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No.: ICC-02/11-01/15

Date: **2 August 2021**

THE APPEALS CHAMBER

Before: Judge Marc Perrin de Brichambaut, Presiding
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ

Public

Prosecution response to the “Requête afin que le dossier de l’affaire soit ouvert au public le plus largement possible et que dans ce but soit créée une base de données publique”

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. On 19 July 2021, Mr Gbagbo requested that the case file in this case be made public to the widest extent possible, and that a public database be created for this purpose (“Request”).¹ The Request should be dismissed for its vagueness and the excessive scope of relief requested. While the Prosecution shares the view that publicity and transparency of cases before the Court is important and necessary, these interests must be balanced against the efficient use of resources and the need to prioritise records to be made public. The Defence however fails to substantiate why the wholesale ‘de-confidentialisation’ of the case file and the creation of a new database is mandatory in order to meet these ends, or justified in light of the limited resources of the parties and the Court.

2. Rather, the Prosecution submits that the more efficient and reasonable approach would be for the parties to *continue* engaging in an incremental process of reclassification/lifting redactions. In recent months, the Defence has approached the Prosecution in *inter partes* communications requesting it to review the confidentiality of specific records. The Prosecution has responded affirmatively and promptly to all of these requests. The Prosecution stands ready to continue to assist the Defence with *specific* and *focused* requests for of this nature, and indeed the Chamber may consider instructing the Defence to proceed in this way.

3. Otherwise, the Request, if granted, will entail intensive efforts by the Office of the Prosecution (“Office”) over a significant period of time—at least several months. In light of the Office’s very limited resources, and noting that all the lawyers, investigators and case manager who were involved in this case have been reassigned to other cases before the Court, the strain on the Office to comply with the Request would be acute. In that context, if the Chamber is minded to grant all or part of the Request, the Prosecution respectfully requests that it be given ample time to comply—

¹ ICC-02/11-01/15-1408.

at least ten months—with the opportunity to request further time to complete the review, if required.

Submissions

A. The request to lift the confidentiality of the case file should be dismissed for vagueness and failure to justify the overly broad relief it seeks

4. The Defence states that in order to respect the principle of transparency, it is necessary to (i) ‘de-confidentialise’ as much as possible the entire case file,² including the parties’ submissions, evidence, prior statements of witnesses, hearing transcripts and decisions of the Judges; and (ii) create a publicly available database to consult the entire case file, noting that there already exists such a resource for records, decisions and transcripts, but now also to include the evidence.³

5. The request to lift the confidentiality of the case file is vague, overly broad and should be dismissed.

6. *First*, the Defence does not attempt to identify any specific records, or categories of records that should be prioritised for a confidentiality review, but simply requests the *wholesale* review of the records. This is despite its claim that it has been reviewing the case file for several months to identify what can be made public.⁴ Moreover, the precise scope of the requested review is unclear. The Request inconsistently states on the one hand that the *entire case file* should be reviewed to lift confidentiality,⁵ while on the other, it requests an order for the parties to review *all evidence* in the case file.⁶ There is a significant difference between reviewing the entire case file as opposed to all the evidence. But even if it is confined to the evidence, the evidence in this case

² Although as relief, the Defence requests an order that the parties lift the confidentiality of the *evidence* and *prior statements* only: see Request, p. 11.

³ Request, para. 7.

⁴ Request, para. 8.

⁵ Request, para. 7.

⁶ Request, para. 7, p. 11.

includes, as the Defence notes, at least 16,000 pages of hearing transcripts, 18,034 items of evidence, and the prior statements of 39 witnesses.⁷ A request of this magnitude is untenable.

7. *Second*, the Defence fails to justify the need for a wholesale review, whether of all the evidence or the entire case file. It appears that the Defence's primary concern is that the public understands the basis of the Trial Chamber's reasons for acquitting Mr Gbagbo and Mr Blé Goudé.⁸ If that is the case, then the Defence should explain why the Majority's reasons for the acquittal, as set out in the detailed and lengthy Reasons of Judge Henderson,⁹ is not adequate for this purpose. However, the Defence fails to do so. At a minimum, the Reasons of Judge Henderson could form an appropriate starting point for the Defence to make a more specific and focused request. Elsewhere in the Request, the Defence states that Mr Gbagbo may be required to refer to the evidence in order to invoke *ne bis in idem* in any national proceedings against him in Côte d'Ivoire.¹⁰ This is a hypothetical scenario at present, but if and when such domestic proceedings are instituted, Mr Gbagbo may approach the Prosecution or make an application before this Court to review and lift redactions on the necessary items of evidence. The Defence's other reasons for increased publicity of the case file, such as the accessibility of the evidence by academics, journalists, historians and private citizens,¹¹ is too vague and remote to justify the requested wholesale review.

8. *Third*, the Prosecution affirms that the goals of publicity and transparency are critical to the work of the Court and its outreach in the affected countries. And to that end, the key documents in this case are already publicly available *via* the Court's website, specifically: the decisions and reasons of the Pre-Trial, Trial and Appeals Chambers, the filings of the parties and participants, and the testimony of witnesses.¹²

⁷ Request, para. 2.

⁸ See e.g. Request, paras. 4, 9, 17.

⁹ ICC-02/11-01/15-1263-AnxB-Red.

¹⁰ Request, para. 23.

¹¹ Request, para. 3.

¹² See <https://www.icc-cpi.int/court-records>.

The Defence presents no concrete reason or example to demonstrate why this access is insufficient.

9. Rather, the more efficient and reasonable approach would be for the parties to *continue* engaging in an incremental process of reclassification/lifting redactions. Accordingly, if the confidentiality of *specific* records or evidence needs to be reviewed, the Defence may communicate that request directly to the Prosecution for it to assess and respond *inter partes*. Indeed, since the termination of the case by the Trial Chamber, the Prosecution has already been responding promptly and affirmatively to *inter partes* requests from the Defence to seek the reclassification of specific documents to public—as the Defence acknowledges.¹³ The Defence is not precluded from continuing to make such requests to the Prosecution, and indeed, the Chamber may consider instructing the Defence to continue to make such requests given that this is a far more efficient way to proceed. The Prosecution stands ready to assist the Defence and the Court in this regard.

10. Otherwise, the wholesale review of all of the evidence or the entire case file for the purposes of lifting confidentiality would be an overly cumbersome exercise. The Defence itself recognises—and the Prosecution agrees—that the exercise would be a very complex one as the case file contains various interrelated parts that would require a detailed review and consultation between the parties.¹⁴ The Prosecution’s review of the evidence alone would entail: reviewing each witness’s testimony, any prior statements and related items of evidence; assessing whether redactions can be lifted based on the Prosecution’s knowledge of the case and the security situation; if necessary, contacting the witness to assess their security situation; and cross-checking all redactions throughout each witness’s evidence to ensure that the lifting of redactions does not undermine the confidentiality of any other information that must remain protected. This exercise requires careful attention and diligence and cannot be

¹³ Request, para. 11.

¹⁴ Request, paras. 10-11.

assigned to personnel who were not involved in the case—certainly not if the review is to be conducted expeditiously.

11. But even if conducted expeditiously, the review would be a very time-consuming and lengthy one. While the Prosecution cannot provide an accurate estimate of the length of time that such review would take due to the unspecific and broad nature of the Request, it anticipates that it would require at least ten months of dedicated and intensive efforts of key personnel in the Office. In that regard, the case manager, trial lawyers and investigators who were closely involved in the trial proceedings would be essential to conducting the review exercise, given their deep knowledge of the case file and its interrelated items of evidence, and their ability to accurately appraise the risks to witnesses if further aspects of their evidence were to be made public. However, all of these key personnel have been reassigned to other cases. In particular, the Senior Trial Lawyer, eight out of the ten trial lawyers and the case manager are working on cases currently at trial or in the pre-trial stage. Many are currently also on leave during the Court's summer recess and are therefore unable to assist at present.

12. In this context, the Prosecution requests that if the Chamber is minded to grant the Request, that it allow the Prosecution at least ten months in which to undertake its review of the case file/evidence, and that the Prosecution be permitted to seek an extension of time to complete the review, if required.

B. The Request fails to substantiate why a database is necessary in light of the existing publicly accessible resources

13. The Defence fails to justify why a database of the case file including all evidence should be created to meet the goals of publicity and transparency in this case.¹⁵ As stated above, members of the public are already able to access the public records in this case (*i.e.* decisions and reasons of the Chambers, filings of the parties and

¹⁵ *Contra* Request, para. 7.

participants, and witness testimonies) *via* the “Court records and transcripts” page of the Court’s website¹⁶ and the ICC Legal Tools website.¹⁷ Moreover, members of the public would not be precluded from contacting the Court to request access to specific records if they require it. The Defence does not explain why these avenues are insufficient, nor does it identify any concrete instance in which this was the case.

14. While the Prosecution does not oppose, in principle, the need for a database to hold the publicly available evidence in each case, the creation of such a facility would be a significant long-term project. It would require close consultation with the Registry to ascertain, *inter alia*, whether there are already any ongoing initiatives of this nature, and to avoid duplication with existing databases. Moreover the need for such a facility should be carefully assessed against the constraints of time, funding and resources of the Court. The Prosecution is willing to engage with the Registry in any such consultations if it may be of assistance. However, given the broad and vague nature of the Request, the Defence does not justify the need for such a facility in this case.

Conclusion

15. The Prosecution requests the Chamber to dismiss the Request. In the alternative, the Chamber should direct the Defence to identify specific records that it seeks to have reviewed by the Prosecution, to which the Prosecution may respond on an *inter partes* basis. In the further alternative, if the Chamber is minded to grant the Request, the Prosecution requests that the Chamber allow the Prosecution at least ten months to conduct the review of the case file, with the opportunity to approach the Chamber for a request for an extension of time, if so required.

¹⁶ See <https://www.icc-cpi.int/court-records>.

¹⁷ See <https://legal-tools.org/>.



Karim A. A. Khan QC, Prosecutor

Dated this 2nd day of August 2021

At The Hague, The Netherlands