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

Date: **19 July 2021**

THE APPEALS CHAMBER

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

SITUATION IN CÔTE D'IVOIRE

**IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLÉ GOUDÉ***

Public Document

**Request for the Record of the Case to be Made Public to the Greatest Extent
Possible and for the Creation of a Public Database to that End**

Source: Defence team for Laurent Gbagbo

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

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Other

1. On 31 March 2021, the Appeals Chamber affirmed the acquittal of Laurent Gbagbo entered by the Trial Chamber on 15 January 2019.

2. The trial commenced on 28 January 2016; the Prosecutor rested her case on 4 June 2018. 18,034 items of evidence were submitted into the case record by the Prosecution and the Defence, either directly through witnesses, or through bar table motions filed by the Prosecutor; 82 witnesses took the stand and the prior statements of 39 witnesses were admitted pursuant to rule 68 of the RPE. The hearings generated over 16,000 transcript pages. The reasons for the judgment of acquittal were set out in Judge Henderson's separate opinion of 16 July 2019; they run to 1,012 pages and refer to hundreds of items of evidence and the full transcripts of the hearings.

3. However, as matters stand, the evidence, unlike the transcripts, is not in the public domain, which means that the general public cannot comprehend the premises of the positions taken by the Parties at trial and the bases for the decisions taken by the Bench, including the decision to acquit, since it has no way of consulting the evidence referred to by the Parties and the Bench. Otherwise put, at present, those legal commentators, academics, journalists, historians, laypersons and professionals in domestic courts with an interest in the trial – and, specifically, in the decisions as to the innocence or guilt of the two men concerned – cannot consult a single item of evidence and have no access to any of the prior statements of witnesses entered into the record.

4. There are now public redacted versions of the Trial Bench's decision of 16 July 2019 and the Appeals Bench's decision of 31 March 2021, but the general public has no access to the evidence to which those decisions refer.

5. If the evidence on which the Judges relied is to be made available so that the general public can genuinely engage with the content of the decisions and understand them, and if that evidence is to be used in other legal proceedings (in Côte d'Ivoire, for example), public access to that material is paramount.

6. It is worth underscoring that such access would be in conformity with the principle of transparency which applies to the delivery of justice.

7. Adherence to the principle of transparency requires: (1) declassification to the greatest extent possible of the entire record of the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, meaning the written submissions of the Parties and the participants, the evidence, the prior statements of witnesses entered into the record of the case, the transcripts of the hearings and the Judges' decisions; and (2) the introduction, in a technical and concrete sense, of a publicly available database (as has been done for written submissions, decisions and transcripts) whereby the entire record, including the evidence (redacted or unredacted) entered in the record of the case, can be consulted.

8. Regarding declassification of the record, the Defence has, for several months, been endeavouring to survey the entire record to see what could be declassified. On analysis, there seem to be many examples of evidence which could be reclassified or at least provided in public redacted form. The same is true of the information which was redacted from the transcripts, mostly because it was given in closed session. Lastly, as the Defence sees it, in some instances, the reasons which warranted granting protective measures for certain witnesses – and hence a confidential classification and/or redactions – are now, several years after the Prosecutor rested her case, outdated; the reasons should therefore be reviewed for continued relevance.

9. Declassification of the record is a key step as it makes the record genuinely available to the public. It is the *sine qua non* of the general public's taking ownership of the judicial process and its acceptance of the judicial decision.

10. Declassification is a particularly complex exercise as the record of the case consists of a corpus of documents which derive their significance from their interrelationship and refer to one another. For example, reclassification of an item of evidence hinges on a number of criteria: the reasons for the initial classification; the content of that item; the source of the evidence; the relationship between the item of evidence and others; the fact that the evidence was referred to in open court or in private session (for example, the fact that it was discussed, in whole or in part, with a witness, since a piece of confidential evidence discussed in open court with a witness could be reclassified, unless the witness was given protective measures); and the fact that the item was discussed in various written submissions exchanged between the Parties (which may or may not be confidential) or in decisions issued by the Judges (which may or may not be confidential). The same criteria apply to prior statements of witnesses entered into the record pursuant to rule 68 of the RPE.

11. The complexity of the process entails that, in looking into the possibility of declassification, it is for the Parties to identify systematically how the evidence and *inter alia* transcripts of hearings, Parties' written submissions, Judges' decisions and data available in Ringtail (e.g. relating to metadata and chains of custody) interrelate so that the evidence can be reclassified and ultimately declassification of the record can be accomplished to the greatest extent so as to make it, genuinely and fully, available to the public. For true declassification to be accomplished, it rests therefore with the Parties to discuss issues concerning reclassification of all of the items that make up the record. It is noteworthy in this regard that Prosecution and Defence are already conferring about these issues.

12. Once all the material identified by the Parties is declassified, a public database must – as part of a conversation between all protagonists, *viz.* Judges, Parties, participants and Registry – be created as a repository for the declassified record, which will make the record genuinely available to the public.

13. It is critical that the ICC, as the first permanent international criminal court with a universal remit, afford the widest possible public access to the cases considered. The conundrums of genuine access to the record of a case on the ICC's docket are many and considerable:

14. First, the International Criminal Court is duty-bound to serve as a paragon. That it can only do, however, if the general public and legal professionals the world over are able to engage with the technicalities of the problems it has addressed.

15. Second, to make the record publicly available would be in conformity with the principle of the transparency of the delivery of justice and would allow the general public to see how justice works. Public access to the bulk of the judicial record will only strengthen public buy-in for the International Criminal Court, since each and all, armed with all the necessary information, will be able to take ownership of the justice process. Justice must be delivered transparently and must be accessible to all who may come within its purview if it is to serve its purpose in a democratic society.

16. Specifically, international justice is designed to be public and transparent so that the communities directly concerned can engage with and take ownership of the proceedings. If justice is to be in a position to resolve conflicts and to address the suffering of victims, it must be understood as first and foremost serving the communities concerned. For justice to find acceptance among the affected communities, they must, however, be able to access it and to grasp its intricacies; for

this reason, access to the factual information underpinning the record and an understanding of how the Judges interpreted the facts is crucial.

17. In this respect, to allow the affected communities real, tangible access to the cases before the Court would, as far as the Court's outreach activities are concerned, be the most effective way of showing and explaining what the Court does. A public database which, among other things, makes available the evidence underlying the key decisions of the Judges – particularly decisions as to innocence or guilt – would be a vital tool in the Court's outreach endeavours. The creation of a public database would add value to outreach efforts and best explain the judicial process, particularly to those who have applied to participate in the proceedings as victims. At present, the communities concerned have only incomplete access to that which is central to the criminal proceedings since they cannot consult the evidence and the prior statements of witnesses entered into the record, which nonetheless form the substance of what the Parties discussed and explain the decisions given by the Judges.

18. To allow affected communities access to the record, through the creation of a database, would afford them a greater understanding of what the Judges do and enable the Court to consolidate its legitimacy, thereby also fostering acceptance of the justice it delivers, which will promote reconciliation between affected communities.

19. Transparency of the process, an understanding of the decisions and reconciliation are thus entwined. The delivery of justice is clearly conducive to peace and reconciliation but only if it is understood and, even more so, if the affected communities take ownership of it. Hence it matters greatly that the Court be able to furnish the general public with every possible aid to understanding: legal tools, the content of what was said in court and details of information exchanged. To make

only the complex and technical decisions available to the affected communities will not do. They must be given all the facts canvassed at trial. The facts, the evidence underlying them and the interpretation thereof are what enable the general public to engage with a judicial case. A judgment or a judicial process cannot be understood without access to the facts and the underlying evidence. In other, what matters is that the general public is equipped with the tools to understand the decisions for itself, so that it can actively engage with the judicial process and embark on the healing process.

20. As Doctor Iva Vukušić, a historian who has worked for years on the archives of international criminal trials, sees it:

Inaccessibility to archives of international tribunals and courts is a serious problem. If we are to understand and remember genocides, crimes against humanity and war crimes, as we should, we must take the time to study what happened. If we are to honor victims, we need to know about their experiences. If we are to engage more fruitfully in atrocity prevention and mitigation, members of the international community need to deepen their understanding of violent actors and atrocity crimes. To do all that, the public and scholars need access to court archives.¹

21. Third, the aim is to give meaning, the utmost significance, to the principle of public hearings, even after they have taken place. Confidentiality must be the exception and justified case-by-case by compelling grounds (such as, for example, respect for privacy, protection of witnesses and victims, etc.) explicitly laid down in the founding instruments of the Court. And so it is crucial that the protagonists in the trial, be they Parties, participants or Judges, continue to ensure that the reasons which at some point warranted the classification of an item of evidence or a written submission as confidential still apply and, if not, that reclassification ensues forthwith, if need be in the form of a redacted version.

¹ Iva Vukušić, "Why We Should Open Archives from War Crimes Trials to the Public", <https://www.ushmm.org/genocide-prevention/blog/why-we-should-open-archives-from-war-crimes-trials>.

22. Fourth, declassification of a case record to the greatest extent possible and its placement in the public domain help establish a “historical record” of the situation which serves not only affected communities but also scholars and historians. The archives of the international tribunals have always been a priceless trove of information for historians. Now, 75 years on from the Nuremberg trials, besides the judgments, the archives of that tribunal offer an insight into how the events canvassed at trial came to take place.

23. Fifth, to guarantee public access to the record of the case is crucial to safeguarding Laurent Gbagbo’s rights. Specifically, Laurent Gbagbo now enjoys the basic protection prescribed by the principle of *ne bis in idem*, enshrined at article 20 of the Rome Statute, which provides: “No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court”. So that Laurent Gbagbo may rely on the decisions establishing his innocence, which the Court handed down, in order to counter any authorities which might seek to prosecute him for “the same offences”, it is important that, in order to invoke his rights before any competent national court, Laurent Gbagbo be able not only to avail himself of the decisions issued by the Court but also to explain which of the evidence canvassed underpins those decisions. Given the complexity of legal characterization when it comes to international crimes, evidence is what clearly delineates the factual parameters of the proceedings before the ICC. Were facts within these parameters to come up in another jurisdiction, *ne bis in idem* could be raised. But in order to ascertain exactly whether allegations made on the national plane have already been adjudicated at the ICC, it is crucial for him to be able to draw on the evidence to show that that they were; it is crucial for judges in domestic jurisdictions to have access to that evidence to ascertain *ne bis in idem*. This is possible only if the evidence drawn on in discussions at the ICC (regarding incidents which form part of the contextual element of crimes against humanity, for

example) and which informed the decision of the ICC Judges is reclassified as public (in redacted form, if need be) and made available in an official, public database.

24. Sixth, of note is that the International Residual Mechanism for Criminal Tribunals (Mechanism) has already introduced a database of the kind the Defence is calling for. The Statute of the Mechanism provides: “The Mechanism shall be responsible for the management, including preservation and access, of these archives”.² What is, in concrete terms, the status of access to public documents and the archives there? The tool which has made the judicial archives of the ICTY, the ICTR and the MICT available online is called “Unified Court Records”.³ Access to this database is very straightforward. All it requires is the creation of an account, which can be done from any computer and using any email address. The user then has access, through specific search forms, to all of the judicial documents (such as decisions, judgments and parties’ written submissions), as well as to evidence admitted in the course of the proceedings, transcripts and audio-visual recordings of hearings. According to the IRMCT Press Office, 70% of the “judicial records” are publicly available.⁴

25. In the words of Doctor Iva Vukušić,

laudably, the IRMCT makes many of the transcripts and exhibits public online. As a rule, other international courts and tribunals do not—at least not in exhaustive ways. The International Criminal Court (ICC), also based in The Hague, does not provide extensive access to exhibits. Lack of access is the default. For international courts to maximize their positive impact on affected communities and beyond, that must change. These courts already hold these records—they are digitized, translated, and sorted. It is time to make them accessible. Transparency and access should be the rule. Now, as the first ad hoc Tribunal is ending its work, and others like the ICC are seeing more cases, it is the right

² MICT, Statute, article 27 – Management of the archives, paragraph 2.

³ <https://ucr.irmct.org/>.

⁴ Iva Vukušić, *Why We Should Open Archives from War Crimes Trials to the Public*, <https://www.ushmm.org/genocide-prevention/blog/why-we-should-open-archives-from-war-crimes-trials>.

time to make access to transcripts and exhibits a central aspect of the work of international justice.⁵

Conclusion

26. The exercise consisting of declassification and the introduction of a public database of the trial cannot be accomplished without close collaboration between the Registry, the Parties and the participants. Only the Parties in the trial – Defence and Prosecution, essentially – are in a position, thanks to their familiarity with the record, to say, following discussions *inter partes* if need be, which aspects of the record may be made public and which must instead remain confidential. The Parties are acquainted with the issues at play in the classification of evidence and the classification of prior statements of witnesses. In any event, as it was the Parties who decided on the classifications in the first place, it is for them to remove them or to make the redactions now required. The Parties know why a given piece of information had to be discussed in private session during a hearing and whether those reasons still exist. The Parties are in a position to gauge the risks posed by the lifting of redactions or the reclassification of a written submission or an item of evidence.

27. By the same token, the Parties are the best judge of what the database must house: as the main users of the record, their input is invaluable regarding how the database must be put together, and how it must be arranged so that tailored searches can be readily performed.

⁵ Iva Vukušić, “Why We Should Open Archives from War Crimes Trials to the Public”, <https://www.ushmm.org/genocide-prevention/blog/why-we-should-open-archives-from-war-crimes-trials>.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO

- **Direct** the Parties to declassify systematically, where possible and in consultation with each other, the evidence, and the prior statements of witnesses entered into the record of the case;
- **Direct** the Registry to create, in consultation with the Parties, a database which makes all the public material in the record (written submissions, decisions, transcripts, evidence, and prior statements of witnesses entered into the record) publicly available.

[signed]

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Dated this 19 July 2021

At The Hague, Netherlands