

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **13 April 2022**

**TRIAL CHAMBER VII**

**Before:** Judge Kimberly Prost, Presiding Judge  
Judge Miatta Maria Samba  
Judge Sergio Gerardo Ugalde Godínez

**SITUATION IN THE CÔTE D'IVOIRE**

**IN THE CASE OF**

***THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLÉ GOUDÉ***

**Public  
with Confidential Annex A**

**Decision on the Defence for Mr Gbagbo's Requests for the Record of the Case to be Made Public, the Creation of a Public Database and for Email Decisions to be Placed on the Record of the Case**

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

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**Victims Participation and  
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**TRIAL CHAMBER VII** of the International Criminal Court, in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, having regard to Articles 64, 67, 68 of the Rome Statute (the ‘Statute’), Rule 81(4) of the Rules of Procedure and Evidence (the ‘Rules’), and Regulations 20, 21, 42 of the Regulations of the Court (the ‘Regulations’), issues this ‘Decision on the Defence for Mr Gbagbo’s Requests for the Record of the Case to be Made Public, the Creation of a Public Database and for Email Decisions to be Placed on the Record of the Case’.

## **I. PROCEDURAL HISTORY**

1. On 19 July 2021, the Defence for Mr Gbagbo filed the ‘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’ (the ‘First Request’).<sup>1</sup> In the First Request, the Defence for Mr Gbagbo requests: (i) declassification of the record<sup>2</sup> and an order that parties be directed, in consultation with each other, to systematically consider whether the evidence and witness statements in the case file can be made public;<sup>3</sup> and (ii) the Registry be directed to create, in consultation with the parties, a database to provide the public access to all public materials in the case file.<sup>4</sup>

2. On 2 August 2021, the Office of the Prosecutor (the ‘Prosecution’) responded to the First Request (the ‘First Response’).<sup>5</sup> The Prosecution requests that the First Request be ‘dismissed for its vagueness and the excessive scope of the relief requested.’<sup>6</sup> In the alternative, the Prosecution requests that the Defence for Mr Gbagbo identify the specific records that it seeks to have reviewed,<sup>7</sup> or in the further alternative, if the Chamber is minded to grant the First Request, to allow the Prosecution at least ten months to conduct the review of the case file.<sup>8</sup>

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<sup>1</sup> [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](#), 19 July 2021, ICC-02/11-01/15-1408-tENG (the ‘First Request’).

<sup>2</sup> [First Request](#), paras 7-11.

<sup>3</sup> [First Request](#), p. 12. *See also* paras 11, 26.

<sup>4</sup> [First Request](#), p. 12. *See also* para. 12.

<sup>5</sup> [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’](#), 2 August 2021, ICC-02/11-01/15-1409 (the ‘First Response’).

<sup>6</sup> [First Response](#), paras 1, 5.

<sup>7</sup> [First Response](#), paras 2, 15.

<sup>8</sup> [First Response](#), paras 3, 15.

3. On 3 September 2021, the Defence for Mr Gbagbo filed the ‘Request for the Decisions which the Judges Issued via Email to Be Placed on the Record of the Case’ (the ‘Second Request’).<sup>9</sup> In the Second Request, the Defence for Mr Gbagbo requests that any decisions issued via email during the trial phase of the case be formally filed onto the record.<sup>10</sup> In terms of practicalities, the Defence for Mr Gbagbo requests that the parties, participants and the Registry be ordered to embark on discussions to determine the appropriate level of classification for each decision.<sup>11</sup>

4. On 14 September 2021, the Prosecution responded to the Second Request (the ‘Second Response’).<sup>12</sup> The Prosecution does not oppose the Second Request,<sup>13</sup> albeit the Prosecution disagrees with the Defence for Mr Gbagbo’s submissions in respect of process. Instead, the Prosecution submits that the process of registering email decisions onto the record should be a ‘a structured one, led by the Registry, with judicial oversight’.<sup>14</sup>

5. On 1 March 2022, the Presidency constituted Trial Chamber VII (the ‘Chamber’) and referred to it the First and Second Requests.<sup>15</sup>

## II. ANALYSIS

### 1. Analysis of the First Request

6. The Chamber will first address the request by the Defence for Mr Gbagbo for ‘declassification of the record’ and the commencement of an extensive review of, *inter alia*, the evidence, transcripts and the prior statements of witnesses entered into the record of the case.

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<sup>9</sup> [Request for the Decisions which the Judges Issued via Email to Be Placed in the Record of the Case](#), 3 September 2021, ICC-02/11-01/15-1410-tENG (the ‘Second Request’).

<sup>10</sup> [Second Request](#), para. 3.

<sup>11</sup> [Second Request](#), para 9, p. 5.

<sup>12</sup> [Prosecution response to the ‘Requête visant à ce que les décisions ayant été rendues par les Juges par voie d’email soient soumises au dossier de l’affaire’](#), 14 September 2021, ICC-02/11-01/15-1412 (the ‘Second Response’).

<sup>13</sup> [Second Response](#), para. 2.

<sup>14</sup> [Second Response](#), paras 3-5.

<sup>15</sup> [Decision constituting Trial Chamber VII and referring to it two request in accordance with the Appeals Chamber’s ‘Decision on counsel for Mr Gbagbo’s requests \(ICC-02/11-01/15-1408-tENG and ICC-02/11-01/15-1410-tENG\)’ dated 15 October 2021 \(ICC-02/11-01/15-1422\)](#), 1 March 2022, ICC-02/11-01/15-1428.

7. First, the Chamber notes that in the specific context of the Court's legislative framework each trial chamber must strike a balance between the requirement that the proceedings be transparent in accordance with Article 67(1) of the Statute and the obligation under Article 68 of the Statute to protect the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses.<sup>16</sup>

8. In this regard, the Chamber observes that this latter obligation is specifically framed as an exception to the principle of public hearings provided for in Article 67(1) of the Statute, allowing each chamber to manage the proceedings as it sees appropriate.<sup>17</sup> This involves, *inter alia*, taking the necessary decisions in respect of protective measures such as the use of redactions in filings and closed or private sessions during hearings.<sup>18</sup>

9. The Chamber finds that, given the paramount importance of the need to ensure the protection of those who participate in the Court's proceedings, these decisions must be left with the trial chamber which has the in-depth, first-hand knowledge of the relevant proceedings which is necessary to weigh all the relevant factors in reaching a determination. Article 68 of the Statute is also framed in terms which make it clear that the obligation to safeguard these interests is a continuing one, regardless of whether a specific case has concluded or not.<sup>19</sup> In addition, absent an appellate process or circumstances where review is necessitated by other proceedings before the Court, nothing in the Court's legislative framework provides for general reconsideration or review of such decisions by another chamber.

10. Furthermore, the Chamber observes that the Defence for Mr Gbagbo points to no authority which would justify a wholesale review of the entirety of the case file. In this regard, the Chamber agrees with the Prosecution that the request is overly vague and overly broad.

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<sup>16</sup> The Chamber observes that this exercise is explicitly set out in Article 64(7) of the Statute. *See further*, Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, [Decision on the Prosecution Requests for In-Court Protective Measures for 73 Trial Witnesses](#), 9 March 2021, ICC-01/14-01/18-906-Red2, paras 14-15; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, [Decision on the 'Prosecution's application for in-court protective and special measures'](#), 29 November 2016, ICC-02/04-01/15-612-Red, paras 5-6. *See also* Regulation 20 of the Regulations.

<sup>17</sup> Article 68(2) of the Statute; Regulation 20 of the Regulations.

<sup>18</sup> *See also* Article 64(2) of the Statute; Regulation 21 of the Regulations.

<sup>19</sup> *See also* Regulation 42(1) of the Regulations.

11. Accordingly, for the reasons set out above, the Chamber finds that the Defence for Mr Gbagbo's request is without merit and must be dismissed. That notwithstanding, the Chamber notes that this does not preclude *inter partes* communication and discussion leading to reclassification of particular materials or the lifting of redactions on the basis of a specific request.

12. The Chamber will now address the Defence for Mr Gbagbo's request for the introduction of a publicly available database for the entire public record of the case, including written submissions, decisions, transcripts, evidence and prior statements of witnesses.

13. From the outset the Chamber recalls the character and purpose of the right to publicity. This right protects against the scenario where there is secrecy surrounding the administration of justice, with no public scrutiny about the genuine character of the procedure.<sup>20</sup> In this regard, publicity in the context of criminal proceedings contributes to the realisation of a fair trial for the accused.<sup>21</sup>

14. However, the Chamber notes that this does not translate into a right to blanket disclosure of every element of the case file to the public. While disclosure to the public as an element of the transparency of proceedings is intended to ensure that the exercise of fundamental rights is genuine, it does not require that all the material presented at trial be publicly available.<sup>22</sup> This is particularly pertinent where there is sensitive information which might be contained in the case file.<sup>23</sup>

15. In respect of the present case, the Chamber observes that the Defence for Mr Gbagbo's request is made without reference to any statutory or legislative basis and is without precedence in the practice of the International Criminal Court. The Defence for

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<sup>20</sup> See also Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Public Redacted Version of "Decision on in-court protective measures for Witnesses 38, 22 and 87"](#), ICC-01/05-01/08-1021 of 19 November 2010, 27 June 2016, ICC-01/05-01/08-1021-Red, para. 24.

<sup>21</sup> See Article 14(1) International Covenant on Civil and Political Rights; Article 8(5) American Convention on Human Rights; Article 6(1) European Convention on Human Rights. See further European Court of Human Rights, *Döry v. Sweden*, Judgment, Application No. 28394/95, 12 November 2002, para. 37.

<sup>22</sup> See Rule 81(4) of the Rules.

<sup>23</sup> See, for example, Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Redacted Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents](#), 20 July 2010, ICC-01/05-01/08-813-Red, para. 85.

Mr Gbagbo has provided no justification for this request beyond generic references to the goals of publicity and transparency of the proceedings.

16. In any event, the Chamber is satisfied that the requirements of publicity and transparency of proceedings have been fully met in this case. There is an extensive record which is already available on the Court's website including the filings and decisions of the pre-trial, trial and appeals proceedings, as well as at least 16,000 pages of hearing transcripts reflecting the witness testimony. In addition, the public record includes the detailed reasoning set out in the trial and appeals judgments - both of which include extensive concurring and dissenting opinions.

17. In so far as evidentiary items that were submitted to the competent trial chamber are concerned, these are not generally made publically available in any case before the Court. What the Defence for Mr Gbagbo seeks is unprecedented, without proper justification as to necessity and would entail the use of an extensive amount of limited resources. The Chamber further emphasises that the primary role of the International Criminal Court is to adjudicate on the individual criminal responsibility of individuals for crimes within the Court's jurisdiction and to provide a reasoned judgment for the same.<sup>24</sup> The requirements for public proceedings necessary to realise that function of the Court has already been fully met in this case. Accordingly, the Chamber dismisses the request for the creation of a public database for the entire public record as being without merit.

18. Last, as noted by the Prosecution,<sup>25</sup> the Chamber observes that if, for specified reasons, members of the public seek access to a particular item of evidence then such access can be considered by the Prosecution on a case by case basis, resources permitting.

## *2. Analysis of the Second Request*

19. In the Second Request, the Defence for Mr Gbagbo seeks to have decisions issued by email in the *Gbagbo and Blé Goudé* trial formally placed on the record of the case.

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<sup>24</sup> See Articles 1 and 74(5) of the Statute.

<sup>25</sup> [First Response](#), para. 13.

20. The Chamber notes that there is no disagreement between the parties as to whether this would be appropriate to ensure the completeness of the record and to serve the interests of publicity. In fact, it is now the practice in all trial chambers that email rulings are published on the record of the case as part of periodic reports by the Registry.<sup>26</sup> The adoption of this practice post-dated the *Gbagbo and Blé Goudé* trial. The Chamber notes that Trial Chamber I used more informal procedures to maintain a record of such decisions and, as a result, there are limits to what can be reconstituted at this stage, especially given resource constraints. The Chamber notes that while the practice of placing of decisions issued via email on the public record is preferred, it is not a requirement under the Court's legislative scheme.

21. Based on the available records, and after consultation with the Registry, a list of email decisions containing the substance of the content of each communication is attached as confidential Annex A to this decision. In compiling this list, in accordance with the principles outlined above, the Chamber has not included any email decision where it appears that it was issued *ex parte* by Trial Chamber I. In the view of the Chamber, these *ex parte* decisions should remain as classified by Trial Chamber I.

22. The Chamber instructs the Registry to consult with the parties and participants with a view to generating a public version of the list, with any necessary redactions, which can be placed on the public record.

23. Following the conclusion of those consultations, the Chamber instructs the Registry to submit by 30 June 2022 the public version of the proposed list for final approval by the Chamber.

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<sup>26</sup> See, for example, Trial Chamber III, *The Prosecutor v. Paul Gicheru*, [Directions on the Conduct of the Proceedings](#), 7 October 2021, ICC-01/09-01/20-189, para. 56; Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, [Initial Directions on the Conduct of Proceedings](#), 26 August 2020, ICC-01/14-01/18-631, para. 76.



**FOR THESE REASONS, THE CHAMBER HEREBY**

**REJECTS** the First Request;

**ORDERS** the Registry and parties and participants to proceed in accordance with paragraphs 22 and 23 above; and

**REJECTS** the remainder of the Second Request.

Done in both English and French, the English version being authoritative.



**Judge Kimberly Prost**  
**Presiding Judge**



**Judge Miatta Maria Samba**



**Judge Sergio Gerardo Ugalde Godínez**

Dated 13 April 2022

At The Hague, The Netherlands