

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **21 July 2015**

TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Single Judge

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
*THE PROSECUTOR v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ***

Public

**Second decision on objections concerning access to confidential material on the
case record**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Eric MacDonald

Counsel for Mr Laurent Gbagbo

Mr Emmanuel Altit

Ms Agathe Bahi Baroan

Counsel for Mr Charles Blé Goudé

Mr Geert-Jan Alexander Knoops

Mr Claver N'dry

Legal Representatives of Victims

Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Judge Geoffrey Henderson, acting as Single Judge on behalf of Trial Chamber I ('Single Judge' and 'Chamber', respectively) of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* ('Gbagbo and Blé Goudé case'), having regard to Rules 121(10), 131 and 137 of the Rules of Procedure and Evidence ('Rules'), Regulation 23 *bis* of the Regulations of the Court ('Regulations') and Regulations 20, 21 and 22 of the Regulations of the Registry, issues the following 'Second decision on objections concerning access to confidential material on the case record'.

I. Background and submissions

1. On 24 June 2015, the Single Judge, *inter alia*, instructed as follows ('Decision 101'):¹
 - a) that the filing party or participant of the documents identified in Annex C to Decision 101² ('Annex C Documents') either (i) indicate whether the Annex C Documents may be transferred to the *Gbagbo and Blé Goudé* case record as 'confidential' or (ii) provide specific and detailed reasons for 'confidential, *ex parte*' classification and simultaneously file public redacted and/or confidential redacted versions notified to all parties and participants;³ and
 - b) that the parties and participants (i) upload all materials from the E-court databases in *The Prosecutor v. Laurent Gbagbo* case ('Gbagbo case') and *The Prosecutor v. Charles Blé Goudé* case ('Blé Goudé case') to the E-court database in the *Gbagbo and Blé Goudé* case and (ii) release them to all parties and participants, unless 'confidential, *ex parte*' classification is 'demonstrably justified'.⁴

¹ Decision on objections concerning access to confidential material on the case record, ICC-02/11-01/15-101, with three public annexes (ICC-02/11-01/15-101-AnxA; ICC-02/11-01/15-101-AnxB; ICC-02/11-01/15-101-AnxC), para. 19. *See also* paras 13 and 16.

² ICC-02/11-01/15-101-AnxC.

³ Decision 101, ICC-02/11-01/15-101, para. 18 and page 12.

⁴ Decision 101, ICC-02/11-01/15-101, para. 19 and page 12. *See also* paras 13 and 16.

2. On 6 July 2015, the defence for Mr Gbagbo ('Gbagbo Defence'),⁵ Office of the Prosecutor ('Prosecution')⁶ and Legal Representative of Victims ('LRV')⁷ made further submissions concerning access to the case record ('Gbagbo Defence Submissions', 'Prosecution Submissions' and 'LRV Submissions', respectively).
3. The Gbagbo Defence submits that there is no reason that the LRV and/or defence for Mr Blé Goudé ('Blé Goudé Defence') should have access to the following Annex C Documents for the following reasons:
 - a) ICC-02/11-01/11-191-Conf is a request for redactions to witness statements which was dismissed and the statements were not used;⁸
 - b) ICC-02/11-01/11-408-Conf (and its two annexes) is a request for extension of time to disclose two witness statements that was rejected, one of the statements was not disclosed, the request identifies two witnesses and access by the LRV poses a risk;⁹
 - c) ICC-02/11-01/11-600-Conf (and its two annexes), which was not granted, concerns a proposed expert, reveals defence strategy and disclosure of the proposed expert's name threatens investigations;¹⁰
 - d) ICC-02/11-01/11-697-Conf (and its annex), ICC-02/11-01/11-699-Conf, ICC-02/11-01/11-707-Conf (and its confidential redacted version), ICC-02/11-01/11-758-Conf (and its three annexes and confidential redacted version) and ICC-02/11-01/11-774-Conf contain private information relating to conditional

⁵ *Soumissions portant sur le niveau de confidentialité et sur la classification à attribuer aux documents émanant de la Défense de Laurent Gbagbo listés à l'Annexe C de la décision du Juge unique du 24 juin 2015 (ICC-02/11-01/15-101) et soumissions sur le niveau de confidentialité et sur la classification à attribuer aux documents non mentionnés par le Juge unique dans sa décision du 24 juin 2015, ICC-02/11-01/15-124-Conf-Exp. A public redacted version was filed the same day (ICC-02/11-01/15-124-Red).*

⁶ Prosecution's response to the Single Judge order on the transfer of documents to the joint case record (ICC-02/11-01/15-101), ICC-02/11-01/15-123.

⁷ Email communication from LRV to Trial Chamber on 6 July 2015 at 12:37.

⁸ Gbagbo Defence Submissions, ICC-02/11-01/15-124-Conf-Exp, para. 10.

⁹ Gbagbo Defence Submissions, ICC-02/11-01/15-124-Conf-Exp, para. 11.

¹⁰ Gbagbo Defence Submissions, ICC-02/11-01/15-124-Conf-Exp, para. 12.

release, confidential medical information and/or reference supporting material which may not be relied upon again;¹¹

- e) ICC-02/11-01/11-91-Conf concerns the execution of the arrest warrant, is confidential by nature and constitutes confidential, private information;¹²
 - f) ICC-02/11-01/11-192-Conf-Red concerns a request for protective measures which was not granted and the relevant statements were not used;¹³ and
 - g) ICC-02/11-01/11-429-Conf, ICC-02/11-01/11-647-Conf-Anx1 (and its corrected version), ICC-02/11-01/11-647-Conf-Anx2 and ICC-02/11-01/11-647-Conf-Anx4 mention confidential evidence and/or identifying information of witnesses.¹⁴
4. Generally, the Gbagbo Defence submits that all requests for protective measures were rejected, the relevant statements were not disclosed and there is no reason for further access to the witnesses' identities.¹⁵ It claims that such statements are given on the condition of confidentiality and disclosure could endanger witnesses, reveal defence strategy and/or impact on investigations.¹⁶ However, the Gbagbo Defence has no objection to classification of ICC-01/22-01/11-393-Conf as 'confidential'.¹⁷
5. The Gbagbo Defence further submits that translations should have the same classification as the original.¹⁸ In relation to evidentiary material (except four items), the Gbagbo Defence argues that LRV access is unjustified: the sources consented to disclosure only to the Prosecution; disclosure of witness identities threatens their safety and the conduct of investigations; and some items concern relations with states and organisations.¹⁹

¹¹ Gbagbo Defence Submissions, ICC-02/11-01/15-124-Conf-Exp, paras 13-18.

¹² Gbagbo Defence Submissions, ICC-02/11-01/15-124-Conf-Exp, para. 35.

¹³ Gbagbo Defence Submissions, ICC-02/11-01/15-124-Conf-Exp, para. 36.

¹⁴ Gbagbo Defence Submissions, ICC-02/11-01/15-124-Conf-Exp, paras 38-42. The Defence does not object to LRV access to the annex. Gbagbo Defence Submissions, ICC-02/11-01/15-124-Conf-Exp, para. 40.

¹⁵ Gbagbo Defence Submissions, ICC-02/11-01/15-124-Conf-Exp, para. 21.

¹⁶ Gbagbo Defence Submissions, ICC-02/11-01/15-124-Conf-Exp, paras 22-31 and 44-47.

¹⁷ Gbagbo Defence Submissions, ICC-02/11-01/15-124-Conf-Exp, para. 48.

¹⁸ Gbagbo Defence Submissions, ICC-02/11-01/15-124-Conf-Exp, paras 49-51.

¹⁹ Gbagbo Defence Submissions, ICC-02/11-01/15-124-Conf-Exp, paras 54-61.

6. The Prosecution submits that the Annex C Documents should be transferred with the 'same confidentiality level' and that the LRV should have access.²⁰
7. The LRV indicates that, as the filing participant of ICC-02/11-01/11-702-Conf, she does not object to its transfer to the *Gbagbo and Blé Goudé* case record as 'confidential'.²¹ The LRV also does not object to the reclassification of filing ICC-02/11-01/15-65-Conf as 'public'.²²
8. On 16 July 2015, the LRV responded to the Gbagbo Defence Submissions, submitting that the LRV should have access to the Annex C Documents.²³

II. Preliminary matters

9. The Single Judge considers that there is nothing in filing ICC-02/11-01/15-65-Conf which warrants 'confidential' classification. Pursuant to Regulation 23 *bis*(3) of the Regulations, and noting that the filing participant does not object to its reclassification, the Single Judge reclassifies ICC-02/11-01/15-65-Conf as 'public'.
10. As a further preliminary matter, the Single Judge notes that, despite his express instruction, the Gbagbo Defence has failed to provide redacted versions, accessible to all parties and participants, of those Annex C Documents which are the subject of the Gbagbo Defence Submissions. No justification for this non-compliance is given. The Single Judge emphasises that, if the Gbagbo Defence is unable to abide by an order, it must avail itself of all reasonable measures, including those provided in the legal framework of the Court, to avoid or remedy such anticipated non-compliance.
11. The Single Judge also notes that the Gbagbo Defence attempts to re-litigate matters that have already been decided and repeatedly affirmed. Accordingly, the

²⁰ Prosecution Submissions, ICC-02/11-01/15-123, paras 2-3.

²¹ Email communication from LRV to Trial Chamber on 6 July 2015 at 12:37.

²² Email communication from LRV to Trial Chamber on 6 July 2015 at 12:16.

²³ Response to the further submissions by the Defence of Mr. Gbagbo on the level of access and the classification of documents and materials on the case record (ICC-02/11-01/15-124-Red), ICC-02/11-01/15-146.

Single Judge has not taken into account the Gbagbo Defence's submissions concerning the general practice of other Chambers relating to notification, whether the status of the LRV precludes her from a right of access to 'confidential' material and whether notification to the LRV, in and of itself, risks a breach in confidentiality.²⁴

III. Analysis

12. The Single Judge recalls the applicable law concerning classification of, and access to, the case record as set out in previous decisions.²⁵
13. The Single Judge notes that the Gbagbo Defence repeatedly submits that 'confidential, *ex parte*' classification is justified in the absence of any reason to give the LRV and/or Blé Goudé Defence access. This argument is misconceived. Publicity of proceedings and access of all parties and participants is the general rule. In turn, the Gbagbo Defence must demonstrate that restricted classification is necessary and proportional, not *vice versa*. Pursuant to Regulation 23 *bis*(1) of the Regulations, the Gbagbo Defence must state the factual and legal basis for the restricted classification of each individual document.²⁶
14. The Gbagbo Defence invokes exceptions to the general rule of access which could, in principle, justify 'confidential, *ex parte*' classification. However, these submissions are not substantiated. The Gbagbo Defence fails to demonstrate the existence of any objectively justifiable risk to any individual person or the

²⁴ See e.g. Transcript of hearing on 4 November 2014, ICC-02/11-01/11-T-25-Red-ENG CT, page 4, line 22 to page 5, line 7; Decision on the Legal Representative of Victims' access to certain confidential filings and to the case record, 19 January 2015, ICC-02/11-01/11-749, paras 15 and 20; Transcript of hearing on 13 February 2015, ICC-02/11-02/11-T-9-Red-ENG, page 6, lines 5-13; Decision on Defence's requests seeking leave to appeal the 'Decision on the Legal Representative of Victims' access to certain confidential filings and to the case record' and seeking suspensive effect of it, 11 March 2015, ICC-02/11-01/11-809; Decision on requests for clarification concerning review of the case record and extension of time, 13 April 2015, ICC-02/11-01/15-30, para. 8; Decision 101, ICC-02/11-01/15-101, para. 13; Decision on request for leave to appeal the 'Decision on objections concerning access to confidential material on the case record', 10 July 2015, ICC-02/11-01/15-132.

²⁵ Decision 101, ICC-02/11-01/15-101, para. 13 *citing* ICC-02/11-01/11-T-25-Red-ENG CT, page 4, line 22 to page 5, line 7; ICC-02/11-01/11-749, paras 15 and 20; ICC-02/11-02/11-T-9-Red-ENG, page 6, lines 5-13; ICC-02/11-01/11-809, paras 18, 23 and 33; ICC-02/11-01/15-30, para. 8. See also ICC-02/11-01/15-132, para. 4.

²⁶ See also Decision 101, ICC-02/11-01/15-101, para. 13.

conduct of its investigations. Those Annex C Documents which concern requests for protective measures²⁷ do not include identifying information of the relevant persons: this information is either redacted or included only in accompanying annexes,²⁸ which have already been transferred to the *Gbagbo and Blé Goudé* case record as ‘confidential, *ex parte*’. The Single Judge also notes, but is not persuaded by, submissions concerning limitations on access mandated by certain sources. These submissions do not specify any details which would allow the Single Judge to assess them. Further, it is insufficient to argue that a request should be ‘confidential, *ex parte*’ because it was previously resolved or concerns a person whose statement was never filed on the case record.

15. Moreover, the Gbagbo Defence does not specifically identify that information allegedly covered by medical secrecy or privacy. The LRV already has access to the relevant Annex C Documents.²⁹ There is no apparent reason to withhold access from the Blé Goudé Defence.³⁰

16. Accordingly, having reviewed them, the Single Judge considers that withholding access from any party or participant to any of the Annex C Documents is not justified. At the same time, there is no readily apparent indication that the bases for the ‘confidential’ classification of the Annex C Documents no longer exists. The Single Judge therefore decides that the Annex C Documents shall be transferred to the *Gbagbo and Blé Goudé* case record as ‘confidential’.

²⁷ ICC-02/11-01/11-191-Conf (and related documents); ICC-02/11-01/11-192-Conf-Red (and related documents).

²⁸ ICC-02/11-01/11-191-Conf-Exp-Anx1; ICC-02/11-01/11-191-Conf-Exp-Anx2.

²⁹ The LRV was notified of ICC-02/11-01/11-774-Conf by the Gbagbo Defence and received access to the other Annex C Documents relating to conditional release by order of the Chamber or Single Judge. *See* Decision granting the Defence request for extension of page limit, ICC-02/11-01/11-701; ICC-02/11-01/11-749; Eighth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute, 11 March 2015, ICC-02/11-01/11-808, para. 42.

³⁰ Indeed, in relation to transcripts, the Gbagbo Defence previously submitted that, as the LRV and Prosecution have access to certain confidential information (including in relation to conditional release), ‘*il est tout aussi logique que l'équipe de Défense de Charles Blé Goudé reçoive les transcrits de ces audiences*’. *Soumissions portant sur le niveau de confidentialité à attribuer aux documents que comprend le dossier de l'affaire*, 30 June 2015, ICC-02/11-01/15-47-Red4, para. 49.

17. In response to submissions relating to translations, the Single Judge notes that, consistent with Regulation 23 *bis*(2) of the Regulations, a translation shall bear the same classification as the original.
18. Finally, the Single Judge underlines his instructions to the parties and participants concerning the transfer of materials in the E-court databases for the *Gbagbo and Blé Goudé* cases to the E-court database for the *Gbagbo and Blé Goudé* case.³¹ The Gbagbo Defence submits that restricted classification is necessary for all evidentiary material (except four items), but fails to justify such classification for each item. The Single Judge therefore dismisses these submissions and instructs the Gbagbo Defence to, in the exercise of all reasonable diligence, comply with Decision 101.
19. In light of his findings above and pursuant to Regulation 23 *bis*(3) of the Regulations, the Single Judge decides to reclassify the ‘confidential, *ex parte*’ version of the Gbagbo Defence Submissions as ‘confidential’.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

DIRECTS the Registry to transfer all Annex C Documents to the *Gbagbo and Blé Goudé* case record as ‘confidential’;

DIRECTS the Registry to reclassify filing ICC-02/11-01/15-65-Conf as ‘public’;

DIRECTS the Registry to reclassify the ‘confidential, *ex parte*’ version of the Gbagbo Defence Submissions (ICC-02/11-01/15-124-Conf-Exp) as ‘confidential’; and

REJECTS all other requests.

³¹ See para. 1, *supra*. See also Decision 101, ICC-02/11-01/15-101, paras 13, 16 and 19.

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

A handwritten signature in black ink, appearing to read "G. Henderson", written over a horizontal line that extends to the right and ends in an arrowhead.

Judge Geoffrey Henderson, Single Judge

Dated 21 July 2015

At The Hague, The Netherlands