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TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Olga Herrera-Carbuccia
Judge Geoffrey Henderson

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR

v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ

Public

Public redacted version of “Notice of a challenge by the Legal Representative of the victims to the disclosure of an Investigator’s Report”, 5 April 2017, ICC-02/11-01/15-868-Conf-Exp

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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**Unrepresented Applicants for
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**Victims Participation and Reparations
Section**

Other

Introduction

1. This Notice is filed in the expectation of the Legal Representative filing a request this week opposing disclosure by the Prosecution under rule 77 of the Rules of Procedure and Evidence (“Rules”) of an investigator’s report related to Witness P-0433 (“the Report”), a dual status witness in this case.¹
2. The Report² contains information related to Witness P-0433’s contacts with an assistant to Counsel of the Legal Representative of the Victims (“the Legal Representative’s assistant”), [REDACTED]. It is the Prosecution’s assessment that this information, together with the further details provided in the Report, is material to the preparation of the Defence, and therefore subject to disclosure under rule 77 of the Rules.
3. The Legal Representative for Victims (“Legal Representative”) has informed the Prosecution that she opposes disclosure of the Report on grounds, including, so the Prosecution understands, that the relevant information is, first, not material to the preparation of the Defence within the meaning of rule 77 of the Rules; second, is protected by client-attorney privilege; and third, reveals confidential information on the Legal Representative’s working methods that endangers activities in the field and may endanger the safety of her clients and of third parties, so exempting the Prosecution from its disclosure under rule 77.
4. The Prosecution will file a detailed response – insofar as necessary - to the Legal Representative’s expected Request, once made. By this filing, the Prosecution merely gives the Chamber notice of an impending issue.
5. The Report is attached as *ex parte* Annex A to this submission and relevant correspondence at *ex parte* Annexes B to C.

¹ Witness P-0433 filed a victim’s application form [REDACTED].

² CIV-OTP-0096-0586.

Request for Receipt of Filing as Confidential *Ex Parte*

6. Pursuant to Regulation 23*bis* of the Regulations of the Court, the Prosecution files this document and its annexes as “Confidential, *ex parte*, only available to the Prosecution and the Legal Representatives of the Victims”, as notice to the Accused of their content would defeat the purpose of this submission.

Submissions

A. Issues raised in the Investigator’s Report

7. On 2 December 2016, Witness P-0433, a dual status witness, informed the Prosecution, by telephone, that, during contacts with the Legal Representative’s assistant, [REDACTED],³ [REDACTED]. [REDACTED].⁴”
8. This information was summarised in the Report,⁵ dated 2 December 2016, which the Prosecution considers it is under an obligation, under rule 77 of the Rules, to disclose. The Report also describes the Prosecution’s follow-up to its conversation with the Witness, including [REDACTED].
9. It is the Prosecution’s assessment that the information provided by Witness P-0433 is material to the preparation of the Defence because first, Witness P-0433 effectively acted as an intermediary [REDACTED].⁶

B. Communications with the Legal Representative of the Victims regarding disclosure of the Report

10. The Prosecution has communicated with the Legal Representative on the issue of disclosure of the Report. Having met with the Prosecution on 13 December 2016, on 19 December 2016, the Legal Representative sent a letter to the Prosecution,⁷ outlining the main objections to disclosure of the Report, to which the Prosecution

³ CIV-OTP-0096-0586, para. 3.

⁴ CIV-OTP-0096-0586, para. 4.

⁵ See Annex A.

⁶ [REDACTED].

⁷ [REDACTED]. This letter is attached as *ex parte* Annex B.

responded, by e-mail, on 20 December 2016.⁸ On 3 April 2017, a meeting took place between the Prosecution and the Legal Representative in order to come to a common understanding as to how to resolve the issue of the disclosure of the Report. During this meeting it was decided to seize the Trial Chamber *ex parte* in order to seek a resolution.⁹

11. The Legal Representative has informed the Prosecution of her position that the Report not be disclosed on the following, broad, grounds.
12. First, disclosure of the report is opposed on grounds that it does not contain information that is material to the Defence within the meaning of rule 77.¹⁰ The Prosecution repeats its position as described at paragraphs 7-9 above.
13. Second, disclosure of the Report is opposed on grounds that it includes confidential information protected by client-attorney privilege.¹¹ Pursuant to rule 73(1) of the Rules, privilege attaches to “communications made in the context of the professional relationship between a person and his or her legal counsel.” The Prosecution submits that the relevant information in the Report does not fall within client-attorney privilege because it is not related to discussions concerning Witness P-0433’s personal situation or to his victim status or application. Rather, the contacts as between Witness P-0433 and the Legal Representative’s assistant were more akin to contacts within the context of a relationship of victim intermediary and counsel. This is a different relationship that is not covered by legal professional privilege.¹² In addition, privilege does not attach to contacts as between a person and his or her legal counsel where third parties are involved - in this case [REDACTED]. These contacts were, necessarily, not confidential in nature, and not related to the professional relationship as between Witness P-0433 and the Legal Representative’s assistant.

⁸ The Prosecution’s response is attached as *ex parte* Annex C.

⁹ The Prosecution submits Annexes B to C out of transparency and since the Legal Representative stated she would do so in her own submission.

¹⁰ As communicated during the meeting on 3 April 2017 between the Prosecution and Legal Representative.

¹¹ See *ex parte* Annex B, p. 2, para. 5.

¹² See section 1(e) and fn. 18 of the ICC Guidelines Governing the Relations between the Court and Intermediaries, March 2014.

14. Third, disclosure of the Report is opposed on grounds that it reveals confidential information on the working methods of the Legal Representative, and may endanger their ongoing investigations and the safety of their clients or innocent third parties.¹³ Such information may, when justified, be subject to redactions pursuant to rules 81(2) and 81(4) of the Rules. However, objectively justifiable risks need to be demonstrated by the Legal Representative in order to justify measures being taken on the basis of these rules. Moreover, even when the requirements of these rules are met, the risks are usually mitigated by less intrusive measures, such as redactions, and typically do not require the full non-disclosure of a document to the Defence.

15. Finally, it may be that the account provided by Witness P-0433 as to his contacts with the Legal Representative's assistant is not accurate.¹⁴ The Prosecution submits that this position – if indeed advanced by the Legal Representative – does not support an argument for non-disclosure of the relevant information under rule 77 of the Rules.

Conclusion

16. As indicated, the Prosecution will file a detailed response – insofar as necessary – to the Legal Representative's expected Request, once made. By this filing, the Prosecution merely gives the Chamber notice of an impending issue.



Fatou Bensouda, Prosecutor

Dated this 1st day of May 2017

At The Hague, The Netherlands

¹³ See *ex parte* Annex B, p. 2, para. 3.

¹⁴ [REDACTED].