



Original: English

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

Date: 1 May 2017

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 “Reply to the “Response to the Notice of a challenge by the Legal Representative of the victims to the disclosure of an Investigator’s Report” (ICC-02/11-01/15-871-Conf-Exp)”, 19 April 2017,
ICC-02/11-01/15-877-Conf-Exp**

Source: Office of the Prosecutor

Document 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 the Victims

Ms Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**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**

Other

Introduction

1. The Prosecution opposes the Legal Representative of Victims' ("LRV") request¹ for the non-disclosure to the Defence of an Investigator's Report² ("Report") related to a phone conversation that a Prosecution investigator held with dual-status Witness P-0433.
2. As noted in the Prosecution's previous filing,³ and contrary to the submission of the LRV, i) the Report contains information that is material to the preparation of the Defence; ii) the information contained in the Report is not protected by lawyer-client privilege; and iii) any information that may endanger the LRV's investigative activities and the safety of her clients and of third parties may be mitigated by less intrusive means than full non-disclosure, such as through the application of any necessary redactions pursuant to rules 81(2) and (4) of the Rules of Procedure and Evidence ("Rules"), if the requirements of those rules are met.

Request for Receipt of Filing as Confidential *Ex Parte*

3. 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.

¹ ICC-02/11-01/15-871-Conf-Exp.

² ICC-02/11-01/15-868-Conf-Exp-AnxA.

³ ICC-02/11-01/15-868-Conf-Exp, paras 2, 7-9.

Submissions

A. The information contained in the Report is material to the preparation of the Defence

4. Contrary to the LRV's submission, information that is contained in the Report may be material to the preparation of the Defence.⁴ The Prosecution provided the following reasons for this assessment in its previous filing "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]"⁵
5. The LRV disagrees that Witness P-0433 effectively acted as an intermediary on the basis that he was granted authorisation to participate in the proceedings on behalf of an organisation, the COMUSILEM, and is consequently a representative of a group of people belonging to that organisation. The LRV therefore argues that "the support provided by Witness P-0433 for the Legal Representative to be able to identify and defend in the proceedings the interests of the *communauté* authorised to participate at trial and for which Witness P-0433 is the representative cannot turn said individual into an "intermediary."⁶
6. According to Section 1 of the Guidelines Governing the Relations between the Court and Intermediaries ("Guidelines"), "An intermediary is someone who comes between one person and another; who facilitates contact or provides a link between one of the organs or units of the Court or Counsel on the one hand, and victims, witnesses, beneficiaries of reparations and/or affected communities more broadly on the other" [emphasis added].⁷ A clarification to the term "organs or units of the Court or Counsel" states that "The main parts of the Court that interact directly with intermediaries are OTP, VPRS, PIDS and the TFV. Other units (VWU, OPCV) might work with intermediaries, as other units/organs are working with them" [emphasis added].⁸ The Guidelines therefore explicitly

⁴ ICC-02/11-01/15-871-Conf-Exp, paras 3 and 15-26.

⁵ ICC-02/11-01/15-868-Conf-Exp, para. 9.

⁶ ICC-02/11-01/15-871-Conf-Exp, para. 22.

⁷ ICC Guidelines Governing the Relations between the Court and Intermediaries, March 2014, Section 1.

⁸ *Ibid*, footnote 1 to the Introduction.

acknowledge that OPCV might also work with intermediaries as other organs and units of the Court do.

7. The Guidelines set out some of the functions that may be performed by intermediaries. Such functions include to “Liaise between Legal Representatives and victims for the purposes of victim participation/reparations.”⁹ Annex 1 to the Guidelines provides further specific examples of tasks intermediaries might carry out when interacting with an organ or unit of the Court. Such tasks include the following: “Assist the OPCV or VPRS to communicate with victims;”¹⁰ “Identify victims in affected communities”¹¹ and; “Assist Court staff to meet with victims.”¹² [REDACTED].¹³
8. The Chamber previously acknowledged that the identity and activities of intermediaries who are also Prosecution witnesses, are material to the preparation of the Defence and should be disclosed.¹⁴ Following this precedent, it is also material to the Defence to be aware [REDACTED], as described in the Report.
9. In any event, irrespective of whether Witness P-0433 can be qualified as an intermediary, [REDACTED] make the Report disclosable pursuant to rule 77, as the information contained therein is material to the preparation of the Defence. This interpretation of rule 77 would be consistent with how the Prosecution has applied it throughout this case and with the Appeals Chamber’s guidance that “the term ‘material to the preparation of the defence’ must be interpreted broadly.”¹⁵

⁹ *Ibid*, Section 1(e).

¹⁰ *Ibid*, Annex 1, page 1.

¹¹ *Ibid*, Annex 1, page 3.

¹² *Ibid*, Annex 1, page 3.

¹³ ICC-02/11-01/15-868-Conf-Exp-AnxA, paras. 2-4.

¹⁴ ICC-02/11-01/15-506-Conf, para. 21.

¹⁵ ICC-01/04-01/06-1433 OA11, para. 78. *See also* paras. 80-81; ICC-01/04-01/06-3017 A5 A6, para. 10.

B. The information contained in the Report is not protected by lawyer-client privilege

10. Contrary to the LRV's contention,¹⁶ the Report does not contain any information protected by lawyer-client privilege under rule 73(1). Rule 73(1) provides that "communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privilege, and consequently not subject to disclosure, unless [...] the person voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence to that disclosure."

11. Privilege under this provision does not apply to the information contained in the Report because: (a) no privilege attaches to communications between the Prosecution and its witnesses in the context of a criminal trial; (b) the Report does not refer to any communication between Witness P-0433 and his legal counsel; and (c) even if, *arguendo*, there was any privilege, Witness P-0433 has waived it pursuant to rule 73(1)(b).

(a) No privilege attaches to communications between the Prosecution and its witnesses

12. The Report records a conversation that a Prosecution investigator held with Witness P-0433, a Prosecution witness who is scheduled to testify in the near future. According to the jurisprudence of the Court, conversations between the Prosecution and its witnesses are not covered by privilege under rule 73, subject to security issues.

13. Trial Chamber I in the *Lubanga* case has held that no such privilege applies because "no reasonable expectation of privacy can exist; nor is confidentiality essential to the relationship between the Prosecutor and a potential witness. The opposite is the position: the presumption is that the details of what is said by the witness may well be disclosed, subject to certain particular considerations, such

¹⁶ ICC-02/11-01/15-871-Conf-Exp, paras. 27-39.

as relevance and the witness's security."¹⁷ According to Trial Chamber I, "[r]ecognising privilege in this context would not further the objectives of the Statute and the Rules, under Rule 73(2) of the Rules, not least because of the prosecution's disclosure obligations to the accused."¹⁸

14. Accordingly, even if during the conversation between the Prosecution and one of its witnesses reference was made to a prior interaction that Witness P-0433 had with a representative of the OPCV, this does not attach privilege to the Prosecution's conversation with Witness P-0433, or otherwise exempt it from disclosure.

(b) The Report does not refer to any communication between P-0433 and his legal counsel

15. As correctly pointed out by the LRV, privilege under rule 73(1) applies to communications between a person and "his or her legal counsel."¹⁹ It does not extend to all assistants, case managers or other persons who support counsel or are employed by the same entity. The Single Judge of Pre-Trial Chamber II held, in an analogous situation, that privilege under 73(1) does not extend to conversations between an accused and a case manager supporting legal counsel.²⁰

16. The Single Judge in that case analysed the difference between counsel and other support staff, to whom privilege under rule 73(1) does not apply. He noted that the Rules of Procedure and Evidence (rule 22) and the Regulations of the Court (regulations 67 and 68) set forth in detail the requirements to be met by counsels and assistants to counsel, including by way of reference to the Regulations of the Registry. Furthermore, article 32 of the Code of Professional Conduct for counsel provides that counsel is responsible for "instructing" his or her assistants or staff in the standards of the Code and that counsel shall be liable for misconduct by his or her assistants or staff when he either orders or approves the conduct involved

¹⁷ ICC-01/05-01/08-750-Conf, para. 36.

¹⁸ *Ibid.*

¹⁹ ICC-02/11-01/15-871-Conf-Exp, para. 28.

²⁰ ICC-01/05-01/13-48, paras. 4-6.

or knows or has information suggesting that violations may be committed and takes no reasonable remedial action.²¹

17. Based on the above, the Single Judge concluded that communications between a person and those who are assigned administrative functions or provide assistance to counsels, for instance “for the purposes of identifying and retrieving information pertaining to the case” are not protected by privilege.²²

18. The legal counsel appointed by the Trial Chamber to represent Witness P-0433 in these proceedings is the LRV, Ms Paolina Massidda. The Report does not refer to conversations between Witness P-0433 with Ms Massidda, but to conversations [REDACTED]. [REDACTED]²³ [REDACTED].²⁴ [REDACTED].

(c) Witness P-0433 waived privilege

19. Even if, *arguendo*, the conversation between Witness P-0433 and [REDACTED] were protected by privilege, Witness P-0433 waived that privilege pursuant to rule 73(1)(b) by voluntarily disclosing the content of his communication with [REDACTED] to the Prosecution, who through the Report is now providing evidence of Witness P-0433’s voluntary disclosure of information.

20. It ought to be recalled that the privilege under rule 73(1) is not a right of legal counsel, but a right of the client. As such, he or she is free to waive that right at any time without counsel’s consent.

21. The LRV argues that Witness P-0433’s waiver of privilege is tainted because the Prosecution did not seek prior consent to contact Dual Status Individuals, and because Witness P-0433, when talking to the Prosecution, [REDACTED].²⁵ None of these arguments are supported.

²¹ Ibid, para. 4.

²² Ibid, para. 5.

²³ ICC-02/11-01/15-871-Conf-Exp, para. 2. See also ICC-02/11-01/15-T-8-Red-FRA WT, page 3 lines 9-14.

²⁴ Annex A.

²⁵ ICC-02/11-01/15-871-Conf-Exp, paras. 34-36.

22. The Prosecution concedes that under the Protocol on Dual Status Individuals, it should have informed the LRV prior to contacting Witness P-0433. However, this does not establish that Witness P-0433's disclosure to the Prosecution of the content of his prior communication with [REDACTED] was involuntary. To the contrary, the Report demonstrates that it was Witness P-0433 who took the initiative to contact the Prosecution and to share with the Prosecution investigator information relating to his prior interaction [REDACTED].
23. In addition, the LRV's contention that Witness P-0433 was unaware that [REDACTED].
24. First, the LRV's argument is based [REDACTED].²⁶ [REDACTED].
25. Second, in the context of this case, it is entirely unreasonable to infer that Witness P-0433 would have been unaware that the [REDACTED].
26. Witness P-0433 is aware that [REDACTED].²⁷ [REDACTED]. [REDACTED].²⁸ [REDACTED].
27. Accordingly, because there is no reason to believe that Witness P-0433's disclosure of his prior conversations [REDACTED] was involuntary, he effectively waived any privilege, if such privilege existed in the first place.
28. Finally, the LRV's insinuation that the Prosecution [REDACTED],²⁹ and interfered with the administration of justice is factually unsupported and predicated on an incorrect understanding of the law of privilege under rule 73, of article 70 and of the Code of Conduct of the Office of the Prosecutor. The LRV's arguments should therefore be dismissed.

C. Potential risks to the LRV's ongoing investigations or risks to the safety of her clients or third parties do not justify full non-disclosure of the Report

²⁶ [REDACTED].

²⁷ Report, para. 2.

²⁸ [REDACTED].

²⁹ ICC-02/11-01/15-871-Conf-Exp, para. 38.

29. As previously stated,³⁰ any information that may endanger the LRV's investigative activities and the safety of her clients and of third parties may be mitigated by less intrusive means than non-disclosure of the entire Report. The Prosecution reiterates its previous observations on the matter that such information may be redacted pursuant to rules 81(2) and (4) of the Rules if the LRV can demonstrate objectively justifiable risks resulting from disclosure.³¹

Conclusion

30. For the reasons stated above, the Prosecution requests the Chamber's authorisation to disclose the Report to the Defence.



Fatou Bensouda, Prosecutor

Dated this 1st day of May 2017

At The Hague, The Netherlands

³⁰ ICC-02/11-01/15-868-Conf-Exp, para. 14.

³¹ ICC-01/04-01/07-475 OA, paras. 71, 98; ICC-01/04-01/06-3031, OA4 OA5 OA6, para. 10.