

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/10

Date: 23 August 2011

PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Single Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

***IN THE CASE OF
THE PROSECUTOR V. CALLIXTE MBARUSHIMANA***

Public

**Decision on the “Defence request for disclosure of information related to the
alleged victims of sexual violence”**

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

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo

Ms. Fatou Bensouda

Mr. Anton Steynberg

Legal Representatives of Victims

Me. Mayombo Kassongo

Me. Ghislain Mabanga

Unrepresented Victims

Counsel for the Defence

Mr. Nicholas Kaufman

Ms. Yaël Vias-Gvirsman

Legal Representatives of Applicants

**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

Ms. Silvana Arbia

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Ms. Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section Others**

I, Judge Sanji Mmasenono Monageng, the Single Judge of Pre-Trial Chamber I of the International Criminal Court (“Chamber” and “Court” respectively) responsible for carrying out the functions of the Chamber in relation to the case of *The Prosecutor v. Callixte Mbarushimana*;¹

NOTING the “Prosecution’s request for variation of time limit and Fifth application for redactions to witness statements pursuant to Rule 81(2) and Rule 81(4)”,² filed on 24 June 2011, and the corrigendum thereof,³ filed on 24 June 2011 (“Prosecution Request for Authorisation for Redactions”), wherein the Prosecutor sought an extension of the deadline for the filing of an application for redactions in relation *inter alia* to the statement of witness DRC-OTP-WWWW-0694 (“Witness”) on which the Prosecutor intends to rely at the hearing on the confirmation of charges;

NOTING the “Decision on the Prosecution’s request for variation of time limit and fourth and fifth applications for authorization for redactions pursuant to Rules 81(2) and (4)”,⁴ issued on 6 July 2011 (“Decision Authorising Redactions”), whereby the Single Judge *inter alia* (i) rejected the Prosecutor’s request for an extension of the deadline for the filing of an application for redactions, (ii) found that the Prosecutor may rely on a summary of the statement of the Witness, and (iii) authorised the redaction of the identity of the Witness;

NOTING the “Defence request for disclosure of information related to the alleged victims of sexual violence”,⁵ filed on 12 August 2011 (“Defence Request”), wherein the Defence requested that the Chamber order the Prosecutor to disclose: (i) the age of the Witness (“First Defence Request”), (ii) the details of those persons present during the interview with the Witness (“Second Defence Request”), and (iii) all psycho-social assessments or similar pre-interview materials emanating from those victims of sexual violence or witnesses thereto whose evidence will be produced at the confirmation hearing (“Third Defence Request”);

¹ ICC-01/04-01/10-192.

² ICC-01/04-01/10-249-Conf-Exp.

³ ICC-01/04-01/10-249-Conf-Corr-Red.

⁴ ICC-01/04-01/10-268.

⁵ ICC-01/04-01/10-358-Conf.

NOTING the “Prosecution’s response to “Defence Request for disclosure of information related to the alleged victims of sexual violence” – ICC-01/04-01/10-358-Conf”⁶ filed on 15 August 2011 (“Prosecution Response”), whereby the Prosecutor submitted (i) that the Defence has not established that any of the requested information is material to the preparation of the Defence for the purpose of the confirmation hearing, (ii) that the disclosure of the age of the Witness and the psycho-social reports of the victims and witnesses of sexual violence would violate the privacy rights and possibly reveal the identities of the victims and witnesses in question, and (iii) that, while he has no principled objection to the disclosure of the identities of the investigators present at the interview of the Witness, he objects to the provision of this information based on the lateness of the Defence Request and the lack of any justification or explanation of the relevance of this information for the preparation of the Defence;

NOTING articles 54(1)(b), 57(3)(c), 61(5), 68(1) of the Rome Statute (“Statute”), rules 76, 77, 81, 86 and 121 of the Rules of Procedure and Evidence (“Rules”) and regulation 23 *bis* of the Regulations of the Court (“Regulations”);

CONSIDERING, in relation to the First Defence Request, that the Prosecution Request for Authorisation for Redactions requested authorisation to redact the identity, as well as identifying information, including the age, of the Witness, based on the fact that disclosure of the identity of the witness would compromise her safety;

CONSIDERING the finding of the Single Judge in the Decision Authorising Redactions that disclosure of the identity of the Witness would pose an unjustifiable risk to her safety and the corresponding authorisation for the redaction of the identity of the Witness;

CONSIDERING that disclosure of the age of the Witness, when viewed in the context of the specific details of the events described in her statement, could lead to her identification;

⁶ ICC-01/04-01/10-366-Conf with annex.

CONSIDERING that the Defence may make relevant submissions, if any, as to the potential correlation between the age of the victim and her credibility as a witness in the abstract without knowing the actual age of the witness;

CONSIDERING, therefore, that, in view of the limited purpose and evidentiary scope of the confirmation hearing, withholding information relating to the age of the Witness from the Defence is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial, and the Single Judge finds no legal or factual reason to review the Decision Authorising Redactions in this respect;

CONSIDERING, in relation to the Second Defence Request, that the Prosecutor did not, in the Prosecution Request for Authorisation for Redactions, request authorisation to redact the identities of those persons present at the interview with the Witness;

CONSIDERING, moreover, that the Prosecutor has indicated that he has no principled objection to the disclosure of the identities of the investigators present at the interview of the Witness, although he has not indicated whether he has any objection to the disclosure of the details of other persons present at said interview;⁷

CONSIDERING that, subject to authorisation by the Chamber, information pertaining to other persons present during an interview with the witness may be redacted, under rule 81(2) of the Rules, where necessary for the protection of ongoing investigations or, under rule 81(4) of the Rules, where necessary for the protection of persons who may be put at risk on account of the activities of the Court;⁸

CONSIDERING that no factual or legal basis to withhold this information from the Defence has yet been identified by the Prosecutor;

⁷ Prosecution Response, para.2.

⁸ *The Prosecutor v. Germain Katanga*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements'", Appeals Chamber, 13 May 2008, ICC-01/04-01/07-475; *The Prosecutor v. Bahar Idriss Abu Garda*, "Public Redacted Version of the 'First Decision on the Prosecution's Requests for Redactions' issued on 14 August 2009", Pre-Trial Chamber I, 20 August 2009, ICC-02/05-02/09-58.

CONSIDERING that, in justifying the Third Defence Request, the Defence posits that “psycho-social assessments of rape victims and/or those who witness sexual assaults are common practice in many jurisdictions and, often reveal contradictions between the version of events communicated to the psychologist/caring professional and that communicated to the Prosecution investigators”⁹;

CONSIDERING the Prosecutor’s submissions that the psycho-social assessments in question are carried out by his office, pursuant to his duties under article 68(1) of the Statute to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, in order to assist the Prosecutor to prevent secondary traumatisation of the witnesses and to determine whether any medical or psychological treatment is required;

CONSIDERING that the Third Defence Request, which is aimed at exploiting the psycho-social assessments of vulnerable witnesses and using these assessments to contest the credibility of these witnesses is entirely inappropriate and, if granted, would tend to subvert the necessary purpose served by the carrying out of such assessments;

CONSIDERING that the Single Judge views with concern the Defence’s biased assumption that victims of sexual violence, once submitted to psychological assessments, “often reveal contradictions between the version of the events communicated to the psychologist/caring professional and that communicated to the Prosecution investigators”;

CONSIDERING that the Defence Request was filed as a confidential document, based on the Defence’s understanding that the document containing the charges was classified as confidential;

CONSIDERING that the Prosecution Response was, in accordance with regulation 23 *bis* of the Regulations, also filed as confidential;

⁹ Defence Request, para. 3.

CONSIDERING that a public redacted version of the document containing the charges was filed on 4 August 2011,¹⁰ and that the Defence Request makes reference to one item of information which has been redacted from the public version of the document containing the charges;¹¹

FOR THESE REASONS,

REJECT the First Defence Request;

PARTIALLY GRANT the Second Defence Request;

REJECT the Third Defence Request;

ORDER the Prosecutor to provide the Defence with the names and functions of OTP investigators present at the interview with the Witness by no later than 24 August 2011;

ORDER the Prosecutor to either (i) submit a request for authorisation for non-disclosure of the identities of other persons present at the interview with the Witness or (ii) provide the Defence with the names and functions of all other persons present at the interview with the Witness by no later than 24 August 2011;

ORDER the Registrar to reclassify the Prosecution Response as a public document; and

ORDER the Defence to file a public redacted version of the Defence Request, from which any information which may identify the Witness has been redacted in conformity with the public redacted version of the document containing the charges.

¹⁰ ICC-01/04-01/10-311-AnxA-Red.

¹¹ Paragraph 56 of the public version of the document containing the charges states in relevant part that “W-694 a vu [EXPURGÉ] être violée, battue, éviscérée (dont le foetus) et démembrée”.

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

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above the name of the judge.

Judge Sanji Mmasenono Monageng

Single Judge

Dated this Tuesday, 23 August 2011

At The Hague, The Netherlands