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PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Single Judge
Judge Sylvia Steiner
Judge Cuno Tarfusser

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. Callixte MBARUSHIMANA

Public Document
Prosecution's Application for Non-Disclosure Order and Order on Regulation of
Contact with Witnesses

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

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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**Victims Participation and Reparations
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Other

I. Introduction

1. Pursuant to Articles 57(3)(c) and 68 of the Statute and Rule 87 of the Rules of Procedure and Evidence, the Prosecution seeks i) an order of non-disclosure to any person of the identities, contact and other information of Prosecution witnesses disclosed to the Defence, except to the limited extent that such disclosure is strictly necessary for the preparation and presentation of the Defence case, and ii) an order regulating the contact by the parties with witnesses interviewed by the other party, including witnesses whose statements are being relied on at the confirmation hearing.
2. The Prosecution submits that these orders are necessary to regulate the use of information disclosed confidentially. They are also necessary to uphold the principle that witnesses must consent to all contacts with the parties, as well as to instil a sense of security in the minds of witnesses.¹ It also submits that these measures are not prejudicial to or inconsistent with the rights of the Suspect to a fair and impartial trial.

II. Non-Disclosure Order

3. The Prosecution seeks a non-disclosure order that expressly prevents the disclosure by the Suspect or his Defence team (collectively “the Defence”) of non-public evidence and information disclosed by the Prosecution, except to the limited extent that such disclosure is strictly necessary for the preparation and presentation of the Defence case.

¹ The Prosecution intends to inform its witnesses of the content of the order in the event that it is granted by the Trial Chamber.

4. The non-disclosure order should extend to the identities, whereabouts and any other identifying features of all witnesses whose statements the Prosecution has disclosed to the Defence as “Confidential” and all persons named in such statements.
5. If the Defence finds it strictly necessary to disclose, directly or indirectly, the identity or identifying information, they should be ordered to inform each person to whom disclosure is made that he or she may not disclose the information in any manner to any other person. If provided with the original or a copy of any document containing information about Prosecution witnesses, the person shall return it and any copies thereof to the Defence as soon as the possession of such material is no longer necessary.
6. The Prosecution requests that the Defence be ordered to keep a log of the name, address and function of any person or entity to whom disclosure is made or documents are given, as well as the date of disclosure,² and that the log be made available to the Chamber if required.
7. The Prosecution submits that the term “person” in paragraph 5 above should include all persons, governments, organisations, entities, clients, associations and groups, the family, friends, associates of the Suspect and other suspects or accused and their defence counsel in cases before the ICC or before domestic courts,³ as well as media and journalists. It shall not include, however, members of Chambers, the Registry, or the Office of the

² The Prosecution underscores that this recommendation should not be understood as calling into question the Defence’s handling of the preparation of its case. Rather, it is a suggested precautionary measure to counter any danger to witnesses that may arise during the proceedings that is beyond the control of the parties and to assist the Chamber to determine the source of any breach of confidence.

³ Including Ignace MURWANASHYAKA, Straton MUSONI and their counsel in domestic proceedings in Germany.

Prosecution; the Suspect, his counsel, and formally appointed members of the Defence team.

8. The Prosecution submits that the order should specifically preclude the Defence from facilitating the publication of the identities, whereabouts and any other identifying features of all witnesses by third parties. This aspect of the order is necessary particularly in light of the contents of a notebook⁴ seized from the Suspect, which refer to the proposed creation of an internet “blog” publishing the names of witnesses appearing in the German criminal proceedings against the Suspect’s associates.⁵
9. Further, the Prosecution submits that in the event a member of the Defence team withdraws from the case, all material in his/her possession should be returned to lead counsel, thereby ensuring that the order covers former members of the Defence team.
10. The Prosecution submits that the proposed non-disclosure order does not hinder the Defence’s ability to prepare or present its case and therefore does not infringe upon the rights of the Suspect as prescribed in Article 67 of the Statute. Rather, they preserve the rights of the Suspect as well as the security of witnesses.⁶ Furthermore the Prosecution submits that the order is necessary to regulate the use of information disclosed to the Defence

⁴ DRC-REG-0007-3438, at DRC-REG-0007-3471.

⁵ ICC-01/04-01/10-163, para. 64. The decision is under appeal.

⁶ The Prosecution informs the Chamber that at least one witness told the Prosecution’s attention the potential publication of his name on the internet. See the transcript of the interview with Witness W-0559, DRC-OTP-2032-0828 at 0842 to 0842, lines 473-516. The witness did not allege that his name had been published by the Defence; nor did he link the publication of his name to the ICC proceedings. The Prosecution submits, nevertheless, that his alertness to the issue of publication and the fact that he brought it up of his own initiative in the early stages of his interview with the Prosecution indicates concern about the impact that un-controlled publication of information may have on the witnesses’ security.

confidentially. Similar orders have been issued in the *Lubanga* prosecution, with no apparent hardship or prejudice to the Defence.⁷

11. The Prosecution notes the decision in the *Bemba* case ruling that a similar order was unnecessary,⁸ but submits that Article 8 of the Code of Professional Conduct for counsel,⁹ referred to by Chamber in that decision, provides insufficient guidance as to the limitations to the use of information disclosed confidentially to the Defence. The article does not appear to regulate the legitimate disclosure of confidential information to third parties which counsel or other members of the Defence team may need to resort to in the course of the investigation. The article does not, moreover, define the concept of “protected victims and witnesses” used in sub-paragraph 4 of Article 8. It is unclear whether the term applies only to persons in the Court’s witness protection program, or to a broader category of persons benefitting from more limited protection.¹⁰ Finally, the article does not apply to a suspect or members of the Defence team other than counsel. Their handling of non-public evidence disclosed to the Defence is therefore unregulated.

III. Order Regulating Contact with Witnesses

12. The Prosecution seeks an order requiring that the Defence provide notice before contacting any Prosecution witnesses in order to ensure that the witnesses have an opportunity to consent to such contacts and that their security concerns will be properly addressed. The Prosecution submits that the order should extend to contact with all witnesses interviewed by the Prosecution whose statements have been disclosed to the Defence

⁷ ICC-01/04-01/06-447, p. 5 and ICC-01/04-01/06-1372, para. 8-10 and 12-13.

⁸ ICC-01/05-01/08-134, para. 20.

⁹ Article 1 of the Code of Professional Conduct for counsel and ICC-01/05-01/08-769, para. 35.

¹⁰ Such as persons whose identities are known but whose statements are otherwise redacted or were disclosed as confidential evidence.

(“Prosecution witnesses”).¹¹ The order should be applicable irrespective of whether the Defence obtains the witnesses’ contact details through disclosure¹² or through its own investigations.¹³

13. Other Chambers have recognized that no party “owns” a witness.¹⁴ Thus, one party may contact and speak to witnesses of the opposing party so long as the *witness* – not the party -- consents. However, the parties are not identically situated. The Chamber has found reasonable grounds to believe that the Suspect has committed crimes, the same obviously is not true of the Prosecution. Moreover, the Prosecution bears the burden of proof and also a burden of protection that is not shared by the Defence. Accordingly, it is appropriate that the Chamber order the Defence to take additional steps that need not be required of the Prosecution. Here, the Prosecution requests only that the Defence provide the Prosecution with reasonable notice of the Defence’s intent to speak to a Prosecution witness. This would allow the Prosecution to ask the person whether he/she agrees¹⁵ and, if the witness does not wish to be approached at home or work, to make other arrangements.

¹¹ The Prosecution does not intend the requested order to apply to witnesses whose consent to speak to the Defence is abundantly clear and in relation to whom there are no security concerns such as Father Matteo Zuppi, who does not reside in the DRC or in Rwanda.

¹² As in the case of Witness W-0564. See ICC-01/04-01/10-222-Conf-Red.

¹³ The fact that the Defence may be able to obtain the contact details of Prosecution witnesses independently does not detract from the requirement that Prosecution witnesses should have the opportunity to consent freely to being contacted by the Defence in relation to these proceedings, and to raise security concerns, if any, with the party responsible for their protection.

¹⁴ *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Practices of Witness Familiarisation and Witness Proofing, ICC-01/04-01/06-679, 8 November 2006, para. 26; Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049, 30 November 2007, paras. 33 and 34, at 34: “The Trial Chamber agrees with the conclusion that witnesses are not attributable to parties, but rather are witnesses of the Court”.

¹⁵ See ICC-01/04-01/06-1372, para. 11 and ICC-01/04-01/07-1134, para. 28.

14. If the witness requests the presence of the Prosecution, the Defence should also be required to inform the Prosecution of the date and location of the proposed interview.¹⁶
15. The above-mentioned process would allow the Prosecution – as the party responsible for its witnesses’ protection – to seek relief from the Chamber, should any specific protection or access issues arise (for example where the consent of the witness is unclear, or a curtailment of the contact might be necessary)
16. Furthermore, such an order could allow the party that interviewed a witness to identify persons falsely claiming to be representatives of the other party. The Prosecution would be in a better position to verify whether a phone call or visit to a witness was in fact made by a member of the Defence team, thus protecting the witness from imposters who may wish them harm.
17. The Prosecution notes that other Chambers have issued similar orders during pre-trial and trial proceedings.¹⁷ The Prosecution also notes the decision in the *Bemba* case denying the relief sought here.¹⁸ However, the Prosecution submits that this ruling should not be applied in the current situation, as the relief requested herein is narrowly tailored to the need to ensure that witnesses are advised, by the party which has instigated their cooperation with the Court, to raise security concerns, if any. Such request does not prevent the Defence’s access to Prosecution witnesses, but merely provides a suitable mechanism to ensure the safety of the witnesses.

¹⁶ ICC-01/04-01/07-1134, para. 28 and ICC-01/04-01/07-2491-Conf.

¹⁷ ICC-01/04-01/06-447, pp. 6-7 (iii), ICC-01/04-01/06-1372, para. 11, ICC-01/04-01/07-1134, paras. 25-31 and ICC-01/04-01/07-2491-Conf.

¹⁸ ICC-01/05-01/08-134, para. 29.

18. The Prosecution notes that in other cases it sought similar orders only in respect of witnesses on whom it intended to rely on at the confirmation hearing or at trial. Given the early stage of the proceedings and the limited scope of the confirmation hearing, the Prosecution is not yet in a position to indicate which witnesses will be called to testify at trial. The Prosecution submits that it is also important to ensure the Protection of witnesses upon whom it does not rely for the confirmation hearing, but may still rely on at trial. It therefore requests that the order apply to all witnesses unless and until the Prosecution indicates that it will not rely on them at trial.
19. The Prosecution stresses that the above-mentioned process is fair as it would apply equally to both parties; each party would be required to inform the opposing party of its intent to contact opposing party's witnesses¹⁹ for the purposes of obtaining evidence from them pertaining to this case.²⁰

¹⁹ That is, witnesses from whom the Defence has taken a witness statement and disclosed it to the Prosecution.

²⁰ This would therefore not apply to contacts which are unrelated to the investigation of this case.

IV. Relief Sought

20. The Prosecution requests the Chamber to issue orders for non-disclosure of non-public witness-related information and the regulation of contact with witnesses, incorporating the elements contained in paragraphs 3 to 9 and 12 to 14 above respectively.



Luis Moreno-Ocampo,
Prosecutor

Dated this 14th day of June 2011

At The Hague, Netherlands