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

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PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Presiding 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
[REDACTED]**

Defence response to Prosecution filing: ICC-01/04-01/10-234

Source: Defence for Mr. Callixte Mbarushimana

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor

Ms. Fatou Bensouda, Deputy Prosecutor

Mr. Anton Steynberg, Senior Trial Lawyer

Counsel for the Defence

Mr. Nicholas Kaufman

Ms. Yaël Vias-Gvirsman

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented

(Participation/Reparation)

Applicants

The Office of Public Counsel for the Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

1. The Defence for Mr. Callixte Mbarushimana hereby submits its response to the *Prosecution's Application for Non-Disclosure Order and Order on Regulation of Contact with Witnesses* ("the Prosecution Application").¹

2. **With respect to the request contained in paragraphs 3-9 of the Prosecution Application:** The Defence submits that the Prosecution request for non-disclosure orders as sought is superfluous and was, further, deemed unnecessary in a decision rendered in the case against *Jean-Pierre Bemba Gombo*.² This decision was not appealed and the only reason it now gives for establishing alternative precedent is its view that Article 8 of the Code of Professional Conduct for Counsel ("the CPCC") "*provides insufficient guidance as to the limitations to the use of information disclosed confidentially to the Defence*".

3. The Defence disagrees with this Prosecution submission. Article 8(4) is explicit in that Counsel is forbidden "*to reveal the identity of protected victims and witnesses, or any confidential information that may reveal their identity or whereabouts, unless he or she has been authorized to do so by an order of the Court*". The overriding principle, therefore, is that Counsel is forbidden from revealing confidential information. In these circumstances, defining the concept of "protected victims and witnesses" is unnecessary since, should the names of victims and witnesses have only been revealed to the Defence in a confidential document, the Defence team and Mr. Mbarushimana will, perforce, be obliged to maintain the confidentiality of their identities.

4. Notwithstanding the aforementioned, the Defence suggests that Article 8(4) of the CPCC should not be read as detracting from the protocol judiciously approved in the case against *Germain Katanga & Mathieu Ngudjolo*:

¹ ICC-01/04-01/10-234.

² ICC-01/05-01/08-134.

As regards the use of the names of protected witnesses in investigations, the Protocol states that “[i]t is crucial that any investigating party or participant strictly avoids the risk of exposing the identity of protected witnesses to a third party to the extent possible” and that “[i]n cases where this may become necessary and no alternatives are available” “[t]he investigating party should use the names of the protected witnesses in a careful and focused manner and only when necessary for the purposes of the investigation or inquiry”.

The Chamber considers that the language of the Protocol places sufficient emphasis on the fact that the names of protected witnesses should be disclosed only in exceptional circumstances, whilst proposing a realistic approach which enables the Defence to investigate effectively the credibility of prosecution witnesses. Moreover, the Chamber is of the view that it is not so much using the name of a protected witness during investigations that is a risk factor, but rather disclosing the fact that the person is a Court witness.³

5. The Defence opposes the requirement that it be ordered to maintain a log of persons to whom disclosure necessary for the preparation of the Defence case is made. The legislation of the International Criminal Court does not provide for such a measure which the Prosecution itself defines as being "precautionary" - without specifying either its purpose or potential utility. Such a request should therefore be rejected and, in so far as it be accepted, should similarly apply to the Prosecution.

6. [REDACTED].

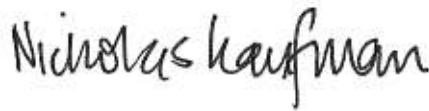
7. **With respect to the request contained in paragraphs 12-14 of the Prosecution Application:** The Defence has already agreed to notify the Prosecution of its intention directly to contact a Prosecution witness on the grounds of reciprocity (*i.e.* that the Prosecution likewise inform the Defence of its intent to interview any notified Defence witness).⁴ The Defence objects, however, to the proposition that the Prosecution be entitled to discuss with its witnesses the issue of whether to consent to a Defence interview. The Defence notes the following observation of Trial Chamber II, once again, in the case against Germain Katanga & Mathieu Ngudjolo:

³ ICC-01/04-01/07-2047 at paragraph 10.

⁴ ICC-01/04-01/10-223-Conf. at paragraph 3.

"The party calling the witness is prohibited from trying to influence the witness's decision as to whether or not to agree to be interviewed by Counsel of another party".⁵

The Defence suggests that the only way such a concern may suitably be addressed is by ensuring that all contact with one Party's witness on the issue of consent to an interview by the other Party be effected through a neutral agency such as the VWU. VWU would then be entrusted to report to the Parties and the Chamber on any pertinent witness concern in order for a suitable decision to be taken.



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Friday, June 17, 2011

⁵ ICC-01/04-01/07-1134 at paragraph 28.