

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 29 June 2011

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

Decision on the "Prosecution's Request for an order regulating defence use of an inadvertently disclosed witness statement and lifting of redactions" and on the "Prosecution's Application for non-disclosure order and order on regulation of contact with witnesses"

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, Prosecutor

Mr Anton Steynberg, Senior Trial Lawyer

Counsel for the Defence

Mr Nicholas Kaufman

Ms. Yael Vias-Gvirsman

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**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

Victims and Witnesses Unit

Maria Luisa Martinod Jacome

Detention Section

**Victims Participation and Reparations
Section**

Others

PRE-TRIAL CHAMBER I of the International Criminal Court (“Chamber” and “Court” respectively);

NOTING the “Prosecution’s request for an order regulating defence use of an inadvertently disclosed witness statement and lifting of redactions” dated 8 June 2011 (“Prosecutor’s Request”), whereby the Prosecutor notes that “contact and other information relating to one witness (“Witness”), which the Chamber authorised the Prosecution to redact pursuant to Rule 81(4) of the Rules of Procedure and Evidence, has previously been inadvertently disclosed to the Defence” and “seeks an order requiring the Defence to notify the Prosecution in advance before it contacts [the Witness] or discloses information regarding his identity to others”;¹

NOTING the “Defence response to Prosecution filing: ICC-01/04-01/10-222-Conf” dated 9 June 2011 (“Defence Response to the Prosecutor’s Request”), whereby the Defence (i) notes that the Witness’s identity was not redacted by the Chamber, either on the Prosecutor’s request or *motu proprio*, and that, accordingly, if granted, the order to the Defence not to disclose should only encompass those details which were inadvertently disclosed before being redacted; (ii) agrees to notify the Prosecutor in advance of its intention to contact the Witness, on grounds of reciprocity; and (iii) objects to the request that it inform the Prosecutor of any intended contact with other potential witnesses in which the Witness’s identity would be revealed;²

NOTING the “Prosecutor’s Application for non-disclosure order and order on regulation of contact with witnesses” dated 14 June 2011 (“Prosecutor’s Application”), whereby the Prosecutor requests the Chamber to issue (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” (“First Requested Order”) and (ii) “an order regulating the contact by the parties with witnesses interviewed by the other party,

¹ ICC-01/04-01/10-222-Conf-Red.

² ICC-01/04-01/10-223-Conf.

including witnesses whose statements are being relied on at the confirmation hearing” (“Second Requested Order”);³

NOTING furthermore that, in his Application, the Prosecutor requests that the First Requested Order also apply to the Suspect;

NOTING the “Defence response to Prosecution filing: ICC-01/04-01/10-234” dated 17 June 2011 (“Defence Response to the Prosecutor’s Application”), whereby the Defence

- (i) as to the First Requested Order, notes that the request is superfluous and,
- (ii) as to the Second Requested Order, whilst adhering to the suggestion that the party calling the witness should be notified of the other party’s intention to interview the witness, argues that the Prosecution should not be entitled to discuss with its witnesses the issue of whether to consent to a Defence interview and 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 Victims and Witnesses Unit (“VWU”), which would then be entrusted to report to the Parties and the Chamber on any pertinent concern of the witness;⁴

NOTING articles 57(3)(c), 43(6) and 68 of the Rome Statute, rules 87-89 of the Rules of Procedure and Evidence, article 8 of the Code of Professional Conduct for Counsel (“Code of Conduct”);

CONSIDERING that the Prosecutor’s Request, as far as it seeks an order of the Chamber requiring the Defence to notify the Prosecution in advance of its intention to contact a certain witness or to disclose information regarding his identity, relates in general to the same issues as those raised by the Prosecutor’s Application;

CONSIDERING that, notwithstanding the current classification of the Prosecutor’s Request and of the Defence’s Response to the Prosecutor’s Request as confidential, which should be maintained, it is advisable and appropriate to address the Prosecutor’s Request

³ ICC-01/04-01/10-234.

⁴ ICC-01/04-01/10-239.

in a public document, in light of the paramount principle of the publicity of the proceedings;

CONSIDERING that, accordingly, it is appropriate to address jointly the Prosecutor's Request and the Prosecutor's Application ;

CONSIDERING that both the issue of disclosure by the Defence of confidential information and the issue of contact between one party and witnesses to be called and relied upon by the other party have already been addressed by the Chamber in other cases;

CONSIDERING that this and other Chambers of the Court have already established a number of overarching principles which are relevant for the purposes of both the First and the Second Requested Order;

CONSIDERING, with particular regard to the First Requested Order, that, whenever a party is provided with information of a non-public nature, that party is under the obligation to preserve its confidentiality and may reveal it only "to the extent that is truly necessary for the preparation of the case"⁵;

CONSIDERING that the aforementioned principle is enshrined in article 8 of the Code of Conduct;

CONSIDERING that, by virtue of article 32(1) of the Code of Conduct, counsel shall be liable for misconduct under article 31 of the Code by his or her assistants or staff when he or she either ordered or approved the conduct or fails to take reasonable remedial action when knowing or having information suggesting that violations may be committed;

CONSIDERING also that, by virtue of article 32(2), counsel shall instruct his or her assistants or staff in the standards set by the Code of Conduct;

CONSIDERING that, therefore, the Prosecutor's submission that the handling of non-public information by members of the defence team other than counsel is "unregulated" is without merit;

⁵ ICC-01/04-01/06-1372, paragraph 12.

CONSIDERING that, accordingly, precautions such as (i) being mindful of the confidential nature of the information whenever disclosure is required for the purposes of the preparation of the case; (ii) alerting third persons to whom non-public information is disclosed, of the nature of the disclosed information and of the ensuing duties not to further disclose it; (iii) keeping track of all relevant details of any disclosure which took place and ensuring that a person provided with documents containing information of a non-public nature shall return the documents and any copies thereof, as soon as the possession is no longer necessary, are all inherent and coessential to the overarching obligation of the Defence to preserve the confidentiality of any non-public information;

CONSIDERING that the Defence's duty to take all precautions necessary to preserve the confidentiality of information also applies to communication of such information to the suspect;

CONSIDERING furthermore that the suspect is equally the addressee of the orders given by the Chamber to the Defence in matters concerning the respect of confidentiality;

CONSIDERING that, in light of the above, the First Requested Order is not necessary, since the objectives it would serve are adequately assured by the scope of the Defence's inherent obligation to preserve the confidentiality of proceedings as appropriate;

CONSIDERING, as regards the Second Requested Order, that the principle that a witness whom one party intends to call must consent to be contacted by the other party is well established in the case law of the Court;⁶

CONSIDERING that the Prosecutor's request that the Chamber order the Defence to give notice before contacting any Prosecution witness is premised on the need to ensure that the witness has an opportunity to consent to such contacts and that his/her security concerns will be properly addressed;

CONSIDERING that on the one hand the principle that the party who wishes to contact the witness shall convey this to the calling party is well established in the case-law of the Court;⁷

⁶ ICC-01/04-01/06-447; ICC-01/04-01/06-1372.

CONSIDERING on the other hand that, by virtue of its statutory mandate, the VWU is the best placed organ of the Court to provide independent professional advice as to the security measures which are necessary and appropriate as a consequence of one party's wish to contact a witness to be relied upon by the other party;

CONSIDERING it therefore appropriate, in light of the case-law of the Court, (i) that contact with a witness by a party other than the calling party takes place through the VWU, which will make sure that the calling party is informed of the other party's wish and, provided that consent is given, will make all the necessary arrangements as regards the logistics and timing of the interview; (ii) that a representative of VWU be present at the time and location of the interview; and (iii) that the calling party be also present, if the witness so wishes;

CONSIDERING that the same principles apply to the disclosure of information relating to and the establishment of contact with the Witness addressed in the Prosecutor's Request;

CONSIDERING that the request for authorisation to lift redactions applied to the statement of the Witness contained in the Prosecutor's Request is moot, since the information has already been disclosed to the Defence, without prejudice to the latter's obligation to treat the information for which redactions have been ordered as confidential, in accordance with the principles established in this decision;

FOR THESE REASONS, the Chamber

ORDERS that a party wishing to contact and interview a witness to be relied upon by the other party shall notify the VWU of its wish;

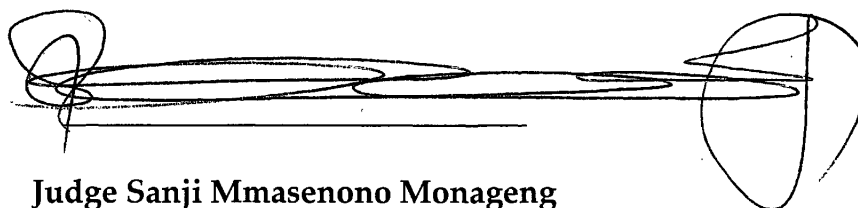
ORDERS the VWU, once it receives notification of a party's wish to contact and interview a witness to be called upon by the other party:

⁷ ICC-01/04-01/06-447; ICC-01/04-01/06-1372.

- (i) to inform the calling party about the other party's request for an interview with the witness;
- (ii) to contact the relevant witness in order to secure his or her consent;
- (iii) to assess the security implications of the requested contact and interview, in cooperation with the party wishing to call the witness, as appropriate;
- (iv) to make all necessary arrangements as regards the logistics and timing of the interview, including ascertaining the witness's wishes as regards the participation by the calling party in the interview to be conducted by the other party; and
- (v) to ensure that a representative of the VWU is present at the interview;

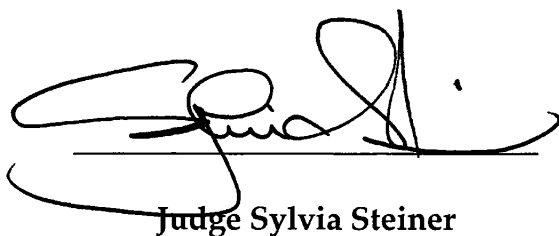
REJECTS the other requests contained in the Prosecutor's Request and the Prosecutor's Application.

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



Judge Sanji Mmasenono Monageng

Presiding Judge



Judge Sylvia Steiner



Judge Cuno Tarfusser

Dated this Thursday, 29 June 2011

At The Hague, The Netherlands