

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 15 August 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***

**Confidential document
With Confidential Annex**

**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**

Source: The Office of the Prosecutor

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

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

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Victims and Witnesses Unit

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Other

I. Introduction

1. On 12 August 2011 the Defence requested that the Pre-Trial Chamber order the Prosecution to disclose the age of W-694, the identities of persons present during her witness interview, and “all psycho-social assessments or similar pre-interview material emanating from victims of sexual violence or witnesses thereto” whose statements or summaries the Prosecution will rely upon at the confirmation hearing.¹
2. The Prosecution opposes the request. The Prosecution submits that the Defence request does not establish that the requested information is material to the preparation of the defence, especially not for the purposes of the confirmation hearing, bearing in mind the limited nature and scope of this hearing. Furthermore, the disclosure of the age of W-694 and the psycho-social reports of the victims and witnesses of sexual violence would risk revealing their identities and violates the privacy rights, in contravention of Article 68(1). While the Prosecution has no principled objection to revealing the identity of the investigators present at W-694’s interview, the Defence has failed to establish why this information is material. The Prosecution also objects to the inexplicably late request, three working days before the commencement of the confirmation hearing, when the Defence has had access to all of the relevant witness statements for at least four weeks.

II. Statement of facts

3. On 20 May 2011 Pre-Trial Chamber I (“the Chamber”) ordered the non-disclosure of the identity of W-650, W-655, W-656, W673, W-674 and W-683 to

¹ ICC-01/04-01/10-358-Conf, para. 6.

protect their safety.² The Chamber authorised redactions to the statements of W-650, W-655, W-656 and W-683 and ordered the disclosure of the statements of W-673 and W-674 in summary form.

4. On 1 June the Prosecution disclosed all the redacted witness statements in its possession that it intended to rely on at the confirmation hearing.
5. On 6 July 2011, the Chamber authorized the use of summaries for the confirmation hearing in respect of certain further statement taken from witnesses W-687, W-692, W-693 and W-694 and again ordered the non-disclosure of their identities to protect their safety.³
6. On 14 July the relevant summaries were disclosed to the Defence.⁴
7. On 1 August the Defence submitted its list of evidence that it intends to rely on at the confirmation hearing.
8. On 12 August, three working days prior to the confirmation hearing, the Defence filed its request for disclosure ("the Defence Request").⁵

III. Submissions

9. The Prosecution submits that the Defence has not established that the information requested is material to its preparation for the confirmation hearing, bearing in mind the limited nature and scope of this hearing.⁶ The

² ICC-01/04-01/10-167.

³ ICC-01/04-01/10-268.

⁴ Annex disclosure letter as confidential annex.

⁵ ICC-01/04-01/10-358-Conf.

⁶ This Chamber has previously ruled that "the confirmation hearing is neither a trial before the trial nor a mini-trial"; *Abu Garda* Decision on confirmation of charges, ICC-02/05-02/09-243-Red, , para. 39. Rather, "the

Prosecution submits that a confirmation hearing does not envisage a full-blown testing of the Prosecution evidence, which is more properly conducted at trial stage.⁷

10. The Prosecution notes that the Defence Requests comes **less than three working days** before the commencement of the confirmation hearing, while the evidence relating to these witnesses was disclosed weeks ago, on 1 June⁸ and 14 July⁹ respectively. Moreover, the Prosecution would oppose any Defence effort to proffer these, or any other last-minute materials, at the hearing; these materials are not on the Prosecution's List of Evidence and the deadline for submitting Defence evidence has expired. Absent any compelling justification for such significantly late submission, the Chamber should deny it.

Age of W-694

11. The Prosecution submits that the age of W-694, in the context of her statement, could lead to her identification and compromise her safety. It thus cannot be disclosed in light of the Chamber's decision to protect her identity. The Prosecution further submits that it is not essential for the Defence to know the witness' age in order to make submissions regarding the effect of age on

purpose of the confirmation hearing is limited to committing to trial only those persons against whom sufficiently compelling charges going beyond mere suspicion have been brought"; ICC-02/05-02/09-243-Red, para. 39. The limited nature of the confirmation hearing was recently stressed again by Pre-Trial Chamber II in the Kenya situation; see ICC-01/09-01/11-153, para. 8 and ICC-01/09-01/11-221, para. 8. See also **Prosecutor v Bemba** Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, para. 29: "The Chamber concurs with the conception articulated by Pre-Trial Chamber I, namely that 'for the Prosecut[or] to meet [the] evidentiary burden, [he] must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning [his] specific allegations'".

⁷ See **Prosecutor v Bemba** Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, para. 29: "The Chamber concurs with the conception articulated by Pre-Trial Chamber I, namely that 'for the Prosecut[or] to meet [the] evidentiary burden, [he] must offer concrete and tangible proof demonstrating a clear line of reasoning underpinning [his] specific allegations'".

⁸ For witnesses W-650, W-655, W-656, W-673, W-674 and W-683.

⁹ For witnesses W-687, W-692, W-693 and W-694.

reliability. The Chamber has access to the unredacted statement of this witness and the Prosecution has no objection to it taking her age into account in assessing her credibility.

Psycho-social reports

12. It lies with the Prosecution to determine, in good faith, whether materials within its custody contain information material to the preparation of the defence.¹⁰ In the instant case, the Defence speculates that the psycho-social reports may contain contradictions with the version of events contained in the witness statements. They do not. If they did, the Prosecution would have made timely and appropriately disclosure of the fact that one or more of its witnesses contradicted themselves in a material way.

13. In addition, psycho-social assessments contain intimate and confidential information on the mental and physical condition of the witnesses, including medical information. These assessments are conducted to assist the Prosecution to avoid secondary traumatising and to determine whether any medical or psychological treatment is required. The Prosecution submits that ordering the disclosure of such information will have a chilling effect on future crime-based witnesses' willingness to disclose this intimate information and, hence, defeat the purpose of the assessments. Moreover, both the Prosecution and the Chamber are obliged under Article 68(1) to "take appropriate measures to protect the safety, physical and **psychological well-being, dignity and privacy** of victims and witnesses" and "**in particular** [...] where the crime involves sexual or gender violence or violence against children" (Emphasis added).

¹⁰ ICC-01/05-01/08-632, paras 20 – 22.

14. These reports also contain information which may tend to identify the witnesses, whose identities the Chamber has ordered not to be disclosed. Disclosure of the reports would accordingly require redactions, which the Prosecution submits it should not be forced to produce at the eleventh hour due to the Defence's tardiness.

Persons present at interview

15. Regarding the Defence's request to reveal the identities of the OTP members present at the interview of W-694, the Prosecution notes that this is unsupported by any justification or explanation of its relevance for the purposes of the confirmation hearing. Nor is such relevance readily apparent. In these circumstances and given the tardiness of the request, the Prosecution submits that it should also be refused.

IV. Conclusion

16. The Prosecution accordingly submits that the Defence Request should be denied.



Luis Moreno-Ocampo, Prosecutor

Dated this 15^h day of August 2011

At The Hague, The Netherlands