



Original: English

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

Date: 29/08/2011

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

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

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. Yael Vias Gvirsman

Legal Representatives of the Victims

Me. Mayombo Kassongo

Me. Ghislain Mabanga

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented

(Participation/Reparation)

Applicants

**The Office of Public Counsel for
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. Pursuant to Article 82(1)(d) of the Rome Statute, the Defence for Mr. Callixte Mbarushimana hereby seeks leave to appeal the Single Judge's *Decision on the "Defence request for disclosure of information related to the alleged victims of sexual violence"* (the "Impugned Decision").¹

2. The Defence requests that the Pre-Trial Chamber certify one issue for appeal; namely, whether the Defence should be afforded access to psycho-social reports prepared for vulnerable witnesses in order to check their consistency with the testimony that they provided to the Office of the Prosecutor and, thereafter, as a means for challenging their credibility.

Submission

The Existence of an Appealable "Issue" arising out of the Impugned Decision

3. The aforementioned issue clearly arises out of the Impugned Decision² and concerns a matter of fundamental importance; namely, that a judicial assessor of fact should be entitled to draw conclusions from a witness's prior inconsistent statement – whatever its source. By criticising the rationale behind the Defence request for access to such psycho-social reports and deeming it "entirely inappropriate", the Single Judge was not merely exercising her discretion in a fashion which displeases the Defence, but was forthrightly rejecting a principle of the law of evidence which the Defence firmly believes to exist. The Single Judge, furthermore, failed to entertain the possibility of an intermediate form of relief whereby the Pre-Trial Chamber itself, independently of the Defence, would review the psycho-social reports for consistency with the witnesses' testimony. The issue at hand, therefore, is a substantial topic which, in the present instance, requires resolution.³ As the Prosecution has stated on many an occasion, the correctness of the Chamber's

¹ ICC-01/04-01/10-386

² Ibid at page 6

³ ICC-01/04-168 at paragraph 9.

decision is irrelevant to an application for leave to appeal, the sole relevant criteria being those listed in Article 82(1)(d).⁴

Impact on the fair conduct of proceedings

4. It is agreed that Article 68(1) of the Rome Statute, sets out the obligation of the Court, including that of the Prosecutor, to take appropriate measures to protect the psychological wellbeing of witnesses and victims. Article 68(1) equally states, however, that such measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. While maintaining the secrecy of the psycho-social reports, the Single Judge, it is felt, neglected to consider the future impact of the Impugned Decision on the fairness of a trial. Even if it was believed that no prejudice could be caused to Mr. Mbarushimana by denying him access to the psychosocial reports, there was, so it is argued, an obligation to state such in the Impugned Decision.

5. The Prosecution has stated elsewhere, “[f]airness is also linked to the ability of a party to present its case”⁵ and, similarly, “[n]or does the Chamber seem to have contemplated the possibility of alternative and less taxing means to reach the results sought by the Decision”.⁶ The Defence respectfully endorses these arguments of the Prosecution and asserts that an *ex parte* review of the psycho-social reports by the Chamber would have constituted just such an alternative mechanism for achieving the results sought by the Defence.

6. The criminal process envisaged by the Rome Statute is initiated by the Prosecution and adversarial in nature. In circumstances such as these, and in order to maintain true equality before the Court, it is essential to allow the Defence optimal means for assessing a witness’s credibility (while respecting the latter's wellbeing). The Defence’s observation that contradictions often arise

⁴ ICC-01/04-01/10-93 at paragraph 10 citing ICC-02/04-01/05-20-US-Exp at paragraph 22.

⁵ ICC-01/04-01/10-93 at paragraph 12.

⁶ *ibid* at paragraph 14.

between psychosocial reports and a witness's testimony is based on professional experience. Witnesses are human and contradictions will often arise whenever two versions of the same event are related to two different authorities. The reasons for such contradictions may either support or fail to support the Defence case. The fact that the Single Judge viewed the Defence observation "with concern", however, suggests, with respect, a predisposition liable to impact on the "fairness" of the proceedings – namely the opinion that vulnerable witnesses are, more likely than not, truthful and that challenging such a preconception is the expression of a biased view which should be criticized.

7. The fact that a version of a sexual assault forming the subject of charges is detailed in a psycho-social report – even if the primary purpose of the said report is treatment or counseling - does not make it immune from disclosure to the Defence. Any version of an event detailed in the document containing the charges is, *prima facie*, of material benefit to the Defence and thus liable to disclosure under Rule 77 of the Rules of Procedure and Evidence. Indeed, in *Prosecutor v. Anto Furundzija*,⁷ the International Criminal Tribunal for the Former Yugoslavia considered that the failure of the Prosecution to disclose the psychological report of a victim of sexual assault was serious misconduct which prejudiced the Defence.⁸

Impact on the Expeditious Conduct of Proceedings

8. The jurisprudence of the International Criminal Court is equivocal as to the need to prove a potential impact on the expeditious conduct of proceedings in addition to an impact on the fairness of proceedings. The Defence cites the Prosecution itself as authority for this matter:

⁷ IT-95-17/1-T, Decision of 16 July 1998.

⁸ *ibid* at paragraph 16.

“Chambers of this Court have taken different approaches to whether a party is also required to show that an issue affects the expeditious conduct of proceedings once it has been demonstrated that the issue affects fairness. Trial Chambers II and III have each granted leave to appeal when the issue bore on fairness alone, without making an additional finding that it affected the expeditious conduct of the proceedings. Hence, once a party has demonstrated that an issue affects the fair conduct of the proceedings, then any further showing that the issue also affects the expeditious conduct of the proceedings is superfluous for the purposes of obtaining leave to appeal under Article 82(1)(d).”⁹

9. Notwithstanding, it is submitted that disclosure of the psycho-social reports will ultimately render the trial process more fair, respectful and expeditious in so far as it will permit the Defence to concede or stipulate to the more traumatic aspects of a victim’s testimony.

Resolution of the Issue will materially advance the proceedings

10. The Prosecution cited Article 68(1) as the statutory basis for refusing disclosure of the psycho-social reports which, so it is submitted, are a potential source of information of material benefit to the Defence. The Single Judge, however, did not clarify that her decision refusing access to the psycho-social reports was confined to the confirmation hearing proceedings alone. Resolution of the issue at hand is, therefore, essential in order to determine the parameters of Article 68(1) and its interaction with Rule 77 of the Rules of Procedure and Evidence. Resolution of the issue at hand is also necessary to ensure the fairness of a trial should the charges against Mr. Mbarushimana be confirmed. Finally, not only will resolution of the identified issue materially advance the

⁹ ICC-01/04-0110-93 at paragraph 20.

proceedings conducted against Mr. Mbarushimana but it will streamline the handling of the same topic in other cases at the International Criminal Court.

Relief Sought

11. The Defence opposes any further postponement of the confirmation hearing and, to this end, does not require an immediate decision on the present application. Indeed, were the Pre-Trial Chamber minded or able to grant interim relief, the Defence would request that the Pre-Trial Chamber clarify that its decision denying access to the psycho-social reports is confined to the confirmation proceedings alone and satisfy itself, *ex parte*, that the same reports (in so far as they touch on the events detailed in the document containing the charges) are consistent with the victims' testimony.

12. Failing the aforementioned, the Pre-Trial Chamber is respectfully requested to grant leave to appeal the Impugned Decision.



Nicholas Kaufman

Counsel for Callixte Mbarushimana

Jerusalem, Israel
Monday, August 29, 2011