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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

**Prosecution's Response to the 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: Office of the Prosecutor

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

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I. Introduction

1. On 23 August 2011 the Single Judge of Pre-Trial Chamber I (“the Single Judge”) denied the Defence Request to obtain access to the psycho-social assessments of vulnerable witnesses in order to assess and challenge their credibility at the upcoming confirmation hearing (“the Decision”).¹ On 29 August, the Defence filed an application for leave to appeal the Decision (“the Application”).² It identifies the appealable issue as: “whether the Defence should be afforded access to psycho-social reports (“the 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”.³
2. The Prosecution submits that the Application should be dismissed. Firstly, the Defence inappropriately uses an application for leave to appeal, a legal instrument with a concrete and regulated purpose, to seek clarification of the Decision and to reformulate its initial demand to include a new request that the Chamber review the Reports *ex parte*. That part of the Application, at a minimum, does not meet the requirements of Article 82(1)(d), and indeed is not a request for leave to appeal at all. The clarification sought is also misconceived, as the Pre-Trial Chamber has no authority to issue rulings binding to the Trial Chamber. Trial Chambers have clearly found that they have unfettered authority to rule on procedural matters and on admissibility and relevance of evidence, subject only to the decisions of the Appeals Chamber.⁴ In addition, the Defence does not indicate the purpose of its new request - namely that the Chamber examines *ex parte* the consistency of the Reports and the witnesses’ testimony. The Defence has not advanced any reasons to question the Prosecution’s statement that there is no information

¹ ICC-01/04-01/10-386.

² ICC-01/04-01/10-390.

³ Application, para.2.

⁴ ICC-01/04-01/06-1084, para.5.

material to the preparation of the defence in the reports. On these grounds, the interim relief should also be rejected.

3. Secondly, the issue on which leave to appeal is sought, in the event the Chamber does not clarify or agree to review the psycho-social statements *in camera*, also fails to meet the requirements under Article 82(1)(d).

II. Background

4. On 12 August 2011, the Defence requested Pre-Trial Chamber I, *inter alia*, to order the Prosecution to disclose, pursuant to Rule 77, the psycho-social assessments of vulnerable witnesses so that he could contest the witnesses' credibility ("Defence Request").⁵
5. On 15 August the Prosecution objected to the Defence Request ("Prosecution Response").⁶ The Prosecution submitted that it retains the discretion to determine whether documents within its possession contain information material to the preparation of the defence under Rule 77; and that in the instant matter the requested documents did not constitute Rule 77 information.⁷ In addition, the Prosecution noted that psycho-social reports on vulnerable witnesses are not evidence. They are prepared pursuant to the Prosecution's obligations 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 are designed to assist the Prosecution to prevent secondary traumatising and to assess whether medical or psychological treatment is required.⁸
6. On 23 August 2011 the Single Judge of Pre-Trial Chamber I denied the Defence Request.⁹

⁵ ICC-01/04-01/10-358-Red, para.3.

⁶ ICC-01/04-01/10-366.

⁷ Prosecution Response, para.12.

⁸ Ibid., para.13.

⁹ ICC-01/04-01/10-386.

7. On 29 August the Defence filed a timely application for leave to appeal. In the Application, the Defence first seeks interim relief, namely clarification on whether the non-disclosure of psycho-social reports will apply at the trial stage, and it requests the Chamber to assess the Reports *ex parte*.¹⁰
8. In the event that the interim relief is not granted, the Defence seeks leave to appeal the following issue: “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”.¹¹

III. Submissions

9. The Prosecution submits that the Application should be dismissed for the reasons set out below:

A. The Defence improperly seeks clarification and attempts to re-argue a matter already litigated

10. As noted above the Defence seeks the following interim relief¹² – first, the Defence requests clarification on whether the Single Judge’s ruling will bind the Trial Chamber if charges are confirmed; and second, it advances a new request - that the Chamber conduct an independent review of the psycho-social reports for inconsistencies. These requests have nothing to do with the purported justification for appeal. Hence, those portions of the Application that are unrelated to the appealable issue clearly fail to meet the statutory criteria in Article 82(1)(d).¹³

¹⁰ ICC-01/04-01/10-390 (“the Application”), para.11.

¹¹ Application, para.2.

¹² Application, para.11.

¹³ It is unclear if the Defence requests the Chamber’s intervention to test the Prosecution’s previous assertion (Prosecution’s Response, para. 12) that the reports do not contradict the witnesses’ statements or to assess more broadly, on its own account, the witnesses’ reliability in order to determine the appropriate weight to be given to their evidence. The Prosecution disagrees that the Chamber, on this record, should feel it necessary to question the truthfulness of the Prosecution’s response or consider whether the psycho-social reports bear on the witnesses’ credibility. See, on this point, Prosecution’s Response, para.13 where we argued that the Reports have

B – The Issue on which leave to appeal is sought does not meet the criteria under Article 82(1)(d)

11. As established by the jurisprudence of the Court, the correctness of a decision is irrelevant to an application for leave to appeal under Article 82(1)(d). The sole question is whether there is an identifiable issue arising out of the decision¹⁴ and the issue meets the criteria set out in the provision.¹⁵ Reference to the merits of the Decision will only be made when necessary to demonstrate that it does not meet the criteria of article 82(1)(d).

12. The Prosecution submits that the Issue identified by the Accused does not meet the requirements under Article 82(1)(d) and hence intervention of the Appeals Chamber is not merited.

(i) *The Issue does not affect the fairness of the proceedings*

13. The Defence fails to demonstrate how the Decision affects the fairness of the proceedings. The Defence argues in the abstract that the issue would affect its ability to present the case¹⁶ and that, although there is no prejudice resulting from the non-disclosure, the Chamber should have considered the “future impact” of the Decision.¹⁷ As the Defence appears to concede the absence of an identifiable prejudice, there is accordingly no identifiable impact on the fairness of the proceedings. Moreover, the Defence does not identify the possible and future impact that the Chamber should have considered.¹⁸

a different purpose. Ultimately, however, the Chamber need not decide those issues, since an application for leave to appeal is an inappropriate mechanism to pursue either objective.

¹⁴ ICC-01/04-01/06-168O A3, paras.9-10. See also, ICC-01/04-01/06-1433OA11, (Dissenting Opinion of Judge Song), para.4, specifying that “[a] decision “involves” an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

¹⁵ ICC-02/04-01/05-20-US-Exp, para.22.

¹⁶ Application, para.5.

¹⁷ Application, para.4.

¹⁸ Application, para.4.

14. The Prosecution submits that no prejudice can be elicited from the non-disclosure of the Reports. The Prosecution clearly stated the confined purpose of the reports (to protect the well-being of witnesses and victims of sexual crimes) and that it would have disclosed in a timely and appropriate manner any information contained therein that is material to the preparation of the Defence. In the instant case there was none.¹⁹ In addition, the Defence cannot speculate in the abstract that the Decision could prejudice the rights of the Suspect in the event of a future trial. As Chambers of this Court have stated a purely general complaint does not suffice.²⁰ Furthermore, the Decision of the Pre-Trial Chamber in this regard is not binding on any future Trial Chamber. Hence, any hypothetical prejudice which might arise at trial can be addressed by the Trial Chamber without the intervention of the Appeals Chamber.

(ii) *The Issue does not affect the expeditious conduct of the proceedings*

15. The Defence asserts that there is no need to demonstrate an impact on both fairness and expeditiousness in order to satisfy the first prong of Article 82(1)(d).²¹ The Prosecution has asserted a similar position, with limited success. Here, however, since there is no impact on fairness, under the Defence rationale it still would be required to show that the issue has a significant effect on the expeditious conduct of the proceedings. The Application fails on that score as well.

16. The Defence submits that the trial will be expeditious “in so far as it will permit the Defence to concede or stipulate to the more traumatic aspects of a victim’s testimony”.²² This argument is inconsistent with the Defence’s original request, which sought the information to assess or challenge the credibility of witnesses’ statements that “will be produced at the confirmation

¹⁹ Prosecution Response, para.12.

²⁰ ICC-01/04-01/07-2463, para. 31.

²¹ Application, para.8.

²² Application, para.9.

hearing”.²³ No witness is scheduled to testify at the hearing, so the new Defence concern about avoiding trauma is both unnecessary and irrelevant to the expeditious conduct of the proceedings.

17. In short, the Defence fails to show how the disclosure of these reports would either affect the fairness of the confirmation or expedite the confirmation proceedings.²⁴

(iii) *Immediate resolution by the Appeals Chamber of the Issue would not materially advance the proceedings*

18. The Defence does not demonstrate that immediate resolution by the Appeals Chamber of the issue would materially advance the proceedings. In fact, the Defence argues – albeit in the abstract - that the resolution of this issue is necessary to materially advance the trial if the charges are confirmed, based on his claim that it is uncertain whether the ruling would be confined to the confirmation proceeding.²⁵

19. Trial Chambers of this Court have indicated that they are not bound by evidentiary or procedural decisions of the Pre-Trial Chambers, but rather have independent authority to decide procedural matters and to rule on the admissibility and relevance of evidence, subject only to decisions of the Appeals Chamber.²⁶ To answer the Defence’s concern, a future Trial Chamber need not be bound by this ruling. Hence, an appeal against the Decision is premature and will not materially advance the trial.

²³ Defence Request, para 6(b).

²⁴ The Prosecution notes that its position with respect to psycho-social reports is the same both at the confirmation hearing and at trial. Regardless of the stage of the proceedings, the Prosecution is bound to disclose information that material for the preparation of the defence. However, what is material depends on the stage of the proceedings.

²⁵ Application, para.10.

²⁶ ICC-01/04-01/06-1084, para.5.

IV. Relief sought

20. For the reasons set out above, the Prosecution requests that the Trial Chamber reject the Defence Application.



Luis Moreno-Ocampo
Prosecutor

Dated this 2nd day of September 2011

At The Hague, The Netherlands