

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/10
Date: 27 September 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 “Defence Application for leave to appeal the ‘Decision on the Defence request for disclosure of information related to the alleged victims of sexual violence’”

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
 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 Victims

Mr Kassongo Mayombo
 Mr Ghislain Mabanga

Unrepresented Victims

Legal Representatives of Applicants

**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

Detention Section

**Victims Participation and Reparations
 Section**

Others

PRE-TRIAL CHAMBER I (“Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Callixte Mbarushimana* (“Case”);

NOTING the “Defence request for disclosure of information related to the alleged victims of sexual violence” (“Defence’s request for disclosure”),¹ dated 12 August 2011, whereby the Defence requested that the Chamber order the Prosecutor to disclose (i) the age of Prosecutor’s Witness W-694 (“First Defence Request”); (ii) the details of those individuals present at the interview (“Second Defence Request”); and (iii) “all psycho-social assessments or similar pre-interview materials emanating from victims of sexual violence or witnesses thereto – the evidence of whom will be produced at the confirmation hearing” (“Third Defence Request”), as well as the Prosecutor’s Response thereto dated 15 August 2011²;

NOTING the “Decision on the ‘Defence request for disclosure of information related to the alleged victims of sexual violence’” dated 23 August 2011 (“Decision”), whereby the Single Judge *inter alia* rejected the First and the Third Defence Request³;

NOTING 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”” dated 29 August 2011 (“Defence Application”)”,⁴ whereby the Defence (i) seeks leave to appeal the Decision on 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” (“Issue”) and (ii) as “interim relief”, requests that the Chamber clarify that the Decision “is confined to the confirmation proceedings alone” (“Defence First Request for Interim Relief”) and “satisfy itself, ex parte, that the relevant reports (in so far as they touch on the events detailed in the document containing the charges) are consistent with the victims’ testimony” (“Defence Second Request for Interim Relief”);

¹ ICC-01/04-01/10-358-Red.

² “Prosecution’s response to ‘Defence request for disclosure of information related to the alleged victims of sexual violence’” (ICC-01/04-01/10-366).

³ ICC-01/04-01/10-386.

⁴ ICC-01/04-01/10-390.

NOTING the “Prosecution’s Response to the Defence ‘Application for leave to appeal the “Decision of the defence request for disclosure of information related to the alleged victims of sexual violence””⁵;

NOTING article 82(1)(d) of the Rome Statute (“Statute”);

CONSIDERING that, according to the established jurisprudence of the Court, interlocutory appeals are meant as remedies of an exceptional character, which makes it mandatory to construe narrowly the statutory requirements and that, in order for the Pre-Trial Chamber to grant leave to appeal under article 82(1)(d) of the Statute, the issues identified by the party seeking leave must have been dealt with in the relevant decision; and meet the following two cumulative criteria: (i) it must be an issue that would significantly affect (a) both the fair and expeditious conduct of the proceedings; or (b) the outcome of the trial; *and* (ii) in the opinion of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings;⁶

CONSIDERING that the Appeals Chamber held that, for the purposes of article 82(1)(d) of the Statute, “[o]nly an ‘issue’ may form the subject-matter of an appealable decision” and that “[a]n issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”, as well as that “an issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”⁷;

CONSIDERING that, also in light of the established jurisprudence of the Court, failure to establish either of the requirements set forth in article 82(1)(d) of the Statute makes it unnecessary for the Chamber to determine whether all or either of the others requirements are met;

⁵ ICC-01/04-01/10-394.

⁶ *The Prosecutor v. Bahar Idriss Abu Garda*, Pre-Trial Chamber I, “Decision on the Prosecution’s Application for Leave to Appeal the Decision on the Confirmation of Charges”, ICC-02/05-02/09-267, 23 April 2010; *Situation in Uganda*, Pre-Trial Chamber II, “Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Application for Warrants of Arrest under Article 58”, 19 August 2005, ICC-02/04-01/05-20-US-Exp (unsealed pursuant to Decision ICC-02/04-01/05-52), paragraph 20.

⁷ *Situation in the Democratic Republic of the Congo*, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, paragraph 9.

CONSIDERING that, accordingly, the Chamber will first analyse whether the issue identified by the Defence qualifies as an “appealable issue” within the meaning established by the Appeals Chamber and followed by the case-law of the Pre-Trial Chambers ever since;

CONSIDERING that the issue with respect to which the Defence seeks leave to appeal concerns the Defence’s access to “psycho-social reports prepared for vulnerable witnesses”, whereas the Decision deals with specific psycho-social assessments carried out by the Prosecutor’s office “in order to assist the Prosecutor to prevent secondary traumatisation of the witnesses and to determine whether any medical or psychological treatment is required”;⁸

CONSIDERING that, since the Decision has not dealt in general terms with *any* type of psycho-social reports prepared for vulnerable witnesses, but only with a certain specific type of reports, the Issue identified by the Defence is based on a misinterpretation of the determination made by the Chamber in the Decision and, as such, does not qualify as an appealable issue within the meaning of article 82(1)(d) of the Statute, as construed by the Appeals Chamber;

CONSIDERING further that the Defence states that it “does not require an immediate decision” on its Application;

CONSIDERING that, by not requiring an immediate decision on its application, the Defence acknowledges that an immediate resolution by the Appeals Chamber would not materially advance the present proceedings;

CONSIDERING therefore that the issue raised by the Defence does not qualify as an appealable issue within the meaning of article 82(1)(d) of the Statute and that further, even if the issue were to amount to an appealable matter, its immediate resolution by the Appeals Chamber would not “materially advance the proceedings”;

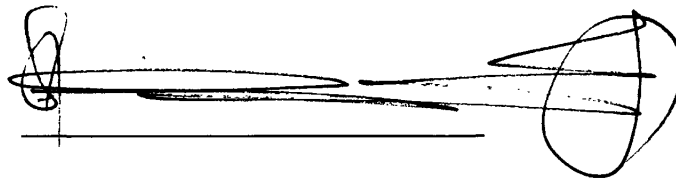
⁸ Decision, p. 6.

FOR THESE REASONS, the Chamber

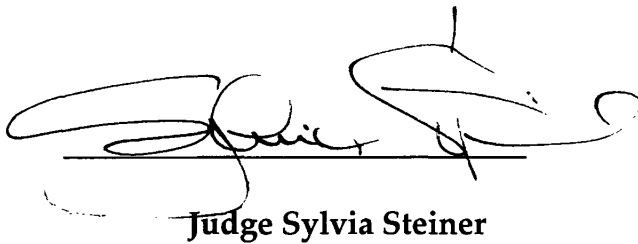
REJECTS

the Defence Application.

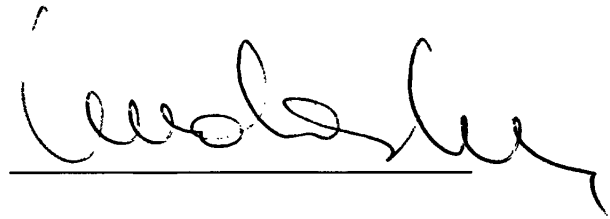
Done in English and French, the English version being authoritative.

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Judge Sanji Mmasenono Monageng
Presiding Judge

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Judge Sylvia Steiner

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke, positioned above a solid horizontal line.

Judge Cuno Tarfusser

Dated this Tuesday 27 September 2011

At The Hague, The Netherlands