

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/10
Date: 25 January 2011

PRE-TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Sylvia Steiner
Judge Sanji Mmasenono Monageng

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

***IN THE CASE OF
THE PROSECUTOR V. CALLIXTE MBARUSHIMANA***

Public

**Decision on the Prosecution application for protective measures for four documents
and on the subsequent unsealing and reclassification of certain documents in the
record of the case**

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

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

Mr Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
 Section**

Others

PRE-TRIAL CHAMBER I of the International Criminal Court (“Chamber” and “Court” respectively), in the case of *The Prosecutor v. Callixte Mbarushimana* (“Mbarushimana case”), issues the following Decision on the Prosecution application for protective measures for four documents and on the subsequent unsealing and reclassification of certain documents in the record of the case:

1. On 20 August 2010, the Office of the Prosecutor (“Prosecution”) filed the “Prosecution’s application under Article 58”, (“Application”),¹ whereby the Chamber was requested to issue a warrant of arrest for Mr Callixte Mbarushimana (“Mr Mbarushimana” or “Suspect”), for war crimes and crimes against humanity allegedly committed in the North and South Kivu Provinces of the Democratic Republic of the Congo (“DRC”) between January 2009 and the date of the Application.

2. On 28 September 2010, the Chamber issued the “Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana”,² whereby the Chamber found that there were reasonable grounds to believe that Mr Mbarushimana is criminally responsible under article 25(3)(d) of the Rome Statute (“Statute”) for war crimes and crimes against humanity allegedly committed in the North and South Kivu Provinces of the DRC. Subsequently, the Chamber issued a warrant of arrest for Mr Mbarushimana.³

3. On 11 October 2010, pursuant to the warrant of arrest, Mr Mbarushimana was arrested and kept in custody in France.

¹ Prosecution’s Application under Article 58, 20 August 2010, ICC-01/04-573-US-Exp with 11 Annexes all classified as under seal *ex-parte*, Prosecution only. The Application was reclassified as confidential *ex parte*, Prosecution only (ICC-01/04-01/10-20-Conf-Exp) and a confidential redacted version and a public redacted version of the Application were filed pursuant to decision ICC-01/04-01/10-7 of 11 October 2010 (ICC-01/04-01/10-11-Conf-Red and ICC-01/04-01/10-11-Red, respectively). The annexes thereof remained classified as under seal *ex parte*, Prosecution only.

² Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana, 28 September 2010, ICC-01/04-01/10-1-US and ICC-01/04-01/10-1 reclassified as public pursuant to decision ICC-01/04-01/10-7 of 11 October 2010.

³ Mandat d’arrêt à l’encontre de Callixte Mbarushimana, 28 Septembre 2010, ICC-01/04-01/10-2-US, reclassified as public pursuant to decision ICC-01/04-01/10-7 of 11 October 2010.

4. On 14 January 2011, the Registry filed the “Information from the French authorities in relation to the surrender of Callixte Mbarushimana”,⁴ transmitting to the Chamber the following information received from the French authorities: (i) that on 4 January 2011, the French Court of Cassation authorized the surrender of Mr Mbarushimana to the Court; and (ii) that pursuant to article 627-10 of the French Code of Criminal Procedure, the surrender would take place within a month from the date of issuance of the above decision, between 4 January and 4 February 2011.

5. On 19 January 2011, Judge Cuno Tarfusser acting as Single Judge issued the “Decision to unseal and reclassify certain documents in the record of the case”,⁵ whereby the Prosecution was ordered to file a proposal on the change of the level of confidentiality and/or redactions to be made to the following documents, in order for them to be copied into the record of the case:

ICC-01/04-573-US-Exp-Anx1;
ICC-01/04-573-US-Exp-Anx2;
ICC-01/04-573-US-Exp-Anx3;
ICC-01/04-573-US-Exp-Anx4;
ICC-01/04-573-US-Exp-Anx5;
ICC-01/04-573-US-Exp-Anx6;
ICC-01/04-573-US-Exp-Anx7;
ICC-01/04-573-US-Exp-Anx8;
ICC-01/04-573-US-Exp-Anx9;
ICC-01/04-573-US-Exp-Anx10; and
ICC-01/04-573-US-Exp-Anx11.

⁴ Information from the French authorities in relation to the surrender of Callixte Mbarushimana, 14 January 2011, ICC-01/04-01/10-34. Document reclassified as Public pursuant to Decision ICC-01/04-01/10-36, of 19 January 2011.

⁵ Decision to unseal and reclassify certain documents in the record of the case, 19 January 2011, ICC-01/04-01/10-36.

6. On 21 January 2011, the Prosecution filed the “Prosecution application for protective measures for four documents”,⁶ whereby the Chamber was informed that: (i) in the course of the investigation, the Prosecution requested documents from the archives of the United Nations Mission in the DRC (“MONUC”) in a form that could be disclosable to the parties and participants;⁷ (ii) the United Nations (“UN”) provided eight documents and specifically set conditions for the use of four of these documents,⁸ including redactions to be applied to specific segments of the documents in the event that they were to be made public;⁹ and (iii) out of the eight documents given to the Prosecutor, two were appended to the Application and four others were referred to in footnotes of the Application.¹⁰

7. On 21 January 2011, the Prosecution further filed the “Prosecution’s proposal to reclassify Annexes to the “Prosecution’s Application under Article 58” and to lift redactions to confidential version thereof” (“Proposals for reclassification”)¹¹ whereby the following is proposed:

(i) the reclassification of Annexes 1, 2, 3, 4, 7, 8 and 9 to the Application as “public”;¹²

(ii) the reclassification of Annexes 5, 6, 10 and 11 to the Application as “confidential”;¹³

(iii) the lifting of the redactions to references made to the documents provided by the UN in paragraphs 109 and 114; footnotes 50, 129, 149, 151, 154, 155 and 156; and page 69 of the confidential redacted version of the Application;¹⁴

⁶ Prosecution Application for protective measures for four documents, 21 January 2011, ICC-01/04-01/10-38.

⁷ ICC-01/04-01/10-38, paragraph 2.

⁸ ICC-01/04-01/10-38, paragraph 3.

⁹ For the list of the specified segments *see*, ICC-01/04-01/10-38, paragraph 11.

¹⁰ ICC-01/04-01/10-38, paragraph 4.

¹¹ Prosecution’s proposal to reclassify Annexes to the “Prosecution’s Application under Article 58” and to lift redactions to confidential version thereof”, 21 January 2011, ICC-01/04-01/10-39.

¹² ICC-01/04-01/10-39, paragraph 12.

¹³ *Ibid.*

¹⁴ ICC-01/04-01/10-39, paragraph 14.

(iv) the lifting of the redactions to the portions of the confidential redacted version of the Application relating to the execution of the Suspect's surrender applied to paragraph 203 and footnotes 236 to 239;¹⁵

(v) the reclassification as "confidential", once the Suspect is surrendered to the Court, of Annex A of the Proposals for reclassification which contains a version of the Application in which the relevant redactions have been lifted.¹⁶

NOTING articles 57(3)(c), 67 and 68(1) of the Statute and rule 87 of the Rules of Procedure and Evidence;

CONSIDERING that the protective measures sought by the Prosecution aim at preventing the public disclosure of sensitive information contained in the documents provided by the UN and relating to the identity of victims of sexual violence; and that they are the least intrusive measures that can be taken in the present circumstances and, as such, they are necessary and appropriate;

CONSIDERING further that the UN when providing the documents sought protective measures *vis-à-vis* the public only and does not oppose their disclosure to the parties and participants in the present proceedings and that therefore the protective measures sought do not prejudice the rights of the Defence;

CONSIDERING that, in light of the above and of the need to ensure the expeditiousness of the proceedings, there is no need to provide the Defence with the opportunity to respond to the Prosecutor's Application;

CONSIDERING finally that, as assured by the French authorities, Mr Mbarushimana is in their custody and will be surrendered to the Court on 4 February at the latest, and that the

¹⁵ ICC-01/04-01/10-39, paragraph 15.

¹⁶ ICC-01/04-01/10-39, paragraph 16.

Prosecutor has not provided any reasons to justify his request to delay the reclassification of the information attached to the Application until the Suspect's surrender to the Court;

FOR THESE REASONS

DECIDES to grant the Prosecutor's Application for the following protective measures for four documents:

- (i) Annex 1: DRC-OTP-2016-0023, paragraphs 28 to 41; 47 and 48; and 59 and 60;
- (ii) Annex 2: DRC-OTP-2016-0033, paragraphs 59; 61 and 62;
- (iii) Annex 3: DRC-OTP-2016-0053, page 6, paragraph 3 [« I »] ; and
- (iv) Annex 4: DRC-OTP-2016-0061, paragraphs 17 to 22; and 24 to 41.

ORDERS that the following protective measures be put in place in respect of the four documents:

- (i) the Suspect, the members of his Defence team, any victims participating in the proceedings and their legal representatives, if they are granted access to these documents, are all prohibited from disclosing the above-specified parts of the documents or their contents to any third party;
- (ii) if the documents are used as evidence, these specified parts are to be redacted from the version of the documents available to the public, and proceedings in which these parts are discussed shall take place in closed session; and
- (iii) unredacted transcripts and/or recordings of such proceedings are restricted to the Chamber and its staff, the Office of the Prosecutor, the Suspect and his Defence team and any representatives of the victims in this case, if they are granted access to such transcripts and/or recordings.

DECIDES that the following documents shall be reclassified as public and copied in the record of the present case:

ICC-01/04-573-US-Exp-Anx1

ICC-01/04-573-US-Exp-Anx2

ICC-01/04-573-US-Exp-Anx3

ICC-01/04-573-US-Exp-Anx4

ICC-01/04-573-US-Exp-Anx7

ICC-01/04-573-US-Exp-Anx8

ICC-01/04-573-US-Exp-Anx9

DECIDES that the following documents shall be reclassified as confidential and copied in the record of the present case:

ICC-01/04-573-US-Exp-Anx5

ICC-01/04-573-US-Exp-Anx6

ICC-01/04-573-US-Exp-Anx10

ICC-01/04-573-US-Exp-Anx11

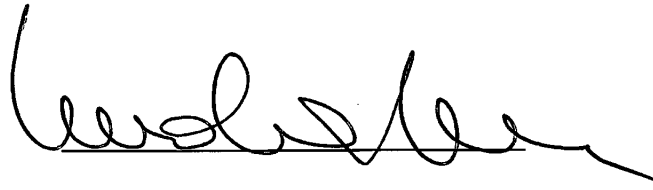
DECIDES to lift the redactions applied to the confidential redacted version of the Prosecution's Application under Article 58 (ICC-01/04-01/10-11-Conf-Red), in relation to:

- (i) the references to the documents provided by the UN in paragraphs 109 and 114; footnotes 50, 129, 149, 151, 154, 155 and 156; and page 69;
- (ii) the information to the execution of the Suspect's surrender in paragraph 203 and footnotes 236 to 239.

DECIDES that the following document shall be reclassified as confidential:

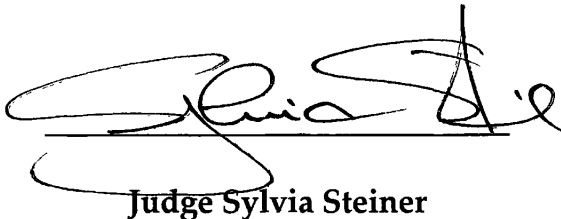
ICC-01/04-01/10-39-Conf-Exp-AnxA

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

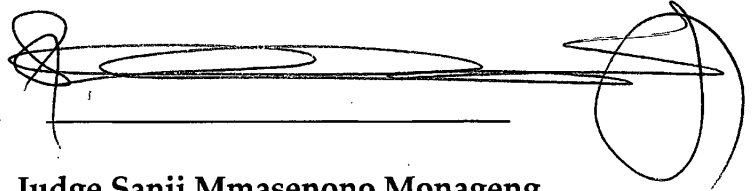


Judge Cuno Tarfusser

Presiding Judge



Judge Sylvia Steiner



Judge Sanji Mmasenono Monageng

Dated this Tuesday, 25 January 2011

At The Hague, The Netherlands