

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/10
Date: 27 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 Document

Decision on the Defence Request for Disclosure

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*, renders the following decision on the Defence's request for disclosure.

I. PROCEDURAL BACKGROUND

1. On 28 September 2010, the Chamber issued a warrant of arrest for Mr Callixte Mbarushimana ("Mr Mbarushimana").¹ On 11 October 2010, pursuant to this warrant of arrest, Mr Mbarushimana was arrested in France.

2. On 14 December 2010, the Defence filed the "Defence Request for Disclosure" ("Request"),² whereby it requests the Chamber to order the Prosecutor to effect immediate disclosure of (i) information forming the basis for the Prosecutor's application pursuant to Article 58 of the Rome Statute ("Statute"); and (ii) the material sought in three requests for disclosure made by the Defence to the Prosecutor. The Defence submits that it has made the following requests to the Prosecutor:

- on 31 October 2010, the Defence requested information relating to the "*intercept conversations*" that were mentioned by the Prosecutor in a television interview, including a list of the agencies allegedly involved in such intercepts, as well as dates and physical means by which such interception was performed;³

- on 31 October 2010, the Defence requested any material relating to an alleged conclusion of the Prosecutor that there was not sufficient evidence to investigate any alleged activity of the *Forces démocratiques de libération du Rwanda* ("FDLR") in the Kivus and a decision of the Prosecutor to focus exclusively on the region of Ituri;⁴

¹ ICC-01/04-01/10-2.

² ICC-01/04-01/10-29.

³ Request, para. 4.

⁴ Request, para. 6.

- on 3 November 2010, the Defence requested the disclosure of any supporting documentation which accompanied the referral of the situation.⁵

3. In addition to this specific material and information, the Defence states, albeit only in the “Relief Sought” of the Request, that it also seeks the disclosure of other “exculpatory and/or materially relevant information necessary for the pursuit of challenges under Article 19(2)(a) of the Rome Statute and Rule 117(3)”.

4. In the Request the Defence claims that the Prosecutor replied that he would consider the Defence’s three requests for disclosure “*at the appropriate time*”. The Defence submits that the requested material is necessary to enable the Defence to, *inter alia*, (i) challenge the admissibility of a case pursuant to article 19(2)(a) of the Statute;⁶ (ii) to challenge the validity of the warrant of arrest of Mr Mbarushimana pursuant to rule 117(3) of the Rules of Procedure and Evidence (“Rules”);⁷ and (iii) to seek interim release upon Mr Mbarushimana’s first appearance.⁸ The Defence further claims that the Prosecutor is effectively prolonging the overall length of Mr Mbarushimana’s detention by declining to entertain the Defence’s requests.

5. On 5 January 2011, the Prosecutor filed the “Prosecution Response to the ‘Defence Request for Disclosure’” (“Response”),⁹ with 5 confidential annexes, whereby he submits that the Request ought to be refused. The Prosecutor argues, *inter alia*, that:

- there is no statutory basis for disclosure by the Prosecutor prior to the surrender of the arrested person to the Court and, furthermore, such disclosure would pose risks to the ongoing investigations and the security of witnesses and victims;

⁵ Request, para. 8.

⁶ Request, para. 16.

⁷ Request, para. 13.

⁸ Request, para. 14.

⁹ ICC-01/04-01/10-31.

- the accused has no right to pre-surrender disclosure for the purpose of challenging the admissibility of the case because there is no live admissibility issue pending;
- a challenge to validity of the warrant of arrest under rule 117 of the Rules is limited to the formal and procedural aspects as opposed to objections to the Chamber's finding of reasonable grounds upon which the warrant was based;
- the legality of the intercepts and the admissibility of any evidence derived therefrom is a matter to be decided at the trial or confirmation hearing and cannot be raised at the present stage of the proceedings; and
- the accused has no right to pre-surrender disclosure for the purpose of an application for interim release because he may make such an application only after he is surrendered to the Court.

6. On 19 January 2011, the Chamber issued the "Decision to unseal and reclassify certain documents in the record of the case",¹⁰ whereby the Chamber, *inter alia*, ordered the Prosecutor to file a proposal on the reclassification and redactions to the annexes to the "Prosecution's Application under Article 58" ("Application").¹¹

7. On 21 January 2011, the Prosecutor filed the "Prosecution's proposal to reclassify Annexes to the "Prosecution's Application under Article 58" and to lift redactions to confidential version thereof",¹² whereby the Prosecutor proposes (i) to reclassify the annexes to the Prosecution's Application; and (ii) to lift redactions contained in the confidential version of the Application.

8. On 25 January 2011, the Chamber issued the "Decision on the Prosecution application for protective measures for four documents and on the subsequent unsealing

¹⁰ ICC-01/04-01/10-36.

¹¹ ICC-01/04-01/10-11-Conf-Exp.

¹² ICC-01/04-01/10-39.

and reclassification of certain documents in the record of the case”,¹³ whereby the Chamber ordered that the annexes to the Application be reclassified and copied in the record of the case.

9. On 25 January 2011, Mr Mbarushimana was surrendered to the seat of the Court in The Hague, The Netherlands.

II. RIGHT OF THE DEFENCE TO DISCLOSURE

10. The Chamber notes at the outset that the right to disclosure of documents for the three purposes identified by the Defence is not expressly set forth in the Statute or the Rules.¹⁴ However, the existence of a right to such disclosure for the purposes of applications for interim release was confirmed by the Appeals Chamber.¹⁵ In the case against Jean-Pierre Bemba Gombo, the Appeals Chamber held that:

“... in order to ensure both equality of arms and an adversarial procedure, the defence must, to the largest extent possible, be granted access to documents that are essential in order effectively to challenge the lawfulness of detention, bearing in mind the circumstances of the case.”¹⁶

In light of this ruling, the Chamber agrees with the Defence’s assertion that it has the right of access to documents that are essential for the purposes of applying for interim release, which is one of the three purposes for which the Defence seeks disclosure. The Chamber recalls that on 25 January 2011, the Defence was granted access to such documents, following the reclassification of the annexes to the Prosecution’s Application for the warrant of arrest.¹⁷

¹³ ICC-01/04-01/10-42.

¹⁴ See, with respect to disclosure in relation to applications for provisional release, *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled ‘Decision on application for interim release’”, 16 December 2008, ICC-01/05-01/08-323 (“Appeals Chamber Judgment”), para. 26.

¹⁵ Appeals Chamber Judgment, para. 28.

¹⁶ Appeals Chamber Judgment, para. 32.

¹⁷ See *supra* para. 8.

11. As regards disclosure for the purposes of challenging the validity of the warrant of arrest, the Chamber notes that the grounds on which such a challenge can be made are similar to the grounds for seeking interim release and thus require access to the same documents. For this reason and in view of the fact that the Defence already has access to the materials supporting the Prosecutor's application for a warrant of arrest, the Chamber finds it unnecessary to examine the issue of whether or not the Defence is entitled to such documents.

12. Turning to the third of the potential applications for the purposes of which the Defence seeks disclosure, namely a challenge to the admissibility of the case, the Chamber notes that article 19(2)(a) the Statute expressly provides that such a challenge, as well as a challenge to the jurisdiction of the Court, may be made by a person for whom a warrant of arrest has been issued under article 58.

13. The Chamber takes note of a decision of Pre-Trial Chamber II, whereby it ordered the disclosure of certain documents to the defence for the purpose of making observations on the admissibility of the case.¹⁸ Pre-Trial Chamber II relied on the fairness of the proceedings in this connection. Similarly, Trial Chamber III held that the prosecution has obligations with respect to the disclosure of certain documents to the defence for the purposes of challenging the admissibility of the case. Trial Chamber III based its conclusion on rule 77 of the Rules. It held that documents relevant to the accused's admissibility challenge are "material to the preparation of the defence" and the prosecution should therefore permit inspection of them, as required by rule 77.¹⁹ The Chamber concurs with that view. The Chamber is also of the view that an effective exercise of the right to make a challenge to the admissibility of the case or the jurisdiction of the Court, a right which is expressly provided for in the Statute, requires access to relevant documents. For these reasons, the Chamber acknowledges that the Defence must

¹⁸ *Prosecutor v. Joseph Kony et al*, "Decision on Defence Counsel's "Request for conditional stay of proceedings"", 31 October 2008, ICC-02/04-01/05-328.

¹⁹ *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on the defence application for additional disclosure relating to a challenge on admissibility", 2 December 2009, ICC-01/05-01/08-632, para. 18.

have access to documents that are essential in order effectively to challenge the admissibility of the case or the jurisdiction of the Court.

14. The Chamber is further not persuaded by the argument of the Prosecutor that the disclosure of information and documents should only be effected if an admissibility issue is pending before the Court.²⁰ As discussed above, the purpose of such disclosure is to give effect to the suspect's right to challenge the admissibility of the case. In particular, the Defence should have access to relevant documents in order to be able to make such a challenge. Making such disclosure dependent on a prior finding by the Chamber that there is a live admissibility issue pending or on a prior challenge to admissibility by the Defence would unduly restrict and delay the Defence's exercise of the right to effectively make such a challenge.

III. SCOPE OF DISCLOSURE

(a) Disclosure of background information regarding intercepts

15. As indicated earlier, the Defence seeks information relating to the "*intercept conversations*" that were mentioned by the Prosecutor in a television interview and submits that it intends to challenge such evidence as inadmissible by virtue of article 69(7) of the Statute.²¹ In response, the Prosecutor argues that the Defence is not entitled at this stage to the disclosure of such information. The argument seems to be that, since it would be inappropriate for the Chamber at this stage to examine such an issue, the Defence would be in no position to raise this issue in its application and thus should not be given access to information relating thereto.

16. The Chamber notes that pursuant to articles 64(9) and 69(4) of the Statute and rule 63(1) of the Rules, it is empowered to rule on the relevance and admissibility of evidence.

²⁰ See *supra* para. 5.

²¹ Request, para. 25.

The Chamber also notes that this power is not limited to a certain kind of proceedings. On the contrary, pursuant to rule 64(1) of the Rules an issue relating to relevance and admissibility of evidence must be raised at the time when the evidence is submitted to a Chamber. The Chamber further notes that rule 63(1) of the Rules confirms that article 69(7) is applicable in proceedings before all Chambers, therefore, also to the proceedings before this Chamber. As a result, the Chamber is of the view that the Defence is entitled to challenge the legality of the intercept communications which form part of the material supporting the Prosecutor's application for the warrant of arrest. In order to do so, the Defence is entitled to be provided with the requested information which is in the possession of the Prosecutor and is essential for the preparation of the said challenge.

(b) Disclosure of information and documents relating to the admissibility of the case and the Court's jurisdiction

17. As regards the Defence's request for access to any material "formulated or retained" by the Office of the Prosecutor and regarding the Prosecutor's alleged decision to focus exclusively on the Ituri region and that there was insufficient evidence to investigate crimes allegedly committed in the Kivus, the Chamber notes that pursuant to rule 81(1) of the Rules, such material is not subject to disclosure. This rule provides:

Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure.

The Chamber therefore concludes that the Defence shall not be granted access to these materials.

18. As regards the Defence's request for access to supporting documentation accompanying the referral of the situation in the Democratic Republic of the Congo ("DRC") to the Prosecutor, the Chamber notes that the Defence should, in principle, be entitled to such documents, as long as the Prosecutor's confidentiality obligations so

allow.²² The Chamber would, however, point out that when disclosing such documents regard must be had to the need to protect national security interests of the State from which the documents originated. Pursuant to article 72(1) of the Statute, this process may in some cases necessitate consultations with the State with a view to establishing whether or not the disclosure of information or documents would prejudice that State's national security and taking appropriate measures if necessary.

(c) Other information

19. As indicated earlier, the Defence also seeks the disclosure of other "exculpatory and/or materially relevant information necessary for the pursuit of challenges under Article 19(2)(a) of the Rome Statute and Rule 117(3)". In so far as the Defence may be understood as seeking access to information that is "material to the preparation of the defence", within the meaning of rule 77 of the Rules, this matter will be addressed in a decision setting out the modalities of disclosure, to be issued in due course.

FOR THESE REASONS, the Chamber hereby

(1) PARTIALLY GRANTS the Request and **ORDERS** the Prosecution to disclose the following to the Defence, subject to restrictions on disclosure pursuant to rule 81 of the Rules and as long as the Prosecutor's confidentiality obligations so allow:

- a. information and documents which relate to the "*intercept conversations*" referred to by the Defence in paragraph 4 of the Request and which are essential for the preparation of an application challenging the legality of the intercept communications which form part of the material supporting the Prosecutor's application for the warrant of arrest;

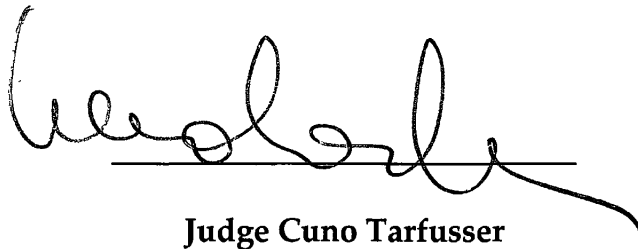
²² See, *inter alia*, Article 54(3)(e) and (f) of the Statute; Rules 81(1) to (5) and 82(1) to (3) of the Rules.

b. supporting documentation accompanying the referral of the situation in the DRC to the Prosecutor, referred to by the Defence in paragraph 8 of the Request, which is essential for the preparation of a challenge under article 19(2) of the Statute;

(2) ORDERS the Prosecutor to disclose to the Defence those portions of the said information and documents that do not require redactions no later than 2 February 2011 and to apply to the Chamber for redactions with respect to other documents no later than 8 February 2011; and

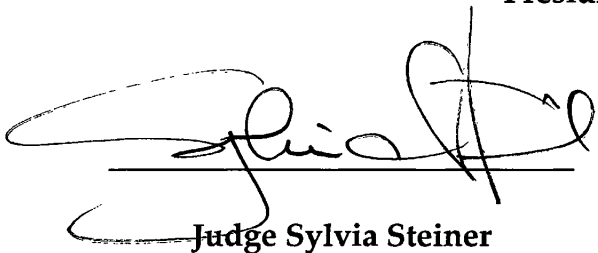
(3) DISMISSES the Request in all other respects.

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

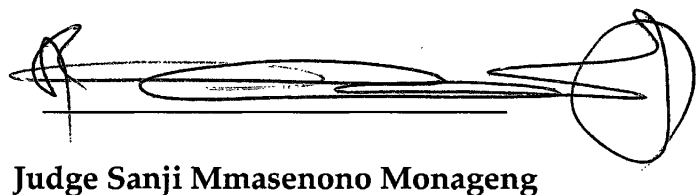


Judge Cuno Tarfusser

Presiding Judge



Judge Sylvia Steiner



Judge Sanji Mmasenono Monageng

Dated this Thursday, 27 January 2011

At The Hague, The Netherlands