

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 21 March 2011

PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Single Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public Document

Decision on matters raised at the status conference of 14 February 2011

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**

Mr Xavier-Jean Keita

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
 Section**

Others

I, **Judge Sanji Mmasenono Monageng**, the Single Judge of Pre-Trial Chamber I of the International Criminal Court (“Chamber” and “Court” respectively) responsible for carrying out the functions of the Chamber in relation to the case of *The Prosecutor v. Callixte Mbarushimana*,¹ render the following decision with respect to general matters raised at the status conference of 14 February 2011.

Background

1. On 27 January 2011, the Chamber issued the Decision on the Defence Request for Disclosure,² whereby the Chamber ordered the Prosecutor to disclose to the Defence a certain number of documents and information related to “*intercept conversations which form part of the material supporting the Prosecutor’s application for the warrant of arrest*” against Mr Callixte Mbarushimana (“Mr Mbarushimana”).

2. On 14 February 2011, the Single Judge held a hearing (“Hearing”)³ to discuss matters regarding disclosure for the purposes of the confirmation hearing in the present case. The hearing was attended by representatives of the Office of the Prosecutor (“Prosecution”), the Defence Counsel for Mr Mbarushimana (“Defence”) and the Registrar.

3. At the Hearing, the Defence raised certain general matters, some of which were related to the Prosecutor’s alleged failure to comply with the Decision on the Defence Request for Disclosure. The Defence requested the Chamber, *inter alia*, to order:

- a. the Prosecution to effect immediate compliance with the Decision on the Defence Request for Disclosure; a request which was based on the Defence’s contention that some information has not been disclosed to it, contrary to the said Decision, in particular the identity of the people listening into intercepted conversations,

¹ Oral Decision of the Chamber, 28 January 2011, ICC-01/04-01/10-T-1-ENG, p. 11.

² ICC-01/04-01/10-47.

³ Hearing was held pursuant to the “Decision Scheduling a Hearing on Issues relating to Disclosure between the Parties”, 7 February 2011, ICC-01/04-01/10-52.

technical means by which such interceptions were performed and the appropriate judicial or administrative authorisation of the intercepts;⁴

- b. the Prosecution to disclose to the Defence the French intercepts which Prosecutor Moreno-Ocampo allegedly spoke about in an interview;⁵
- c. the lifting of redactions in Section F of the Prosecution's Application under Article 58 ("Application");⁶ and
- d. the release of the full materials mentioned in Annexes 5 and 6 to the Application.⁷

4. On 24 February 2011, the Prosecution filed the "Prosecution's observations pursuant to the order of the Single Judge of 17 February 2011"⁸ ("Observations"),⁹ whereby the Prosecution recalls that in the Decision on the Defence Request for Disclosure the Chamber only ordered to disclose "information and documents which relate to the "intercept conversations" [...] which form part of the material supporting the Prosecutor's application for the warrant of arrest";¹⁰ and submits that the Prosecution:

- a. has disclosed all requested information relating to the German intercepted communications, insofar as such information is in its possession or under its control;¹¹
- b. did not rely on the content of any French intercepted communications in its Application;¹² and
- c. has given the Defence everything related to Annexes 5 and 6 that the Chamber received in the Application;¹³ and that the Chamber has already ruled in the

⁴ Transcript of the Hearing, ICC-01/04-01/10-T-2-ENG ("Transcript"), pp. 20, 32.

⁵ Transcript, pp. 21-22.

⁶ Transcript, pp. 22-23, referring to ICC-01/04-01/10-11-Conf-Red2.

⁷ Transcript, pp. 22-23.

⁸ The Observations were filed pursuant to the "Order for the Prosecutor's Observations", issued by the Single Judge on 17 February 2011, ICC-01/04-01/10-57.

⁹ ICC-01/04-01/10-62.

¹⁰ Observations, para. 10, emphasis omitted.

¹¹ Observations, para. 12.

¹² Observations, para. 13.

Decision on the Defence Request for Disclosure that the Defence has already been granted access to documents “essential for the purpose of applying for interim release,” access to which the Defence was entitled.¹⁴

5. On 21 February 2011, the Prosecution filed an *ex parte* “Prosecution’s Submission of Information on Reasons for Redactions as Ordered by the Single Judge”¹⁵ (“Submission on Redactions”),¹⁶ whereby it provided justification for the redactions to Section F of the Application.¹⁷

Determination by the Single Judge

Information about the intercept communications

6. As regards information on the interceptions, the Single Judge takes note of the Prosecution’s submission that it disclosed to the Defence all information as ordered in the Decision on the Defence Request for Disclosure, insofar as such information was in the Prosecution’s possession or under its control.¹⁸ In a letter to the Defence providing the requested information, the Prosecution also specifically informed the Defence that it did not have copies of any legal filings/documentation of the competent national authorities attesting to the proper request for and authorisation of interceptions.¹⁹ This was reiterated by the Prosecutor at the Hearing.²⁰ The Single Judge therefore notes that, the Prosecution is not in possession of or in control of such documents as requested by the Defence. The Single Judge is of the view that the Decision on the Defence Request for Disclosure does not require the Prosecution to obtain information which is not in its possession.

¹³ Observations, para. 18.

¹⁴ Observations, para. 19.

¹⁵ The Submission on Redactions was filed pursuant to the Oral Decision of the Single Judge, 17 February 2011, ICC-01/04-01/10-T-3-CONF-EXP-ENG, p. 5.

¹⁶ ICC-01/04-01/10-59-Conf-Exp.

¹⁷ The Single Judge, being aware of the confidential nature of some filings referred in the decision, does not consider the revelation of the particular information referred thereto to be inconsistent with the confidential nature of the filing as such.

¹⁸ Observations, para. 12.

¹⁹ ICC-01/04-01/10-62-Conf-AnxB.

²⁰ Transcript, p. 28.

Nonetheless, the Single Judge notes in this respect that the Prosecution anticipates in the Observations that it will receive further material that may bear on the lawfulness of the interception and that it will then disclose such material to the Defence.²¹ The Single Judge is therefore satisfied that, in so far as information on the intercept communications is concerned, the Prosecution did not fail to comply with the Chamber's Decision on the Defence Request Disclosure.

French intercept communications

7. At the outset, the Single Judge recalls that in the Decision on the Defence Request for Disclosure the Chamber ordered the Prosecution to disclose only those "intercept conversations" that "form part of the material supporting the Prosecutor's application for the warrant of arrest". As regards the French intercept communications, the Single Judge takes note of the submission by the Prosecution that the content of these communications was not relied on by the Prosecution in its Application. The Single Judge also notes that the section of the Application listing the categories of evidence primarily relied upon by the Prosecution does not include any French intercept communications.²² The Single Judge is therefore of the view that the French intercept communications were not subject to the Decision on the Defence Request for Disclosure.

Redactions

8. The Single Judge takes note of the Prosecution's Submission on Redactions and, in particular, the reasons given by the Prosecution for the redactions to Section F of the Application. The Single Judge finds these reasons persuasive and agrees with the Prosecution that the disclosure of the redacted information may prejudice further or ongoing Prosecution's investigations and that the applied redactions are, at this stage, adequate to minimise this risk. Bearing in mind the rights of the suspect, the Single Judge also believes that such redactions are also restricted to what is strictly necessary to overcome such risk and are, at this stage, the least intrusive alternative measure that can

²¹ Observations, para. 14.

²² Application, para. 29.

be taken to achieve this goal. For this reason, the Single Judge rejects the request of the Defence to lift these redactions.

Annexes 5 and 6 to the Application

9. The Single Judge notes that the Defence has full access to Annexes 5 and 6 to the Application.²³ In so far as the Defence requests disclosure of materials mentioned in Annexes 5 and 6, but not included therein, the Single Judge notes that such materials were neither relied on by the Prosecution in its Application, nor by the Chamber in its decision to issue the warrant of arrest.²⁴ The Single Judge is therefore of the view that the materials requested by the Defence were not subject to the Decision on the Defence Request for Disclosure and that the reasons for disclosure set out therein do not apply to the material requested by the Defence.

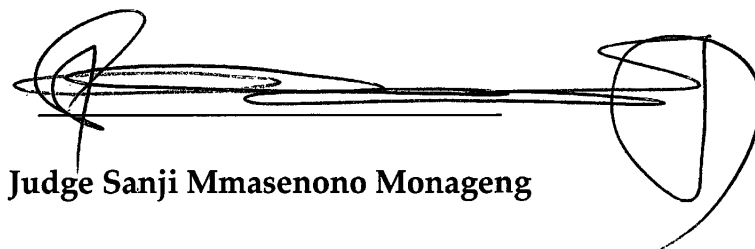
FOR THESE REASONS, the Single Judge

REJECTS the aforementioned requests made by the Defence at the status conference of 14 February 2011 in their entirety.

²³ Annexes 5 and 6 to the Application were reclassified as confidential pursuant to the "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", 25 January 2011, ICC-01/04-01/10-42.

²⁴ "Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana", 28 September 2010, ICC-01/04-01/10-1.

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

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above the printed name.

Judge Sanji Mmasenono Monageng

Single Judge

Dated this Monday, 21 March 2011

At The Hague, The Netherlands