

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 21 April 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 "Prosecution's application for leave to Appeal the 'Decision on issues relating to disclosure' (ICC-01/04-01/10-87)"**

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 Yael Vias-Gvirsman

**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**

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**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) hereby renders a decision on the “Prosecution’s Application for leave to Appeal the ‘Decision on issues relating to disclosure’” (“Prosecution’s Application”),<sup>1</sup> in the case of *The Prosecutor v. Callixte Mbarushimana*.

### I) Procedural history

1. On 30 March 2011, the Chamber issued a “Decision on issues relating to disclosure” (“Decision”),<sup>2</sup> whereby it (i) establishes a system governing disclosure for the purpose of the confirmation hearing in the present case, and (ii) sets out the time-frame for disclosure. With regard to potentially exculpatory material disclosed under article 67(2) of the Rome Statute (“Statute”) and items which are material to the preparation of the Defence under rule 77 of the Rules of Procedure and Evidence (“Rules”), the Chamber requires that the Prosecution shall notably provide (i) a concise summary of the content of each item, and (ii) an explanation of the relevance of such item as potentially exculpatory or material to the preparation of the defence.<sup>3</sup>

2. On 5 April 2011, the Prosecution filed the Prosecution’s Application, in which it seeks leave to appeal, pursuant to article 82(1)(d) of the Statute, in relation to the following two issues:

- i. “Whether the Chamber can order the Prosecution, in carrying out its statutory disclosure obligations, to also write, for the Defence, a concise summary of the content of each item and an

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<sup>1</sup> ICC-01/04-01/10-93.

<sup>2</sup> ICC-01/04-01/10-87.

<sup>3</sup> *Ibid.*, para. 11.

explanation as to how each item may be potentially exculpatory or material to the preparation of the Defence” (“First Issue”);<sup>4</sup> and

ii. “Whether for the purposes of the confirmation hearing the Defence is entitled to inspect “any and all” material that falls within the scope of Rule 77 and to disclosure of “any and all” material covered by Article 67(2)” (“Second Issue”).<sup>5</sup>

3. On 11 April 2011, the Defence filed the “Defence Response to the Prosecution’s Request for Leave to Appeal Decision ICC-01/04-01/10-87” (“Defence’s Response”),<sup>6</sup> wherein the Defence submits that the Prosecution’s Application should be rejected.

## II) The law

4. Article 82(1) of the Statute provides, in so far as relevant:

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

[...]

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

5. The Chamber, mindful of the restrictive nature of the remedy provided by article 82(1)(d) of the Statute, notes that according to the established jurisprudence of the Court, in order for a Chamber to grant leave to appeal

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<sup>4</sup> Prosecution’s Application, para. 8.

<sup>5</sup> *Ibid.*

<sup>6</sup> ICC-01/04-01/10-94.

under article 82(1)(d) of the Statute, the party seeking leave to appeal a decision must first identify an appealable issue, and such issue must (i) have been dealt with in the relevant decision; and (ii) meet the following two cumulative criteria:

a. it must be an issue that would significantly (i.e. in a “material way”)<sup>7</sup> affect (i) *both* the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial;

*and*

b. it must be an issue for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.<sup>8</sup>

6. The Appeals Chamber has held that “[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”.<sup>9</sup> It has further found that an “issue is constituted by a subject the resolution of which is essential for

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<sup>7</sup> *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, para. 10.

<sup>8</sup> *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 Applications 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), para. 20.

<sup>9</sup> *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, para. 9.

the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one".<sup>10</sup>

7. The requirements of Article 82(1)(d), as set out above, are cumulative and therefore "failure to fulfil one or more requirement is fatal to an application for leave to appeal".<sup>11</sup> The cumulative nature of these requirements therefore means that, if at least one of them is not satisfied, it is unnecessary for the Chamber to continue considering whether the following criteria are met.

### III) Submissions of the parties

#### A. The Prosecution

8. The Prosecution submits that both issues arise from the Decision.

9. The Prosecution submits that the First Issue affects the fair conduct of the proceedings,<sup>12</sup> as the Decision imposes on the Prosecution a "burdensome" disclosure obligation without a legal basis<sup>13</sup> and without taking into consideration the rights of the Prosecution.<sup>14</sup> In particular, it submits that the Decision "effectively demands on an allocation of resources to the performance of tasks ordered by the Chamber"<sup>15</sup> and, thus, adversely impacts "on its abilities to fulfil its cores duties"<sup>16</sup> and restricts its "independent authority to

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<sup>10</sup> *Ibid.*

<sup>11</sup> ICC-01/05-01/08-980, para. 14. See also, *inter alia*, ICC-01/04-01/06-2404, para. 18; ICC-01/04-01/07-1732, para. 12; ICC-01/04-01/06-2107, para. 27.

<sup>12</sup> Prosecution's Application, paras 12-19.

<sup>13</sup> Prosecution's Application, paras 13-15.

<sup>14</sup> Prosecution's Application, paras 14-19.

<sup>15</sup> Prosecution's Application, para. 16.

<sup>16</sup> Prosecution's Application, para. 19.

undertake other investigations, including those referred by the Security Council or States".<sup>17</sup> The Prosecution further submits that the First Issue affects the expeditious conduct of the proceedings, as the duty imposed on the Prosecution by the Decision cannot reasonably and realistically be fulfilled in a detailed, adequate and efficient way within the time allotted by the Decision.<sup>18</sup>

10. The Prosecution also contends that immediate resolution of the First Issue by the Appeals Chamber may materially advance the proceedings in that the Appeals Chamber (i) will have the opportunity to pronounce upon whether the disclosure system advanced by the Decision is compatible with the disclosure and inspection scheme envisaged in articles 61(3)(b) and 67(2) of the Statute and rule 77 of the Rules respectively, and (ii) will ensure "that the parties are in a position to effectively and efficiently allocate their resources for the preparation for and conduct of the confirmation hearing."<sup>19</sup> The Prosecution also submits that the Appeals Chamber's authoritative pronouncement upon the issue would restore the uniformity of the Court's decisions and enhance legal certainty.<sup>20</sup>

11. As regards the Second Issue, the Prosecution submits that this issue affects the fair conduct of the proceedings in that the Decision imposes a "more onerous model of disclosure", requiring the *totality* of article 67(2) or rule 77 material to be disclosed or available for inspection prior to the confirmation hearing, as a result of which the Prosecution's ability to present its case will be adversely affected. The Prosecution contends that the Decision is likely to

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<sup>17</sup> Prosecution's Application., para. 6.

<sup>18</sup> Prosecution's Application, paras 22-26.

<sup>19</sup> Prosecution's Application, para. 28.

<sup>20</sup> Prosecution's Application, paras 28-32. The Prosecution contends that the disclosure and inspection system advanced in the Decision is consistent only with the process adopted in the *Abu Garda* case, but it significantly deviates from the scheme of disclosure and inspection in the *Lubanga, Katanga and Ngudjolo* and *Bemba* cases.

render the confirmation hearing a “mini-trial” where the prosecutorial disclosure obligations and the defence preparation for the confirmation hearing would be identical to those at trial. The Prosecution thus submits that the Decision does not take into consideration the confined nature of the confirmation hearing.<sup>21</sup> The Prosecution further submits that the Second Issue affects the expeditious conduct of the proceedings, as the imposition of this “more taxing” and “extra-statutory disclosure and inspection regime” will slow the pace of the disclosure and inspection processes.<sup>22</sup> The Prosecution argues that the immediate resolution of the Second Issue by the Appeals Chamber may materially advance the proceedings in that it will provide the needed legal certainty.<sup>23</sup>

#### *B. The Defence*

12. The Defence submits that neither the First nor the Second Issue is liable to affect the fair conduct of the proceedings given the fact that the Prosecution has a “clearly defined and positive duty to identify information which could be useful for the Defence based on its understanding of the case”.<sup>24</sup> Moreover, the Defence contends that, given the disparity between the manpower available to it and that of the Prosecution, a reversal of the Decision would, on the contrary, serve to render the proceedings wholly unfair to the Defence.<sup>25</sup>

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<sup>21</sup> Prosecution’s Application, paras 33-34.

<sup>22</sup> Prosecution’s Application, paras 35-36.

<sup>23</sup> Prosecution’s Application, paras 37-38.

<sup>24</sup> Defence’s Response., para. 10.

<sup>25</sup> *Ibid.*



13. The Defence submits that the Prosecution's Application, if granted, would not render the proceedings more expeditious, but, on the contrary, more dilatory. The Defence alleges that the true essence of the Prosecution's complaint is the relatively short time-frame within which it has to comply with the obligation to provide a concise summary or explanation of the relevance of its own evidence.<sup>26</sup> The Defence dismisses as "tendentiously hypothetical" the Prosecution's allegation that it is "virtually certain that the Defence will initiate litigation, which in turn will delay the case, if it believes the Prosecution's summaries and explanations are inadequate"<sup>27</sup> and notes that the Prosecution itself has acknowledged that the system of disclosure established in the Abu Garda case is "fair and efficient".<sup>28</sup>

14. The Defence further submits that the Prosecution fails "to demonstrate the significant nature of the harm it foresees" and suggests that if the disclosure system adopted by the Decision were so "significantly unfair" compared to the disclosure system advanced in the Abu Garda case, the Prosecution would have sought leave to appeal the relevant Abu Garda decision.<sup>29</sup>

15. In addition, the Defence argues that the Second Issue should be dismissed as it does not arise out of the Decision, arising rather out of a mischaracterisation of the relevant rulings of the Decision and a misconstruction of the disclosure duties of the Prosecution as formulated in the jurisprudence of the Court in relation to exculpatory material.

16. Finally, the Defence challenges the Prosecution's argument that immediate resolution of the issues will materially advance proceedings by

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<sup>26</sup> Defence's Response, para. 12.

<sup>27</sup> Defence's Response, para. 13.

<sup>28</sup> Defence's Response, para. 14.

<sup>29</sup> Defence's Response, para. 15.

restoring the uniformity of the Court's decisions and enhancing legal certainty. The Defence contends that issues identified for appeal "ought, primarily, to be relevant to the proceedings at hand and not to other future proceedings".<sup>30</sup>

#### **IV) Analysis and Conclusions**

17. At the outset, the Chamber is cognisant of the fact that considering a request for leave to appeal a decision is not the forum for delving into explanations of the said decision and its merits. Nonetheless, where appropriate and necessary, as when it is clear that a party has misinterpreted the Decision, the Chamber will entertain such arguments whenever relevant to the assessment of the requirements of article 82(1)(d) of the Statute. In addition, the Chamber will address the requirements of article 82(1)(d) of the Statute only to the extent they have been addressed by the appellant.

##### *A. The First Issue*

18. In the view of the Chamber, the first issue raised by the Prosecution is an "identifiable subject requiring a decision for its resolution" which was dealt with in the Decision. However, the Chamber is not convinced that the First issue would significantly affect the fair and expeditious conduct of these

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<sup>30</sup> Defence's Response, para. 16.

proceedings, as alleged by the Prosecution, for the reasons hereunder developed.<sup>31</sup>

19. The Chamber notes that the Prosecution, on the assumption that the summaries “must be detailed”,<sup>32</sup> put forward the arguments of insufficient time and resources to fulfil the obligations imposed by the Decision as obstacles to preparing the requested summaries. Thus focusing on the practical aspects of the implementation of the Decision, the Prosecution submits that compliance with this “burdensome” obligation would impact on the fairness and expeditiousness of the proceedings.

20. The Chamber is of the view that, without trivialising the additional work the Decision imposes on the Prosecution, issues of workload and resources, on their own, which pertain to the internal organisation of the Prosecutor’s office, “can only have a limited bearing on legal considerations”.<sup>33</sup> It is worth recalling, at this juncture, the exceptional and restrictive nature of the remedy of the interlocutory appeals pursuant to article 82(1)(d) of the Statute.

21. The Chamber is of the view that the Prosecution’s understanding, that the said summaries are to be “detailed”, lies on a misinterpretation of the Chamber’s instructions to submit “a concise summary of the content of each item”<sup>34</sup> and on the presumption that the Defence will “initiate litigation.”<sup>35</sup> In particular, the Chamber notes that the Prosecution does not provide any basis

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<sup>31</sup> The Prosecution does not allege that the First Issue would impact on the outcome of the Trial and therefore, this requirement will not be addressed by the Chamber.

<sup>32</sup> Prosecution’s Application, para. 24.

<sup>33</sup> Similarly, see, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III, “Decision on the Prosecutor’s application for leave to appeal Pre-trial Chamber III’s decision on Disclosure”, 25 August 2005, ICC-01/05-01/08-75, para. 65.

<sup>34</sup> Decision, para. 11(a).

<sup>35</sup> Prosecution’s Application, para. 24.

for its contentions apart from the Prosecution's own practice of summarising evidence in the Abu Garda case and an email sent by the Defence.<sup>36</sup> However, this assumption is not based on any decision of the Chamber. The Decision itself does not require the preparation of detailed summaries. On the contrary, the summaries are expected to be "concise".

22. Therefore, the Prosecution's main argument, that is, the inability to fulfil the obligation imposed by the Chamber within the allotted time, is essentially based on its own misinterpretation of the Chamber's instructions.

23. For the sake of clarity, the Chamber recalls that the requested summaries stem from the Chamber's commitment to "facilitate the Defence's assessment of the potentially exculpatory evidence disclosed or subject to inspection" and to "enable the Chamber to better perform its role under rule 121(2)(b) of the Rules 'to ensure that disclosure takes place under satisfactory conditions'",<sup>37</sup> with a view to expediting the proceedings.

24. Indeed, in accordance with article 61(6) of the Statute, the Defence has the right to object to the charges, challenge the evidence presented by the Prosecutor and present evidence. The materials disclosed pursuant to article 67(2) of the Statute and rule 77 of the Rules, including those that are material to the preparation of the defence, would enable the Defence to exercise such a statutory right. Furthermore, the Prosecution is under the obligation to investigate incriminating and exonerating circumstances equally, in accordance with article 54(1)(a) of the Statute. The Prosecution has conducted investigations into the Kivus for approximately two years as a result of which he has requested the issuance of the warrant of arrest against Mr

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<sup>36</sup> Prosecution's Application, paras 2 and 24.

<sup>37</sup> Decision, para. 11, see also ICC-02/05-02/09-35, paras 13, 14-16.

Mbarushimana on 20 August 2010.<sup>38</sup> The Prosecution should, therefore, already have in its possession most of the incriminating and exonerating material against Mr Mbarushimana for the purposes of the confirmation hearing. The Chamber is thus of the view that the Prosecution is better placed to identify and specify the nature and relevance of the material collected in a timely manner.

25. The Chamber therefore finds that the First Issue, as articulated by the Prosecution, is not such as would significantly affect the fair and expeditious conduct of the proceedings. As the Prosecution does not argue that the First Issue would impact on the outcome of the trial, the Chamber will not undertake an analysis of the remaining requirements of article 82(1)(d) of the Statute.

*B. The Second Issue*

26. The Chamber accepts that the issue of whether the Prosecution is expected to make available to the Defence all material that falls within the scope of rule 77 of the Rules and disclose all material covered by article 67(2) of the Statute is an “issue”, within the meaning of article 82(1)(d) of the Statute.

27. The Chamber notes that the Prosecution’s argument that the Second Issue affects the fair and expeditious conduct of the proceedings is based on the assumption that the Decision imposes on the Prosecution a more onerous

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<sup>38</sup> ICC-01/04-01/10-11-Conf-Red.

duty than the relevant decisions issued in other cases.<sup>39</sup> The difference in the scope of the disclosure obligations between the present case and those other cases appears to be the basis of the Second Issue.

28. The Chamber underlines at the outset that the Prosecution has misinterpreted the scope of its disclosure obligations in the previous cases it refers to. Indeed, the Chamber notes that in the *Lubanga* case, the then Single Judge of Pre-Trial Chamber I acknowledged that some material could be disclosed to the Defence only after the confirmation hearing.<sup>40</sup> The then Single Judge nonetheless first highlighted that “the final system of disclosure must satisfy the minimum guarantees provided for in article 67 of the Statute among them: (i) the right of the defence to know as soon and as fully as possible the evidence the Prosecution intends to rely on at the confirmation hearing, and about potentially exculpatory and other materials that may assist the Defence in preparing for the confirmation hearing (...)”<sup>41</sup>. The Single Judge further made it abundantly clear that delays in disclosure, including delays after the date of the confirmation hearing, caused for example by the Defence’s decision not to reveal its defence before the confirmation hearing, or by the procedures provided for in articles 54(3)(e), 72 or 93 of the Statute, should be an exception.<sup>42</sup> There is nothing to suggest that in the *Lubanga* case, as referred by the Prosecution, it was given any discretion as to the selection

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<sup>39</sup> Prosecution’s Application, para. 34.

<sup>40</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the final system of disclosure and the establishment of a timetable”, 15 May 2006, ICC-01/04-01/06-102, para. 126. See also *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, “Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence’s Preparation for the Confirmation Hearing”, 20 June 2008, ICC-01/04-01/07-621, para. 8.

<sup>41</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the final system of disclosure and the establishment of a timetable”, 15 May 2006, ICC-01/04-01/06-102, p. 5.

<sup>42</sup> *Ibid.*, paras 125, 127.

of material which it would disclose only after the confirmation hearing. The delays were to be justified by objective reasons.

29. The Chamber further notes that, in the present case, the Prosecution is not expected to disclose or make available to the Defence for inspection items in respect to which the Prosecution is in no position to determine whether they can be material to the preparation of the defence, or which cannot be disclosed for reasons relating to the application of articles 54(3)(e), 72 or 93 of the Statute.<sup>43</sup> The Chamber is thus of the view that the difference in the required scope of disclosure in the present case and the cases referred to by the Prosecution is insignificant, if any at all. For this reason, the Chamber is not persuaded that the Second Issue “would significantly affect the fair and expeditious conduct of the proceedings”, as required by article 82(1)(d) of the Statute. In addition, the Chamber takes note that the Prosecution does not allege that the issue would significantly affect the outcome of the trial and will thus not undertake an analysis of this requirement of article 82(1)(d) of the Statute.

30. In view of this conclusion, the Chamber finds it unnecessary to determine whether the Second Issue is one for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

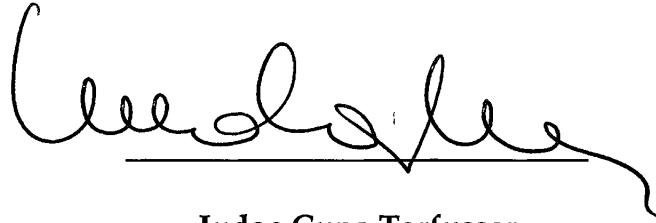
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<sup>43</sup> The Decision foresees the likelihood that certain materials falling under article 67(2) of the Statute or rule 77 of the Rules might be protected under articles 54(3)(e), 73 and 93 of the Statute and requested therefore the Prosecution to file a report on that issue, see p.17 of the Decision.

**FOR THESE REASONS**, the Chamber

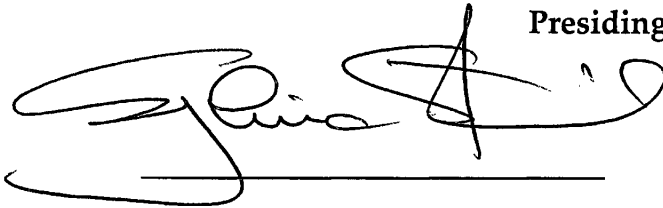
**REJECTS** the Prosecution's Application for leave to appeal.

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

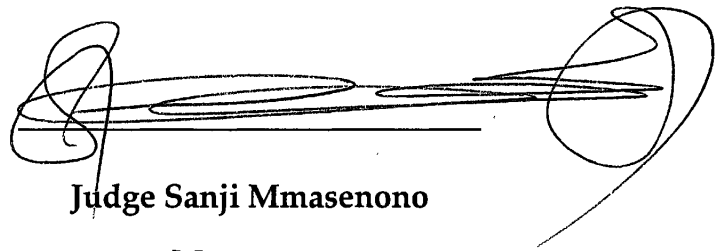


**Judge Cuno Tarfusser**

**Presiding Judge**



**Judge Sylvia Steiner**



**Judge Sanji Mmasenono**

**Monageng**

Dated this Thursday 21 April 2011

At The Hague, The Netherlands