

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 15 February 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**

Confidential, *ex parte*, Defence Only

**Decision on the Defence's request for State cooperation from the Democratic
Republic of the Congo**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

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 Others
Section**

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

NOTING the warrant of arrest for Mr Callixte Mbarushimana ("Mr Mbarushimana") issued by the Chamber on 28 September 2010,² pursuant to which Mr Mbarushimana was arrested in France on 11 October 2010 and surrendered to the seat of the Court in The Hague, The Netherlands on 25 January 2011;

NOTING the "Defence Request under Article 57(3)(b) of the Rome Statute for State Cooperation from the Democratic Republic of the Congo"³ ("Request"), filed on 28 December 2010 by the Defence counsel for Mr Callixte Mbarushimana ("Defence"), whereby he seeks an order from the Chamber requesting the Democratic Republic of the Congo ("DRC") to cooperate with the Court by providing "all contemporaneous records and documents, including official records and documents, which specifically comprise the *supporting documentation* envisaged under article 14(1) of the Rome Statute and which may shed light on the scope of the [r]eferral" of the situation in the DRC to the Court;

NOTING the "Order for clarification on the Defence's application to seek cooperation of the Democratic Republic of the Congo",⁴ issued on 26 January 2010, whereby the Single Judge ordered the Defence: (a) to clarify which materials it seeks the Chamber to request from the DRC; and (b) to justify the level of confidentiality of the Request;

NOTING the "Defence Clarification of its Request pursuant to Article 57(3)(b) of the Rome Statute",⁵ filed on 27 January 2011, whereby the Defence: (a) states that it seeks such "supporting documentation" as supplied by the Democratic Republic of the Congo

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

² ICC-01/04-01/10-2.

³ ICC-01/04-01/10-30-Conf-Exp.

⁴ ICC-01/04-01/10-44-Conf-Exp.

⁵ ICC-01/04-01/10-45-Conf-Exp.

together with the state referral of 3 March 2004, and any contemporaneous documentation or record of meetings with the OTP retained by the DRC authorities which may shed light on the scope of the referral; and (b) provides reasons for the filing of the Request as confidential, *ex parte*, Defence only, including the contention that "since the purpose of the Defence Request is effectively an investigative procedure designed to obtain information which may or may not be introduced as evidence – there should be no duty on Counsel to publish his strategy to the Prosecution";

NOTING the "Decision on the Defence Request for Disclosure" ⁶ ("Decision on Disclosure"), issued on 27 January 2011, whereby the Chamber ordered the Prosecutor to disclose, by 2 February 2011 unless redactions were required,⁷ *inter alia*, "supporting documentation accompanying the referral of the situation in the DRC to the Prosecutor";

NOTING articles 14, 57(3)(b), 86, 87, 93, 96 and 97 of the Rome Statute ("Statute") and rules 116, 176 and 177 of the Rules of Procedure and Evidence ("Rules");

CONSIDERING that pursuant to rule 116(2) of the Rules, the Chamber has discretion whether or not to seek the views of the Prosecutor before deciding on the Defence's Request and that, given the nature of the documents sought by the Defence and the reasons it provides for maintaining the current level of confidentiality, it is preferable not to seek the views of the Prosecutor and to continue the proceedings on an *ex parte* basis;

CONSIDERING that, according to article 57(3)(b) of the Statute, the Pre-Trial Chamber may, upon the request of a person who has been arrested, "seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence";

⁶ ICC-01/04-01/10-47.

⁷ The Chamber was informed by the Office of the Prosecutor that it would not seek redactions.

CONSIDERING that the type of cooperation the Defence is requesting the Chamber to seek from the DRC is provided for in article 93(1)(i) and (l) of the Statute;

CONSIDERING that pursuant to the Decision on Disclosure the Prosecutor was supposed to disclose to the Defence the supporting documentation accompanying the referral of the situation in the DRC by 2 February 2011 and, thus, there is no need for the Chamber to seek these documents from the DRC;

CONSIDERING that most or all of the remaining documents sought by the Defence, that is "any contemporaneous documentation or record of meetings with the OTP retained by the DRC authorities which may shed light on the scope of the [r]eferral", are likely to be in the exclusive possession of the authorities of the DRC;

CONSIDERING that pursuant to rule 116(1) of the Rules the Pre-Trial Chamber shall seek cooperation under article 57(3)(b) of the Statute, where it is satisfied: (a) that such an order would facilitate the collection of evidence that may be material to the proper determination of the issues being adjudicated, or to the proper preparation of the person's defence; and (b) in a case of cooperation under Part 9 of the Statute, that sufficient information to comply with article 96(2), has been provided;

CONSIDERING that the Chamber is satisfied that the documents sought by the Defence may be material to the proper preparation of the defence of Mr Mbarushimana and that sufficient information to comply with article 96(2) of the Statute has been provided; and that, therefore, the Chamber shall seek, under article 57(3)(b) of the Statute, the cooperation of the DRC in providing the said documents;

CONSIDERING that, in accordance with articles 87, 93 and 96 of the Statute, rules 176 (2) and 177 of the Rules and the practice of the Chamber in relation to the preparation and

transmission of cooperation requests to States Parties⁸, the Registrar shall, as soon as practicable: (i) prepare the necessary cooperation request, which shall include all information required by articles 93 and 96 of the Statute; and (ii) transmit to the relevant authorities of the DRC such cooperation request through the proper channels of communication as provided for in article 87 of the Statute and rule 177 of the Rules;

CONSIDERING that, in accordance with article 87(3) of the Statute, the DRC shall keep confidential the said request for cooperation and documents supporting it, except to the extent that the disclosure is necessary for execution of the request;

CONSIDERING that, according to article 97 of the Statute, if the relevant authorities of the DRC identify problems which may impede or prevent the execution of the cooperation request, the DRC shall consult with the Chamber "without delay to resolve the matter;"

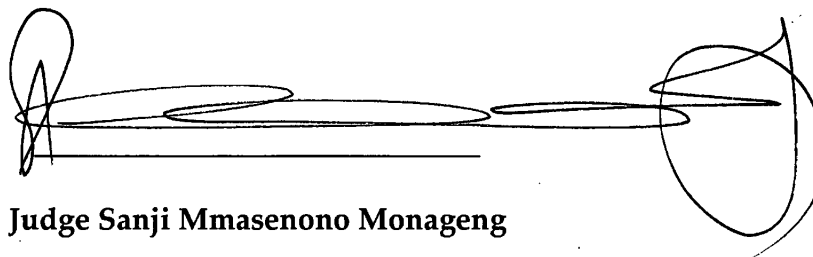
FOR THESE REASONS,

- (i) **GRANTS** the Defence's Request in part, and seeks the cooperation of the DRC with respect to the transmission of "any contemporaneous documentation or record of meetings with the OTP retained by the DRC authorities which may shed light on the scope of the [r]eferral;"
- (ii) **ORDERS** the Registrar to:

⁸ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Demande adressée à la République Démocratique du Congo en vue d'obtenir l'identification, la localisation, le gel et la saisie des biens et avoirs de Germain Katanga", 6 July 2007, ICC-01/04-01/07-7; "Demande adressée à la République Démocratique du Congo en vue d'obtenir l'identification, la localisation, le gel et la saisie des biens et avoirs de Mathieu Ngudjolo Chui" 14 November 2007, ICC-01/04-01/07-266; "Decision on the 'Defence Application pursuant to Article 57(3)(b) of the Statute to Seek the Cooperation of the Democratic Republic of the Congo (DRC)'" , 25 April 2008, ICC-01/04-01/07-444.

- a. prepare the necessary cooperation request, which shall include all information required by articles 93 and 96 of the Statute; and
 - b. transmit to the relevant authorities of the DRC such a cooperation request through the proper channels of communication as provided for in article 87 of the Statute and rule 177 of the Rules;
- (iii) **RECALLS** that (i) the DRC shall keep confidential the said request for cooperation and documents supporting it, except to the extent that the disclosure is necessary for execution of the request; and (ii) if the DRC identifies problems which may impede or prevent the execution of the cooperation request, the DRC shall consult with the Chamber "without delay to resolve the matter"; and
- (iv) **DISMISSES** the Request in all other respects.

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

A handwritten signature in black ink, consisting of a series of loops and horizontal strokes, positioned above the printed name of the judge.

Judge Sanji Mmasenono Monageng

Single Judge

Dated this Tuesday, 15 February 2011

At The Hague, The Netherlands