

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 28 April 2011

PRE-TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public

Decision to Hold Consultations under Rule 114

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

Ms Fatou Bensouda

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**

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**

Other

Netherlands Forensic Institute

I, Judge Cuno Tarfusser, 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* in the absence of Judge Sanji Mmasenono Monageng;¹

NOTING the “Prosecution’s request for authorisation to conduct destructive analysis of corrupted disc” (“Request”) filed by the Prosecutor on 27 April 2011² whereby the Prosecutor submits that:

- (i) one of the discs (“Disc”) provided by the French authorities and containing copies of intercepted communications originating from phones attributed to Mr Callixte Mbarushimana was corrupted and thus unreadable;
- (ii) to the best of his knowledge, it currently exists no other copies of these conversations;
- (iii) he delivered the Disc to the Netherlands Forensic Institute (“NFI”) in order to attempt recovery of the data and the NFI succeeded in recovering 86% of the data on the Disc by conducting a non-destructive analysis; and
- (iv) in relation to the remaining 14% of the data, although the NFI believes that it is “most likely not recoverable”, it recommends destructive analysis of the Disc to attempt to retrieve it;

NOTING furthermore that, in his Request, the Prosecutor states that, should the Chamber authorises the destructive analysis of the Disc, he will seek a variation of the 2 May 2011

¹ICC-01/04-583.

²ICC-01/04-01/10-122 and its Annex A.

deadline ordered by the Chamber for the inspection of materials pursuant to Rule 77 of the Rules of Procedure and Evidence ("Rules");³

NOTING article 56 of the Rome Statute ("Statute") and rule 114 of the Rules;

CONSIDERING that the Prosecutor contends that no other copies of the said intercepted communications are available besides those contained in the Disc;

CONSIDERING that the Prosecutor submits that an attempt to retrieve the totality of the data could be made through a destructive analysis of the Disc;

CONSIDERING further that, by resorting to this type of analysis, the "source material on the disc will be irreversibly altered" and "some or all the material could be destroyed";⁴

CONSIDERING that, in light of the submission that no alternative solution to retrieve the data is available besides conducting a destructive analysis of the Disc, there arises a unique investigative opportunity within the meaning of article 56 (1) (a) of the Statute;

CONSIDERING therefore that, according to rule 114 (1), the Pre-Trial Chamber shall hold consultations without delay with the Prosecutor and the Defence;

CONSIDERING that it is appropriate that these consultations take place in the form of a hearing to be held in the presence of the Prosecutor, the Defence and the Registry;

CONSIDERING furthermore that, in light of the technical aspects of the proposed method to attempt and retrieve the data from the Disc, the presence of a representative of the NFI will enable the parties and the Chamber to benefit from all relevant information in relation to the destructive analysis process suggested;

³ ICC-01/04-01/10-122, para.15.

⁴ ICC-01/04-01/10-122, para.12.

CONSIDERING that, in light of the above, the Disc shall be excluded from the materials to be inspected by the Defence within the abovementioned 2 May 2011 deadline, pending the determinations to be taken by the Chamber in light of the forthcoming consultations;

CONSIDERING finally that the issue raised by the Prosecutor in his Request, being limited to one specific disc, shall not impact on the abovementioned 2 May 2011 deadline ordered by the Chamber⁵ in relation to all the remaining available materials (other than the Disc) covered by rule 77 of the Rules;

FOR THESE REASONS,

DECIDE to hold consultations with the Prosecutor and the Defence by way of a hearing before the Chamber on Wednesday 4 May 2011 at 17 hours in Courtroom I in order to determine the measures to be taken and the modalities of their implementation;

INVITE a representative of the Registry and of the NFI to attend the hearing;

REITERATE the deadlines ordered by the Chamber in relation to inspections to be conducted pursuant to rule 77 of the Rules for all relevant materials except the Disc.

⁵ ICC-01/04-01/10-87, p.16.

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

A handwritten signature in black ink, appearing to read 'Cuno Tarfusser', with a stylized, cursive script.

Judge Cuno Tarfusser

Single judge

Dated this Thursday, 28 April 2011

At The Hague, The Netherlands