

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 25 May 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

**Order to the Netherlands Forensic Institute to return Disc to the Prosecutor and
Decision on Defence Request dated 23 May 2011 (ICC-01/04-01/10-171)**

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

Unrepresented Victims

Legal Representatives of Applicants

**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

Others

Netherlands Forensic Institute

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Mr Didier Preira

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

NOTING the "Prosecution's request for authorisation to conduct destructive analysis of corrupted disc" filed by the Prosecution on 27 April 2011,² whereby the Prosecution submitted, *inter alia*, that a “destructive analysis” of a corrupted disc (“Disc”) containing records of intercepted communications originating from phones attributed to Mr Callixte Mbarushimana needed to be conducted by the Netherlands Forensic Institute (“NFI”) in order to recover the 14 % of the data stored on the disc, which are unreadable;

NOTING the “Decision to Hold Consultations under Rule 114” issued by Single Judge Cuno Tarfusser on 28 April 2011,³ convening a hearing in order to determine the measures to be taken and the modalities of their implementation;

NOTING the hearing held on 4 May 2011 (“Hearing”), attended, *inter alia*, by representatives of the NFI;⁴

NOTING the “Order to NFI to submit a report” issued by the Chamber on 5 May 2011, inviting the NFI to “perform a non-destructive pre-investigation on the corrupted disc and to submit a report detailing the different options available for proceeding to the analysis of the Disc by Monday 9 May 2011 at 12 hours”;⁵

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

² ICC-01/04-01/10-122 and its Annex A.

³ ICC-01/04-01/10-126.

⁴ ICC-01/04-01/10-T-4-ENG.

⁵ ICC-01/04-01/10-136.

NOTING the “Extension of Deadline for Submission of NFI Report” issued by Single Judge Cuno Tarfusser on 9 May 2011, extending the deadline for the submission of the report by the NFI to 11 May 2011;⁶

NOTING the “Investigation Proposal” submitted by the NFI on 11 May 2011,⁷ whereby the NFI provides an overview of the “investigation possibilities” detailing various options of investigations and indicating that the recommended investigations might be completed by 27 June 2011;

NOTING the “Order requesting observations on the report from the Netherlands Forensic Institute” issued by Single Judge Sanji Mmasenono Monageng on 17 May 2011, ordering the Prosecution and the Defence to submit by no later than Friday 20 May 2011, observations on further action to be taken with respect to the Disc;⁸

NOTING the “Defence Observations on Pre-Trial Chamber I’s order ICC-01/04-01/10-154”, whereby the Defence reasserts its preference for non-destructive analysis of the Disc and maintains that, “while conscious that exculpatory material could be present” on the 14% of the Disc, it does not insist “on the doubtful retrieval and disclosure of such for the purposes of the confirmation hearing”;⁹

NOTING the “Defence observations on the Prosecutor’s failure to comply with Pre-Trial Chamber I’s order: ICC-01/04-01/10-154”, whereby the Defence notes the Prosecutor’s failure to comply with the deadline established for the submission of observations by the Order dated 17 May 2011 and requests that the Chamber recommend that the Registry

⁶ ICC-01/04-01/10-141.

⁷ ICC-01/04-01/10-144-Anx, annexed to the “Registry Transmission of the Report from the Netherlands Forensic Institute”, ICC-01/04-01/10-144.

⁸ ICC-01/04-01/10-154.

⁹ ICC-01/04-01/10-156.

reimburse the costs incurred by the Defence in connection with its attendance of the hearing held on 4 May 2011;¹⁰

NOTING the “Prosecution’s observations on the report from the Netherlands Forensic Institute” dated 24 May 2011, whereby the Prosecutor submits that failure to comply with the time limit imposed by the Single Judge “resulted from an internal miscommunication in the process of having the draft filing approved, due to the multiplicity of simultaneous filings being prepared” and “was certainly not intended as acquiescence to the Defence’s suggestion that only non-destructive analysis would be performed”;¹¹

NOTING article 57 of the Rome Statute, rule 121 of the Rules of Procedure and Evidence (“Rules”), regulations 28(2) and 35(2) of the Regulations of the Court and article 7 of the Code of Professional Conduct for counsel;

CONSIDERING that compliance with the relevant time limits is of essence with a view to ensuring that proceedings are conducted in an orderly and efficient manner;

CONSIDERING that no convincing reasons have been provided to justify the Prosecution’s failure to comply with the time limit set by the Single Judge;

CONSIDERING that, in the circumstances, the Prosecution should bear the consequences of its failure to comply with the said time limit;

CONSIDERING that, accordingly, the Disc should be returned to the Prosecution without any additional investigation or action being performed on it;

¹⁰ ICC-01/04-01/10-171.

¹¹ ICC-01/04-01/10-178.

CONSIDERING, as regards the Defence's request for reimbursement of the expenses incurred in connection with its attendance of the Hearing, that, as stipulated by article 7.3 of the Code of Professional Conduct for Counsel, Counsel "shall comply at all times with the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and such rulings as to conduct and procedure as may be made by the Court";

CONSIDERING that, accordingly, the Defence has the obligation to attend any and all hearings convened by the Chamber and that this obligation is not conditional on a particular outcome of the hearing or the issue to which the hearing refers;

FOR THESE REASONS,

ORDER the NFI to return the Disc to the Prosecutor;

REJECT the Defence Request for reimbursement.

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 Wednesday, 25 May 2011

At The Hague, The Netherlands