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

Date: **22 June 2011**

PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Sylvia Steiner
Judge Cuno Tarfusser

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. Callixte MBARUSHIMANA***

**Public Document
With Confidential *Ex Parte* Prosecution only Annex
Prosecution's observations on the Defence Request for Disclosure
ICC-01/04-01/10-227**

Source: Office of the Prosecutor

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to:

The Office of the Prosecutor

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States' Representatives

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Counsel Support Section

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Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The Defence seeks the disclosure of a letter written by the Government of the Democratic Republic of the Congo ("GoDRC").¹ The Prosecution submits that the disclosure of a State's confidential communication is inappropriate and unnecessary for the preparation of the Defence's admissibility and jurisdiction challenge. However, as ordered, the Prosecution attaches a copy of the letter herewith for the consideration of the Pre-Trial Chamber ("the Chamber").² The Prosecution requests that the Defence's request for access to the letter be dismissed, alternatively, that it be authorized to disclose such information contained in the letter as the Chamber may deem material by way of a separate summary.

II. Statement of Facts

2. On 8 October 2003 the Prosecution wrote a letter to the GoDRC informing it of the Prosecution's analysis of the situation in the DRC and seeking to cooperate with the GoDRC on matters relating to the investigation and those responsible of crimes within the ICC's jurisdiction.³ The GoDRC responded by letter dated 14 November 2003. On 3 March 2004, the GoDRC referred the situation in the DRC to the Prosecution.⁴ On 21 June 2004, the Prosecution announced to States Parties and other relevant States its decision to open its investigation into war crimes and crimes against humanity occurring in the DRC. In September 2008, the Prosecution announced would focus on crimes committed in the Kivus over the preceding years. This investigation resulted in the Chamber's issuance of an arrest warrant against the Suspect on 28 September 2010.

¹ ICC-01/04-01/10-227, 10 June 2011.

² See Annex.

³ This letter was disclosed to the Defence on 13 April 2011. See ICC-01/04-01/10-160, 18 May 2011, Annex 5.

⁴ The referral letter was also disclosed to the Defence on 13 April 2011; *ibid*.

3. On 31 October 2010, the Defence wrote to the Prosecution indicating its intention to challenge the admissibility and jurisdiction of the case. The basis of this challenge was described as follows:

*"[...] despite the fact that the Article 18(1) letter of notification mentions the Prosecutor's belief that crimes had been or were being committed on the territory of the DRC - his Article 53(1)(a) evaluation, it will be alleged, eventually focussed solely on the Ituri region (to the exclusion of other regions of the DRC) and, what is more, revealed no reasonable grounds to believe that the FDLR had committed crimes in the Kivus. For the purposes of complementarity, therefore, the Article 18(1) letter cannot be viewed as a validly constituted or genuine invitation to State Parties to exercise primary jurisdiction over the then contemporaneous events in the Kivus."*⁵

4. In light of the abovementioned challenge, the Defence sought disclosure of:

*"[...] any material formulated or retained by the OTP from before 3 March 2004 and up to the delivery of the Article 18(1) letter of notification whereby it may be understood that the OTP had decided to focus exclusively on the Ituri region and/or had concluded that there was insufficient evidence to investigate any alleged FDLR or other organised criminal activity in the Kivus."*⁶

5. The Prosecution responded on 8 November, indicating that it would consider disclosure requests at the appropriate time.⁷ As a result of the Defence's proposed challenge to the scope of the referral of the situation,⁸ however, the Prosecution also sought the consent of the GoDRC to disclose correspondence preceding the referral of the situation to the Court, including the letter. The GoDRC agreed to disclose its letter of referral, but refused to consent to the disclosure of the prior 14 November 2003 letter on the ground that it was a confidential communication not intended for disclosure to third parties.

⁵ A copy of this letter was filed as ICC-01/04-01/10-31-Conf-Anx2, 05 January 2011.

⁶ *Ibid.*

⁷ A copy of the Prosecution reply was filed as ICC-01/04-01/10-31-Conf-Anx5.

⁸ See paragraphs 3 and 4 above.

6. On 14 December the Defence asked the Chamber to order disclosure of the requested material⁹ as well as *“any other exculpatory and/or materially relevant information necessary for the pursuit of challenges under Article 19(2)(a) of the Rome Statute and Rule 117(3) [...]”*¹⁰
7. On 27 January 2011, the Chamber refused the Defence’s request for *“material formulated or retained by the OTP”*¹¹ and deferred the request for disclosure of the remaining Rule 77 material pending a decision on the modalities of disclosure.¹²
8. On 30 March, the Chamber ordered the Prosecution to disclose Rule 77 information relating to jurisdiction and admissibility,¹³ and on 13 April the Prosecution disclosed the documents which it determined to be material.¹⁴ In the accompanying disclosure letter, the Prosecution referred to the existence of the GoDRC 14 November 2003 letter. It explained that it was not disclosing that letter because (i) the GoDRC regarded it as confidential and (ii) it was not relevant to the Defence challenge.¹⁵ However, the Prosecution offered to place the letter before the Chamber, if necessary, for its decision.
9. On 10 June the Defence filed its request for disclosure in which it requested the Chamber *“to review the letter and to order its transmission to the Defence”*¹⁶ and to allow it the right to reply *“should the Prosecution raise statutory grounds for refusing the disclosure of the letter”*.¹⁷
10. On 15 June the Chamber issued its Order for the observations on the “Defence Request for Disclosure”.¹⁸

⁹ The request is quoted in para 4 above.

¹⁰ ICC-01/04-01/10-29, 14 December 2010.

¹¹ ICC-01/04-01/10-47, 27 January 2011, para. 17.

¹² *Ibid.*, para. 19.

¹³ ICC-01/04-01/10-87, 30 March 2011, page 14.

¹⁴ ICC-01/04-01/10-160, Annex 5.

¹⁵ ICC-01/04-01/10-227, para 2.

¹⁶ *Ibid.*, para 3.

¹⁷ *Ibid.*, para 4.

¹⁸ ICC-01/04-01/10-236, 15 June 2011.

III. Submissions

11. The Prosecution renews its opposition to disclosure of the letter on relevance grounds and because the sender, the GoDRC, objects. It is well accepted that diplomatic correspondence – though perhaps not privileged per se -- is intended to be confidential and the expectation of confidentiality ought not to be lightly disregarded.¹⁹ The Prosecution thus submits that the recognition of States Parties' expectation of confidentiality in their correspondence with the OTP²⁰ in furtherance of their duty of cooperation with the Court²¹ is both necessary and in accordance with the objectives of the Statute and Rules.²² If such confidential communications were to be disclosed at the mere request of the Defence, this would have a chilling effect on frank and effective communications between the Court and states,²³ which in turn would compromise the effective functioning of the Court. This is more especially so where the state in question has explicitly requested that the communications be kept confidential.²⁴ Therefore, the Prosecution submits that the Chamber should not breach this confidentiality without, at a minimum, a clearly established need for disclosure.
12. In the instant matter, the letter of referral – which has already been disclosed to the Defence -- is what defines the terms of the referral of the situation.²⁵ The

¹⁹ Cf. for example, Bowers v. United States Department of Justice, 930 F.2d 350, 357-358 (4th Cir.), cert. denied, 502 U.S. 911 (1991) (disclosure of confidential diplomatic communications would "violate an understanding of confidentiality with the foreign government [and] would have a chilling effect on the free flow of information"; Do-Ky v. Canada (Minister of Foreign Affairs and International Trade) (T.D.), [1997] 2 F.C. 907 "Similar to the solicitor-client privilege which allows for open and honest discourse between a solicitor and his or her client, the confidentiality of international communication allows states to negotiate delicate situations frankly and quickly. If Canada or any other nation were to begin to reveal diplomatic correspondence, such a practice could reasonably be anticipated to injure the conduct of international affairs."

²⁰ Or indeed non-States Parties, whose cooperation with the Court is required.

²¹ In terms of Article 86.

²² In terms of Article 87(3), State Parties are obliged to keep confidential requests for cooperation. It is reasonable to infer that such confidentiality should also extend to related correspondence. Although it is not suggested that correspondence between the Court and States Parties should be elevated to the same status as formal diplomatic communications between sovereign states, the same principles underlying the need for confidentiality apply.

²³ See Do-Ky v. Canada *supra*.

²⁴ See Do-Ky v. Canada *supra*. "[...] once a state requests that diplomatic correspondence remain confidential there is no need for the Canadian government to assess the reasons of that country. It is sufficient that they have made the request of the Canadian government. Indeed, it would be a diplomatic lapse were the Canadian government to sit in judgment of the rationale of the foreign state except in the most extreme circumstances."

²⁵ The letter of referral was among the documents disclosed to the Defence on 13 April. See ICC-01/04-01/10-160, Annex 5.

referral did not exclude the Kivus. Notwithstanding the Defence speculation, the DRC did not limit that referral to Ituri or otherwise exclude the Kivus in any other communication with the Prosecution.

13. Furthermore, the Prosecution submits that the contents of the letter are not material to the Defence's anticipated admissibility or jurisdictional challenge. There is nothing contained therein which suggests that the subsequent referral of the situation to the Court was intended to be limited geographically or temporally. Hence, it is not subject to disclosure in terms of Rule 77. However, as stated in the disclosure letter of 13 April, the Prosecution has no objection to placing the letter before the Chamber to rule on the necessity of disclosure.²⁶ The letter is annexed hereto as a confidential *ex parte* Prosecution only Annex.
14. Should the Chamber agree with the Prosecution's assessment that the letter is not sufficiently relevant to require breaching the expectation of confidentiality, the Prosecution submits that this would be the end of the enquiry and there would be no need for any further reply from the Defence.
15. However, should the Chamber consider that the letter contains information relevant to the Defence's jurisdictional challenge, the Prosecution requests that the Chamber permit the Prosecution to summarize the critical information in lieu of disclosing the letter itself. This would appropriately address the Defence's need for the information, while respecting the principle that the confidentiality of diplomatic communications be protected and, in this instance, also the State's particular request that its communication not be disclosed.

IV. Confidentiality

16. The letter is annexed as a "confidential *ex parte* Prosecution only" Annex. The Prosecution submits that this classification is necessary, since the disclosure of the letter to the Defence prior to the Chamber's ruling would defeat the purpose of such a ruling.

²⁶ See Annex.

V. Conclusion

17. The Prosecution submits that the Defence's request for the disclosure of this letter should be refused. Should the Chamber determine that any information contained in the letter is material to the preparation of the Defence case, the Prosecution requests that it be authorized to summarize the material information instead of disclosing the document itself.



Luis Moreno-Ocampo,
Prosecutor

Dated this 22nd day of June 2011

At The Hague, Netherlands