

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 20 July 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 on "Defence request to postpone implementation of decision: ICC-01/04-01/10-291"

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

Legal Representatives of Victims

Counsel for the Defence

Mr. Nicholas Kaufman

Ms. Yaël Vias-Gvirsman

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

Mr. Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

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 Monageng¹;

NOTING the "Decision on issues relating to disclosure"² issued on 30 March 2011, wherein the Chamber *inter alia* noted that, pursuant to rule 121(5) of the Rules, if the Prosecutor intends to present new evidence at the hearing, he has to provide the Chamber and the Defence with a list of that evidence no later than 15 days before the date of the hearing³;

NOTING the "Decision on the Prosecution's request for the postponement of the confirmation hearing"⁴ issued by the Chamber on 31 May 2011, wherein the commencement of the confirmation hearing was postponed to 17 August 2011;

NOTING the "Registry Report on the processing of faulty and protected devices and other outstanding issues"⁵ filed on 12 July 2011, whereby the Registrar informed the Chamber that the Registry had (i) received, on 4 July 2011, two reports from Carratu Ltd. indicating the data that had been retrieved from eight faulty or protected devices ("Data Retrieved from the Faulty and Encrypted Devices") and (ii) prepared copies of the information contained in the acquired devices which could be provided to the Defence;

¹ ICC-01/04-583.

² ICC-01/04-01/10-87.

³ *Ibid.*, at para. 19.

⁴ ICC-01/04-01/10-207.

⁵ ICC-01/04-01/10-276-Conf.

NOTING the “Decision on Data Retrieved from Faulty and Encrypted Devices and analysis of Mobile Phones Seized from the Premises of Mr. Mbarushimana”⁶ issued on 19 July 2011 (“Decision”), whereby the Single Judge ordered that the Defence carry out a review of the Data Retrieved from the Faulty and Encrypted Devices for privileged communications by Monday 25 July 2011 at the latest so that copies of the data contained therein and found not to be privileged may be provided to the Prosecutor;

NOTING the “Defence request to postpone implementation of decision: ICC-01/04-01/10-291”⁷ filed on 20 July 2011, wherein the Defence submitted that it was unable to comply with the Decision as it was fully and totally occupied with preparing its list of evidence and submissions for the confirmation hearing and noted that the Data Retrieved from the Faulty and Encrypted Devices “may not presently be used at the confirmation hearing since the deadline for the Prosecution’s list of evidence – 15 July 2011, has already passed”;

NOTING articles 57(3)(c) and 67 of the Rome Statute and rules 73 and 121 of the Rules of Procedure and Evidence (“Rules”);

CONSIDERING that rule 121(5) of the Rules provides that, should the Prosecutor intend to present new evidence at the hearing, he shall provide a list of that evidence no later than 15 days before the date of the hearing;

CONSIDERING that, for the purpose of rule 121(5) of the Rules, “new evidence” refers to any information, material or evidence which came into the

⁶ ICC-01/04-01/10-291.

⁷ ICC-01/04-01/10-292.

Prosecutor's control or possession after the deadline provided for in rule 121(3) of the Rules"⁸;

CONSIDERING that the Data Retrieved from the Faulty and Encrypted Devices has not been in the Prosecutor's control or possession due to the delay in processing the faulty and encrypted devices and for reasons outside his control;

CONSIDERING that, in view of the proximity of the confirmation hearing, it is not possible to postpone the deadline set in the Decision for the carrying out of a review by the Defence of the Data Retrieved from the Faulty and Encrypted Devices;

CONSIDERING that, in light of the circumstances highlighted by the Defence, it is appropriate that the Defence be assisted by the OPCD in carrying out its review for potentially privileged materials in order to facilitate the preparation of the Defence for the confirmation hearing;

FOR THESE REASONS,

ORDER the OPCD to provide the Registry with a list of members available to assist the Defence in carrying out a review of the Data Retrieved from the Faulty and Encrypted Devices for privileged communications;

ORDER the Registrar to give to the persons to be listed by the OPCD access to a copy of Data Retrieved from the Faulty and Encrypted Devices in an accessible and searchable format; and

ORDER the Defence to comply with the order contained in the Decision.

⁸ ICC-01/09-02/11-48 at para. 9; ICC-01/09-01/11-44, para. 8.

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



Judge Cuno Tarfusser

Single Judge

Dated this Wednesday, 20 July 2011

At The Hague, The Netherlands