

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 22 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

URGENT

**Decision on the "Defence request to exclude the Prosecution's amended document
containing the charges and amended list of evidence"**

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**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

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 that, at the initial appearance hearing of Mr. Mbarushimana, held on 28 January 2011, the Chamber decided that the hearing on the confirmation of the charges would commence on 4 July 2011;²

NOTING the "Decision on issues relating to disclosure"³ issued on 30 March 2011 whereby the Chamber set 1 June 2011 as the deadline for the submission of the detailed description of the charges ("document containing the charges") and the list of the evidence which the Prosecutor intended to present at the hearing of the confirmation of charges;

NOTING the "Prosecution's request in terms of Rule 121(7) for the postponement of the confirmation hearing to preserve the fairness of the proceedings"⁴ filed on 25 May 2011, wherein the Prosecutor *inter alia* submitted that he would not be able to meet the deadline of 1 June 2011 set for the filing of the document containing the charges and the list of evidence;

NOTING the "Decision on the Prosecution's request for the postponement of the confirmation hearing"⁵ issued by the Chamber on 31 May 2011, whereby the commencement of the confirmation hearing was postponed to 17 August 2011 and the Prosecutor ordered to file the document containing the charges and the list of evidence by 15 July 2011 ("Deadline");

NOTING the "Decision on the Prosecution request for extension of page limit"⁶ issued on 24 June 2011 ("Decision extending the page limit"), whereby the Single Judge extended the page limit for the document containing the charges to 50 pages;

¹ ICC-01/04-583.

² Oral Decision of the Chamber, 28 January 2011, ICC-01/04-01/10-T-1-ENG, p. 10.

³ ICC-01/04-01/10-87.

⁴ ICC-01/04-01/10-189.

⁵ ICC-01/04-01/10-207.

⁶ ICC-01/04-01/10-248.

NOTING the “Prosecution’s document containing the charges and List of Evidence submitted pursuant to Article 61(3) and Rule 121(3)”⁷ filed on 15 July 2011;

NOTING the “Addendum to the “Prosecution’s document containing the charges and List of Evidence submitted pursuant to Article 61(3) and Rule 121(3)”⁸ filed on 20 July 2011 (“Addendum”), whereby the Prosecutor, having identified errors, internal inconsistencies, omissions and duplications in the document containing the charges and the list of evidence, filed altered versions of both documents;

NOTING the “English version of Prosecution’s document containing the charges and List of Evidence submitted pursuant to Article 61(3) and Rule 121(3)”⁹ filed on 20 July 2011 (“English Version of the Addendum”), whereby the Prosecutor filed English translations of the altered versions of the document containing the charges and the list of evidence;

NOTING the “Defence request to exclude the Prosecution’s amended document containing the charges and amended list of evidence”¹⁰ filed on 21 July 2011 (“First Defence Request”), wherein the Defence submitted *inter alia* that the Addendum is “nothing less than a totally new document filed without leave and out of time” and requested that the Chamber decline to receive the Addendum;

NOTING the “Second Defence request to exclude the amended document containing the charges”¹¹ filed on 21 July 2011, wherein the Defence submitted that the document containing the charges submitted by way of addendum fails to comply with the requirements of regulation 36 of the Regulations of the Court (“Regulations”) and requested that the Chamber decline to receive the altered document containing the charges on this basis;

NOTING the “Defence observations on the consequences flowing from the Prosecution’s failure to file in an appropriate manner the document containing the charges and the list of evidence”¹² filed on 22 July 2011 (“Second Defence Request”), wherein the defence

⁷ ICC-01/04-01/10-287 with annexes.

⁸ ICC-01/04-01/10-298 with annexes.

⁹ ICC-01/04-01/10-300.

¹⁰ ICC-01/04-01/10-301.

¹¹ ICC-01/04-01/10-303.

¹² ICC-01/04-01/10-304.

submitted that the original document containing the charges filed on 15 July 2011 also fails to meet the requirements of regulation 36(3) of the Regulations and that the Prosecutor should not be permitted to present any document containing the charges and list of evidence at the confirmation hearing;

NOTING the "Defence request to strike out portions of document containing the charges for lack of specificity"¹³ filed on 22 July 2011 ("Third Defence Request"), wherein the Defence submitted that certain portions of the document should be altered or struck out for lack of specificity;

NOTING articles 54(1), 61(3) and 67(1)(a)(b) and (c) of the Rome Statute, rule 121(3) and (8) of the Rules of Procedure and Evidence ("Rules") and regulation 36 of the Regulations;

CONSIDERING the duty of the Prosecutor, set out in rule 121(3) of the Rules, to provide to the Pre-Trial Chamber and to the suspect, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of evidence which he intends to present at the hearing;

CONSIDERING the Deadline of 15 July 2011, established by the Chamber, in accordance with rule 121(3) of the Rules and with due regard to the need to ensure the expeditiousness of proceedings, and the fundamental right of the suspect "to be informed promptly and in detail of the nature, cause and content of the charge in a language which [he] fully understands and speaks" under article 67(1)(c) of the Statute¹⁴;

CONSIDERING that the Addendum filed by the Prosecutor on 20 July 2011, 5 days after the expiry of the Deadline set in accordance with rule 121(3) of the Rules, purported to submit a document containing the charges and list of evidence, which are materially and substantially different to the document containing the charges and list of evidence filed on 15 July 2011;

CONSIDERING, as an example of such substantial differences, that the list of evidence filed as an Annex to the Prosecutor's Addendum¹⁵ contains as many as 10 pages, referring

¹³ ICC-01/04-01/10-305.

¹⁴ ICC-01/04-01/10-87 at para. 20.

¹⁵ ICC-01/04-01/10-298-Conf-AnxB.

to facts and evidence supporting paragraphs 112 to 120 of the document containing the charges¹⁶ (contrary to what was described by the Prosecutor as the insertion of missing paragraph references¹⁷ "in the part of the list of evidence supporting paragraph 112"¹⁸), which 10 pages were not included in the list of evidence annexed to the document containing the charges filed on 15 July 2011¹⁹;

CONSIDERING that the Prosecutor's blatant disregard for his obligations under the Statute and the Rules, as well as the orders of the Chamber, is a source of serious concern to the Single Judge;

CONSIDERING that the Prosecutor has not identified any legal or factual justification for the filing of altered versions of the document containing the charges and list of evidence five days after the expiry of the Deadline and that he has provided little more than a vague and generalised description of the changes introduced in both documents;

CONSIDERING that the errors, internal inconsistencies and omissions which appear in the document containing the charges and the list of evidence are the responsibility of the Prosecutor and that any prejudice resulting therefrom must be borne by the Prosecutor and cannot be shifted to the Defence;

CONSIDERING that the original document containing the charges filed on 15 July 2011 does not comply with the requirements of regulation 36 of the Regulations;

CONSIDERING, however, that the remedy sought in the Second Defence Request is disproportionate and that the Defence would not be unduly prejudiced by the filing of a shortened version of the document containing the charges;

CONSIDERING that the Third Defence Request pertains to issues which may be raised during the confirmation hearing and that it would be more appropriate to deal with during the confirmation hearing;

FOR THESE REASONS,

¹⁶ See ICC-01/04-01/10-298-Conf-AnxB, pages 154 to 163.

¹⁷ ICC-01/04-01/10-298-Anx1, page 4 lett. i.

¹⁸ ICC-01/04-01/10-298-Anx1, page 4, footnote 16.

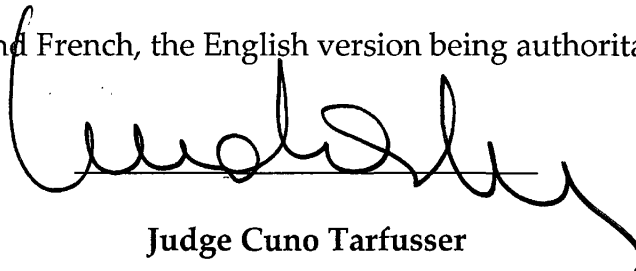
¹⁹ See ICC-01/04-01/10-287-Conf-AnxB, pages 147-148: reference to paragraph 111 of the document containing the charges is followed by reference to paragraph 122.

GRANT the First Defence Request,

ORDER the Registrar to strike the Addendum and the English Version of the Addendum from the record of the case, and

ORDER the Prosecutor to re-file the document containing the charges filed on 15 July 2011, together with a version of this document containing tracked changes, which has been shortened to comply with the requirements of regulation 36 of the Regulations and the Decision extending the page limit, but which does not add to, or in any way expand upon, the information that is contained in the original document containing the charges, by 16.00 on Monday, 25 July 2011.

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

A handwritten signature in black ink, appearing to be 'Cuno Tarfusser', written over a horizontal line.

Judge Cuno Tarfusser

Single Judge

Dated this Friday, 22 July 2011

At The Hague, The Netherlands