

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: 26 July 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***

Confidential

**Prosecution's response to the Defence request
for a status conference ICC-01/04-01/10-289**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court*
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Legal Representatives of the Applicants

Unrepresented Victims

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I. Introduction

1. The Defence requests¹ the Chamber to schedule a “short” status conference to entertain a legal challenge to the admissibility of two categories of evidence on which the Prosecution intends to rely at the confirmation hearing, namely: all the material seized from the Suspect’s house at the time of his arrest and all contents and records of communications intercepted by both the French and German authorities.² The challenge appears to be based on the provisions of Articles 69(4) and 69(7)³ and on Rule 64. The Prosecution disputes that an oral hearing is necessary or appropriate and submits that this issue should be resolved on the basis of written submissions.⁴

II. Submission

2. The Prosecution notes that the purpose of a pre-confirmation status conference in terms of Rule 121(2)(b) is “to ensure that disclosure takes place under satisfactory conditions”.⁵ The purpose of the hearing proposed by the Defence clearly does not fall within the ambit of this provision.
3. The Prosecution takes no position on whether it is desirable to dispose of any challenge to the admissibility of evidence prior to the commencement of the confirmation hearing. However, it disagrees that there is not enough time before the hearing to deal with this by way of written submissions.⁶ But if the latter is true, the shortage of time is attributable exclusively to the Defence’s apparent

¹ ICC-01/04-01/10-289, 19 July 2011.

² *Ibid.*, para 6.

³ *Ibid.*, para 7.

⁴ This filing does not address the merits of the Defence’s challenge to the admissibility of the disputed evidence, since the Defence does not articulate the underlying legal basis, but merely its request to make its challenge orally in a status conference.

⁵ Rule 121(2)(b). It is specifically for this purpose which the Single Judge invited the parties to request a status conference, ICC-01/04-01/10-T-ENG at line 14.

⁶ The Prosecution notes that the Defence has not to date been averse to requesting the curtailment of filing time limits, where this has suited their needs.

decision not to act more promptly. The Suspect was present on 11 October when French authorities arrived to search his premises; he has known since at least 31 October 2010⁷ that German and French authorities conducted electronic surveillance; and he has known for months that material acquired from the search and interceptions would be proffered by the Prosecution. Though the Defence complained repeatedly about the purported illegality of these actions,⁸ for tactical or other reasons it failed to make a written application for the exclusion of any evidence so derived. Relieving the Defence of the obligation to give proper notice of his challenge by way of written submissions (on the ground that prompt action is required because confirmation is due to commence in less than a month) would simply reward the Defence for creating the exigency in the first place.

4. The Prosecution further disputes that presenting legal claims by written submissions "is not the statutorily preferred way of raising such evidence challenges" or that requiring submissions "would severely prejudice the Defence".⁹ This Chamber operates almost exclusively on written submissions, and nothing suggests that this is statutorily undesirable or prejudicial to the Defence. To the contrary, the process and the parties can only benefit from the opportunity for briefing and judicial reflection.
5. In addition, Rule 64(1) envisages that evidentiary challenges may be raised during the course of a trial, but it does not exclude written submissions and indeed authorizes the Chamber to request that "the issue be raised in writing". Moreover, the requirement that objections be made "at the time when the evidence is submitted to the Chamber" is not to prohibit advance challenges, but to limit the ability to make delayed ones. Finally, it is completely unwarranted to suppose that the Rule's tolerance of oral objections implies a preference that the

⁷ See ICC-01/04-01/10-31-Conf-Anx 1.

⁸ See for instance ICC-01/04-01/10-24, para 25.

⁹ *Ibid.*, para 9.

Chamber convene pre-trial (or pre-confirmation) hearings specifically to entertain them.¹⁰

6. The Prosecution further submits that raising the challenge in writing is the procedure which is fairest to all parties in the circumstances. The Prosecution is at present only aware that the Defence objects to the search and interceptions. Given that the investigative activities were conducted by appropriate French and German authorities and that in considering the admissibility of evidence the Statute presumes the correct application of the collecting State's national law,¹¹ the Prosecution cannot guess at the basis for the Defence claim that these authorized acts violated internationally recognized human rights. Accordingly, the Prosecution submits that it would be severely prejudiced if it were required to defend the admissibility of this evidence at an oral hearing without adequate notice of the basis for the Defence challenge. Essentially, the Defence would be at liberty to ambush the Prosecution with allegations which the Prosecution cannot reasonably anticipate or unexpected witnesses it cannot reasonably prepare to cross-examine or rebut.
7. Finally, the Prosecution submits that the Defence bears the burden of establishing its challenge before the Prosecution is called upon to defend the processes by which the evidence was obtained.¹² In this instance, the evidence was gathered by the competent authorities of Germany and France.¹³ Their investigative activities must be deemed to be presumptively lawful, and not presumptively conducted in violation of the Suspect's human rights. If, however, the issue is not the lawfulness of the investigations but the probative value of the evidence, this

¹⁰ The Statute and Rules only specifically provides for the following oral hearings at the pre-trial stage: the initial appearance (Art 60); hearings on interim release (Rule 118(3)); status conferences to ensure proper disclosure (Rule 121(2)(b)); a challenge to jurisdiction or admissibility (Rule 58(2)); and the confirmation of charges hearing (Art 61(1)). Other issues are resolved by means of written submissions.

¹¹ Article 69(8).

¹² As noted by *Triffterer*, Article 69(4) "... adopts presumptively the civil law procedure of general admissibility and free evaluation of evidence" *Triffterer Commentary on the Rome Statute of the International Criminal Court*, page 1322; "[R]elevant evidence which has probative value is admissible if such evidence is not infected by an exclusionary virus". *Prosecutor v. Delalic and others* Case No IT-96-21 Decision on exhibit 155, 19 January 1998, para. 30.

issue need not be resolved before the hearing, but indeed would better be assessed after all the evidence is introduced.

III. Conclusion

8. The Prosecution accordingly requests the Chamber to reject the Defence request for a status conference and to direct the Defence to submit any challenge to the admissibility of the Prosecution's evidence in writing by a specified date.



Luis Moreno-Ocampo,
Prosecutor

Dated this 26th day of July 2011

At The Hague, Netherlands