

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 11 August 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, *ex parte*, Prosecution and Defence Only

**Prosecution's response to Defence Request to deny the use of certain incriminating
evidence at the Confirmation Hearing**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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I. Introduction

1. Following the last Prosecution disclosure on 1 June 2011, the Defence filed, on 7 August 2011 the "Defence Request to deny the use of certain incriminating evidence at the confirmation hearing"¹ ("Defence's Request") urging the Chamber to deny the Prosecution the use of all witness interviews, as incriminating evidence, which have not been supplied to the Defence by way of written transcript prepared in Kinyarwanda or for which English/Kinyarwanda transcripts have been supplied but without their associated audio files.² The Chamber ordered the Prosecution to respond by 11 August.
2. The Prosecution objects to the Defence's Request. The Prosecution's disclosure complies with the Chamber's disclosure order³ and the Rules of Procedure and Evidence and enables Mr. Mbarushimana ("Suspect") to adequately prepare for the Confirmation Hearing, in particular, in light of the nature and the limited scope of such proceedings. The Prosecution further objects to the Defence's Request based on its late submission, when it touches an essential aspect of the Confirmation Hearing as well as the sanction it seeks to impose.

II. Procedural history

3. On 30 March 2011 the Chamber issued the Decision on Disclosure in which it set out the timeframe for disclosure in preparation of the Confirmation Hearing. In this Decision it ordered, *inter alia*, that the Prosecution disclose to the Defence no later than 23 May 2011 (or, when redactions are requested, no later than five days after the Chamber's decision regarding

¹ ICC-01/04-01/10-348.

² ICC-01/04-01/10-343.

³ ICC-01/04-01/10-87, p. 17 - 18.

such redactions) in their original and also in a language Mr. Mbarushimana fully understands and speaks, the names and the statements of the witnesses on which it intends to rely at the confirmation hearing.⁴

4. On 28 April 2011, the Prosecution requested an assessment whether Callixte Mbarushimana fully understands and speaks the English language because it intended to present material in English.⁵
5. The Defence argued that the Prosecution's Request should be rejected because, among other things, Mr. Mbarushimana would be severely handicapped if "forced to assimilate a huge quantity of English incriminating materials and witness transcripts in the month prior to confirmation".⁶
6. In its "Decision on the 'Prosecution's request for the assessment of the English proficiency of Callixte Mbarushimana'", on 12 May 2011, the Chamber considered, *inter alia*, the difficulties faced by the Prosecutor to produce by 23 May 2011 the French translations of the witness statements it intended to rely on at the hearing of the confirmation of charges.⁷ When ordering the Prosecution to disclose names and statements of all witnesses in its original version, no later than 23 May 2011, the Chamber also took into consideration the fact that the witness' lawyer is fluent in English and the Suspect is fluent in Kinyarwanda.⁸ The Court ordered the disclosure of the French versions for witness statements not previously disclosed in Kinyarwanda by 1 June 2011.
7. Pursuant to the Chamber's "Decision on issues relating to disclosure" ("Decision on disclosure") and "Decision on the Prosecution's applications for redactions pursuant to Rule 81(2) and Rule 81(4), in preparation of the

⁴ *Ibid.*

⁵ ICC-01/04-01/10-12.

⁶ ICC-01/04-01/10-131, para. 4.

⁷ ICC-01/04-01/10-145, p. 7.

⁸ ICC-01/04-01/10-145, p. 8.

confirmation hearing”, the Prosecution disclosed on 1 June 2011 five packages of materials (pre-trial packages 7-10 and pre-trial PEXO package 1). A chart was communicated to the Defence that day which identified the format of the disclosed materials, namely whether they were transcripts or audiotapes. Ten weeks later, the Defence filed the instant request.⁹

III. Submissions

8. The Defence submits that the provision of audio files alone *in lieu* of a written transcript in French or Kinyarwanda contravenes both the Disclosure Decision and the Rules of Procedure and Evidence. The Defence interprets Rule 112 to require, albeit implicitly, the transcription of interviews. The Defence hypothesizes that if an audio/video recording could not be effectuated then the procedure dictated by Rule 111 would apply warranting a “written format” of the interview so as to enable the person interviewed to sign the record. The Defence argues that because of the Prosecution’s disclosure of audio material in Kinyarwanda (and English) instead of transcripts, counsel and client will be unable to work from the same media, which it contends constitutes a breach of Article 67(1)(b) of the Statute. Finally, as to interviews for which full English and Kinyarwanda transcripts have been provided, the Defence submits that the Prosecution was obligated to also disclose the audio tapes of those interviews, and that its failure prejudices Mr Mbarushimana’s right to prepare adequately for the confirmation hearing. For these reasons, the Defence requests that the Prosecution be precluded from relying on any recorded statements for which the Prosecution has not provided both original audiotapes and prepared transcripts in both languages.
9. The Prosecution submits that the Defence’s Request should be rejected. The Prosecution has complied with its disclosure obligations as set by the

⁹ ICC-01/04-01/10-343.

Chamber. The Defence is sufficiently informed to adequately prepare for the confirmation hearing in light of the nature and scope of such proceedings. The Prosecution also submits that the deliberate late filing of this request is unreasonable, and that its timing renders it necessarily prejudicial to the Prosecution.

A. The Prosecution has satisfied its disclosure obligations in accordance with relevant statutory provisions and directions from the Chamber in light of the nature and scope of the Confirmation Hearing

10. The Prosecution's duties vis-à-vis disclosure are guided by the provisions in the Statute and the Rules and, more particularly, by rulings from the Chamber. The Prosecution takes its disclosure obligations seriously. It has met, and will continue to strive to meet, those obligations to the best of its ability and resources.
11. The Chamber ordered the Prosecution to disclose witness statements to the Defence in original and in a language which the Suspect fully understands and speaks. The Prosecution has done so. All of the witness statements are available in both English and Kinyarwanda, either in written or audio form.
12. The Defence now contends that the Prosecution was obliged to disclose recorded witness statements in both written and audio form. The Prosecution disputes that it was obliged to do so. The Prosecution submits that its timely disclosure to the Defence of all the relevant statements in either audio or written format sufficiently informs the suspect of the evidence against him to enable the Defence to prepare adequately for the Confirmation Hearing.

13. The Prosecution met the Chamber's 1 June 2011 disclosure deadline. It also made every effort, subject to its available resources, to provide full transcriptions of the audio recordings of its interviews. However, and as indicated to the Chamber in a prior filing,¹⁰ the Prosecution has been able to recruit only a limited number of qualified staff to transcribe the Kinyarwanda portions of the interviews. Its attempts to outsource this work to private companies have been - to date - unsuccessful due to the unsatisfactory standard of the transcriptions produced. For that reason, the transcription of the Kinyarwanda portions of the interviews could not be completed prior to the confirmation hearing, as had been initially anticipated.¹¹ But that has not left the Defence without the necessary information. They have received full and timely disclosure of the audio portions, which in fact is the best evidence of what the witnesses said, unfiltered through the work of a transcriber.

Defence's erroneous interpretation of Rules 111 and 112

14. Although creative, the Defence's interpretation of Rules 111 and 112 is wrong. It mistakes the purpose for which an interviewed person signs a transcript. The requirement that an interviewee sign a statement is to acknowledge that the written statement, which is anticipated to be a summary of the oral statement, accurately reflects the content of the interview. It has nothing to do with disclosure. When an interview is video/audio recorded,¹² transcripts are not produced contemporaneously to the interview. Such task would be impossible to achieve. Rule 112(e)

¹⁰ ICC-01/04-01/10-103, para 5.

¹¹ The Prosecution notes, however, that it undertook to provide the Defence with the Kinyarwanda portions of the transcripts "in due course" and it stands by this undertaking. However, the Prosecution did not promise that these would be provided before the confirmation hearing.

¹² Which is required in certain circumstances to guarantee that the interviewee's rights have been preserved during the interview process.

merely requires the Prosecution to transcribe the interview "as soon as practicable". For reasons described above, it has not yet been practicable to do so.¹³ Therefore, contrary to the Defence's assertion, Rule 112 does not imply the production of a transcript and certainly not contemporaneously to the interview for the interviewee to sign.

The Defence's request to receive audio tapes and transcripts to conduct a quality check of the interpretation extends beyond the scope of Articles 67-1(a) and the nature and scope of the confirmation hearing

15. Likewise, the Defence's assertion that both the audio recording and the transcripts must be disclosed and failure to do so constitute a breach of Article 67, is erroneous. Article 67 provides the guarantees which must be afforded to an accused, or at the pre-trial stage, to a suspect. Article 67(1)(a) guides the issue at hand; it requires that a suspect be sufficiently informed of the charges brought against him so as to enable him to adequately prepare his defence. The ability of a suspect to verify the accuracy of an interpretation clearly extends beyond the scope of this provision and the intent of the drafters of the Rome Statute.¹⁴
16. Furthermore, as consistently held by Chambers of this Court, a Confirmation Hearing is neither a trial nor a rehearsal of the trial. It is a mechanism to filter out unfounded criminal allegations. Chambers have noted the limited purpose and scope of the confirmation of charges hearing and, accordingly, stress the necessity that the parties, for the purposes of this hearing, select their best pieces of evidence in order to convince the Chamber that the charges brought against the suspects shall

¹³ For the purposes of preserving the interview's rights, the interviewees' signature is requested when the pouches containing the video/audio tapes are sealed in his/her presence.

¹⁴ See *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Defence's Request Related to Language Issues in the Proceedings", ICC-01/05-01/08-307, paras. 12-14.

be confirmed or, conversely, that they shall not.¹⁵ During the confirmation hearing the evidentiary debate is limited¹⁶ and, for that reason, the Appeals Chamber has clearly distinguished between the confirmation and trial stages in terms of the Prosecution's disclosure obligations.¹⁷

17. For these reasons, the Prosecution submits that the Statute and Rules, as well as the decisions of this Court, do not support the Defence's assertions that the Prosecution is obligated to disclose both audio recordings and transcripts of the interviews it intends to rely on at the Confirmation Hearing, and that its failure to provide both requires that the substantive evidence be excluded from the hearing.

B. The Defence's late submission of its Request is unfair and prejudicial to the Prosecution

18. The Prosecution notes that the Defence has been aware of which portions of the materials were in audio or transcript format since 1 June 2011. However, the Defence chose to remain silent on what they now claim to be a fundamental right, and to submit its Request the week prior to the commencement of the Confirmation Hearing. This late filing deprives both the Prosecution and the Chamber of the ability to reflect on the application and, assuming the Chamber were to agree with the Defence, it deprives the Prosecution of a fair opportunity to comply with a new Chamber directive on disclosure before the hearing is held.
19. Furthermore, the remedy sought by the Defence – a demand that evidence be excluded from the imminent confirmation hearing -- is neither fair nor proportional to the prejudice, if any, that the Defence may have suffered.

¹⁵ See, for example, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing, ICC-01/09-01/11-153, paras. 8-9.

¹⁶ *Ibid* at para. 9.

¹⁷ See *v Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the appeal of the Prosecutor against the decision of Pre - Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", ICC - 01/04 - 01/07 - 475 (OA), para. 68 (footnote omitted).

Nor should the Defence be entitled to such a drastic remedy when it has effectively ruled out any other relief by choosing to ignore the issue at hand until the eve of the confirmation hearing.

IV. Relief

20. For the foregoing reasons, the Prosecution requests that the Chamber deny the Defence's Request.



Luis Moreno-Ocampo
Prosecutor

Dated this 11th day of August 2011

At The Hague, The Netherlands