

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 18 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***

**Public Document  
URGENT**

**Request to access documents in the case record in relation to the Defence  
Challenge to the Jurisdiction of the Court**

**Source:** Office of Public Counsel for Victims

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

**The Office of the Prosecutor**

Mr Luis Moreno Ocampo, Prosecutor  
 Ms Fatou Bensouda, Deputy Prosecutor  
 Mr Anton Steynberg, Senior Trial Lawyer

**Counsel for the Defence**

Mr Nicholas Kaufman  
 Ms Yael Vias-Gvirsman

**Legal Representatives of the Victims**

Mr Hervé Diakiese  
 Mr Mayombo Kassongo  
 Mr Ghislain Mabanga

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
 (Participation/Reparation)**

**The Office of Public Counsel for  
 Victims**

Paolina Massidda

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

**States' Representatives**

The Government of the Democratic  
 Republic of the Congo

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Deputy Registrar**

Mr Didier Preira

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
 Section**

**Other**

## I. PROCEDURAL HISTORY

1. On 19 July 2011, the Defence of M. Mbarushimana introduced a Challenge to the Jurisdiction of the Court, classified confidential *ex parte* pending a reclassification ordered by the Chamber, requesting Pre-Trial Chamber I to determine under article 19 of the Rome Statute that “*there is no jurisdiction to entertain the case against the suspect*” before the International Criminal Court (“the Defence Jurisdictional Challenge”)<sup>1</sup>.

2. On 20 July 2011, the Single Judge of Pre-Trial Chamber I issued a “Decision on the 'Defence Request for Reclassification' dated 14 July 2011 and on the request for reclassification of the 'Defence Challenge to the Jurisdiction of the Court'”, granting the reclassification of said Defence Challenge and related documents<sup>2</sup>.

3. On 16 August 2011, Pre-Trial Chamber I issued a Decision requesting the Office of Public Counsel for Victims (the “OPCV” or the “Office”) to represent the unrepresented victim applicants for the purpose of their participation in the article 19 proceedings (“the Decision”)<sup>3</sup>. In its Decision, Pre-Trial Chamber I underlined that “*the victims who have communicated with the Court in relation to the case are entitled, pursuant to rule 59(1) of the Rules [of Procedure and Evidence], to be informed of the challenge by the Registrar*” in order to make written observations to the Chamber, in accordance with article 19(3) of the Rome Statute and rule 59(3) of the Rules of Procedure and Evidence, on 12 September 2012 at the latest.

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<sup>1</sup> See the “Defence Challenge to the Jurisdiction of the Court”, No. ICC-01/04-01/10-290, 19 July 2011 (“the Defence Jurisdictional Challenge”).

<sup>2</sup> See the “Decision on the 'Defence Request for Reclassification' dated 14 July 2011 and on the request for reclassification of the 'Defence Challenge to the Jurisdiction of the Court'” (Single Judge, Pre-Trial Chamber I), No. ICC-01/04-01/10-293, 20 July 2011.

<sup>3</sup> See the “Decision requesting observations on the 'Defence Challenge to the Jurisdiction of the Court'” (Pre-Trial Chamber I), No. ICC-01/04-01/10-377, 16 August 2011 (“the Decision”).

4. In light of the time limit set by the Decision, the Principal Counsel of the OPCV respectfully requests the Pre-Trial Chamber to treat this Request as urgent, in order to be in a position to comply with said Decision and to effectively represent the interests of her clients in the article 19 proceedings<sup>4</sup>.

## II. ACCESS TO DOCUMENTS IN THE CASE RECORD

5. The Principal Counsel submits that in order to fulfil her mandate and to be able to adequately protect the rights and interests of the victim applicants, it is necessary that access to certain documents be granted to the Office. Indeed, the scope of the victims' information in relation to article 19 proceedings as referred to by the Single Judge<sup>5</sup> encompasses access by their legal representatives to all relevant information in the record of the case.

6. In this regard, the Principal Counsel notes the constant jurisprudence of the various Chambers of the Court having granted access to the OPCV - in its capacity of legal representative of the victims for the purposes of article 19 proceedings - to documents, including documents classified as confidential when relevant, kept in the record of the corresponding cases<sup>6</sup>.

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<sup>4</sup> The Office also recalls the *Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990), also available on the Website of the Office of the United Nations High Commissioner for Human Rights, at the following address : <http://www2.ohchr.org/english/law/lawyers.htm>. See notably article 21: "It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time."

<sup>5</sup> See the Decision, *supra* note 3 and par. 3.

<sup>6</sup> See, *inter alia*, Trial Chamber III's Oral Decision, No. ICC-01/05-01/08-T-20-Red-ENG WT2, 8 March 2010, pp. 5-6, as well as the "Decision Prescribing the Procedure to be Followed Under Article 19 of the Statute (Rule 58 of the Rules of Procedure and Evidence)" (Trial Chamber II), No. ICC-01/04-01/07-943-Conf-tENG, 5 March 2009.

7. Due to the fact that the Office has had, to date, no access to an index of the case record, the Principal Counsel is not in a position to identify all documents which may be of interest for the fulfilment of her mandate on behalf of victim applicants in relation to article 19 proceedings. Despite this fact, the Office – through the reading of public documents – has been able to identify some documents which appear important for a comprehensive knowledge of the Defence Jurisdictional Challenge and which are still classified confidential.

8. Therefore, the Principal Counsel respectfully requests Pre-Trial Chamber I to be notified of the following documents:

- Annexes B (letter addressed by the Prosecutor to the President of the Democratic Republic of the Congo – the “DRC”) and C (letter addressed by a high official of the DRC to the Prosecutor) to the Defence Jurisdictional Challenge<sup>7</sup> - as mentioned in Pre-Trial Chamber I’s Decision No. ICC-01/04-01/10-293 dated 20 July 2011, reclassified by said Decision as “Confidential”;

- Annexes 1 to 5 to the “Prosecution Response to the “Defence Request for Disclosure””<sup>8</sup> (correspondence exchanged between the parties concerning notably the Defence Request for Disclosure of certain documents in relation to its, at the time, intended challenge under Article 19(2)(a) of the Rome Statute, as well as other documents possibly) – still classified as confidential, as mentioned in the “Prosecution’s response to Defence Challenge to the Jurisdiction of the Court ICC-01/04-01/10-290” dated 28 July 2011<sup>9</sup>.

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<sup>7</sup> See the Defence Jurisdictional Challenge, *supra* note 1.

<sup>8</sup> See the “Prosecution Response to the “Defence Request for Disclosure””, No. ICC-01/04-01/10-31, 5 January 2011.

<sup>9</sup> See the “Prosecution’s response to Defence Challenge to the Jurisdiction of the Court ICC-01/04-01/10-290”, No. ICC-01/04-01/11-320, 28 July 2011.

9. Moreover, the Principal Counsel requests Pre-Trial Chamber I to grant access to the OPCV to any documents that appear to be relevant in relation to article 19 proceedings and which she cannot list in this request for not being aware of their existence yet.

10. The Principal Counsel notes the decision of the Chamber in relation to documents emanating from the Democratic Republic of the Congo for which the Chamber ordered their classification to remain "Confidential, *ex parte* to the Defence"<sup>10</sup>. However, should the Chamber decide otherwise or receive any indication from the DRC Authorities in relation to the reclassification of the relevant documents as confidential, the Principal Counsel requests the Chamber to be granted access to said documents as well, as soon as their classification should change<sup>11</sup>.

11. Finally, the Principal Counsel submits that in order to be able to adequately entertain the issues related to the Defence Jurisdictional Challenge, the Office needs to access the non-redacted version of the Prosecution's Document containing the charges dated 3 August 2011 and any annex(es) to it<sup>12</sup>, documents for which access has already been granted to the other legal representatives by virtue of Pre-Trial Chamber I's decision dated 11 August 2011<sup>13</sup>.

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<sup>10</sup> See the "Decision on the 'Defence Request for Reclassification' dated 14 July 2011 and on the request for reclassification of the 'Defence Challenge to the Jurisdiction of the Court'", *supra* note 2.

<sup>11</sup> The Principal Counsel especially refers to Annex 1 to document No. ICC-01/04-01/10-152 ("note verbale ainsi que le procès verbal adressé aux autorités congolaises"), Annexes 1 and 2 to Document No. ICC-01/04-01/10-203 (respectively "document reçu des autorités congolaises le 13 mai 2011" and "note verbale ainsi que le procès verbal adressé aux autorités congolaises"), Annex 1 to Document No. ICC-01/04-01/10-204 ("documents reçus des autorités congolaises le 27 mai 2011") as well as Annex 1 to Document No. ICC-01/04-01/10-269 ("note verbale transmise par les autorités congolaises").

<sup>12</sup> See Document No. ICC-01/04-01/10-330.

<sup>13</sup> See the "Decision on the 138 applications for victims' participation in the proceedings" (Single Judge, Pre-Trial Chamber I), No. ICC-01/04-01/10-351, 11 August 2011, par. 44 and p. 22.

**FOR THE FOREGOING REASONS**, the Principal Counsel respectfully requests  
Pre-Trial Chamber I,

- a) to order the Registry to notify to the OPCV the documents listed in paragraph 8 of this request together with any other relevant documents in relation to article 19 proceedings as mentioned in paragraphs 9 and 10 of this request;
- b) to order the Registry to notify to the OPCV the unredacted version of the Prosecution's Document containing the charges and the annex(es) attached thereon; and
- c) to order the Registry to systematically notify to the OPCV any document submitted by the parties, participants and/or the Democratic Republic of the Congo related to the Defence Jurisdictional Challenge and which might be classified confidential – on the same basis as the other parties and participants in the article 19 proceedings.



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Paolina Massidda  
Principal Counsel  
Office of Public Counsel for Victims

Dated this Wednesday 18 August 2011

At The Hague, The Netherlands