

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 23 May 2011

PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Single Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

***IN THE CASE OF
THE PROSECUTOR V. CALLIXTE MBARUSHIMANA***

Public Document

URGENT

**Decision on the Prosecution's response to the Defence submission of a list of
potentially privileged documents**

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, 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 Victims

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 Others**

Judge Sanji Mmasenono Monageng, the Single Judge of Pre-Trial Chamber I (“Chamber”) of the International Criminal Court (“Court”) responsible for carrying out the functions of the Chamber in relation to the case of *The Prosecutor v. Callixte Mbarushimana*;¹

NOTING the “Second Decision on matters regarding the review of potentially privileged material” (“Second Decision on Potentially Privileged Material”) issued by the Chamber on 15 April 2011,² whereby the Chamber, *inter alia*, (i) partially modified the system for review of potentially privileged material established in the “Decision on the ‘Prosecution’s request for a review of potentially privileged material’”³; (ii) ordered the Registry to provide the Defence with copies of all the non-faulty and unprotected devices seized at the premises of Mr Callixte Mbarushimana (“Mr Mbarushimana”) in an accessible and searchable format; and (iii) ordered the Defence to review the relevant seized material and submit to the Chamber a list of documents identified by the Defence as potentially privileged under rule 73 of the Rules of Procedure and Evidence (“Rules”);

NOTING the “Defence submission of a list of potentially privileged material” (“First Defence Submission”) filed on 6 May 2011,⁴ whereby the Defence (i) submitted a list of files and documents which it had identified on the seized hard drives as potentially privileged in order for the Chamber to review it; (ii) enumerated the problems encountered in relation to the hardware and software supplied to Mr Mbarushimana; and (iii) noted that further potentially privileged material was likely to exist amongst the seized material but was not available to the Defence due to the said problems;

NOTING the “Prosecution’s Response to the Defence submission of a list of potentially privileged documents and request for access to seized electronic material” (“Prosecution’s

¹ Oral Decision of the Chamber, 28 January 2011, ICC-01/04-01/10-T-1-ENG, p. 11.

² ICC-01/04-01/10-105.

³ ICC-01/04-01/10-67, issued by the Chamber on 4 March 2011.

⁴ ICC-01/04-01/10-137 with Annexes.

Response”) filed on 13 May 2011,⁵ wherein the Prosecution requested, *inter alia*, (i) that it be granted immediate access to the entirety of the electronic material, originating from the seized hard drives, over which the Defence does not claim privilege; (ii) that it be granted access to the confidential *ex parte* annexes to the First Defence Submission, (iii) that in the event that the said annexes do not contain the specific information sought by the Prosecution (such as the type of document, the date of its creation on the hard drive, the author, the file name and path and the ERN number of the device in which the file was contained) in relation to all the potentially privileged documents identified by the Defence, that either the Registry or the Defence be ordered to provide the Prosecution with the relevant information; and (iv) that either the Defence or the Registry be ordered to provide the Prosecution with the details of the number of potentially privileged material identified by the Defence on each of the seized hard drives;

NOTING the “Decision extending the deadline for the review of potentially privileged material” issued on 13 May 2011,⁶ whereby the Single Judge, *inter alia*, ordered (i) the Defence to complete the review of the potentially privileged material identified by the Defence on the seized hard drives and submit to the Chamber by 18 May 2011 a list of the potentially privileged files and documents; and (ii) the Registry to immediately allow the Prosecution to have access to the electronic material over which the Defence does not claim privilege upon receipt of the relevant list of potentially privileged material;

NOTING the “Second Defence submission of a list of potentially privileged material” (“Second Defence Submission”) filed on 17 May 2011,⁷ whereby the Defence submitted two lists over which it claimed privilege, the first under both rule 73(1) and rule 73(2) of the Rules and the second under rule 73(2) of the Rules;

⁵ ICC-01/04-01/10-147.

⁶ ICC-01/04-01/10-150.

⁷ ICC-01/04-01/10-155 with Annexes.

NOTING the “Defence Response to Prosecution filing ICC-01/04-01/10-147” filed on 17 May 2011,⁸ wherein the Defence stated its readiness to provide the number of the potentially privileged items identified and make this information available to the Prosecution via e-mail;

NOTING articles 57(3), 61(3) and 64(2) of the Rome Statute, rule 73 of the Rules, regulations 23bis(3), 28 and 34 of the Regulations of the Court and regulation 14 of the Regulations of the Registry;

CONSIDERING that the Chamber, as well as the Single Judge designated to carry out its functions, has the responsibility to ensure that the proceedings are conducted in a fair and expeditious manner, with full respect for the rights of the Prosecution and the Defence;

CONSIDERING that the Prosecution has a legitimate interest in ensuring that only documents covered by privilege in accordance with rule 73 of the Rules are excluded from its review of the material seized at the premises of Mr Mbarushimana and that therefore the Prosecution’s request for information regarding that privilege is justified;

CONSIDERING that Annex A to the First Defence Submission⁹ and the two Annexes to the Second Defence Submission, which are currently classified as “confidential *ex parte*, Defence and Registry only”, contain the specific information sought by the Prosecution in the Prosecution’s Response and, thus, the re-classification of the said annexes could give the Prosecution access to the sought information;

CONSIDERING it appropriate, prior to any decision on the level of confidentiality of document ICC-01/04-01/10-137-Conf-Exp-AnxA and the two Annexes to the Second

⁸ ICC-01/04-01/10-159.

⁹ In light of the information sought by the Prosecution with respect to potentially privileged material, it should be noted that only Annex A to the First Defence Submission is relevant to the Prosecution’s request in the Prosecution’s Response.

Defence Submission, to seek the Defence's observations on the possible re-classification of the annexes in question;

CONSIDERING that, should the Defence object to the proposed re-classification, it is necessary that it provides the Prosecution with the specific information sought by the Prosecution;

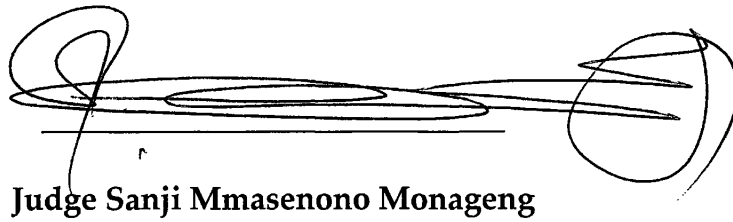
CONSIDERING that it is reasonable at this stage that the Prosecution be provided with information as to how many potentially privileged documents were identified by the Defence on each of the seized hard drives;

FOR THESE REASONS

REQUEST the Defence to submit to the Chamber and the Prosecution, no later than Tuesday, 24 May 2011, at 1600 hours:

- i. in case the Defence has objections to the possible re-classification of document ICC-01/04-01/10-137-Conf-Exp-AnxA and the two Annexes to the Second Defence Submission: (a) reasons for such objections and (b) the following information with respect to the items listed in that document: the type of document, the date of its creation on the hard drive, the author thereof, the file name and path and the ERN number of the device in which the file was contained; and
- ii. the number of the potentially privileged items identified by the Defence on each of the seized hard drives.

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

A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a series of loops and a final circular flourish.

Judge Sanji Mmasenono Monageng

Single Judge

Dated this Monday, 23 May 2011

At The Hague, The Netherlands