

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 9 June 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

Decision on the processing of additional hard drives and compact disks

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
Mr 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

Legal Representatives of the 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 Keïta

States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar
Ms Silvana Arbia

Defence Support Section
Mr Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I, 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 “Further Submission on the Processing of Part of the Seized Materials”, filed on 18 April 2011,² whereby the Registrar submitted, *inter alia*, that out of the 42 electronic devices with high storage space seized at the premises of Mr Callixte Mbarushimana, 7 devices were faulty (“Faulty Devices”) and three other devices could not be acquired due to their inherent security restrictions;

NOTING the “Decision on the ‘Prosecution’s observations on the quotation from the Netherlands Forensic Institute regarding analysis of damaged and protected hard drives’”, issued on 27 May 2011 (“Decision on Faulty and Encrypted Devices”),³ whereby the Single Judge, *inter alia*, ordered the Registry to identify and contact forensic institutes or private companies, other than the Netherlands Forensic Institute, which are able to process the above-mentioned faulty and encrypted devices;

NOTING the “Registry Report pursuant Regulation 24 *bis* of the Regulations of the Court in relation to Prosecution’s filing ICC-01/04-01/10-189” and an Addendum thereto, filed on 6 and 8 June 2011 respectively,⁴ whereby the Registry submits that:

- (i) two additional hard drives were included in the list of faulty hard drives;

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

² ICC-01/04-01/10-109.

³ ICC-01/04-01/10-196-Conf.

⁴ ICC-01/04-01/10-215-Conf ; ICC-01/04-01/10-221-Conf.

- (ii) with the use of recently purchased hardware the Registry was able to recover 99% of one of these hard drives ("Hard Drive"), but the other hard drive appears not to have been accessed ("Faulty Drive");
- (iii) the new hardware can also be used to attempt a recovery of the Faulty Devices;
- (iv) in the process of such recovery the original drive would be altered irretrievably and there may be a risk of damaging the original device;
- (v) due to an oversight, four compact disks were not processed ("Four CDs");

NOTING article 57 of the Rome Statute and rule 73 of the Rules of Procedure and Evidence;

CONSIDERING that the processing of the Faulty Devices and the Faulty Drive by the Registry could expedite the process and reduce its costs;

CONSIDERING, however, that in light of the risk of damage to the devices thus processed, the Parties may prefer a safer method of recovery of data, to be conducted by a forensic institute or a public company;

CONSIDERING that in view of the availability of the Hard Drive and the Four CDs, the keyword search for privileged communications can now be conducted and the Defence can review the content of these devices with a view to identifying privileged communications, as envisaged in the "Second Decision on matters regarding the review of potentially privileged material";⁵

⁵ 15 April 2011, ICC-01/04-01/10-105.

FOR THESE REASONS

ORDER the Registry:

- (i) to provide, as soon as possible, the Defence with a copy of the Hard Drive and the Four CDs in an accessible and searchable format, and to report immediately to the Chamber as soon as provision has occurred;
- (ii) to preserve the original devices so as to ensure their integrity;
- (iii) to perform keyword searches on the Hard Drive and the Four CDs on the basis of the keywords provided by the Parties⁶, compile lists of the files identified through such search and provide the Defence with such lists no later than 13 June 2011;
- (iv) to attempt a recovery of data stored on the Faulty Devices and the Faulty Hard Drive, unless the Prosecution and/or the Defence object thereto by 10 June 2011;
- (v) to report to the Chamber, no later than 17 June 2011, on the process, should the recovery be attempted;

ORDER the Defence to expeditiously carry out its review of the Hard Drive and the Four CDs, and to submit, by no later than 17 June 2011, (i) to the Chamber and the Prosecution a list of the documents over which it claims privilege under rule 73 of the Rules, and (ii) to the Chamber the following information:

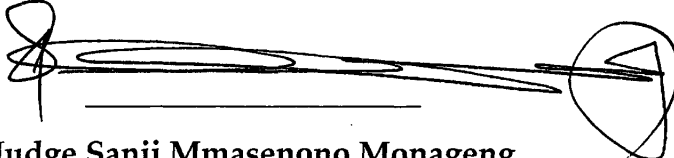
- (a) a description of the context, time and purpose of the document's creation, including whether the document is a draft and whether it was ever actually communicated or rendered public, and

⁶ (1) Subject to the instructions provided in the Annex to the "Decision on the keywords provided by the Defence for the purpose of selection of potentially privileged material", issued on 30 March 2011 by the Single Judge, ICC-01/04-01/10-88; and (2) without the name of the person referred to in para. 1 of the "Defence waiver of privilege and request to consider sanctions for misconduct", filed on 25 May 2011, ICC-01/04-01/10-183-Conf.

- (b) an explanation as to why, in the view of the Defence, this document should be considered to attract privilege within the meaning of rule 73 of the Rules;

ORDER the Registry to allow the Prosecution access to those of the files stored on the Hard Drive and the Four CDs over which the Defence does not claim privilege, as soon as the Defence submits its list of privileged documents.

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



Judge Sanji Mmasenono Monageng
Single Judge

Dated this Thursday, 9 June 2011

At The Hague, The Netherlands