

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 15 July 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***

URGENT

Public

Third decision on the review of potentially privileged material

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

Ms. Fatou Bensouda

Mr. Anton Steynberg

Legal Representatives of Victims

Counsel for the Defence

Mr. Nicholas Kaufman

Ms. Yael Vias-Gvirsman

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 Other
Section**

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

NOTING the "Decision on the 'Prosecution's request for a review of potentially privileged material'"², dated 4 March 2011 ("First Decision on Potentially Privileged Material"), whereby the Chamber, *inter alia*:

- (i) decided to perform a review of 72 documents which had been identified as potentially privileged by means of a keyword search performed by the Prosecutor on that part of the material seized at the premises of Mr. Callixte Mbarushimana upon his arrest ("Materials") which consisted of hard copies of documents ("Hard Copy Materials"), and
- (ii) ordered the Registrar to conduct a search on that part of the Materials that consisted of hard drives and other information storage devices ("Electronic Materials") based on the keywords provided by the Defence and the Prosecutor and approved by the Chamber and to provide the Chamber with a list of documents which the said search would produce;

NOTING the "Second Decision on matters regarding the review of potentially privileged material"³, issued by the Chamber on 18 April 2011, wherein the Chamber, in view of the technical and operational difficulties encountered by the Registrar in implementing the system established by the Chamber in the First Decision on Potentially Privileged Material,⁴ partially modified the system for review of potentially privileged material and ordered that copies of the Electronic Materials be provided to the Defence, with a view to

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

² ICC-01/04-01/10-67.

³ ICC-01/04-01/10-105.

⁴ Registry Report dated 8 April 2011 (ICC-01/04-01/10-95) and Annex thereto (ICC-01/04-01/10-95-Conf-Exp-Anx) and Addendum to the Registry Report dated 11 April 2011 (ICC-01/04-01/10-98) and Annexes thereto (ICC-01/04-01/10-98-Conf-Anx1 and ICC-01/04-01/10-98-Conf-Exp-Anx2).

allowing the Defence to review said documents and identify those over which it claimed privilege;

NOTING the "Third Decision on matters regarding the review of potentially privileged material"⁵, issued by the Chamber on 17 May 2011, whereby the Chamber ordered that 179 documents, identified by means of a key-word search over the Hard Copy Materials also be provided to the Defence to allow it to carry out a review of the said documents and to identify those over which it claimed privilege;

NOTING the "Defence submission of a list of potentially privileged material",⁶ filed by the Defence on 6 May 2011, the "Second Defence submission of a list of potentially privileged material"⁷ filed on 17 May 2011, and the « Soumission d'une liste de documents privilégiés suite à la décision de la Chambre Préliminaire ICC-01/04-01/10-158 »⁸ filed on 19 May 2011 and the Corrigendum thereto⁹ filed on 20 May 2011, whereby the Defence submitted lists of documents and files over which it claimed privilege under rule 73 of the Rules of Procedure and Evidence ("Rules");

NOTING the "Decision on the Prosecution's request for the postponement of the confirmation hearing"¹⁰ issued by the Chamber on 31 May 2011, wherein the commencement of the confirmation hearing was postponed to 17 August 2011 and the deadline for the filing of the document containing the charges and the list of evidence by the Prosecutor was moved to 15 July 2011;

NOTING the "Decision on the review of potentially privileged material"¹¹ issued by the Chamber on 15 June 2011 ("First Review Decision"), whereby the Chamber *inter alia* ordered the Defence, if it maintained its claim of privilege over certain documents and

⁵ ICC-01/04-01/10-158.

⁶ ICC-01/04-01/10-137.

⁷ ICC-01/04-01/10-155.

⁸ ICC-01/04-01/10-165.

⁹ ICC-01/04-01/10-165-Corr.

¹⁰ ICC-01/04-01/10-207.

¹¹ ICC-01/04-01/10-237.

files, to submit to the Chamber a more detailed explanation of why privilege is asserted over those documents and files;

NOTING the “Defence compliance with Pre-Trial Chamber I’s decision: ICC-01/04-01/10-237”¹² filed on 22 June 2011 (“First Defence Submission”), whereby the Defence submitted a list of documents and files over which it maintained its claim of privilege and provided a more detailed explanation of the reasons for its assertion that these particular documents and files were thought to be privileged;

NOTING the “Second decision on the review of potentially privileged material”¹³ issued on 12 July 2011 (“Second Review Decision”), wherein the Chamber *inter alia* ordered (i) the Defence to identify which files it claimed to be privileged amongst those that were formerly password protected and are now accessible and listed in Annex 3 to the Second Review Decision, and (ii) the Prosecutor and the Defence to submit observations as to whether they required an analysis of the contents of the corrupted and password protected files listed in Annex 2 to the Second Review Decision (“Corrupted and Password Protected Files”) to be carried out so that they could be reviewed for privilege;

NOTING the “Registry Report on the processing of faulty and protected devices and other outstanding issues”¹⁴ filed on 12 July 2011, wherein the Registrar *inter alia* informed the Chamber (i) that a number of PST files, which should have been provided to the Prosecutor in accordance with the First Review Decision and the Second Review Decision, had not yet been made available to the Prosecutor due to the possibility that potentially privileged information may be contained in unallocated clusters within these files and (ii) that one of the emails listed in Annex 3 to the First Review Decision could not be located by either the Registry or the Defence;

NOTING the “Defence Observations pursuant to Decision: ICC-01/04-01/10-277”¹⁵ filed on 13 July 2011, wherein the Defence *inter alia* requested that it be allowed to “perform prior

¹² ICC-01/04-01/10-244.

¹³ ICC-01/04-01/10-277.

¹⁴ ICC-01/04-01/10-276-Conf.

¹⁵ ICC-01/04-01/10-278.

analysis of any presently corrupted or password-protected files the contents of which may be retrieved”;

NOTING the “Prosecution’s observations on the analysis of corrupted and protected files”¹⁶ filed on 13 July 2011, wherein the Prosecutor *inter alia* submitted that he would require an analysis of the Corrupted and Password Protected files to be carried out, although not on an urgent basis;

NOTING the “Defence Compliance with Decision ICC-01/04-01/10-277”¹⁷ filed on 14 July 2011 (“Second Defence Submission”), wherein the Defence *inter alia* claimed privilege over a number of the files listed in Annex 3 to the Second Review Decision and two additional files which are copies of files over which privilege is claimed;

NOTING article 57(3)(c) of the Rome Statute (“Statute”) and rule 73 of the Rules;

CONSIDERING that rule 73(1) of the Rules provides that “communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure”;

CONSIDERING that, pursuant to rule 73(1) of the Rules, privilege attaches to communications between a lawyer and his or her client only where the communication was made in the context of the professional relationship between a person and his or her legal counsel;

CONSIDERING that the Defence was instructed to specifically identify which of the files listed in Annex 3 to the Second Review Decision it claimed privilege over and to provide detailed information in relation to each of these files;

CONSIDERING that the Defence Submission asserted privilege over a number of files falling into the following three categories:

¹⁶ ICC-01/04-01/10-279.

¹⁷ ICC-01/04-01/10-280.

- (i) Documents setting out factual and background information which were prepared for use in the defence of Mr. Mbarushimana in criminal legal proceedings instituted against him,
- (ii) Draft correspondence prepared by Mr. Mbarushimana's lawyer(s) which were sent to Mr. Mbarushimana for the purpose of obtaining his observations thereon but never ultimately communicated to a third party or made public, and
- (iii) Draft legal submissions prepared by Mr. Mbarushimana's lawyer(s), which were not communicated to any person other than to Mr. Mbarushimana;¹⁸

CONSIDERING that the content of the files falling into the three categories set out above is such that, were these files disclosed, the content of communications made in the context of the professional relationship between Mr. Mbarushimana and his lawyers would be revealed, thereby depriving rule 73(1) of the Rules of any practical effect;

CONSIDERING, therefore, that the files listed in Annex 1 to the present decision are to be regarded as privileged within the meaning of rule 73(1) of the Rules;

CONSIDERING that the Prosecutor has indicated that he requires an analysis of the content of the Corrupted and Password Protected Files to be carried out, but that he does not require this to be done urgently,¹⁹ as the information contained therein will not be available before the deadline for the submission of the document containing the charges and the list of evidence on which the Prosecutor intends to rely for the purposes of the confirmation hearing;

CONSIDERING, therefore, that it is unnecessary, at this stage, to investigate the possibility of retrieving the content of the Corrupted and Password Protected Files so that it may be reviewed for potentially privileged information;

¹⁸ ICC-01/04-01/10-280 at para. 3.

¹⁹ ICC-01/04-01/10-279 at para. 2.

CONSIDERING that the Registrar has indicated that the Prosecutor has yet to be provided with a number of files containing unallocated clusters which may contain potentially privileged information;²⁰

CONSIDERING that these unallocated clusters have not been reviewed in order to determine whether they contain privileged communications;

CONSIDERING, therefore, that it is necessary to separate the unallocated clusters from the folders and files which have been found not to contain privileged communications or in relation to which the Defence has not articulated a claim of privilege, so that these folders and files may be provided to the Prosecutor;

CONSIDERING that the Registrar has indicated that, despite several search attempts, an email listed in Annex 3 of the First Review Decision cannot be found in the listed location by either the Defence or the Registrar;²¹

CONSIDERING that the Defence, in the First Defence Submission, did not maintain its claim of privilege in relation to the email in question;

CONSIDERING that the folder in which the email was said to be located contains other files which must be provided to the Prosecutor;

FOR THESE REASONS,

GRANT the Defence claim of privilege over the files listed in Annex 1 to the present decision;

ORDER the Registrar to preserve the confidentiality of the files listed in Annex 1 in accordance with their privileged status;

²⁰ ICC-01/04-01/10-276-Conf, at paras.10 – 15.

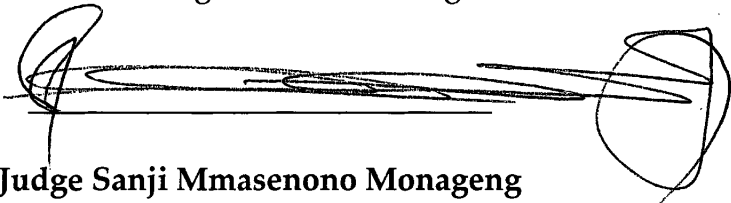
²¹ ICC-01/04-01/10-276-Conf, at paras.16 – 18.

ORDER the Registrar to immediately grant the Prosecutor access to the files and the folder listed in Annex 2 to the present decision;

ORDER the Prosecutor to forensically delete and destroy all copies of the files listed in Annex 3 to the present decision; and

ORDER the Registrar to treat the Corrupted and Password Protected Files as privileged until the proceedings related to the hearing on the confirmation of charges are concluded, at which point, if necessary, the possibility of retrieving the content of these files may be investigated and a review of the potentially privileged materials contained therein, if any, be carried out.

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



Judge Sanji Mmasenono Monageng

Single Judge

Dated this Friday, 15 July 2011

At The Hague, The Netherlands