

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 26 July 2011

PRE-TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public

Fourth 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. Yaël 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 Cuno Tarfusser, 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* in the absence of Judge Sanji Mmasenono Monageng¹;

NOTING the “Decision on the review of potentially privileged material”² issued by the Chamber on 15 June 2011;

NOTING the “Second decision on the review of potentially privileged material”³ issued by the Chamber on 12 July 2011;

NOTING the “Third decision on the review of potentially privileged material”⁴ issued by the Single Judge on 14 July 2011;

NOTING the “Registry Report on the processing of faulty and protected devices and other outstanding issues”⁵ filed on 12 July 2011, whereby the Registrar informed the Chamber that the Registry had (i) received, on 4 July 2011, two reports from a forensic institute tasked with the recovery of data from faulty and password-protected devices seized from the apartment of Mr Mbarushimana at the time of his arrest, indicating the data that had been retrieved from eight faulty or protected devices (“Data Retrieved from the Faulty and Encrypted Devices”) and (ii) prepared copies of the information contained in the acquired devices which could be provided to the Defence;

¹ ICC-01/04-583.

² ICC-01/04-01/10-237.

³ ICC-01/04-01/10-277.

⁴ ICC-01/04-01/10-286.

⁵ ICC-01/04-01/10-276-Conf.

NOTING the “Decision on Data Retrieved from Faulty and Encrypted Devices and analysis of Mobile Phones Seized from the Premises of Mr. Mbarushimana”⁶ issued on 19 July 2011 (“Decision”), whereby the Single Judge ordered that the Defence carry out a review of the Data Retrieved from the Faulty and Encrypted Devices for privileged communications by Monday 25 July 2011 at the latest so that copies of the data contained therein and found not to be privileged under rule 73 of the Rules of Procedure and Evidence (“Rules”) may be provided to the Prosecutor;

NOTING the “Defence request to postpone implementation of decision: ICC-01/04-01/10-291”⁷ filed on 20 July 2011, wherein the Defence submitted that it was unable to comply with the Decision as it was occupied with preparing its list of evidence and submissions for the confirmation hearing;

NOTING the “Decision on “Defence request to postpone implementation of decision: ICC-01/04-01/10-291””⁸ issued on 20 July 2011, wherein the Single Judge ordered the Defence to comply with the Decision and the OPCD to assist the Defence in carrying out its review;

NOTING the “Defence Compliance with Decision: ICC-01/04-01/10-291”⁹ filed on 25 July 2011 (“Defence Submission”), whereby the Defence submitted a list of potentially privileged files contained in the Data Retrieved from the Faulty and Encrypted Devices;

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

⁶ ICC-01/04-01/10-291.

⁷ ICC-01/04-01/10-292.

⁸ ICC-01/04-01/10-296.

⁹ ICC-01/04-01/10-309.

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 Submission identified a number of files which are copies of files which have previously been found to be privileged by the Chamber and asserted privilege over a number of new files falling into the following categories:

- (i) Draft communication between Mr. Mbarushimana and his lawyer,
- (ii) 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,
- (iii) Draft legal submissions prepared by the lawyer of Mr. Mbarushimana, which were not communicated to any person other than to Mr. Mbarushimana and Mr. Murwanashyaka, and
- (iv) Documents which are described as an exchange between attorney and client but are in fact letters or draft letters from Mr. Mbarushimana to the Director of the Office Français de Protection des Réfugiés et Apatrides;

CONSIDERING that the Single Judge is satisfied that the document mentioned in the first category set out above is in fact a draft of a communication made in the context of the professional relationship between Mr. Mbarushimana and his legal counsel;

CONSIDERING that, the content of the files falling into the second and third 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 that neither the description of the time, context and purpose of the creation of the documents in the fourth category set out above, nor the explanation given by the Defence for asserting that these documents are privileged within the meaning of rule 73(1) of the Rules, correspond to the nature or content of the documents in question;

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

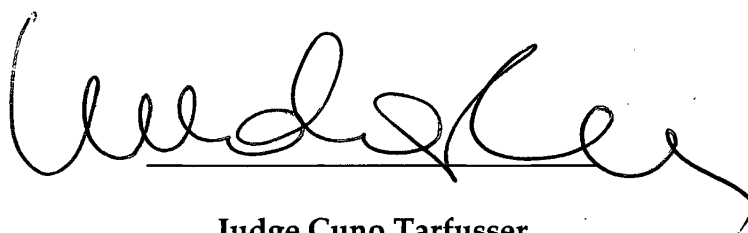
FOR THESE REASONS,

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

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

ORDER the Registrar to immediately grant the Prosecutor access to the remainder of the Data Retrieved from the Faulty and Encrypted Devices, which is not listed in the Annex to the present decision.

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

A handwritten signature in black ink, appearing to read 'Cuno Tarfusser', written over a horizontal line.

Judge Cuno Tarfusser

Single Judge

Dated this Tuesday, 26 July 2011

At The Hague, The Netherlands