



Original: English

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

Date: 4 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

**Prosecution's request for direction in respect of potentially privileged material
contained on hard drive DRC-REG-0009-0046 RED**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for the Defence

Nicholas Kaufman

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Deputy Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The Prosecution hereby informs the Chamber of the presence of potentially privileged material contained on one of the eight hard drives released to the Prosecution by the Registry on 27 July 2011. Notwithstanding the fact that the hard drive was reviewed for privilege by the Defence, the Prosecution discovered at least three emails that appear to be attorney-client communications. Accordingly, and despite that the Defence has presumably approved access to the contents of the materials contained therein, the Prosecution suspended its review of the contents of this drive, unwilling to assume a waiver of privilege or to assume that a document that has apparent *indiciae* of privilege is in fact not privileged. However, this precaution has meant that, despite the Prosecution's best efforts, it now is not possible to use any evidence from that drive in the confirmation hearing.
2. Accordingly, the Prosecution requests that the Defence be ordered to inspect the drive again immediately so that the Prosecution may have access to non-privileged materials by 5 August, or to confirm its previous consent to disclosure now of the drive to the Prosecution. It also requests that, if access to the drive is allowed and highly incriminating new evidence found, it be permitted to submit the evidence 15 days afterward. If the confirmation hearing has not yet concluded, it would offer the evidence at the hearing; if the hearing has concluded, it would supplement its submissions with the new evidence, and with due notice to the Defence.

II. Statement of facts

3. On 12 July 2011, the Registry reported that Carratu Ltd had retrieved data from eight faulty and encrypted hard drives (“the Hard Drives”) seized from the Suspect at the time of his arrest.¹
4. On 19 July the Single Judge of Pre-Trial Chamber I ordered the Defence “to expeditiously carry out and complete its review of the data retrieved from the Faulty and Encrypted Devices, and submit to the Chamber a list of the files contained therein over which it claims privilege [...] by Monday 25 July at the latest”.²
5. On 20 July the Defence filed a request to postpone the implementation of the above order to review the Hard Drives until after the confirmation hearing.³
6. On the same day, the Single Judge refused the Defence request for postponement, but ordered the OPCD to assist it in conducting the review.⁴ In this decision, the Single Judge noted that the contents of these Hard Drives amounted to “new evidence” as envisaged in Rule 121(5), and thus the Prosecution could potentially include such new evidence in an amended List of Evidence, to be filed no later than 15 days before the confirmation hearing.⁵
7. On 25 July the Defence informed the Chamber that it had completed the privilege review and filed a list of potentially privileged documents contained on one of the eight Hard Drives.⁶

¹ ICC-01/04-01/10-326-Conf.

² ICC-01/04-01/10-291, page 5.

³ ICC-01/04-01/10-292.

⁴ ICC-01/04-01/10-296.

⁵ *Ibid.*, pages 4 to 5.

⁶ ICC-01/04-01/10-309.

8. On 26 July the Single Judge granted the Defence's claim of privilege over the listed items and ordered the Registrar to grant the Prosecution immediate access to the remaining data on the Hard Drives.
9. On the morning of 27 July the Registry supplied the Prosecution with copies of the seven hard drives on which no privileged material had been identified by the Defence. On the same afternoon it supplied the Prosecution with a redacted copy of the remaining Hard Drive (the Relevant Hard Drive").⁷
10. The Prosecution immediately began processing the Hard Drives sequentially for relevant material by way of keyword searches, in preparation for importing the relevant files into Ringtail.
11. On 29 July the Prosecution commenced processing the Relevant Hard Drive. During this process it became apparent that, while the Relevant Hard Drive contained a substantial quantity of relevant evidential material, it also contained a number of documents that appeared to be potentially privileged. These included at least three emails between defence counsel and the Suspect which were headed "PRIVILEGED ATTORNEY CLIENT COMMUNICATON" or "ATTORNEY - CLIENT PRIVILEGE ATTACHES TO THIS CORRESPONDENCE".
12. The Prosecution immediately suspended its review and on Monday 1 August enquired from the Registry whether they had properly applied the redactions ordered by the Chamber to the Relevant Hard Drive.⁸ The Registry confirmed

⁷ DRC-REG-0009-0046 RED.

⁸ Per email dated 1 August at 12:20.

that it had.⁹ On the same day, the Prosecution then informed the Single Judge's Legal Officer by email of the discovery, on copy to the Defence. To date the Defence has not reacted to this email

13. A further privilege search of the Relevant Hard Drive has revealed over 500 files which responded to the Prosecution's privilege keywords, including 131 that responded to the term "kaufman".¹⁰

III. Submissions

14. In these circumstances, and in the absence of a clear waiver of privilege by the Suspect over documents labelled as privileged, the Prosecution considered itself duty-bound to suspend its review of the Relevant Hard Drive pending further direction from the Chamber. The result of this is that the Prosecution has been prevented from incorporating any of the new evidence contained on the Relevant Hard Drive on an amended LoE by the 15 day statutory deadline.
15. The Prosecution points out that the failure by the Defence to properly comply with the order of the Single Judge to "expeditiously carry out and complete" its privilege review of the Hard Drives has caused the Prosecution material prejudice. From the preliminary keyword search conducted on the Relevant Hard Drive, it is apparent that it contains some of the most, if not the most, relevant documents and communications relating to the material period.

⁹ Per email dated 1 August at 13:17.

¹⁰ While not all of these hits may in fact represent actual privileged documents, from the search results the Prosecution can identify a series of emails exchanges between the Suspect and his counsel comprising of three or more emails. Some of subject lines in the email exchanges refer, for instance, to "unfreezing assets and legal assistance" or "our meeting" or "confidential" or "email de contact" or "update - urgent". If these titles are accurate indications of the content, then it would appear that these may indeed be privileged communications between the Suspect and his legal counsel.

16. However, the Prosecution submits that where a confirmation hearing is set down for more than one day, Rule 121(5) does not explicitly prevent the Prosecution from filing its amended LoE 15 days before the conclusion of the hearing. Although in practice the Prosecution would normally be expected to file 15 days before the commencement of the hearing, the Prosecution submits that the Chamber has a discretion, in the interests of justice, to allow this where good cause is shown.

17. Thus, if the Defence were to properly complete its privilege review by no later than 5 August, alternatively consent to the Prosecution immediately reviewing the contents of the Relevant Hard Drive notwithstanding the presence of the potentially privileged material, then the Prosecution may still be in a position to submit its amended LoE on Monday 8 August and hence to introduce any new evidence 15 days prior to the termination of the hearing on 24 August.

IV. Relief

18. The Prosecution therefore requests that the Chamber direct the Defence immediately to confirm its consent to disclosure now of the drive to the Prosecution or to inspect the drive again and identify privileged materials contained thereon by no later than 16:00 on Friday 5 August, so that the Prosecution may have access to non-privileged materials by 8 August.

19. The Prosecution also requests leave to submit new incriminating evidence, should it be found, once access to the drive is allowed. If the evidence is found 15 or more days before the end of the confirmation proceeding, the

Prosecution would file an amended LoE and offer it at the hearing. If the evidence is not found in time to meet the requirement in Rule 121(5), the Prosecution requests leave to supplement its submissions with the new evidence after conclusion of the hearing, with due notice to the Defence.



Luis Moreno-Ocampo,
Prosecutor

Dated this 4th day of August 2011

At The Hague, Netherlands