

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 15 April 2011

PRE-TRIAL CHAMBER I

**Before: Judge Cuno Tarfusser, Presiding Judge
Judge Sylvia Steiner
Judge Sanji Mmasenono Monageng**

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public Document

Second Decision on matters regarding 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, 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**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
 Section**

Others

PRE-TRIAL CHAMBER I of the International Criminal Court (“Chamber” and “Court” respectively);

1. **NOTING** the “Decision on the ‘Prosecution’s request for a review of potentially privileged material’” dated 4 March 2011 (“First Decision on Potentially Privileged Material”)¹, whereby the Chamber *inter alia* orders the Registry to conduct a search on some of the material seized at the premises of Mr Callixte Mbarushimana upon his arrest “based on the keywords provided by the Defence and the Prosecutor and approved by the Chamber”, as well as “to provide the Chamber with a list of documents which the said search would produce”, no later than 16 March 2011;

2. **NOTING** the “Request for extension of time with respect to the Chamber’s decision of 4 March 2011” dated 9 March 2011², whereby the Registry submits that the timeframe proposed in the First Decision on Potentially Privileged Material for processing the relevant seized material and report back to the Chamber is not technically feasible and, accordingly, requests an extension of the time-limit;

3. **NOTING** the “Decision on the Registry’s request for extension of time and on other matters regarding the review of potentially privileged material” dated 16 March 2011³, whereby the Single Judge *inter alia* orders the Registry to provide the Chamber with a list of documents produced by the keyword search, as well as with a report on the progress made, including an estimate of the time which would be required to complete the task, no later than 1 April 2011, which deadline was extended to 8 April 2011 by the “Decision on the keywords provided by the Defence for the purpose of selection of potentially privileged material” dated 30 March 2011 (“30 March 2011 Decision”)⁴;

4. **NOTING** the “Registry Report” dated 8 April 2011, filed as confidential⁵, and the confidential *ex parte* Defence and Registry Annex thereto⁶, whereby the Registry (i) submits that it has performed the keyword search on the basis of the keywords submitted

¹ ICC-01/04-01/10-67.

² ICC-01/04-01/10-70.

³ ICC-01/04-01/10-80.

⁴ ICC-01/04-01/10-88+Conf-Exp-Anx.

⁵ ICC-01/04-01/10-95-Conf.

⁶ ICC-01/04-01/10-95-Conf-Exp-Anx.

by the Defence and approved by the Chamber only on one hard drive seized at the premises of Mr Callixte Mbarushimana, and that the said search has produced a number of files including hits on one or more keywords, as detailed in the Annex; (ii) notes that the search based on keywords submitted by the Prosecutor is estimated to be finalized by Monday, 11 April 2011; (iii) indicates that it is unable to provide a reliable time estimate for the further filtering and reviewing of the selected files, in accordance with the instructions given by the Chamber in the Annex to its 30 March 2011 Decision; (iv) maintains that preparing copies of the selected files only, with a view to their transmission to the Defence, or preparing copies of the files other than the selected files, with a view to their transmission to the Prosecutor, will take “an inordinate amount of time” and (v) suggests that, accordingly, the Defence be provided with a list of the selected files in addition to the copy of all the non-faulty and unprotected devices;

5. **NOTING** the “Addendum to the Registry Report” dated 11 April 2011, filed as confidential⁷, and the two confidential ex parte Defence and Registry Annexes thereto⁸, whereby the Registry (i) submits a detailed report with respect to the results of the search based on the keywords submitted by the Prosecutor; (ii) requests guidance as to whether the Prosecution keywords “should be subjected [...] to further restrictions in reviewing the selected files”; (iii) informs the Chamber that the Registry is in a position to provide the Defence with a copy of all the non-faulty and unprotected devices in two formats: either “a) a so-called ‘Encase copy’, forensically sound, where all files are copied from the original hard drives, without [the] possibility to delete nor alter the content”, which, however, could only be searched using “a specific software”; or “b) an export of all the files included in the original hard drive, in a format which is easy to access and therefore search without additional software, however with [the] possibility to delete or alter the content”; (iv) further informs the Chamber that with respect to the keyword search conducted on the basis of the Defence keywords, a number of French words have been spelt by the Defence without accents and the search has been performed on this basis;

⁷ ICC-01/04-01/10-98-Conf.

⁸ ICC-01/04-01/10-98-Conf-Anx1 and ICC-01/04-01/10-98-Conf-Exp-Anx2.

6. **NOTING** regulation 23*bis* of the Regulations of the Court, providing that any document filed and marked as “confidential” “shall state the factual and legal basis for the chosen classification”;
7. **CONSIDERING** that both the Registry Report and the Addendum to the Registry Report do not explain the reasons justifying their classification as confidential and that, whereas the Annexes to both documents do refer to information of a confidential nature, the submissions contained in the Report and in the Addendum are not of such a nature as to justify deviation from the paramount principle of the publicity of the proceedings;
8. **CONSIDERING** that, accordingly, it is appropriate to reclassify the Registry Report and the Addendum to the Registry Report as public, while retaining the confidential and confidential *ex parte* classification of the Annexes thereto;
9. **NOTING** articles 43(1), 57 and 61 of the Rome Statute, rule 73 of the Rules of Procedure and Evidence (“Rules”);
10. **CONSIDERING** that, in light of the information provided by the Registry, for reasons of a technical and operational nature it does not appear feasible for the Registry to perform the search on the relevant seized material in accordance with the instructions, method and timeframe set by the Chamber in its 30 March 2011 Decision and in the Annex thereto;
11. **CONSIDERING** that, whilst mindful of the importance to preserve the confidential nature of relevant material in accordance with the statutory provisions, the Chamber is also concerned about the need to make it feasible for the confirmation hearing to take place as scheduled;
12. **CONSIDERING** that, accordingly, the Chamber deems it appropriate to partially modify the system for review of the potentially privileged material, with a view to preserving the paramount principle of the expeditiousness of these proceedings;
13. **CONSIDERING** that, by virtue of its familiarity with the relevant seized material, the Defence is in a position to expeditiously identify the documents which it claims as privileged;

14. **CONSIDERING** as well that, in light of the technical nature of the difficulties preventing it from performing its task within a reasonable time-frame, the Registry is best placed to suggest alternative solutions which are technically feasible and can be implemented efficiently and expeditiously;

15. **CONSIDERING** therefore that a copy of “all the non-faulty and unprotected devices” included in the relevant seized material – including the one for which the keyword search has been completed - should be provided to the Defence, with a view to allowing the Defence to review the devices and identify those documents which it claims as privileged;

16. **CONSIDERING**, with regard to the technical modalities for transferring the devices to the Defence, that the Defence should be provided with copies “in a format which is easy to access and therefore search without additional software”⁹, provided that the original devices are preserved by the Registry so as to ensure their integrity;

17. **CONSIDERING** that, however, the Chamber is of the view that the carrying out of a preliminary, neutral keyword search by the Registry, and the compilation of lists of the files identified through such search, might still be useful with a view to assisting the Defence and possibly expediting the completion of its task;

18. **CONSIDERING** that this kind of neutral task is entirely consistent with the role of the Registry as an impartial organ “responsible for the non-judicial aspects of the administration and servicing of the Court”, as set forth in article 43(1) of the Statute;

19. **CONSIDERING** that, accordingly, the list of the files which have already been selected and those to be selected following the performance of the keyword search by the Registry should likewise be provided to the Defence, as soon as such lists have been compiled following completion of the search on each device;

20. **CONSIDERING**, as regards the French keywords provided by the Defence, that the search should be conducted using the correct spelling of such words, to which accents are an integral part;

⁹ ICC-01/04-01/10-98-Conf, page 5.

21. **CONSIDERING** that, in light of the technical difficulties highlighted by the Registry, it appears no longer advisable or appropriate at this stage that the Registry perform additional analysis and/or review of the material identified through the keyword search;

22. **CONSIDERING** that the review by the Defence should be completed before the relevant seized material is transmitted to the Prosecutor;

23. **CONSIDERING**, however, that there is need to ensure that having the review of the relevant material carried out by the Defence does not unduly delay the proceedings, thereby jeopardizing the chances of the Chamber holding the confirmation hearing to start on 4 July 2011, as scheduled;

FOR THESE REASONS, the Chamber

DECIDES

that the Registry Report (ICC-01/04-01/10-95-Conf) and the Addendum to the Registry Report (ICC-01/04-01/10-98-Conf) be reclassified as public;

ORDERS

the Registry

- (i) to provide, as soon as possible, the Defence with a copy of all the relevant non-faulty and unprotected devices, 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 continue performing keyword searches on the relevant seized material, and also compile lists of the files identified through such search and to finalize the search by no later than 21 April 2011;
- (iv) to immediately provide the Defence with the lists of the files identified through the keyword search which are already available;

- (v) to provide the Defence with the lists of the files which will be compiled as regards the remaining seized material as soon as the keyword searches have been completed and the lists compiled;

ORDERS

the Defence to expeditiously carry out and complete its review of the relevant seized material, and to submit to the Chamber a list of the documents on which it claims privilege under rule 73 of the Rules by no later than 6 May 2011.

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

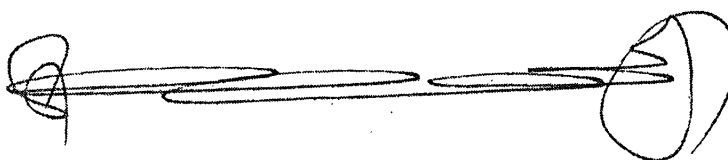


Judge Cuno Tarfusser

Presiding Judge



Judge Sylvia Steiner



Judge Sanji Mmasenono Monageng

Dated this Friday, 15 April 2011

At The Hague, The Netherlands