

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 11 May 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

**Order to the Registry to submit a report concerning the Defence submission of a list
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**

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
 Section**

Others

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 “Second Decision on matters regarding the review of potentially privileged material” (“Second Decision”) issued on 15 April 2011, whereby the Chamber, *inter alia*, (i) ordered the Registry to provide the Defence (a) as soon as possible, with a copy of all the relevant non-faulty and unprotected devices seized from the house of Callixte Mbarushimana, in an accessible and searchable format, and (b) immediately, with the lists of files already identified through the keyword search as well as with those to be compiled following the performance of the keyword search; and (ii) ordered 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 of Procedure and Evidence by no later than 6 May 2011;²

NOTING the “Registry Report on the Keyword Searches Performed on a Part of Seized Materials” filed on 21 April 2011, wherein the Registry submitted, *inter alia*, that the Registry provided the Defence with a copy of all the seized electronic materials except the faulty and encrypted devices, in two formats, and the list of selected files resulting from the keyword search;³

NOTING the “Defence implementation of the second decision on matters regarding the review of potentially privileged material” filed on 1 May 2011, wherein the Defence, *inter alia*, (i) explained the technical difficulties encountered by the Defence as well as the steps taken in the attempt to implement the Second Decision; (ii) submitted that without Mr Mbarushimana’s full assistance the Defence would not be able to conduct the search of potentially privileged material in an expeditious, efficient and effective manner; and (iii)

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

² ICC-01/04-01/10-105.

³ ICC-01/04-01/10-119 with Annexes.

requested the Chamber that Mr Mbarushimana be immediately supplied with exactly the same hardware, software and training which had been afforded the Defence representatives to date;⁴

NOTING the “Decision on the Defence Requests concerning the implementation of the Chamber’s ‘Second Decision on matters regarding the review of potentially privileged material’ dated 2 May 2001” issued on 2 May 2011 (“Decision on Implementation of the Second Decision”), whereby the Chamber ordered the Registry “to immediately supply Mr Mbarushimana ‘with exactly the same hardware, software and training which has been afforded the Defence representatives to date’ as requested by the Defence”;⁵

NOTING the “Defence submission of a list of potentially privileged material” filed on 6 May 2011, whereby the Defence (i) submitted a list of potentially privileged files and documents which it had identified on the hard drive collection seized; (ii) noted that the Defence cannot preclude the possibility that further potentially privileged material will be identified as soon as the problems with the hardware and software supplied to Mr Mbarushimana are resolved; and (iii) enumerated the relevant problems, alongside their impact on the conduct of the review of the seized material, as follows: (a) inability to access “Microsoft Office 2010”; (b) absence of the necessary software on Mr Mbarushimana’s computer required to read Email files; (c) absence of the necessary software required to open and review audio or video files; (d) absence of a printer and a USB port on the computer provided to Mr Mbarushimana; and (e) problems relating to the import of materials from the hard drive collection with the use of the FTK software;⁶

NOTING article 57(3)(b) of the Rome Statute;

CONSIDERING that the confirmation hearing is scheduled to commence on 4 July 2011;

⁴ ICC-01/04-01/10-127.

⁵ ICC-01/04-01/10-129.

⁶ ICC-01/04-01/10-137 with Annexes.

CONSIDERING that the contribution of Mr Mbarushimana is essential to the Defence's task to review the seized material and identify potentially privileged documents in an expeditious manner, as ordered by the Chamber;⁷

CONSIDERING the possibility that further potentially privileged material might exist among the seized material and, thus, be identified by the Defence;

CONSIDERING that in order for Mr Mbarushimana to provide his assistance and for the Defence to fulfil its task in accordance with the Chamber's order, it is necessary that any problems relating to the hardware and software placed at Mr Mbarushimana's disposal be resolved as soon as possible;

CONSIDERING that the observations of the Registry regarding the problems emanating from the hardware and software supplied to Mr Mbarushimana, as well as an update on the action taken with a view to resolving them, will enable the Single Judge to address, in a timely and meaningful manner, the difficulties which Mr Mbarushimana is facing, as identified by the Defence and communicated to the Registry;

FOR THESE REASONS,

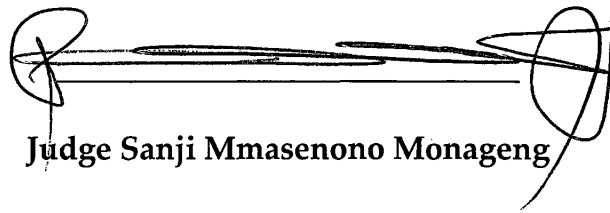
ORDER the Registry

- i. to immediately take any steps necessary to resolve the problems indicated by the Defence; and
- ii. to make observations on the action taken to address the problems encountered in relation to the hardware and software supplied to Mr Mbarushimana, and,

⁷ See Decision on Implementation of the Second Decision, where the Single Judge observed on p. 3 that "the assistance of Mr Mbarushimana is indeed critical with a view to allowing the Defence to complete its task as ordered".

accordingly, submit a report containing its observations no later than Thursday, 12 May 2011, at 1600 hours.

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

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke, positioned above the printed name of the judge.

Judge Sanji Mmasenono Monageng

Single Judge

Dated this Wednesday, 11 May 2011

At The Hague, The Netherlands