

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 15 June 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**

**with confidential *ex-parte* , Defence only, annexes 1, 3 and 4  
and confidential annex 2**

**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**

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**Registrar**

Ms. Silvana Arbia

**Deputy Registrar**

Mr. Didier Preira

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section Other**

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

**NOTING** the “Decision on the ‘Prosecution’s request for a review of potentially privileged material”<sup>1</sup>, 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”),
- (ii) requested the Prosecutor and Defence to inform the Chamber if they identify any other potentially privileged material in the Hard Copy Materials, and
- (iii) 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 “Prosecution submission of keywords and list of potentially privileged materials”<sup>2</sup>, filed on 9 March 2011, whereby the Prosecutor submitted to the Chamber *inter alia* an updated list of potentially privileged documents found in the Hard Copy Materials (“179 Documents”), which list had increased from 72 to 179 documents as a result of the implementation of a keyword search using the names of a further three legal counsel which had been identified by the Defence;

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<sup>1</sup> ICC-01/04-01/10-67.

<sup>2</sup> ICC-01/04-01/10-71.

**NOTING** the "Second Decision on matters regarding the review of potentially privileged material"<sup>3</sup>, 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,<sup>4</sup> 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 allowing the Defence to review said documents and identify those over which it claimed privilege;

**NOTING** the "Defence submission of a list of potentially privileged material",<sup>5</sup> filed by the Defence on 6 May 2011 ("First Defence Submission"), wherein the Defence submitted a list of potentially privileged files and documents for the Chamber's review;

**NOTING** the "Decision extending the deadline for the review of potentially privileged material"<sup>6</sup>, issued by the Single Judge on the 13 May 2011, whereby, in view of the technical problems which had impeded Mr. Mbarushimana's review of the Materials, the Single Judge extended the deadline for the review of privileged materials to 18 May 2011 and ordered the Registrar to grant the Prosecutor access to the Materials over which privilege is not claimed by 18 May 2011;

**NOTING** the "Third Decision on matters regarding the review of potentially privileged material"<sup>7</sup>, issued by the Chamber on 17 May 2011, whereby the Chamber ordered that the 179 Documents 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 "Second Defence submission of a list of potentially privileged material"<sup>8</sup> ("Second Defence Submission") filed on 17 May 2011, whereby the Defence submitted two

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<sup>3</sup> ICC-01/04-01/10-105.

<sup>4</sup> 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-01/4-01/10-98) and Annexes thereto (ICC-01/04-01/10-98-Conf-Anx1 and ICC-01/04-01/10-98-Conf-Exp-Anx2).

<sup>5</sup> ICC-01/04-01/10-137.

<sup>6</sup> ICC-01/04-01/10-150.

<sup>7</sup> ICC-01/04-01/10-158.

<sup>8</sup> ICC-01/04-01/10-155 with Annexes.

lists of files over which it claimed privilege under rule 73(1) and (2) of the Rules of Procedure and Evidence (“Rules”);

**NOTING** the « Soumission d’une liste de documents privilégiés suite à la décision de la Chambre Préliminaire ICC-01/04-01/10-158 »<sup>9</sup> (“Third Defence Submission”) filed on 19 May 2011 and the Corrigendum thereto<sup>10</sup> filed on 20 May 2011, whereby the Defence submitted a list of 122 documents from among the 179 Documents over which it claimed privilege under rule 73 of the Rules;

**NOTING** the “Decision on the Prosecution’s access to documents not considered to be potentially privileged and on re-classification of Defence filings”<sup>11</sup> issued by the Single Judge on 25 May 2011, whereby the Single Judge ordered that the Prosecutor be granted immediate access to those of the 179 Documents over which the Defence did not claim privilege;

**NOTING** the “Defence waiver of privilege and request to consider sanctions for misconduct”<sup>12</sup> filed on 25 May 2011, whereby the Defence waived the privilege it claimed with respect to communications between Mr. Mbarushimana and one of the members of religious clergy with whom he had communicated;

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

**CONSIDERING** that rule 73(3) of the Rules states that the Court “shall give particular regard to recognising as privileged those communications made in the context of the professional relationship between a person and his or her medical doctor [...] or between a person and a member of a religious clergy” if, in accordance with rule 73(2) of the Rules:

- (i) the Chamber decides that communications occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure,

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<sup>9</sup> ICC-01/04-01/10-165.

<sup>10</sup> ICC-01/04-01/10-165-Corr.

<sup>11</sup> ICC-01/04-01/10-185.

<sup>12</sup> ICC-01/04-01/10-183-Conf.

- (ii) confidentiality is essential to the nature and type of relationship between the person and the confidant, and
- (iii) recognition of the privilege would further the objectives of the Statute and the Rules;

**CONSIDERING** that the First Defence Submission, Second Defence Submission and Third Defence Submission (collectively “Defence Submissions”) purport to identify a number of documents as “communications made in the context of the professional relationship between a person and [...] a member of a religious clergy” within the meaning of rule 73(3) of the Rules, as well as one document which is alleged to contain “confidential medical information”<sup>13</sup>;

**CONSIDERING** that the document in question, although it contains confidential medical information, is not a communication made in the context of the professional relationship between a person and his or her medical doctor within the meaning of rule 73(3) of the Rules;

**CONSIDERING** that the Defence has waived its claim of privilege over communications between Mr. Mbarushimana and one of the members of a religious clergy with whom he communicated;

**CONSIDERING** that those communications between Mr. Mbarushimana and the member of a religious clergy over which the Defence maintains its claim of privilege under rule 73(3) of the Rules were made in the context of a relationship falling outside the scope of rule 73(3) of the Rules, given that Mr. Mbarushimana was not acting in a personal capacity, the member of the religious clergy in question was not acting as a confidant within the meaning of rule 73(2) of the Rules and the fact that he was a member of a religious clergy was incidental to the relationship;

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<sup>13</sup> ICC-01/04-01/10-165-Conf-AnxA, document no. 122.

**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, the protection which attaches to privileged communications between a lawyer and his or her client is lost in circumstances where (i) the communication was not in the context of the professional relationship between a person and his or her legal counsel (ii) the person consents in writing to disclosure of such a communication, or (iii) the person voluntarily disclosed the content of the communication to a third party and that third party then gives evidence of that disclosure;

**CONSIDERING** that the Defence Submissions purport to identify an extensive range of documents as “communications made in the context of the professional relationship between a person and his or her legal counsel” within the meaning of rule 73(1) of the Rules;

**CONSIDERING** that the documents over which the Defence claims privilege under rule 73(1) of the Rules broadly fall within three categories: (i) documents which are clearly communications made in the context of a professional relationship between a person and their lawyer, including drafts of and attachments to such communications (ii) documents which, although of a legal nature and related to various legal proceedings, are manifestly not of a kind which would attract legal privilege, for example, official and public court documents and *inter-partes* correspondence, and (iii) documents which do not ostensibly appear to be communications between a person and his or her legal counsel but which may attract privilege depending on their content and the circumstances, context or purpose of their creation or communication;

**CONSIDERING** that, if the Defence wishes to maintain its claim of privilege over documents falling in the third category, it must provide additional information as to how the content of the document or the circumstances, context or purpose of its creation or communication may give rise to privilege within the meaning of rule 73(1) of the Rules;

**CONSIDERING** that the First Defence Submission and the Second Defence Submission also claim privilege over a number of electronic files which the Chamber has encountered problems in viewing, either because they are password protected or corrupted, as well as over a number of folders, which contain a range of documents, many of which are obviously not privileged;

**CONSIDERING** that the Defence, in the Second Defence Submission, submits that whole batches of emails should be regarded as privileged where it proves technically impossible to isolate individual privileged emails from that batch;

**CONSIDERING** that the Registrar has informed the Chamber that it is currently not within the technical capability of the Registry to separate individual emails from a batch of emails;

**FOR THESE REASONS**, the Chamber

**GRANTS** the Defence claim of privilege over the documents listed in Annex 1 to the present decision;

**REJECTS** the Defence claim of privilege over the documents contained in Annex 2 to the present decision;

**ORDERS** the Defence, if it maintains its claim of privilege in relation to the documents listed in Annex 3 to the present decision, to submit, no later than 20 June 2011, in relation to each document, the following information:

- (i) a full and detailed description of the context, time and purpose of the document's creation, including whether the document is a draft and whether it was ever actually communicated or rendered public, and
- (ii) a detailed explanation as to why, in the view of the Defence, this document should be considered to attract privilege within the meaning of rule 73(1) of the Rules;



**ORDERS** the Defence, if it maintains its claim of privilege in relation to the documents listed in Annex 4 to the present decision, no later than 20 June 2011, to:

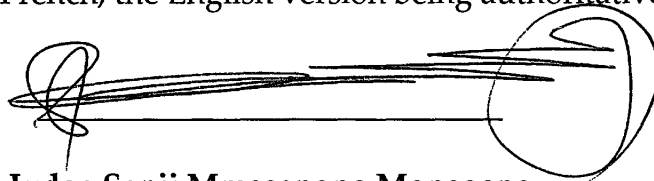
- (i) submit an explanation as to why privilege is asserted in relation to the documents which are corrupted and the documents contained in the DBX folders which the Chamber has been unable to access, including whether the Defence has actually viewed the documents in question and, if it is assumed that the document is similar or identical to another document over which privilege is claimed and which can be viewed, the details of that other document,
- (ii) provide the password to the files which are password protected so that their contents can be assessed, and
- (iii) identify the specific documents or emails within the folders over which privilege is claimed setting out the detailed information requested above where such documents do not ostensibly appear to be communications between a person and his or her legal counsel made in the context of the professional relationship between them;

**ORDERS** the Registrar to immediately grant the Prosecutor access to the documents listed in Annex 2 to the present decision, being the documents which have been found by the Chamber not to be privileged as well as those documents over which the Defence has waived its claim of privilege;

**ORDERS** the Registrar to destroy all copies of the Hard Copy Materials listed in Annex 1 and to return the originals to Mr. Mbarushimana and to preserve the confidentiality of the Electronic Materials listed in Annex 1 in accordance with their privileged status; and

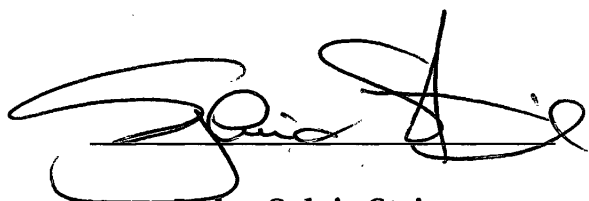
**ORDERS** the Registrar to investigate the appropriate means of separating privileged emails from a batch of emails and to report its conclusions, including an estimated timeframe for the completion of this process, to the Chamber.

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



**Judge Sanji Mmasenono Monageng**

**Presiding Judge**



**Judge Sylvia Steiner**



**Judge Cuno Tarfusser**

Dated this Wednesday, 15 June 2011

At The Hague, The Netherlands