

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 12 July 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 annex 1, annex 2 and annex 4
and confidential *ex parte* Defence only annex 3**

Second 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

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”¹, 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”), and
- (ii) 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 “Second Decision on matters regarding the review of potentially privileged material”², 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,³ 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;

¹ ICC-01/04-01/10-67.

² ICC-01/04-01/10-105.

³ 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-01/04-01/10-98) and Annexes thereto (ICC-01/04-01/10-98-Conf-Anx1 and ICC-01/04-01/10-98-Conf-Exp-Anx2).

NOTING the “Third Decision on matters regarding the review of potentially privileged material”⁴, issued by the Chamber on 17 May 2011, whereby the Chamber ordered that 179 documents, identified by means of a key-word search over the Hard Copy Materials 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 “Defence submission of a list of potentially privileged material”,⁵ filed by the Defence on 6 May 2011, the “Second Defence submission of a list of potentially privileged material”⁶ filed on 17 May 2011, and the « Soumission d’une liste de documents privilégiés suite à la décision de la Chambre Préliminaire ICC-01/04-01/10-158 »⁷ filed on 19 May 2011 and the Corrigendum thereto⁸ filed on 20 May 2011, whereby the Defence submitted lists of documents and files over which it claimed privilege under rule 73 of the Rules of Procedure and Evidence (“Rules”);

NOTING the “Decision on the review of potentially privileged material”⁹ issued by the Chamber on 15 June 2011 (“First Review Decision”), whereby the Chamber *inter alia* ordered the Defence, if it maintained its claim of privilege over certain documents and files, to submit to the Chamber a more detailed explanation of why privilege is asserted over those documents and files;

NOTING the “Defence compliance with Pre-Trial Chamber I’s decision: ICC-01/04-01/10-237”¹⁰ filed on 22 June 2011 (“Defence Submission”), whereby the Defence submitted a list of documents and files over which it maintained its claim of privilege and provided a more detailed explanation of the reasons for its assertion that these particular documents and files were thought to be privileged;

⁴ ICC-01/04-01/10-158.

⁵ ICC-01/04-01/10-137.

⁶ ICC-01/04-01/10-155 with Annexes.

⁷ ICC-01/04-01/10-165.

⁸ ICC-01/04-01/10-165-Corr.

⁹ ICC-01/04-01/10-237.

¹⁰ ICC-01/04-01/10-244.

NOTING the “Prosecution’s request for reclassification of annexes to the “Decision on the review of potentially privileged documents””¹¹ filed on 17 June 2011, wherein the Prosecutor submitted that the annexes to the First Review Decision should be reclassified as confidential in order to “enable the Prosecution to exercise its legitimate interest in reviewing all relevant evidence except materials legitimately protected by privilege” (“Prosecution’s First Request for Reclassification”);

NOTING the “Defence response to Prosecution filing: ICC-01/04-01/10-238” filed on 24 June 2011¹² wherein the Defence objected to the reclassification of the annexes to the First Review Decision and requested that the Prosecutor be ordered to destroy materials in its possession which had been found to be privileged;

NOTING the “Prosecution’s request for reclassification of the annexes to the “Defence compliance with Pre-Trial Chamber I decision: ICC-01/04-01/10-237”” filed on 28 June 2011, whereby the Prosecutor requested the reclassification as confidential of the annexes to the Defence Submission so that the Prosecutor could exercise his right to make submissions thereon if necessary (“Prosecution’s Second Request for Reclassification”);¹³

NOTING the “Defence response to Prosecution filing: ICC-01/04-01/10-254”¹⁴ filed on 29 June 2011, wherein the Defence objected to the reclassification of the annexes to the Defence Submission and reiterated its request that the Prosecutor be ordered to destroy materials in its possession which had been found to be privileged in the First Review Decision;

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

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”;

¹¹ ICC-01/04-01/10-238.

¹² ICC-01/04-01/10-250.

¹³ ICC-01/04-01/10-254.

¹⁴ ICC-01/04-01/10-257.

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 privilege is lost in circumstances where (i) the person consents in writing to disclosure of such a communication, or (ii) 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 was instructed to provide further information in relation to each document or file listed in Annex 3 to the First Review Decision, if it maintained its claim of privilege in relation to those documents or files;

CONSIDERING that the Defence Submission maintained Mr. Mbarushimana's claim of privilege over a number of documents and files falling into the following five broad categories:

- (i) Documents setting out factual and background information which were prepared for use in the defence of Mr. Mbarushimana in criminal legal proceedings against him;
- (ii) Draft correspondence prepared by Mr. Mbarushimana's lawyers which were sent to Mr. Mbarushimana for the purpose of obtaining his observations thereon but never ultimately communicated to a third party or made public;
- (iii) Draft legal submissions prepared by Mr. Mbarushimana's lawyer, which were not communicated other than to Mr. Mbarushimana;
- (iv) Communications between Mr. Mbarushimana and his lawyers in the context of proceedings against Mr. Mbarushimana and two other defendants; and
- (v) Communications which were *inter-partes* correspondence in the context of a legal dispute;

CONSIDERING that, the content of the documents falling into the first three categories set out above is such that, were these documents or 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, in light of the explanation provided in the Defence Submission, the Single Judge is satisfied that the documents mentioned in category 4 are in fact communications made in the context of the professional relationship between Mr. Mbarushimana and his legal counsel;

CONSIDERING, therefore, that the first four categories of documents and files are to be regarded as privileged within the meaning of rule 73(1) of the Rules;

CONSIDERING that the final category of documents, being *inter-partes* correspondence, does not fall within the meaning of rule 73(1) of the Rules;

CONSIDERING that the Defence was instructed to provide further information in relation to the corrupted and password protected files listed in Annex 4 to the First Review Decision and to identify specific files over which it claimed privilege within a number of folders, if it maintained its claim of privilege in relation to those files;

CONSIDERING that the Defence did not identify any files within the specified folders over which it claimed privilege and is therefore presumed to have abandoned its claim of privilege over these folders;

CONSIDERING that the Defence, in its submission, indicated that it was unable to access those files which were password protected or corrupted and had claimed privilege over those files either because it presumed them to be copies of other files over which it had claimed privilege or because it could not preclude the possibility that they may contain privileged material;

CONSIDERING that the Prosecutor has provided the Chamber with a number of passwords which were deciphered by an external forensic institute when processing other files of Mr. Mbarushimana;

CONSIDERING that these passwords allow access to all but two of the files which were listed as password protected;

CONSIDERING that, in relation to the Prosecutor's requests for reclassification of the annexes to the Defence Submission and the First Review Decision, the reasoning contained in the present decision and in the First Review Decision contains the information and reasoning on which the Prosecutor may base any submissions or observations he deems necessary in relation to these documents and files and whether they should be treated as privileged;

CONSIDERING that the information contained in the annexes to both the First Review Decision and Defence Submission, which consists of file names and locations and document numbers, would not be of assistance to the Prosecutor in making submissions or observations on the Chamber's determination as to which documents or files should be treated as privileged;

CONSIDERING, in addition, that the annexes to the Defence Submission, which elaborate on the reasons for the Defence's claim of privilege in relation to each document or file, themselves contain information which would reveal the content of privileged communications;

FOR THESE REASONS,

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

REJECTS the Prosecution's First Request for Reclassification and the Prosecution's Second Request for Reclassification;

ORDERS the Prosecutor and the Defence to submit observations, no later than 13 July 2011, as to (i) whether they require an analysis of the content of the corrupted and password protected files contained in Annex 2 to the present decision to be carried out (if indeed it is possible to access or retrieve the content), and (ii) whether the retrieval or accessing of the content of these files should be carried out by the Registry or by an external forensic institute;

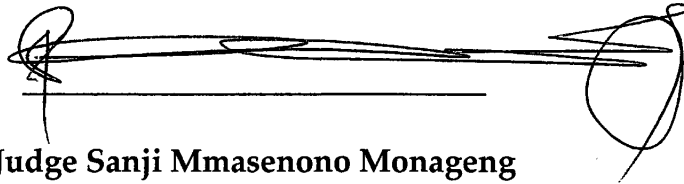
ORDERS the Defence to specifically identify, no later than 14 July 2011, which of the files contained in Annex 3, being files which were formerly password protected and are now accessible, it claims privilege over, setting out (i) a full description of the context, time and purpose of the document's 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 of the Rules;

ORDERS the Registrar to immediately grant the Prosecutor access to those Hard Copy Materials and Electronic Materials to which he has not already been granted access, with the exception of those documents and files which are listed in the Annexes to the present decision;

ORDERS the Registrar to destroy all copies of the Hard Copy Materials listed in Annex 1 to the present decision 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

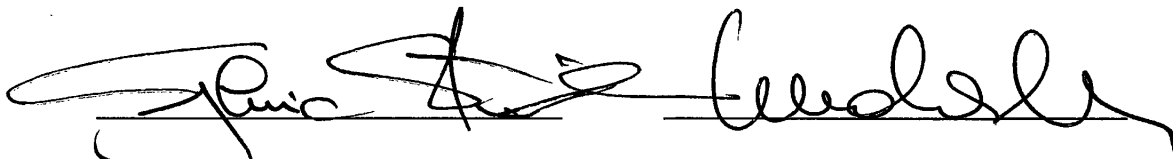
ORDERS the Prosecutor to destroy all copies in his possession of materials which have been found to be privileged as set out in Annex 1 and Annex 4 to the present decision.

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



Judge Sanji Mmasenono Monageng

Presiding Judge



Judge Sylvia Steiner Judge Cuno Tarfusser

Dated this Tuesday, 12 July 2011

At The Hague, The Netherlands