

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 5 August 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**

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

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

**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**

**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**

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*;<sup>1</sup>

NOTING the “Prosecution’s request for direction in respect of potentially privileged material contained on hard drive DRC-REG-0009-0046 RED” (“Prosecution’s Request”), filed on 4 August 2011, wherein the Prosecution, *inter alia*, (i) submits that during the processing of the information on eight hard drives to which the Prosecution was granted access,<sup>2</sup> the Prosecution identified potentially privileged material on hard drive DRC-REG-0009-0046 RED (“Hard Drive”); and (ii) requests that (a) the Defence be directed either to confirm its consent to disclosing the entirety of the information on the Hard Drive to the Prosecution or to inspect the Hard Drive again in order to identify potentially privileged material, which would allow the Prosecution to have access to the non-privileged content of the Hard Drive; and (b) the Prosecution be granted leave to submit new incriminating evidence which would potentially arise out of the review of the Hard Drive either during or after the conclusion of the confirmation hearing;<sup>3</sup>

NOTING the “Defence response to Prosecution filing: ICC-01/04-01/10-333”, filed on 5 August 2011, wherein the Defence submits that it is ready to review potentially privileged communications found on the Hard Drive and contests the Prosecution’s interpretation of rule 121(5) of the Rules of Procedure and Evidence (“Rules”) with respect to the potential submission of new evidence by the Prosecution;<sup>4</sup>

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

<sup>2</sup> “Fourth decision on the review of potentially privileged material”, ICC-01/04-01/10-314, issued by Single Judge Tarfusser on 26 July 2011.

<sup>3</sup> ICC-01/04-01/10-333.

<sup>4</sup> ICC-01/04-01/10-339.

**NOTING** the “Decision on the Prosecution’s request for the postponement of the confirmation hearing”, issued on 31 May 2011, whereby the Chamber decided to postpone the commencement of the hearing on the confirmation of the charges to 17 August 2011;<sup>5</sup>

**NOTING** articles 61(3), 64(2) of the Rome Statute and rule 121(5) and (8) of the Rules;

**CONSIDERING** that the hearing on the confirmation of the charges is scheduled to commence on 17 August 2011;

**CONSIDERING** that, pursuant to rule 121(5) of the Rules, in cases where the Prosecution intends to present new evidence at the hearing on the confirmation of the charges, the Prosecution has to provide the Chamber and the Defence with a list of the new evidence no later than 15 days before the date of the hearing;

**CONSIDERING** that “the date of the hearing” shall be understood as the date of the commencement of the confirmation hearing;

**CONSIDERING** that, in accordance with rule 121(8) of the Rules, the Chamber shall not take into consideration charges and evidence presented after the time limit, or any extension thereof, has expired;

**CONSIDERING** that such deadlines are imposed with the purpose of ensuring that the Pre-Trial Chamber and the Defence are informed of the content and scope of the evidence on which the Prosecution intends to rely at the confirmation hearing in a timely manner and within a reasonable time *before* the commencement of the confirmation hearing;

**CONSIDERING** the need to ensure the fairness and impartiality of the proceedings and safeguard in every respect the rights of the Suspect;

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<sup>5</sup> ICC-01/04-01/10-207.

**CONSIDERING** that the Prosecution has not provided cogent reasons for its alleged inability to review the content of the Hard Drive for new evidence and that there is thus no reason to consider whether the Prosecution should, exceptionally, be allowed to introduce new evidence after the statutory deadlines;

**CONSIDERING** therefore that the Prosecution's requests for directing the Defence to confirm its consent to disclosing all information on the Hard Drive, including potentially privileged material, to the Prosecution or for an order to the Defence for an additional review of the Hard Drive, are moot;

**FOR THESE REASONS,**

**REJECT** the Prosecution's Request.

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



**Judge Sanji Mmasenono Monageng**

**Single Judge**

Dated this Friday, 5 August 2011

At The Hague, The Netherlands