



Original: English

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

Date: 31 May 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 Document

**Decision on the Prosecution's request for the postponement of the confirmation
hearing**

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**

Ms Fiona McKay

Others

Pre-Trial Chamber I of the International Criminal Court (“Chamber” and “Court” respectively),

NOTING the “Warrant of Arrest for Callixte Mbarushimana” (“Arrest Warrant”), issued by the Chamber on 28 September 2010, on 11 counts of war crimes and crimes against humanity;¹

NOTING that on 11 October 2010, Mr Callixte Mbarushimana (“Mr Mbarushimana”) was arrested in France, pursuant to the Arrest Warrant;

NOTING that at the time of Mr Mbarushimana’s arrest, a number of objects, including documents, hard drives, mobile telephones and CDs, were seized at his premises (“Seized Material”), following a request from the Prosecution²;

NOTING that Mr Mbarushimana was surrendered to the Court on 25 January 2011 and is currently in custody in the Court’s detention centre in The Hague;

NOTING that at the initial appearance hearing of Mr Mbarushimana, held on 28 January 2011, the Chamber decided that the hearing on the confirmation of the charges would commence on 4 July 2011;³

NOTING the “Prosecution’s request for a review of potentially privileged material” filed on 14 February 2011, whereby the Prosecution (i) submitted that, among the material seized at the premises of Mr Mbarushimana and processed by the Registry, it had identified, by means of a keyword search, and quarantined 72 potentially privileged documents (“72 Documents”), and (ii) requested the Chamber that the 72 Documents be subjected to further screening by the Chamber or someone designated by the Chamber in

¹ ICC-01/04-01/10-2.

² “Prosecution’s Application under Article 58”, 20 August 2010, ICC-01/04-01/10-11-Red2 (public redacted version, filed on 27 January 2011), para. 202.

³ Oral Decision of the Chamber, 28 January 2011, ICC-01/04-01/10-T-I-ENG, p. 10.

order to determine whether the said documents fell within the scope of potentially privileged material;⁴

NOTING the “Decision on the ‘Prosecution’s request for a review of potentially privileged material” (“First Decision on Potentially Privileged Material”) issued on 4 March 2011, whereby the Chamber, *inter alia*, (i) decided to perform a review of the 72 Documents; (ii) ordered the Registry to conduct a search on the material originating from hard drives and other information storage devices based on the keywords to be provided by the Prosecution and the Defence and approved by the Chamber, and to make the documents that the said search would produce available to the Chamber by 16 March 2011;⁵

NOTING the “Decision on the Registry’s request for extension of time and on other matters regarding the review of potentially privileged material”, issued on 16 March 2011, whereby the Single Judge, in light of the Registry’s submission that an extension of time would be necessary for the forensic processing of the seized material, decided to modify the time limit set in the First Decision on Potentially Privileged Material and extend it to 1 April 2011;⁶

NOTING the “Decision on issues relating to disclosure” (“Decision on Disclosure”) issued on 30 March 2011, whereby the Chamber, *inter alia*, ordered the Prosecution to file in the record of the present case the Document Containing the Charges and the List of Evidence by 1 June 2011 and the Defence to file the Defence List of Evidence by 16 June 2011;⁷

NOTING the “Second Decision on matters regarding the review of potentially privileged material” (“Second Decision on Potentially Privileged Material”), issued by the Chamber

⁴ ICC-01/04-01/10-54 with Annex.

⁵ ICC-01/04-01/10-67.

⁶ ICC-01/04-01/10-80.

⁷ ICC-01/04-01/10-87.

on 15 April 2011,⁸ whereby the Chamber, *inter alia*, in light of the technical difficulties encountered by the Registry which prevented it from fulfilling its task within the time limit set by the Chamber and having considered the fact that the Defence was in a position to identify the potentially privileged material in an expeditious manner, (i) partially modified the system for review of potentially privileged material established in the First Decision on Potentially Privileged Material; (ii) ordered the Registry to complete the review of the relevant seized material by 21 April 2011 and provide the Defence with copies of all the non-faulty and unprotected devices seized at the premises of Mr Mbarushimana in an accessible and searchable format; and (iii) ordered the Defence to complete the review of the relevant seized material and submit to the Chamber a list of documents identified by the Defence as potentially privileged under rule 73 of the Rules of Procedure and Evidence (“Rules”) by 6 May 2011;

NOTING the “Decision extending the deadline for the review of potentially privileged material” issued on 13 May 2011,⁹ whereby the Single Judge, having considered that it was not feasible for the Defence to complete its review within the allotted time due to technical problems beyond its control decided, *inter alia*, to modify the time limit for the Defence to complete the review of the potentially privileged material identified on the seized hard drives and extend it to 18 May 2011;

NOTING the “Third Decision on matters regarding the review of potentially privileged material” issued on 17 May 2011, whereby the Chamber ordered the Defence to complete the review of 179 documents produced by the initial keyword search conducted by the Prosecutor and supplemented through an additional search (“179 Documents”) by 23 May 2011;¹⁰

NOTING the “Decision on the Prosecution’s access to documents not considered to be potentially privileged and on re-classification of Defence filings”, issued on 25 May 2011,

⁸ ICC-01/04-01/10-105.

⁹ ICC-01/04-01/10-150.

¹⁰ ICC-01/04-01/10-158.

whereby the Single Judge, *inter alia*, ordered that the Registry allow the Prosecution to have access to those of the 179 Documents over which the Defence did not claim privilege pursuant to rule 73 of the Rules;¹¹

NOTING the “Prosecution’s request in terms of Rule 121(7) for the postponement of the confirmation hearing to preserve the fairness of the proceedings” (“Prosecution’s Request for Postponement”) filed on 25 May 2011, wherein the Prosecution:

(i) submits that it will not be able to meet the deadline of 1 June 2011 set for the filing of the Document Containing the Charges and the List of Evidence and, accordingly, it will not be properly prepared for the confirmation of charges hearing, which would prejudice the principle of the fair conduct of the proceedings for the following reasons:

(a) it has not had sufficient time to review the part of the non-privileged material to which it obtained access only on 23 May 2011 and the relevant material was not immediately accessible due to the format of the documents;

(b) it has not been able to access the remaining electronic evidence originating from the 10 faulty or protected devices;

(c) it does not have access to further non-privileged material since such material is currently under the Chamber’s review;

(d) it has not been provided with access to the content of two hard drives and four compact disks;

(e) the analysis of the mobile telephones seized from Mr Mbarushimana has not been completed;

(ii) contends that the Prosecution’s inability to review the seized material resulting in the unavailability of the evidence within the allotted time was beyond its control;

(iii) submits that the Chamber should postpone the deadline for the disclosure of evidence and the filing of the Document Containing the Charges and the List of Evidence in the record of the case; and

¹¹ ICC-01/04-01/10-185.

(iv) requests the Chamber to set a new date for the confirmation hearing which would allow the Prosecution to review the remaining electronic material;¹²

NOTING the “Order setting a time limit for the Defence’s response to the Prosecution’s request for the postponement of the confirmation hearing”, issued on 26 May 2011, whereby the Single Judge set the deadline for the Defence’s response to the Prosecution’s Request for Postponement for 30 May 2011;¹³

NOTING the “Decision on the “Prosecution’s observations on the quotation from the Netherlands Forensic Institute regarding analysis of damaged and protected hard drives”, issued on 27 May 2011, whereby the Chamber (i) considered that the time required by the Netherlands Forensic Institute to process faulty and encrypted devices seized at the premises of Mr Mbarushimana would be too long, whereas the Institute was not willing to prioritize the Court’s request, and (ii) ordered the Registry to identify other institutes that could process those devices;¹⁴

NOTING the “Decision on the Prosecution’s request for interim relief pending the Chamber’s decision on the request for postponement”, issued on 27 May 2011,¹⁵ whereby the Single Judge, extended until 1 June 2011 the time limit for the Prosecution’s disclosure to the Defence of the names and the statements of the witnesses subject to the redactions authorised by the “Decision on the prosecution’s applications for redactions pursuant to Rule 81(2) and Rule 81(4)”¹⁶;

NOTING the “Defence response to Prosecution filing: ICC-01/04-01/10-189”, filed on 30 May 2011, wherein the Defence requests the Chamber:

¹² ICC-01/04-01/10-189.

¹³ ICC-01/04-01/10-195.

¹⁴ ICC-01/04-01/10-196-Conf.

¹⁵ ICC-01/04-01/10-200.

¹⁶ ICC-01/04-01/10-167 issued on 20 May 2011.

- (i) to reject the Prosecution's request for the postponement of the confirmation hearing and for an extension of all pending deadlines, submitting, *inter alia*, that (a) the Prosecution has had adequate time to complete the review of the non-potentially privileged material, the totality of which the Prosecution has had in its possession since 25 May 2011; (b) the Prosecution's delayed access to the seized material pertains only to the electronic evidence; (c) the Defence has not caused any delay regarding the review of potentially privileged material; or, alternatively,
- (ii) to grant the Prosecution's request for the postponement of the confirmation hearing on the condition that the Chamber find that "inexcusable delay" was caused by the Prosecution for the purpose of article 60(4) of the Rome Statute ("Statute");¹⁷

NOTING article 54(1)(a), 57(3)(c), 60(4), 61 and 67 of the Statute, as well as rules 73, 76 to 83 and 121 of the Rules;

CONSIDERING that the review of the Seized Material aimed at identifying privileged communications was delayed by various technical problems, including difficulties with acquiring software required for the process and the Netherlands Forensic Institute's unwillingness to prioritize the task of processing the faulty and encrypted devices;

CONSIDERING thus that for reasons beyond its control the Prosecution had no access to some of the hard drives seized at the premises of Mr Mbarushimana and still has no access to some others, and thus is unable to review a significant amount of material that may be relevant to its case;

CONSIDERING that the material contained on the hard drives may also contain potentially exculpatory information, and/or be material to the preparation of the defence;

¹⁷ ICC-01/04-01/10-202.

CONSIDERING that in the present case the Prosecution's ability to investigate "all facts and evidence relevant to an assessment of whether there is criminal responsibility under [the] Statute", as required by article 54(1)(a) of the Statute, as well as its duty to "support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged", as set out in article 61(5) of the Statute, have been adversely affected by events outside the Prosecution's control;

CONSIDERING, however, that any postponement of the confirmation hearing may have a bearing on the suspect's right to be tried without undue delay, as provided for in article 67(1)(c) of the Statute, and that, therefore, when deciding on a request for such postponement the Chamber must take that right into consideration;

CONSIDERING that although, in the circumstances, the confirmation hearing needs to be postponed, it should only be postponed by a short period of time, to make it possible for the Prosecution to review, to the extent possible, the remainder of the Seized Material, and that the time limits set in the Decision on Disclosure should only be modified in so far as necessary for the review of that material;

CONSIDERING that since (i) the Prosecution bears no responsibility for the above-mentioned technical problems causing the delay in the selection of privileged communications, and (ii) it was in fact the Prosecution who notified the Chamber of its discovery of copies of potentially privileged communications in the Seized Material and it did so with a view to ensuring that no such communications are subject to disclosure, the Prosecution cannot be said to have caused "inexcusable delay", within the meaning of article 60(4) of the Statute;

FOR THESE REASONS, THE CHAMBER

DECIDES to postpone the commencement of the confirmation hearing to 17 August 2011 and its end to no later than Wednesday, 24 August 2011;

DECIDES to modify the following dates set in the Decision on Disclosure:

- the filing of the Document Containing the Charges and the List of Evidence by the Prosecution: by 15 July 2011;
- the Defence permitting the Prosecution to inspect material which the Defence intends to use for the purposes of the confirmation hearing: no later than 28 July 2011;
- the Defence's notification of the Prosecution of the existence of an alibi or a ground for excluding criminal responsibility: no later than 28 July 2011;
- the filing of the Defence List of Evidence, if any: no later than 1 August 2011; and

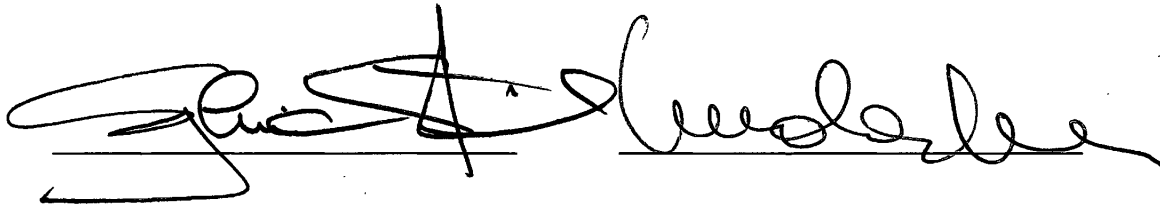
ORDERS the Victims Participation and Reparation Section to transmit to the Chamber complete applications for participation as victims in the proceedings at the pre-trial stage of the case no later than 30 June 2011.

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

A stylized signature consisting of a large, loopy initial 'S' followed by a long horizontal line that ends in a large, rounded flourish.

Judge Sanji Mmasenono Monageng

Presiding Judge

Two signatures side-by-side. The left signature is a cursive 'S' followed by a horizontal line. The right signature is a cursive 'C' followed by a horizontal line.

Judge Sylvia Steiner

Judge Cuno Tarfusser

Dated this Tuesday, 31 May 2011

At The Hague, The Netherlands