



Original: **English**

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

Date: **1 March 2011**

PRE-TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Sylvia Steiner
Judge Sanji Mmasenono Monageng

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. Callixte MBARUSHIMANA***

**Public Document with
Confidential Annexes A and B**

**Prosecution's reply to the "Defence Response to Prosecution's Request for the
Review of Potentially Privileged Material"**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Luis Moreno-Ocampo

Fatou Bensouda

Counsel for the Defence

Nicholas Kaufman

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

Xavier-Jean Keita

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Deputy Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The Defence seeks the immediate quarantine of all seized evidence and intercepted communications until the Prosecution proves the legality of the search and seizure operation and Pre-Trial Chamber I (“Chamber”) rules on the legality of the unsealing of the seized evidence. The Defence also argues that the review of potentially privileged evidence be done by the Defence; alternatively, if that proposal is rejected, it seeks review by the OPCD.

2. The Defence request should be denied. The legality of the search and seizure operation and of the unsealing of the seized materials are matters which have no bearing on the issue at hand, namely how to deal with potentially privileged documents. Nor does the Defence advance any support for the contention that the French seizure was unlawful, and its legal authorities do not establish that it was entitled to witness the unsealing of the seized evidence bags. On the issue regarding privilege, there is in fact no support for the proposition that the Defence has the authority to make unreviewable and conclusive determinations that particular evidence is privileged and cannot be seen by the Prosecution or, presumably, the Court.

3. The Prosecution further disputes the Defence allegation that French authorities ignored Callixte MBARUSHIMANA’s (“the Suspect”) invocation of privilege during the search and seizure operation. Finally, the Prosecution disputes that certain seized communications are “*prima facie* subject to religious privilege”, much less that the Defence has the right to sift through all the seized evidence and quarantine such privileged documents. The only existing *prima facie* privilege relates to “sacred confessions”. As to other communications between a person and his religious advisor, the Chamber determines whether privilege attaches. The Defence has failed to satisfy the requirements for such privilege in terms of Rule 73(2). The Prosecution submits that this determination should only be made if and when the

Prosecution tenders such material into evidence and the defence disputes its admissibility.

II. Statement of facts

4. On 14 February 2011 the Prosecution filed the Prosecution's Request for a review of potentially privileged material¹ ("Prosecution Request"). The Prosecution requested that 72 documents identified through a word search as being potentially privileged attorney-client communications be reviewed by the Chamber or a neutral third party. The Prosecution made no proposal, at that stage, for the review of evidence seized in electronic form.²
5. On 16 February the Defence transmitted to the Prosecution the names of additional lawyers who represented the Suspect in the past.³ The Prosecution ran further word searches and has now identified and quarantined a total of 179 items.
6. Counsel for the Suspect filed the Defence Response to Prosecution's Request for the Review of Potentially Privileged Material⁴ ("Defence Response") on 18 February.
7. On 23 February the Prosecution sought leave to reply to the Defence Response. On 24 February the Chamber authorised the Prosecution to reply by 1 March.⁵
8. On 25 February the Chamber ordered the Registry to withdraw the Prosecution's access to "materials seized from the house of Mr. Mbarushimana, as well as the transcripts and original recordings of

¹ Prosecution's Request for a review of potentially privileged material, 11 February 2011, ICC-01/04-01/10-54.

² Prosecution Request, paras. 12 and 9(d).

³ These are listed in footnote 11 of the Defence Response.

⁴ Defence Response to Prosecution's Request for the Review of Potentially Privileged Material, 18 February 2011, ICC-01/04-01/10-58.

⁵ Decision on the Prosecution's request for leave to reply to the "Defence Response to Prosecution's Request for the Review of Potentially Privileged Material", 25 February 2011, ICC-01/04-01/10-61. This decision was notified to the Prosecution at 16:39 that same day.

intercepted communications”, and ordered the Prosecution to “cease all dealings” with these materials pending resolution of the Prosecution Request and the Defence Response.⁶ The Prosecution returned to the Registry all copies of the evidence seized from the Suspect pursuant to the Chamber’s request for assistance to French authorities and temporarily suspended its own access to intercepted communications that it obtained from German and French authorities, including those obtained prior to the filing of the application for a warrant of arrest.

III. Submissions

The legality of the search and seizure operation

9. The Defence contends that the review of potentially privileged materials should not proceed until the legality of the search and seizure operation conducted at the Suspect’s premises is established, and that the Prosecution must prove that the search was judicially authorized and proportional to the aims of the investigation.⁷ This Chamber has previously ruled that “pursuant to rule 64(1) of the Rules an issue relating to relevance and admissibility of evidence must be raised at the time when the evidence is submitted to a Chamber”.⁸ Until then, the legality of the search has no bearing on the proceedings before the Chamber or on the Prosecution Request.
10. First, the Statute requires States Parties to execute the Court’s requests for assistance in conformity with their national law.⁹ Absent contrary indications,

⁶ Decision Temporarily Suspending Dealings with Transcripts and Original Recordings of Intercepted Communications and Materials Seized from the House of Mr. Callixte Mbarushimana, 25 February 2011, ICC-01/04-01/10-63, page 5.

⁷ Defence Response, para. 20(a).

⁸ Decision on the Defence request for Disclosure, ICC-01/04-01-10-47, 27 January 2011 at para. 16.

⁹ Article 99(1), read with Article 93. See also Article 88.

the search should be presumed lawful.¹⁰ The Defence has failed to advance any grounds to doubt the *prima facie* lawfulness of the operation. The Prosecution submits that the Defence is merely embarking on a fishing expedition.

11. The Defence claims that the seizure of “the total media content” of the Suspect’s house was overbroad.¹¹ Given the volume of material, seizure of all hard drives and other electronic media and devices was necessary, reasonable and consistent with accepted international practice. The alternative, remaining on the premises for months to examine each item and determine whether to seize or copy it, is neither practicable nor required. We note, moreover, that the Suspect asserts that “all of the electronic media are liable to contain information which at the very least is material to the conduct of the Defence and could, in certain circumstances, depending on the nature of the Prosecutor’s Charging Document, be potentially exculpatory”.¹² This assertion confirms all of the seized electronic items are likely to contain relevant evidence. Furthermore, searching the electronic media on the scene would alter the data contained thereon and taint the reliability of any evidence subsequently discovered. The only forensically sound procedure is to create exact mirror images of the electronic media, using appropriate forensic tools, and to subsequently search these copies for the relevant material. It would have been impracticable to create such copies on-site.¹³

12. Secondly, even if the search had not complied with domestic law, the evidence would be excludable only if it was obtained in violation of the Statute or

¹⁰ Should the Chamber consider it necessary to require French authorities to prove that they conducted the search in compliance with their domestic law, it may do so *proprio motu* or at the Defence’s request.

¹¹ The Defence makes no allegations of over-breadth in relation to the seized documents. Defence Response, para. 7.

¹² Defence Response, para. 22.

¹³ The Prosecution estimates that French authorities would have required approximately two hours to create forensic copies of each of the 34 seized hard drives.

internationally recognised human rights, but not if it were merely obtained in violation of domestic requirements.¹⁴

The legality of the unsealing of the bags containing the seized evidence

13. The Defence contends that the Chamber must rule on the legality of the Registry's breaking of the seals of the evidence bags containing the seized materials in the absence of the Suspect or his counsel, and argues that this determination must be made before the review of potentially privileged materials can proceed.¹⁵ In the instant matter, the Chamber authorised a protocol which provided that the Registry unseal the seized items, verify their contents and supervise the labelling and scanning of all seized documents.¹⁶ This protocol adequately safeguarded the Suspect's rights.

14. Furthermore, the Prosecution disputes that the presence of the Defence is a legal requirement. First, there is no provision for such a procedure contained in the Statute of Rules of this Court. Second, presence of counsel may be a necessary element when the process governing the breaking of the seals in and of itself does not offer sufficient safeguards. The Prosecution notes that the Defence has not explained how the process here – unsealing in the presence of the Registry -- was inadequate or why the absence of the Defence prejudiced the Suspect.

15. The Defence also contends that breaking the seals in the presence of the suspect is an “established principle” confirmed by the ICTR decision in the

¹⁴ See Article 69(7) and (8); also *Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803-tEN, paras. 85-90 and *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on the admission of material from the “bar table”, 24 June 2009, ICC-01/04-01/06-1981, paras. 46-48.

¹⁵ Defence Response, paras 5, 8 and 11.

¹⁶ Enregistrement au dossier de l'affaire du protocole d'ouverture des scellés et de l'inventaire des biens saisis au domicile et sur le lieu de travail de Callixte Mbarushimana, ICC-01/04-01/10-24-Conf, 17 November 2010, pages 3 and 4 and ICC-01/04-01/10-24-Conf-Anx, page 3, para. 2.

Nziorera case,¹⁷ and that failing to do so “constitutes a serious breach of accepted procedure under international law.”¹⁸ This assertion is incorrect. In *Nziorera*, the Prosecution proposed to the Trial Chamber that the Accused and his counsel be present while seized evidence was unsealed,¹⁹ because no inventory had been made when the evidence was seized.²⁰ The Trial Chamber accordingly agreed. But by the time the Chamber issued its order, the seals had already been broken. The Chamber characterized this as “unfortunate” but explained that “it was not shown to have caused prejudice to the Accused”.²¹

The procedure to be adopted for the review of privileged material allegedly contained in the seized evidence and in the intercepted communications

16. The Defence requests that the filtering of privileged materials be entrusted exclusively to the Defence and that its determination of privilege be unreviewed and conclusive.²² In the alternative, the Defence requests that OPCD conduct the review.²³ The Defence further asks that the Prosecution be deprived of access to all seized evidence and intercepted communications until this process is completed.

17. The Defence bases its proposal that the Defence filter the seized evidence for privilege unsupervised on “precedent” established by the ICTY Appeals

¹⁷ Defence Response, footnote 6, quoting *Prosecutor v. Nziorera*, ICTR-98-44-T, Decision on the Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting the Return of Personal Items Seized, 7 September 2000.

¹⁸ Defence Response, para. 8. The Defence, however, fails to provide any other authority besides the *Nziorera* case that this is an “accepted procedure under international law”.

¹⁹ *Prosecutor v. Joseph Nziorera*, ICTR-98-44-T, Transcript, 2 June 2000, p. 29, lines 15 – 18.

²⁰ *Prosecutor v. Joseph Nziorera et al*, ICTR-98-44-T, Decision on the Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting the Return of Personal Items Seized, 7 September 2000, para. 30.

²¹ *Prosecutor v. Joseph Nziorera et al*, ICTR-98-44-T, Decision on Defence third motion for return of property and sanctions for violations of a Court order, 13 October 2003, para. 23, as quoted in Defence Response at footnote 7.

²² Defence Response, para 20 c).

²³ Defence Response, para 20 d).

Chamber in the *Gotovina* case.²⁴ That decision is hardly precedent for such a proposal even in that tribunal.

18. In that case, the material which the Defence was permitted to review by the Trial Chamber had been seized from members of the Defence team, not from the Suspect, a critical distinction. Because the materials had been seized from the legal defence team, the Trial Chamber allowed the Defence access to the seized documents in order to identify what it considered to be privileged material. Thereafter the Accused and Croatia (which had seized the materials) were directed to agree as to which items were and were not protected. In the event of a dispute, the documents were referred to an “independent body” established by the President.²⁵ *Gotovina* contended that the Chamber, and not the independent body, should resolve the dispute on privilege.²⁶ Notably, however, the Defence did not contend, nor did the Appeals Chamber hold, that the *Defence* would be the sole arbiter of privilege. Indeed, the Appeals Chamber the *Gotovina* case expressed no view at all on the “stripping of an accused of his right to inspect the seized information”, contrary to the contention in the Defence Response.²⁷ The rationale for the decision was rather the fact that the Chamber had acted *ultra vires* the ICTY basic documents.²⁸

19. In the instant matter, the Prosecution did not request the Chamber, far less the Presidency, to establish an “independent body” to review the evidence. Rather, the Prosecution requested the Chamber to “authorize the Prosecution, alone or in cooperation with the Defence, to designate the OPCD or an outside practitioner to screen the seized materials, identify the privileged items, and report its recommendations to the Chamber”. Thus, the Chamber will retain

²⁴ *Prosecutor v. Ante Gotovina et al*, IT-06-90-AR73.5, Decision on Gotovina Defence Appeal on 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, 14 February 2011.

²⁵ *Ibid.*, para. 62.

²⁶ *Ibid.*, para. 66. The Appeal Chamber, however, decided the issue on a different basis and did not rule on this point.

²⁷ Defence Response, para. 16.

²⁸ *Prosecutor v. Ante Gotovina et al*, IT-06-90-AR73.5, Decision on Gotovina Defence Appeal on 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, 14 February 2011, para. 69.

control of the process and, in the event of a dispute, the Prosecution submits that the Chamber has the authority to make such an order on the strength of Article 64(6)(f).

20. The Prosecution further submits that to allow the Defence to be the sole arbiter of what it considers should be excluded from the evidence on the basis of privilege would not be consistent with fairness, any more than allowing the Prosecution to do so would be. Regardless of Counsel's obligations in terms of the ICC Code of Professional Conduct, such a decision would conflict with the basic tenet of justice that no one may be a judge in his/her own cause. Nor would such a process be consistent with the need to conduct proceedings expeditiously. Depriving the Prosecution of access to all seized material and intercepted communications whilst the Defence conducts such review at its leisure would inevitably result in substantial delay in both the disclosure process and the Prosecution's preparation for confirmation hearing.²⁹

21. Turning to the issue of who, then, should conduct the privilege review, the Prosecution disputes the Defence assertion that the Suspect would be prejudiced if the Chamber conducted the review. The only justification advanced for this proposition is that the Chamber could "be prejudicially swayed into not ordering interim release"³⁰ should it have sight of privileged materials. But this Court's judges must be presumed to be impartial.³¹ The jurisprudence of the other international tribunals is unequivocal on this point:

²⁹ In this regard it should be noted that the volume of materials that the Defence proposes to review is enormous. The seized documents comprise over 27 000 pages. The precise volume of the electronic data seized is not yet determined. However, the media seized has a combined theoretical capacity of over 1,2 Terabytes of data, or the theoretical equivalent of in the order of 50 million pages of processed word text. Even if the actual data contained on the media is only 1% of this theoretical capacity, it would still be practically impossible to conduct an item by item privilege review. The German intercepted communications comprise over 5000 recordings, transcripts and associated files and the French material comprises over 900 intercepted communications. The Defence has not given any indication as to how they propose to conduct their proposed privilege review of this volume of evidence.

³⁰ Defence Response, para. 13.

³¹ *Prosecutor v. Jean-Paul Akayesu*, Appeal Judgment, ICTR-96-4-A, 1 June 2001, para. 269; *Prosecutor v. Furundzija* Appeal Judgment, ICTY- IT-95-17/1-A, 21 July 2000, para. 196; *Prosecutor v. Delalic*, Appeals Judgment, IT-96-21-A, 20 February 2001, para. 683 and 697.

“it is assumed, in the absence of evidence to the contrary, that by virtue of their training and experience, judges will rule fairly on the issues before them, relying solely and exclusively on the evidence adduced in the particular case.”³²

22. Moreover, the Chamber will rule on issues of disclosure,³³ which would include a determination on whether material is exempt from disclosure by reason of legal privilege, as provided in Rule 73(1). It also has the responsibility of ensuring that the proceedings are both fair and expeditious and conducted with full respect for the rights of the accused.³⁴ In all the circumstances, the Chamber must inspect disputed material in order to make a determination, and can be expected to do so without thereafter facing accusations of bias because it has been exposed to materials that it determines are not admissible.

23. However, the Prosecution submits that it is neither necessary nor practical for the Chamber to review all the seized material and/or intercepted communications for privilege. It is submitted that the Prosecution’s proposal to pre-identify potentially privileged material by means of an appropriate word search and refer only responsive documents for review satisfies the requirements of fairness, expeditiousness and the protection of the rights of the Suspect, for the following reasons:

- a. The searches are conducted according to objective criteria, and the Defence is free to identify the relevant details of all legal representatives of the Suspect in addition to those already used by the Prosecution;
- b. The word searches are conducted automatically and without reference to the contents of the documents;

³² *Prosecutor v. Jean-Paul Akayesu*, Appeal Judgment, ICTR-96-4-A, 1 June 2001, para. 269.

³³ See Article 61(3)

³⁴ Article 64(2).

- c. These word searches are the only practicable means of identifying the potentially privileged documents in such a large volume of evidence;
- d. The Defence will be provided with copies of all seized materials and intercepted communications and will be in a position to confirm whether or not all privileged materials have in fact been identified and subjected to review;
- e. The whole process will ultimately be subject to the determination of the Chamber, in the event of a dispute.

24. The Defence disputes that the key word search would successfully filter out all potentially privileged material.³⁵ Bearing in mind that the privilege envisaged in Rule 73(1) relates to communications made in the course of the professional relationship between a person and his or her legal counsel, it would be very unlikely that such a document would not bear the name of the counsel or their contact details. The Prosecution has already directed a request to the defence to provide a list of legal counsel who have represented the suspect. Although the Prosecution disputes that it is necessary to screen the seized material for communications with Roman Catholic priests,³⁶ there is no reason why this cannot also be done by way of a word search, should the Chamber so order.³⁷

25. Although the Prosecution filing on privilege dealt only with the seized documents, the Prosecution submits that the electronic media may be dealt with in the same manner.

26. As regards the German intercepted communications, there is no question of involving any material which is privileged vis-à-vis the Suspect. These are not intercepts of the Suspect's communications, but rather those of two FDLR members resident in Germany. The Suspect is not even a party to the vast

³⁵ Defence Response paras. 11 and 12.

³⁶ See paras. 31 to 33 below.

³⁷ Such a search would be further facilitated by the provision of the contact details (telephone, email etc) of the priests.

majority of these communications. Furthermore, neither of the FDLR members is the Suspect's legal counsel. Finally, the communications were disclosed to the Defence in full on 2 February 2011 and the Defence has not identified any privileged communications. There is accordingly no reason why the materials ought to be quarantined or subject to any further privilege review.

27. As far as the French intercepted communications are concerned, the Prosecution specifically informed the French authorities that the Suspect was legally represented and asked that they refrain from intercepting or transmitting any privileged communications. Those authorities confirmed that French law does not permit them to transcribe conversations between a lawyer and a client and that they would not provide recordings of any conversations that appeared to be privileged.

28. The Prosecution has conducted a preliminary review of the transcripts. There are no identifiable transcripts of privileged communications. The actual recordings have not yet been reviewed and are still in the custody of the IEU. These are currently quarantined pursuant to the order of the Single Judge.³⁸ The Prosecution proposes, however, that these recordings would separately be screened for privilege, if it is possible to do so, on the basis of the contact details of the Suspect's legal representatives.

Purported refusal by French authorities to respect the Suspect's privilege

29. The Defence contends that the French authorities refused the Suspect's request to filter out certain privileged materials during the search.³⁹ It contends that this request was made in the presence of a Prosecution investigator.⁴⁰ The

³⁸ ICC-01/04-01/10-63.

³⁹ Defence Response, paras. 3 and 7. The Defence has never previously complained in a hearing or filing in this Court or in the French proceedings that the searching officers ignored his invocation of privilege as to any documents.

⁴⁰ Ibid.

Prosecution did not “confirm” these allegations.⁴¹ On the contrary, it denied them, in an email to the Defence on Friday 18 February.⁴²

30. The Prosecution in particular disputes that the Suspect voiced any protestations. The Prosecution investigator on the scene, in an attached declaration⁴³, confirms that the Suspect never voiced any such protest to him, or, to the best of his knowledge, to the French Authorities.⁴⁴ Furthermore, he confirms that a *procès-verbal* prepared by the French authorities contains a contemporaneous record of the fact that, at the instance of those conducting the search, certain documents identified by the Suspect as privileged were in fact filtered out.⁴⁵

The alleged existence of material claimed to be subject to “religious privilege”

31. The Defence alleges that the seized materials include “confidential correspondence” between the Suspect and a number of Roman Catholic priests.

32. The Defence alleges that this correspondence is *prima facie* subject to religious privilege.⁴⁶ The Prosecution disagrees. In terms of Rule 73(3), only communications which take place “in the context of a sacred confession where it is an integral part of the practice of that religion” are automatically considered to be privileged.⁴⁷ The Defence has not asserted that the clergymen were the Suspect’s confessors; neither do the circumstances of this case support this.⁴⁸ Therefore, the Prosecution submits that, before such communications can be said to be privileged, the Defence must satisfy the

⁴¹ See Defence Response, footnote 2.

⁴² It is noted, however, that this email was sent shortly after the Defence filed its Response.

⁴³ See a declaration by a Prosecution investigator who saw the said *procès-verbal* attached as Confidential Annex A.

⁴⁴ See Annex A. The Prosecution asked French authorities to transmit the *procès-verbal*.

⁴⁵ See Annex B.

⁴⁶ Defence Response, para 12.

⁴⁷ Rule 73(3).

⁴⁸ It is a notorious fact that sacred confessions in the Catholic Church traditionally take place in person and at church, not via email.

Chamber as to the existence of the three requirements set out in Rule 73(2), which it has not done.

33. The Prosecution further notes that the circumstances of this case suggest that the communications with the relevant priests are not confessions on behalf of the Suspect or otherwise covered by religious privilege. One of the priests mentioned, Don Matteo Zuppi, is a representative of Sant'Egidio, a religious community based in Rome, Italy. The community has been involved in peace mediation efforts in Africa, and in particular in the Great Lakes region. For example, in March 2005 Sant'Egidio facilitated a meeting between the transitional Government of the DRC and the FDLR leadership in Rome. As a representative of Sant'Egidio, Don Matteo Zuppi has been actively involved in negotiations about the voluntary disarmament of Rwandan armed groups in the DRC, including the FDLR. Correspondence in this context between Don Matteo Zuppi and the FDLR leadership, including Callixte MBARUSHIMANA, would thus fall clearly outside the bounds of religious privilege.

IV. Relief sought

34. The Prosecution requests the Chamber to
- a. deny the relief sought at paragraph 20 of the Defence Response;
 - b. order the Defence to immediately provide a comprehensive list of names and/or identifying information of all persons in respect of whom the Suspect claims privilege;
 - c. allow the Prosecution to conduct further word searches based on these details to identify potentially privileged documents for review;
 - d. direct the OPCD or an independent third party appointed by the Prosecution, or the Prosecution and Defence, to review all such

potentially privileged material and report to the Chamber on its findings; and

- e. direct that, in the event of a dispute between the parties as to the correctness of the findings, that the matter of privilege be finally determined by the Single Judge.

The Prosecution also requests that the Chamber restore the Prosecution's access to all seized documents and intercepted communications that do not respond to keyword searches as soon as possible, in order to prevent delays and to permit timely disclosure, investigation and preparation for upcoming confirmation proceeding.



Luis Moreno-Ocampo
Prosecutor

Dated this 1st day of March 2011

At The Hague, The Netherlands