

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 4 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***

Urgent Public Document

Decision on the "Prosecution's request for a 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, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Mr Nicholas Kaufman

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 Others**

PRE-TRIAL CHAMBER I of the International Criminal Court (“Chamber” and “Court” respectively), in the case of *The Prosecutor v. Callixte Mbarushimana*;

NOTING the “Prosecution’s request for a review of potentially privileged material” (“Prosecution Request”),¹ filed on 14 February 2011, whereby the Prosecutor submits that he identified in the material seized (“Seized Material”) at the premises of Mr Callixte Mbarushimana (“Mr Mbarushimana”) and already processed by the Registry, potentially privileged communications (“72 Documents”), which he thereafter quarantined; the Prosecutor requests that these documents be screened, either by the Chamber or someone designated by the Chamber, in order to determine whether they are in fact privileged;

NOTING the “Defence Response to Prosecution’s Request for the Review of Potentially Privileged Material” (“Defence Response”),² filed on 18 February 2011, whereby the Defence:

(a) submits:

- i. that the arresting authorities ignored Mr Mbarushimana’s demands to filter out privileged information from the materials seized;³ and
- ii. that there is no guarantee that the keyword search succeeded in filtering out all potentially privileged information, such as, for example, the confidential correspondence between Mr Mbarushimana and a number of Roman Catholic priests;⁴

(b) requests that all of the Seized Material, as well as the transcripts and original recordings of intercepted communications, be quarantined pending the following procedural steps:

¹ ICC-01/04-01/10-54.

² ICC-01/04-01/10-58.

³ Defence Response, para. 3.

⁴ Defence Response, para. 12.

- i. proof by the Prosecutor that the search of Mr Mbarushimana's premises was judicially authorised and that the search warrant was drafted in a sufficiently stringent manner;
- ii. a ruling as to the legality of the Registry's breaking of the seals; and
- iii. a review of the Seized Material and the said intercepted communications by the Defence Counsel and/or his appointed representative (and failing which and in the alternative, the Office of Public Counsel for the Defence ("OPCD") should be appointed to conduct the review) in order that privileged information could be removed at the discretion of the Defence;⁵ and

NOTING the "Decision Temporarily Suspending Dealings with Transcripts and Original Recordings of Intercepted Communications and Materials Seized from the House of Mr. Callixte Mbarushimana",⁶ issued on 25 February 2011 ("Interim Decision"), whereby the Single Judge (i) ordered the Registry to withdraw the access by the Prosecutor to, *inter alia*, any of the Seized Material, and (ii) ordered the Prosecutor to cease all dealings with these materials and to quarantine them pending resolution of the issues raised in the Prosecution Request and the Defence Response;

NOTING the "Prosecution's reply to the "Defence Response to Prosecution's Request for the Review of Potentially Privileged Material""⁷ ("Prosecution Reply"),⁸ filed on 1 March 2011, whereby the Prosecutor

(a) requests the Chamber to

- i. deny the relief sought by the Defence in its Response;

⁵ Defence Response, para. 20.

⁶ ICC-01/04-01/10-63.

⁷ Leave to reply was granted by the Single Judge on 24 February 2011 in the "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"", ICC-01/04-01/10-61.

⁸ ICC-01/04-01/10-66.

- ii. order the Defence to provide a comprehensive list of names and/or identifying information of all persons in respect of whom Mr Mbarushimana claims privilege and allow the Prosecutor to conduct further searches based on these details;
- iii. direct the OPCD or an independent third party to review all potentially privileged material and report to the Chamber on its findings;
- iv. direct that, in the event of a dispute between the parties, the matter of privilege be determined by the Single Judge; and
- v. restore the Prosecutor's access to all Seized Material and intercepted communications that do not respond to keyword searches as soon as possible;⁹ and

(b) disputes

- i. that the French authorities refused Mr Mbarushimana's request to filter out certain materials during the search,¹⁰ and
- ii. that the correspondence between Mr Mbarushimana and a number of Roman Catholic priests is *prima facie* subject to religious privilege because it was neither asserted by the Defence, nor do the circumstances of the case support the view, that the communications in issue took place "in the context of a sacred confession" in terms of rule 73(3) of the Rules of the Court ("Rules");¹¹

NOTING articles 55, 57, 67 and 69(5) of the Rome Statute ("Statute") and rules 73 and 121(1) of the Rules;

CONSIDERING that, pursuant to article 69(5) of the Statute, the Court shall respect and observe privileges on confidentiality and that rule 73 of the Rules provides that privileged communications made in the context of certain specified relationships are not to be subject to disclosure;

⁹ Prosecution Reply, para. 34.

¹⁰ Prosecution Reply, paras 29, 30.

¹¹ Prosecution Reply, para. 32.

CONSIDERING the right of the suspect to communicate freely with Counsel of their choosing in confidence, pursuant to article 67(1)(b) of the Statute and rule 121(1) of the Rules;

CONSIDERING that, consistently with articles 55, 57 and 67 of the Statute and rule 121(1) of the Rules, the Chamber has a responsibility for the protection of the rights of the suspect¹² and it is therefore its duty to ensure that privileged communications of Mr Mbarushimana are not disclosed to the Prosecutor;

CONSIDERING that in order to enable the Prosecutor and members of his Office to continue the reviewing of the Seized Material without them gaining access to privileged communications, it is of importance that such communications be excluded from the material subject to the Prosecutor's review;

CONSIDERING that in order to exclude privileged communications from the material that has already been provided to the Prosecutor, the 72 Documents must be reviewed to determine whether or not they are privileged within the meaning of rule 73 of the Rules;

CONSIDERING that no provision of the Statute, the Rules and the Regulations of the Court precludes the Chamber from reviewing documents for the purpose of determining whether they are privileged under rule 73 of the Rules;

CONSIDERING, on the contrary, that there are provisions in the Statute that give specific powers to the Chamber to assess evidence and determine its admissibility (article 69(4) of the Statute) and its potential exculpatory nature (article 67(2)) without envisaging that, regardless of the outcome of such assessment, this could lead to the disqualification of the judges on grounds of bias;

¹² "Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings", ICC-01/04-01/10-51, 31 January 2011, para. 6; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga", ICC-01/04-01/07-330, 18 March 2008, p. 8.

CONSIDERING therefore that the mere fact that the Chamber has reviewed, for the specific purpose of determining whether the privilege set out in rule 73 of the Rules applies, communications between the suspect and his or her defence counsel, or other persons referred to in rule 73, in no way leads to bias and does not preclude the Chamber from further conducting the pre-trial proceedings and ultimately deciding on whether or not the charges against that suspect should be confirmed, as in its future decisions the Chamber will not take into consideration the content of the documents found to be privileged;¹³

CONSIDERING therefore that the Chamber is empowered to conduct a review of communications between a person and his or her legal counsel, or other persons referred to in rule 73, in order to assess whether or not they are privileged in accordance with rule 73 of the Rules;

CONSIDERING that the Chamber's review of such documents shall be limited to what is relevant and necessary to a determination of whether or not they are privileged;

CONSIDERING that the 72 Documents identified by the Prosecutor as potentially privileged shall be reviewed by the Chamber;

CONSIDERING that the remainder of that part of the Seized Material which has already been processed by the Registry, has been made available to the Prosecutor and the Defence and that, therefore, the Chamber does not need to review these documents unless one of the parties petitions the Chamber to do so after having identified potentially privileged communications;

CONSIDERING further that in order to minimise the risk of transmission of privileged communications to the Prosecutor in the process of registration of the remaining Seized

¹³ See, *mutatis mutandis*, ECtHR, *Werner v. Poland*, "Judgment", 15 November 2001, application no. 26760/95, para. 43.

Material, it is necessary that before giving the Prosecutor and the Defence access to these materials, the Registry conducts a search to identify potentially privileged communications;

CONSIDERING that the issues of the legality of the search of Mr Mbarushimana's premises, the manner in which the search was conducted, the manner in which the seals of the bags containing the Seized Material were broken and the intercepted communications are of no relevance to the issue of filtering of privileged communications, raised in the Prosecution Request, and shall therefore not be examined in the present decision;

FOR THESE REASONS,

ORDERS the Registry to ensure that only the Chamber has access to the 72 Documents, as listed in Annex A to the Prosecution Request;¹⁴

REQUESTS the Prosecutor and the Defence to inform the Chamber of any potentially privileged communications they identify in that part of the Seized Material which has already been processed by the Registry;

ORDERS the Defence and the Prosecutor to provide the Chamber and the Registry, no later than 9 March 2011, with a properly motivated list of keywords, if any, that can be used in a search for potentially privileged communications in the remaining Seized Material;

ORDERS the Registry to conduct a search of the remaining Seized Material based on the keywords provided by the Defence and the Prosecutor and approved by the Chamber, and to consult the Chamber if and when the need arises;

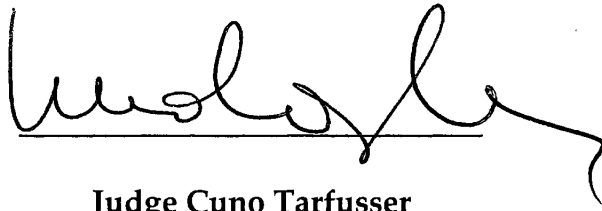
¹⁴ ICC-01/04-01/10-54-AnxA.

ORDERS the Registry to provide the Chamber, no later than 16 March 2011, with a list of documents which the said search produces and ensure that the Chamber has access to these documents for the purpose of determining whether or not they are privileged and should be excluded from the material that will be made available to the Prosecutor and the Defence;

ORDERS the Registry not to give access to the remaining Seized Material until the Chamber completes its assessment and provides the Registry with a list of documents to which rule 73 of the Rules applies and which should not be available to the Prosecutor; and

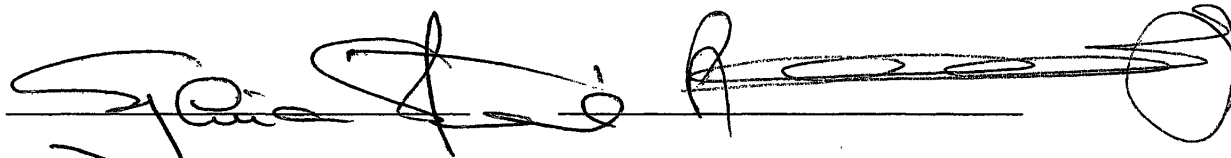
DECIDES that the Interim Decision ceases to be effective.

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



Judge Cuno Tarfusser

Presiding Judge



Judge Sylvia Steiner

Judge Sanji Mmasenono

Monageng

Dated this Friday, 4 March 2011

At The Hague, The Netherlands