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

Date: **09/03/2011**

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 Annex A, *ex parte*, Defence & Registry Only**

**Defence Submission of 'Keywords'
for the Review of Potentially Privileged Material**

Source: Defence for Mr. Callixte Mbarushimana

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

The Office of the Prosecutor

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 Ms. Fatou Bensouda, Deputy Prosecutor
 Mr. Anton Steynberg, Senior Trial Lawyer

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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**

States' Representatives

Amicus Curiae

REGISTRY

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Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
 Section**

Other

1. On 4 March 2011, Pre-Trial Chamber I rendered its “*Decision on the Prosecution’s request for a review of potentially privileged material*”¹ (“the Decision”) ordering “...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”.

2. Without prejudice to its intent to seek leave to appeal the Decision yet in accordance with the terms of the Decision, the Defence hereby submits a list of keywords in a confidential annex - *ex parte*, Defence and Registry only.

3. The learned Pre-Trial Chamber is respectfully informed that the annexed list is non-exhaustive owing to the difficulty in formulating keywords with respect to thousands of documents which were gathered over a period of more than a decade and are no longer in the possession of the Defence. To this end, the Defence reserves its right to claim privilege in respect of material in the future.

Rationale for keywords under Rule 73(1)

4. Under Rule 73(1) ‘*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*’.

5. The keywords below relate to names, organisations, places and other words that would assist in tracing potentially privileged information of communications between M. Callixte Mbarushimana and his legal counsel.

Rationale for keywords under Rule 73(2):

6. Rule 73(2) states:

*“communications made in the context of a **class of professional or other confidential relationships** shall be regarded as privileged , and*

¹ ICC-01/04-01/10-67

consequently not subject to disclosure...if a Chamber decides in respect of that class that:

- (a) Communications occurring within that class of relationship are made in the course of a confidential relationship **producing a reasonable expectation of privacy and non-disclosure**;*
- (b) Confidentiality is **essential to the nature and type of relationship** between the person and the confidant; and*
- (c) Recognition of privilege would further the objectives of the Statute and the Rule. [emphasis added]*

Notwithstanding, Rule 73(3) states:

*“in making a decision under sub-rule 2, the court shall give particular regard to recognizing as privileged those communications...between a person **and a member of a religious clergy**; and in the latter case, the court shall recognize as privileged those communications made in the context of a sacred confession where it is an integral part of the practice of that religion.”*
[Emphasis added].

7. The list of keywords for the review of potentially privileged information under Rule 73(2) takes into account the fact Mr. Mbarushimana has had longstanding, confidential and privileged relationships with several members of the religious clergy since his pre-school years in Rwanda. The Defence submits that the character of these relationships incorporated an *inherent* understanding that they were subject to the same confidentiality which would apply in the confessional.

8. Mr. Mbarushimana maintained these privileged relationships in Rwanda until his departure and, thereafter, during his stay in refugee camps in the Democratic Republic of Congo (DRC), Angola, Kenya, Kosovo and France up until his arrest on 11 October 2010 by French authorities.

9. Such confidential relationships endured the ravages of war and persecution and were characterized by trust based on the reasonable expectation of the confidentiality of

communications exchanged. Based on this trust, Mr. Mbarushimana communicated freely and frankly with the religious clergymen - frankness that can only be explained by the religious authority the clergymen held in the eyes of Mr. Mbarushimana and due to understanding that confidentiality would extend beyond the confessional.

10. Without the aforementioned expectation, Mr. Mbarushimana would not have shared information of a confidential and intimate nature with the clergymen concerned.

11. The Defence respectfully submits that Pre-Trial Chamber should recognize the reasonableness of M. Mbarushimana's expectations of confidentiality, as well as the inherent confidential character of the relationship in accordance with the interests that Rule 73(2) was designed to protect. The communications discussed herein were *made in the context of a sacred confession* and were based on trust which, once established, did not require a written, separate or express mention of the aforementioned sanctity.

Justification for Confidentiality

12. Annex A is filed "Confidential - *ex parte* Defence & Registry only" in order to prevent the Prosecution from being exposed to notions, concepts and topics which are, of themselves, subject to privilege.



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The Hague, the Netherlands
Wednesday, March 09, 2011