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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

**Application for leave to appeal Pre-Trial Chamber I's "Decision on
Prosecution's request for a review of potentially privileged material" of 4
March 2011**

Source: Defence for Mr. Callixte Mbarushimana

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

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Introduction

Pursuant to Article 82(1)(d) of the Rome Statute, the Defence hereby seeks leave to appeal Pre-Trial Chamber I's "*Decision on Prosecution's request for a review of potentially privileged material*"¹ of 4 March 2011 (the "Impugned Decision").

As required under Rule 155 of the Rules of Evidence and Procedure, this application for leave to appeal is filed within five days of notification of the Impugned Decision.

In satisfying the conditions for requesting leave to appeal, the Defence will submit that the Impugned Decision's failure to ensure the integrity of Mr. Mbarushimana's privileged communications will have a prejudicial effect on the fairness of the proceedings and will grievously affect the fair and expeditious conduct thereof. In the circumstances, therefore, the immediate rectification of the Impugned Decision by the Appeals Chamber is necessary and will materially advance the proceedings. The disputed issues may also, in the alternative, affect the outcome of the trial.

Procedural Background

1. On 14 February 2011, the Office of the Prosecutor ("OTP") filed the "*Prosecution's Request for Review of Potentially Privileged Information*" ("the Prosecution Request").²

¹ ICC-01/04-01/10-67.

² ICC-01/04-01/10-54.

2. On 18 February 2011, herein undersigned Counsel filed the Defence Response to the Prosecution Request (“the Defence Response”).³

3. On 25 February 2011 the learned Single Judge issued her “*Decision Temporarily Suspending Dealings with Transcripts and Original Recordings of Intercepted Communications and Materials Seized from the House of Mr. Callixte Mbarushimana*” (“the Interim Decision”).⁴

4. On 1 March 2011, with prior leave of the learned Pre-Trial Chamber, the Prosecution filed a reply to the Defence Response.⁵

5. On 4 March 2011, the Pre-Trial Chamber rendered the Impugned Decision.

6. On 7 March 2011, the Defence filed a request for suspensive effect of the Impugned Decision (“Defence request”)⁶ based on its intent to file the present leave for appeal and the fear that the immediate implementation of the Impugned Decision would ‘potentially defeat the purpose’ of the appeal.

7. On 9 March 2011, the Prosecution filed a response to the Defence request (“Prosecution’s response”).⁷

8. On 11 March 2011, Pre-Trial Chamber I rejected the Defence’s request for suspensive effect of the Impugned Decision.⁸

³ ICC-01/04-01/10-58.

⁴ ICC-01/04-01/10-63.

⁵ ICC-01/04-01/10-66.

⁶ ICC-01/01-01/10-68.

⁷ ICC-01/04-01/10-73.

⁸ ICC-01/04-01/10-74.

Submission

9. Article 82(1)(d) of the Statute sets out the requirements to be satisfied when bringing an application for leave to appeal an interlocutory decision. It reads as follows:

"Either Party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

.....

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcomes of the trial, and for which, in the opinion of the Pre-Trial Chamber or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings."

The existence of an appealable "issue" arising out of the Impugned Decision

10. The Defence respectfully submits that the issues it will appeal arise directly out of the Impugned Decision. It is settled precedent of the International Criminal Court that an appealable issue under Article 82(1)(d) of the Statute must comprise a topic which is subject to judicial determination.⁹

11. The Impugned Decision includes two findings which are challenged by the Defence:

- a. That the preliminary review of the privileged material should be conducted by the Registry and not the Defence team or the OPCD, and;

⁹ Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC/01/04-168 at para. 9.

- b. That the proposed review of privileged materials including the use of computerised keyword searches (by both the Prosecution and the Registry) will ensure that privileged material is not disclosed to the Prosecution and the Chamber in contravention of Rule 73(1) and Rule 73(3) of the Rules of Procedure and Evidence ("Rules").

12. The Impugned Decision thus raises the following appealable issues for the purposes of Article 82(1)(d):

- a. Whether the Chamber erred by finding that the preliminary review of Rule 73(1) privileged materials should be conducted by the Registry rather than the Defence or OPCD, and;
- b. Whether the mechanism instituted by the Pre-Trial Chamber for the review of the potentially privileged materials is erroneous given that it fails adequately to safeguard those Defence interests protected by legal and/or religious privilege.

Impact on the Fairness of the Proceedings

Issue 1: *Whether the Chamber erred by finding that the preliminary review of Rule 73(1) privileged materials should be conducted by the Registry rather than the Defence or OPCD.*

13. As recently stated by Trial Chamber III in Prosecutor v. Jean-Pierre Bemba: “[o]n applications under Article 82(1)(d), the Chamber’s assessment of the

merits of the proposed appeal is an irrelevant consideration."¹⁰ Accordingly, in determining whether this appealable issue affects the fairness of the proceedings, the Chamber is precluding from relying upon its assessment that review of the privileged materials by either the Registry or the Chamber would not affect the fairness of the proceedings. Rather, the Pre-Trial Chamber must take into consideration the possible impact on the fairness of the proceedings if the thrust of the Impugned Decision was incorrect.

14. In the Impugned Decision, the Pre-Trial Chamber does not make any distinction between materials which are protected under Rule 73(1) and materials which, potentially, fall under Rule 73(3). According to the drafting history of these provisions, however, Rule 73(1) was drafted broadly as an absolute privilege. Indeed, initial drafts of this rule (which provided for exceptions to the privilege), were discarded on the basis that it would not be possible to apply such exceptions without the Chamber being able to examine the contents of the privileged materials and to create such a procedure would violate article 67(1)(b) of the Statute.¹¹ It was thus acknowledged that the involvement of the Chamber could affect this particular right and, as a consequence, the overall fairness of the proceedings.

15. The learned Pre-Trial Chamber also failed to take into consideration the syntactical differences between Rule 73(1) (the absolute privilege) and Rule 73(3) (which is a qualified privilege). The language of Rule 73(2) expressly envisages that the Chamber will adjudicate any disputes as to whether material falls within the purview of Rule 73(2) (i.e. religious privilege). By contrast, Rule 73(1) allocates no role to the Chamber. In conjunction with the drafting history of Rule 73(1), the express omission of the Chamber in Rule 73(1) supports the

¹⁰ ICC-01/05-01/08-1169, 26 January 2011, at para 21, *Prosecutor v. Jean-Pierre Bemba*, Decision on the prosecution and defence applications for leave to appeal the "Decision on the admission into evidence of materials contained in the prosecution's list of evidence",.

¹¹ D Piragoff, *Evidence* in R. Lee (ed): The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence at page 359.

conclusion that Rule 73(1) vests the responsibility for determining legal professional privilege in the Defence (or, at least, an approved representative of the Defence).¹²

16. There is also no consideration in the Impugned Decision as to why the Defence or the OPCD (as opposed to the Prosecution or Registry) should not conduct the review of the materials – especially since the latter option (OPCD) was agreed between the Parties. Both the Defence and the OPCD are bound by the Code of Professional Conduct for Counsel and should, therefore, be presumed to perform their functions in good faith. The International Criminal Court has consistently adopted the view that parties and participants can be presumed to comply with their ethical duties.¹³ Similarly, the *ad hoc* Tribunals and the ICC have always resisted requests from the Defence to incorporate an independent mechanism for verifying whether the Prosecution has complied with its obligation to identify and disclose exculpatory material.

¹² See Kenya situation, Decision on the "Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor's Application under Article 58(7)" ICC-01/09-42, at para 18, in which the Pre-Trial Chamber utilized the principle of '*ubi lex voluit dixit, ubi noluit tacuit*' in interpreting the Statute and Rules.

¹³ See for example, para 16 of *Prosecutor v. Lubanga*, Decision on the legal representative's application for leave to tender into evidence material from the "bar table" and on the Prosecution's Application for Admission of three documents from the Bar Table Pursuant to Article 64 (9), ICC-01/04-01/06-2694, 2 March 2011. The ICTY Appeals Chamber also underscored in the Prlić case that the Chamber should generally presume, absent evidence to the contrary, that defence counsel will act in an appropriate manner (Prosecutor v. Prlić et al, 'Decision On Prosecution's Appeal Against Trial Chamber's Order On Contact Between The Accused And Counsel During An Accused's Testimony Pursuant To Rule 85(C)', 5 September 2008, at para 18. This finding was upheld by the Special Court for Sierra Leone in the Charles Taylor case: Prosecutor v. Taylor, Decision on Prosecution Motion for an Order Restricting Contact Between the Accused and Defence Counsel During Cross-Examination', 20 November 2009, at page 3: "**SATISFIED FURTHER** that the integrity of the proceedings is also protected by the professional and ethical obligations assumed by Counsel under Articles 5 and 6 of the Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone; **CONSIDERING** that there has been no suggestion that Defence Counsel have acted unethically or inappropriately in their communications with the Accused during the course of his examination-in-chief and that Trial Chamber has indicated that there is a rebuttable presumption of *bona fides* when counsel deals with his witness while the witness is giving evidence".

17. The system established by the Pre-Trial Chamber for the review of Defence privileged materials creates a dual and discriminatory system for examining privilege before the Court. On the one hand, with respect to materials for which the Prosecution may invoke an exemption from disclosure, the Prosecution itself is deemed to be capable of defining the scope of the exemption and of identifying which *prima facie* materials might require the intervention of the Chamber. By contrast, however, it would appear that the Impugned Decision does not afford the Defence the same trust since the review for privileged material is delegated to the Registry: a non-judicial and administrative entity of the Court. The Registry is not bound by the Code of Conduct nor is it experienced in the application of legal professional privilege. Moreover, the Registry is an organ against which the Defence might have no recourse if it performs its review in a faulty or flawed manner. The Prosecution has thus been placed at a procedural advantage in the terms of its ability to assert its powers contrary, it is submitted, to the principle of equality of arms.

18. The Defence further submits that there is no legal basis in the Statute or Rules for assigning the crucial and highly sensitive task of privileged material review to the Registry. Under the terms of the Impugned Decision, the Registry will have unfettered discretion to decide "*if and when to consult with the Chamber*", and will conduct its key word searches in an entirely unmonitored manner. The Chamber will only be apprised of those documents which the Registry considers to potentially fall within the privilege, and will not be provided with those documents which the Registry has decided do not fall within the privilege. There will thus be no transparent and appealable record of the Registry's decision that certain documents do not fall within the scope of privileged materials which should be transmitted to the Chamber. In this respect, it will be remembered that the Appeals Chamber has emphasised that

the Defence, as a rule, has a right to a reasoned decision so that it can exercise its appellate rights in an effective manner.¹⁴

19. Moreover, in accordance with Article 43(1) of the Rome Statute, the “Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court”. This provision clearly excludes the possibility that the Registry should be tasked with what is essentially a judicial duty. Thus, it is not a matter of questioning the Registry’s impartiality but rather contrasting the judicial character of the task at hand compared with the solely non-judicial functions the Registry is obliged to perform by law.

20. Despite the Prosecution's submission that it is ‘*impossible to discern how the involvement of the Registry*’¹⁵ may irreversibly prejudice the rights of the Defence, the decision to assign the review of privileged material to the Registry fundamentally affects the right of the Defence to effectively enforce its privilege and to seek appropriate judicial review.

21. In matters of privilege, the Defence submits that the role of the Chamber should be confined to arbitrating where disagreement arises between the Parties as to the scope of such privilege. The fact that the Pre-Trial Chamber could, in principle, have access to certain material does not abrogate from its duty to exercise caution in deciding whether it *should* do so. The Defence submits that the Chamber could have achieved its objective of ensuring the fairness and integrity of the proceedings by requiring the Defence or the OPCD to submit a table to the Chamber detailing why each and every seized document does or does not attract privilege. This, it is submitted, was the

¹⁴ Prosecutor v. Lubanga, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81 ICC-01/04-01/06-773, 14 December 2006, at para 20.

¹⁵ Prosecution’s response, par. 12.

system employed by the Trial Chamber of the ICTY in the *Gotovina* case,¹⁶ and its adoption, in the present instance, would have ensured that the learned Pre-Trial Chamber was involved only to the extent necessary to adjudicate in connection with disputed documents.

22. Despite the aforementioned, the Impugned Decision will entail the Pre-Trial Chamber reviewing all documents which potentially fall under the privilege. Such a system is not consistent with the Statute and Rules governing other forms of less privileged yet equally confidential materials. For example, as concerns information subject to Article 54(3)(e), the Court's general practice has shown that the Prosecution is not obliged to place all such materials before a Chamber in order to benefit from such protection. The Chamber, furthermore, has no power to review the Prosecutor's determination as to what materials should or should not be placed before the Chamber for adjudication.

¹⁶ *Prosecutor v. Gotovina*, Decision On Requests For Permanent Restraining Orders Directed To The Republic Of Croatia, 12 May 2010.

"41. Croatia shall initially desist from inspection of the contents of the seized materials and keep the materials in its custody and under seal. Croatia shall further provide the Gotovina Defence with access to the seized materials, in such a manner that the Gotovina Defence can review their content and that the integrity of the seized materials is protected. Croatia may temporarily lift the seal on the seized materials only to the extent necessary to provide such access. The Gotovina Defence and Croatia shall then communicate with a view to seeking agreement on which items are and which are not protected under Rules 70(A) or 97. Croatia shall not inspect the contents of the materials during such communications. Instead, the Gotovina Defence shall provide brief descriptions of the items it considers protected under those Rules. The Chamber notes that the Gotovina Defence may seek the assistance of an independent third party, such as the Tribunal's Association of Defence Counsel, to assist the communications with Croatia, for instance by confirming that the Defence's descriptions match the contents of seized materials.

42. Croatia may lift the seal on and inspect any seized materials the Gotovina Defence does not consider protected under those Rules. Croatia shall return to the Gotovina Defence any items that the Gotovina Defence and Croatia agree are protected under those Rules.

43. With regard to items the Gotovina Defence considers to be protected under Rules 70(A) or 97, but which Croatia does not consider to be protected under those Rules, the Gotovina Defence shall contact the President of the Tribunal with a view to seeking a determination of the matter by an independent body. Croatia must return to the Gotovina Defence the items which an independent body has determined fall within the scope of Rules 70 (A) or 97. Croatia may lift the seal on and inspect items which an independent body has determined fall outside of the scope of those Rules."

23. The Impugned Decision therefore unnecessarily exposes the Pre-Trial Chamber to information which could contain material of a self-incriminating nature. The relationship between privileged information and the right not to incriminate one's self is an accepted principle in most State national laws. The relationship has also been recognized by the European Court for Human Rights:

"La Cour estime que des perquisitions et des saisies chez un avocat portent incontestablement atteinte au secret professionnel, qui est la base de la relation de confiance qui existe entre l'avocat et son client. D'ailleurs, la protection du secret professionnel est notamment le corollaire du droit qu'a le client d'un avocat de ne pas contribuer à sa propre incrimination, ce qui présuppose que les autorités cherchent à fonder leur argumentation sans recourir à des éléments de preuve obtenus par la contrainte ou les pressions, au mépris de la volonté de l'accusé."¹⁷

Issue 2: *Whether the framework for the review of the materials adequately safeguards the rights of the defence and ensures non-disclosure of privileged materials*

24. In the Impugned Decision, the Pre-Trial Chamber correctly notes 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 suspect and it is therefore its duty to ensure that privileged communications of Mr. Mbarushimana are not disclosed to the Prosecutor"*. Nonetheless, the framework set out in the Impugned Decision for the review of materials which have already been processed by the Registry and provided to the Prosecution, fails to ensure that privileged materials will not be disclosed to the Prosecution.

¹⁷ See *J.B. c. Suisse*, arrêt du 3 mai 2001, *Recueil des arrêts et décisions* 2001-III, § 64 ; See also, *Funke c. France*, arrêt du 25 février 1993, série A no 256-A, § 44.

25. In its filing of 18 February 2011,¹⁸ the Defence clearly alerted the Pre-Trial Chamber to the fact that among the materials which were already in possession of the Prosecution, there was additional material which would be subject to legal professional privilege or religious privilege. The keyword searches employed by the Prosecutor to isolate the 72 documents would not have picked up these documents. Firstly, as concerns the legally privileged documents, Mr. Mbarushimana was unable to remember the precise names of all counsel and clergymen he had consulted and many documents (including jottings/commentaries on typed documents) were handwritten such that they are now non-conducive to optical-character-recognition (OCR) and cannot thus be electronically searched. Secondly, with respect to the documents falling under religious privilege, the Prosecution has disputed the application of this privilege to the material in question, has not quarantined such documents and will continue to review them unabated.

26. Since there was no order that this body of material should be isolated and protected from further review by the Prosecution, the Pre-Trial Chamber has, it is submitted, failed to comply with its own self-appointed “*duty to ensure that privileged communications of Mr. Mbarushimana are not disclosed to the Prosecutor*”. As recognized by the learned Pre-Trial Chamber, this duty is intrinsically linked to Mr. Mbarushimana’s rights under Articles 55 and 67 of the Rome Statute and if the Impugned Decision fails properly to safeguard this duty, the fairness of the proceedings and the rights of the Defence will, as a consequence, be detrimentally affected.

27. The Defence further submits that the Chamber’s decision not to review those seized documents which have already been processed and transmitted to the Parties “*unless one of the parties petitions the Chamber to do so after having*

¹⁸ ICC-01/04-01/10-58

identified potentially privileged communications",¹⁹ also fails to safeguard the rights of the Defence thereby affecting the fairness of the proceedings. In order to prevent the Prosecution from continuing to review privileged materials, the Defence ought to have been granted prior access to the seized materials after the lifting of the Interim Decision allowing it to identify privileged information and, thereafter, to petition the Chamber for resolution of a doubtful case.

28. In the circumstances, the Prosecution commenced its review of potentially privileged materials long ago and, despite its present voluntary cessation of review activity, it has, nevertheless, acquired a *de facto* advantage over the Defence.

29. Moreover, since the Impugned Decision fails to clarify the parameters of the qualified religious privilege, the Prosecution will not necessarily cease its review of such potentially affected documents. Irreversible prejudice will, therefore, be caused to the Defence because the Impugned Decision does not require the Prosecution to refer potentially privileged materials under Rule 73(3) to the Pre-Trial Chamber for arbitration.

30. Even if the Prosecution is subsequently precluded from using potentially privileged material as evidence, it can still utilize its knowledge of the content of the documents as spring-board evidence, i.e. to guide its investigations by way of countering Defence strategy. This would render Mr. Mbarushimana's protection against self-incrimination nugatory. It would also affect the fairness of the proceedings by affording the Prosecution a source of intelligence to which it would not, otherwise, be entitled.

31. Further problems with the review mechanism instituted by the Pre-Trial Chamber affect the fairness of the proceedings. The material seized

¹⁹ At page 7.

comprises thousands of documents collected over a decade and it is wholly unfair to saddle Mr. Mbarushimana with the burden of supplying "key-words" from memory in order to guarantee the preservation of one of his inherent rights under the Statute and Rules of Evidence and Procedure. Finally, it is entirely possible that performing keyword searches with the names of counsel or clergymen will not, necessarily, pick up short emails or communications in which the addressee might not be identified – especially where the email is a follow-up to a telephone conversation or is, otherwise, expected by the recipient.

Impact on the Expeditionousness of the Proceedings

32. The review system set out in the Impugned Decision has the potential to create a constant round of litigation, as the Parties could petition the Pre-Trial Chamber for an adjudication on privilege arising out of materials which have not responded to the "keyword" search. The failure of the Pre-Trial Chamber to clearly delineate the parameters of Rule 73(3) privilege will also create uncertainty resulting in further unnecessary and time consuming litigation.

33. Moreover, since the Impugned Decision requires the Pre-Trial Chamber to review each and every document potentially subject to privilege (even if Prosecution does not dispute the application of the privilege), the time and resources of the Pre-Trial Chamber will also be diverted from its oversight of the pre-confirmation process. The Office of the Prosecutor itself implicitly concurred with this view when it argued that the issues raised by the Defence would "significantly impact the ability of the parties, participants and the Chamber to prepare for the scheduled 4 July confirmation hearing."²⁰

²⁰ ICC-01/04-01/10-73 par.3.

34. In the absence of an immediate resolution by the Appeals Chamber, the proceedings may be tainted to such an extent that the rights of the Defence will irreparably be prejudiced. The need for immediate rectification of the Impugned Decision now has an additional degree of urgency in light of the Registry's Request for extension of time to implement the Impugned Decision of 9 March 2011 whereby it informed the Pre-Trial Chamber that "*the time needed for the forensic processing may vary between two and three months*".²¹

An immediate decision of the Appeals Chamber as concerns both issues would materially advance the proceedings

35. The Appeals Chamber has correctly noted that a flawed decision may often result in setting back and not advancing the legal proceedings:²²

"A wrong decision on an issue in the context of Article 82(1)(d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process. In those circumstances, the proceedings will not be advanced but on the contrary they will be set back."

36. An immediate resolution by the Appeals Chamber of the appealable issues and the designation of the Defence or OPCD (as suggested by the Prosecution) as the reviewing body will materially advance the proceedings in that it will provide a less time consuming and more effective means for guaranteeing the interests protected by privilege.

²¹ ICC-01/04-01/10-70.

²² "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", Situation in the Democratic Republic of the Congo, ICC-01/04-168, para. 16.

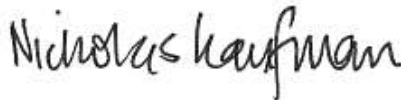
The Effect on the Outcome of the Trial

37. Additionally, although only required to prove such in the alternative, the Defence reiterates that the exposure of the Prosecution to the contents of privileged material will allow it to benefit from the breach of a statutorily protected expectation. By being afforded access to such spring-board information the Prosecution will have acquired an evidentiary advantage which could affect the outcome of the trial.

38. Such access to privileged materials, as identified in paragraph 37 above, could even affect the outcome of the trial by leading to a potential claim for abuse of process requiring the stay of proceedings on a permanent basis.²³

Relief sought

39. In light of the aforementioned, the Defence respectfully requests leave to appeal the Impugned Decision.



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Monday, March 14, 2011

²³ See, for example, *Hksar v Wong Hung Ki* [2010] 4 HKC 118, 11 May 2010, in which the Court ordered a permanent stay of the proceedings due to the fact that the Prosecution had inappropriately listened to intercepts of privileged conversations. The Court found that “The adversarial system could not work justly if lawful confidential communications between client and legal adviser were not insulated from law enforcement authorities responsible for investigating and prosecuting a case. But for the astute preservation of that confidentiality, the process by which we determined guilt or innocence was undermined. In general, therefore, where there was a deliberate violation of a suspected person’s right to legal professional privilege, that constituted an affront so great to the integrity of the system of justice and therefore the rule of law that the associated prosecution was rendered abusive and ought not to be countenanced by the court.