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

Date: **14 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

**Prosecution Response to the “Defence Submission of ‘Keywords’
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:

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I. Introduction

1. On 9 March 2011, the Defence filed the “Defence Submission of ‘Keywords’ for the Review of Potentially Privileged Material” (“the Defence Filing”).¹
2. It elected to file the list of keywords in a confidential *ex parte* Annex, alleging that the contents thereof contain “notions, concepts and topics which are, of themselves, subject to privilege”.² Hence, the Prosecution has no knowledge of its contents, save that the keywords “relate to names, organisations, places and other words that would assist in tracing potentially privileged information of communications” between Mr Mbarushimana (“the Suspect”) and his legal counsel.³ The Defence Filing also proposes keywords aimed at protecting an ill-defined, but seemingly extensive, series of communications with various unnamed Roman Catholic priests.⁴
3. The Prosecution reminds the Chamber that attorney-client privilege and the alleged religious privilege apply only to the contents of confidential communications – i.e., communications only between the Suspect and his lawyer or priest, not shared with any outside party -- for the purpose of obtaining legal advice or religious comfort. The keywords must, accordingly, enable the search to identify at the outset the documents that themselves constitute confidential communications between the Suspect and his attorney and the Suspect and his priest. Once those documents are identified, the Chamber can determine if the communications are confidential and made for the narrow protected purposes – securing legal advice or religious counsel.
4. Documents that are not themselves communications but refer to communications are not privileged. Documents that are not communications

¹ Defence Submission of ‘Keywords’ for the Review of Potentially Privileged Material, ICC-01/04-01/10-72, 9 March 2011.

² *Ibid.* at para. 12.

³ *Ibid.* at para. 5.

⁴ The Suspect previously named three of the priests as Monsignor Matteo Zuppi (Italy), Father Jean Berchmans Tulikubwinge (Italy) and Father Aldo Rizzi (Philippines). See Defence Response to Prosecution’s Request for the Review of Potentially Privileged Material, ICC-04/01-04/10-58, 18 February 2011, at footnote 13.

- but refer to counsel or priests are not privileged. And documents that are not communications but refer to “notions, concepts and topics” or “names, organisations, places, and other words that would assist in tracing potential privileged information of communications” – the basis for the Defence’s proposed keywords – are not privileged.
5. Accordingly, it would be totally inefficient to use those keywords as alternatives to keywords that will identify actual communications with counsel or priest. The Prosecution also strongly disagrees with the implied argument that any materials that may relate to these “*notions, concepts, topics, names, organisations, places, and other words that would assist in tracing potential privileged information of communications*” can themselves be protected as privileged communications.

II. Submissions

Religious privilege

6. The Prosecution submits that the Suspect has failed to establish that any communication with a Roman Catholic priest is automatically privileged, regardless of context or subject. He misapprehends the meaning of a “sacred confession” as envisaged by Rule 73(3). Furthermore, the Defence Filing fails to satisfy at least the second and third requirements for privilege under Rule 73(2).
7. The Prosecution reiterates its previous submission on this issue.⁵ The Prosecution submits further that the Suspect has not even begun to establish that the communications which he apparently seeks to protect were “made in the context of a sacred confession”,⁶ as he alleges.⁷ The Suspect appears to consider that any confidential communication made to a Roman Catholic

⁵ Prosecution’s reply to the “Defence Response to Prosecution’s Request for the Review of Potentially Privileged Material”, ICC-01/04-01/10-66, 1 March 2011, paras. 31 – 33.

⁶ As required by Rule 73(3).

⁷ Defence Filing, para. 11.

- priest is made in the context of a sacred confession. This is not so. A sacred confession in the Catholic Church has a specific and well-known meaning. It is part of the holy sacrament of confession, which is a ritual that occurs between the person confessing and a priest, after which the priest grants absolution.⁸
8. Moreover, the Prosecution questions whether the confessional ritual can occur remotely by letter, telephone, email, SMS messages, Facebook, Twitter or equivalent social networks. Father Federico Lombardi, Vatican spokesman, stated recently that "[i]t's essential to understand that the sacrament of penance requires a personal dialogue between the penitent and the confessor, and absolution by the confessor who is present [...]. One cannot speak of a 'confession via iphone'".⁹
 9. Additionally, Rule 73(2) does not apply to all communications with "members of the religious clergy" with whom the Suspect claims to have a "confidential and privileged relationship".¹⁰ The Prosecution submits that the Rule does not protect "privileged relationships", only privileged communications.
 10. The Prosecution submits that the Suspect provides no support for the assumption that all communications are privileged because of his own subjective belief in their confidentiality. For example, conversations with a member of the clergy concerning political mediation efforts would not fall within the category of religious privilege.
 11. Furthermore, the Chamber in evaluating communications between the Suspect and a member of the clergy must also consider the second and third requirements of Rule 73(2) – whether "(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

⁸ This is a fact of such common knowledge that the Chamber may take judicial notice thereof, as provided for in Art. 69(6).

⁹ See Catholic News Service, "iPhone confession app 'no substitute' for the sacrament", 9 February 2011, available at <http://www.catholicnews.com/data/stories/cns/1100527.htm> (last accessed 11 March 2011).

¹⁰ Defence Filing, para. 7 (emphasis added).

Rules". Confidentiality of confessions is deemed essential to encourage a full and frank disclosure of sins. But broader protection of all communications with religious persons would not "further the objectives of the Statute and the Rules". On the contrary, the important objective of ensuring that cogent relevant and probative evidence is placed before the Court in order to enable it to reach just and informed decisions¹¹ would be compromised, while the fairness of the proceedings would not be significantly advanced. "By examining the Statute as a whole, including its preamble, one could discern a number of values and objectives, such as the need to ensure that the most serious crimes to the international community not go unpunished, that the well-being, dignity and privacy of victims and witnesses are protected, that trials are conducted fairly and the testimony of witnesses is evaluated fairly, that the human rights and equality of all participants are respected, that persons convicted are fairly punished, [and] that victims receive reparations, including restitution, compensation and rehabilitation [...]"¹² Hence, it is unwarranted to extend a privilege about which there is no international consensus and thereby exclude consideration of relevant evidence.

12. Furthermore, even if the Suspect's non-face to face communications with the various Roman Catholic priests could be privileged, he should identify by all relevant keywords those members of the clergy with whom he has had allegedly confidential communications. The keywords will permit a search for those communications, which the Chamber can eventually review to determine if they are indeed subject to religious privilege.

¹¹ See Art 69(3).

¹² Roy S Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, 1999, p. 361.

The extent of the counsel-client privilege protected under Rule 73(1)

13. The Suspect appears to contend that Rule 73(1) protects not only the communications between a person and his or her legal counsel for the purpose of securing legal advice,¹³ but also the more enigmatic “information of communications”. The Prosecution submits that the language of Rule 73(1) is clear: it is the content of the confidential communication itself, not extraneous information about the communication, which is protected.
14. Indeed, the potential privilege recognised for “information”, not simply communications, appears only in Rule 73(4)-(6) where it is expressly limited to information received from the International Committee of the Red Cross.¹⁴

The keywords proposed by the Suspect

15. Since the Defence filed its keyword list as a confidential *ex parte* Annex, the Prosecution cannot comment on the terms proposed. Nor does the Prosecution know if the Defence intends that the search terms be employed after a preliminary search identifies the pool of relevant privileged communications based on the participants. The Prosecution is concerned that these terms extend far beyond what is appropriate to identify potentially privileged communication between the Suspect and his legal counsel.¹⁵
16. The Prosecution submits that the use of “names, organisations, places” or other “notions, concepts and topics” alone cannot distinguish between privileged and non-privileged documents. By way of example, a search based on a topic such as “attacks on civilians in Busurungi” would produce documents entirely unrelated to any privileged communications, such as press

¹³ As Lee explains, *ibid.* at p. 360, the privilege is inapplicable to communications not made for the purpose of giving or receiving legal advice.

¹⁴ Although the French version of Rule 73(3) does mention “*informations*”, it is clear that this refers to information divulged in the course of the confession – i.e. the contents thereof. “[L]a Cour considère comme couvertes par le secret professionnel les informations divulguées au cours d’une confession religieuse lorsque celle-ci fait partie intégrante des rites de la religion considérée”.

¹⁵ Or, for that matter, the priests with whom he communicated.

releases or NGO reports, which the Chamber would then be obliged to laboriously review. This process will waste the Chamber's time and unnecessarily delay the Prosecution's access to the seized evidence and hinder its preparation for the confirmation hearing.

17. Thus, the Prosecution submits that the names of legal counsel and their contact information are the appropriate means to identify communications between them and the Suspect. All the Chamber would then be required to establish is whether such communications were additionally made" in the context of a professional relationship".

A handwritten signature in blue ink, appearing to read 'Luis Moreno-Ocampo', with a long horizontal stroke extending to the left.

Luis Moreno-Ocampo
Prosecutor

Dated this 14th day of March 2011

At The Hague, The Netherlands