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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

Prosecution's Response to the Defence "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"

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I. Introduction

1. Counsel for Callixte Mbarushimana (“the Defence”) seeks leave to appeal a decision issued by Pre-Trial Chamber I (“the Chamber”) setting out a method to review materials which may contain potentially privileged communications under the terms of Rule 73.¹ The Decision establishes that the parties will provide relevant keywords to the Registry and the Chamber that may assist in the identification of any such communications; the Registry will then run a mechanical/ computer search applying those keywords to the materials seized and will transmit to the Chamber the documents identified by the search. The Chamber will then proceed to conduct the review of the materials to determine whether they contain any privileged communications.
2. The Defence seeks leave to appeal two issues purportedly arising from the Decision: first, that the Decision entrusts the Registry with the task of conducting “the preliminary review of rule 73(1) privileged materials”, and second, that the method *in toto* fails to safeguard the Defence’s privilege with respect to attorney-client and priest-penitent communications.
3. The Prosecution submits that the first issue does not arise from the Decision; rather, it misconstrues the Decision, which directs the Chamber – and not the Registry – to review the materials. The second issue attempts to reopen a discussion on a matter already decided by the Chamber with respect to the method deemed suitable to review the seized material. In this regard, the Defence arguments only show its disagreement with the Chamber’s discretionary decision.
4. The Prosecution submits that the Application should be summarily dismissed as it fails to establish the existence of appealable issues arising from the Decision, much less that they satisfy the requirements of Article 82(1)(d).

¹ ICC-01/04-01/10-75 (“the Application”). ICC-01/04-01/10-67 (“the Decision”).

II. Statement of facts

5. On 11 October 2010 French authorities searched the home and office of Callixte Mbarushimana (“the Suspect”) and seized some 27,000 pages of documents and a large volume of electronic data. The paper documents were scanned and registered in Ringtail.
6. On 14 February 2011 the Prosecution filed a request that the Chamber or a neutral third party review 72 documents from the scanned Ringtail material that potentially contained privileged attorney-client communications. The Prosecution made no proposal, at that stage, for the review of the electronic data.²
7. On 18 February the Defence responded to the Prosecution Request and argued that Counsel for the Suspect or his appointed representative should remove the “privileged information without any supervision being exercised by either the Prosecution or independent counsel” or, as a last resort, OPCD should conduct the review.³ On 1 March the Prosecution filed its reply.⁴
8. On 25 February the Single Judge issued the Interim Decision, which suspended the Prosecution’s access to the seized documents and intercepted communications.⁵
9. On 4 March the Chamber issued the Decision whereby it rejected the Defence proposals, particularly that the Defence make the unreviewable determination as to which items are privileged (“the Decision”).⁶ The Chamber distinguished between the documents already processed by the Registry and the remaining evidence – the electronic data - which constitutes the vast majority of the material seized.
10. With respect to the latter, the Chamber set out a procedure whereby the Registry would run an electronic search of the remaining seized material

² ICC-01/04-01/10-54.

³ ICC-01/04-01/10-58. See paras.17 and 19.

⁴ ICC-01/04-01/10-66.

⁵ ICC-01/04-01/10-63.

⁶ ICC-01/04-01/10-67.

based on the keywords provided by the parties and approved by the Chamber and provide the Chamber with the documents that contained the keywords. The Chamber then would review these documents to identify potentially privileged communications. The Chamber found that the ICC statutory framework allows it to make the privilege determination, and that it can do so and maintain its impartiality. With respect to the first batch of documents already processed by the Registry and made available to the parties, the Chamber would proceed to review the ones already identified as potentially containing privileged communications. In addition, it ordered the parties to inform it of any further potentially privileged communication identified in the processed documents.

11. On 11 March 2011, the Chamber denied a Defence request⁷ for suspensive effect of the Decision pending an Application for Leave to Appeal.⁸
12. On 14 March 2011 the Defence sought leave to appeal two issues allegedly arising from the Decision: (i) “Whether the Chamber erred by finding that the preliminary review of Rule 73(1) privileged material should be conducted by the Registry rather than the Defence or OPCD”⁹ (“First Issue”) and; (ii) “[w]hether 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” (“Second Issue”).¹⁰

III. Submissions

13. The Prosecution submits that the First Issue does not arise from the Decision and the Second Issue does not constitute an appealable “issue” within the terms of article 82(1)(d). The Chamber should summarily dismiss the

⁷ ICC-01/04-01/10-68.

⁸ ICC-01/04-01/10-74.

⁹ This issue relates only to the review of the electronic media and not the seized documents, which have already been registered by the Registry.

¹⁰ ICC-01/04-01/10-75, para.12 (“Defence Application”).

Application on these grounds alone. In the alternative, should the Pre-Trial Chamber consider that the issues do arise from the Decision, the Prosecution submits that they do not fulfill the requirements for leave to appeal to be granted.¹¹

The Applicable Standard for Granting Leave to Appeal

14. As established by the jurisprudence of the Court, the correctness of a decision is irrelevant to an application for leave to appeal under Article 82(1)(d). The sole question is whether the issue meets the criteria set out in the provision.¹²

15. Article 82(1)(d) sets out criteria for determining the appropriateness of an interlocutory appeal. It requires that the decision being challenged “involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial [...] Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

The First Issue

(i) *The First Issue does not arise from the Decision*

16. The First Issue is grounded on the Defence’s erroneous understanding that the Registry will conduct the preliminary review of Rule 73 privileged materials.¹³ This is not the case. The Registry’s intervention is limited to the mechanical, non-judicial task of running electronic searches of the seized materials based on keywords provided by the parties and approved by the Chamber.¹⁴ The

¹¹ The Prosecution will address below the Defence arguments as presented in its Application, namely it will deal separately with the two issues with respect to (i) whether they constitute an appealable issue arising from the Decision and (ii) their purported impact on fairness. However, it will jointly respond the remainder of the prongs under article 82(1)(d).

¹² ICC-02/04-01/05-20-US-Exp, para.22.

¹³ Defence Application, para.11(a), 12(a).

¹⁴ Decision, p.8, last paragraph.

Registry will then submit the package of identified materials for the Chamber's review. The procedure ordered by the Chamber does not require the Registry to read any documents or further screen the documents to be transmitted to and reviewed by the Chamber. The acts of typing in keywords and clicking on a search key instead are purely mechanical tasks connoting no exercise of discretion or judicial judgment.

17. In short, the Registry's limited functions cannot legitimately be characterized as a "review". Thus, the First Issue, predicated on the assertion that the Registry will exercise a review function that should instead be assigned to the Defence or the OPCD, does not arise from the Decision.
18. Even if considered, the Defence submissions fail to demonstrate that the purported issue meets the requirements under article 82(1)(2).

(ii) *The First Issue does not affect the fairness of the proceedings*

19. First, the Defence fails to demonstrate how the Decision will affect the fairness of the proceedings. To the extent that it complains that it is unfair to allow the Registry – and not the Defence or the OPCD¹⁵ -- to perform the review, since the Registry will not conduct the review, the fairness complaint is factually unfounded and can be easily dismissed.
 20. For example, the Defence asserts that there is no basis in the basic texts of the Court "for assigning the crucial and highly sensitive task of privileged material review to the Registry,"¹⁶ and that Article 43(1) envisages that the "Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court".¹⁷ The Prosecution agrees with these assertions, but not the implication that the Decision contravenes them.
- As noted above, the Decision does not assign "the crucial and highly sensitive

¹⁵ Defence Application, paras.16,21. The Prosecution notes how these arguments only show the Defence disagreement with the Chamber's selected method of revision and the Defence improperly attempts to reargue its preferred method of review without showing any impact of the Chamber's decision on the criteria under article 82(1)(d).

¹⁶ Defence Application, para.18.

¹⁷ Defence Application, para.19.

task” to the Registry, it assigns to the Registry the mechanical and “non-judicial” tasks of entering the keywords provided by the parties and approved by the Chamber and running computer searches among the materials seized.¹⁸

21. The Defence further argues that there will not be a “transparent and appealable record of the Registry’s decision” as to which documents fall within the scope of privileged materials transmitted to the Chamber.¹⁹ Again, however, the Registry will not make a decision. It will simply run automated searches at the Chamber’s direction. And the criteria – the keywords -- will be fully transparent and open to input or review by the Defence. Indeed, the Defence has had access to all the seized evidence which is currently in the possession of the Prosecution²⁰ since 24 February.²¹ It can run a parallel search using the same keywords and identify precisely those documents that the Registry’s keyword exercise identifies. Moreover, the Chamber also approved a Protocol whereby the Defence will have access to the entire seized materials and may therefore identify additional documents (that may not be discovered through the keyword search) that it alleges contain privileged communications.²²

22. In short, the Decision is clear that the *Pre-Trial Chamber* – and not the Registry – will conduct the review: “[t]he 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[...].”²³

¹⁸ Decision, pp.7-8.

¹⁹ Defence Application, para.18.

²⁰ This excludes electronic media, to which the Prosecution has also not had access.

²¹ The Defence acknowledged this fact in an email to the Senior Legal Adviser of this Pre-Trial Chamber at 5:13 PM on 16 March 2011,

²² ICC-01/04-01/10-24-Conf-Anx. The Chamber envisages the right of the parties to bring to the Chamber’s attention potentially privileged communications not identified within the material already processed by the Registry. See Decision, pp.7-8. It is significant that, despite the Defence having had access to these seized documents since 24 February, they have not to date identified any as being privileged, which underscores the speculative nature of its complaint.

²³ Decision, p.7, para.2. See also p.6, para.5.and p.9.

23. Alternatively, the Defence suggests that the Chamber's review also affects the fairness of the proceeding as it appears to contend that the Chamber has no role in determining whether a communication involving legal counsel is privileged under Rule 73(1).²⁴ According to the Defence, Rule 73(1) "vests the responsibility for determining legal professional privilege in the Defence [...]".²⁵ Thus, the Defence submits, the involvement of the Chamber "*could* affect the [suspect's right under article 67(1)(b)] and as a consequence, the overall fairness of the proceedings".²⁶

24. The Defence assertion is grounded on two erroneous and unfounded conclusions: first, that Rule 73(1) authorizes the Defence to determine the existence of a legal communications privilege; and second, that the Chamber should never be involved in determining the existence of such privileged communications. The first contention finds no support in the Statute, the Rules, or the drafting history and cannot be inferred from the reasoning provided by the Defence: the fact that the Chamber is not explicitly mentioned in Rule 73(1) does not establish that the identification of privileged legal communications lies exclusively with the Defence. The second conclusion is based on a partial and incorrect reading of Rule 73(1) and the authority cited by the Defence, which - if read in full - explains that Rule 73(1) *allows* for the involvement of the Chamber to determine the existence of legal counsel privilege.²⁷

25. Most importantly, the Defence fails to show how the involvement of the Chamber even hypothetically might prejudice the Suspect's right under Article 67(1)(b) and the overall fairness of proceedings.²⁸ Such a spectre of

²⁴ Defence Application, paras.14-15.

²⁵ Ibid., para.15.

²⁶ Ibid., para.14 (emphasis added).

²⁷ See D Piragoff, in Lee, R., Evidence, The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, p. 360: "[The] reference to 'the context of the professional relationship' [in the chapeau of rule 73(1)] would subtly enable the Court not to recognize a privilege if the communication was outside of the bounds of a professional relationship; e.g., it was not made for the purpose of giving or receiving legal advice". This implicitly recognises that the Chamber must have a discretion to determine whether or not any particular piece of evidence falls within the bounds of professional privilege.

²⁸ Defence Application, para.14.

unfairness is particularly inconsistent with the fact that the Chamber is the ultimate guardian of the fairness of the proceedings.²⁹

26. The Defence's arguments with respect to a possible contamination of the Chamber as a result of its exposure to material of self-incriminating nature are also without merit.³⁰ Even disregarding that the Decision is concerned only with identifying materials that may be privileged and inadmissible at trial, and is not about compelled self-incrimination, the Chamber is composed of professional judges³¹ who can be expected to disregard inadmissible materials. Courts routinely consider the admissibility of evidence, including privileged communications and self-incriminating statements, and it is not deemed to be unfair that a judge who excluded a statement may continue to adjudicate guilt or innocence based on admissible evidence.³² Moreover, the Pre-Trial Chamber is not the ultimate trier of fact and law in the Suspect's case. If charges are confirmed, the guilt or innocence of the Suspect will be independently determined by the Trial Chamber. Hence the fairness vis-à-vis the right of the Suspect to not be compelled to incriminate himself or to protect confidential attorney-client communications cannot be affected by this Chamber's review.

27. In addition, the Defence argues that the Chamber's process unfairly advantages the Prosecution – which, the Defence alleges, has unreviewable discretion to refuse to disclose information to the Defence – because the Defence is not given unreviewable discretion to quarantine evidence to keep it from the Prosecution, thus violating the principle of equality of arms.³³ This assertion is grounded on three erroneous premises: first, the Decision does not deal with a matter of disclosure, but of identification of materials potentially containing privileged communications, which were already in the Suspect's

²⁹ ICC-01/04-01/06-2582 OA18, para. 47.

³⁰ Defence Application, para.23.

³¹ Decision, pp.6-7

³² See in that regard the Prosecutor's Response to the Defence request for suspensive effect (ICC-01/04-01/10-73, para.13, fn.19) whereby domestic authorities are cited to support this contention, in addition to article 65(3) which permits a Trial Chamber to continue to preside in a case after it has heard and rejected a plea of guilty.

³³ Defence Application, paras.17,22.

possession and legally obtained by the Prosecution in execution of a judicially authorized search and seizure operation. Second, the Defence has had access to all the seized evidence which is currently in the possession of the Prosecution³⁴ since 24 February.³⁵ Third, the Prosecution's role and ensuing obligations (including those of disclosure) during the investigation and prosecution are regulated in the basic texts of the Court and are obviously distinctive from those of the Defence; in addition any Prosecution's oppositions to disclosure (such as requests for redactions) are subject to judicial authorization, and the Chamber also has the authority to review material that cannot be disclosed (such as Article 54(3)(3) materials) and fashion appropriate remedies. Any attempt to draw parallels with the Prosecution's disclosure obligations is thus misplaced.

The Second Issue

(i) *The Second Issue is not an appealable issue*

28. The Prosecution submits that the Second Issue does not qualify as an appealable issue pursuant to Article 82(1)(d). In its Decision, the Chamber stated that it "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".³⁶ The Decision further establishes safeguards to protect the rights of the Suspect.³⁷ It appears, therefore, that the real point of contention concerns the role that the Defence or the OPCD should play in the review of potentially privileged materials.³⁸ The Defence has been heard on this issue and the Chamber adopted a process that departs from that proposed by the Defence.

³⁴ This excludes electronic media, to which the Prosecution has also not had access.

³⁵ The Defence acknowledged this fact in an email to the Senior Legal Adviser of this Pre-Trial Chamber at 5:13 PM on 16 March 2011,

³⁶ Decision, p.5.

³⁷ Decision, pp.7-9.

³⁸ Defence Application, paras.27,36.

The Prosecution therefore submits that the Second Issue merely concerns a question on which the Defence is in disagreement with the Decision.³⁹

29. In addition, the Second Issue as presented by the Defence “merely represents [...] a hypothetical concern”,⁴⁰ which according to the Appeals Chamber cannot constitute an appealable issue. The Defence arguments are based on the erroneous and unsupported assumption that mere access by the Prosecution to a pool of materials that may include privileged communications causes prejudice to the Defence,⁴¹ or that the Prosecution could use privileged information in a manner that is inconsistent with its duty under Article 54(1)(c) to fully respect the rights of persons under the Statute.⁴² The Defence has failed to show any concrete prejudice that it could suffer as a result of the implementation of the Decision, and that could be anticipated at this stage.

(ii) *The Second Issue does not affect the fairness of the proceedings*

30. The Prosecution submits that the Decision includes sufficient safeguards to fully protect the rights of the Suspect. Concerning the seized material that has been scanned and made available for several weeks to both Prosecution and Defence, the Decision provides that “the Prosecutor and the Defence [may] inform the Chamber of any potentially privileged communications they identify in that part of the [materials]”.⁴³ That statement eviscerates the claim that the Decision affects adversely the fairness of the proceeding. If the Defence believes that the Prosecution’s keywords were inadequate to capture all privileged communications and that a broader search is required, it could conduct its own search and propose additional documents that should be quarantined. Notwithstanding that right and capacity, in fact the Defence has

³⁹ See ICC-01/04-01/078-2035, para.25.

⁴⁰ ICC-01/05-01/08-532, para.17.

⁴¹ Defence Application, paras.24, 26,27, 28, 31.

⁴² Defence Application, para.30.

⁴³ Decision, p.8.

not identified a single document from the seized material that it believes should have been quarantined and submitted to the Chamber for review, or even requested reasonable additional time to conduct its own keyword search.

31. The argument advanced by the Defence that irreversible prejudice will be caused due to the fact that “the Decision fails to clarify the parameters of the qualified religious privilege” and that as a result “the Prosecution will not necessarily cease its review of such potentially affected documents” is incorrect.⁴⁴ The Prosecution will continue to identify potentially privileged communications by way of keyword searches and provide any relevant document to the Chamber for its determination, as instructed by the Decision.⁴⁵ In addition, the Defence, having access to the relevant materials, has an equal opportunity to do the same.

32. The Defence further alleges that the Prosecution “can [...] utilize its knowledge of the content of the documents as spring-board evidence, i.e. to guide its investigations”, which would render the Suspect’s protection against compelled self-incrimination nugatory or otherwise affect the fairness of the proceedings.⁴⁶ The theoretical possibility that the Prosecution *could* do that does not establish any impact on the fairness of the proceedings, particularly since there is no reason to assume that the pool of scanned documents contains unidentified privileged communications or confessions. The Defence does not suggest that the Prosecution *would* use privileged communications as lead information for its investigations.⁴⁷ Such action would in fact be inconsistent with the Prosecution’s duty under Article 54(1)(c) to fully respect the rights of persons under the Statute. Moreover, the Prosecution has abundantly shown in this matter that it abides by the highest standards. It independently took steps to cause its Services Section to identify potentially privileged materials in the seized documents and isolate them from persons in

⁴⁴ Defence Application, para. 29.

⁴⁵ Decision, p.7, para. 5.

⁴⁶ Defence Application, para. 30.

⁴⁷ Even assuming the existence of such material, which is in itself merely hypothetical.

other divisions of the Prosecution.⁴⁸ Moreover, without further looking at the materials, the matter was referred to the Chamber.⁴⁹

33. Finally, the Defence submission that the mechanism put in place by the Decision affects the fairness of the proceedings, as it does not allow all potentially privileged communications to be identified, is also without merit.⁵⁰ If the Suspect is unable to recall the names, addresses, telephone numbers, or other identifying details of any lawyers and clergymen with whom he allegedly had privileged communications over the last decade or so, it is unlikely that those communications – if they exist at all -- are relevant to these proceedings.

Matters common to both Issues

(i) *The two Issues do not affect the expeditious conduct of the proceedings*

34. The Application fails to demonstrate that the two issues significantly affect the expeditious conduct of the proceedings within the meaning of Article 82(1)(d). The Defence submits that the review procedure set out by the Chamber will create a constant round of litigation as the parties would argue privilege arising out of materials not identified by the keyword search.⁵¹ It also indicates that this task would divert the time and resources of the Chamber from its preparation of the confirmation hearing.⁵² The Prosecution disputes these complaints.

⁴⁸ The Knowledge Base Unit (KBU) conducted keyword searches in Ringtail to identify potentially privileged materials. It further quarantined any such material in Ringtail so that the rest of the Prosecution could not access them. The Information and Evidence Unit (IEU) took possession of all printed copies of the seized material and removed all the potentially privileged documents that were identified by KBU before returning the remainder to the investigators. This process was repeated as soon as the Prosecution obtained additional keywords from the Defence.

⁴⁹ See ICC-01/04-01/010-54, para. 9.

⁵⁰ Defence Application, para. 31.

⁵¹ Defence Application, para.32.

⁵² Ibid., para.33.

35. First, any reasonable method to identify privileged information – excluding, of course, the proposal that it be left entirely to the unreviewable discretion of the Defence⁵³ -- will potentially lead to litigation between the parties. Thus, there can be no guarantee of consensus, regardless whether the materials are screened and/or subsequently reviewed by the Registry, Chamber, OPCD or Defence. Also, under any method it will be the Chamber who has the last word. Similarly, the Chamber is the organ best placed to determine its capacity and resources to efficiently address the matters before it. This is particularly relevant as the Defence has expressly indicated that they lack the resources to expeditiously conduct the review⁵⁴ and that even the task of identifying keywords places a huge burden on the Suspect.⁵⁵

36. In any event, the Defence submissions merely raise speculative concerns as no litigation in this regard has yet occurred. Hence, an Appeal at this stage will not advance the expeditious conduct of the proceedings. On the contrary, interjecting an appeal to issues that can be fully addressed at another stage (when they effectively arise – if they do so), will only delay, not expedite the process.

(ii) *Immediate resolution by the Appeals Chamber of the two Issues would not materially advance the proceedings*

37. The Defence does not demonstrate that immediate resolution by the Appeals Chamber of the two Issues would materially advance the proceedings.⁵⁶ The Prosecution is of the view that the opposite is true: an appeal at this stage would interrupt the review and disclosure process and therefore unnecessarily delay the proceedings. It would almost inevitably result in the postponement of the confirmation hearing.

⁵³ That is not to concede that the proposal for unreviewable Defence authority has any legitimacy. The Chamber is the ultimate guardian of the fair and expeditiousness conduct of the proceedings, and its decisions will always be guided to that end ICC-01/04-01/06-2582 OA18, para. 47.

⁵⁴ ICC-01/04-01/10-68, para.10.

⁵⁵ ICC-01/04-01/10-72, para.3.

⁵⁶ Defence Application, paras.35-36.

38. Moreover, an appeal against the Decision is premature. As demonstrated above, the process laid out in the Decision does not cause any prejudice to the Defence. If at a later stage the Defence can identify the wrongful disclosure, as a result of the implementation of the Decision, of discrete items of potentially privileged information, then the Decision leaves the Defence with sufficient remedies. The Defence may challenge the admissibility of any document containing privileged communications. Moreover, if the Chamber relied on any information that is privileged, the Defence can raise this matter in a final appeal against the judgement of the Trial Chamber.

(iii) *The Issues do not affect the outcome of the trial*

39. The arguments that the Prosecution can benefit by being exposed to the contents of privileged material, and therefore that the Issues will have an impact on the outcome of the trial, is also purely speculative.⁵⁷ Moreover, the Defence retains the power to identify privileged communications or propose legitimately and rationally motivated terms that will enable effective screening. And, should items be disclosed despite the best efforts of the Chamber and the parties, the Chamber can take remedial action appropriate to meet the particular circumstance. This demonstrates that any suggestion that the issues have an effect on the outcome of the trial is abstract.

⁵⁷ Defence Application, paras.37-38. The Prosecution notes that the only arguments appear to relate to the Second Issue, while no argument is advanced in relation to the First Issue.

IV. Relief sought

40. For the reasons set out above, the Prosecution requests that the Trial Chamber reject the Defence Application.



Luis Moreno-Ocampo
Prosecutor

Dated this 18th day of March 2011

At The Hague, The Netherlands