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PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Cuno Tarfusser
Judge Sylvia Steiner

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. Callixte MBARUSHIMANA***

Public redacted version of
Prosecution's response to the Defence "waiver of privilege and request to consider sanctions for misconduct"
with Confidential Annex A

Source: The Office of the Prosecutor

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I. Introduction

1. On 25 May 2011, the Defence submitted its “waiver of privilege and request to consider sanctions for misconduct”,¹ in which it complains of the fact that the Prosecution has interviewed and obtained a statement from one [REDACTED]. It alleges, incorrectly, that during the course of this interview the Prosecution elicited from [REDACTED] details of the contents of the communications in respect of which the Defence claims privilege. On the strength of this faulty premise, the Defence constructs an argument that the Prosecution has violated Callixte Mbarushimana’s (“the Suspect”) alleged privilege in respect of these communications and pre-empted the Chamber’s determination of the issue. Therefore, so the argument goes, the Defence is now “forced” to waive its claimed privilege. This conduct is alleged by the Defence to be so egregious that the Chamber should consider whether sanctions for misconduct are warranted, pursuant to Article 71 of the Statute.

2. The purpose of the interview with [REDACTED] was not to enquire into the contents of the allegedly privileged communications which may be contained in the seized electronic media.² It was to establish, from the person best qualified to comment, the nature of those communications.

3. The Prosecution submits that it is entitled to investigate the credibility of the Suspect’s evolving claims of privilege including, but not limited to, claims in respect of [REDACTED]. Having properly spoken to [REDACTED] about the nature of the communications, it was also appropriate to take a statement from him in order to disclose to the Defence that which [REDACTED] told the Prosecution.

¹ ICC-01/04-01/10-183-Conf, 25 May 2011.

² This material is presently the subject of the Chamber’s review. It is worth noting that the details of these documents were unknown to the Prosecution at the time of the interview, as both the Defence’s lists of keyword and lists of potentially privileged documents were withheld from the Prosecution.

4. Finally, while the Defence is certainly free to waive further invocation of this so-called privilege – which in effect waives nothing, since the privilege itself is a fiction and the waiver may relieve the Chamber of the burden of reviewing those documents – its claim that Prosecutorial action “forces” the Suspect to execute this waiver is flawed on multiple grounds. Firstly, there is no recognized privilege protecting communications made “for the purpose of peace”.³ Secondly, there is no basis for the argument that [REDACTED] disclosed the substance of confidential communications in furtherance of peace to the Prosecution. Thirdly, even if these communications were in fact made under the protection of confidentiality and thereafter disclosed by [REDACTED] to the Prosecution, his disclosure would not require the Suspect to waive the privilege. Finally, the Defence asserts that [REDACTED] agreed to testify in this Court on the Suspect’s behalf and confirmed that he could do so despite his “clerical and mediatory role”.⁴ The Defence thus both proposes [REDACTED] as a Defence witness and simultaneously declares that his clerical or mediatory role renders his evidence and prosecutorial contact off-limits.

5. The Prosecution submits that the Defence’s waiver of what is in fact a non-existent “pursuit of peace” privilege is an empty gesture and its complaint that it is forced by prosecutorial actions is merely designed to smear the Prosecution and deter it from conducting appropriate and legitimate investigations. Thus, while the Court may choose to accept the Suspect’s waiver, it nonetheless should summarily dismiss the allegations of prosecutorial wrongdoing.

II. Statement of facts

6. On 23 August 2010 the Prosecution filed its Application under Article 58⁵ (“the Prosecution Application”) for a warrant of arrest in respect of the Suspect. In this Application, the Prosecution describes the FDLR’s attempts to extort political concessions from the Rwandan government in return for the cessation of atrocities against the civilian

³ ICC-01/04-01/10-183-Conf, para. 6.

⁴ ICC-01/04-01/10-183-Conf, para. 6.

⁵ ICC-01/04-573-US-Exp, 23 August 2010 (Reclassified as public: ICC-01/04-573-Red 14 October 2010).

population of the Kivus.⁶ As part of its analysis of this allegation, the Prosecution described the history of the FDLR's negotiations with the Rwandan government and other intermediaries in the process, with specific reference to the role of [REDACTED].⁷ The role of [REDACTED], and particularly the role of the Suspect in the negotiation process, has thus been a subject of interest in the investigation long before the arrest of the Suspect.

7. On 11 February 2011 the Prosecution filed its request for a review of potentially privileged material,⁸ alerting the Chamber to the possibility that one or more of the seized documents contained potentially privileged communications.
8. On 18 February the Defence filed its response to the Prosecution request for a review of potentially privileged material, in which it claimed privilege in respect of [REDACTED].⁹
9. [REDACTED]¹⁰ [REDACTED].¹¹
10. On 4 March the Chamber issued its "Decision on the 'Prosecution's request for a review of potentially privileged material'".¹² Citing the privileged communications provision of Rule 73, the decision ordered the parties 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."¹³

⁶ *Ibid*, paras 9 – 12.

⁷ *Ibid*, para 46.

⁸ ICC-01/04-01/10-54, 14 February 2011.

⁹ *Ibid*, para. 12 (emphasis added).

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² ICC-01/04-01/10-67, 4 March 2011.

¹³ *Ibid*, p. 8.

11. On 9 March the Prosecution¹⁴ and the Defence¹⁵ submitted their proposed keyword lists.

In the Defence filing, the Suspect expanded his claim of “religious privilege”.¹⁶ He explained that he

*“...has had longstanding, confidential and privileged relationships with several members of the religious clergy since his pre-school years in Rwanda”¹⁷ and that “...the character of these relationships incorporated an inherent understanding that they were subject to the same confidentiality which would apply in the confessional.”¹⁸ [...] “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.”¹⁹ [...] “Without the aforementioned expectation, Mr. Mbarushimana would not have shared information of a **confidential and intimate nature** with the clergymen concerned.”²⁰ [...] “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.”²¹*

12. On 14 March the Prosecution filed the “Prosecution Response to the ‘Defence Submission of ‘Keywords’ for the Review of Potentially Privileged Material’”,²² in which it objected to the Defence’s keyword list and specifically pointed out that:

¹⁴ ICC-01/04-01/10-71, 9 March 2011.

¹⁵ ICC-01/04-01/10-72, 9 March 2011.

¹⁶ In the Relevant Background to the Defence Waiver document (ICC-01/04-01/10-183-Conf), the Defence appears to have inadvertently omitted reference to this filing, ICC-01/04-01/10-72.

¹⁷ It is unclear whether this is intended to include [REDACTED], but from [REDACTED]’s statement, this is clearly not the case. See Confidential Annex A.

¹⁸ ICC-01/04-01/10-72, para 7.

¹⁹ *Ibid*, para 9 (emphasis added).

²⁰ *Ibid*, para 10 (emphasis added).

²¹ *Ibid*, para 11 (emphasis in original).

²² ICC-01/04-01/10-77, 14 March 2011.

“... the Suspect has failed to establish that any communication with a Roman Catholic priest is automatically privileged, regardless of subject or context. He misapprehends the meaning of a ‘sacred confession’ as envisaged by Rule 73(3). Furthermore, the Defence fails to satisfy at least the second and third requirements for privilege under Rule 73(2).”²³

13. After more litigation on the keywords²⁴ and upon receipt of the Registry’s subsequent report²⁵ and addendum²⁶ indicating the tens of thousands of hits based on those keywords, on 15 April the Chamber issued its “Second Decision on matters regarding the review of potentially privileged material”,²⁷ in which it ordered the Defence to conduct the review of the seized material and submit to the Chamber a list of the documents on which it claims privilege under Rule 73 by no later than 6 May.
14. On 27 April, apparently after having spoken to [REDACTED] itself,²⁸ the Defence asked whether the Prosecution had spoken to [REDACTED] and sought a copy of the interview notes.²⁹ On 3 May the Prosecution declined to comment on who it speaks to in its ongoing investigation or to turn over internal work product, assuring the Defence that if and when a statement was taken, it would be disclosed in the ordinary course.³⁰
15. After various filings and orders on the keywords to enable identification of potential privileged materials, on 17 May the Defence made a submission on the Suspect’s claimed privilege with respect to “conversations between Mr. Mbarushimana and the clergy concerned”. The privilege is no longer based on “sacred confession” or “religious

²³ *Ibid.*, para. 6. See further paras. 7 – 11.

²⁴ ICC-01/04-01/10-88.

²⁵ ICC-01/04-01/10-95-Conf, 11 April 2011.

²⁶ ICC-01/04-01/10-98-Conf, 13 April 2011.

²⁷ ICC-01/04-01/10-105, 15 April 2011.

²⁸ ICC-01/04-01/10-183-Conf, para. 6.

²⁹ ICC-01/04-01/10-183-Conf-AnxA, 25 May 2011.

³⁰ *Ibid.*

authority”; rather, the Defence “clarified” that it related to “*the peace-mediation role performed by the clergy concerned*”.³¹

16. On 19 May the Prosecution interviewed [REDACTED] and obtained a statement from him.³² The statement was limited to his knowledge and relationship with the Suspect and issues related to the nature of their communications. Arrangements were made for a subsequent interview in order to cover additional aspects relevant to the charges against the Suspect, but no date for this interview has yet been fixed.

17. On 25 May the Defence filed the Defence waiver of privilege and request to consider sanctions for misconduct.³³

III. Submissions

The Prosecution was entitled to interview and depose [REDACTED]

18. The Prosecution submits that it is entitled to interview and take statements from prospective witnesses. As the Defence itself notes, “*there is no property in a witness*”.³⁴

19. The Prosecution has long regarded [REDACTED] as a potential witness. His evidence pertaining to the Suspect’s involvement in negotiations with the Congolese and Rwandan governments to obtain political concessions for the FDLR is relevant to the alleged role played by the Suspect in the crimes.

20. The Office of the Prosecutor has been in touch with [REDACTED] since 2009, in his capacity as representative of [REDACTED], which has an active role in the DRC where the Prosecution was investigating several cases and was able to provide useful contextual

³¹ *Ibid*, p. 5 (emphasis added).

³² See Conf Annex A.

³³ ICC-01/04-01/10-183-Conf.

³⁴ *Ibid*, para. 13.

information regarding the political landscape in the Great Lakes region. In relation to this particular investigation, the Prosecution was engaged in pre-interview discussions with [REDACTED], intending to interview him regarding the Suspect's activities as FDLR representative abroad after it received a copy of the statement he earlier gave to the German authorities. When the Defence asserted that the Suspect's conversations with [REDACTED] were protected by religious privilege – months after [REDACTED]'s name was mentioned in the case –, the Prosecution added it to the list of topics it proposed to cover in the interview. In a pre-interview conversation, [REDACTED] indicated that his communications with the Suspect were not in the nature of a sacred confession. Because the Suspect seemed intent on resisting disclosure, on religious privilege grounds, of all documents related to his communications with [REDACTED], it was important to develop the facts on the nature of those communications. Accordingly, the Prosecution took a statement from [REDACTED] focussing on that subject.

21. It was the Defence's email of 27 April which prompted the Prosecution to formally interview [REDACTED] on 19 May and obtain his statement prior to the time limit for the disclosure thereof. Since the Prosecution regards interview notes as internal work product, these are not normally disclosed. However, where the contents thereof contain information which may be material to the preparation of the Defence, it is necessary to disclose this in another form. Therefore, the Prosecution deemed it necessary to record [REDACTED]'s disclosure regarding the nature of his communications with the Suspect in a formal statement for the purpose of disclosure to the Defence, as it subsequently did.³⁵

22. The Defence complains that the topics covered at this interview were selective and that other details relating to the role of the Suspect, which might be exculpatory, were omitted. However, the interview was not intended to be exhaustive, but rather focussed on the threshold issue whether the Suspect's communications were in the nature of a sacred confession, and thus privileged. Indeed, had it been a more extensive interview, the Suspect no doubt would even more vigorously complain that the Prosecution

³⁵ Annex A was disclosed to the Defence on 23 May.

violated his rights by eliciting detailed information before the Chamber ruled on the validity of the privilege assertion.

23. The Suspect complains that the very act of speaking to [REDACTED] breached the privilege. But as the statement taken from [REDACTED] reflects, the purpose of the interview was to establish the nature of their communications, with a view to establishing whether or not they were in fact privileged. It is apparent from the terms of the statement itself³⁶ that no enquiry was made into the specific content of any particular communication with the Suspect, far less the content of any communication which may be contained on the electronic media that are currently the subject of the Chamber's review.

24. In light of the above, the Prosecution submits that the Defence's allegations that the Prosecution "*discussed the contents of Mr. Mbarushimana's statements*"³⁷ with [REDACTED] and "*thereby, obtained all information to which it was not yet entitled*"³⁸ represent a gross misstatement of the facts.

25. Moreover, as the Chamber confirmed, the Prosecution is entitled to challenge the Suspect's claims of privilege. The Single Judge observed that "*the Prosecution has a legitimate interest in ensuring that only documents covered by privilege in accordance with rule 73 of the Rules are excluded from its review of the material seized at the premises of Mr Mbarushimana*".³⁹ Its interview of [REDACTED] was consistent with the Single Judge's ruling and is no different from asking an attorney in respect of whom attorney-client privilege is invoked whether he in fact represented an accused and, if not, taking a statement to that effect.⁴⁰ Now, if and when the Suspect asserts a sacred confessional-based privilege to his communications with [REDACTED], the Prosecution is fairly positioned to rebut that argument.

³⁶ Which [REDACTED] has authenticated by his signature.

³⁷ ICC-01/04-01/10-183-Conf, para. 12.

³⁸ *Ibid.*

³⁹ ICC-01/04-01/10-173, p. 5.

⁴⁰ *Ibid.*

There is no privilege attached to the communications between the Suspect and [REDACTED]

26. [REDACTED] confirmed that, although he took confession from the Suspect on occasions, this was always in person. Therefore, no privilege relating to “sacred confessions” could apply to any correspondence or telephone communications between the two.
27. It appears that the Defence is now claiming privilege to communications related not to [REDACTED]’s “religious authority”,⁴¹ but to his actions in a secular capacity as a peace negotiator.
28. The Prosecution submits that this new peace negotiator privilege was presented only after the Prosecution discussed this subject with [REDACTED] and was in a position to disprove the claim of religious privilege. The Defence does not adduce any judicial authority for the existence of a peace privilege, and the Prosecution is aware of none. The Rules are sparing in their recognition of privilege (specifically requiring recognition only of attorney-client, sacred confessional and Red Cross/Red Crescent privilege), and provide latitude to the Chambers to disallow invocation of privilege as to matters that are more broadly recognized, such as communications with a doctor, psychiatrist, counsellor or psychologist, and even religious advisors.
29. The Defence’s complaint that the Prosecution “*slyly managed to get [REDACTED] to confirm that the majority of conversations were without the context of holy sacrament [...] yet totally omitted to question him as to the applicability of the wider criteria under Rule 73(2)(a), (b) and (c)*”⁴² is equally devoid of merit. The Accused claimed that the communications were protected by religious privilege. If the Prosecution can be faulted, it is only for failing to give credence to the invocation of a “peace negotiator” privilege not previously known in this Court.

⁴¹ ICC-01/04-01/10-72, para 9.

⁴² ICC-01/04-01/10-183-Conf, para. 9

The Defence's request for sanctions for misconduct

30. The Prosecution submits that there has been absolutely nothing untoward in its conduct pertaining to the interview of [REDACTED]. Far from committing any act of misconduct, the Prosecution submits that it acted scrupulously in accordance with its statutory obligations by incorporating the material aspects of its prior communication with [REDACTED] into a statement for the purposes of disclosure to the Defence. The fact that what the statement reveals does not suit the Defence's case is certainly no grounds to ask the Chamber to consider whether sanctions for prosecutorial misconduct are in order.
31. The Prosecution notes that the Defence is increasingly filing unfounded complaints of prosecutorial misconduct, demands for sanctions, and allegations of abuse of process. This tactic itself is abusive and should be checked. The Prosecution will vigorously oppose unfounded accusations of professional misconduct and seek sanctions if the pattern of baseless accusations levelled against the Prosecution continues.
32. Therefore, in the above circumstances, the Prosecution requests that the Chamber reject the Defence's request to consider sanctions against the Prosecution for misconduct.



Luis Moreno-Ocampo, Prosecutor

Dated this 10th Day of June 2011

At The Hague, The Netherlands