



Original: **English**

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

Date: **30/06/2011**

**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 REDACTED**

**Defence waiver of privilege  
and request to consider sanctions for misconduct**

**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**

Mr. Luis Moreno-Ocampo, Prosecutor

Ms. Fatou Bensouda, Deputy Prosecutor

Mr. Anton Steynberg, Senior Trial Lawyer

**Counsel for the Defence**

Mr. Nicholas Kaufman

Ms. Yael Vias Gvirsman

**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**

Mr. Xavier-Jean Keïta

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

---

**Registrar**

Ms. Silvana Arbia

**Defence Support Section**

**Deputy Registrar**

Mr. Didier Preira

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## Introduction

1. By dint of recent developments, the Defence hereby waives the privilege it sought to claim with respect to all communications between Mr. Mbarushimana and [REDACTED]. This waiver is not granted voluntarily but has been forced on the Defence as a result of the Prosecution's flagrant disregard for due process by subsuming the role of the Pre-Trial Chamber and willfully pre-empting an issue which is presently *sub-judice*. In light of the aforementioned, the learned Pre-Trial Chamber is hereby requested to consider whether the OTP should be sanctioned for misconduct before the Court pursuant to Article 71 of the Rome Statute.

## Relevant Background

2. On 18 February 2011, the Defence filed its response<sup>1</sup> to the *Prosecution's Request for the Review of Potentially Privileged Material*,<sup>2</sup> stating, *inter alia*, that it claimed privilege in respect of communications between Mr. Mbarushimana and [REDACTED].<sup>3</sup>

3. On 25 February 2011, the learned Single Judge of Pre-Trial Chamber I temporarily suspended all Prosecution dealings with materials seized from Mr. Mbarushimana's house ("Interim Decision").<sup>4</sup> These materials included records of communications with [REDACTED]. In her decision, the learned Single Judge concluded that Rule 73 of the Rules of Procedure and Evidence ("Rules") provides that communications made in the context of certain specified relationships are not subject to disclosure – thus accepting the Defence submission that privilege could potentially attach not just to relationships between lawyers and their clients.

---

<sup>1</sup> ICC-01/04-01/10-58.

<sup>2</sup> ICC-01/04-01/10-54.

<sup>3</sup> ICC-01/04-01/10-58 at paragraph 12 footnote 11.

<sup>4</sup> ICC-01/04-01/10-63.

4. On 4 March 2011, the Pre-Trial Chamber issued its *Decision on the Prosecution's request for a review of potentially privileged material*<sup>5</sup> reserving to itself the following function: "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 of the Rules". It is worth noting, that unlike the Prosecution, the Pre-Trial Chamber imposed on itself a caveat asserting that "the Chamber's review of such documents shall be limited to what is relevant and necessary to a determination of whether or not they are privileged". The Pre-Trial Chamber thus suspended the Interim Decision and ordered the Parties to submit a list of keywords to facilitate the identification of potentially privileged communications among the materials seized from Mr. Mbarushimana's house.

5. On 15 April 2011, the Pre-Trial Chamber issued its *Second Decision on matters regarding the review of potentially privileged material*<sup>6</sup> whereby it ordered the Defence to "expeditiously carry out and complete its review of the relevant seized material, and to submit to the Chamber a list of documents on which it claims privilege under rule 73 of the Rules by no later than 6 May 2011".

6. In the latter half of the month of April 2011, without knowing that the Prosecution proposed to interview him, Counsel contacted [REDACTED] by telephone to verify the content of his communications with Mr. Mbarushimana. From his conversation with [REDACTED], Counsel understood that the former had already been contacted by the OTP. [REDACTED] concluded his conversation with Counsel by expressing his readiness to come to The Hague and to testify on behalf of Mr. Mbarushimana. Counsel asked [REDACTED] whether this would indeed be permissible given his [REDACTED] but was assured that it would not be a problem. Counsel further stated to [REDACTED] that Mr. Mbarushimana was claiming privilege in respect of their communications and explained to him the relevant criteria

---

<sup>5</sup> ICC-01/04-01/10-67.

<sup>6</sup> ICC-01/04-01/10-105.

set out in Rule 73(2)(a),(b) and (c). [REDACTED] agreed that his conversations with Mr. Mbarushimana were made in the reasonable expectation of privacy, that confidentiality was essential to their relationship and that the communications were conducted for the [REDACTED]. Counsel thanked [REDACTED] for his cooperation and informed him that he would re-contact him once the issue of privilege had been resolved.

7. On 27 April 2011, Counsel sent an enquiry to the Senior Prosecuting Trial Lawyer requesting that he confirm whether or not members of his office had interviewed [REDACTED]. The Senior Trial Lawyer responded, on 3 May 2011, by stating that he would not comment on whether the OTP had spoken to any person as part of its ongoing investigations.<sup>7</sup>

8. In light of his conversation with [REDACTED] and the Senior Trial Lawyer, Counsel suspected the potential for prosecutorial malfeasance. Accordingly, on 17 May 2011, in his response to the *Prosecution's response to the Defence submission of a list of potentially privileged documents and request for access to seized electronic material*,<sup>8</sup> Counsel reiterated and clarified the privilege sought under Rule 73(2):

*"The Defence further notes the restrictive interpretation given to [REDACTED] privilege as contained in paragraph 44(b) of the Prosecution Filing. After reviewing the relevant materials, the Defence clarifies that conversations between Mr. Mbarushimana and [REDACTED] are, prima facie, subject to privilege under Rule 73(2) of the Rules of Procedure and Evidence given (i) the expectation of privacy and non-disclosure, (ii) the essential nature of such confidentiality to the relationship and (iii) [REDACTED]."*<sup>9</sup>

9. Two days later, on 19 May 2011, two OTP officials interviewed [REDACTED] discussing the contents of Mr. Mbarushimana's conversations with him. The same OTP officials slyly managed to get [REDACTED] to confirm that the majority of

---

<sup>7</sup> Confidential Annex 1.

<sup>8</sup> ICC-01/04-01/10-147.

<sup>9</sup> ICC-01/04-01/10-159 at p. 3

conversations were without the context of [REDACTED] Rule 73(3) yet totally omitted to question him as to the existence of the wider criteria under Rule 73(2)(a), (b) and (c).

### Submission

10. The Prosecution has persistently disputed the applicability of privilege to the communications between Mr. Mbarushimana and [REDACTED]. This is of no consequence to the present filing which requests the Court not to determine the applicability of privilege but to rule on the propriety of the Prosecution conduct. The decision as to whether privilege applies to the communications with [REDACTED] was for the Pre-Trial Chamber to take and **NOT** for the Prosecution. The Prosecution knew that the Pre-Trial Chamber was yet to rule on whether the privilege sought by the Defence could apply to the communications with [REDACTED] yet acted to pre-empt this decision regardless. After all, for what reason did the Pre-Trial Chamber order the Defence to perform the laborious task of isolating communications in respect of which privilege was sought? For what reason did the Pre-Trial Chamber spill so much ink to design a review procedure for protecting Mr. Mbarushimana's rights just for the Prosecution to do as it wishes without the slightest care for due process?

11. By way of comparison, the learned Pre-Trial Chamber is requested to ask itself how the Prosecution would react if the Defence were, of its own initiative, to contact witnesses in respect of whom protective measures were sought in order to interrogate them as to the necessity for such.

12. Counsel has set out - in great detail - the events which have led to the waiver of privilege which is no longer worth claiming for several reasons. Firstly, the Prosecution has flouted the preliminary protection which the Pre-Trial Chamber afforded the Defence and, thereby, obtained all information to which it was not yet entitled.

13. Secondly, in light of the wholly one-sided nature of the witness interview conducted without any regard to Article 54(1)(a) of the Rome Statute, Counsel notifies the Pre-Trial Chamber of his present need and intent to interview [REDACTED] in order to rectify the bias created by the Prosecution. [REDACTED] has much to say which may exonerate Mr. Mbarushimana of the charge that he was conspiring to cause a humanitarian catastrophe. None of this information was included in the Prosecution interview with him which was conducted solely to prove Mr. Mbarushimana's alleged standing within the FDLR and to ascertain what was discussed [REDACTED] and what was not. Counsel notes that there is no property in a witness and that his contact with [REDACTED] was initiated at a time when the Prosecution was refusing to disclose whether or not it intended to interview the former.

14. Finally, the Defence believes the Prosecution's conduct to have been so reprehensible that the Pre-Trial Chamber should consider whether it constitutes misconduct under Article 71 of the Rome Statute.



---

Nicholas Kaufman  
Counsel for Callixte Mbarushimana

Done in Jerusalem, Israel  
Thursday, June 30, 2011