

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 11 March 2011

**PRE-TRIAL CHAMBER I**

**Before: Judge Sanji Mmasenono Monageng, Single Judge**

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

***IN THE CASE OF  
THE PROSECUTOR V. CALLIXTE MBARUSHIMANA***

**Public Document**

**Decision on the "Defence Request for Suspensive Effect of Decision  
ICC-01/04-01/10-67"**

Decision 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

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
 Participation/Reparation**

**The Office of Public Counsel for  
 Victims**

**The Office of Public Counsel for the  
 Defence**

Mr Xavier-Jean Keita

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Deputy Registrar**

Mr Didier Preira

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
 Section**

**Others**

I, **Judge Sanji Mmasenono Monageng**, the Single Judge of Pre-Trial Chamber I of the International Criminal Court (“Chamber” and “Court” respectively) responsible for carrying out the functions of the Chamber in relation to the case of *The Prosecutor v. Callixte Mbarushimana*;<sup>1</sup>

**NOTING** the “Decision Temporarily Suspending Dealings with Transcripts and Original Recordings of Intercepted Communications and Materials Seized from the House of Mr. Callixte Mbarushimana” (“Interim Decision”),<sup>2</sup> issued on 25 February 2011, whereby the Single Judge (i) ordered the Registry to withdraw access of the Prosecutor to, *inter alia*, any of the materials seized from the house of Mr Callixte Mbarushimana (“Mr Mbarushimana”); and (ii) ordered the Prosecutor to cease all dealings with these materials and to quarantine them pending resolution of the issues raised in previous filings by the Prosecutor and the Defence for Mr Mbarushimana (“Defence”);

**NOTING** the “Decision on the ‘Prosecution’s request for a review of potentially privileged material’” (“Decision on Privileged Material”),<sup>3</sup> issued on 4 March 2011, whereby the Chamber (i) decided that the Interim Decision ceases to be effective; and (ii) established a procedure for the selection of potentially privileged communications by the Registry and their subsequent review by the Chamber;

**NOTING** the “Defence Request for Suspensive Effect of Decision ICC-01/04-01/10-67” (“Defence Request”),<sup>4</sup> filed on 7 March 2011, whereby the Defence:

- (a) submits that it intends to seek leave to appeal the Decision on Privileged Material on the grounds of: (i) the alleged failure of that decision to safeguard Mr Mbarushimana’s right not to incriminate himself; (ii) the alleged insufficiency of the

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<sup>1</sup> Oral Decision of the Chamber, 28 January 2011, ICC-01/04-01/10-T-1-ENG, p. 11.

<sup>2</sup> ICC-01/04-01/10-63.

<sup>3</sup> ICC-01/04-01/10-67.

<sup>4</sup> ICC-01/04-01/10-68.

key-word search envisaged in the decision for the purpose of identifying potentially privileged information; and (iii) the Chamber's alleged failure to determine the parameters of the religious privilege claimed by Mr Mbarushimana; and that the immediate implementation of the Decision on Privileged Material would irreversibly prejudice the rights which the intended appeal would seek to protect and render superfluous the third of the above-listed grounds of appeal; and

(b) requests the Chamber (i) to grant suspensive effect to the Decision on Privileged Material pending resolution of the interlocutory appeal for which the Defence intends to seek leave or, in the alternative, pending a decision of the Appeals Chamber on the matter, should leave to appeal be granted, and (ii) should the Defence Request be granted, to order reinstatement of the Interim Decision;

**NOTING** the "Prosecution's Response to the 'Defence Request for suspensive effect of ICC-01/04-01/10-67'" ("Prosecution's Response"),<sup>5</sup> filed on 9 March 2011, whereby the Prosecutor requests the Chamber to dismiss the Defence Request based on the following considerations: (i) the low risk that further privileged documents are contained in the material seized from the house of Mr Mbarushimana; (ii) the absence of likelihood of irreversible prejudice if the Defence Request is denied; and (iii) the need to ensure expeditiousness of the proceedings; and, in the alternative, should the Chamber decide to suspend the implementation of the Decision on Privileged Material, the Prosecutor requests the Chamber to exclude intercepted communications from the materials quarantined;

**NOTING** article 82(3) of the Rome Statute ("Statute") and rule 156(5) of the Rules of Procedure and Evidence;

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<sup>5</sup> ICC-01/04-01/10-73. The Prosecution's Response was filed in accordance with the "Order on the time limit for the Prosecutor's response to the 'Defence Request for Suspensive Effect of Decision ICC-01/04-01/10-67'", 8 March 2011, ICC-01/04-01/10-69.

**CONSIDERING** that the suspensive effect envisaged in article 82(3) of the Statute may be ordered by the Appeals Chamber when a person lodges an appeal, and that this provision is thus not applicable to the present case, where the Defence has only indicated its intention to request leave to appeal the Decision on Privileged Material;

**CONSIDERING**, however, that in exceptional cases suspensive effect may be given to a decision by Chambers other than the Appeals Chamber;<sup>6</sup>

**CONSIDERING** that in its decisions regarding suspensive effect under article 82(3) of the Statute, the Appeals Chamber has considered whether the implementation of the decision under appeal (i) "would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant" (ii) "would lead to consequences that would be very difficult to correct and may be irreversible", or (iii) "could potentially defeat the purpose of the appeal";<sup>7</sup>

**CONSIDERING** that the Defence does not explain how the Chamber's review of potentially privileged communications may irreversibly prejudice Mr Mbarushimana's right not to incriminate himself in case leave to appeal is granted and the Appeals Chamber finds that "it was inappropriate" for the Chamber to have conducted a review of potentially privileged communications;<sup>8</sup>

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<sup>6</sup> Suspensive effect was granted by Trial Chambers in the cases of *Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06-T-314-ENG, pp 21-22) and *Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08-811, para. 5).

<sup>7</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the "Decision on the Admissibility and Abuse of Process Challenges"", 9 July 2010, ICC-01/05-01/08-817, para. 11, citing: *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008", 22 April 2008, ICC-01/04-01/06-1290, para. 7; "Decision on the Requests of the Prosecutor and the Defence for suspensive effect of the appeals against Trial Chamber I's Decision on Victim's Participation of 18 January 2008", 22 May 2008, ICC-01/04-01/06-1347, para. 23; "Reasons for the decision on the request of the Prosecutor for suspensive effect of his appeal against the 'Decision on the release of Thomas Lubanga Dyilo'", 22 July 2008, ICC-01/04-01/06-1444, para. 10.

<sup>8</sup> Defence Request, para. 6.

**CONSIDERING** that, even if this contention of the Defence were correct, there is nothing to suggest that the purported prejudice to Mr Mbarushimana's rights creates "an irreversible situation that could not be corrected";

**CONSIDERING**, further, that the Defence fails to substantiate its claim that the implementation of the Decision on Privileged Material would render superfluous the appeal sought by the Defence on the ground of the Chamber's alleged failure to determine the parameters of the religious privilege claimed by Mr Mbarushimana;<sup>9</sup>

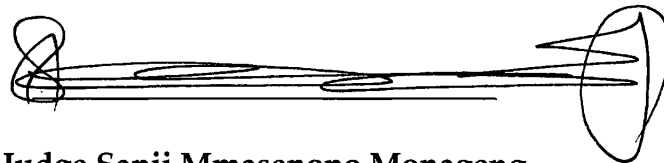
**CONSIDERING** that there are no other apparent reasons for suspending the implementation of the Decision on Privileged Material;

**CONSIDERING**, that, in light of the foregoing, the Defence's request for reinstatement of the Interim Decision is unsubstantiated;

**FOR THESE REASONS,**

**REJECT** the Defence Request.

Done in English and French, the English version being authoritative.



**Judge Sanji Mmasenono Monageng**

**Single Judge**

Dated this Friday, 11 March 2011

At The Hague, The Netherlands

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<sup>9</sup> Defence Request, para. 8.