

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 15 April 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

**Decision on the Defence's Application for Leave to Appeal the Decision on
Potentially Privileged Material dated 4 March 2011**

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
 Ms Yael Vias-Gvirsman

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**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
 Section**

Others

PRE-TRIAL CHAMBER I (“Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Callixte Mbarushimana* (Mr Mbarushimana);

NOTING the “Decision on the ‘Prosecution’s request for a review of potentially privileged material” dated 4 March 2011 (“First Decision on Potentially Privileged Material” or “Decision”),¹ whereby the Chamber *inter alia*

- (i) noted that the Prosecutor,² having identified a number of potentially privileged communications among the material seized at the premises of Mr Mbarushimana upon his arrest, had requested that those communications be screened “either by the Chamber or by someone designated by the Chamber”, with a view to determining whether they were in fact privileged;³
- (ii) noted that the Defence⁴ requested *inter alia* that the relevant seized material be reviewed either by the Defence Counsel and/or his appointed representative, or by the Office of Public Counsel for the Defence, “in order that privileged information could be removed at the discretion of the Defence”;⁵
- (iii) established the review system of potentially privileged material according to which the Registry was entrusted with the task to conduct a search of the relevant seized material based on keywords provided by the Defence and the Prosecutor and approved by the Chamber;
- (iv) ordered the Registry “to provide the Chamber with a list of documents which the said search would produce” no later than 16 March 2011, which time limit was later modified and extended to 8 April 2011 by the “Decision on the

¹ ICC-01/04-01/10-67.

² Prosecution’s request for a review of potentially privileged material and Public Annex A, 14 February 2011, ICC-01/04-01/10-54 and AnxA.

³ ICC-01/04-01/10-67, p.3.

⁴ Defence Response to Prosecution’s Request for the Review of Potentially Privileged Material, ICC-01/04-01/10-58+Anx1.

⁵ ICC-01/04-01/10-67, p.4.

keywords provided by the Defence for the purpose of selection of potentially privileged material” issued on 30 March 2011;⁶

NOTING the “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” filed by the Defence on 14 March 2011 (“Defence’s Application for Leave to Appeal” or “Defence’s Application”)⁷ in which it seeks, pursuant to article 82(1)(d) of the Rome Statute (“Statute”), leave to appeal in relation to the following two issues:

- a. “Whether the Chamber erred by finding that the preliminary review of Rule 73(1) privileged materials should be conducted by the Registry rather than the Defence or the OPCD” (“First Issue”); and
- b. “Whether 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”);

NOTING the “Prosecution’s Response to the Defence ‘Application for leave to appeal Pre-Trial Chamber I’s ‘Decision on Prosecutor’s request for a review of potentially privileged material’ of 4 March 2011””, filed on 18 March 2011,⁸ whereby the Prosecutor requested that the Defence’s Application be rejected;

NOTING further the “Second Decision on matters regarding the review of potentially privileged material” (“Second Decision”) issued on 15 April 2011, whereby the Chamber decided that the Defence be provided with a copy of all the relevant seized material as well as the lists of files already identified and those to be selected following the performance of the keyword search, in order for the Defence to review them and submit to the Chamber a list of the documents on which the Defence claims privilege under rule 73 of the Rules;⁹

NOTING article 82(1)(d) of the Statute;

⁶ ICC-01/04-01/10-88-Conf-Exp-Anx.

⁷ ICC-01/04-01/10-75.

⁸ ICC-01/04-01/10-83.

⁹ ICC-01/04-01/10-105.

CONSIDERING that, according to the established jurisprudence of the Court, (i) interlocutory appeals are meant as remedies of an exceptional character, which makes it mandatory to construe narrowly the statutory requirements; (ii) in order for the Pre-Trial Chamber to grant leave to appeal under article 82(1)(d) of the Statute, the issues identified by the party seeking leave must (i) have been dealt with in the relevant decision; and (ii) meet the following two cumulative criteria: (a) it must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; *and* (b) in the opinion of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings;¹⁰

CONSIDERING that the Appeals Chamber held that, for the purposes of article 82(1)(d) of the Statute, “[o]nly an ‘issue’ may form the subject-matter of an appealable decision” and that “[a]n issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”, as well as that “an issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”¹¹;

CONSIDERING that, also in light of the established jurisprudence of the Court, failure to establish either of the requirements set forth in article 82(1)(d) of the Statute makes it unnecessary for the Chamber to determine whether all or either of the others are met;

CONSIDERING that, accordingly, the Chamber will first analyse whether the issues identified by the Defence qualify as “appealable issues” within the meaning established by the Appeals Chamber and followed by the case-law of the Pre-Trial Chambers ever since;

CONSIDERING that with respect to the First Issue identified by the Defence, its very wording (namely, its reference to “a preliminary review” of the relevant seized materials purportedly to be carried out by the Registry) reveals that it is based on a misconception

¹⁰ *The Prosecutor v. Bahar Idriss Abu Garda*, Pre-Trial Chamber I, “Decision on the Prosecution’s Application for Leave to Appeal the Decision on the Confirmation of Charges”, ICC-02/05-02/09-267, 23 April 2010; *Situation in Uganda*, Pre-Trial Chamber II, “Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Application for Warrants of Arrest under Article 58”, 19 August 2005, ICC-02/04-01/05-20-US-Exp (unsealed pursuant to Decision ICC-02/04-01/05-52), paragraph 20.

¹¹ *Situation in the Democratic Republic of the Congo*, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, paragraph 9.

of the task the Registry was ordered to perform on such material by the First Decision on Potentially Privileged Material;

CONSIDERING that, far from entrusting the Registry with the task or responsibility to conduct the “preliminary review” of the potentially privileged material under rule 73 of the Rules, the Decision only instructed the Registry “to conduct a search of the relevant seized material on the basis of the keywords supplied by the Defence and the Prosecutor and approved by the Chamber”;

CONSIDERING that , accordingly, the limited and neutral task which the Registry was empowered to perform by the Decision, that is, to conduct keyword searches, was one of a purely technical and mechanical nature, and, hence, in accordance with article 43(1) of the Statute, the Registry was not endowed with discretion or power of assessment or appraisal intrinsic to the notion of “review”;

CONSIDERING that, accordingly, the First Issue is based on a misinterpretation of the determination made by the Chamber in the Decision and as such does not qualify as an appealable issue within the meaning of article 82(1)(d) of the Statute, as construed by the Appeals Chamber;

CONSIDERING that the Second Issue, by making reference to “*the mechanism instituted by the Pre-Trial Chamber for the review of the potentially privileged materials*”, is inextricably linked to the First Issue and, as such, is likewise based on an inaccurate interpretation of the determination made in the Decision;

CONSIDERING that, accordingly, the Second Issue also fails to qualify as an appealable issue within the meaning of article 82(1)(d) of the Statute, as construed by the Appeals Chamber;

CONSIDERING further that, in light of the technical difficulties faced by the Registry and in order to avoid causing undue delay in the proceedings, the Chamber has partially modified the system for the review of potentially privileged material and has accordingly decided that, by virtue of its familiarity with the relevant seized material, the Defence is in

a position to expeditiously identify the documents which it claims as privileged (included any handwritten documents);¹²

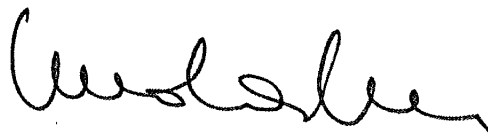
CONSIDERING therefore that none of the issues raised by the Defence qualify as appealable issues within the meaning of article 82(1)(d) of the Statute and that, in any event, in light of the amendment brought to the system for the review of potentially privileged material, their immediate resolution by the Appeals Chamber will not “materially advance the proceedings”;

FOR THESE REASONS, the Chamber

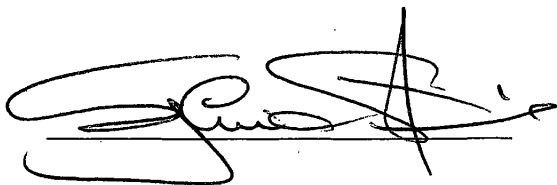
REJECTS

the Defence’s Application for Leave to Appeal.

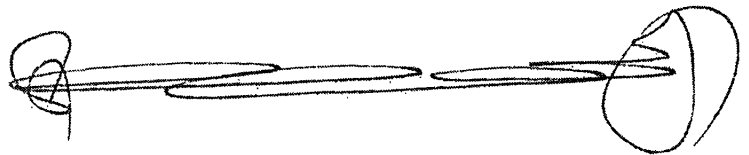
Done in English and French, the English version being authoritative.



Judge Cuno Tarfusser
Presiding Judge



Judge Sylvia Steiner



Judge Sanji Mmasenono Monageng

Dated this Friday, 15 April 2011

At The Hague, The Netherlands

¹² ICC-01/04-01/10-105.