



Original: **English**

No.: ICC-01/04-01/10
Date: **27 January 2011**

PRE-TRIAL CHAMBER I

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. Callixte MBARUSHIMANA

Public document

**Prosecution motion to strike the “Supplementary Information in support of the
Defence Challenge to the Validity of the Arrest Warrant”**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the*

Court to:

The Office of the Prosecutor

Luis Moreno-Ocampo
Fatou Bensouda

Counsel for the Defence

Nicholas Kaufman

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**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Deputy Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. Mr Callixte Mbarushimana (“the Suspect”) seeks to adduce “new” information¹ in support of his Defence Challenge to the Validity of the Arrest Warrant (“the Defence Challenge”),² to which the Prosecution has already responded (“the Prosecution’s Response”).³ The Prosecution disputes that he is permitted to do so.
2. The Suspect attempts to raise new legal arguments and to reply to the arguments in the Prosecution’s Response. The Prosecution disputes that he is permitted to do this either. The Prosecution further disputes that the material (“the Additional Information”) discloses any relevant new facts which would assist the Chamber to reach a correct decision.

II. Submissions

3. The stated objective of the filing is to adduce “*additional information communicated to [counsel for the suspect] by German Defence Counsel*”. However, the Suspect does not identify any legal basis for the filing, save for the vague assertion that “*herein undersigned counsel, as an officer of the Court, is duty bound to apprise the learned Pre-Trial Chamber of all information necessary for it to render a correct decision*”.
4. The Prosecution disputes that counsel’s ethical duties to the Court oblige or permit him to file additional information without statutory or judicial authorization.⁴ There is no basis in the legal texts for reply submissions, much less for submissions that proffer new documents. Regulation 28(1) of the Regulations of the Court permits a Chamber to order the participants to clarify

¹ Supplementary Information in support of the Defence Challenge to the Validity of the Arrest Warrant, ICC-01/04-01/10-40, 25 January 2011.

² Defence Challenge to the Validity of the Arrest Warrant, ICC-01/04-01/10-32, 10 January 2011.

³ Prosecution response to the “Defence Challenge to the Validity of the Arrest Warrant”, ICC-01/04-01/10-35, 18 January 2011.

⁴ If this were the case, counsel could rely on this to file new information at any stage of the proceedings, without regard for the established rules of practice.

or provide additional detail on any document, but does not authorise a party to provide additional detail on his own initiative without prior authorization. Regulation 24(5) similarly allows a party to reply to a response only with the leave of the Chamber.

5. The Prosecution contends that the Additional Information is not newly available, absent any reason why this information could not have been adduced in the Defence Challenge.⁵
6. The Prosecution further disagrees that the Additional Information provides the Chamber with any relevant new information which would assist the Chamber in reaching a correct decision. Instead, it merely confirms that which has never been disputed – that Callixte Mbarushimana was a named suspect in an ongoing investigation in Germany at the time the arrest warrant was issued – but sheds no light on the heart of the issue: whether, despite having named Mbarushimana as a suspect, the German authorities were, or are currently conducting an investigation or a prosecution against him.⁶
7. The filing also exceeds its stated purpose. It does not simply submit new materials, but also makes additional legal argument⁷ and replies to legal arguments raised in the Prosecution’s Response.
8. The Prosecution therefore submits that the Suspect’s filing is in breach of the Regulations⁸ and on that basis that the Chamber should refuse to entertain it. In these circumstances the Prosecution will not compound the violation by

⁵ Annex 3 to the present filing could not have previously been attached, since it is dated 11 January 2011, the day after the defence Challenge was filed. However, this document merely informs the Suspect’s counsel of a hearing date and adds nothing relevant to the issue at hand. There is no explanation why the remaining annexes were not obtained from his German counsel prior to the filing.

⁶ The Prosecution notes that the assertion in the last sentence of footnote 4 of the filing is misleading to the extent that it suggests that the German investigation was “active”. The quoted portion of the German letter of 2 December 2010 [ICC-01/04-01/10-40-Anx2, page 6 para. b) (1)] states that there was no formal decision to terminate the investigation, but the following paragraph in that same letter makes it clear that the German authorities had taken no formal investigative steps against him.

⁷ ICC-01/04-01/10-40, paras. 5 to 7.

⁸ The Prosecution further observes that the voluminous Additional Information is annexed in a language other than French or English, without an accompanying translation, which violates Regulation 39(1).

answering the merits of the filing until the Suspect has obtained the necessary leave or the Chamber authorises a response.

III. Conclusion

9. The Prosecution submits that the Chamber should refuse to entertain this filing. Should the Chamber decide to entertain it, the Prosecution requests an opportunity to respond on the merits.



Luis Moreno-Ocampo,

Prosecutor

Dated this 27th day of January 2011

At The Hague, The Netherlands