



Original: **English**

No.: **ICC-01/04-01/10**
Date: **23 February 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

**Prosecution's request for leave to reply to the "Defence Response to Prosecution's
Request for the Review of Potentially Privileged Material"**

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**

Xavier-Jean Keita

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. On 14 February 2011 the Prosecution filed the Prosecution Request for a review of potentially privileged material ("the Prosecution Request"). It proposed that 72 items (thus far) identified through a word search as being potentially privileged attorney-client communications be reviewed by the Chamber or a neutral third party.
2. Counsel for Callixte MBARUSHIMANA ("the Suspect") filed the "Defence Response to Prosecution's Request for the Review of Potentially Privileged Material" ("the Defence Response") on 18 February 2010. The Defence Response proposes a different remedy – that the Prosecution immediately terminate its review of all seized materials, the Defence alone be given access to the materials, and its determination of privilege be un-reviewed and conclusive -- for what it claims is an overwhelming volume of materials, both documents and electronic data, that were illegally seized in deliberate disregard of the Suspect's invocation of privilege. It also seeks protections for materials allegedly subject to religious privilege.
3. The Defence Response thus is, in effect, a counter-application rather than a response to the Prosecution's submission. In addition, the Defence Response contains material factual inaccuracies. Since the Prosecution has had no opportunity to address the new remedy sought, or the facts set out in the Defence submission, the Prosecution seeks leave to file a brief response.

II. Submissions

4. The Prosecution Request sought an order from the Chamber to authorise a procedure to review possible privileged attorney-client communications¹ discovered amongst the physical documents (not the electronic media) seized

¹ On the basis of legal professional privilege, as envisaged in Rule 73(1). Although this was not specifically mentioned in the filing, it is implicit in the filing that the privilege related to communications between the suspect and his legal representative(s).

from the Suspect.² The Defence Response, however, contains a broader range of factual assertions and legal issues, including:

- a. The legality and/or propriety of the procedure adopted for breaking the seals of the seized evidence;³
 - b. The alleged illegality of the search and seizure operation and the purported refusal of an OTP investigator and French authorities to respect the Suspect's timely-invoked privileges;⁴
 - c. Privileged material allegedly contained in the electronic media seized;⁵
 - d. Issues of privilege pertaining to the French communication intercepts;⁶
 - e. The alleged existence of material claimed to be subject to "religious privilege".⁷
5. The Prosecution notes that the Defence Response, by including these allegations and seeking extremely broad relief, does not simply respond to the Prosecution Request. Instead, the Defence Response seeks further substantive relief on these new and distinct issues without, however, making a separate Defence filing to which the Prosecution could have responded as of right. Since the Prosecution has not had the opportunity to address these new issues, it requests leave to submit a reply on the Defence's new factual and legal assertions.
6. A response to these new issues, including a brief analysis of some of the legal authorities relied upon by the Defence would assist the Chamber to reach the correct decision.

² See the Prosecution's request for a review of potentially privileged material, ICC-01/04-01/10-54, 14 February 2011, para. 12.

³ Defence Response to Prosecution's Request for the Review of Potentially Privileged Material, ICC-01/04-01/10-58, 18 February 2011, paras 5, 8 and 11.

⁴ ICC-01/04-01/10-58, paras 3 and 7. Additionally, footnote 2 to this para 3 incorrectly states that the Prosecution confirmed this allegation, which will be disputed.

⁵ ICC-01/04-01/10-58, paras 9 and 22.

⁶ ICC-01/04-01/10-58, para 10.

⁷ ICC-01/04-01/10-58, para 12.

III. Relief sought

7. The Prosecution accordingly seeks leave in terms of Regulation 24(5) to file a reply to the Defence Response.

A handwritten signature in blue ink, appearing to read 'Luis Moreno-Ocampo', is positioned above a horizontal line.

Luis Moreno-Ocampo
Prosecutor

Dated this 23rd day of February 2011

At The Hague, The Netherlands