



Original: **English**

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

Date: **17/05/2011**

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

Defence Response to Prosecution filing ICC-01/04-01/10-147

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. Yaël 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**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section Other**

On 17 May 2011, the Defence completed its review of all electronic media supplied to it by the Registry and represented as arising out of the search performed at Mr. Mbarushimana's residence.

Pursuant, therefore, to the *Decision extending the deadline for the review of potentially privileged material*,¹ all items apart from those identified by the Defence as potentially privileged, will forthwith be accessible to the Prosecution.

The Defence notes the request for access to the confidential lists of materials identified as potentially privileged contained in paragraph 44(a) of Prosecution filing ICC-01/04-01/10-147 ("the Prosecution Filing"). The *Second Decision on matters regarding the review of potentially privileged material*,² however, explicitly and solely ordered the Defence to submit the lists to the Chamber (and not to the Prosecution).

The Defence further notes the restrictive interpretation given to "priest-penitent" 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 the clergy concerned 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) the fact that recognition of the privilege claimed would further "peace, security and well-being of the world"³ by protecting the peace-mediation role performed by the clergy concerned.

Finally, the Defence has no objection to enumerating the number of potentially privileged items it has identified. Should the Pre-Trial Chamber order the Defence to do so, it will communicate this information to the Prosecution via Email.

¹ ICC-01/04-01/10-150.

² ICC-01/04-01/10-105.

³ An objective of the Rome Statute as contained in the preamble thereto.

In light of all the aforementioned, all the requests contained in the Prosecution Filing are moot.

A handwritten signature in black ink that reads "Nicholas Kaufman". The signature is written in a cursive, slightly slanted style. Below the signature is a solid horizontal line.

Nicholas Kaufman

Counsel for Callixte Mbarushimana

Jerusalem, Israel

Tuesday, May 17, 2011