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No.: **ICC-01/04-01/10**
Date: **11 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 a review of potentially privileged material
and Public Annex A**

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

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. A potentially privileged document was discovered during the course of a preliminary review of the documents seized from the premises of Callixte MBARUSHIMANA ("the Suspect").
2. The purpose of this filing is to seek the Chamber's assistance in reviewing potentially privileged material to establish whether the documents are in fact privileged.

II. Statement of facts

3. On 11 October 2010 French authorities executed searches on the premises of Callixte MBARUSHIMANA ("the Suspect") and seized various documents, electronic media and communication devices.¹
4. An Investigator from the Office of the Prosecutor, who was present at the searches, specifically requested the French authorities not to seize any material that appeared to be privileged.
5. The French authorities delivered the seized material to Registry officials on 20 October 2010.²
6. The scanning and registration of the seized documents commenced on 22 November 2010 under the supervision of the Registry.³ After each batch of documents was registered, it was returned to the Registry vault. The scanned and registered documents were then made available to the Prosecution for review.

¹ The digital media and communication devices include hard disk drives, memory sticks, compact discs, mobile telephones and SIM cards.

² Notification de documents relatifs aux pièces saisies à la suite de perquisitions et saisies au domicile et sur le lieu de travail de Callixte Mbarushimana, ICC-01/04-01/10-23-Conf, 17 November 2010, page 3.

³ See Annexe - Enregistrement au dossier de l'affaire du protocole d'ouverture des scellés et de l'inventaire des biens saisis au domicile et sur le lieu de travail de Callixte Mbarushimana, ICC-01/04-01/10-24-Conf-Anx, 17 November 2010, para. 5.

7. Whilst reviewing printed copies of registered documents, an OTP investigator came across a document that appeared to be a print-out of a September 2010 email between defence counsel, Mr Nicholas Kaufman, and the Suspect.
8. Without reading further, the Investigator immediately turned the document over and quarantined it by placing it in an envelope and sealing it, and he informed senior investigation and legal staff. The investigator did not see any of the substance of the apparent communication.
9. The Prosecution subsequently took the following steps to identify and isolate potentially privileged material in the seized documents:
 - a. The review of documents ceased immediately and all printed documents were sealed and quarantined from investigation and legal staff.
 - b. The Information and Evidence Unit immediately suspended access to all scanned documents for both investigation and legal staff.
 - c. The Information and Evidence Unit checked all scanned material for potentially privileged documents by means of key-word searches⁴ and quarantined all responsive documents. Thereafter, access to the remaining documents was restored.
 - d. The Prosecution has not yet received copies of the seized electronic media from the Registry. Upon receipt, however, it proposes to put in place a similar procedure to identify and quarantine potentially privileged material.
10. 72 documents responding to the search criteria have been quarantined. The documents are listed in Annex A, attached.

⁴ Using the names and contact details of all lawyers who are known to have represented the Suspect.

III. Submissions

11. It is necessary to determine whether or not the documents identified by the key word searches are in fact privileged. Since broad search criteria – the names and contact details of all lawyers known to have represented the Suspect – were used, the Prosecution expects that non-privileged documents will also have been quarantined.⁵

IV. Relief sought

12. The Prosecution requests that the documents be screened for privilege. The Chamber may designate itself⁶ or someone from outside the Chamber to screen the documents to identify those that contain confidential communications and thereafter authorize the Prosecution to review the non-privileged materials. Alternatively, the Chamber may authorize the Prosecution, alone or in cooperation with the Defence, to designate the OPCD or an outside practitioner to screen the seized materials, identify the privileged items, and report its recommendations to the Chamber and the parties.



Luis Moreno-Ocampo

Prosecutor

Dated this 11th day of February 2011

At The Hague, The Netherlands

⁵ For instance, any document which merely mentions the name or email address of one of the Suspect's legal representatives would be flagged.

⁶ It is conceivable that exposure to a privileged communication could allow the Defense to require the Judge to disqualify himself or herself from participating in a subsequent phase of the proceedings against the Suspect. See Article 41(2). However the Prosecution considers that the Pre-Trial Chamber is not called upon to determine the guilt or innocence of the Suspect. It is therefore competent to conduct the screening exercise.