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

Date: **17 June 2011**

**PRE-TRIAL CHAMBER I**

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**IN THE CASE OF**  
***THE PROSECUTOR v. Callixte MBARUSHIMANA***

**Public Document**

**Prosecution's request for reclassification of annexes to the "Decision on the review of potentially privileged documents"**

**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**

**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**

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Ms. Silvana Arbia

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**Victims and Witnesses Unit**

**Detention Section**

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Section**

**Other**

1. On 15 June Pre-Trial Chamber I ("the Chamber") issued its Decision on the review of potentially privileged material ("the Decision").<sup>1</sup> Three of the four annexes thereto were classified as "confidential *ex-parte*, Defence only".
2. The Annexes appear to be lists – i.e., the titles -- of documents and not the documents themselves. Annex 1 lists the documents in respect of which the Defence claim of privilege was granted and Annexes 2 and 3 list documents in respect of which the Chamber requested the Defence to provide additional information and/or motivation, by 20 June, before it issues its decision.
3. The Prosecution previously submitted that privilege does not attach to the title of a document, but rather to the contents thereof, and that it was entitled to have access to the Defence's list of potentially privileged documents ("the Defence lists") in order to make submissions thereon if necessary.<sup>2</sup> The Defence indicated that it had no objection to the Prosecution being granted access to the Defence lists<sup>3</sup> and the Single Judge, having recognized the Prosecution's legitimate interest in reviewing all relevant evidence except materials legitimately protected by privilege in accordance with Rule 73,<sup>4</sup> allowed the Prosecution access to the Defence lists.<sup>5</sup>
4. The Annexes, the Prosecution believes, reveal nothing more than was already revealed in the original Defence lists - they simply identify those documents that have specifically been determined to be privilege<sup>6</sup> and others for which additional explanation has been requested.<sup>7</sup> Accordingly, since the Prosecution already has the master Defence lists, there is no principled reason to withhold from it the sub-category lists contained in Annexes 1, 3 and 4 of the Decision.

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<sup>1</sup> ICC-01/04-01/10-236, 15 June 2011.

<sup>2</sup> ICC-01/04-01/10-147, 13 May 2011, paras. 43 - 45.

<sup>3</sup> ICC-01/04-01/10-179, 24 May 2011,

<sup>4</sup> ICC-01/04-01/10-173, 23 May 2011.

<sup>5</sup> ICC-01/04-01/10-185, 25 May 2011,

<sup>6</sup> In respect of Annex 1.

<sup>7</sup> In respect of Annexes 3 and 4.

5. Access to the Annexes 3 and 4 is required as this will enable the Prosecution to exercise its legitimate interest in reviewing all relevant evidence except materials legitimately protected by privilege in accordance with Rule 73<sup>8</sup>.
6. Access to the Annexe 1 is required as this will allow the Prosecution to know immediately what documents have been excluded, information that the Prosecution submits it is entitled to have. This in turn will assist the Prosecution in understanding the Chamber's privilege rulings. Moreover, given that the Prosecution has received the master Defence lists, it will in any event be able (by comparing lists of disclosed documents against the lists of challenged documents) to identify the privileged documents. Access to the Annexes will not provide any new information, but it will provide the information quickly and without requiring the Prosecution to undertake its own arduous process of comparison and elimination.
7. If, however, the Annexes do in fact contain additional information which is not contained in the Defence lists and which reveals the contents of privileged or potentially privileged documents, the Prosecution submits that this may be remedied by allowing the Defence the opportunity to propose suitable redactions.
8. The Chamber is accordingly requested to order the reclassification of Annexes 1, 3 and 4 of the decision, redacted as necessary, as "confidential, Prosecution and Defence only".



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Luis Moreno-Ocampo,  
Prosecutor

Dated this 17<sup>th</sup> day of June 2011

At The Hague, Netherlands

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<sup>8</sup> As recognised by the Single Judge in ICC-01/04-01/10-173.