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

Date: **23 May 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 response to the Defence "Soumission d'une liste de documents privilégiés suite à la décision de la Chambre Préliminaire ICC-01/04-01/10-158"

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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

1. On 6 May 2011, the Defence submitted its *Soumission d'une liste de documents privilégiés* suite à la décision de la Chambre Préliminaire ICC-01/04-01/10-158,¹ in which it identifies 122 documents² in respect of which it claims privilege. The documents are contained in an Annex submitted *ex parte* Defence and Registry only.
2. The Prosecution has to date been denied access to the 179 documents identified by the Prosecution's keyword search as potentially privileged³ by virtue of the Chamber's decision of 4 March,⁴ as amended.⁵ However, since the Defence now claims privilege in respect of only 122 of these the Prosecution submits that there is no need any longer to deny it access to the 57 documents in respect of which privilege has not been claimed.
3. The Prosecution submits further that it should be granted access to the list of documents in respect of which privilege is claimed so that it may exercise its right to dispute the privilege claim, if necessary, since it is only the content of protected communications which are privileged and not the titles or descriptions thereof. In this regard, the Prosecution refers the Chamber to the reasons set out in paragraphs 43 – 45 of its "response to the Defence submission of a list of potentially privileged documents and request for access to seized electronic material",⁶ which it submits apply *mutatis mutandis* to the latest privilege list. Indeed, there is even less reason for secrecy in respect of the latest list, since the documents in question were selected from a list provided by the Prosecution itself. Thus the Prosecution already knows the details of all the documents on the original list, so identification of the 122 documents that the Defence claims is privileged does not disclose anything new to the Prosecution.⁷
4. Furthermore, the Prosecution notes that the Defence did not oppose the Prosecution's previous request for access to the first list of privileged documents, but merely noted that it was filed *ex parte* in accordance with the terms of the

¹ ICC-01/04-01/10-165, 6 May 2011. On the same date it also filed a corrigendum ICC-01/04-01/10-165-Corr.

² Out of 179 documents identified by the Prosecution's keyword search as potentially privileged; ICC-01/04-01/10-71-Anx B, 9 March 2011.

³ *Ibid.*

⁴ ICC-01/04-01/10-67, 4 March 2011.

⁵ ICC-01/04-01/10-80, 16 March 2011.

⁶ ICC-01/04-01/10-147, 13 May 2011.

⁷ Although, if the Chamber grants the Prosecution access to the non-privileged items, it could identify these through a process of elimination.

Chamber's original order.⁸ The Prosecution submits that it has shown good cause for the Chamber to now allow it access to the information it seeks.

5. Therefore, in the above circumstances, the Prosecution requests:
- a. An order allowing the Prosecution immediate access to those documents on ICC-01/04-01/10-71-Anx B in respect of which privilege has not been claimed; and
 - b. An order reclassifying Defence filing ICC-01/04-01/10-165-Anx A as "Confidential".



Luis Moreno-Ocampo
Prosecutor

Dated this 23rd day of May 2011
At The Hague, The Netherlands

⁸ See ICC-01/04-01/10-159, 17 May 2011, third para.