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Date: **24 May 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

Prosecution's observations on the report from the Netherlands Forensic Institute

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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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Victims**

**The Office of Public Counsel for the
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States' Representatives

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REGISTRY

Registrar

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The Prosecution hereby files its observations on the report from the Netherlands Forensic Institute, (“NFI”),¹ as ordered by the Single Judge.²

II. Submissions

The Prosecution did not file its observations by the time limit due to an unintentional oversight

2. The Prosecution acknowledges and deeply regrets that it failed to comply with the time limit imposed by the Single Judge. It was not the intent of the Prosecution to ignore the Order. The failure resulted from an internal miscommunication in the process of having the draft filing approved, due to the multiplicity of simultaneous filings being prepared, including two filing dealing with separate NFI reports. It was certainly not intended as acquiescence to the Defence’s suggestion that only non-destructive analysis would be performed.
3. The Prosecution accordingly respectfully requests the Chamber to accept these observations. The Prosecution submits that the delay of two days in submitting these observations has not resulted in any irreparable prejudice to the Defence. The Prosecution apologises for the inconvenience caused to the Chamber.

The Recommendations of the NFI

4. The Prosecution submits that the procedures proposed by the NFI are reasonable and present the best available option for the recovery of the unreadable data contained on the corrupted disk.
5. The Prosecution submits that the necessity of the examination and the availability of the evidence for the confirmation hearing, as presently scheduled, are two

¹ ICC-01/04-01/10-144-Anx, 11 May 2011.

² ICC-01/04-01/10-154, 17 May 2011.

distinct issues. The Prosecution would in any event require this analysis to be done for the purposes of trial, should charges be confirmed.

6. The Prosecution submits that the question of whether or not lack of access to this material would justify a postponement of the confirmation hearing -- either alone or in combination with other factors -- is an issue which is beyond the scope of the present filing.
7. The Prosecution submits that in order to obtain all possible data from the corrupted disc, both non-destructive and potentially destructive investigation should be performed, as outlined in options 1 – 3 of the report.³
8. The Prosecution notes further that, since the investigation will be preceded by making a full forensic image of all readable data on the disc,⁴ the performance of potentially destructive analysis would not result in the loss of any data which is currently available.
9. The Prosecution submits that the NFI should also be requested to submit an expert report for court purposes, as outlined in option 4,⁵ since the Defence have already indicated that they link the corruption of the disc to the admissibility thereof.⁶ The cause of the corruption may therefore become a contentious issue.
10. The Prosecution reiterates its view that the NFI is an independent institute and that the presence of a further independent expert is not necessary to protect the rights of the Defence. The Prosecution is concerned that this would occasion further delay in the analysis of the disc.⁷

³ ICC-01/04-01/10-144, para. 4.

⁴ Ibid., para. 3.1.

⁵ Ibid., para. 4.4.

⁶ ICC-01/04-01/10-T-4-ENG ET WT, 4 May 2011, page 11 lines 14 - 17.

⁷ In this regard the Prosecution notes that in his oral submissions to the Chamber, counsel for the Defence foreshadowed the possibility that this could be a lengthy process. ICC-01/04-01/10-T-4-ENG ET WT, page 9 line 23 to page 10 line 18.

11. In the circumstances, the Prosecution submits that the NFI should be requested to immediately proceed with the investigation outlined in options 1, 2, 3 and 4 of their report.



Luis Moreno-Ocampo

Prosecutor

Dated this 24 day of May 2011
At The Hague, The Netherlands