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

Date: **28 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 "Defence compliance
with Pre-Trial Chamber I's decision: ICC-01/04-01/10-237"**

Source: Office of the Prosecutor

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Legal Representatives of the Applicants

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Detention Section

**Victims Participation and Reparations
Section**

Other

Background

1. On 15 June 2011 Pre-Trial Chamber I (“the Chamber”) issued its Decision on the review of potentially privileged material (“the Decision”).¹ Three of the four annexes thereto were classified as “confidential *ex-parte*, Defence only”.² The Decision required the Defence to provide further information in support of its privilege claims for the documents listed in Annexes 3 and 4 of the Decision.³
2. On 17 June the Prosecution filed a request for access to these *ex parte* annexes (the “Request for Access”).⁴ On 24 June the Defence filed its response (“the Defence Response”) to the Request for Access,⁵ in which it objects to the Prosecution being given access to the annexes to the Decision.
3. On 22 June the Defence filed the “Defence compliance with Pre-Trial Chamber I’s decision: ICC-01/04-01/10-237” (“the Defence Filing”).⁶ It provided the information requested by the Chamber by way of two confidential, *ex parte* annexes.⁷ The Defence provided no motivation for the *ex parte* classification of these annexes. Presumably, it followed the classification applied by the Chamber in respect of Annexes 3 and 4, but without affirmatively making arguments in support of that classification.

Submissions

4. The Prosecution submits that the arguments for disclosure of the original annexes in its 17 June Request for Access apply also to Annexes A and B of the Defence Filing.
5. To remind the Chamber, the Defence previously consented to the Prosecution being granted access to its privileges lists.⁸ The contents of Annexes 1, 3 and 4 of

¹ ICC-01/04-01/10-237, 15 June 2011.

² Annexes 1, 3 and 4.

³ ICC-01/04-01/10-237, pages 8 and 9.

⁴ ICC-01/04-01/10-238, 17 June 2011.

⁵ ICC-01/04-01/10-250, 24 June 2011.

⁶ ICC-01/04-01/10-244, 22 June 2011.

⁷ *Ibid*, Annexes A and B.

⁸ ICC-01/04-01/10-179, 24 May 2011.

the Decision are – presumably – merely a subset of the documents described in the master Defence lists. The same is true of Annexes A and B of the Defence Filing, insofar as these refer to potentially privileged documents.

6. Secondly, the Prosecution reiterates that privilege applies to the content of the documents –i.e., the substance of the confidential communications between, for example, attorney and client. Unless the titles reveal the content of privileged communications, they are not themselves protected against disclosure. The Defence provides no authority or argument in the Defence Filing to justify its classification of the annexes as *ex parte*.⁹ The Prosecution further notes that the Defence has not alleged that the titles of the documents listed in the annexes to the Decision would reveal privileged content.¹⁰ Presumably the same applies to Annexes A and B to the Defence filing.
7. Finally, the Prosecution submits that the fact that the Chamber has yet to render a decision on whether the contents of the documents listed in Annexes 3 and 4 are privileged provides no reason to deny the Prosecution access to the titles of the documents. The Prosecution seeks access to Annexes A and B to the Defence filing for the same reason as it sought access to the lists in Annexes 3 and 4 -- it needs that information in order to exercise its right to make submissions thereon if necessary.¹¹ If access were to be denied until after the Chamber rendered a final decision on whether these documents are privileged, this right would be denied.
8. If Annexes A and B of the Defence Filing do in fact contain additional information which is not contained in the Defence lists and which reveals the content of privileged or potentially privileged documents, the Prosecution submits that the Defence should propose suitable redactions or alternatives.

⁹ Presumably, its justification would be the same as it subsequently asserted in the Defence Response, filed 24 June, in which it summarily states that “[t]he contents of Annex 1 have been deemed privileged and, as such, privilege should also attach to the title of all material listed therein”. (ICC-01/04-01/10-250, third para; emphasis added). However, the Defence provides no explanation in law or in logic why this should be so.

¹⁰ The Prosecution submits that the Defence argument that the seized “Hard Copy Materials [...] could, conceivably, include those [documents] listed in Annex 1...” (ICC-01/04-01/10-250, final para.) in fact provides a potent argument in favour of disclosing the titles of the documents set out in Annex 1. This would allow the Prosecution to protect the Defence’s privilege by searching for and destroying or quarantining any duplicates of these documents amongst the evidence in its possession.

¹¹ ICC-01/04-01/10-147, 13 May 2011, paras. 43 - 45.

9. The Chamber is accordingly requested to order the reclassification of Annexes A and B of the Defence filing as “confidential, Prosecution and Defence only”.



Luis Moreno-Ocampo,
Prosecutor

Dated this 28th day of June 2011

At The Hague, Netherlands