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

Date: 21/07/2011

**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**

**Defence request to exclude  
the Prosecution's amended document containing the charges  
and amended list of evidence**

**Source:** Defence for Mr. Callixte Mbarushimana

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

**The Office of the Prosecutor**

Mr. Luis Moreno-Ocampo, Prosecutor

Ms. Fatou Bensouda, Deputy Prosecutor

Mr. Anton Steynberg, Senior Trial Lawyer

**Counsel for the Defence**

Mr. Nicholas Kaufman

Ms. Yaël Vias-Gvirsman

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented**

**Applicants**

(Participation/Reparation)

**The Office of Public Counsel for the Victims**

**The Office of Public Counsel for the Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms. Silvana Arbia

**Defence Support Section**

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

The Defence for Mr. Callixte Mbarushimana hereby requests that the Pre-Trial Chamber decline to receive<sup>1</sup> the Prosecution's amended document containing the charges and amended list of evidence.<sup>2</sup>

1. The Defence notes that the original French list of evidence filed on 15 July 2011<sup>3</sup> contained 208 pages whereas the new list of evidence has spawned another 10 pages. Disguised, therefore, as an "addendum", the Prosecution filing is nothing less than a totally new document filed without leave and out of time. For this reason it should be rejected.

2. It was immediately apparent to Counsel that the French list of evidence filed on 15 July 2011 contained gross errors, duplications and omissions. Accordingly, Counsel immediately requested an English translation of the list of evidence informing the Prosecution that he would view it as the version *faisant foi* given that English is the working language of this Prosecution team. Counsel's request remained unanswered until yesterday when the reason for such became apparent. Despite successfully persuading the Pre-Trial Chamber, against the Defence's will, to postpone the confirmation hearing by at least a month, the Prosecution still remained unprepared for the task ahead of it. Fiddling, proverbially, while Rome burned, the Prosecution submitted collateral requests for the review of intercepted internet data<sup>4</sup> and observations on a Registry report<sup>5</sup> - all calculated to burden the Defence with additional electronic evidence of dubious value - while filing a poorly translated list of evidence riddled with mistakes.

3. The Defence submits that the Prosecution's poor state of preparation has been apparent right from the moment it obtained Mr. Mbarushimana's arrest. It should not be understood that the Defence has ever accepted that the Prosecution request to postpone the confirmation hearing was truly based on the purported prejudice it

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<sup>1</sup> "strike".

<sup>2</sup> ICC-01/04-01/10-289-ConfAnxA and ConfAnxB.

<sup>3</sup> ICC-01/04-01/10-287-ConfAnxB

<sup>4</sup> ICC-01/04-01/10-251.

<sup>5</sup> ICC-01/04-01/10-295.

had suffered as a result of its late access to the electronic media it had seized from Mr. Mbarushimana's house. Despite almost three years of costly investigations, the reason for the postponement was motivated solely by the fact that the Prosecution had taken stock, at the eleventh hour, of its woeful lack of first-hand evidence to support poorly substantiated allegations of FDLR rapes in the Kivus. To this end, and at the very time it was seeking its postponement, the Prosecution was clandestinely and frantically planning and conducting missions to recruit new witnesses. When the Defence protested this activity by submitting that the subsequent out of time requests for redactions to the new witness statements should be rejected, the Pre-Trial Chamber indulged the Prosecution once more by permitting it to file summaries of the testimonies.

4. The Defence further notes that the first explanatory annex accompanying the Prosecution filing is nebulous to the extent that it affords the Defence scant idea as to whether the amendments made are indeed clerical corrections or otherwise substantive additions.

5. The requested "addendum" is the latest in a line of Prosecution filings which have been filed out of time. The Defence reminds this learned Pre-Trial Chamber of HHJ Sanji Mmasenono Monageng's observations, on a previous occasion, when a Prosecution failure to submit on time was accompanied by an inappropriate *ex parte* plea to the Chamber to explain the missed deadline:

*"NOTING the "Prosecution's first application for redactions to witness statements pursuant to Rule 81(2) and Rule 81(4)" and annexes thereto, filed on 18 April 2011 at 16.44, outside the time limit specified by the Single Judge in the Second Decision;*

*NOTING the "Prosecution's request for variation of time limit for the filing of the "Prosecution's first application for redactions to witness statements pursuant to Rule 81(2)*

*and Rule 81(4)"" ("Prosecution Request"),« filed on 19 April 2011, wherein the Prosecutor submitted that, although the filing was ready at 15.30, he encountered technical problems in converting the redacted*

*witness statements that were the subject of his application into the requisite format, which resulted in his filing being delayed by 44 minutes; NOTING that the Prosecutor also submitted that the Senior Trial Lawyer tried to contact several of the Associate Legal Officers of the Chamber without success; CONSIDERING that attempts to contact the legal support staff of the Chamber, successful or unsuccessful are of no relevance to the deadline set for the filing of the First Application for Redactions or to the Prosecutor's failure to meet such deadline;"*<sup>6</sup>

6. To compound matters, the Prosecution filed both its application to postpone the confirmation hearing<sup>7</sup> and the first list of evidence out of time. On neither occasion was the late filing accompanied by a formal request for an extension of the time limit and on both occasions the filing was notified on the day of the missed deadline after Court Management Services had received oral instructions from the Pre-Trial Chamber.<sup>8</sup>

#### Relief Sought

7. In light of all the aforementioned, the learned Pre-Trial Chamber is requested to decline to receive the amended document containing the charges and the amended list of evidence.




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Nicholas Kaufman

Counsel for Callixte Mbarushimana

Jerusalem, Israel

Thursday, July 21, 2011

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<sup>6</sup> ICC-01/04-01/10-117.

<sup>7</sup> ICC-01/04-01/10-189.

<sup>8</sup> Email from CMS to Counsel of 26 May 2011 whereby CMS informed him that the Prosecution request for the postponement had been filed at 16:01 and the Chamber had indicated that it be notified the same day. Also, Email from CMS to Counsel of 19 July 2011 whereby CMS informed him that the final version of the document containing the charges and the list of evidence had been filed at 16:30 and the Chamber had indicated that it be notified the same day.