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No.: **ICC-01/04-01/10**
Date: **21 January 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 with
Confidential *ex parte* Prosecution only Annexes A and 1 - 4
Prosecution application for protective measures for four documents

Source: Office of the Prosecutor

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

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**Unrepresented Applicants
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Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The Prosecution seeks an order for limited protective measures against public disclosure of sensitive information contained in four documents provided to the Prosecution. Three of these documents were referred to in the Prosecution's Application for a Warrant of Arrest¹, and two of the three were attached as annexes to that Application. The Provider set conditions against the public disclosure of certain information in the four documents. In order to effect production of the documents to the Suspect, the Prosecution accordingly seeks an order preventing the disclosure of specified parts of the documents or their contents to any third party. The requested protective order would also restrict disclosure of the protected content in public hearings or transcripts.

II. Statement of facts

2. During the course of the investigation, the Prosecution requested documents from the archives of the United Nations Mission in the Democratic Republic of the Congo (MONUC), in a form that could be disclosable to the parties and participants.
3. On 25 June 2010, the United Nations ("the Provider") provided eight documents (collectively referred to below as "the UN documents").² While

¹ Prosecution's Application under article 58, ICC-01/04-573-US-Exp, 20 August 2010.

² OTP ERNs DRC-OTP-2014-1169; DRC-OTP-2016-0023; DRC-OTP-2014-1180; DRC-OTP-2016-0033; DRC-OTP-2016-0053; DRC-OTP-2014-1189; DRC-OTP-2016-0061; and DRC-OTP-2014-1192. All of the documents contained certain limited redactions made by the Provider before it gave the documents to the Prosecution. The Provider's redactions appear to relate to the identity of interviewed persons.

not restricting disclosure to the parties and participants, the Provider imposed conditions on the use of four of these documents in public proceedings.³

4. On 20 August 2010, the Prosecution filed its Application under Article 58 (“the Application”)⁴ for an arrest warrant for Callixte MBARUSHIMANA (“the Suspect”). The Prosecution appended two of the four UN documents to which conditions were attached as annexes to the Application.⁵ It also referred to four of the UN documents in various footnotes.⁶
5. The Prosecution filed the public version of the Application on 14 October 2010.⁷ It also filed a “Confidential - Prosecution and Defence only” version of its Application, lifting some redactions that had been included in the public version, on 10 November.⁸ In each of these versions the references to the UN documents were redacted, and neither included as attachments the two UN documents that had been annexed to the Under Seal Application.
6. On 3 November 2010, the *Chambre de l’Instruction près la Cour d’Appel de Paris* issued its decision in favour of surrendering the Suspect to the ICC.⁹
7. On 4 January 2011, the Suspect’s *pourvoi en cassation* was rejected and he is expected to be surrendered to this Court imminently.¹⁰ After he is surrendered, the Prosecution will initiate disclosure.

³ Annex A, letter from the Provider transmitting the documents. The four documents are DRC-OTP-2016-0023, DRC-OTP-2016-0033, DRC-OTP-2016-0053 and DRC-OTP-2016-0061. They are attached as Annexes 1 - 4.

⁴ ICC-01/04-573-US-Exp.

⁵ ICC-01/04-573-US-Exp, Annexes 10 and 11. These two documents are attached to the present application as Annexes 1 and 2 respectively.

⁶ ICC-01/04-573-US-Exp, paras. 109 and 114, footnotes 50, 129, 149, 151, 154, 155 and 156 and page 70.

⁷ Prosecution’s Application under Article 58, ICC-01/04-01/10-11-Red, 14 October 2010.

⁸ Prosecution’s Application under Article 58, ICC-01/04-01/10-11-Conf-Red, 10 November 2010.

⁹ Annex 1 to the Second Rapport sur la procédure devant la Chambre de l’instruction de la Cour d’Appel de Paris, ICC-01/04-01/10-19-Conf-Anx1, 8 November 2010.

¹⁰ Decision to unseal and reclassify certain documents in the record of the case, ICC-01/04-01/10-36, 19 January 2011, para. 6.

III. Submissions

8. Consistent with conditions imposed by the Provider, the Prosecution seeks a protective order against the public disclosure of sensitive information contained in four documents¹¹ prior to disclosure, specifically the identity of victims of sexual violence.
9. The Provider specifically set the following conditions:¹²
 - (i) The accused person, his Defence representatives, the victims participating in the proceedings and their representatives are all prohibited from disclosing the specified parts of the documents or their contents to any third party.
 - (ii) If the documents are used as evidence, these specified parts are to be redacted from the version of the documents available to the public, and proceedings in which these parts are discussed shall take place in closed session.
 - (iii) Unredacted transcripts and/or recordings of such proceedings are restricted to the Chamber and its staff, the Office of the Prosecutor, the Suspect and his Defence team and the representatives of the victims in this case.
10. The Prosecution recalls the obligations placed upon the Prosecution and the Chamber respectively in Articles 54(3)(f), 57(3)(c) and 68(1) of the Statute to ensure the confidentiality of sensitive information and to protect the safety, wellbeing, dignity and privacy of victims and witnesses. The Prosecution submits that the protective measures requested by the Provider are limited and reasonable, will not interfere with the right of the Defence or the public nature of the trial, and are necessary to permit disclosure of the Provider's documents to the Defence.

¹¹ Annexes 1 - 4.

¹² See Annex A.

11. Therefore, the Prosecution respectfully requests the Chamber to impose protective measures in accordance with the Provider's requested conditions to the specified segments of the following documents:

- (i) Annex 1: DRC-OTP-2016-0023 – paragraphs 28 – 41; 47 – 48; 59 – 60.
- (ii) Annex 2: DRC-OTP-2016-0033 – paragraphs 59; 61 – 62.
- (iii) Annex 3: DRC-OTP-2016-0053 – page 6, paragraph 3 [“I”].
- (iv) Annex 4: DRC-OTP-2016-0061 – paragraphs 17 – 22; 24 – 41.

IV. Confidential and *ex parte* classification

12. The Prosecution requests that Annex A and Annexes 1– 4 to this filing be classified as ‘confidential *ex parte*, Prosecution only’ until the Chamber grants the present application and the Suspect is surrendered to this Court, whereupon they may be reclassified as specified below. The Prosecution submits that the confidential *ex parte* classification is justified since:

- (i) Annex A refers to and identifies documents¹³ which are presently only identified in the under seal version of the Prosecution's Application.¹⁴ Hence Regulation 23*bis* requires that these documents be reclassified before they may be identified.
- (ii) The documents annexed to this filing¹⁵ are documents in respect of which the protective measures are required. The disclosure of these documents to the public or the Defence prior to the Chamber ruling on this request would defeat the object of this filing.
- (iii) The Suspect's surrender to the Court will trigger the Prosecution's disclosure obligations. The Prosecution submits that the Defence is not

¹³ Including Annexes 1 – 3 of this filing.

¹⁴ ICC-01/04-573-US-Exp.

¹⁵ Annexes 1 - 4.

entitled to access to the evidential material contained in Annexes A and 1 – 4 until the Suspect is in the Court's custody and subject to its control.

13. Concurrently with the instant filing and in compliance with the decision of the Chamber of 19 January 2011,¹⁶ the Prosecution is filing a proposal to reclassify the Annexes to its Application and to lift certain redactions in the confidential version thereof, including the references to the UN Documents.
14. The Provider has consented to the use of the UN Documents in these proceedings, but has not consented to their release to the general public. Hence the Prosecution submits that they should remain confidential.
15. Therefore, although the Annexes are temporarily filed as "confidential *ex parte*", once the Suspect has been surrendered and the Chamber has ruled upon this request for protective measures, the Prosecution requests that the Chamber direct the Registry to reclassify them as "confidential".

¹⁶ ICC-01/04-01/10-36.

16.

V. Relief sought

17. The Prosecution seeks an order for the protective measures in respect of the relevant portions of Annexes 1 – 4, as specified in paragraphs 9 and 11 above, and thereafter the re-classification of Annexes A and 1 – 4 as specified in paragraph 15 above.



Luis Moreno-Ocampo
Prosecutor

Dated this 21st day of January 2011

At The Hague, The Netherlands