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

Date: **18/02/2011**

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

**Defence Response to Prosecution's Request
for the Review of Potentially Privileged Material**

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

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Ms. Fatou Bensouda, Deputy Prosecutor

Mr. Anton Steynberg, Senior Trial Lawyer

Counsel for the Defence

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented

(Participation/Reparation)

Applicants

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Victims**

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**Victims Participation and Reparations
Section**

Other

The Defence hereby files its response to the *Prosecution's Request for the Review of Potentially Privileged Material* of 14 February 2011 ("the Prosecution Request").¹

Factual Background

1. On 11 October 2010, while executing the arrest warrant issued by Pre-Trial Chamber I on 28 September 2010, the French authorities and the Office of the Prosecutor ("the OTP") conducted a search of Mr. Mbarushimana's premises seizing documents and various items of hardware capable of holding electronic information viz.; hard drives, CDs and cellular telephones ("electronic media").

2. It should be stressed that the Registry of the International Criminal Court ("the ICC") made no provision for Counsel for Mr. Mbarushimana or *ad hoc*/duty Counsel to be in attendance at the time of the arrest in order to oversee the integrity of the search.

3. Despite his protestations voiced to all present – including the attending OTP investigator, the arresting authorities blatantly ignored² Mr. Mbarushimana's demands to filter out privileged information from the materials seized.

4. To date, no official judicial search warrant has been disclosed to the Defence from which the parameters of the authorized search may be discerned.

5. Since their delivery to the custody of the Court, the Registry of the ICC has broken the seals on the evidence bags containing all seized materials – once

¹ ICC-01/04-01/10-54.

² Confirmed in the Prosecution Request at paragraph

again in the absence of Counsel for Mr. Mbarushimana or *ad hoc*/duty Counsel. The Registry asserts that the protocol for dealing with evidence bags (“the Protocol”) was approved by the Pre-Trial Chamber.³ No comment or input, however, was sought by the Registry from Counsel for Mr. Mbarushimana or from *ad hoc*/duty Counsel before submitting the Protocol to the Pre-Trial Chamber. Of the seized materials, the loose leaf documentation was scanned, “entered into Ringtail”⁴ and, thereafter, forwarded to the Prosecution for its examination.

6. Having stumbled across an Email written by herein undersigned Counsel to Mr. Mbarushimana, the Prosecution submits that it has now quarantined all potentially privileged information.

Submission

7. At the outset, the Defence submits that the Prosecution has failed to prove the legality of the search and the legality of its own subsequent examination of the loose-leaf documentary materials by reference to a judicially authorized warrant. The search, itself, was conducted in a totally indiscriminate fashion with the total media content of Mr. Mbarushimana’s house being confiscated – lock, stock and barrel. The Defence thus submits that the search was wholly disproportionate to needs of the investigation being conducted against Mr. Mbarushimana. There are thus strong grounds for challenging the legality of the search pursuant to the law of the European Court of Human

³ c.f. the Registry’s filings: ICC-01/04-01/10-24-Conf and ICC-01/04-01/10-53-Conf. where reference is made to approval for the Protocol being granted by way of Email communication emanating from a legal officer of the Pre-Trial Chamber.

⁴ The Court’s electronic evidence management system.

Rights which has stressed that a search warrant needs to be drafted in a manner which can ensure that its impact is kept within reasonable bounds.⁵

8. Furthermore, the Registry's failure to consult the Defence regarding the Protocol and its subsequent breaking of the seals on the evidence bags containing the seized materials, in the absence of Mr. Mbarushimana and/or his legal representative, constitutes a serious breach of accepted procedure under international law⁶ and is liable to affect the admissibility of all the seized materials where prejudice to the suspect can be shown.⁷ The fact that the seized materials contain privileged information only compounds the matter.

⁵ *Van Rossem v. Belgium* (Application No. 41872/98) at para. 45, 9 December 2004. *c.f.*; also, *Ilyia Stefanov v. Bulgaria* (Application no. 65755/01), 22 May 2008 where in finding a breach of ECHR Article 8 rights, the Court observed that the search warrant's excessive breadth was reflected in the way that it was executed and commented on the fact that the suspect was denied the presence of legal representatives: "43. In addition, the Court notes that, while the search was carried out in the presence of two certifying witnesses, they were neighbours who were not legally qualified. This may be considered problematic, as this lack of legal qualification made it highly unlikely that these observers were truly capable of identifying, independently of the investigation team, which materials were covered by legal professional privilege, with the result that they did not provide an effective safeguard against excessive intrusion by the police into the applicant's professional secrecy (see, as examples to the contrary, *Tamosius*; and *Wieser and Bicos Beteiligungen GmbH*, §§ 60 (d) and 62, both cited above). This was especially true in respect of the electronic data seized by the police, as it does not seem that any sort of sifting procedure was followed during the search (see *Wieser and Bicos Beteiligungen GmbH*, cited above, § 63). [...]".

⁶ *c.f.*, for example: *Prosecutor v. Nzirorera*, ICTR-98-44-T, Decision on the Defence Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting the Return of Personal Items Seized (TC), 7 September 2000 ("Decision of 7 September 2000: In this decision the confirmed the established principle that the breaking of seals on evidence bags should be carried out in front of the suspect: "32. The Chamber recalls that the Prosecution acknowledged that the seized documents and other materials still have not been inspected but agreed to return items that are not material to the case against the Accused. The Prosecutor also suggested that the seals be removed in the presence of the Defence, while noting certain difficulties in doing so in brief delay.

33. However, notwithstanding the difficulties alleged by the Prosecutor, the Chamber considers that the seized documents and other property continue to be the responsibility of the Prosecution and, accordingly, directs the Prosecutor to resolve said difficulties and to establish a date with the Defence for the removal of the seals, in the presence of the Defence, and to establish at this time an inventory to be included in an official record signed by the parties".

⁷ *Prosecutor v. Nzirorera*, ICTR-98-44-T 'Decision on Defence Third Motion for Return of Property and Sanctions for Violation of Court Order', 13 October 2003 where some of the seals on evidence had been broken in the absence of the Defence: "23. The Chamber further accepts the Prosecutor's explanations in respect of the breaking of the seals on the items seized at the Accused's residence in 1998, and notes that Trial Chamber II's Order of 7 September 2000 could not have been complied with at the time when the inspection occurred. The Chamber notes the Prosecutor's claim that, at the hearing of 2 June 2000 on the first Defence Motion requesting restitution of property seized from the Accused, he was unaware that the seals had been broken. The Chamber further observes that the breaking of the seals appears to have been inadvertent. Although unfortunate, it was not shown to have caused prejudice to the Accused. However, the Accused will be in a position to raise at trial any matters pertaining to this issue...24. The Chamber notes that, in future, Prosecution evidence under seal should be distinctly marked as such, and that a caution should be added forbidding unauthorised breaking of the seals."

9. This Defence submission relates to all potentially privileged materials whether physically seized at the time of Mr. Mbarushimana's arrest or collected by other means. For the sake of clarity, the Defence asserts that privileged materials are liable to be contained in all of the following materials:

- a) paper documentation seized from the house of Mr. Mbarushimana;
- b) electronic media seized from the house of Mr. Mbarushimana capable of holding documentary data such as hard drives, cellphones containing SMS messages, compact discs, memory sticks, etc. and;
- c) the transcripts and original recordings of all communications intercepted by the German and the French authorities.

10. The present situation is potentially rendered all the more egregious by virtue of the fact that, on 21 January 2011, the Prosecution apparently received intercept evidence from the French authorities.⁸ The learned Pre-Trial Chamber is reminded that in the *Defence Request for Disclosure* filed on 14 December 2010,⁹ Counsel for Mr. Mbarushimana specifically requested that he be provided with the "*instructions that the Prosecutor – Mr. Luis Moreno-Ocampo had demanded from the competent domestic authorities to ensure that the interception he had requested would not infringe attorney-client privilege....*".¹⁰ To date, the requested information has not been forthcoming.

11. In any event, the Defence objects to the manner in which the Prosecution has quarantined what it currently deems to be potentially privileged information and, furthermore, asserts that serious prejudice has already been caused to Mr. Mbarushimana's interests. In light of Mr. Mbarushimana's clearly voiced protestations at the time of arrest, none of the seals on the evidence bags

⁸ ICC-01/04-01/10-T-2-ENG ET WT 14-02-2011 30/34 at line 1.

⁹ ICC-01/04-01/10-29

¹⁰ *ibid* at para. 4(viii).

containing the seized materials should have been broken nor their contents examined in the absence of Defence Counsel or his representatives. Notwithstanding the aforementioned, having encountered an Email from herein undersigned Counsel to Mr. Mbarushimana, the Prosecution should immediately have ceased dealings with all the seized information and avoided performing the procedure detailed in paragraph 9(c) of the Prosecution Request. Indeed, given that the Defence was not consulted at any time as to the identity of the numerous lawyers which have represented Mr. Mbarushimana over the years,¹¹ there is no guarantee that the key-word search performed by the Information and Evidence Unit of the OTP succeeded in filtering out all potentially privileged information.¹²

12. Moreover, the key-word search performed by the Prosecution does not cover the many items to be found among all of the seized materials which comprise confidential correspondence between Mr. Mbarushimana and a number of Roman Catholic priests¹³ in whom he has regularly confided and which are, *prima facie*, subject to religious privilege.¹⁴

13. The Defence objects to the Prosecution suggestion whereby the learned Pre-Trial Chamber would perform the review of all seized information. Such a course of action is not supported by the jurisprudence of the international criminal tribunals and would set a wholly undesirable precedent whereby a suspect's most sensitive and statutorily protected communications would be exposed to the very tribunal charged with determining his fate. The

¹¹ The following list is not exhaustive: Nicholas Kaufman (Israel), Karl Engels (Germany), Michael Ried (Germany), Steffan Gellas (Germany), Philippe Greciano (France), Christophe Gouget (France), Laurence Garapin (France), Stephane Boulain (France), Francois Roux (France), George Irving (United States). Mr. Mbarushimana has been represented by at least three additional lawyers the identity of whom he no longer recalls.

¹² This is quite contrary to the Prosecution's submission that its present preventative steps have caused the quarantine of too many documents.

¹³ These clergymen would include, but are not limited to, the following: Monsignor Matteo Zuppi (Italy), Father Jean Berchmans Tulikubwingi (Italy) and Father Aldo Rizzi (Philippines).

¹⁴ Rules 73(2) and 73(3) of the Rules of Procedure and Evidence.

Prosecution's argument¹⁵ that no prejudice would be caused by the Pre-Trial Chamber's exposure to privileged information is totally without merit. Although not charged with assessing guilt or innocence, the Pre-Trial Chamber could, nevertheless, be prejudicially swayed into not ordering interim release.

14. Furthermore, the proposals tendered by the Prosecution for the inspection of the potentially privileged materials are not supported by reference to any provision of the Rome Statute or the ICC Rules of Procedure and Evidence. In such a legislative vacuum, the Defence submits that the Pre-Trial Chamber should be guided by the practice at other international criminal tribunals and, in case of ambiguity, should adopt the solution which is most favourable and/or desirable to the suspect.

15. To this end, the Defence refers the learned Pre-Trial Chamber to the precedent established by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") which, in the case of *Prosecutor v Gotovina*, considered the implications of the blanket seizure of materials containing privileged documents from an accused's legal representatives by the Croatian authorities.¹⁶ Firstly, the ICTY Appeals Chamber declined to interfere with the procedure fixed by the relevant ICTY Trial Chamber for the review of materials which were likely to contain potentially privileged information:

"The Trial Chamber ordered that Croatia initially refrain from inspecting the content of the seized materials and keep them under seal. Croatia would then provide the Gotovina Defence with access to the seized materials so that the latter could review their content with a view to determining what material it considers to be protected under Rules 70(A) and 97 of the Rules. The Trial Chamber directed Croatia and Gotovina, after this review, to seek agreement regarding which items are and are not protected under those Rules. The Trial Chamber noted that Gotovina could seek assistance from an independent third party, such as the

¹⁵ Prosecution Request at fn. 6.

¹⁶ *Decision on Gotovina Defence Appeal against 12 March 2010 Decision on Requests for Permanent Restraining Orders directed to the Republic of Croatia* dated 14 February 2011.

Tribunal's Association of Defence Counsel, in communicating with Croatia.”¹⁷

16. Secondly, the ICTY Appeals Chamber roundly disapproved of stripping an accused of the right to inspect the seized information for potentially privileged information in favour of a Court appointed “independent body”:

*“With respect to Gotovina's argument that the Trial Chamber erroneously shifted to the President its obligation to ensure that the seized documents did not contain privileged materials protected under Rules 70 (A) and 97 of the Rules, the Appeals Chamber notes that the procedure established by the Trial Chamber to protect the documents bestowed an obligation on the President that has no foundation in the Statute or the Rules. The Appeals Chamber observes that the President is not endowed with the right to establish an independent body. The President is only permitted, pursuant to his or her role under Rule 19 of the Rules, to coordinate the work of the Chambers, supervise the activities of the Registry and assign the resolution of judicial matters to a Trial Chamber, a bench of three judges, or a single judge. The President's delimited powers under the Statute and Rules of the Tribunal do not permit him to assign judicial matters to any other entity. Thus, the Appeals Chamber finds that the Trial Chamber acted ultra vires of the Rules and Statute in establishing this procedure, constituting an abuse of discretion.”*¹⁸

17. The Defence for Mr. Mbarushimana thus endorses the jurisprudence of the ICTY Appeals Chamber and argues that its application in the present instance should entail the immediate quarantine of all the materials detailed in paragraph 9 hereinabove and their subsequent inspection by herein undersigned Defence Counsel or his appointed representative for the removal of privileged information without any supervision being exercised by either the Prosecution or independent counsel. It goes without saying, of course, that herein undersigned Counsel is bound by the ICC Code of Professional Conduct such that his determination as to what is subject to privilege should be honoured.

¹⁷ ibid at para. 62.

¹⁸ ibid at para. 69.

18. Such a protocol, in so far as it is relevant to materials seized emanating from herein undersigned Counsel would also be wholly in keeping with the spirit of Article 18(1)(c) of the Agreement on Privileges and Immunities of the ICC to which the Republic of France is a signatory party. This provision stresses the inviolability of documents and materials necessary for the performance of counsel's functions and would include, it is submitted, such of those papers in the possession of Defence counsel's client.

19. Should the learned Pre-Trial Chamber, however, dissent from the jurisprudence of the ICTY Appeals Chamber, then the Defence would respectfully request that the Prosecution's suggestion that the Office of the Public Counsel for the Defence conduct the review be endorsed.¹⁹

Relief Sought

20. In light of all the aforementioned, the learned Pre-Trial Chamber is hereby respectfully requested to order that all materials detailed in paragraph 9 hereinabove be quarantined pending the following procedural steps in the order set out below:

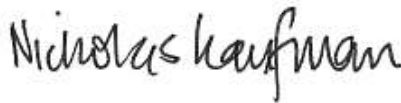
- a) proof by the Prosecution that the search was judicially authorized and that the search warrant was drafted in a sufficiently stringent manner so as to ensure that the invasion of Mr. Mbarushimana's privacy and various privileges was proportional to the legitimate aim of the investigation;
- b) a ruling as to the legality of the Registry's breaking of the seals of the evidence bags containing the seized materials in the absence of Mr. Mbarushimana and/or his legal representative, and;

¹⁹ ICC-01/04-01/10-54 at para. 12 and **Annex 1** whereby the Head of OPCD – Me. Xavier-Jean Keïta expresses his willingness for OPCD to be designated for the purpose of the said review.

- c) a ruling that Defence Counsel and/or his appointed representative be entitled to extract from the seized materials privileged information at their own discretion before returning the same to the Registry for dissemination to the OTP, failing which and in the alternative;
- d) a ruling that OPCD – conduct the review of the seized materials for privileged information.

21. Given that the breaking of the seals on the evidence bags is now a *fait accompli* and was performed in the absence of Mr. Mbarushimana, the Defence reserves the right to re-petition the Pre-Trial Chamber or, if necessary, the Trial Chamber to challenge the admissibility of the seized materials should it be informed by the Registry that any of the electronic media are corrupted and/or damaged.

22. The Defence notes for the record that all of the electronic media are liable to contain information which at the very least is material to the conduct of the Defence and could, in certain circumstances, depending on the nature of the Prosecutor's Charging Document, be potentially exculpatory.



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Friday, February 18, 2011