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

Date: **9 March 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

Prosecution's Response to the "Defence Request for suspensive effect of ICC-01/04-01/10-67"

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I. Introduction

1. The Defence seeks an order suspending the effect of the Pre-Trial Chamber's "Decision on the 'Prosecution's request for a review of potentially privileged material'"¹ ("the Decision") pending resolution of an interlocutory appeal that it intends to file or, in the alternative, a decision of the Appeals Chamber.²
2. The Defence further seeks³ the reinstatement of the Single Judge's "Decision Temporarily Suspending Dealings with Transcripts and Original Recordings of Intercepted Communications and Material Seized from the House of Mr. Callixte Mbarushimana" rendered on 25 February 2011 ("the Interim Decision").⁴
3. So as not to defeat the Chamber's ability to rule on this most recent Defence application, the Prosecution has again suspended its review of the material pending the Chamber's decision. However, the delays to date occasioned by the prior and current Defence submissions will significantly impact the ability of the parties, participants and the Chamber to prepare for the scheduled 4 July confirmation hearing.
4. On the merits, the Prosecution submits that the Defence fails to show that it will be irreversibly prejudiced if the Decision is implemented but thereafter reversed on appeal.

¹ ICC-01/04-01/10-67, 4 March 2011 ("the Decision").

² Defence Request for Suspensive Effect of Decision ICC-01/04-01/10-67, ICC-01/04-01/10-68, 7 March 2011 ("Defence Request").

³ Ibid., para.12.

⁴ ICC-01/04-01/10-63, 28 February 2011.

II. Statement of facts

5. On 11 October 2010 French authorities searched the home and office of Callixte Mbarushimana ("the Suspect") and seized some 27,000 pages of documents ("the Seized Documents") and a large volume of electronic data ("the Electronic Media"). These are both collectively referred hereafter to as "the Seized Material". They handed the Seized Material to the Registry on 20 October 2010. On 16 November 2010 the Chamber ordered that the Seized Material be filed in the court record.⁵ On 22 November 2010 the Information and Evidence Unit ("IEU"), under the supervision of the Registry, began to register the Seized Documents. On 18 February 2011 it provided the entire collection of scanned documents to the Registry to file in the record of the case. The Electronic Media remains in the possession of the Registry, which is procuring the necessary equipment and software with which to make forensic mirror images of the data.
6. On 14 February 2011 the Prosecution filed a request that the Chamber or a neutral third party review 72 documents that potentially contained privileged attorney-client communications ("Prosecution Request").⁶ The Prosecution made no proposal, at that stage, for the review of evidence seized in electronic form.⁷
7. On 16 February the Defence transmitted to the Prosecution the names of additional lawyers who had represented the Suspect in the past.⁸ On 18 February the Defence responded to the Prosecution Request and raised

⁵ Enregistrement au dossier de l'affaire du protocole d'ouverture des scellés et de l'inventaire des biens saisis au domicile et sur le lieu de travail de Callixte Mbarushimana, ICC-01/04-01/10-24-Conf, page 4 and footnote 3, 17 November 2010.

⁶ Prosecution's request for a review of potentially privileged material, ICC-01/04-01/10-54, 11 February 2011.

⁷ ICC-01/04-01/10-54, paras. 12 and 9(d).

⁸ These are listed in footnote 11 of the Defence Response to Prosecution's Request for the Review of Potentially Privileged Material, 18 February 2011, ICC-01/04-01/10-58.

additional issues.⁹ On 24 February the Chamber granted leave to reply, and the Prosecution filed its reply (“the Prosecution Reply”) on 1 March.¹⁰

8. On 25 February the Single Judge issued the Interim Decision, which suspended the Prosecution’s access to the seized documents and intercepted communications.
9. On 4 March the Chamber issued the Decision. It rejected the Defence proposals, particularly that the Defence make the unreviewable determination as to which items are privileged. Instead, the Chamber set out a rational procedure whereby the Registry and/or the parties would flag, and ultimately the Chamber would identify, privileged information within the Seized Material.¹¹ The Chamber firstly found that the ICC statutory framework allows it to conduct a review of potentially privileged material to determine whether it is privileged and that the Chamber can do so without infecting itself with bias that would preclude it from continuing to preside. Hence, the Chamber ordered the Registry to grant it exclusive access to the 72 documents already identified as potentially privileged.¹² With respect to the remaining non-processed material (i.e. the Electronic Media), it ordered the Registry to conduct a search to identify potentially privileged communications that will be subsequently provided to the Chamber. The Chamber requested the Prosecutor and the Defence to provide to the Registry and the Chamber properly motivated keywords to facilitate the Registry’s task. The Chamber also requested the parties to inform it of any potentially privileged communications they identify in the Seized Documents already processed by the Registry. Finally, the Chamber lifted the Interim Decision, thereby restoring the Prosecution’s access to the Seized Documents, other than the 72 documents listed in the Prosecution Request.

⁹ ICC-01/04-01/10-58.

¹⁰ Prosecution’s reply to the “Defence Response to Prosecution’s Request for the Review of Potentially Privileged Material”, ICC-01/04-01/10-66, 1 March 2011.

¹¹ ICC-01/04-01/10-67.

¹² The Prosecution subsequently ran further word searches incorporating further information supplied by the Defence, and has now identified and quarantined 179 items.

III. Submissions

There is no likelihood of irreversible prejudice if the Defence Request is denied

10. The Defence requests the suspension of the implementation of the Decision and the reinstitution of the Interim Decision pending resolution of a potential interlocutory appeal or, in the alternative, a decision of the Appeals Chambers on a separate request for suspensive effect.
11. The Appeals Chamber has recognized that a Chamber's discretionary authority to suspend the implementation of a decision should be exercised in the interest of justice and the efficacy of the judicial process.¹³ Suspension is unwarranted unless the implementation of the Decision would create an irreversible situation that would defeat the purpose of an eventual appeal (for which leave has not yet been requested, let alone granted).¹⁴ The Defence has failed to meet this burden.
12. The Defence merely claims that it will be irreparably prejudiced if members of the Registry examine the Seized Material for the purpose of identifying potentially privileged information to be submitted to the Chamber for a final determination.¹⁵ In that regard, it also claims that the process will somehow affect the Suspect's right not to incriminate himself.¹⁶ It is impossible to discern how the involvement of the Registry (which is merely to perform a keyword search and to isolate documents that the search identifies) and its

¹³ Reasons for the decision on the request of the Prosecutor for suspensive effect of his appeal against the "Decision on the release of Thomas Lubanga Dyilo" - Separate Opinion of Judge Georgios M. Pikis, ICC-01/04-01/06-1444-Anx, 22 July 2008, paras. 6, 9 and 10 .

¹⁴ Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008, ICC-01/04-01/06-1290, 22 April 2008, para. 8, Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the "Decision on the Admissibility and Abuse of Process Challenges", ICC-01/05-01/08-817, 9 July 2010, para. 11.

¹⁵ Defence Request, para. 6.

¹⁶ Defence Request, para. 6.

exposure¹⁷ to potentially privileged materials can cause prejudice to the Suspect. The Registry is not the Court, it is not the Prosecution and it is not a participant in the case. As Article 43(1) describes it, the Registry is “responsible for the non-judicial aspects of the administration and servicing of the Court”.

13. Nor will the judges’ exposure to possibly privileged materials cause discernible, much less irreparable, prejudice. As this Chamber made clear, the Chamber is composed of professional judges¹⁸ who can be expected to disregard inadmissible materials. Moreover, courts in national systems routinely assign similar roles – i.e., to assess whether proffered evidence is privileged or whether confessions are reliable – to their judges without requiring disqualification of the reviewing judge on the ground that he or she can no longer be fair.¹⁹

14. The Defence also seeks an order barring the Prosecution from continuing access to the materials. Yet again, it does not identify what prejudice would result should that order be denied and the possibility of prejudice is not readily apparent. The Prosecution has instituted substantial precautions, which are detailed in previous submissions,²⁰ in order to identify all potentially privileged materials; it ran new searches after the Defence provided additional names and isolated more materials based on those

¹⁷ The process described is automated and does not even involve sight of the contents of any potentially privileged document.

¹⁸ ICC-01/04-01/10-67, pp. 6-7.

¹⁹ See for instance, in the United States, *Jackson v. State*. 684 A.2d 745, 753 (Delaware Supreme Court (US), 1996); *State v. Medina* 349 N.J. Super. 108, 130, 793 A.2d 68, 80 (New Jersey (US) Super. A.D., 2002). Cf. *Prosecutor v. Blagojevic and Jokic*, Case No. IT-02-60-T, Prosecution's Motion for Clarification of Oral Decision Regarding Admissibility of Accused's Statements, 30 June 2003, paras. 13, 15-20. In South Africa, the presiding officer is both finder of law and fact and determines the admissibility of all evidence, including confessions (in terms of Section 217, Criminal Procedure Act, No 51 of 1977 - “CPA”). If a confession is ruled inadmissible, the court will disregard this evidence in reaching its verdict in the main trial but is not disqualified from continuing to preside. With respect to sight of privileged documents, *Lenz Township Co (Pty) Ltd v Munnick & others* 1959 SA 567 (T) at 574 decided that the court has an inherent power to examine any document in respect of which privilege is claimed. Also, *Van der Linde v Calitz* 1967(2) SA 239 (A) at 257 and 260. Cf. Art 65(3) of the Rome Statute, which permits a Trial Chamber to continue to preside in a case after it has heard and rejected a plea of guilty.

²⁰ ICC-01/04-01/10-54, para. 9(a)-(c).

searches; and the procedures defined by the Chamber, which invite the Defence to submit additional motivated keywords for searches, will further ensure that materials the Defence wishes to protect will be captured and quarantined.

15. The Prosecution also notes that if handwritten communications had been sent to or by Mr Kaufman or other members of the Defence, this would surely have been brought to the Chamber's attention. In any case, as in the past, if the Prosecution identifies such material, it will inform the Chamber immediately.

16. The Defence's attempt to prevent the Prosecution's access to and French intercepted conversations is unfounded. The Prosecution submits that there is no prospect of prejudice to the Suspect if the Prosecution is allowed to continue its review of this material. An extension of the Interim Decision in this respect would further serve to delay the Prosecution's preparations for the confirmation hearing and the disclosure process.

17. With respect to the German intercepted communications, the Prosecution already explained in its reply²¹ that these were communications between two suspects in the German domestic investigation and various other parties. A small number of these conversations involved the Suspect. However, it is manifestly obvious that they could not include communications between the Suspect and his legal counsel. Furthermore, this material has already been extensively reviewed by the Prosecution and no potentially privileged communications have been identified. The Defence also has been in possession of the entire collection of German intercepts for over a month now, but has not identified even one communication as privileged.

18. With respect to the French intercepted communications, the Prosecution explained in its reply²² that the French authorities specifically stated that they would not transcribe any privileged communications. Additionally, the

²¹ ICC-01/04-01/10-66, para. 26.

²² ICC-01/04-01/10-66, para 27.

Prosecution already screened the transcripts – which it is prepared shortly to disclose²³ – and confirmed that they do not contain any communications that appear to be privileged. Some of the intercepted communications are audio recorded but not transcribed. They have not yet been reviewed but they have been searched for possible privileged communications using the telephone numbers of lawyers alleged to have represented the Suspect.²⁴ One call was identified by its phone number. This file has been quarantined and will also be referred to the Chamber for review. In all the above circumstances, the suspension of the Prosecution’s access to this material is also entirely unmerited.

Prior decisions of this Court do not support the Defence Request

19. The Defence notes that two Trial Chambers of this Court granted temporary suspensive effect of orders pending appeal.²⁵ However, both decisions cited by the Defence involved the clear possibility of irreparable prejudice: with respect to the admissibility appeal in *Bemba*, even if the Accused were successful on appeal the underlying right – to not be tried before the ICC at all – would be lost unless the imminently-scheduled trial were delayed pending resolution of the appeal; and the failure to suspend the decision in *Lubanga* ordering the release of the Accused meant that if the decision were reversed the Court would not be able to ensure the Accused’s presence at trial.²⁶

²³ These would have been disclosed this week already, but for the delay occasioned by the latest Defence filing.

²⁴ The search was based upon the available phone numbers for all counsel alleged to have represented the Suspect. Should further phone numbers be provided by the Defence, this process can be repeated.

²⁵ Defence Request, para. 11.

²⁶ ICC-01/04-01/06-1359, para. 14; see also ICC-01/04-01/06-T-98-ENG, p.42, ln.7-p.43, ln.3.

If granted, suspension can affect the ability to hold a confirmation hearing on 4 July

20. Not only is there no legitimate argument that the Suspect will be irreparably prejudiced without a suspension of the process, the Prosecution and the Chamber may be unable to adhere to the current schedule if the review process is halted. And if the suspension requires delay to the confirmation proceeding, the interests of justice and the Suspect's right to an expeditious proceeding will also be affected.
21. The Prosecution has only had access to the complete Seized Documents (approximately 27,000 pages of documents) from 4 February 2011 until access was suspended on 25 February, some three weeks. Therefore, although the Prosecution commenced its review process, most of this material has not yet been reviewed. Should the Defence Request be granted, this access will be suspended for at least a further two weeks, even if leave to appeal is eventually refused. If the Defence Request denies the Prosecution the ability within the available time to conduct a meaningful review of the seized evidence, it might prove to be impossible to conduct a confirmation hearing on 4 July, as currently scheduled

IV. Relief sought

22. Therefore, considering the low risk of further privileged documents being contained in the Seized Documents, the absence of any established trial-related prejudice and the need to ensure expeditious proceedings, the Prosecution requests the Chamber to dismiss the Defence Request. In the alternative, should the Chamber decide to suspend the implementation of the Decision, the Prosecution respectfully requests the Chamber to exclude the Intercepted Communications from the materials quarantined.



Luis Moreno-Ocampo
Prosecutor

Dated this 9th day of March 2011

At The Hague, The Netherlands