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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
URGENT**

**Defence implementation of the second decision
on matters regarding 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

Mr. Luis Moreno-Ocampo, Prosecutor
 Ms. Fatou Bensouda, Deputy Prosecutor
 Mr. Anton Steynberg, Senior Trial Lawyer

Counsel for the Defence

Mr. Nicholas Kaufman
 Ms. Yael Vias Gvirsman

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
 (Participation/Reparation)**

**The Office of Public Counsel for
 Victims**

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

Mr. Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Defence Support Section

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
 Section**

Other

The Defence for Mr. Callixte Mbarushimana hereby updates the learned Pre-Trial Chamber as to its efforts to meet the deadline set for the review of potentially privileged material in decision ICC-01/04-01/10-105 and, to this end, seeks specific relief pursuant to Article 57(3)(b) of the Rome Statute.

In light of the administrative and technical difficulties which will be detailed hereinafter, the Defence requests that this matter be canvassed briefly at the status conference set for Wednesday, 4 May 2011. By that stage, the Defence will be better placed to give an estimate of whether it can complete the review within the stipulated time-limit.

Background

1. On 4 March 2011, in its “*Decision on the Prosecution’s request for a review of potentially privileged material*”,¹ Pre-Trial Chamber I decided that the Registry would forensically examine the entire hard drive collection seized by the Office of the Prosecutor (“OTP”) and the French gendarmerie from Mr. Mbarushimana’s residence in Paris. This examination was to be performed with the use of “keywords” to be supplied by both the OTP and the Defence as a tool for identifying potentially privileged material.

2. On 11 March 2011, the Pre-Trial Chamber rejected the Defence’s request to suspend the effect of the aforementioned decision.² Notwithstanding, the Defence sought leave to appeal the aforementioned decision arguing, *inter alia*, that a keyword search of computer hard drives was an unreliable means of identifying the existence of potentially privileged material and preventing its communication to the OTP.³

¹ ICC-01/04-01/10-67.

² ICC-01/04-01/10-74.

³ ICC-01/04-01/10-75.

3. On 30 March 2011, after receiving keywords from the Parties, the Pre-Trial Chamber ordered the Registry to attempt to produce a record of all positive hits by 8 April 2011 and to provide an estimate of the time required to complete the task.⁴

4. On 8 April 2011, the Registry reported that it had failed to produce a complete record of positive hits and requested an extension of the deadline for this task until 21 April 2011.⁵

5. On 13 April 2011, the Defence was notified of an addendum⁶ to the report mentioned in the preceding paragraph, in which the Registry clarified the means whereby it had performed the keyword search. In order to avoid corrupting the contents thereof, the Registry had produced two forensic images of the hard drives seized from Mr. Mbarushimana's house:

"a) a so-called "Encase copy", forensically sound, where all files are copied from the original hard drives, without possibility to delete nor alter the content; however, for this copy to be searched, a specific software is required; and b) an export of all the files included in the original hard drive, in a format which is easy to access and therefore search without additional software, however with possibility to delete or alter the content. The Registry has performed the keyword search on the Encase copy so as not to modify the original content."

6. On 15 April 2011, the Pre-Trial Chamber rejected the Defence's application for leave to appeal the use of keywords as viable means for searching for potentially privileged material.⁷ Simultaneously, and in its second decision on the matter,⁸ the Pre-Trial Chamber tasked the Defence with performing that which the latter had previously sought yet was denied; *i.e.*, its own review of the hard drives for potentially privileged material. The Pre-Trial

⁴ ICC-01/04-01/10-88.

⁵ ICC-01/04-01/10-95.

⁶ ICC-01/04-01/10-98.

⁷ ICC-01/04-01/10-106.

⁸ ICC-01/04-01/10-105.

Chamber, however, mandated that the Defence perform this task by 6 May 2011 while ordering the Registry to complete its keyword search by 21 April 2011 and to make the results thereof and the “non-faulty”⁹ hard drive collection available to the Defence *“in a format which is easy to access and therefore search without additional software”*.

7. On 21 April 2011, the Registry informed the Pre-Trial Chamber as follows:¹⁰

- 1. A forensic image of all the seized electronic items has been created;*
- 2. Each of the forensic images has been loaded onto a special workstation containing specialised forensic software allowing for the indexing and keyword searching;*
- 3. Upon the completion of the indexing and keyword searching, and for the ease of use of the parties, the results have been migrated to an excel sheet containing the exact file name, its location and number of hits.*

8. On 27 April 2011, the Defence wrote to the Registry as follows:

“I write to you regarding the implementation of PTC1’s order ICC-01/04-01/10-105 which requires the Defence to review the contents of hard drives for potentially privileged materials.

At the outset, I would like to thank you and your representatives for your courteous and helpful manner to date. This has been of some comfort to members of my team and OPCD in facing the mammoth task ahead of them.

I must, however, raise a practical/resource issue(not connected to the Defence) which leads me to believe that obtaining the 6 May 2011 deadline set by the Pre-Trial Chamber is perhaps rather wishful. I do stress that this problem is of a nature which does not yet enable the Defence to start working on the hard drives and when it does - such work will be slow and inefficient.

As I am informed, the drives - in the format that they were communicated to the Defence - can only be reviewed on specifically designated computers

⁹ The issue of the corrupted drives, the breaking of seals on the evidence bags containing them and the impact thereof on the admissibility of the whole hard drive collection will be raised in a separate filing.

¹⁰ ICC-01/04-01/10-119.

because of security concerns: namely, the fear that either the virus-killing software present on all ICC work stations will obliterate the contents of the drives or, vice-versa, the contents of the drives might contain viruses which could subsequently infect the whole Court.

Regardless of whether I have correctly stated the reasons for such, I am told that OPCD will (at a later date) only be provided with 2 such specially designated work-stations/computers and its accompanying special software. This unfortunately is inadequate. After all, only one person can operate a computer at one time - and in order to achieve maximum efficiency and to meet the deadline we will need all designated team members and the Suspect himself simultaneously working on this project.

I remind you that the PTC has permitted 5 members of OPCD to work on this task in addition to the two Defence counsel. Mr. Mbarushimana will also require a specially designated computer to be provided to him in the Detention Unit along with a copy of the drives - since it is he - alone - who is capable of directing the Defence as to which drives/directories/files should be subjected to review. In order, therefore, to meet the said deadline we will require an additional six specially designated computers (making 8 in total).

I am also forced to mention the format in which the fruits of the keyword searches have been presented to the Defence. The hits are not hyperlinked to the files in which they are located, the reliability of the software used to conduct the keyword searches is questioned by my client and the use of this software has effectively changed the former names of the files making it extraordinarily difficult for my client to recognise where he formerly held privileged material.

In the circumstances - no Defence representative has yet received the necessary hardware for carrying out the necessary review despite the fact that the relevant Court order was rendered on 15 April 2011.

I repeat my appreciation of your efforts to date - but nevertheless would be grateful for your views on how the Defence can possibly meet the deadline which has been set by the Pre-Trial Chamber since -at present and for all the reasons mentioned above - I do not believe that we have received copies of the hard drives as the PTC envisaged "in a format which is easy to access and therefore search without additional software" [cf. ICC-01/04-01/10-105]."

9. Later on Wednesday 27 April 2011, the Defence informed the Registry that its representatives had, in fact, received two work-stations but was still short of additional hardware and the software necessary for performing the review.

10. On Thursday 28 April 2011, the Defence received the following response from the Registry including a polite, yet bureaucratic, reminder that concerns relating to the provision of administrative facilities, despite their urgency, should be channeled through Counsel Support Services:

“Following the reception of your email on the 27th of April, CMS has requested that 5 workstations equipped with the relevant software be immediately placed at the disposal of the OPCD.

The machines and the relevant software have been installed in the OPCD premises yesterday evening. Please note that the machines used by the CMS in its “IT forensic lab” have been used for this purpose and with a view of accelerating the matter.

Furthermore, CMS is currently delivering a training as to the use of the FTK software to both the designated OPCD staff and relevant Defense team members. This training is aimed at allowing the OPCD and Defense team members to perform their review in an easier and more efficient manner in the current circumstances.

Please note that in the matter at hand the hyperlinking of the keywords to the relevant files was not possible. Hyperlinking to non-fixed locations (the data is not fixed on one machine but rather provided on portable media – the hard drives) is impossible.

*Please note that in light of decision ICC-01/04-01/10-105, it is not required that additional software and/or other upgrade be made on Mr Mbarushimana’s workstation in the Detention Center. **If the Defense requires this to be done it should address a request to the Chamber to this end** [emphasis added – NK].*

Finally, I take this opportunity to remind you that the relevant Registry Section providing support to the Defense teams is CSS.”

Submission

11. The Pre-Trial Chamber's second decision concerning the review of potentially privileged material was rendered on 15 April 2011. Despite this, the Registry only provided the Defence with the appropriate combination of hardware and software necessary to decipher and analyse the copies of hard drives in the afternoon of Thursday 28 April 2011 - several hours before all support staff left for an extended holiday weekend.

12. While grateful to the Registry for its well-meaning and sympathetic attitude, the Defence does not believe that the materials were supplied to it "*in a format which is easy to access and therefore search without additional software*".

13. Of the two images of the hard drives mentioned in the Registry addendum cited above, only the "native" format is conducive to Defence analysis without further processing. This format, however, does not include documents which may have been deleted from Mr. Mbarushimana's hard drives and which may, nevertheless, be relied upon by the OTP. The "EnCase" format, on the other hand, while providing the desired complete mirror image of Mr. Mbarushimana's hard drives, is not amenable to further analysis without the provision of a specially adapted work-station and the application of "*additional software*" known as "FTK" (Forensic Tool Kit). Learning to use this software has, also, required intensive and time-consuming training.

14. Paradoxically, the Defence has been put in a position where it is presently obliged to analytically review a myriad of positive hits and the entire hard drive collection for documents not responsive to OCR and not subjected to a "fuzzy" keyword search¹¹ – all in less than one week. This is in stark contrast to the three weeks it took the Registry just to generate the aforementioned

¹¹ The Pre-Trial Chamber did not order the Registry to factor in the possibility that the keywords may have been misspelled in the original privileged document.

results and, thereafter, plead that it was “*unable to provide a reliable time estimate*” for the review of responsive files.¹²

15. On Friday 29 April 2011, the Defence team visited Mr. Mbarushimana in his place of detention, perforce, with a personal lap-top computer containing the less complete “native” image of the hard drives. Despite serious reservations about the adequacy and execution of the keyword search,¹³ within the short space of time permitted for such visits, Mr. Mbarushimana managed to conduct a preliminary review of approximately one third of the seized hard drives identifying files for further analysis while filtering out those files which (by virtue of their file extension) cannot possibly contain privileged materials.

16. Without the benefit of Mr. Mbarushimana's full assistance, the Defence will not be able to complete this task within any reasonable time limit. To put it quite succinctly, the Defence representatives will be looking for proverbial needles in haystacks whereas Mr. Mbarushimana - given his familiarity with the contents of the hard drives - will be able to direct a speedy and focused search.¹⁴ By way of example, Mr. Mbarushimana will be able to identify documentary files by their extensions (such as *.pdf, *.doc, *.docx or *.ppt) and Email files¹⁵ which may possibly contain potentially privileged material. Mr. Mbarushimana can only provide such essential assistance, however, if he is supplied with the specially adapted hardware and additional “FTK” software which the Registry currently denies him and which will enable him to work around the clock from the “comfort” of his cell.

¹² ICC-01/04-01/10-95 at page 5 paragraph 2(b) and ICC-01/04-01/10-105 at paragraph 10; “*CONSIDERING that, in light of the information provided by the Registry, for reasons of a technical and operational nature it does not appear feasible for the Registry to perform the search on the relevant seized material in accordance with the instructions, method and timeframe set by the Chamber in its 30 March 2011 Decision and in the Annex thereto;*”

¹³ Which generated thousands of hits in non-exploitable or totally irrelevant files such as MS-Windows system files or other files related to computer programmes (e.g. files bearing the following extensions: *.dll, *.ini, *.log, *.exe, *.com, *.dat, etc.) and video files.

¹⁴ ICC-01/04-01/10-105 at paragraph 13.

¹⁵ the relative paucity of such Email files also suggests that the Registry performed an inadequate execution of the keyword search.

17. Mr. Mbarushimana is strongly opposed to the postponement of the confirmation hearing for reasons connected to the quantity (and the dubious evidential quality) of materials seized indiscriminately from his house in the pursuit of what may be termed “the mother of all fishing expeditions”.

Relief Sought

18. The urgent relief requested herein is sought without prejudice to any future submission concerning the adequacy of the Registry's compliance with ICC-01/04-01/10-105 and the admissibility of the materials contained on the seized hard drives for use at the confirmation hearing or trial.

19. Noting, therefore, that Article 57(3)(b) of the Rome Statute empowers it to grant such orders as necessary to be of assistance in the preparation of a person's defence, the learned Pre-Trial Chamber is respectfully requested to order the Registry to immediately supply Mr. Mbarushimana with exactly the same hardware, software and training which has been afforded the Defence representatives to date.

20. The learned Pre-Trial Chamber is also requested to hear further brief Defence submissions on the implementation of decision ICC-01/04-01/10-105 at the status conference which has been fixed for Wednesday 4 May 2011.



Nicholas Kaufman

Counsel for Callixte Mbarushimana

Done in Jerusalem, Israel

Sunday, May 01, 2011

No. ICC-01/04-01/10

10/10

1 May 2011