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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

**Defence observations on the Prosecution's failure to comply
with Pre-Trial Chamber I's order: ICC-01/04-01/10-154**

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
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. The Defence for Mr. Callixte Mbarushimana hereby notes the Prosecution's failure to comply¹ with the learned Single Judge's *Order requesting observations on the report from the Netherlands Forensic Institute* ("the Order").² The Defence also notes that the Single Judge has previously reprimanded the Prosecution for failing to comply with an order "to submit observations" deeming such as potential "*misconduct liable to sanctions envisaged in article 71 of the Statute and rule 171 of the Rules*".³

2. The Defence recalls that it was the Prosecution which initiated the present proceedings by filing a request for authorisation to conduct destructive analysis of a corrupted disc ("the Prosecution Request").⁴ The Defence also recalls that the Prosecution stressed the singularly essential nature of its request by asserting that "*the only way to retrieve the content of the remaining 14% of the Disc is by way of destructive analysis*".⁵

3. Notwithstanding, the Defence notes that the Netherlands Forensic Institute ("NFI") did not initially advocate destructive analysis⁶ but, rather, a non-destructive "pre-investigation" of the disc. Such pre-investigation has now shown that, contrary to the initial Prosecution assertion, destructive analysis is not the only viable option for retrieving the corrupted portion of the disc.⁷

4. On the basis of the Prosecution's unjustified tardiness in filing its request, its initial negligent (mis)representation that destructive analysis was essential and its consequent (mistaken) characterization of the requested procedure as a "unique investigative opportunity", the Pre-Trial Chamber convened a status conference on 4 May 2011 necessitating the attendance of Counsel for the Defence at short notice.

¹ The Single Judge ordered the Parties to file observations by 20 May 2011. As of 14:00 – today – 23 May 2011 - no Prosecution observations were registered in TRIM.

² ICC-01/04-01/10-154.

³ ICC-01/04-580.

⁴ ICC-01/04-01/10-122.

⁵ *ibid* at paragraph 11.

⁶ ICC-01/04-01/10-122-AnxA.

⁷ ICC-01/04-01/10-144-Anx, annexed to the "Registry Transmission of the Report from the Netherlands Forensic Institute", ICC-01/04-01/10-144

5. All missions to the seat of the Court are paid for out of a monthly costs fund of 4,000 Euros allocated to Mr. Mbarushimana pursuant to the terms of his legal assistance. The costs incurred by the superfluous mission undertaken in connection with the Prosecution Request have had the consequential effect of reducing the monies available to the Defence for financing its other case-related activities thereby impacting on the much lauded principle of "equality of arms".

6. The Defence submits that the Prosecution's recognition of the expertise of the NFI and its present failure to respond to the Order is indicative of its acquiescence in the view that destructive analysis is no longer an essential and unique pre-confirmation requirement.

Relief Sought

7. In light of all the aforementioned, and in order that Mr. Mbarushimana may not be financially prejudiced in the preparation of his defence,⁸ the learned Pre-Trial Chamber is requested to recommend⁹ that the Registry reimburse the Defence's legal aid fund for the costs of Counsel's mission to the Court for the status conference which was held on Wednesday 4 May 2011.



Nicholas Kaufman

Counsel for Callixte Mbarushimana

Jerusalem, Israel
Monday, May 23, 2011

⁸ Article 57(3)(b) of the Rome Statute.

⁹ The Defence accepts that the Court does not, unfortunately, have the power to order the transfer of monies from one budget to another.