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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

**Prosecution's request in terms of Rule 121(7) for the postponement of the confirmation
hearing to preserve the fairness of the proceedings**

Source: Office of the Prosecutor

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I. Introduction

1. At the initial appearance of Callixte Mbarushimana (“the Suspect”) before the Court on 28 January 2011, Pre-Trial Chamber I (“the Chamber”) fixed the date for the confirmation of charges hearing (“the Confirmation Hearing”) for 4 July. At that time, the Presiding Judge remarked that *“[b]ased on the experience of the Chamber, the Judges are confident that this date provides the Prosecutor with adequate time to disclose all the relevant evidence and the Defence with equally adequate time to properly prepare for the case”*. Pursuant to a subsequent order, the Prosecution’s Document Containing the Charges (DCC) and its List of Evidence (LoE) must be filed by 1 June. At the time the Chamber set these schedules, it was impossible to foresee that none of the electronic evidence seized from the Suspect would be made available to the Prosecution before 23 May,¹ that only part of the electronic evidence would be turned over in late May, and that it would be in a format which provided required further time-consuming processes to be conducted before it would be ready for review. The total volume of electronic data received for review to date exceeds 1 Terabyte² and a further 10 devices with a potential capacity of 270 Gigabytes are still outstanding.
2. Accordingly, under the current schedule, the Prosecution cannot include any of the seized electronic evidence in its DCC, identify it on its LoE, or rely upon it at the Confirmation Hearing. Access to the largest and potentially most significant portion of the evidence is an essential prerequisite of a confirmation hearing that is fair to the Prosecution and permits it to exercise its duties under the Rome Statute. It would therefore violate the Prosecution’s right to a fair proceeding to require it to establish its case at a Confirmation Hearing without allowing it sufficient access to the seized materials.
3. “Fairness” within the terms of Article 82(1)(d) incorporates fairness towards the accused, the victims and the Prosecution. It requires that the procedural and substantive rights and obligations of all participants be respected. In particular, that “means that the Prosecutor must be able to exercise the powers and fulfil the duties listed in Article 54”.³

¹ The Registry made this material available to the Prosecution at approximately 10:30 on Monday 23 May 2011. However, the

² Or 1026 Gigabytes

³ ICC-01/04-135-tEN, 31 March 2006, paras. 38-39; See also ICC01/04-141, para. 48; ICC-02/04-01/05-212, paras. 10-11. This principle has also been widely recognized, for instance in the ICTR (*Prosecutor*

Fairness has also been linked to the ability of a party to present its case.⁴ In this case, the Single Judge also expressly recognized that the Chamber has the responsibility to ensure that the proceedings are conducted “with full respect for the rights of the Prosecution and the Defence”.⁵

4. As the Prosecution urged in its 13 May submission, “complete access to the non-privileged portions of all electronic media seized from the Suspect is essential to the preparation of its case and a condition *sine qua non* for the conduct of a Confirmation Hearing that is fair to both parties”.⁶
5. At the same time, the Defence – which starts with the advantage of a general knowledge regarding the contents of the evidence since it was seized from the Suspect and is subject to a much later deadline for disclosing its intended evidence⁷ -- has had access to the electronic evidence for over a month.⁸ If the Chamber maintains the current schedule, the Prosecution may well be surprised by evidence to which it does not now, and may not by the time of the hearing, have full access.⁹
6. In addition, the recently-filed Defence request for a permanent stay of the proceedings is pending.¹⁰ If successful, it would result in the termination of the proceedings. Although the Prosecution will argue that this request is meritless and should be dismissed swiftly, the Prosecution submits that it is appropriate that it be ruled upon before the Confirmation Hearing, and the related disclosure deadlines should be adjusted in accordance with the Chamber ruling on the alleged abuse of process.

v. Zlatko Aleksovski, 16 February 1999 [reference?], paras 24 - 25) and the ECtHR (See for instance *Ekbani v. Sweden* (1988) 10 EHRR 510 at para. 30; *Barberà v. Spain*. (1988) 11 EHRR 360 at para. 18; *Brandsetter v. Austria* (1991) 15 EHRR 213 at para. 67; and *Dombo Beheer BV v. The Netherlands* (1993) 18 EHRR 213 at para. 33. This was a civil case but the court was considering whether the requirement of equality of arms recognised in criminal cases should apply to civil cases also).

⁴ ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), para. 24.

⁵ ICC-01/04-01/10-173, 23 May 2011., page 5.

⁶ ICC-01/04-01/10-147, para 34. See also paras. 32 – 41. The Prosecution refers the Chamber to these relevant paragraphs as if specifically incorporated herein. Notably, the Defence did not take issue with this legal point in its response, see ICC-01/04-01/10-159.

⁷ ICC-01/04-01/10-87 sets the defence deadline to submit its LoE as 16 June.

⁸ Since 18 April, ICC-01/04-01/10-174150, page 6.

⁹ “...the paramount principle of fair trial requires that both parties be in a position to properly and adequately prepare for the confirmation hearing, also with a view to preventing unknown issues to be raised at the last minute which might adversely affect the expeditiousness of the proceedings”; *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09, 8 October 2009.

¹⁰ ICC-01/04-01/10-177, 24 May 2011.

7. The Prosecution therefore requests the Chamber to establish a new confirmation date to hold a Confirmation Hearing allowing the Prosecution to exercise its rights and duties in accordance with article 82 and 54 and adjust accordingly the remaining disclosure time limits. In the interim, the pending Defence request for a permanent stay of proceedings may be litigated.

II. Statement of Facts

8. On 11 October 2010 the French authorities executed the warrant of arrest¹¹ and simultaneously conducted a search of the Suspect's residence and work premises and seized a number of documents and a large quantity of electronic media.
9. The French authorities delivered the seized material to Registry officials on 20 October.
10. On 15 November the Registry submitted to the Chamber its proposed protocol for the inventory and unsealing of seized items which provided the Registry would ensure that the seized electronic media are forensically copied and copies made available to the Prosecution, the Defence and the Chamber.¹²
11. On 22 December the Registry submitted to the Chamber its proposed terms of reference for the forensic copying, data extraction and forensic examination of the seized electronic media.¹³
12. On 28 January 2011 the Suspect made his initial appearance before the Chamber which fixed 4 July as the date for the start of the Confirmation Hearing.
13. On 11 February the Prosecution filed its request for a review of potentially privileged material,¹⁴ alerting the Chamber to the possibility that one or more of the seized documents contained potentially privileged communications.
14. On 14 February the Single Judge held a status conference to discuss issues relating to disclosure.¹⁵ At this status conference the Prosecution foreshadowed the fact that the

¹¹ Warrant of Arrest for Callixte Mbarushimana, ICC-01/04-01/10-2-tENG, 28 September 2010.

¹² 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 Origine, ICC-01-04-01/10-24, 17 November 2010 + Annexe.

¹³ ICC-01/04-01/10-53-Conf-Anx, 11 February 2011.

¹⁴ ICC-01/04-01/10-54, 14 February 2011.

¹⁵ ICC-01/04-01/10-T-2-ENG ET WT 14 February 2011.

determination of the evidence it intended to rely upon at the Confirmation Hearing would be dependent upon (i) its access to the evidence seized from the Suspect and (ii) its opportunity to review this evidence.¹⁶

15. On 18 February the Defence filed its response to the Prosecution request for a review of potentially privileged material, in which it asserted that *"privileged materials are likely to be contained in all of the following materials: ... b) electronic media seized from the house of Mr. Mbarushimana capable of holding documentary data such as hard drives, cell phones containing SMS messages, compact discs, memory sticks, etc."*¹⁷
16. On 4 March the Chamber issued its "Decision on the 'Prosecution's request for a review of potentially privileged material'".¹⁸ In this decision it ordered the parties to provide the Chamber and the Registry, "no later than 9 March 2011, with a properly motivated list of keywords, if any, that can be used in a search for potentially privileged communications in the remaining Seized Material."¹⁹ It ordered the Registry to conduct a search of the seized electronic data based on these keyword lists and to provide the Chamber with a list of documents by 16 March. It also ordered the Registry not to give the Prosecution access to the seized electronic data until the Chamber had completed its assessment and provided the Registry with a list of documents to which rule 73 applied.
17. On 9 March the Prosecution²⁰ and the Defence²¹ submitted proposed keyword lists.
18. On the same date the Registry filed a request for the extension of the time limit to conduct the keyword search.
19. On 14 March the Prosecution filed the "Prosecution Response to the 'Defence Submission of 'Keywords' for the Review of Potentially Privileged Material'",²² in which it objected to the Defence's keyword list and specifically pointed out that "these terms extend far beyond what is appropriate to identify potentially privileged communication between the Suspect and his legal counsel"²³ and further that "the use of 'names, organisations,

¹⁶ *Ibid.*, page 14, lines 6 – 10.

¹⁷ ICC-01/04-01/10-58, 18 February 2011, at para 9.

¹⁸ ICC-01/04-01/10-67, 4 March 2011.

¹⁹ ICC-01/04-01/10-67, p. 8.

²⁰ ICC-01/04-01/10-71, 9 March 2011.

²¹ ICC-01/04-01/10-72, 9 March 2011.

²² ICC-01/04-01/10-77, 14 March 2011.

²³ *Ibid.*, para. 15.

places' or other 'notions, concepts and topics' alone cannot distinguish between privileged and non-privileged documents."²⁴

20. On 16 March the Single Judge issued her "Decision on the Registry's request for extension of time and on other matters regarding the review of potentially privileged material",²⁵ in which she (a) approved the Prosecution's keyword list; (b) rejected the Defence's keyword list and ordered it "to 'properly motivate' and, when appropriate, reformulate keywords it has submitted"; and (c) ordered the Registry to provide to the Chamber, by 1 April, a list of documents obtained through its search and a report on its progress, including an estimate of how much more time would be required to complete the task.²⁶
21. On 17 March the Defence filed its "Defence submission of properly motivated keywords."²⁷
22. On 30 March the Single Judge issued her "Decision on the keywords provided by the Defence for the purpose of selection of potentially privileged material",²⁸ in which she accepted the Defence's keyword list subject to certain reservations.
23. Also on 30 March, the Chamber issued its "Decision on issues relating to disclosure",²⁹ in which it set time limits for the disclosure of evidence for the purpose of the confirmation hearing and ordered the Prosecution to file in the record of the case by 1 June the DCC and LoE.
24. On 8 April the Registry filed the "Registry Report"³⁰ and on 12 April it filed an Addendum to the Registry Report.³¹ The Registry's report indicated that its keyword searches had resulted thus far in tens of thousands of hits.
25. On 15 April the Chamber issued its "Second Decision on matters regarding the review of potentially privileged material",³² in which it ordered the Defence to conduct the review

²⁴ *Ibid.*, para. 16.

²⁵ ICC-01/04-01/10-80.

²⁶ The original deadline for this report was 1 April, but this was subsequently extended to 8 April: ICC-01/04-01/10-88, 30 April 2011.

²⁷ ICC-01/04-01/10-81.

²⁸ ICC-04/01-01/10-88.

²⁹ ICC-01/04-01/10-87, 30 March 2011.

³⁰ ICC-01/04-01/10-95-Conf, 11 April 2011.

³¹ ICC-01/04-01/10-98-Conf, 13 April 2011.

³² ICC-01/04-01/10-105, 15 April 2011.

of the seized material and submit to the Chamber a list of the documents on which it claims privilege under Rule 73 by no later than 6 May. On 19 April, the Defence filed the "Defence Request for OPCD Support", in which it requested the assistance of five staff members from the Office of the Public Counsel for the Defence to assist him with the privilege review.³³ This request was granted by the Single Judge on 21 April.³⁴

26. On 18 April the Registry filed its "Further Submissions on the Processing of Part of the Seized Material",³⁵ indicating that of the 42 media devices seized, it was unable to access 10, as seven were faulty and three were encrypted. The Registry proposed to ask the Netherlands Forensic Institute ("NFI") to process these devices.
27. On 21 April the Registry filed the "Registry Report on the Keyword Searches Performed on a Part of Seized Material".³⁶
28. On 2 May the Defence filed the "Defence implementation of the second decision on matters regarding the review of potentially privileged material"³⁷ in which it complained that the Suspect lacked access to hardware and software necessary to participate in the privilege review. The Defence also signalled that it would not be able to complete the privilege review by the set date and requested permission to make oral submissions on these issues. On the same day the Single Judge granted the request³⁸ for the Suspect to be granted access to the requested hardware and software, but refused the request to address this issue at a hearing, leaving open the "defence's right to submit observations in writing".
29. On 6 May the Defence filed the "Defence submission of a list of potentially privileged material."³⁹
30. On 11 May the Single Judge ordered the Registry to submit a report concerning the Defence submission of a list of potentially privileged material⁴⁰ by no later than Thursday 12 May.

³³ ICC-01/04-01/10-114, 19 April 2011.

³⁴ ICC-01/04-01/10-115, 21 April 2011.

³⁵ ICC-01/04-01/10-109, 18 April 2011.

³⁶ ICC-01/04-01/10-119, 21 April 2011.

³⁷ ICC-01/04-01/10-127, 2 May 2011.

³⁸ Decision on the "Defence implementation of the second decision on matters regarding the review of potentially privileged material", ICC-01/04-01/10-129, 2 May 2011.

³⁹ ICC-01/04-01/10-143, 11 May 2011.

31. On 12 May the Registry filed the Registry Report on technical problems with the computer installed in the Suspect's detention cell.⁴¹
32. On 13 May the Registry filed its Report on the faulty and encrypted hard drives that were among the seized materials.⁴² It indicated that the NFI estimated that it could process the first device by 31 July 2011, and thereafter proceed with the remaining nine devices at the rate of one or two per month. Under this proposed schedule, the Prosecution will not have access to all of the relevant devices until approximately the beginning of 2012.
33. Also on 13 May the Prosecution filed its response to the Defence submission of a list of potentially privileged documents and request for access to seized electronic material.⁴³ In the filing, the Prosecution stressed the importance of its timely access to all seized electronic material prior to the Confirmation Hearing.⁴⁴
34. Also on the same date the Single Judge issued her Decision extending the deadline for the review of potentially privileged material,⁴⁵ in which she ordered the Defence (a) to expeditiously carry out and complete its review of the Materials, (b) to submit to the Chamber a list of allegedly privileged documents and files as soon as possible and no later than Wednesday, 18 May 2011; and (c) to file its observations on the Prosecution Request, if any, no later than Thursday, 19 May 2011. The Single Judge also ordered the Registrar, on receipt of the Defence's list of potentially privileged files and documents on 18 May, to "immediately" grant the Prosecutor access to the Materials over which privilege is not claimed.
35. On 17 May the Chamber issued its Third Decision on matters regarding the review of potentially privileged material⁴⁶, in which it required the Defence to file by 23 May a list of documents in respect of which privilege was claimed from the among the 179 seized documents identified by the Prosecution keyword searches as potentially privileged.

⁴⁰ Order to the Registry to submit a report concerning the Defence submission of a list of potentially privileged material; ICC-01/04-01/10-114, 19 April 2011.

⁴¹ ICC-01/04-01/10-146, 12 May 2011.

⁴² ICC-01/04-01/10-149, 13 May 2011.

⁴³ ICC-01/04-01/10-147 13 May 2011.

⁴⁴ Ibid. para. 35.

⁴⁵ ICC-01/04-01/10-150, 13 May 2011.

⁴⁶ ICC-01/04-01/10-158, 17 May 2011,

36. The Defence submitted its supplementary privilege list as ordered in Decision ICC-01/04-01/10-150 on 17 May.⁴⁷ The Prosecution received access to the documents on the relevant hard drives in respect of which no privilege was claimed on 23 May, not “immediately” on 17 or 18 May, as ordered.⁴⁸
37. The Defence filed its third privilege list as ordered in Decision ICC-01/04-01/10-157 on 20 May.⁴⁹
38. On 23 May the Single Judge issued her Decision on the Prosecution's response to the Defence submission of a list of potentially privileged documents.⁵⁰ The Decision did not address the Prosecution's request that the Chamber determine a timetable for the Prosecution to be granted access to all remaining electronic material, including the damaged and protected devices and documents which the Chamber subsequently determines not to be privileged. It did, however, requests the Defence to submit to the Chamber and the Prosecution, no later than Tuesday, 24 May 2011, relevant information regarding any documents that it did not want reclassified as confidential (and thus accessible to the Prosecution), and the number of the potentially privileged items it identified on each of the seized hard drives.
39. On 24 May the Defence filed its response to the Chamber's order ICC-01/04-01/10-173,⁵¹ in which it did not object to reclassification of its various privilege lists.
40. On the same day the Prosecution filed its observations on the NFI's proposed timelines for analyzing the 10 damaged and protected hard drives and proposed alternative solutions,⁵² again stressing its need for timely access to all seized electronic material.
41. Also on 24 May, the Defence filed a request for a permanent stay of proceedings alleging prosecutorial misconduct and abuse of process, in which it repeats arguments previously submitted in its unsuccessful request to set aside the warrant of arrest.⁵³

⁴⁷ Second Defence submission of a list of potentially privileged material, ICC-01/04-01/10-155, 17 May 2011.

⁴⁸ Despite the Chamber's order that the Registry should give the Prosecution “immediate” access to these documents, certain technical issues relating to the export of the data apparently prevented the Registry from implementing the order any sooner.

⁴⁹ Soumission d'une liste de documents privilégiés suite à la décision de la Chambre Préliminaire ICC-01/04-01/10-158, ICC-01/04-01/10-165, 20 May 2011.

⁵⁰ ICC-01/04-01/10-173, 23 May 2011.

⁵¹ ICC-01/04-01/10-179, 24 May 2011.

⁵² ICC-01/04-01/10-174-Conf, 24 May 2011.

III. Submissions

It would be infringe the Prosecution's right to a fair proceeding to require it to establish its case at a Confirmation Hearing without allowing it sufficient access to the seized materials.

42. As previously submitted by the Prosecution in its Response to the Defence Privilege List⁵⁴, “fairness” within the terms of Article 82(1)(d) incorporates fairness towards the accused, the victims and the Prosecution. It requires that the procedural and substantive rights and obligations of all participants be respected. In particular, that “means that the Prosecutor must be able to exercise the powers and fulfil the duties listed in Article 54”.⁵⁵ Fairness has also been linked to the ability of a party to present its case.⁵⁶ In this case, the Single Judge also expressly recognized that the Chamber has the responsibility to ensure that the proceedings are conducted “with full respect for the rights of the Prosecution and the Defence”.⁵⁷ Other Pre-Trial Chambers have previously decided to postpone the confirmation hearing in order to ensure that a party to the proceedings can “properly exercise its rights and, in particular, prepare adequately for the hearing”.⁵⁸ In this decision the party who’s rights were being protected was the Defence, but on the strength of the authorities quoted above, the Prosecution submits that this principle applies *mutatis mutandis* to the Prosecution.

43. As the Prosecution urged in its 13 May submission, “complete access to the non-privileged portions of all electronic media seized from the Suspect is essential to the preparation of its case and a condition *sine qua non* for the conduct of a Confirmation Hearing that is fair to both parties”.⁵⁹ Even had access been immediately provided on 13

⁵³ ICC-01/04-01/10-177, 24 May 2011.

⁵⁴ ICC-01/04-01/10-147, para 34.

⁵⁵ ICC-01/04-135-tEN, 31 March 2006, paras. 38-39; See also ICC01/04-141, para. 48; ICC-02/04-01/05-212, paras. 10-11 . This principle has also been widely recognized, for instance in the ICTR (*Prosecutor v. Zlatko Aleksovski*, 16 February 1999 [reference?], paras 24 - 25) and the ECtHR (See for instance *Ekbatani v. Sweden* (1988) 10 EHRR 510 at para. 30; *Barberà v. Spain*. (1988) 11 EHRR 360 at para. 18; *Brandsetter v. Austria* (1991) 15 EHRR 213 at para. 67; and *Dombo Beheer BV v. The Netherlands* (1993) 18 EHRR 213 at para. 33. This was a civil case but the court was considering whether the requirement of equality of arms recognised in criminal cases should apply to civil cases also).

⁵⁶ ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), para. 24.

⁵⁷ ICC-01/04-01/10-173, 23 May 2011., page 5.

⁵⁸ ICC-01/05-01/08-170-tENG, para. 25.

⁵⁹ ICC-01/04-01/10-147, para 34. See also paras. 32-41 The Prosecution refers the Chamber to these relevant paragraphs as if specifically incorporated herein. Notably, the Defence did not take issue with this legal point in its response, see ICC-01/04-01/10-159.

May, the Prosecution would have had a difficult time meeting the deadlines for the upcoming confirmation. But in fact the Prosecution received access to the non-privileged documents from those hard drives on Monday 23 May, only eight working days prior to its deadline to submit the DCC and LoE and disclose the incriminating evidence on which it intends to rely at the Confirmation hearing. Nor was that access in fact sufficient to allow it to start to review the materials on 23 May. The format in which the documents were provided to the Prosecution, although forensically sound, requires the Prosecution to first import the one Terabyte of data into Forensic Tool Kit ("FTK") before any further examination can be conducted. This alone will take an estimated 48 hours.⁶⁰ Thereafter the data must be "de-nisted" to remove system files and other irrelevant content, and an initial relevance search must then be conducted before the relevant content can be downloaded into Ringtail for review. This process must be conducted in respect of the contents of each of the 31 items provided to the Prosecution. The content of the first of the hard drives will therefore not be available for review until sometime next week, too late for its inclusion in the DCC and LoE.

44. In the circumstances, the Prosecution in fact cannot review and use any of this evidence at the confirmation hearing.
45. Nor has the Prosecution any access to the remaining electronic evidence, or any reliable indication when it will have access to the contents of the 10 faulty or protected devices,⁶¹ or to unprivileged documents presently under review by the Chamber. The Prosecution also does not yet appear to have been provided with access to the contents of two hard drives⁶² and four compact disks,⁶³ but will liaise with the Registry to clarify this issue. Finally, the four mobile telephones seized from the Suspect have not yet been analysed.
46. At the same time, the Defence – which starts with the advantage of a general knowledge regarding the contents of the evidence since it was seized from the Suspect and is subject to a much later deadline for disclosing its intended evidence⁶⁴ -- has had access to the electronic evidence for over a month.⁶⁵ If the Chamber maintains the current schedule,

⁶⁰ At the rate at which the data can be uploaded into FTK.

⁶¹ The Prosecution has previously submitted why the contents of these hard drives, particularly the three encrypted devices, are regarded as vital to its investigation. ICC-01/04-01/10-174-Conf, para 16.

⁶² DRC-REG-0009-0048 and -0067

⁶³ DRC-REG-0009-0002, DRC-REG-0005-2888, -2890 and 2891.

⁶⁴ ICC-01/04-01/10-87 sets the defence deadline to submit its LoE as 16 June.

⁶⁵ Since 18 April, ICC-01/04-01/10-174150, page 6.

the Prosecution may well be surprised by evidence to which it does not now, and may not by the time of the hearing, have full access.⁶⁶ One need only consider what the position would have been had the circumstances been reversed⁶⁷ to illustrate how patently unreasonable it is to expect the Prosecution to proceed to confirmation in the circumstances.⁶⁸

47. Moreover, the inequality of access is not merely a matter of inconvenience. Without prosecutorial access to the materials, the Defence can make an incomplete and out-of-context presentation of seemingly explanatory or exculpatory evidence, with no rebuttal or explanation by the Prosecution, and the Chamber will be unable to determine the truth.
48. Under these circumstances, it would be contrary to the truth-seeking purpose of the confirmation hearing and unfair to the Prosecution to retain the present schedule.
49. Finally, the Prosecution notes that if the Chamber postpones the confirmation hearing, that will allow the Chamber to consider the just-filed application by the Defence to dismiss the case in its entirety for abuse of process.
50. If the delays in obtaining access to the seized materials were caused by the Prosecution, it might be ill-positioned to complain about the resulting unfairness. But, contrary to the suggestions previously made by the Defence, the Prosecution is not responsible for the unavailability of the evidence and its inability to review it.
51. The Prosecution requested the search of the Suspect's premises and the seizure of his computer hard drives and other digital media because it considered that the evidence

⁶⁶ "...the paramount principle of fair trial requires that both parties be in a position to properly and adequately prepare for the confirmation hearing, also with a view to preventing unknown issues to be raised at the last minute which might adversely affect the expeditiousness of the proceedings"; *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09, 8 October 2009.

⁶⁷ In other words, if the Prosecution had one and a half months to review a pool of evidence while the defence had less than a week to do so.

⁶⁸ "One of the fundamental aspects of the right to fair trial is that proceedings should be adversarial in nature and that there should be equality of arms, in the sense of a fair balance between the parties. Based on this finding, the Single Judge concurs with Pre-Trial Chamber II in saying that **fairness is preserved when a party is provided with the genuine opportunity to present its case - under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent** - and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision. The Single Judge equally concurs with the finding of Pre-Trial Chamber I in that the respect for fairness of the proceedings with regard to the Prosecutor entails that the Prosecutor must be able to exercise his powers and fulfill his duties under article 54 of the Statute." (emphasis added); *Prosecutor v. Jean-Pierre Bemba* ICC-01/05-01/08-75, 25 August 2008, para. 14.

would be highly relevant to its investigation. The Chamber and the French authorities agreed. The Prosecution's review of the hard copy documents to date has confirmed the relevance of this evidence. The Suspect's persistent objections to allowing the Prosecution access to the seized materials presumptively confirms that the evidence is likely to be relevant to the case against him.

52. The Defence attribution of blame to the Prosecution for the delay in receiving access is wholly misplaced. The search and seizure was a legitimate and reasonable law enforcement measure, and it was carried out in keeping with internationally recognised best practices for the seizure of electronic evidence.⁶⁹ But the seizure of the electronic media, including the problems with encryption and corruption of certain disks, presented novel forensic complications that the Registry has not previously had to resolve.⁷⁰ In addition, much of the delay is attributable to the Defence, which in its

⁶⁹ See in this regard the Association of Chief Police Officers (ACPO) "Good Practice Guide for Computer-based Electronic Evidence", pages 4, 8 – 10,

http://www.7safe.com/electronic_evidence/ACPO_guidelines_computer_evidence.pdf - last accessed on 13 May 2011; Scientific Working Group on Digital Evidence (SWGDE) "Best Practices for Computer Forensics", 2006, pages 3 - 6 - http://www.oas.org/juridico/spanish/cyb_best_pract.pdf - last accessed on 13 May 2011; International Organisation on Computer Evidence (IOCE) "Guidelines for Best Practice in the Forensic Examination of Digital Technology", 2002, pages 11-14, http://www.ioce.org/fileadmin/user_upload/2002/Guidelines%20for%20Best%20Practices%20in%20Examination%20of%20Digital%20Evid.pdf - last accessed on 13 May 2011; United States Secret Service "Best Practices for Seizing Electronic Evidence" (See "Golden Rules" and "Evidence Preservation") - <http://www.forwardedge2.com/pdf/bestpractices.pdf> - last accessed on 13 May 2011; Working Group Forensic IT (ENSFI) "Guidelines for Best Practice in the Forensic Examination of Digital Technology", 2006, para 9.5, http://www.enfsi.eu/uploads/files/ENFSI_Forensic_IT_Best_Practice_GUIDE_5%5B1%5D.0.pdf - last accessed on 13 May 2011; and Council of Europe "Convention on Cybercrime", 2001, Article 19, <http://conventions.coe.int/Treaty/EN/Treaties/html/185.htm> - last accessed on 13 May 2011.

http://www.7safe.com/electronic_evidence/ACPO_guidelines_computer_evidence.pdf; Scientific Working Group on Digital Evidence (SWGDE) "Best Practices for Computer Forensics", 2006, pages 3 - 6 - http://www.oas.org/juridico/spanish/cyb_best_pract.pdf; International Organisation on Computer Evidence (IOCE) "Guidelines for Best Practice in the Forensic Examination of Digital Technology", 2002, pages 11-14, http://www.ioce.org/fileadmin/user_upload/2002/Guidelines%20for%20Best%20Practices%20in%20Examination%20of%20Digital%20Evid.pdf; United States Secret Service "Best Practices for Seizing Electronic Evidence" (See "Golden Rules" and "Evidence Preservation") - <http://www.forwardedge2.com/pdf/bestpractices.pdf>; Working Group Forensic IT (ENSFI) "Guidelines for Best Practice in the Forensic Examination of Digital Technology", 2006, para 9.5, http://www.enfsi.eu/uploads/files/ENFSI_Forensic_IT_Best_Practice_GUIDE_5%5B1%5D.0.pdf; and Council of Europe "Convention on Cybercrime", 2001, Article 19, <http://conventions.coe.int/Treaty/EN/Treaties/html/185.htm>.

⁷⁰ Another contributor to the delay has been the inability of the Registry to expediently and efficiently complete the forensic copying of the seized media and attend to the subsequent keyword privilege

vehement arguments against prosecutorial access raised belated and over-inclusive claims of privilege, and objections to prosecutorial proposals for efficient privilege review. Compounding these strategies, which caused significant delay, the Defence then failed to meet the Chamber's 6 May deadline for its privilege review.

53. Thus, the Prosecution alleges that the Defence was the chief agent of delay. First, the Suspect did not make a timely claim regarding privilege. The Defence assertion otherwise, that the Suspect raised the claim at the time of, or shortly after, the initial search, has been comprehensively disproved.⁷¹ The Defence did not raise privilege before the French Courts. It did not raise privilege during the extensive post-arrest correspondence with the Prosecution. It did not raise privilege at the Suspect's initial appearance. It did not raise privilege in any filing before this Court.⁷² In fact, it was only on 18 February, four months after his arrest and the seizure of this material and only after the Prosecution alerted the Chamber and the Defence to its discovery of a single potentially privileged communication amongst the seized documents, that the Defence came forward to claim that privilege permeated the electronic media.

54. The lateness of the claim is even more remarkable given the breadth of the privilege assertions. The Defence conception of privilege extends well beyond confidential communications with legal counsel to secure legal advice (in the context of a professional relationship) or with a religious advisor in the context of a sacred confession.⁷³ Indeed, the Defence now is asserting an unprecedented "peace-mediator privilege"⁷⁴ to protect from disclosure and use an untold number of documents that may be highly relevant to the Suspect's contributions to the crimes committed by the FDLR. In addition to its misinterpretation of the underlying privileges, the Defence also proposed overbroad keywords that have led to a plethora of false hits. The Prosecution surely cannot be deemed responsible for delays resulting from these Defence decisions.

search. In this regard, the Prosecution requested in November 2010 that the Registry outsource the copying of the seized electronic material. The Registry ultimately decided against this due to cost concerns. See ICC-01/04-01/10-53-Conf, paras. 5–7 and Conf-Anx.

⁷¹ See ICC-01/04-01/10-66, 1 March 2011, at paras 29–30 and Annexes thereto.

⁷² This is in contrast to the privilege which the Defence asserted in relation to the French communication intercepts. See ICC-01/04-01/10-29 14 December 2010, paras 4 and 25.

⁷³ ICC-01/04-01/10-58, para 12.

⁷⁴ ICC-01/04-01/10-159. This is a significant deviation from the "religious privilege" originally claimed.

55. The Defence's blanket assertion of privilege over the entire collection of seized electronic media has effectively prevented the Prosecution from accessing any of it. The Defence's list of potentially privileged documents has only today been reclassified as confidential and thus made available to the Prosecution.⁷⁵ They confirm precisely what the Prosecution has long suspected – that is that allegedly privileged material was only contained on a fraction of the seized electronic media⁷⁶ and that the Defence ought to have realized that their claim of privilege in respect of all electronic media would delay Prosecutions access thereto and frustrate its ability to prepare for the Confirmation Hearing. The Prosecution notes the Defence's assertions regarding the fact of the Suspect's familiarity with the content of the computer hard drives. That familiarity, which is singularly within the competence of the Suspect, should have made an initial focused identification of confidential communications between the Suspect and his attorney more, not less, feasible. While he may have no legal obligation, his failure to identify the confidential communications from the outset disqualifies the Defence from complaining if the confirmation hearing is postponed or attributing delay to prosecutorial malfeasance.

The Chamber should also postpone the remaining disclosure and filing deadlines

56. In the above circumstances, the Prosecution submits that the remaining deadlines for the disclosure of witness statements and the filing of the DCC and LoE should likewise be postponed and the Chamber should determine a new disclosure framework after an updated and reliable assessment from the Registry on the possibility of expedited access to the seized material and after hearing submissions by the parties.

57. The review of the seized material may fundamentally effect the selection of evidence upon which the Prosecution relies for the Confirmation Hearing. The Prosecution submits that it is inappropriate to compel it to disclose the statements of witnesses upon whom it may ultimately choose not to rely. This would potentially expose these witnesses to harm. Nor is there any compelling reason to require disclosure before the confirmation hearing is rescheduled.

⁷⁵ As per ICC-01/04-01/10-185, 25 May 2011.

⁷⁶ Eight of the 31 devices recently provided to the Prosecution.

IV. Urgency

58. The deadline for the filing of the DCC and LoE is presently set for 1 June. Unless a decision on this application is issued before this date, the purpose of this application will be defeated. The Prosecution alerted the Chamber already on 13 May that it was of the view that a fair confirmation Hearing could not be held prior to it having a reasonable opportunity to review the seized electronic material. However, it was only upon the belated receipt of the non-privileged electronic material from the Registry that the Prosecution was in a position to make a concrete assessment of its ability to review it in time for confirmation. In the circumstances, the Prosecution submits that there is good cause to shorten the time limit for the Defence response until Friday 27 May, in order to give the Chamber sufficient opportunity to render its decision.

V. Conclusion

59. The Prosecution accordingly requests an order to establish a new date for the confirmation of charges hearing permitting the Prosecution sufficient time to review the remaining electronic material; to present the Document Containing the Charges and to comply with the disclosure necessary for the Confirmation Hearing.



Luis Moreno-Ocampo
Prosecutor

Dated this 25th day of May 2011
At The Hague, The Netherlands