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PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Cuno Tarfusser
Judge Sylvia Steiner

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
THE PROSECUTOR
*v. CALLIXTE MBARUSHIMANA***

Public Document

Defence response to Prosecution filing: ICC-01/04-01/10-189

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

Mr. Nicholas Kaufman
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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
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REGISTRY

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Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
 Section**

Other

Introduction

1. The Defence for Mr. Callixte Mbarushimana hereby submits its response to the *Prosecution's request in terms of Rule 121(7) for the postponement of the confirmation hearing to preserve the fairness of the proceedings* ("the Prosecution request").¹
2. The Defence fails to appreciate what can possibly be "fair" in condoning the Prosecution's unwillingness to meet Court set deadlines and its thinly disguised ploy to seek more time to continue its investigations in an attempt to upgrade its evidence to meet the standard set out in Article 61(7) of the Rome Statute.
3. Mr. Mbarushimana was arrested on 11 October 2010 and has remained in detention ever since. Any setback in conducting a confirmation hearing after a delay which the Pre-Trial Chamber deemed "adequate" for both parties to prepare and to which the Prosecution assented will seriously prejudice Mr. Mbarushimana and should be firmly rejected.
4. Furthermore, at the initial appearance² held on 28 January 2011, the Prosecution knew that the electronic materials it now covets had been seized but did not condition the holding of a confirmation hearing on a successful analysis of their contents.
5. In the circumstances, any postponement of a confirmation hearing occasioned by the Prosecution's lack of preparation or unwillingness to present its case at the present stage, should be deemed "inexcusable delay" for the purposes of Article 60(3) of the Rome Statute.

¹ ICC-01/04-01/10-189.

² A hearing specifically convened, *inter alia*, for the purpose of fixing the date of a confirmation hearing.

Discrete Analysis of the Prosecution Submissions

6. **Paragraph 42:** The concept of "fairness" as defined in the Prosecution request is not grounded in any legislative provision nor is it supported by judicial precedent. By contrast, Article 67(1)(c) of the Rome Statute specifically guarantees Mr. Mbarushimana's right "to be tried without undue delay". The Rome Statute provides no right to the Prosecution to postpone a confirmation hearing because it is not satisfied with the evidence that it has in its possession.

7. **Paragraph 43:** There is no such rule stipulating that complete Prosecution access to all available evidence is a *sine qua non* for the conduct of a "fair" confirmation hearing. Furthermore, the only items to which the Prosecution was entitled (and were formerly in the exclusive possession of the Defence) were those electronic items seized from Mr. Mbarushimana's house and which positively responded to privilege related "keyword hits". Apart from a short delay without its control, occasioned by the lack of suitable hardware and software, the Defence completed its "de-nesting" and FTK analysis of these items within the Pre-Trial Chamber's deadlines. By way of clarification, the Defence completed its first analysis of keyword derived materials in two and a half weeks (18 April – 6 May)³ and its second analysis within four days (13 May – 17 May). On 25 May 2011, all of the seized materials, except for those deemed potentially privileged, were communicated to the Prosecution.⁴ There is absolutely no reason, therefore, why the Prosecution should not now accomplish the same analysis, overcoming the same problems associated with the FTK software,⁵ within the same timeframe and still be left with two and a half weeks or so to spare before the confirmation hearing. There is no merit whatsoever in the Prosecution claim that the Defence has been dilatory in its

³ ICC-01/04-01/10-137.

⁴ ICC-01/04-01/10-185.

⁵ The Defence notes that Prosecution has not balked from supplying the Defence with a substantial disclosure package which could not be uploaded into Ringtail and could only be accessed with the FTK software.

dealings with the seized materials or has gained an unfair advantage over the Prosecution having had "access to the electronic evidence for over a month".⁶

8. If the Prosecution's calculations are taken at face value – it will only succeed in analyzing the first of the accessible hard drives within one week. Applying the same logic to the remaining 30 hard drives would mean that the Prosecution – according to its very own arithmetic – would only be ready for the confirmation hearing in another seven months at least without taking into account the time needed to process the 10 corrupted hard drives. This is totally unacceptable.

9. **Paragraph 44:** The Prosecution's complaint as to delayed access to material relates only to the electronic evidence. The Prosecution has conveniently neglected, however, to mention the numerous bags bursting with thousands of documents seized by the French gendarmerie from Mr. Mbarushimana's residence. These items have been at the Prosecution's disposal for several months and have served it as a "useful" source of incriminating information. For example, the Prosecution secured Mr. Mbarushimana's detention at first instance by virtue of its eagle-eyed production of a notebook unearthed from the morass of papers. The Prosecution also neglects the prior access it had to French interceptions.

10. **Paragraph 45:** The Prosecution complains of lack of access to various items which have similarly been denied the Defence. These very same items could equally contain exonerating evidence yet the Defence does not seek a postponement of the confirmation hearing on the grounds of fairness. As for the forensic tests required with respect to the mobile telephones, the Prosecution displays its ignorance of what is required for meaningful exploitation of the discovery of DNA or fingerprints. With respect to DNA, the Prosecution would need to take an agreed sample from Mr. Mbarushimana and, thereafter, compare its identified sample with an agreed genetic pool broadly reflecting Mr. Mbarushimana's genetic profile. As for fingerprints, once

⁶ ICC-01/04-01/10-189 at paragraph 46.

again, Mr. Mbarushimana would be required to provide a sample. The Prosecution assumes, without foundation, that the Defence would agree to such procedures without arguing that they would entail self-incrimination. In a nutshell, the forensic tests would never have been completed before a confirmation hearing.

11. **Paragraph 46:** It ill befits the Prosecution to talk about the Defence being afforded unfair advantages in the run up to the confirmation hearing. As mentioned in paragraph 7 above, even if it will not be able to include the non-privileged seized materials in its document containing the charges and list of evidence, the Prosecution will still have plenty of time to examine the contents thereof in order to prevent surprise should the Defence chose to produce such items. Furthermore, the Prosecution has had the best part of two years to collate evidence against Mr. Mbarushimana. In any event, the Pre-Trial Chamber has provided an adequate safeguard against “surprises” by ordering the Defence to disclose a list of all evidence on which it intends to rely at the confirmation hearing by 16 June 2011.⁷

12. **Paragraph 47:** The Prosecution, apparently, misunderstands its appointed role in the conduct of confirmation proceedings - especially as regards the burden of proof. The Prosecution needs to be concerned that it has the necessary evidence to satisfy the Pre-Trial Chamber of the existence of substantial grounds to believe that Mr. Mbarushimana committed the crimes with which he is charged. The fact that the Prosecution is more occupied by the potential for Defence chicanery to undermine its case suggests that it is not completely focused on the task with which it is assigned and, perhaps, doubts the strength of its own evidence.

13. **Paragraph 48:** The Prosecution is sadly mistaken as to the purpose of a confirmation hearing. It is the trial which is possessed of “truth-seeking purpose”. The rationale for a confirmation hearing is to assess whether the Prosecution should be permitted to bring its case to trial on the basis of the evidence which it has, to date,

⁷ ICC-01/04-01/10-87.

disclosed to the Defence and not on the basis of voluminous and inaccessible evidence which it asked its French agents to greedily seize.

14. **Paragraph 49:** The schedule set by the Pre-Trial Chamber for a response to the Defence request for a permanent stay of proceedings⁸ indicates that it will deliver its decision before the confirmation hearing. The Prosecution's kind offer to afford the Pre-Trial Chamber leisurely deliberation of the said submission would thus appear to be superfluous. Furthermore, since the Prosecution claims that the said Defence application is "meritless and should be dismissed swiftly",⁹ there is even less reason for it to believe that the Pre-Trial Chamber would require substantial time to render its decision.

15. **Paragraph 50:** The Defence strongly objects to the Prosecution attempt to cite Defence conduct as the cause of delay in what it (the Prosecution) perceives to be the non- expeditious handling of materials seized from Mr. Mbarushimana's house. Such a tactic is calculated, purely and simply, to avoid a finding that the Prosecution has engendered "inexcusable delay" under Article 60(3) of the Rome Statute.

16. **Paragraph 51:** The Prosecution's assertion that a legitimate Defence submission "presumptively confirms that the evidence is likely to be relevant to the case against him" is both speculative and offensive. Put otherwise, the Prosecution is insinuating that the Defence is attempting to hide material under a cloak of privilege. It is therefore fortunate that the Pre-Trial Chamber is well positioned to assess the candour of the Defence's assertion of privilege – something which it is not so easily able to do with respect to the Prosecution's classification of material falling under Article 67(2) of the Rome Statute.

⁸ ICC-01/04-01/10-177.

⁹ Prosecution Request at paragraph 6.

17. **Paragraph 52:** The Defence has continually stressed the indiscriminate way in which the search and seizure at Mr. Mbarushimana's house was conducted.¹⁰ Right back in October 2010, when Mr. Mbarushimana was arrested, Counsel wrote to the OTP as follows:

"...Mr. Mbarushimana asserts that many documents were seized from his place of residence which are absolutely essential for the conduct of the interim release proceedings in Paris. Such documents could include, but are not limited to, anything which testifies to Mr. Mbarushimana's firm roots in the French Republic, family circumstances, refugee status and details concerning his employment.

*As it is not clear to me how many of these documents were seized by the OTP and how many by the French authorities (one or the other), I would kindly ask you as a matter of extreme urgency to supply Me. Gouget (copying me) with a detailed inventory of all documentary items seized from my client's house."*¹¹

18. In its reply to French Counsel for Mr. Mbarushimana – Me. Christophe Gouget, the Prosecution was not ashamed to admit that one of its own investigators - despite being present at the said search - did no more than look on from the side:

*Regarding the trailing email from Mr. Nick Kaufman, the Office of the Prosecutor wishes to clarify that the searches were conducted by the French Gendarmerie following a decision of a French Judge, pursuant to a Request from the ICC. An officer of the OTP was present only as an observer. He did not take possession of any seized items; all of the seized material and any inventory thereof are in the possession of the French authorities.*¹²

19. **Paragraph 53:** It is ludicrous to believe that the Prosecution expected to be put on notice of a Defence objection to it reviewing materials passed between an attorney and his client. Client-Attorney privilege is one of the most basic concepts of evidence and ethics known to professional advocates.

¹⁰ ICC-01/04-01/10-58 at paragraph 7.

¹¹ Email from Counsel to Senior Trial Lawyer dated 18.10.10.

¹² Email from Senior Trial Lawyer to Counsel dated 20.10.10.

20. **Paragraph 54:** Neither privilege under Article 73(2) of the Rome Statute remains a relevant issue nor the broad keywords required to identify communications falling within its purview. The Prosecution request was filed before the OTP had taken stock of the Defence waiver of privilege¹³ attaching to the only relationship identified as meeting the criteria of Article 73(2).

21. **Paragraph 55:** While familiar with the general type of information contained on the seized hard drives, Mr. Mbarushimana could not possibly have been expected to remember the contents of each and every file and document – especially if, as the Prosecution claims, “the volume of electronic data received for review to date exceeds 1 Terabyte”.¹⁴

22. **Paragraph 56:** The Prosecution requests the postponement of all relevant deadlines without giving any estimate as to the length of time it will require to ready itself for confirmation. This is inappropriate.

23. **Paragraph 57:** The contents of this paragraph point to a serious misunderstanding of the role of the Prosecution. Apparently, it is believed that witness statements need only be disclosed if they support the Prosecution case. If that which was formerly deemed incriminating becomes less incriminating after a review of the seized material, it would, in all likelihood, materially benefit the preparation of the Defence case. In these circumstances, the Prosecution should not be withdrawing such witness statements but disclosing them, at the first available opportunity, pursuant to Rule 77 of the Rules of Evidence.

¹³ ICC-01/04-01/10-183-Conf.

¹⁴ Prosecution Request at paragraph 1.

Relief Sought

24. The learned Pre-Trial Chamber is requested to reject the Prosecution application for a postponement of the confirmation hearing and for an extension of all pending deadlines.

25. Failing the aforementioned, the Pre-Trial Chamber is requested only to accede to the Prosecution request for a postponement of the confirmation hearing by finding that it has engendered "inexcusable delay" for the purpose of Article 60(3) of the Rome Statute.

A handwritten signature in black ink that reads "Nicholas Kaufman". The signature is written in a cursive, slightly slanted style. Below the signature is a solid horizontal line.

Nicholas Kaufman
Counsel for Callixte Mbarushimana

Jerusalem, Israel

Monday, May 30, 2011