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

Date: **29/06/2011**

PRE-TRIAL CHAMBER I

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

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-01/04-01/10-251

Source: Defence for Mr. Callixte Mbarushimana

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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 Ms. Fatou Bensouda, Deputy Prosecutor
 Mr. Anton Steynberg, Senior Trial Lawyer

Counsel for the Defence

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
 (Participation/Reparation)**

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 Victims**

**The Office of Public Counsel for the
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Victims and Witnesses Unit

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**Victims Participation and Reparations
 Section Other**

The Defence for Mr. Callixte Mbarushimana hereby submits its response to the *Prosecution's request for review of intercepted internet data*"¹ ("the Request").

1. The Prosecution correctly states that the Defence has been unable to access the hard drive ("the Hard Drive") received from the French authorities which allegedly contains internet data ("the Internet Data"). FTK software does not enable the Defence to access the said information in a manageable format.

2. The Defence particularly notes that the Prosecution received the Hard Drive on 21 January 2011 and, some considerable time thereafter, on 14 April 2011, requested to amend the eCourt Protocol seeking the ability to import electronic materials in their original format as opposed to *TIFF format.² At this juncture, the Prosecution did not disclose the nature of the problems it had encountered accessing the Internet Data. Accordingly, on 21 April 2011, ignorant of the impending prejudice to the Defence, the Pre-Trial Chamber amended the eCourt protocol deeming that Defence's views on the matter were "not necessary".³ The first time the Defence became aware of these problems was when it was received the Hard Drive on 2 May 2011 and was unable to upload its contents into Ringtail. The Defence subsequently petitioned the Prosecution for assistance and was told that the eCourt protocol only required the Internet Data to be disclosed in its original format.

3. It is thus submitted that the Prosecution concealed the nature of the problems it was encountering for more than three months and, thereafter, craftily succeeded in

¹ ICC-01/04-01/10-251.

² ICC-01/04-01/10-100.

³ ICC-01/04-01/10-124 at page 6.

securing an amendment to the eCourt protocol so that the Defence would be saddled with the burden of decrypting the untold amounts of Internet Data the French authorities had indiscriminately acquired.

4. Herein undersigned Counsel was not made privy to the Prosecution's consultations with CSS in an attempt to find "an efficient and cost effective solution"⁴ to the difficulties faced with respect to the Internet data and is not aware of the identity of the service provider identified by the Prosecution as being able to convert the Internet Data into a more readily accessible format. In this respect, the Defence finds it hard to neglect the Prosecution's very own concern; that the conversion of data from one format to another may entail the loss of content.⁵ The solution currently hinted at by the Prosecution does not address such a concern nor does the identity of the service provider appear to be proffered to the Pre-Trial Chamber for its approval.

5. The Defence is particularly concerned that, at this late stage - a month and a half before the confirmation hearing, the Prosecution is proposing to embark on an extraction process which will require the passage of three weeks⁶ before the Defence and the Chamber can even embark on the further time-consuming task of isolating and reviewing potentially privileged information.

6. To summarise, the Defence views the Request as nothing more or less than subtle means for contriving a pretext for an additional request to postpone the confirmation hearing.

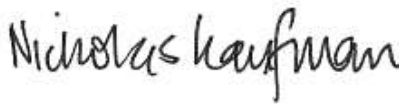
⁴ Request at paragraph 4.

⁵ ICC-01/04-01/10-100 at paragraph 14.

⁶ Request at paragraph 6.

7. The Defence furthermore objects to the Prosecution's proposal that its own "Knowledge Based Unit" perform the search for potentially privileged material. Additionally, and in light of the Prosecution's tardy notification of the problem, the Defence – with its limited manpower – strenuously objects to any requirement that it be obliged to perform further time-consuming reviews of materials for privileged information, within shortened time-limits, just so that the Prosecution may be in a position to use the same materials at the confirmation hearing.

8. In light of all the aforementioned, the Request should be denied and the Prosecution should not be entitled to rely on any of the Internet Data for the purpose of the confirmation hearing.



Nicholas Kaufman
Counsel for Callixte Mbarushimana

Dated Wednesday, June 29, 2011

Jerusalem, Israel