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

Date: **16/07/2011**

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
URGENT**

**Defence request for a status conference
to determine the admissibility of two categories of evidence on which the
Prosecution intends to rely at the confirmation hearing**

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 requests that a short status conference be held to entertain a legal challenge to the admissibility of two categories of evidence on which the Prosecution proposes to rely at the confirmation hearing.

2. Article 61(6)(b) of the Rome Statute permits a suspect to challenge the evidence presented by the Prosecutor at the confirmation hearing itself. Indeed, the Prosecution itself has previously acknowledged that submissions concerning the admissibility of evidence – in particular intercepted communications – may be raised at the confirmation hearing:

“The legality of such intercepts and the admissibility of any evidence derived there from is a matter to be decided upon by at the trial (or potentially at the confirmation hearing) after a full examination of the relevant circumstances.”¹

3. Rule 64(1) of the Rules of Procedure and Evidence, more particularly, states that an issue relating to the relevance or admissibility of evidence “must be raised at the time when the evidence is submitted to a Chamber”. The Appeals Chamber has recently added that Rule 64(1) ensures that the parties have the chance to raise objections to the evidence before it is admitted into evidence. The Trial Chamber has to give effect to this right and, therefore, cannot admit items into evidence without first giving the parties an opportunity to raise issues”.²

4. Rule 64(1), more generally, is clear in that a challenge to the admissibility of evidence is to be made orally unless the Chamber orders otherwise.

5. On 15 July 2011, the Prosecution submitted to the Pre-Trial Chamber the list of evidence on which it will rely at the confirmation hearing (“the List of Evidence”).

¹ ICC-01/04-01/10-31.

² ICC-01/05-01/08-1386 at paragraph 48.

6. In keeping, therefore, with the aforementioned statutory provisions, the Defence formally challenges the admissibility of the following two categories of information contained in the List of Evidence:

- (a) All materials seized from Mr. Mbarushimana's house at the time of his arrest whether documentary or electronic - including the contents of computer hard drives and other items of electronic media, and;
- (b) All contents and records of communications intercepted by the French and German authorities.

7. The Defence asserts that the Prosecution has failed to prove the legality of the search, seizure and extraction of the materials identified in paragraph 6 hereinabove. More particularly, it is alleged that the Prosecution has failed to show that the aforementioned materials were obtained in a manner which is consistent with internationally recognised human rights. Given that the prejudicial effect of allowing the Prosecution to rely on such materials at the confirmation hearing would outweigh their probative value, the Defence submits that they should be removed from the Prosecution's List of Evidence.

8. The Defence further recalls that the learned Single Judge – HHJ Sanji Mmasenono Monageng invited the parties to exercise their right to request a status conference “as and when the need arises pursuant to Rule 121(2)(b) of the Rules of Procedure”.³ Apart from a hearing on a potential “unique investigative opportunity”, the Pre-Trial Chamber has not since held a status conference.

9. Given the short time remaining before the confirmation hearing, obliging the provision of written submissions and responses – which is not the statutorily preferred way of raising such evidentiary challenges - would severely prejudice the Defence. Counsel, unlike the Prosecution, is presently required, with the assistant of

³ ICC-01/04-01/10-T-2-ENG at line 14.

one legal assistant,⁴ to analyze and digest the huge amount of evidence on which the Prosecution intends to rely at the confirmation hearing in less than 30 days. Furthermore, postponing legal arguments on the admissibility of evidence to the confirmation hearing itself would hamper the smooth conduct of proceedings with Counsel interjecting every time that the Prosecution were to refer to an offending item.

9. The Defence respectfully requests, therefore, that a short status conference be convened sufficiently in advance of the confirmation hearing in order to afford the parties an opportunity to assimilate changes to the evidential matrix should either of the legal challenges be allowed.



Nicholas Kaufman

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Saturday, July 16, 2011

⁴ Despite petitioning the Director of Counsel Support Services a month ago (on 15 June 2011) and sending three subsequent reminders, no response has been received to Counsel's request to recruit additional manpower in advance of the confirmation hearing. This is a sad indictment of the supposed "equality of arms" afforded legally aided individuals at the International Criminal Court.