



Original: **English**

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

Date: **20/07/2011**

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

Defence request to postpone implementation of decision: ICC-01/04-01/10-291

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. On 19 July 2011, HHJ Sanji Mmasenono Monageng ordered the Defence to review the contents of faulty and encrypted drives seized from Mr. Mbarushimana's residence in Paris and to report on the existence of potentially privileged material by 25 July 2011.

2. In the short time available to it, the Defence is, with regret and with the utmost respect, not able to comply with this order.

3. The Defence is presently fully and totally occupied with preparing its list of evidence and submissions for the confirmation hearing fixed for 17 August 2011.

4. The Defence notes that information found on the faulty and encrypted drives may not presently be used at the confirmation hearing since the deadline for the communication of the Prosecution's list of evidence – 15 July 2011, has already passed.

5. Requiring the Defence to review the aforementioned drives - two of which contain approximately 60 gigabytes of information - will prejudice the Defence's right to prepare adequately for the confirmation hearing and to offer Mr. Mbarushimana the best representation possible in the circumstances.¹

6. On 15 June 2011, the Defence requested that Counsel Support Services supply it with extra manpower yet this request remains unanswered to this day.

7. The Defence recalls a similar Prosecution request for the review of intercepted internet data for potentially privileged material which HHJ Cuno Tarfusser rejected in the following manner:

"CONSIDERING the proximity of the commencement of the hearing on the confirmation of charges;

CONSIDERING that, according to the information submitted by the Prosecutor, the Hard Drive will not be available in an accessible and

¹ Article 67(1)(b) of the Rome Statute.

searchable format before the deadline for the submission of the document containing the charges and the list of evidence on which the Prosecutor intends to rely for the purposes of the confirmation hearing ("List of Evidence");

CONSIDERING, *therefore, that the Prosecution will not be able to include the information contained in the Hard Drive in its List of Evidence or to rely on it at the confirmation hearing;*

CONSIDERING *that a review of the Hard Drive for potentially privileged material is thus unnecessary at this stage;*

CONSIDERING *the right of the suspect, under article 67(l)(b) to have adequate time for the preparation of his defence;*

CONSIDERING *that requiring the Defence, in compliance with the procedure adopted with respect to other potentially privileged communications in this case, to engage in a review of the Hard Drive for potentially privileged material after the disclosure of the Prosecution's List of Evidence would serve only to divert the Defence from its preparation for the hearing on the confirmation of charges;"²*

8. The Defence, is of course, mindful of its obligations fully to respect decisions of this learned Chamber .

9. Nevertheless, in light of all the aforementioned, the Defence respectfully requests that the Pre-Trial Chamber order that the information contained on the faulty and encrypted drives be quarantined until all proceedings related to the hearing on the confirmation of charges are concluded, at which point a review of the potentially privileged materials contained therein, if any, can be carried out if necessary.



Nicholas Kaufman

Counsel for Callixte Mbarushimana

Jerusalem, Israel

Wednesday, July 20, 2011

² ICC-01/04-01/10-274.