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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
with Annex A**

CORRIGENDUM

**Defence request for a ruling on the admissibility of two categories of
evidence**

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

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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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States' Representatives

Amicus Curiae

REGISTRY

Registrar

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Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
 Section Other**

Introduction

1. On 19 July 2011, the Defence requested that the Pre-Trial Chamber convene a status conference to determine the admissibility of two categories of evidence on which the Prosecution intends to rely at the confirmation hearing:

- (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.¹

2. On 27 July 2011, the Pre-Trial Chamber declined to convene a status conference and ordered the Defence to submit its request to suppress the aforementioned evidence in writing.²

Submission

a) Items seized from Mr. Mbarushimana's house

3. As of the date of this filing, the Defence has not seen any judicial order or warrant authorising the search which was executed at Mr. Mbarushimana's house ("the Search"). In the absence of such warrant, the Defence is not able to ascertain which authority was legally entitled to conduct the Search. Nor is the Defence able to ascertain where, when, for what items³ and for what purpose the authority entitled to execute the warrant could conduct the Search. The Defence suggests that it would be wholly contrary to justice to presume that a search is legal in the absence of an appropriate warrant. Quite the opposite is true. The European Court of Human Rights has held⁴ that interference by way of search and seizure will constitute a breach of the right to privacy unless it can be shown that it was both "necessary in a democratic society" and done "in

¹ ICC-01/04-01/10-289.

² ICC-01/04-01/10-318.

³ The Defence reiterates that the Search was performed in a totally indiscriminate manner with almost every

⁴ *Stephanov v. Switzerland*, Application no. 65755/01, Judgment 22 May 2008

accordance with the law” for a legitimate purpose. This would suggest that unless proved legal – a search is, in fact, to be presumed illegal. The OTP is not, therefore, entitled to presume the legality of the Search but must prove that it was conducted within the exact parameters stipulated by the appropriate judicial authority – in this case the relevant French *juge d’instruction*. For the aforementioned reasons, the Prosecution can neither rely on a *procès-verbal* from the executing officer as evidence of the legality of the search.

4. The Defence deems it appropriate to recall the provisions of Article 69(7) of the Rome Statute which provides that evidence obtained by means of a violation of the Rome Statute or internationally recognized human rights shall not be admissible if: (a) the violation casts substantial doubt on the reliability of the evidence; or (b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

5. In the *Lubanga* case,⁵ Trial Chamber I considered the admissibility of evidence obtained from an illegal search and seizure within the framework of Article 69(7). In the presence of an OTP investigator, the DRC authorities had searched the residence of a member of Thomas Lubanga's political party, when the former was absent. The Trial Chamber confirmed that this search breached the party member's right to privacy and was, furthermore, disproportionate in the circumstances. Notwithstanding, Trial Chamber I found that Article 69(7)(b) was not triggered because a) the violation in question was not particularly grave, b) the impact of the violation on the integrity of the proceedings was lessened because the rights violated were those of a witness and not of the accused and c) the illegal acts were committed by the Congolese authorities over whom the OTP investigator could exercise no influence.

⁵ ICC-01/04-01/06-1981.

6. The Defence submits that the present case is different. Firstly, the inability of the Prosecution to prove the legality of a search and the parameters thereof is far more grievous than performing a search in the absence of a witness. Secondly, the rights affected are those of Mr. Mbarushimana – the suspect himself and not those of a third party. Finally, the OTP investigator while having affirmed by way of affidavit that he acted merely as a curious spectator, provided no reason as to why he did not obtain a copy of the judicial warrant authorising the Search.

7. Once seized by the French gendarmerie, all items were placed in evidence bags - the seals on which were subsequently broken by members of the ICC Registry in the absence of a Defence representative and pursuant to a protocol which, it is submitted, was not subject to judicial approval by way of a decision which could be appealed.

8. The Defence submits that international criminal precedent disapproves of the unauthorised breaking of seals. In the *Nzitorera* case, the International Criminal Tribunal for Rwanda, while accepting that the Prosecution was not a wilful party to the breaking of seals on evidence bags, nevertheless indicated that, "Prosecution evidence under seal should be distinctly marked as such, and that a caution should be added forbidding unauthorised breaking of the seals".⁶

9. In the present case, the Registry's unauthorised breaking of the seals has caused prejudice to Mr. Mbarushimana to the extent that it is now impossible to ascertain whether all of the materials seized during the Search were eventually processed and entered into Ringtail. As submitted in previous filings, the Search was carried out in an indiscriminate fashion. Certain items were seized and sealed in evidence bags with a detailed inventory attached thereto. Other

⁶ ICTR-98-44-T 'Decision on Defence Third Motion for Return of Property and Sanctions for Violation of Court Order', 13 October 2003

items, such as the reams of paper documents were sealed in evidence bags without the preparation of a detailed inventory and without counting the numbers of pages. In the latter instance, prejudice has been caused to Mr. Mbarushimana who now has no idea as to whether pages containing exonerating information went missing.

10. The Defence, further, recalls that a number of hard drives seized from Mr. Mbarushimana's residence were declared to be faulty after being handled by the French *gendarmerie* and by the ICC Registry. At a later stage, some of these items were rendered only partly accessible after the Registry proposed and commissioned the services of a private contractor – Carratu Ltd. Another item – a corrupted disc in the possession of the Prosecution - was the subject of a status conference where the OTP proposed forensic analysis in the context of a unique investigative opportunity. In any event, the Defence cannot know, with any degree of certainty, whether some of the aforementioned hard drives were faulty prior to the Search or whether they were, in fact, corrupted whilst being handled by the French *gendarmerie* or any of the organs of the ICC. Indeed, it was specifically to avoid such uncertainty and prejudice that the Defence insisted that one of its representatives be present at the time that the seals were broken and the hard drives forensically examined. This Defence request remained unanswered.

b) Communications intercepted by the French and German authorities

11. The Defence's perusal of the evidence disclosed in Ringtail reveals that while there exists documentation concerning the execution of various interceptions by members of the French *gendarmerie*, the underlying judicial authorisations or warrants (of which there are several) are lacking. By piecing together the various items of evidence, nevertheless, the Defence has been able to establish that **a number of** warrants were issued for various investigative

steps against Mr. Mbarushimana by three different *juges d'instruction*.⁷ Nowhere has the Prosecution supplied a comprehensive list of warrants and for what particular purpose they were issued – whether for the search of premises or for the interception of communications. The Defence has, furthermore, noted that judicial orders were apparently given for the interception of more than one telephone line and e-mail account attributable to Mr. Mbarushimana. The onus is, therefore, on the Prosecution to show that any intercept on which it proposes to rely as incriminating evidence has an accompanying judicial warrant authorising the interception of that particular channel of communication. Failure to do so should render the communication concerned inadmissible.

13. The Defence reminds the learned Pre-Trial Chamber of its submission at the status conference held on 14 February 2011:

"But when Mr Steynberg was talking about the inability to disclose what he doesn't actually have in his possession, then I would also ask the Prosecution to be minded in its response to the Chamber to state whether or not it does, in fact, possess a copy of the judicial authorisation for those intercepts; because just as I'm an experienced Prosecutor in the past, so is Mr Steynberg is an experienced Prosecutor, and he knows full-well that the legal authorisation of intercepts is a basic requirement for their admissibility in a court of law. I have not seen such a judicial authorisation to date, and I would like the Prosecution to state to this Court whether or not such authorisation exists or whether or not it intends to submit such authorisation under a cloak of privilege."

14. Subsequent to that status conference, the Prosecution provided the following clarification:

⁷ Annex A.

“The interceptions were done by German authorities pursuant to national procedures. The Prosecution did not make a request under the rules of the International Criminal Court.

*The Prosecution does not have copies of any legal filings/documentation of the competent authorities of Germany attesting to the proper request and authorisation of interceptions”.*⁸

15. The Defence notes that the German intercepts were performed on communication devices allegedly belonging to Igance Murwanashyaka. In so far, however, as the evidence arising out of these intercepts can be deemed incriminating, if at all, it can only incriminate the person who was the judicially approved subject of the intercept. In any event, the Prosecution has not provided German telecom data to prove that Mr. Murwanashyaka was the subscriber to the intercepted telephone line. Nor has the Prosecution produced, as it admits, a valid German warrant authorising the interception of Mr. Murwanashyaka’s communications. Accordingly, even if the Prosecution should later produce such a warrant, it would not render legitimate the use of such intercepted communications in which Mr. Mbarushimana was an alleged interlocutor as evidence to incriminate Mr. Mbarushimana – unless Mr. Mbarushimana himself was the subject of the German judicial warrant.⁹ The Prosecution, it is to be assumed, will agree that Mr. Mbarushimana was not the subject of such a judicial warrant because, as it has argued elsewhere, there was no substantive active investigation conducted against Mr. Mbarushimana on German soil.

16. Sixteen compact discs containing the sum total of the German intercepted communications were, in due course, forwarded to the OTP. Having secured an amendment of the E-Court protocol to permit disclosure in

⁸ ICC-01/04-01/10-62-Conf-AnxB

⁹ At the time of arrest the BKA had identified only one such communication.

original format, the OTP subsequently transferred these compact discs to the Defence. Although accessible, the metadata and the searching tools on these discs are in German which is not a working language of the Court.

17. The Prosecution is not able to prove the means by which these German interceptions were performed nor by whom and how exactly they were performed. Despite the Defence request, the names of the BKA agents and details concerning their working practices have not been supplied.¹⁰ Moreover, German national security considerations (as envisaged under Article 72 of the Rome Statute) have not been invoked in order to justify the OTP's refusal, to date, to communicate the requested information. The Defence has thus been prejudiced by not being able to investigate these matters. In the circumstances, there can be no guarantee that the hundreds of audio-files and transcripts communicated to the Defence accurately reflect the intercepted communications in their entirety.

18. In addition, the Defence strenuously objects to the use of the metadata accompanying each and every German interception as the means for identifying the interlocutors participating in an intercepted communication. By way of example, the Defence points to one intercepted telephone conversation - DRC-OTP-2021-0262 - concerning which the burden is on the Prosecution to show that Mr. Mbarushimana was a participating interlocutor. The BKA metadata provide one telephone number for each of the participants in the conversation. One of the telephone numbers is a French telephone line which the BKA author of the metadata attributes to Mr. Mbarushimana. The transcripts¹¹ of the communication itself, however, identify the interlocutors as Ignace Murwanashyaka and an "unidentified individual". The means whereby the BKA concluded that Murwanashyaka's interlocutor was speaking from a

¹⁰ ICC-01/04-01/10-62-Conf-AnxB.

¹¹ DRC-OTP-2024-2684 and DRC-OTP-2024-2675.

French telephone number¹² have not been explained. Furthermore, the means whereby the German authorities concluded that such telephone line was attributed to Mr. Mbarushimana has not been proved nor has the fact that Mr. Mbarushimana was the sole person to use the same telephone line. Proof of such attribution is, moreover, possible and evidenced by a *procès-verbal* executed by the French authorities in respect of another telephone line allegedly used by Mr. Mbarushimana.¹³ Indeed, given the latter consideration, nothing short of expert voice identification would satisfy the necessary *indicia* of reliability required to convince a reasonable court of law that the probative value of such evidence would outweigh its potentially prejudicial effect.

19. With respect to the interception of French communications, the Prosecution has indicated that it will only rely on one such communication – DRC-OTP-2026-4764. According to the Prosecution list of evidence,¹⁴ this communication is only produced to support the allegation that the FDLR was an organisation possessed of a “criminal” purpose. The main date, however, for the recording of this intercept is registered as 18 July 2010 and it is thus irrelevant in so far as it falls way without the time period relevant to the charges levelled against Mr. Mbarushimana. The accompanying metadata, furthermore, fail to give sufficient details to identify the judicial authorisation or execution report associated with the telephone line allegedly used during this communication.

20. Finally, the Defence notes that a hard drive was communicated by the French authorities allegedly containing Mr. Mbarushimana's internet flow data. This hard drive is totally inaccessible and a solution to this problem has not yet been provided by the Registry. Although the hard drive has been quarantined

¹² +33950372416.

¹³ DRC-OTP-2004-0235 where the telephone line +33660603628 was identified as belonging to Mr. Mbarushimana by virtue of an enquiry made with the hosting company “EDF” while the judicial warrant authorising the extraction the particulars of Mr. Mbraushimana’s telephone line from “EDF” has not been provided.

¹⁴ ICC-01/04-01/10-311-AnxC.

pursuant to a decision of the Single Judge,¹⁵ the ensuing prejudice caused by the Defence's inability to access a source of exonerating information is obvious.

21. Before concluding, the Defence fully anticipates that the Prosecution will attempt to introduce the missing warrants soon after the filing of this request. The only question is whether this Pre-Trial Chamber should allow it to do so after the deadline for the submission of the Prosecution list of evidence. Rule 121(5) of the Rules of Procedure and Evidence permits the Prosecutor to present "new" evidence no later than 15 days before the confirmation hearing. "New" evidence, however, is not "forgotten" evidence which the Defence has been demanding that the Prosecution produce ever since Mr. Mbarushimana was surrendered to the Court. "New" evidence ought only reasonably to include evidence which was generated by the Prosecutor, in the course of his ongoing investigation after the submission of his list of evidence pursuant to Rule 121(3). To find otherwise would render the deadline requirement of Rule 121(3) superfluous. Even if it disagrees with the Defence's interpretation of Rule 121(5), the Chamber still has the discretion not to permit the introduction of the warrants at this late stage – a discretion which should be exercised in the Defence's favour given that the Prosecution has been put on notice ever since Mr. Mbarushimana's surrender to the Court of the need to provide the warrants.

Relief Sought

22. Article 69(4) of the Rome Statute permits the Pre-Trial Chamber to reject evidence either on the grounds of relevance or admissibility. The Defence's objection to the seized materials and the intercepted communication is founded on the premise that their admission would create a prejudice to Mr. Mbarushimana and to the reputation of the Court far outweighing their

¹⁵ ICC-01/04-01/10-274.

probative effect. The Defence's arguments are not, at this stage, to be seen as a challenge to the weight which is to be afforded to these items of evidence.

23. The Defence fully appreciates that the learned Pre-Trial Chamber has been faced with novel challenges in light of the massive amount of intercepted communications and materials seized from Mr. Mbarushimana's house. The Pre-Trial Chamber is, nevertheless, respectfully requested to ensure that the acquisition of such materials is clearly shown to have been done according to law. This is only truly possible with the provision of judicial orders authorising the search of premises, the interception of communications and the breaking of seals. Failing to demand that the Prosecution (and in the case of the breaking of the seals – the Registry) produce such judicial authorisations will encourage a lack of rigour in the way evidence is seized and presented in future ICC cases.

24. In light of all the aforementioned, the Pre-Trial Chamber is respectfully requested to refuse to admit as evidence all materials seized from Mr. Mbarushimana's house and all communications intercepted by the French and German authorities.

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

The Hague, the Netherlands

Wednesday, August 10, 2011