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

Date: **07/03/2011**

**PRE-TRIAL CHAMBER I**

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

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

**Public Document  
URGENT**

**Defence Request for Suspensive Effect of Decision ICC-01/04-01/10-67**

**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

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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  
 Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms. Silvana Arbia

**Defence Support Section**

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
 Section**

**Other**

## Introduction

The Defence hereby announces its intent to seek leave to appeal Pre-Trial Chamber I's "*Decision on the Prosecution's request for a review of potentially privileged material*" rendered on 4 March 2011 ("the Impugned Decision").<sup>1</sup> Pending the resolution of interlocutory appellate proceedings or, in the alternative, pending a decision of the Appeals Chamber on the matter, the Defence requests that suspensive effect be granted to the Impugned Decision.

Should this motion be granted, and until a further decision to the contrary, the Defence would request the reinstatement of Her Honour Judge Monageng's "*Decision Temporarily Suspending Dealings with Transcripts and Original Recordings of Intercepted Communications and Material Seized from the House of Mr. Callixte Mbarushimana*" rendered on 25 February 2011 ("the Interim Decision").

## Procedural Background

1. On 14 February 2011, the Office of the Prosecutor filed the "*Prosecution's Request for Review of Potentially Privileged Information*" ("the Prosecution Request").<sup>2</sup>
2. On 18 February 2011, herein undersigned Counsel filed the Defence Response to the Prosecution Request ("the Defence Response").<sup>3</sup>
3. On 25 February 2011 the learned Single Judge issued her "*Decision Temporarily Suspending Dealings with Transcripts and Original Recordings of Intercepted Communications and Materials Seized from the House of Mr. Callixte Mbarushimana*" ("the Interim Decision").<sup>4</sup>

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<sup>1</sup> ICC-01/04-01/10-67.

<sup>2</sup> ICC-01/04-01/10-54.

<sup>3</sup> ICC-01/04-01/10-58.

<sup>4</sup> ICC-01/04-01/10-63.

4. On 1 March 2011, with prior leave of the learned Pre-Trial Chamber, the Prosecution filed a reply to the Defence Reponse.<sup>5</sup>

5. On 4 March 2011, Chamber rendered the Impugned Decision.

#### Submission

6. As one of its grounds of appeal, the Defence will argue that the Pre-Trial Chamber erred when it assigned unidentified individuals in the Registry to the task of examining the seized material for the purpose of identifying privileged information. The Defence will argue that attorney-client privilege is all-encompassing and the role of the Court is not to perform the primary “sifting” exercise or review envisaged in the Impugned Decision but to act as the ultimate arbiter of whether information identified by the Defence as privileged should indeed be deemed subject to such categorization. By way of clarification, the Defence will submit that the methodology proposed by the learned Pre-Trial Chamber in the Impugned Decision fails adequately to safeguard Mr. Mbarushimana’s right not to incriminate himself. If the Defence is successful on appeal and the Appeals Chamber confirms either that it was inappropriate for the Pre-Trial Chamber to have conducted the aforementioned “primary” review or that the decision of the Pre-Trial Chamber fails to afford adequate protection for Mr. Mbarushimana’s right not to incriminate himself,<sup>6</sup> then the immediate implementation of the Pre-Trial Chamber’s decision would

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<sup>5</sup> ICC-01/04-01/10-66.

<sup>6</sup> For example, if, as envisaged by the Impugned Decision, the Prosecutor has been awarded a virtual *carte blanche* to continue unabated its review of the seized material – notwithstanding the fact that this material could include information which is potentially privileged under Rules 73(1) and (2) of the Rules of Procedure and Evidence – then the privilege becomes devoid of any substantive meaning. Even if the Prosecution is obliged to inform the Chamber and the defence if it comes across privileged material, and is thereafter precluded from relying upon this material as evidence, the prosecution will, nonetheless, have viewed the contents of materials potentially in violation of the defendant’s right not to incriminate himself, and can still use the this information it has thereby gained as “spring-board” evidence.

have irreversibly prejudiced the very rights which the appeal sought to protect.<sup>7</sup>

7. As an additional ground of appeal - should leave be granted, the Defence will respectfully allege that the learned Pre-Trial Chamber erred when it held that a computer generated “key-word” search - as opposed to a comprehensive “human” “document-by-document” search – was sufficient for the purpose of identifying potentially privileged information. Many of the items seized from Mr. Mbarushimana’s house were written in his own hand and, potentially, in the hand of the other party to the privileged relationship. Such items are, therefore, not amenable to optical character recognition (OCR) and will not render any results in the context of a computerized “key-word” search. Furthermore, and as indicated in the Defence Response, Mr. Mbarushimana cannot remember several names of people with whom he had engaged in privileged communications.

8. In a further ground of appeal, the Defence will allege that the learned Pre-Trial Chamber erred when it failed to determine the parameters of the religious privilege claimed by Mr. Mbarushimana pursuant to Rule 73(2) of the Rules of Procedure and Evidence. The Prosecution has already indicated that it disputes the definition given to this form of privilege by the Defence and should suspensive effect not be granted, this ground of appeal would also be rendered superfluous.

9. This motion for suspensive effect includes a Defence request that it be excused from submitting the required list of “key-words” by 9 March 2011.

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<sup>7</sup> *c.f.*; Prosecutor v. Thomas Lubanga Dyilo, “Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008, 22 April 2008”, ICC-01/04-01/06-1290, at para 8. In this decision, the ICC Appeals Chamber held that it is appropriate to grant suspensive effect if the “implementation of the Impugned Decision would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant”.

Compliance with this aspect of the Impugned Decision would, once again, frustrate the purpose of a potential appeal since it would reveal to the Prosecution notions, concepts and topics which are, of themselves, subject to privilege.

10. On a more general note, although the Pre-Trial Chamber has held that the Defence can, in theory, review the remaining materials and assert its privilege in respect thereof, the Defence simply does not have the time and resources to conduct such a review with the expedition required. Furthermore, the Pre-Trial Chamber was apparently misled when it ruled that these materials were already in the possession of the Defence. As of the date of the writing of this motion, Defence access has not yet been granted to the materials seized from Mr. Mbarushimana's house. The net result of this situation is that the Defence is now denied its effective right to assert privilege before the Prosecution reviews the material in question. The Prosecution has been granted a significant "head-start" which it may exploit to full advantage with its vastly greater resources.

11. The Defence acknowledges that the power to grant suspensive effect in connection with an interlocutory appeal is vested with the Appeals Chamber. Notwithstanding, the Trial Chambers of the International Criminal Court have, on occasion, granted such temporary suspensive effect as sought in the present motion.<sup>8</sup> Trial Chamber I has, furthermore, in one particular instance, granted

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<sup>8</sup> In the Lubanga case, in its oral decision releasing the defendant, Trial Chamber I stipulated as follows "This order shall not be enforced until the five day time limit for an appeal has expired. If an appeal is filed within the five day time limit against this order granting release, and if a request is made to suspend its effect, the accused shall not leave detention until the Appeals Chamber has resolved whether this order granting release is to be suspended." Transcript of 15 July 2010, ICC-01/04-01/06-T-314.ENG p. 21, line 25 to p. 22, line 5.

Similarly, in the Prosecutor v. Bemba, the Trial Chamber suspended the commencement of the trial, pending the Appeals Chamber's decision on the defence request for suspensive effect in connection with its appeal against the Decision on the Admissibility Challenge under Article 19 of the Rome Statute. In this instance, Trial Chamber III held that "the consequence of the application to the Appeals Chamber for suspensive effect is that the trial, as a matter of principle, should not commence, at least until the application for suspension has been resolved. It would be inappropriate for the Chamber to commence a trial when there is an outstanding issue for determination by the Appeals Chamber as to whether the

suspensive effect to the proceedings pending the Appeals Chamber's determination of the merits of an appeal.<sup>9</sup> Trial Chambers of the International Criminal Court have thus, by their very practice, recognized that they have an independent power and duty to take such measures as are necessary (including a suspension of the proceedings) in order to prevent prejudice to the rights of the Defence pending the resolution of appellate proceedings.

### Relief Sought

12. In light of all the aforementioned, the learned Pre-Trial Chamber is respectfully requested to grant suspensive effect to the Impugned Decision and to order reinstatement of the Interim Decision pending resolution of the interlocutory appeal or, in the alternative, pending a decision of the Appeals Chamber on the matter should leave to appeal be granted in due course.



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Monday, March 07, 2011

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proceedings (seemingly in their entirety) should be suspended, pending the outcome of the substantive appeal. In addition, as set out during a status conference on 8 March 2010, it is in the interests of justice for this challenge to be resolved prior to the commencement of the trial". Order postponing the commencement of the trial ICC-01/05-01/08-811, 7 July 2010, at para 5.

<sup>9</sup> Prosecutor v. Lubanga, Decision adjourning the evidence in the case and consideration of Regulation 55, ICC-01/04-01/06-2143, 2 October 2009. The Chamber emphasized at para 22 that a decision from the Appeals Chamber granting suspensive effect was not a precondition for the Trial Chamber to independently grant suspensive effect: "Given those conclusions, the inevitable result is that further evidence in this case, along with a more detailed consideration of Regulation 55, cannot occur until the Appeals Chamber has resolved this appeal. The disposal of the applications for suspensive effect will not alter the inability of the Chamber to proceed further until the merits of the joint appeals have been decided."