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

Date: **26 April 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

**Prosecution's request for authorisation to conduct destructive analysis of a
corrupted disc**

with Public Annex 1

Source: Office of the Prosecutor

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

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants
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Other

I. Introduction

1. At the Prosecution's request, the French authorities intercepted communications originating from phones attributed to Callixte MBARUSHIMANA ("the Suspect"). They made copies of the intercepted communications and provided them to the Prosecution on audio discs. One of the seven discs was corrupted¹ ("the Disc") and is electronically unreadable in its present state. To the Prosecution's best knowledge, the Suspect did not record his own calls for his own purposes; thus, the interceptions by the French authorities provide the only potentially available recordings of these conversations.

2. The Prosecution seeks the Trial Chamber's I ("Chamber") authorisation, pursuant to Article 56 of the Rome Statute, to conduct destructive analysis of the Disc, for the purpose of attempting to retrieve the data that was not retrieved through non-destructive signature-based extraction.

II. Statement of facts

3. On 21 January 2011, the Prosecution received a package of items from the *Gendarmerie Nationale*. The package contained, *inter alia*, seven discs of audio recordings of intercepted communications attributed to the Suspect and their associated files.

4. On 26 January 2011, the Prosecution registered the seven discs as evidence in its Ringtail database. While uploading the content of the Disc onto its database, it

¹ DRC-OTP-2026-0139.

appeared that the Disc was not readable. The Disc was examined by the Prosecution's Scientific Response Unit, which established that it was corrupted.

5. On 23 February 2011, the French authorities informed the Prosecution that it is not possible to provide further copies of the recorded calls that are presently not retrievable on the Disc, because the original recordings were deleted in accordance with French law.

6. The Prosecution delivered the Disc to the Netherlands Forensic Institute ("NFI") on 15 March 2011, in order to attempt recovery of data.

7. On 21 March 2011, the NFI returned the Disc to the Prosecution. The NFI produced a report ("NFI Report") detailing the data recovery process and results.² It reflects the NFI's conclusion *inter alia* that the corruption of the Disc was not due to its minimal physical damage but to "faults during production". The "cd-recordable" – the Disc – was not finalized, with the file names having been "lost due [to] the absence/corruption of a Table of Contents."³

8. The NFI reported that a signature-based extraction of data was carried out on the Disc and that this extraction produced approximately 86% of the data on the Disc.⁴ The NFI delivered this recovered data to the Prosecution on another disc.⁵

9. The NFI believes that the remaining data is "most likely not recoverable". It nonetheless recommends destructive analysis of the Disc in order to attempt to retrieve the remaining 14% of data.

² Attached as Annex A.

³ Annex A.

⁴ 613875712 bytes of total 707198976.

⁵ DRC-OTP-2029-0050. The contents of this disc will be disclosed to the Defence on 27 April 2011.

III. Submissions

10. In order for the Prosecution to have possession or control of the remaining contents of the Disc, it must attempt to recover them. Only then will it be possible for either the Prosecution or the Defence to know and make use of the contents.

11. The only way to retrieve the content of the remaining 14% of the Disc is by way of destructive analysis. Standard practice for recovery of material from a corrupted disc is to firstly conduct non-destructive analysis, without modification of any data. The NFI did so, yielding the recovery of approximately 86% of the data. There is no way to recover any of the remaining data except through the so-called destructive analysis process.

12. Destructive analysis is a process whereby the source material on the Disc is irreversibly altered in the attempt to retrieve the remaining data. Some or all the material could be destroyed by virtue of the process. On the other hand, there is no other method that can be employed to attempt to retrieve the recordings of the intercepted calls. Destructive analysis is therefore the only available option for actually retrieving any remaining data.

13. Since this process may result in the loss of a portion of the communication intercept evidence pertaining to the Suspect, the Prosecution deems it necessary to obtain the leave of the Chamber before embarking on this process. The Chamber may wish to take measures it considers necessary to ensure the efficiency and integrity of the proceedings and to protect the rights of the Defence, such as those listed in Article 56(2). This could include an invitation to the Defence to have their own expert present at any approved analysis.

IV. Relief sought

14. Pursuant to Article 56, the Prosecution requests the Chamber to authorise the Prosecution to proceed with the destructive analysis of the Disc, in order to attempt the retrieval of the remaining 14% of data it contains.

15. If the Chamber authorises the destructive analysis of the Disc and the remaining data is recovered, the Prosecution will seek a variation of the 2 May 2011 deadline ordered by the Chamber⁶ for the inspection of materials pursuant to Rule 77 of the Rules of Procedure and Evidence.



Luis Moreno-Ocampo, Prosecutor

Dated this 26th Day of April 2011

At The Hague, The Netherlands

⁶ Decision on issues relating to disclosure, ICC-01/04-01/10-87, 30 March 2011, p. 16.