Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/04-01/10**
Date: **14/12/2010**

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 Disclosure

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

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

Counsel for Mr. Callixte Mbarushimana hereby requests that Pre-Trial Chamber I order the Prosecution to effect immediate disclosure of all materials necessary for enabling Defence challenges pursuant to both Article 19(2)(a) of the Rome Statute and Rule 117(3) of the Rules of Evidence and Procedure ("Rules"). The information required includes, but is not necessarily limited to, the documentary evidence forming the basis for the Prosecution's application pursuant to Article 58 of the Rome Statute and the materials sought in the **three** discrete requests detailed in paragraphs 4, 6 and 8 hereinafter.

Procedural Background

1. On 28 September 2010, after due consideration of a Prosecution application pursuant to Article 58 of the Rome Statute,[1] Pre-Trial Chamber I issued a warrant for the arrest of Mr. Mbarushimana.[2]

2. On 11 October 2010, pursuant to the aforementioned warrant, Mr. Mbarushimana was arrested at his residence in Paris.

3. On 19 October 2010, the Prosecutor of the International Criminal Court – Mr. Luis Moreno-Ocampo gave an interview to French television (France 24) in the course of which he discussed the arrest of Mr. Mbarushimana:

> "*Yeah ... no that's ... I think the arrest of Mbarushimana in France is the great example of what I was talking - the new dimension because basically it was the result of a common effort from France who investigated the crimes for us - helped us to collect intercept conversations - but also we collected information from Germany and also we collected information from Rwanda and from DRC so the Court played* [sic] *together with these four countries....*"[3]

[1] ICC-01/04-01/10-11-RED.
[2] ICC-01/04-01/10-2.
[3] http://www.france24.com/en/20101019-moreno-ocamp-icc-kenya-sudan-war-crimes#comments

4. On 31 October 2010, as a result of Mr. Moreno-Ocampo's frank admission that France had "*investigated the crimes for*" his office and had "*helped*" to collect "*intercept conversations*", Counsel for Mr. Mbarushimana petitioned the Office of the Prosecutor requesting the following information as a matter of urgency ("**the First Request for Disclosure**"):

i) a list of all agencies which had intercepted communications relevant to Mr. Mbarushimana and his case;

ii) a copy of all legal filings/documentation under the rules of the International Criminal Court and/or the competent authorities of any relevant State attesting to the proper request for and authorisation of interceptions – judicial, executive or otherwise;

iii) whether communications were intercepted in which Mr. Mbarushimana was one of the actual participants and a list of the names and/or assumed identities of his interlocutors;

iv) a list of the names and/or assumed identities of any participants in intercepted communications other than those mentioned in sub-paragraph (iii) above (*i.e.*, conversations to which Mr. Mbarushimana was not a party) who had mentioned Mr. Mbarushimana or any detail pertinent to his case;

v) the date from which communications began to be intercepted and the frequency of the interception thereof;

vi) the names of all people who operated/listened into the devices which were used to intercept conversations relevant to Mr. Mbarushimana's case and who prepared transcripts thereof;

vii) the physical means by which such interception was performed – how and where it was effected, and;

viii) instructions that the Prosecutor – Mr. Luis Moreno-Ocampo had demanded of the competent domestic authorities to ensure that the interception he had requested would not infringe attorney-client privilege especially given that his investigation of Mr. Mbarushimana was public knowledge, at the very latest, in May 2010.

5. In his letter to the Office of the Prosecutor, Counsel for Mr. Mbarushimana added that he would, at a later date, file a demand for the substantive recordings or transcripts of intercepted communications – in so far as they exist.

6. On 31 October 2010, in a separate communication, Counsel for Mr. Mbarushimana petitioned the Prosecution seeking "*any material formulated or retained by the OTP from before 3 March 2004 and up to the delivery of the Article 18(1) letter of notification whereby it may be understood that the OTP had decided to focus exclusively on the Ituri region and/or had concluded that there was insufficient evidence to investigate any alleged FDLR activity or other organized criminal activity in the Kivus*" ("**the Second Request for Disclosure**") .[4]

7. On 3 November 2010, the *Chambre d'Instruction* of the *Cour d'Appel de Paris* ordered the surrender of Mr. Mbarushimana to the International Criminal Court.[5]

8. On 3 November 2010, Counsel for Mr. Mbarushimana petitioned the Prosecution once again referring it to the mandatory language of Article 14(2) of the Rome Statute and requesting such "*supporting documentation*" which accompanied the situational referral made by President Joseph Kabila of the Democratic Republic of the Congo on 3 March 2004 ("**the Third Request for Disclosure**").[6]

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[4] Letter to Mr. Anton Steynberg, Senior Trial Lawyer sent on 31 October 2010 at 15:04 GMT +2:00.
[5] Case No. 2010/08027.
[6] Letter to Mr. Anton Steynberg, Senior Trial Lawyer sent on 3 November 2010 at 12:54 GMT +02:00.

9. On 4 November 2010, Mr. Mbarushimana notified his intent to seek *cassation* of the decision to surrender him to The Hague. As of the date of this petition, Mr. Mbarushimana remains in French detention awaiting the outcome of this *pourvoi en cassation*.

10. On 8 November 2010, the Office of the Prosecutor replied to Counsel for Mr. Mbarushimana stating, rather nebulously, that it would "*consider*" his three requests for disclosure "*at the appropriate time*".[7]

11. In light of the response cited in paragraph 10 hereinabove, Counsel understood the Prosecution to be adopting a principled stance whereby it would effect no disclosure whatsoever so long as Mr. Mbarushimana had not been surrendered to the Court. For this reason, therefore, Counsel views himself as obliged to petition the Pre-Trial Chamber not just to resolve the issues raised by his three discrete requests but also in order to gain access to the evidential information supplied to the Pre-Trial Chamber in support of the Prosecution's application pursuant to Article 58 of the Rome Statute and to inspect the case file of all relevant proceedings instituted against Mr. Mbarushimana in the national jurisdictions – in particular in the Federal Republic of Germany .

<u>Submission</u>

(i) *Whether requests for disclosure may be entertained prior to surrender.*

12. At the outset, it should be stressed that Mr. Mbarushimana is currently challenging the decision to surrender him to the International Criminal Court. Consequently, although his present requests for disclosure could, technically,

[7] Email from Mr. Anton Steynberg, Senior Trial Lawyer to Counsel for Mr. Mbarushimana sent on 8 November at 11:43 GMT +01:00.

be rendered moot in the context of an ICC trial, they nevertheless remain highly relevant for the purpose of a hearing under Article 85(1) of the Rome Statute.

13. Notwithstanding, Rule 117(3) is clear in that it permits a person arrested pursuant to an ICC arrest warrant to challenge whether that warrant was validly issued under Articles 58(1)(a) and 58(1)(b) of the Rome Statute. Rule 117(3) is located in the general provision dealing with detention in the custodial state; the Rules thus clearly envisage that the defendant may make such a challenge when he is still present in a custodial State - *i.e.* **prior** to his transfer to the seat of the International Criminal Court in The Hague.

14. Furthermore, should Mr. Mbarushimana be transferred to The Hague upon exhaustion of judicial proceedings in the French Republic, Rule 118(1) will afford him an immediate right to seek interim release "*upon first appearance*". Upon entertaining such an application, the Pre-Trial Chamber will be required to rule thereon "*without delay*". As a result, Counsel submits that the right to present a well researched and substantiated request for interim release should not be prejudiced by an intentional decision of the Prosecution to delay the disclosure of essential evidence.

15. By declining even to entertain **the First Request for Disclosure**, the substantive relevance of which will be examined hereinafter, it may well be argued that the OTP is effectively prolonging the overall length of Mr. Mbarushimana's detention. Article 60(4) of the Rome Statute imposes two distinct obligations on the Pre-Trial Chamber which aim to obviate such a possibility; on the one hand, the Chamber has a positive obligation to take measures to ensure that a person is not detained prior to the trial due to unreasonable delay by the Prosecutor and, on the other hand, the Chamber has an obligation to release the person with or without conditions if such delay has in fact occurred. In order to safeguard against such eventualities, the most

appropriate measure which the Chamber could take would be to order the Prosecutor to provide the defence with the requested materials immediately.[8]

16. Similarly, and with respect to **the Second Request for Disclosure** and **the Third Request for Disclosure**, there exists no statutory proviso which stipulates that an individual be in the custody of the ICC as a prerequisite for the initiation of an admissibility challenge. To the contrary, Article 89(2) of the Rome Statute specifically provides that a person arrested pursuant to an ICC arrest warrant may be detained in the custody of a national court – prior to surrender – pending resolution of the issue of admissibility by the Pre-Trial Chamber.

17. Notably, in *Prosecutor v. Joseph Kony et al.*, Pre-Trial Chamber II granted *ad hoc* Counsel for the Defence access to admissibility related documentation notwithstanding the fact that the suspects he was appointed to represent were still at large. In so doing, Pre-Trial Chamber II clearly fixed a precedent whereby the right to access materials relevant to admissibility is not contingent on a suspect's presence before the Court.

18. Even if a suspect should decide to file an admissibility challenge only after his transfer to the ICC, it would, nonetheless, be in the interests of the expeditious administration of justice to permit him to commence his preparation immediately. In this respect, the Defence is mindful of the rulings of Trial Chamber II and the Appeals Chamber in *Prosecutor v. Germain Katanga & Mathieu Ngudjolo* where a stringent duty of diligence was imposed on the Defence to raise challenges to the arrest proceedings and admissibility as early

[8] Under French law, for example, Counsel for the Defence can, at any time during the investigation, address to the Chambre de l'instruction a request for inadmissibility (nullité) of intercepted evidence (Article 170 Code de Procedure Pénale).

as practicable.[9] In order for this to be feasible, it follows that the Prosecution must correspondingly disclose to the Defence any relevant exculpatory and/or material information at the earliest stage possible.

(ii) The extent of the Prosecution's obligation to effect disclosure prior to surrender.

19. As stated above, Rule 117(3) envisages a challenge to the validity of the arrest warrant and, in particular, argument as to whether it was appropriately rendered pursuant to Article 58(1)(a) of the Rome Statute. It goes without saying that a Defence challenge to the existence of "*reasonable grounds to believe*" that a crime had been committed would be meaningless unless it was afforded access to the evidence forming the basis for the issuance of the arrest warrant.

20. With respect to the material sought in **the First Request for Disclosure**, the Prosecution does not, at present, claim that it comprises national security information protected under Article 72 of the Rome Statute. Indeed, if the evidence substantiating its application under Article 58 included intercepted communications then the Prosecution, in order specifically to avoid unreasonable delay, ought to have ensured that such materials would be capable of disclosure by obtaining waivers, as appropriate, from the relevant national authorities as a pre-condition to their use as incriminating evidence. The evasive answer given by the Prosecution – namely that it would "*consider*" the Defence application "*at the appropriate time*", suggests, at best, that the issue is yet to be broached with the relevant domestic authorities.

[9] Trial Chamber II has held that if the defence wishes to challenge admissibility on any grounds other than ne bis in idem, it must bring such a challenge during the confirmation stage of the proceedings: *Prosecutor v. Katanga and Ngudjolo* 'Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)', ICC-01/04-01/07-1213, 16 June 2010 at paragraphs 49-50. See also *Prosecutor v Katanga and Ngudjolo*, Judgment on the Appeal of Mr. Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", ICC-01/04-01/07-2259.

21. In the case of Prosecutor v. Jean-Pierre Bemba Gombo, the ICC Appeals Chamber has held that in order for the right to challenge detention to be effective and not illusory, the Defence must – to the largest extent possible – be granted access to such documentation necessary to enable the defence to effectively challenge his detention.[10] Although this ruling concerned an individual who was already detained by the ICC, ECHR case law presumes a general right to access documents concerning a criminal suspect's detention – even at the pre-trial/investigative stage.[11] The principles set out in these and other cases at the ECHR are thus directly applicable to the situation of a person who is being held in custody by a State party at the express behest of the ICC.

22. Moreover, recent case law issuing from the Appeals Chamber of the Special Tribunal for Lebanon ("STL") has held that a person, who is neither being held in the custody of the STL nor appearing before the STL, nonetheless, has standing to request access to the case file in order to obtain a remedy in connection with his arrest by national authorities at the request of the STL.[12]

23. The Appeals Chamber of the STL, furthermore, noted that while its founding statute and procedural rules do not expressly provide for such disclosure, they also do not forbid such disclosure.[13] In finding that access to the case file was, in principle, warranted by the interests of justice, the STL Appeals Chamber took into consideration the fact that the applicant had been detained, the fact that the STL had exercised temporary jurisdiction over this detention even though the place of detention was in Lebanon and the fact that the STL

[10] *Prosecutor v. Jean-Pierre Bemba*, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release ICC-01/05-01/08-323 16 December 2008 at paragraph 32.
[11] *Kruslin v. France*, 24 April 1990, 12 EHRR 547 at paragraph 20(m): "*The defence must be able to inspect the reports containing transcriptions, to hear the original tape recordings, to challenge their authenticity* ***during the judicial investigation*** *and subsequent trial and to apply for any necessary investigative measures*..." (emphasis added).
[12] Special Tribunal for Lebanon, Case No. CH/AC/2010/02; Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, 10 November 2010.
[13] *ibid* at paragraph 70.

had custody of the requested documents which were necessary to enable the applicant to enforce his right to a remedy.[14] In his decision at first instance, the Pre-Trial Judge underscored that "*[w]ith regard to the right of access to the criminal file, it should be noted that this is a customary international right recognized for all indicted persons and represents one of the essential means of guaranteeing the effective exercise of the rights of defence, especially when contesting the lawfulness or indeed arbitrary nature of a detention*".[15]

24. The same ruling is equally applicable to Mr. Mbarushimana who is entitled to all information of material benefit to the preparation of his defence. In this respect, it should be noted that the ICC Appeals Chamber has held that the requirement of materiality under Rule 77 must be interpreted broadly.[16] To this end, the Defence does not have to prove that the information requested would assist it in countering a particular aspect of the prosecution case; the Defence merely needs to establish that it would be likely to assist the defence in some aspect of its preparation[17] or that there is, at least, a good chance that it would be of such assistance.[18]

25. Counsel maintains that the information sought herein is not just material but <u>essential</u> for the proper conduct of Mr. Mbarushimana's defence. For example, a failure to obey proper protocol in seeking and executing so-called "wire-tap" permits can, it will be argued, render any evidence obtained thereby

[14] *ibid* at paragraphs 63 & 64.
[15] Order Relating to the Jurisdiction of the Tribunal to Rule on the Application by Mr. El Sayed dated 17 March 2010 and whether Mr. El Sayed has Standing Before the Tribunal'; Case No. CH/PTJ/2010/005, 17 September 2010 at paragraph 44.
[16] Prosecutor v. Lubanga, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, ICC-01-04-01-06-1433, 11 July 2008 at para 78.
[17] Prosecutor v. Lubanga, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, ICC-01-04-01-06-1433, 11 July 2008 at para 79.
[18] *c.f.*; precedent on disclosure at the ICTY: Prosecutor v. M. Krajisnik, IT-00-39-A, "Decision on "Motion by Mico Stanisic for Access to All Confidential Materials in the Krajisnik Case", 21 February 2007, p. 4; Prosecutor v. Popovic et al, IT-05-88-T, "Decision on Pandurevic Motion for Access to Confidential Material in Prosecutor v. Obrenovic", 19 July 2007, p. 5; Prosecutor v. Blaskic, IT-95-14-A, "Decision on Pasko Ljubicic's Motion for Access to Confidential Material, Transcripts and Exhibits", 4 December 2002; para. 13; Prosecutor v. Djordjevic, IT-05-87/1-PT, "Decision on Vlastimir Djordjevic's Motion for Access to Transcripts, Exhibits and Documents in Prosecutor v. Slobodan Milosevic, Case No. IT-02-54", 6 February 2008, para. 7;

inadmissible by virtue of Article 69(7) of the Rome Statute.[19] Indeed, the fruit of such a poisoned tree should be viewed as positively toxic were the Office of the Prosecutor to have knowingly, or even recklessly, received legally privileged communications at such time as it purportedly enjoyed the assistance of domestic investigating authorities.

26. In this respect, the Pre-Trial Chamber is reminded that Mr. Mbarushimana's several encounters with various legal authorities is more than sufficient for the Office of the Prosecutor to have been fully aware that he was legally represented at all relevant times. On 7 July 2008, Mr. Mbarushimana was arrested in Frankfurt pursuant to an Interpol red notice issued by the Rwandan authorities and was, thereafter, represented by legal counsel in connection with crimes he was alleged to have committed in Rwanda. Subsequently, Mr. Mbarushimana was the subject of investigations relevant to the present case in Germany in 2009[20] and in Rwanda by May 2010.[21]

27. The absence of self-incriminating information in intercepted communications to which Mr. Mbarushimana was a party is the best evidence of his not constituting a flight risk and of his not presenting a threat to victims and/or witnesses. Indeed, in so far as the case against Mr. Mbarushimana is based on his alleged "contribution" to a criminal common purpose, the absence of self-incriminating evidence in intercepted communications negates the justification for arguing that he is liable to abuse his freedom, as alleged by the Prosecution, in order to continue committing criminal offences. In these

[19] Under French law, for example, any individual who is formally made a suspect (mis en examen) and whose phone conversations have been recorded and transcribed, can challenge the regularity of such interception (Crim. 15 janv. 2003, BICC576, n°478). A suspect may, for instance, argue that the procedure provided for in the Code de Procedure Pénale has not been properly followed and that the intercepted communications ensuing therefrom should not be admissible. Such a challenge may be raised before the Chambre de l'instruction.
[20] ICC-01/04-01/10-11-Red at para. 172.
[21] *c.f.*; comments attributed to a spokesperson for the Rwandan Prosecution – Mr. Augustin Nkusi in May 2010: "*A fourth team from the International Criminal Court (ICC) is also investigating France-based Callixte Mbarushimana on similar charges*": http://allafrica.com/stories/201005120029.html.

circumstances, disclosure of the required information is vital to allow Counsel to challenge the existence of the grounds for arrest set out under Articles 58(1)(b)(i), 58(1)(b)(ii) and 58(1)(b)(iii).

28. Finally, and turning to the information sought in **the Second Request for Disclosure** and **the Third Request for Disclosure**, Pre-Trial Chamber II expressly recognized in *Prosecutor v. Joseph Kony et al.*, that for the purpose of effective participation in admissibility proceedings, defence counsel may even request access to confidential *ex parte* documents arising out of the Prosecution's application for an arrest warrant.[22]

Justification for Urgency

29. Given that the surrender of Mr. Mbarushimana could be effected in the very near future, this request is filed as a matter of urgency. Should the normal time limits stipulated in Regulation 34(b) of the Regulations of the Court ("Regulations") apply, then the purpose of the request – which, primarily, is designed to substantiate and promote an immediate application for interim release – would be frustrated. In these circumstances, it is submitted, good cause is shown under Regulation 35(2) for substantially reducing the time-period allocated to the Prosecution for its response to this request.

[22] *Prosecutor v. Kony at al*,; Decision on Defence Counsel's "Request for conditional stay of proceedings" ICC-02/04-01/05-328, 30 October 2008, at page 6.

Relief Sought

30. Article 57(3)(b) of the Rome Statute permits a Pre-Trial Chamber to issue such orders as may be necessary to assist a person "*who has been arrested*" in the preparation of his defence. Consequently, and in light of all the aforementioned, Pre-Trial Chamber I is respectfully requested to order:

a) the disclosure of all information forming the evidential basis for the Prosecution's application under Article 58 of the Rome Statute;

b) the disclosure of all information sought pursuant to **the First Request for Disclosure**;

c) the disclosure of all information sought pursuant to **the Second Request for Disclosure**;

d) the disclosure of all information sought pursuant to **the Third Request for Disclosure**, and;

e) the disclosure of any other exculpatory and/or materially relevant information necessary for the pursuit of challenges under Article 19(2)(a) of the Rome Statute and Rule 117(3) – including the information held by the prosecuting authorities of the Federal Republic of Germany, France and Rwanda.

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Tuesday, December 14, 2010