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PRE-TRIAL CHAMBER I

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. Callixte MBARUSHIMANA

Public Document
with Confidential Annexes 1-5

Prosecution Response to the "Defence Request for Disclosure"

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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I. Introduction

1. In the “Defence Request for Disclosure”¹ (“the Request”) Callixte MBARUSHIMANA (“the Suspect”) seeks an order compelling wide-ranging pre-surrender disclosure so that he can make the following applications to this Court:
 - a. An intended challenge under Article 19(2)(a) of the Rome Statute (“the Statute”) to the jurisdiction of the Court and the admissibility of the case;
 - b. An intended challenge under Rule 117(3) of the Rules of Procedure and Evidence (“the Rules”) to the issuance of the warrant of arrest; and
 - c. An intended application for interim release following his surrender to the Court.²
2. The Prosecution opposes the Request. First, the Prosecution’s disclosure obligations under the Statute and Rules are not triggered by the issuance of an arrest warrant, or even by the arrest of the suspect. Thus, there is no statutory basis for the proposition that the Prosecution should provide disclosure before surrender to the Court. Second, the Prosecution disagrees that an arrested person is entitled to the full record in order to contest, in an adversary process either before or immediately after surrender, the sufficiency of the factual showing justifying his arrest. The adversary challenge to the evidence occurs at the confirmation hearing; the challenge to whether the warrant was properly issued does not include a full examination of the underlying basis for the warrant, and it does not require production of all the information

¹ Defence Request for Disclosure, ICC-01/04-01/10-29, 14 December 2010.

² The Suspect also makes passing reference to Article 85(1) of the Statute, but does not appear to rely upon this for any relief sought. See paragraph 12 of the Request. It is of course entirely premature to consider any proceedings in terms of this Article and also probably moot, in light of the apparent recent decision to refuse his *pourvoi en cassation* challenging the decision in favour of his surrender.

presented to and withheld from the Pre-Trial Chamber in order to demand that it reconsider its finding of reasonable grounds. Third, disclosure to a person not before the Court presents risks; the Chamber has no mechanism to regulate or monitor his contacts with other persons or to prevent the dissemination of highly sensitive information; and thus the Court should not fashion a regime outside the Statute and Rules for disclosure to a person who is not subject to the Court's control. Finally, notwithstanding the Suspect's expressed intention to make the applications noted above, in fact he has not yet done so. Even if the Chamber considers that a person not within the Court's jurisdiction is entitled to litigate any or all the legal challenges this Suspect identifies, it does not follow that he is entitled to disclosure in anticipation of his intention to raise these legal issues.

II. Statement of Facts

3. On 20 August 2010, the Prosecution filed an Application under Article 58 for the issue of a warrant of arrest for the Suspect.³ On 10 September 2010 and at the request of Pre-Trial Chamber I ("the Chamber"), the Prosecution filed its Submissions on Jurisdiction.⁴
4. On 28 September 2010, the Chamber agreed that the Prosecution established reasonable grounds to believe the Suspect committed crimes within the jurisdiction of the Court.⁵ Accordingly, it granted the Prosecution's Application and issued a warrant of arrest.⁶

³ Prosecution's Application under Article 58, ICC-01/04-573-US-Exp, 20 August 2010.

⁴ Prosecution's Submissions on Jurisdiction, ICC-01/04-577-US, 10 September 2010.

⁵ Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte MBARUSHIMANA, ICC-01/04-01/10-1, 28 September 2010.

⁶ Warrant of Arrest for Callixte Mbarushimana, ICC-01/04-01/10-2-tENG, 28 September 2010.

5. French authorities arrested the Suspect on 11 October 2010. On the day of the arrest, the French authorities also conducted searches of the Suspect's premises and office and seized a large volume of evidential material, which it subsequently handed over to the Registry of this Court.
6. On 11 October 2010, the Chamber ordered the Prosecution to file a public version of its "Application under Article 58" and its "Submissions on Jurisdiction", "redacted as appropriate".⁷ The Prosecution filed the public version of these documents on 14 October 2010.⁸
7. Between 18 October and 4 November 2010, counsel for the Suspect made several requests to the Prosecution for additional information and documents.⁹ Counsel for the Suspect also objected to the extent of the redactions in the public version of the Prosecution's application under Article 58 and asserted that the redactions hampered his ability *"to assess whether reasonable grounds exist to believe that [his] client committed the crimes with which he has been charged -by way of the mode of liability alleged."*¹⁰
8. The Prosecution made a consolidated reply to counsel's various requests on 8 November 2010 in which it declined generally to provide the requested information at this time, though it also informed counsel that it was in the process of scaling back the redactions to the public version of its Article 58 Application.¹¹ That same day, the Prosecution filed an *ex parte* "Application for Re-classification of its 'Application under Article 58' and Request for

⁷ Decision on issues relating to the publicity of proceedings in the case, ICC-01/04-01/10-7, 11 October 2010.

⁸ Prosecution's Application under Article 58, ICC-01/04-01/10-11-Red, 14 October 2010; Prosecution's Submissions on Jurisdiction, ICC-01/04-577, 14 October 2010.

⁹ See Annexes 1 – 3. All annexes to the present response are filed as "confidential" in light of their nature as correspondence exchanged between the parties and because they contain Defence counsel's and Prosecution officials' contact details.

¹⁰ A copy is attached as Annex 4.

¹¹ A copy is attached as Annex 5.

Authorisation of Redactions".¹² On 10 November 2010 the Chamber authorised the redactions and authorised the Prosecution to file a redacted version of its Article 58 Application.¹³

9. On 3 November 2010, the *Chambre de l'Instruction près la Cour d'Appel de Paris* issued a decision authorising the surrender of the Suspect to the International Criminal Court ("ICC").¹⁴ The Suspect continues to be detained in France pending the outcome of his *pourvoi en cassation* and, if the decision is affirmed, his surrender to the Court.
10. It appears that the Suspect's *pourvoi en cassation* was rejected on 4 January 2011, in which case he will be surrendered to the Court within one month. However, this has not yet been formally communicated to the Prosecution at the time of filing this reply. Notwithstanding this, the Prosecution will nevertheless deal with the issues raised in the Request pertaining to pre-surrender disclosure.
11. The presently is overseeing the process of scanning the seized documents. Registry is also making the necessary arrangement for the duplication of the hard. Once the materials has been scanned into the case record, the defence will have access to all of this material and copies of the duplicated hard drives will also be provided to them.

¹² Prosecution's Application for Re-classification of its "Application under Article 58" and Request for Authorization of Redactions, ICC-01/04-01/10-20-Conf-Exp, 9 November 2010.

¹³ Decision on the "Prosecution's Application for Re-Classification of the "Application under Article 58" and Request for Authorization of Redactions", ICC-01/04-01/10-22-Conf-Exp, 9 November 2010. For the redacted version of the Prosecution's Application under Article 58, see ICC-01/04-01/10-11-Conf-Red, 20 August 2010.

¹⁴ Annex 1: Second Rapport sur la procédure devant la Chambre de l'instruction de la Cour d'Appel de Paris, ICC-01/04-01/10-19-Conf-Anx1, 8 November 2010. The *Chambre de l'Instruction* ordered MBARUSHIMANA's surrender to this Court and declared that in no way should he be expelled, returned or extradited to Rwanda.

III. Submissions

General submissions on disclosure to the Defence prior to surrender

12. The Suspect's request is premised on the assumption that because he can challenge admissibility and argue that the arrest warrant was not properly issued prior to surrender¹⁵ and seek conditional or unconditional release immediately after surrender¹⁶ he is entitled immediately to disclosure of information in advance of any filing. That assumption is incorrect. The Prosecution submits that it is not required to initiate disclosure to a Suspect prior to his or her surrender to the Court for the following reasons:

- a. The legal instruments governing this Court set out a comprehensive disclosure regime that requires disclosure by the Prosecution prior to confirmation and trial. However, the legal texts do not require disclosure **prior** to surrender.
- b. Additionally, the disclosure of non-public information to a Suspect at a time when the Court has no means of control over him could raise grave security issues.¹⁷ The Suspect is not only beyond the reach of the Court's orders, he is also unlikely to submit himself voluntarily to its jurisdiction. Because he is not in this Court's custody, the Registry has no authority while the Suspect is in French custody to restrict or even monitor his communications with others. It is further self evident that if the French authorities ultimately refuse surrender or order his release, this Court would continue to lack the means to control his

¹⁵ As in the case of an Article 19(2) or Rule 117(3) challenge.

¹⁶ As in the case of a request for interim release.

¹⁷ The Prosecution recalls that the Chamber found that the arrest of the Suspect was justified *inter alia* because of the risk that he would intimidate victims or witnesses or otherwise interfere with the investigation. ICC-01/04-01/10-1, paras 48 and 50.

dissemination or use of sensitive information that would have been disclosed to him.

- c. This is particularly a concern with respect to ongoing investigations and information that could identify potential witnesses who at the preliminary arrest stage have not been given full protective measures. As the Appeals Chamber has expressly recognized, the protection of witnesses is a “paramount consideration” along with the need to safeguard ongoing investigations.¹⁸ Requiring disclosure at the arrest stage thus will trigger the obligation first to assess the need for protective measures, and might require that the Court undertake protection for persons who ultimately might not be witnesses at trial or even confirmation. Accordingly, pre-confirmation disclosure and the reliance on protective measures at an early stage should be the exception, ordered only where essential.

13. Notably, the request for disclosure is also predicated upon the Suspect’s professed intention to make substantive applications for relief in this Court. The Prosecution submits that the absence of any disclosure obligation in the Statute and Rules and all the concerns about premature disclosure of sensitive information are dispositive. But even if a substantive pre-surrender *application* might trigger some disclosure rights, the mere possibility of an application at this stage is not enough.

14. Finally, it is not unfairly prejudicial to delay the disclosure of information until the Suspect is before the Court. The Suspect has the right to contest surrender in the custodial state. If those efforts are unsuccessful, he has the right to present his challenges before the International Criminal Court. This sequence is reasonable, orderly, and does not result in either undue delay or

¹⁸ *Prosecutor v. Jean-Pierre Bemba Gombo*, 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 OA](#) at paragraphs 3 and 33.

unfair prejudice to the Suspect's rights. To the contrary, the ensuing process – the dual track litigation – is the result of his selection on how and in what jurisdictions to exercise his rights. In the instant matter, the Prosecution submits that the Suspect has not made out an adequate case for pre-surrender disclosure for any of the purposes for which he seeks such disclosure.

Disclosure prior to surrender for the purposes of a challenge pursuant to Article 19(2)

15. The Prosecution does not dispute that the Suspect may contest admissibility pursuant to Article 19(2) even before he is surrendered to the Court. It does dispute, however, that he is entitled, for this purpose, to advance pre-surrender disclosure of the material which he seeks, in order to determine whether to challenge admissibility and to prepare his challenge. Rather, once he makes an application, the Prosecution can provide all the essential documentation, subject to whatever reasonable redactions may be required to protect witnesses or the integrity of the investigation.

16. In this instance, there are two critical factors: there is no admissibility issue pending, and the Suspect is beyond the jurisdiction of the Court. For that reason, the Suspect is incorrect in contending that the Pre-Trial Chamber in *Kony et al.* “clearly fixed a precedent” for pre-surrender disclosure by allowing *ad hoc* Counsel for the Defence to access admissibility-related documents “notwithstanding the fact that the suspects he was appointed to represent were still at large.”¹⁹ In that case, unlike the present one, there was a live

¹⁹ [ICC-01/04-01/10-29](#), para. 17. It is noted that the Request does not specify which particular decision is relied upon. It is presumed that the relevant decision is *Prosecutor v. Kony et al.*, Decision on Defence Counsel's "Request for conditional stay of proceedings", [ICC-02/04-01/05-328](#), 31 October 2008, as qualified by *Prosecutor v. Kony et al.*, Order to the Prosecutor to file redacted versions of documents in the record, [ICC-02/04-01/05-345](#), 12 November 2008.

admissibility issue at the time the documents were provided to counsel. Notwithstanding that Kony *et al* were not before the Court (a warrant had been issued but they had not been arrested), the Pre-trial Chamber *proprio motu* initiated an admissibility inquiry pursuant to Article 19(1).²⁰ The Chamber appointed *ad hoc* Defence counsel and invited observations from counsel, the Prosecution, the Republic of Uganda and victims. Upon petition by *ad hoc* counsel,²¹ the Chamber provided counsel with access to certain documents in the record, after such documents were suitably redacted by the Prosecution.²² At the same time, however, the Chamber also stressed the importance of protecting the safety of witnesses and victims and the need to adopt a “protective approach”, especially in light of the limited scope of the proceedings.²³

17. The critical distinctions between that unique situation and the instant case make clear that the *Kony et. al.* proceeding does not support the Suspect’s claim that he is now entitled to disclosure before surrender in order to bring a future admissibility challenge. Unlike *Kony et. al.*, where there existed a live admissibility issue initiated by the Court, there is no pending admissibility

²⁰ *Prosecutor v. Kony et al*, Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence, [ICC-02/04-01/05-320](#), 21 October 2008. The Pre-Trial Chamber articulated the inherent need for such a proceeding specific to the circumstances in the situation in Uganda, stating that “a determination by the Chamber on the admissibility of the Case in accordance with articles 19(1) and 17 of the Statute is appropriate in light of the circumstances in order to ensure the proper application of the relevant provisions concerning admissibility to current and future proceedings in the Situation.” See [ICC-02/04-01/05-320](#), page 6.

²¹ *Prosecutor v. Kony et al*, Request for conditional stay of proceedings, [ICC-02/04-01/05-325](#), 28 October 2008.

²² *Prosecutor v. Kony et al*, Decision on Defence Counsel's "Request for conditional stay of proceedings", [ICC-02/04-01/05-328](#), 31 October 2008; Order to the Prosecutor to file redacted versions of documents in the record, [ICC-02/04-01/05-345](#), 12 November 2008. Ultimately, the Pre-Trial Chamber ordered the Prosecution to file ‘confidential, *ex parte* Prosecutor and Defence’ a redacted version of the Under Seal arrest warrant application (“AWA”) and redacted versions of the transcripts of related *ex parte* hearings which had been held in closed session. The Pre-Trial Chamber also ordered the reclassification of some of the Annexes to the AWA as ‘confidential, *ex parte* Prosecutor and Defence’ although it noted at para. 17 that it “appears appropriate to limit the number of annexes to the Prosecutor’s Amended Application made available to the Defence.”

²³ *Prosecutor v. Kony et al*, Order to the Prosecutor to file redacted versions of documents in the record, [ICC-02/04-01/05-345](#), 12 November 2008, para. 16.

issue under consideration here. The documents provided to the *ad hoc* counsel, moreover, were presumably not made available to the suspect himself; rather, counsel had no contact with, or obligations to, the suspects.²⁴ Thus there was little risk in disclosing the materials to counsel alone.

18. The Prosecution submits that the Suspect will not be materially prejudiced if disclosure of the material sought for the purposes of the Article 19(2) challenge is deferred until after his surrender. The Suspect's surrender to the Court by the custodial State will take place within a month. Therefore, the delay occasioned will be the consequence of the way in which the Suspect exercised his rights and can in no way be attributed to Prosecution. For this reason also, the Request for pre-surrender disclosure for the purposes of an Article 19(2) challenge should be dismissed.

Disclosure prior to surrender for the purposes of a challenge pursuant to Rule 117(3)

19. The Suspect contends that he is entitled to challenge the issuance of the arrest warrant under Rule 117(3) prior to his surrender to the seat of the Court. Again, the Prosecution agrees in principle with that assertion. The disagreement lies in the nature of the challenge that a suspect can bring. The Prosecution vigorously disagrees that Rule 117(3) permits the Suspect to litigate the sufficiency of the evidence upon which the warrant is based. It thus disagrees that the Suspect needs all the underlying evidence that was provided to the Court, as well as materials not deemed relevant or necessary, in order to argue that the warrant was not properly issued.

²⁴ See *Prosecutor v. Joseph Kony*, Judgment on the appeal of the defence against the "Decision on the admissibility of the case under article 19(1) of the Statute" of 10 March 2009, [ICC-02/04-01/05-408](#) at para. 56.

20. However, it is more appropriate to defer a determination regarding the nature of the Rule 117(3) challenge until the Suspect makes a concrete application for relief under the Rule. Without such an application, the Chamber need not issue an advisory ruling.
21. The sufficiency of evidence is subject to judicial review at three stages – upon an application for a warrant of arrest or request for surrender, at the confirmation hearing, and at trial. The Statute and Rules also expressly provide two opportunities to the suspect/accused to contest the sufficiency of the evidence in an adversarial process, first in the confirmation hearing and, if charges are confirmed, then at the trial. The Statute does not require three adversary proceedings, and in particular it does not authorize the Chamber to entertain a pre-confirmation challenge to the *ex parte* submission in support of an application for an arrest warrant.
22. Instead, Rule 117(3) allows the suspect to challenge the proper issuance of the warrant, not the sufficiency of the evidence upon which the finding of reasonable grounds was based.
23. The Prosecution submits that the Rule would permit the arrested person to argue, for instance, that the warrant is facially defective, that it is not based on an application made by the Prosecution, the Court's decision is based on articulated and incorrect legal standards, that the crimes alleged are not within the jurisdiction of the Court, that the Suspect is wrongly identified, or that it was unnecessary to seek his arrest to ensure his appearance, protect against obstruction of justice, or prevent the person from continuing to commit crimes. Beyond that, the Suspect's right to challenge the propriety of issuing an arrest warrant **does not** include the right to examine in depth all the evidence that the Prosecution submitted to the Pre-Trial Chamber in order to determine if Chamber "properly issued" the warrant on an adequate showing of reasonable grounds.

24. In this regard, the following factors are relevant:

- a. The wording of Rule 117(3) does not authorize a full-blown challenge to the merits of the warrant. The Rule refers to “...*a challenge as to whether the warrant of arrest was **properly issued** in accordance with article 58, paragraph 1 (a) and (b)*...” (Emphasis added) The emphasised words reflect that the challenge is limited to the formal and procedural steps by which the warrant was issued. If the Rule were intended additionally to permit the challenge to the grounds upon which the warrant was based, i.e. the sufficiency of the evidence underlying the warrant, it clearly could have said so.
- b. Nor is the language of Rule 117 accidental. The drafters specifically considered, but ultimately rejected, the inclusion of a provision permitting “*a Court review of the **grounds for the warrant***”.²⁵ (Emphasis added) The 1998 report of the Preparatory Committee on the Establishment of an International Criminal Court contained a provision that “*a person may apply to the Pre-Trial Chamber for a determination of the **lawfulness under this Statute** of any arrest warrant issued by the Court.*”²⁶ (Emphasis added) However, in a footnote to this provision, the Committee noted that “*Serious questions were raised about the grounds on which such a challenge would be based and whether this provision was needed at all in the light of the procedures for judicial review of the arrest warrant and judicial confirmation of the charges for trial.*” Ultimately, the Working Group deleted the provision.²⁷ This issue was again addressed in a proposal by France before the Preparatory Commission in June 1999

²⁵ Proposal of Italy on evidence, investigation and the rights of the accused, Rule 55.4, [PCNICC/1999/WGRPE/DP.18](#), 26 July 1999.

²⁶ Report of the Preparatory Committee on the Establishment of an International Criminal Court – Draft Statute [A/CONF.183/2/Add.1](#), 14 April 1998, p. 95.

²⁷ Draft Statute for the International Criminal Court, Compendium of Draft Articles Referred to the Drafting Committee by the Committee of the Whole as of 9 July 1998, [A/CONF.183/C.1/L.58](#), 9 July 1998, p. 34.

which contained a provision relating to “*challenges to the **legality** of a warrant of arrest in accordance with Article 58*”.²⁸ (Emphasis added) A subsequent submission by Italy in July 1999 proposed that a person arrested under a warrant “*shall have the right to request a Court review of the **grounds for the warrant** and the legality of the arrest*”.²⁹ (Emphasis added). The provision relating to a “review of the **grounds for the warrant**” was omitted from the final draft of the Statute.

- c. Instead, the examination whether the evidence is sufficient is done by the Court at the arrest warrant stage and thereafter by the Court in an adversary proceeding under a higher standard of proof at the confirmation hearing. There is no room under the Statute or Rules, no precedent in foreign practice cited by the drafters of the legal texts, and no justification in logic or reason for the Pre-Trial Chamber to reconsider, through an adversary process, the correctness of its initial assessment that the evidence provided reasonable grounds to believe the suspect committed the identified crimes.
- d. Finally, the procedure envisaged by Rule 117(3) is also inconsistent with a substantive challenge to the merits of the warrant. The Rule simply provides that the challenge “shall be made in writing” and shall “set out the basis for the challenge”. It provides further that the Chamber shall obtain “the views of the Prosecutor”, whereupon it may proceed to rule on the matter based only on the information to hand. No provision is made for the hearing of oral arguments or the submission of evidence, either *viva voce* or documentary. Again, it is

²⁸ Proposal by France concerning the Rules of Procedure and Evidence, “60.2 Detention in the custodial State”, [PCNICC/1999/DP.7/Add.1/Rev.1](#), 29 June 1999, referring to Article 55, paragraph 1 (d) (Rights of the accused), and Article 59, paragraph 4 (national authority cannot consider whether warrant of arrest was properly issued).

²⁹ Proposal of Italy on evidence, investigation and the rights of the accused, Rule 55.4, [PCNICC/1999/WGRPE/DP.18](#), 26 July 1999.

submitted that this is consistent with an intention that the challenge should be limited to the formal and procedural legality of the warrant, which could adequately be addressed through written submissions alone. Clearly, however, this procedure would be unsuited to the determination of the veracity or reliability of evidence relied upon by the Prosecution, or resolving serious factual disputes.

25. Even if the Prosecution is incorrect in this submission, and should the Chamber find that Rule 117(3) permits the Suspect to challenge whether or not the Chamber was justified in concluding that there are reasonable grounds to believe that the Suspect committed a crime within the jurisdiction of the Court and that his arrest appeared necessary, it is submitted that such challenge must be limited to a determination of whether the Chamber was correct in reaching this conclusion on the strength of the summary of the evidence and any other information placed before it, redacted as necessary.³⁰

26. It is submitted that this Rule certainly does not entitle the suspect to challenge the admissibility, veracity and/or reliability of the evidence or information placed before the Chamber by the Prosecution by way of an adversarial process. The Statute provides a suspect/accused with two opportunities to challenge the cogency and admissibility of evidence relied on by the Prosecution by way of adversarial process, namely at the confirmation hearing³¹ and, if the charges are confirmed, at the trial.³² This is the process

³⁰ Bearing in mind the countervailing interests of the protection of victims and witnesses, the need to safeguard the ongoing investigation and the need for a “protective approach” at this stage of the proceedings.

³¹ Article 61(6). The Chambers of this Court have consistently found that the purpose of the confirmation hearing, *inter alia*, is to ensure “committing to trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought. This mechanism is designed to protect the rights of the Defence against wrongful and unfounded charges.” *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, [ICC-01/04-01/06-803-tEN](#), 29 January 2007, para. 37; see also *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, [ICC-01/04-01/07-717](#), 30 September 2009, para. 63; *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, [ICC-01/05-01/08-424](#), 15 June 2009, para. 28; *Prosecutor*

envisaged by the drafters of the Rome Statute, and should not lightly be deviated from.

27. Thus, the Prosecution submits that the Suspect is not entitled to argue, for instance, that the intercept evidence collected by national authorities was illegally obtained.³³ Bearing in mind the relevant evidentiary threshold applicable in an Article 58(1) application, the Chamber cannot be expected to embark upon such a detailed examination of the material provided by the Prosecution.³⁴

28. It follows that the Suspect is also not entitled at this stage to the disclosure of the material sought in connection with the intercepts for this purpose.³⁵

29. The Prosecution accordingly submits that the Request for disclosure for the purpose of a Rule 117(3) should be dismissed.

Disclosure prior to surrender for the purpose of an application for interim release

30. The Prosecution disputes that the Suspect is entitled to pre-surrender disclosure of the materials sought for the purpose of an application for interim release. This argument also relies on the purported right to challenge the basis for his arrest – the evidentiary support for the finding that there are

v. Bahar Idriss Abu Garda, Decision on the Confirmation of Charges, [ICC-02/05-02/09-243-Red](#), 8 February 2010, para. 39.

³² Articles 67(1)(e) and 69(4).

³³ This might well involve a determination of the *bona fides* of the relevant officials and the appropriateness of their actions, which would best be determined at trial, after hearing the appropriate *viva voce* evidence.

³⁴ It is instructive to note, in this regard, that the Article 58(2) of the Statute does not even require the Prosecution to place any evidence before the Chamber at all, but rather only “a summary of the evidence and any other information which establishes reasonable grounds to believe that [the Suspect] committed those crimes”. This clearly envisages that the Chamber is entitled to accept the material placed before it at face value and is not required to second-guess the accuracy or *bona fides* of the Prosecutor’s summary of the evidence, certainly not in the absence of any *indiciae* of irregularity.

³⁵ The relevant and disclosable information will of course be disclosed at the appropriate time in the course of the normal disclosure process and subject to the relevant provisions of the legal instruments.

reasonable grounds to believe he committed the identified crimes. Hence, the Suspect's argument is, effectively, the same argument made above – that he may challenge the factual basis for the decision to issue an arrest warrant, as a ground for seeking release from detention.

31. The Prosecution similarly disagrees. But, as with the previous issue, this is now merely hypothetical. The Suspect is not before the Court and is therefore not in a position to seek release from custody. If and when he is surrendered he may apply for release and argue that he is entitled to the information sought in order to make his case. He may then also argue that the decisions of other *ad hoc* tribunals³⁶ support his position and justify his request.

32. Thus, the Suspect's related argument that he is entitled to this information now in order to make an immediate and fully argued application for release if he is surrendered is premature. To be sure, the Appeals Chamber has ruled that an arrested person should have access to documents and information that are “**essential** in order to effectively challenge the lawfulness of detention, bearing in mind the circumstances of the case” and that “**ideally**” he should have this information “**at the time of** his ... initial appearance before the

³⁶ The Prosecution disputes the assertion in the Request that the Pre-Trial Chamber ruling of the Special Tribunal for Lebanon (“STL”) is “equally applicable to Mr Mbarushimana.” The STL Appeals Chamber in the decision referred to in the Request was clear in stating that the Application it was considering was “a matter unforeseen by the Rules, and it cannot be addressed through the literal application of rules that relate to accused defendants.” [Special Tribunal for Lebanon, Decision on the Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, CH/AC/2010/02, 10 November 2010, para. 70.] The Appeals Chamber also noted at paragraph 69 that any such right of access, if indeed granted, “is not an absolute right, its existence in a given situation cannot be separated from the limitations and restrictions that would define it.” The Prosecution submits that the Request here relies on a decision without first laying the proper foundation of its context. The circumstances of the matter before the STL Appeals Chamber were such that fell outside the scope of the Tribunal's Rules on disclosure. The Prosecution disagrees that this is in any way relevant to the merits of this Request. There are no circumstances in the context of these proceedings ‘unforeseen by the Rules’ governing this Court, rendering the decision of the STL inapplicable to the Applicant's argument. Additionally, the Prosecution must point out the significant disparity between the Rules governing proceedings before the STL and those which govern proceedings before this Court, and urges that any comparisons ought to be treated with utmost caution.

Court”³⁷ (emphasis added). Since this information is not essential at this time for the purposes of an application for interim release and there are substantial reasons not to provide information that could place persons or the investigation at risk before the Suspect is subject to some measure of court control, that decision does not impose an obligation of immediate disclosure. Instead, as the Appeals Chamber has further confirmed, the right to disclosure for the purposes of challenging detention “is not unqualified” and that “**the nature and timing** of such disclosure must take into account the context in which the Court operates” (emphasis added).³⁸

33. The Prosecution notes that the Suspect has the Warrant of Arrest, the Chamber’s Decision on the Prosecutor’s Application for a Warrant of Arrest,³⁹ the Prosecution’s Submissions on Jurisdiction (unredacted) and, with reduced redactions, a confidential version of the Prosecution’s Article 58 Application.⁴⁰ The Prosecution tenders disclosure of the evidential material Annexed to its Article 58 Application upon the Suspect’s surrender to this Court, subject only to an application for essential redactions and protective measures, which will be submitted *ex parte* to the Chamber prior to surrender. It is noted further that the Appeals Chamber has explicitly approved in principle the necessary redaction of material disclosed.⁴¹

34. This identified material collectively sets out in great detail the factual basis for the Suspect’s arrest. It is submitted that these documents, together with the additional documents that will be tendered after surrender, will provide the Suspect with such information as is “**essential**” in order to effectively

³⁷ *Prosecutor v. Jean-Pierre Bemba Gombo*, 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 OA](#), paras. 1 and 32.

³⁸ *Prosecutor v. Jean-Pierre Bemba Gombo*, *supra* [ICC-01/05-01/08-323 OA](#), at paras. 3 and 33.

³⁹ ICC-01/04-01/10-1.

⁴⁰ ICC-01/04-01/10-11-Conf-Red.

⁴¹ *Prosecutor v. Jean-Pierre Bemba Gombo*, *supra* [ICC-01/05-01/08-323 OA](#) at paras. 3 and 33.

challenge the lawfulness of detention, bearing in mind the circumstances of the case.

35. Even if the Suspect were entitled to further material, it is submitted that the fact that such material is only disclosed after surrender does not materially prejudice him in bringing an application for interim release. As noted by the Appeals Chamber *“a person may, despite the fact that he or she has not yet had full disclosure, wish to raise arguments in relation to interim release in order to have a speedy decision rendered by a Chamber. As soon as the Appellant had received full disclosure, he had the right to apply for interim release again which would have allowed him to make full arguments at that time.”*⁴²

36. It is further submitted that the information and material requested by the Suspect relating to the intercepts⁴³ is **not** information which is essential in order to effectively challenge the lawfulness of detention. The legality of such intercepts and the admissibility of any evidence derived there from is a matter to be decided upon by at the trial (or potentially at the confirmation hearing)⁴⁴ after a full examination of the relevant circumstances. Even if the evidence were illegally obtained, which is disputed, the trial court nevertheless retains discretion to admit it, subject to the provisions of Article 69(7). It would therefore be futile to embark upon a detailed investigation of the provenance of this evidence for the purposes of an application for interim release, since it is respectfully submitted that it would be entirely inappropriate for the Chamber, during such a limited application, to pre-empt the findings of the Trial Chamber and the exercise of the latter's discretion.

⁴² *Prosecutor v. Jean-Pierre Bemba Gombo*, 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 OA](#) at paragraph 39.

⁴³ As per the First Request for Disclosure.

⁴⁴ Article 69(4).

Conclusion

37. Accordingly, the Prosecution respectfully submits that the Request ought to be refused.



Luis Moreno-Ocampo,

Prosecutor

Dated this 5th day of January 2011

At The Hague, The Netherlands