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PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Single Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. Callixte MBARUSHIMANA

Public Document

**Prosecution's observations pursuant to the order of the Single Judge of 17
February 2011**

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I. Introduction

1. This submission responds to three issues raised by the defence at a Status Conference on 14 February 2011.
2. The Prosecution has disclosed all the information in its possession or under its control which falls within the ambit of this Chamber's Decision on the Defence Request for Disclosure¹ ("Decision"). Neither the French intercepts nor the telephone log information fall within the ambit of the Decision. The renewed request of the Defence for the release of the full materials excerpted in Annexes 5 and 6 of the Prosecution's application for a warrant of arrest ("Application") reiterates issues on which the Pre-Trial Chamber has already ruled in its Decision. It held that the Defence has already been granted access to documents² that are essential for the purposes of applying for interim release.³ The Defence, which chose not to seek leave to appeal, presents no reason for the Chamber to reconsider that decision.

II. Statement of facts

3. On 11 October 2010 Callixte MBARUSHIMANA ("the Suspect") was arrested in Paris.
4. On 14 December 2010 the Suspect filed the Defence Request for Disclosure⁴ ("the Defence Request"). The Prosecution responded on 5 January 2011.⁵
5. On 25 January 2011 the Suspect was surrendered to the Court and he made his initial appearance on 28 January.

¹ Decision on the Defence Request for Disclosure, ICC-04/01-01/10-47, 27 January 2011.

² In this case, the annexes to the Application.

³ ICC-04/01-01/10-47, para. 10.

⁴ Defence Request for Disclosure, ICC-04/01-01/10-29, 14 December 2010.

⁵ Prosecution Response to the "Defence Request for Disclosure", ICC-01/04-01/10-31, 5 January 2011.

6. On 27 January 2011 the Chamber delivered its Decision on the Defence Request for Disclosure ("Decision") in which it partially granted the Defence request.⁶ Pertinently, it directed the Prosecution to produce *"information and documents which relate to the "intercept conversations" referred to by the Defence in paragraph 4 of the Request and which are essential for the preparation of an application challenging the legality of the intercept communications which form part of the material supporting the Prosecutor's application for the warrant of arrest"*.⁷
7. On 2 February 2011, the Prosecution delivered two disclosure packages to the Defence. The first package⁸ contained all the German-intercepted conversations (and associated files) which the Decision directed the Prosecution to produce; a log provided by French authorities of calls to and from the Suspect's telephone (without the substance of the conversations themselves) cited in the Application to show the Suspect's connection with FDLR commanders; and other material referred to in the Application. The second package included the balance of the intercepted communications and associated files received from the German authorities that were not referred to in the Application (and thus not included in the first package or subject to the Court's order).⁹ Both packages were delivered under cover of a letter¹⁰ which set out the information requested in paragraph 4 of the Defence Request, to the extent that this information was in the Prosecution's possession or under its control.
8. At a Status Conference on 14 February the Defence raised issues about disclosure. The Chamber directed the Prosecution to submit observations.

⁶ See ICC-04/01-01/10-47.

⁷ Ibid, para. (1) a.

⁸ Pre-Trial INCR Package 1 [2 February 2011]. The list of disclosures in that package is attached as Annex A.

⁹ Pre-Trial Rule 77 Package 1 [2 February 2011]. Due to the length of this document the Prosecution has not annexed it to this filing.

¹⁰ See **Annex B**.

III. Submissions

9. The Prosecution disputes the Defence allegations at the Status Conference that the Prosecution failed to comply with the 27 January Decision. The Chamber clearly delimited the material which the Prosecution was obliged to disclose¹¹ and the Prosecution thereafter disclosed everything in its possession that fell within the Court's Decision.
10. The complaint now focuses primarily on the Prosecution's purported failure to disclose information regarding intercepted communications. As noted in paragraph 6, above, the Prosecution was only ordered to disclose "*information and documents which relate to the "intercept conversations" referred to by the Defence in paragraph 4 of the Request and which are essential for the preparation of an application challenging the legality of the intercept communications **which form part of the material supporting the Prosecutor's application for the warrant of arrest***". (Emphasis added). The Chamber rejected the defence request for compelled disclosure of other materials.
11. In compliance with the Chamber's orders, the information and evidence disclosed was limited to the German intercepted communications. Additionally, the log of telephone calls to and from a telephone in Paris, France, listed in the Suspect's name was disclosed as part of the material relied upon in the Application. The Prosecution did not refer to recordings or transcripts of conversations intercepted by French authorities in the Application; indeed, it did not have them at the time. Therefore the substance of any French intercepts were not "part of the material supporting the Prosecutor's application for the warrant of arrest".

¹¹ ICC-04/01-01/10-47, paras, (1) a. and b.

Disclosure of information relating to the intercepted communications

12. The Prosecution has disclosed all information requested in paragraph 4 of the Defence Request relating to the German intercepted communications, insofar as such information is in its possession or under its control. The covering letter clearly indicated what requested information was not in our possession or control.¹²

The French intercepted communications

13. As pointed out above, the Prosecution did not rely on the content of any French-intercepted communications in the Application. Hence, they do not fall within the scope of the Decision. The Prosecution is currently reviewing the French intercepts that it received after the Application was made and intends to disclose them promptly following that review, together with such requested information, as is in our possession or control.

14. The Prosecution anticipates that it will receive further material from the German and French authorities that may bear on the lawfulness of the interceptions and the substance of the intercepted calls. The Prosecution will disclose to the Defence the relevant information it receives from those authorities, but obviously can do so only after the Prosecution receives it.

15. The telephone log information referred to by the Defence consists of an historical record of calls (but not the content of those conversations¹³) made between November 2008 and November 2009, to and from a telephone number associated with the Suspect. French authorities gave the log to the Prosecution, which cited the log in the Application to establish the **fact** of communications but not their **content**. French authorities only began

¹² See **Annex B**

¹³ Hence these are not “intercepted communications”, nor did these records relate to any intercepted communications.

intercepting the conversations themselves in 2010. The Prosecution disclosed the log to the Defence as part of the material referred to in the Application.¹⁴

16. The Defence requests additional information regarding the log, in order apparently to argue that the French authorities acted unlawfully when it tracked the Suspect's telephone usage. It also seeks additional information regarding the processes by which the French and German intercepts were initiated and carried out, in order apparently to argue that the evidence was obtained in violation of domestic law and therefore should be excluded in this Court. The Prosecution does not have that information. If and when it receives information regarding the domestic operations it will disclose that to the Defence. In the meantime, the Suspect himself can make his own request, or seek the Chamber's assistance, to obtain the information from the relevant national authorities.¹⁵

Annexes 5 and 6 to the Application

17. The Defence asserts that it requires the full materials referred to in Annexes 5 and 6 attached to the Application in order to effectively challenge the lawfulness of the Suspect's detention.¹⁶ There are two dispositive answers to this complaint.
18. Firstly, the Prosecution has given the Defence everything that the Chamber received in the Application. As regards Annex 5, the "full materials" referred to were disclosed to the Defence on 2 February, including the original voice recordings of the conversations. The Defence accordingly is able to verify the translations and transcriptions of the intercepted conversations, should it wish to dispute the accuracy thereof. As regards Annex 6, the Defence has everything that was provided to the Chamber and upon which the Chamber issued the warrant. Transcripts of the witness statements will be disclosed in

¹⁴ See Annex A, Item 57.

¹⁵ See Art 57(3)(b), read with Art 87(1)(a).

¹⁶ See ICC-01/04-01/10-T-2-ENG, page 22 line 20 to page 23 line 7.

due course as part of the disclosure process and in compliance with decisions issued by the Pre-Trial and Trial Chambers defining the modalities and timing of disclosure.

19. Secondly, the Chamber has already ruled in its 27 January Decision on this issue. When it ruled that the Defence was entitled to the disclosure of documents “essential for the purposes of applying for interim release”, it found that the Defence has already been granted access to such documents.¹⁷ Thus, it implicitly denied the Defence request for disclosure of any additional materials on the grounds that that they are not essential for the purpose of applying for interim release.¹⁸ If the Defence was unhappy with this ruling, it ought to have applied for leave to appeal. At a minimum, if the Defence seeks reconsideration of the prior ruling, it should indicate new facts, new legal points, or a compelling argument that would require the Chamber to revisit its decision.¹⁹ In this instance, the Defence has neither appealed nor made a new or specific argument justifying its request that the Chamber reconsider and expand its disclosure order.

20. Nor is there any clear error in the original Decision. The Appeals Chamber has ruled that the Defence does not have an unqualified right to full disclosure for the purposes of an interim release application; rather, the nature and timing of the disclosure must take into account the context in which the Court operates.²⁰

21. The Prosecution submits that it is impossible, both as a general rule and in this particular instance, to provide the Defence with full disclosure before the

¹⁷ ICC-04/01-01/10-47, para. 10.

¹⁸ ICC-04/01-01/10-47, para (3) of the order, which dismisses the Defence Request in “all other respects”.

¹⁹ See *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution’s Urgent Request for the Variation of the Time-Limit to Disclose the Identity of the Intermediary 143 or alternatively to Stay Proceedings Pending further Consultations with the VWU”, ICC-01/04-01/06-2582, 8 October 2010, para. 1: “Orders of the Chambers are binding and should be treated as such by all parties and participants unless and until they are suspended, reversed or amended by the Appeals Chamber or their legal effects are otherwise modified by an appropriate decision of a relevant Chamber.”

²⁰ *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-323, 16 December 2008, para. 33.

Suspect makes his first appearance or first interim release application. Disclosure must be undertaken in a manner that protects the security of the evidence and investigation. Accordingly, the Appeals Chamber has drawn the balance to require that, at this early stage, the Prosecution need only disclose information and documents which are “essential” for an interim release application.²¹ The detained person may bring an interim release application prior to full disclosure without prejudicing his right to apply again after full disclosure has occurred.²²

IV. Conclusion

22. The Prosecution accordingly submits that the issues raised by the Defence at the Status Conference are devoid of merit and that it has not made out any case for the relief sought.



Luis Moreno-Ocampo
Prosecutor

Dated this 24th day of February 2011

At The Hague, The Netherlands

²¹ ICC-01/05-01/08-323, 16 December 2008, para. 32.

²² Ibid., para. 39.