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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
with confidential annex A, *ex parte*, Defence and Prosecution only

Defence Response to the Prosecution's Request for Leave to Appeal Decision ICC-01/-04-01/10-87

Source: **Defence for Mr. Callixte Mbarushimana**

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

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The Defence for Mr. Callixte Mbarushimana hereby responds to the "*Prosecution's Application for Leave to Appeal the Decision on Issues relating to Disclosure*" ("the Prosecution Application").[1]

Submission

1. On 30 March 2011, Pre-Trial Chamber I rendered its "*Decision on Issues relating to Disclosure*" ("the Impugned Decision").[2]

2. The Prosecution Application identifies two issues arising out of the Impugned Decision which purportedly require the immediate intervention of the Appeals Chamber:

(i) Whether the Prosecution should be obliged to formulate a concise summary and explanation of the relevance of all items disclosed under Article 67(2) of the Rome Statute ("the Statute") and Rule 77 of the Rules of Procedure and Evidence ("Rules") ("the First Issue"), and;

(ii) Whether, for the purpose of a confirmation hearing, the Defence is entitled to inspect "any and all" material falling within the scope of Article 67(2) and Rule 77 ("the Second Issue").

3. The Defence will hereinafter examine whether the issues identified in the Prosecution Application meet the requirements for an interlocutory appeal under Article 82(1)(d) of the Statute.

[1] ICC-01/04-01/10-93.
[2] ICC-01/04-01/10-87.

Whether the identified issues arise out of the Impugned Decision

4. While the Defence is prepared to concede that the First Issue, as articulated in the Prosecution Application, arises out of the Impugned Decision, it disputes that this is the case with respect to the Second Issue. The Defence submits that the formulation of the Second Issue, in fact, mischaracterises the various rulings contained in the Impugned Decision.

5. At footnote 7 to the Prosecution Application, four sources are cited in support of the assertion that the Impugned Decision requires the disclosure of "any and all" potentially exculpatory information for the purpose of the confirmation hearing. The first of these sources[3] makes no observation as to the scope of potentially exculpatory or materially beneficial information which ought to be disclosed in advance of the confirmation hearing. The second source[4] makes the general (and indisputable) comment that the Prosecution ought to ensure the disclosure of "any and all" evidence as soon as practicable without mentioning any specific time-frame for such. The third source,[5] contrary to the Prosecution Application, does not provide for the disclosure of "any or all" potentially exculpatory information. Finally, the fourth source,[6] while indeed mandating the inspection of "any"[7] materially beneficial information, is to be read in conjunction with another ruling in the Impugned Decision which permits the Prosecution to request that materials protected under Articles 54(3)(e), 73 and 93 of the Statute be withheld from the Defence and that protective measures, such as redactions, be applied.[8] The fourth cited source does not, therefore, provide support for the assertion that the Impugned Decision obliges the Prosecution to disclose "all" materially beneficial or potentially exculpatory evidence in advance of the confirmation hearing.

[3] Paragraph 2 of the Impugned Decision.
[4] Paragraph 20 of the Impugned Decision.
[5] Page 15 of the Impugned Decision.
[6] Page 16 of the Impugned Decision – first paragraph.
[7] "any" and not "any and all" [emphasis added].
[8] Page 17 of the Impugned Decision – first and second paragraphs.

6. The Defence, further, submits that the Prosecution Application both misconstrues the so-called "bulk rule" and, without statutory foundation, assumes that the Prosecutor's duty to disclose exculpatory material is a staggered process relative to the time-frame for the holding of a confirmation hearing.[9]

7. The "bulk rule" was originally conceived in the *Lubanga* case as a mechanism for ensuring an equitable balance, on the one hand, between the Prosecution's duty to protect witnesses and its statutory power to continue investigations up to and after the confirmation hearing and, on the other hand, the Defence's right to promptly receive materially beneficial or exculpatory information. For better or worse, the "bulk rule" acquired additional significance in the *Katanga & Ngudjolo* case when it essentially became a "life-belt" for the Office of the Prosecutor floundering, as it did, in the overwhelming swamp of privileged yet potentially exculpatory information that it had purportedly acquired with the promise of Article 54(3)(e) confidentiality. The "bulk rule" should not, however, be understood as granting the Prosecution an indulgence to effect only partial disclosure and, certainly, not as a means for withholding essential exculpatory or beneficial evidence which does not require the application of protective measures. Nor should the "bulk rule" be understood as permitting deviation from the following dicta of the ICC Appeals Chamber: "[t]he overriding principle is that full disclosure should be

[9] *c.f.* Ambos, K. and Miller, D; 'Structure and Function of the Confirmation Procedure before the ICC from a Comparative Perspective', International Criminal Law Review 7 (2007), 335–360 at page 343: "The Prosecutor is obliged to disclose all "other materials which are potentially exculpatory or otherwise material to Defence preparations", even if he does not intend to present them at the confirmation hearing". *c.f.*, also, Brady, H; 'Disclosure of Evidence', The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence (Roy Lee ed., 2001) who, observing that whereas there is no need for the Prosecutor to present or inform the person of all of its incriminating evidence at the pre-confirmation stage, nevertheless notes that the "Prosecutor's obligation to disclose *exculpatory* evidence is in a different category" (page 407 fn 16).

made. It must always be borne in mind that the authorisation of non-disclosure of information is the exception to this general rule".[10]

8. In light of the aforementioned, the Defence submits that the Second Issue does not reveal criteria for disclosure which markedly depart from the practice applied, to date, by all Pre-Trial Chambers of the International Criminal Court. The Second Issue does not, therefore, arise out of the Impugned Decision and should be dismissed for this reason alone.

Whether the identified issues affect the fair conduct of the proceedings

9. The Defence contends that there is nothing in either of the two issues raised by the Prosecution which is liable to impact on the fairness of the proceedings. Indeed, were the appeal attempted by the Prosecution to succeed, the net result would be to render the proceedings wholly unfair to the Defence. It should not be forgotten that, in stark contrast to the Prosecution's cohort of lawyers, investigators and interns, the Defence is, at present, unfairly and inequitably, forced to analyse the massive corpus of intercept materials (the majority of which are in Kinyarwanda) with a combined manpower of one counsel (whose "legally-aided" presence in The Hague is subject to "mission" approval by the Registry) and one legal assistant. Having requested this information and, thereafter, eagerly seized it from the French and German law enforcement agencies, the Prosecution is thus far better placed to explain its relevance.[11]

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[10] ICC-01/04-01/07-475; "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorization to Redact Witness Statements"", 13 May 2008, at paragraph 70.

[11] *c.f.* *Prosecutor v. Karemera*, (ICTR), Decision On Interlocutory Appeal Regarding The Role Of The Prosecutor's Electronic Disclosure Suite In Discharging Disclosure Obligations, 30 June 2006, where the ICTR Appeals Chamber cautioned against the use electronic databases to 'bury' or hide relevant and exculpatory materials under thousands of irrelevant documents.

10. The Prosecution Application alleges that the Impugned Decision is unfair because it imposes "highly burdensome duties which have no basis in the Court's documents" and will force it "to divert time and resources to the task of preparing summaries and explanations for the Defence".[12] Such an argument, however, ignores the fact that at the International Criminal Court, as distinct from other international criminal tribunals, the Prosecution has a clearly defined and positive duty to identify information which could be useful for the Defence based on its understanding of the case.[13] Moreover, the Trial Chamber in the Katanga & Ngudjolo case expressly rejected the argument, as formulated above, that the imposition of "additional administrative burdens" on the Prosecution is unfair:

> "*As regards the second aspect, that the impugned order imposes an additional administrative burden, which is unfair on the Prosecution and has no basis in the Statute or the Rules, the Chamber is of the view that this cannot be construed as an appealable issue. Without wishing to minimise the additional work that the production of the Table of Incriminating Evidence entails, the Chamber considers that workload, which is a consequence of the Chamber's normal exercise of its judicial powers and responsibilities under article 64 of the Statute, rule 134 of the Rules and regulation 54 of the Regulations, cannot be the legal basis for granting leave to appeal. The appropriate procedural avenue for raising such issues is by applying for a variation of time limit, as indeed the Prosecution has had occasion to do.*"[14]

11. The Defence stresses the overwhelming importance of paragraph 17 of the Impugned Decision as a critical safeguard to the fairness of the proceedings. After noting that virtually the entire collection of German intercepts had been disclosed pursuant to Rule 77 and, accordingly, deemed

[12] Prosecution Application at paragraph 15.
[13] Article 54(1)(a) of the Rome Statute. *c.f.*, also, ICC-01/04-01/06-1433; Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008 at paragraph 36.
[14] ICC-01/04-01/07-1088; Decision on the "Prosecution's Application for Leave to Appeal the 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol'" and the "Prosecution's Second Application for Extension of Time Limit Pursuant to Regulation 35 to Submit a Table of Incriminating Evidence and related material in compliance with Trial Chamber II 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol'".

relevant, Counsel for Mr. Mbarushimana queried, more than two months ago, how the vitally delicate legal task of distinguishing between materially beneficial and potentially exculpatory information had been executed by the staff of the Office of the Prosecutor which, to the best of Counsel's knowledge, is not exactly brimming with those conversant in Kinyarwanda.[15] Instead of receiving the expected answer – namely that that the Prosecution erred on the side of caution lest it declare irrelevant something that it had yet to understand – Counsel was enigmatically informed that "the Prosecution will disclose or re-disclose all potentially exculpatory evidence in due course, including any material it has disclosed as Rule 77 to date".[16] It is still not clear to the Defence whether such "re-disclosure" was destined to occur before or after the confirmation hearing.

Whether the identified issues affect the expeditiousness of the proceedings

12. Under this heading, the Prosecution reveals the true essence of its complaint. The problem lies not in the fact that the Prosecution has been obliged to provide a concise summary or explanation of the relevance of its own evidence but rather that it has to accomplish such a task in a relatively short time-frame. Be that as it may, the fault lies entirely at the Prosecution's own doorstep in so far as it demanded the arrest of Mr. Mbarushimana (and continues to insist on his detention) before properly assimilating the materials it had indiscriminately gathered and before ascertaining the potentially exculpatory content thereof.[17] The Prosecution's grievance rings all the more hollow in light of the fact that it has already spent more than two years investigating the situation in the Kivus.[18] With its elite investigators, adroit in-house diplomats and state-of-the-art case analysis software, the Prosecution

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[15] **Annex A**.
[16] Email from Ms. Julieta Solano to Counsel for Mr. Mbarushimana on 10 February 2011 at 11:54.
[17] The criminal process is, of course, designed to ensure that the truth is established and time frames should not, as a rule, impact on such a task.
[18] ICC-OTP-20081104-PR369.

should be presumed to have conducted a focussed investigation which would now allow it to provide a prompt explanation of the relevance of seized exhibits.

13. In an effort, perhaps, to disguise its own anxiety, the Prosecution alleges that it is "virtually certain" that a delay in the proceedings will be occasioned should the Defence be dissatisfied with the Prosecution's summaries and, as a result, "initiate litigation".[19] This argument is tendentiously hypothetical. By presenting Counsel's email as a demand for an "elaborate"[20] (and, by implication, unreasonable) précis of materially beneficial evidence, the Prosecution presumes that Counsel expects more than is required by the Impugned Decision. It goes without saying that should the Prosecution faithfully comply with the learned Pre-Trial Chamber's requirements, then there will be absolutely no need for further litigation.

14. In the Defence's opinion, the Prosecution Application, if granted, far from rendering the proceedings more expeditious is liable to render them more dilatory. The learned Pre-Trial Chamber specifically declared that the rationale underlying the *Abu-Garda* disclosure system[21] adopted by the Impugned Decision was to "further improve the current system in order to facilitate the Defence's assessment if the potentially exculpatory evidence disclosed or subject to inspection".[22] Nor did it escape the learned Pre-Trial Chamber's attention that the Prosecution had even acknowledged that the *Abu-Garda* disclosure system - which it now challenges - was deemed "fair and efficient"

[19] Prosecution Application at paragraph 24.
[20] Prosecution Application at paragraph 2.
[21] ICC-02/05-02/09-35.
[22] Impugned Decision at paragraph 11.

[emphasis added].[23] In this regard, it is worth noting the principle evoked in the Lubanga case:

> *''S'agissant des critères applicables aux appels interlocutoires, il n'a pas été établi que l'autorisation d'interjeter appel devrait être accordée pour accélérer la procédure. L'ordre en question a en partie pour objectif de veiller à ce que le procès se déroule avec le moins de retards possible grâce à la communication à l'avance de certaines informations essentielles, de manière à ce que le travail préparatoire puisse se faire sans demandes d'ajournement. L'ordre en question aura l'effet contraire de celui qu'on lui impute, accroître et non amoindrir la rapidité de la procédure, en particulier compte tenu de la nature générale des informations demandées qui ne devraient pas nécessiter beaucoup de temps de préparation.''*[24]

Whether the identified issues would ''significantly" affect the proceedings

15. Under Article 82(1)(d), it is not sufficient just to argue that an identified issue will adversely affect the fairness and expeditiousness of the proceedings. There is a need, also, to show that the envisaged adverse effect will be significant. The Prosecution Application fails to demonstrate the significant nature of the harm it foresees and, in the Defence's opinion, this failing is not accidental. If the Prosecution truly believed that the disclosure system adopted in the Impugned Decision was so significantly unfair, then it would have appealed the *Abu-Garda* decision which formulated it. The simple fact of the matter is that leave was not sought to appeal the *Abu-Garda* decision and, what is more, Counsel for the Prosecution went on the record, as mentioned above, stating that it was both "fair and efficient"! Indeed, the fact that leave was not sought to appeal the *Abu-Garda* decision speaks volumes as to the sincerity of the Prosecution's current observation that the Impugned Decision, by imposing "different standards pertaining to the scope of the Prosecution's disclosure and

[23] *ibid*.
[24] ICC-01/04-01/06-1313; Decision on the Defence request for leave to appeal the "Decision on disclosure by the Defence", 8 May 2008.

inspection duties prior to the confirmation hearing, is a troubling development".[25]

Whether immediate resolution of the issues will "materially advance" the proceedings

16. The Prosecution Application argues that the "immediate" need to resolve the issues at stake is satisfied by reference to differing practices among the various Pre-Trial Chambers at the International Criminal Court and the duty to obtain legal certainty. Such an argument, however, ignores the well established principle that the rationale underpinning Article 82(1)(d) of the Statute is to pre-empt the repercussion of erroneous decisions on the fairness of the proceedings or the outcome of the trial.[26] In other words, the issues identified for appeal ought, primarily, to be relevant to the proceedings at hand and not to other future proceedings. In this respect, the learned Pre-Trial Chamber is referred to the case against Joseph Kony et al:

> *"However, the Chamber wishes to note that most of the arguments put forward by the Prosecutor in support of this requirement relate to the impact of an immediate resolution of the issue at stake on other, future proceedings, instead of addressing specifically the proceedings at stake.*
>
> *The Chamber is aware that the Trial Chambers of the ad hoc Tribunals have in some instances interpreted the reference to the impact of the issue on which appeal is sought as encompassing not only the specific proceedings or trial during which the issue arose, but also other proceedings or trials being held or to be held in the future. However, it should be noted that such reference is usually made in addition to and not in replacement of the necessary reference to an existing impact on the current proceedings. The Chamber already highlighted that the rule previously in force in the ad hoc Tribunals allowed leave to be granted on the mere basis that the issue was of general relevance to "international law". The difference between that previous rule and the provision now appearing in both the ICC Statute and in the current version of the rules of the ad hoc Tribunals consists of the need to show a specific link between*

[25] Prosecution Application at paragraph 37.
[26] ICC-02/05-70 at page 3.

> *the immediate resolution of the issue at stake and the impact on the current proceedings. In the opinion of the Chamber, the potential impact on future proceedings may at most be invoked as an additional argument in support of the alleged significant impact on the current proceedings, which remains an essential condition to be met for the purpose of the leave to appeal.*
>
> *The Chamber is also not convinced that the fact that an issue is new and has never been the subject of the scrutiny by the Appeals Chamber necessarily constitutes a ground for admitting interlocutory appeals. The Court will face novel issues on an ongoing basis throughout its first proceedings. To claim that the novelty of an issue as such warrants the grant of the leave to appeal pursuant to article 82, paragraph 1 (d), of the Statute would essentially deprive its provisions of any meaningful content. The argument must therefore be dismissed.* ''[27]

Relief Sought

17. In light of all the aforementioned, the learned Pre-Trial Chamber is respectfully requested to reject the Prosecution Application.

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Sunday, April 10, 2011

[27] ICC-02/04-01/05-20-US-Exp as reclassified by virtue of ICC-02/04-01/05-52, 19 August 2005, at paragraph 53.