



Original: **English**

No.: ICC-01/04-01/10
Date: **9 September 2011**

PRE-TRIAL CHAMBER I

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v . Callixte MBARUSHIMANA***

**Public document
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Prosecution and Defence Only Annex**

Prosecution's Response to the "Third Defence Request for Interim Release"

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. After the Defence made an eleventh hour complaint about having received in disclosure only the full audiotapes of certain witness interviews conducted in Kinyarwanda and English, but not additional Kinyarwanda transcripts, the Pre-Trial Chamber directed the Prosecution to provide French summaries of the witness interviews. To allow time to prepare the summaries, the Chamber ordered a delay to the confirmation hearing. Thereafter, the Defence filed a “Third Defence Request for interim release”¹ (“Third Request”), seeking release of the suspect on the ground that he has now been “detained for an unreasonable period prior to [confirmation] due to inexcusable delay by the Prosecutor.”²
2. The Prosecution opposes the request.³ In the Prosecution’s view, neither predicate in the Statute has been established here; the Suspect has not been detained for an unreasonable period and there has been no inexcusable delay by the Prosecution. The particular delay about which the Defence complains, a 30 day continuance of the confirmation hearing, was ordered by the Chamber to protect the rights of the Suspect, and did not render the period of detention unreasonable. Nor was there inexcusable delay by the Prosecution. Its failure to provide Kinyarwanda transcripts, that would have totalled more than 2,000 pages, was caused by the inability to find sufficient competent transcribers. The Chamber did not attribute wrongful motivation (i.e., inexcusable delay) to the Prosecution; the only party found to have engaged in inexcusable delay was the Defence itself.

¹ ICC-01/04-01/10-383

² Article 60(4).

³ On 30 August, the legal representative of 93 victims filed the « Observations de victimes autorisées à participer à la procédure sur la liberté provisoire de M. Callixte Mbarushimana », ICC-01/04-01/10-391. On 2 September the Office of Public Counsel for Victims (“OPCV”) filed its « Observations du Bureau du conseil public pour les victimes en tant que représentant légal des demandeurs sur les Deuxième et Troisième requêtes de la Défense de mise en liberté datées des 20 juillet et 19 août 2011 ». Those submissions also oppose the request. ICC-01/04-01/10-393.

II. Background

3. On 12 May 2011, the Single Judge issued the "Decision on the 'Prosecution's request for the assessment of the English proficiency of Callixte Mbarushimana'".⁴ The Judge found that the Prosecution was obligated to disclose, by 1 June 2011, French translations of all witness statements not been previously disclosed in Kinyarwanda.⁵ On 1 June the Prosecution disclosed, among other items of evidence, Kinyarwanda and English audiotapes of witness interviews, along with 2681 pages of English transcripts.⁶ On 28 June, the Prosecution informed the Defence that it considered further disclosure of the Kinyarwanda transcripts to be unnecessary, in light of the disclosure of the full Kinyarwanda audio tapes.⁷
4. Almost six weeks later, on 7 August 2011, 9 days prior to the scheduled start of the confirmation hearing and beyond the time within which the Prosecution could add additional evidence (including transcripts of evidence previously provided), the Defence applied to the Chamber for, *inter alia*, an order barring the Prosecution's use of the witness statements for which audio tapes but neither French nor Kinyarwanda transcripts were provided.⁸ The Defence argued that the 1 June disclosure of English/Kinyarwanda audiotapes of interviews accompanied by English but not Kinyarwanda transcripts was inadequate and that the absence of Kinyarwanda transcripts had "severely prejudiced the ability of counsel and his client to prepare the Defence case".⁹ The Prosecution responded on 11 August,

⁴ ICC-01/04-01/10-145

⁵ ICC-01/04-01/10-145, p. 8

⁶ ICC-01/04-01/10-378, para. 13

⁷ ICC-01/04-01/10-378, para. 9. The Prosecution notes that the Defence appears to contest the accuracy of that fact. The Defence states that "as of 28 June" it did not know that the Prosecution was not going to provide Kinyarwanda transcripts. However, as of 17:03 on 28 June, the Defence was clearly informed that in the Prosecution's view, its disclosure complied with the requirement to disclose this evidence in a language that the Suspect fully understands. Since the Defence omitted relevant parts of the email from its quotation in ICC-01/04-01/10-145, the entire email is annexed hereto.

⁸ ICC-01/04-01/10-343.

⁹ ICC-01/04-01/10-343,, para. 9.

pointing out it had provided the recordings on 1 June and that they were the best evidence of the interviews and were available in Kinyarwanda, a language that the Suspect fully understands.¹⁰ On 12 August the Chamber ordered the Defence to supply certain further information,¹¹ which it did on 15 August.¹² The Prosecution filed its observations in response on 16 August.¹³

5. On 16 August, the Pre-Trial Chamber ruled that the Prosecution should have provided transcripts or summaries of the audiotapes in a language that the Suspect understands. The Chamber also accepted the Defence's assertion that it was prejudiced by the Prosecution's failure to provide transcripts. It noted, however, the lateness of the litigation: "this issue was not brought to the Chamber's attention in sufficient time for it to be handled properly before the presently scheduled confirmation hearing date of 17 August 2011".¹⁴
6. The Chamber also laid that delay in raising the issue squarely on the Defence, noting that the Prosecution had reason to believe that not transcribing the audiotapes was acceptable. It explained:

"[T]he Requests were filed more than two months after the said transcripts and audio recordings were disclosed to the Defence and more than a month after it became abundantly clear that the Prosecutor was unlikely to provide these documents in the requested format and language, sufficiently in advance of the hearing, to enable the suspect to properly examine them and adequately prepare his defence. The prolonged lack of reaction on the part of the Defence to what it perceived as a breach of its procedural rights could be legitimately regarded by the Prosecutor as a tacit approval of the manner in which the disclosure was effected."¹⁵

¹⁰ ICC-01/04-01/10-353.

¹¹ ICC-01/04-01/10-359.

¹² ICC-01/04-01/10-368.

¹³ ICC-01/04-01/10-373.

¹⁴ ICC-01/04-01/10-378, para. 15

¹⁵ ICC-01/04-01/10-378, para. 17

7. The Chamber determined that fairness required that the Suspect have access to the materials sufficiently in advance of the confirmation hearing. Accordingly, the Chamber directed the Prosecution to provide written transcripts in Kinyarwanda or summaries in French, and delayed the confirmation for a month to enable the Suspect to have sufficient time to review the written statements or summaries.¹⁶
8. On 19 August 2011 the Defence filed its Third request.¹⁷ It argued that the present delay to the start of the confirmation hearing was caused by the Prosecution's failure to comply with the Language Proficiency Decision by not transcribing interviews in Kinyarwanda or French; that the failure rendered the Prosecution responsible for "inexcusable delay", as defined by Article 60(4) of the Statute; and that the Prosecution's inexcusable delay warrants the release of Mr. Mbarushimana.¹⁸
9. On 30 August, the Prosecution complied with the Chamber's order and submitted an amended list of evidence removing references to precluded evidence, disclosed to the Defence two recently transcribed interviews in Kinyarwanda (and English) and French summaries of eight witness statements.¹⁹
10. On 5 September, the Defence filed the "Defence Response to the Prosecution's filing of an amended list of evidence in compliance with decision ICC-01/04-01/10-378".²⁰ It now complains that the English transcripts, which it earlier had deemed inadequate for purposes of disclosure, "have been removed from the Prosecution list of evidence and replaced by short summaries". These summaries, it argues, "are not [...] a fair substitute for the fully transcribed interviews which

¹⁶ ICC-01/04-01/10-378, para. 24.

¹⁷ ICC-01/04-01/10-383.

¹⁸ ICC-01/04-01/10-383, para. 10, 11.

¹⁹ ICC-01/04-01/10-392.

²⁰ ICC-01/04-01/10-398.

comprise the most accurate record of the witnesses testimony”.²¹ The Defence seeks to include all of the deleted transcripts into the Defence list of evidence.²²

III. Submissions

11. The Prosecution submits that the Third Request should be denied on multiple grounds. First, the Suspect has not been detained for an unreasonable period of time. Second, postponement of the hearing for a month is hardly unreasonable, particularly since the Chamber entered the decision to benefit the Suspect, based on his complaint. If it was unreasonable and did amount to the sort of delay that could justify release from custody. However, the postponement was not the fault of the Prosecution. The Chamber correctly attributed the delay to the Defence, characterising as “inexcusable” the Defence failure to raise the issue at a time when the Chamber could have been remedied it without continuing the hearing.

The postponement does not constitute an unreasonable delay

12. Under Article 60(4) the Pre-Trial Chamber has an independent obligation to ensure that the judicial process is not protracted.²³ It provides that “[t]he Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.” As the Appeals Chamber held in the *Lubanga* case, there is, “in addition [to the requirement of periodic review of detention], an obligation upon the Pre-Trial Chamber to review the overall period of the detention of the suspect under article

²¹ ICC-01/04-01/10-398, para 6.

²² ICC-01/04-01/10-398, para 8.

²³ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on Interim Release Appeal, Separate Opinion of Judge Pikis, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 19 Sep. Op.

60(4)".²⁴ Thus, even if a detainee is appropriately detained because he is a flight risk or would commit further crimes or obstruct the case (see Article 60(2)), the Pre-Trial Chamber shall consider releasing the person if the period of detention has been, overall, unreasonable, and that unreasonable length of detention is "due to inexcusable delay by the Prosecutor."²⁵

13. The threshold issue here is whether the period of detention thus far has been "unreasonable". When assessing the reasonableness of the length of pre-trial detention the Chamber must consider both overall length and the particular circumstances of each case.²⁶
14. Given the typical length of proceedings before this Court – as well as before other international tribunals – detention of the Suspect for approximately 11 months is not unreasonable by any definition. And it must also be noted that the Pre-Trial Chamber has diligently advanced and expedited these proceedings, including by swiftly resolving the hundreds of applications and issues with which it has "been bombarded, by the parties, mainly the Defence".²⁷ Even with the 30-day postponement of the confirmation hearing, the Defence cannot legitimately argue that the full period of his detention is unreasonable under any objective standard.
15. Not only is the period of detention presumptively reasonable (as the Chamber found, the postponement was limited, "for a reasonable time"),²⁸ but the purpose served by the delay ordered here – protection of the fair trial rights of the suspect, in response to his complaint – is also unquestionably a reasonable one.

²⁴ *Prosecutor v. Thomas. Lubanga Dyilo*, Judgment on Interim Release Appeal, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 98, emphasis added. See also *Prosecutor v. Thomas. Lubanga Dyilo*, Decision on Admissibility of Defence Appeal against Confirmation Decision under Article 82(1)(b), ICC-01/04-01/06-926 OA8, 13 June 2007, para. 13.

²⁵ *Prosecutor v. Thomas. Lubanga Dyilo*, Judgment on Interim Release Appeal, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 120.

²⁶ See *Prosecutor v. Thomas. Lubanga Dyilo*, Judgment on Interim Release Appeal, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 122.

²⁷ ICC-01/04-01/10-378, para. 15.

²⁸ ICC-01/04-01/10-378, para. 24.

16. Confronted with a vigorously argued objection that it would be unfair for the Defence to be confronted at the confirmation hearing with statements that had not been transcribed into Kinyarwanda or French, the Chamber reluctantly ordered the brief postponement of the hearing to ameliorate the claimed unfairness. It found that delaying the commencement of the confirmation proceedings was “the best course of action to ensure a fair and expeditious conduct of the proceedings”.²⁹ In other words, the Defence was granted the delay of the confirmation proceeding as a remedy to protect its rights.

17. In other words, the Defence cannot now properly contend that the month’s postponement was unreasonable, or that it accordingly renders unreasonable the period of detention.

Even if the Suspect could be considered to have been detained for an unreasonable period, the instant delay is not attributable to the Prosecution

18. The crux of the Defence complaint is that the Suspect’s detention has been extended for a month because the Prosecution inexcusably failed to provide French or Kinyarwanda transcripts or summaries of witness interviews. The effort to lay the blame on the Prosecution for inexcusable delay is factually unsupported and is contrary to findings already made by this Chamber.

19. At the outset, the Prosecution notes that the Chamber concluded that the Prosecution “had an obligation in this case to create Kinyarwanda or French transcripts of all Interviews currently transcribed in English only”.³⁰ While not contesting this conclusion, the Prosecution notes that the duty was not spelled out expressly in any order or in the core texts of the Court. Absent any express requirement to provide written transcripts in addition to or instead of audiotaped statements, it thus was not manifestly unreasonable for the Prosecution to

²⁹ ICC-01/04-01/10-378, para. 24.

³⁰ ICC-01/04-01/10-378, para. 22.

conclude that the Kinyarwanda audiotapes met the literal requirements of the Language Proficiency Decision, the Statute, and the Rules. The Chamber did not disagree. It did not identify any specific violation, but found only that the Prosecution's actions did not "respect[] the rationale behind the Language Proficiency Decision and rule 76(3) of the Rules."³¹

20. Nor, in any event, was the Prosecution's failure attributed to negligence or deliberate misconduct on its part. The Prosecution did not make a tactical choice to disadvantage the Defence. The non-disclosure stemmed from the inability to find competent Kinyarwanda transcribers to transcribe the many hours of recorded interviews. Far from "seeking to minimize the expenditure of time and effort involved in complying with the Single Judge's order" as alleged by the Defence,³² the Prosecution did what it could, expending significant time and effort. Lacking in-house capacity, it tried to outsource the transcription of the Kinyarwanda portions of the interview at considerable expense, which efforts unfortunately proved unsuccessful.³³ The Prosecution disclosed the Kinyarwanda audiotapes, without transcription, for the sole reason that it was unable to obtain quality transcripts.

21. Since the Prosecution's failure was excusable – in that it was unable to find competent transcribers to prepare the transcriptions – the Prosecution cannot be held responsible for creating a need for "inexcusable" delay.

22. In contrast, the Defence deliberately contributed to the delayed consideration of the claim. As the Chamber repeatedly noted, the Defence did not make a timely complaint about the unavailability of the evidence.³⁴ Indeed, based on the tardiness of its application, the Chamber reasonably could have concluded that

³¹ ICC-01/04-01/10-378, para. 20. The Chamber also interpreted the Prosecution's agreement to provide written transcripts "in due course" to be a concession that it understood that transcripts were necessary for the Suspect to assist in the preparation of his defence.

³² ICC-01/04-01/10-343, para. 11.

³³ As explained in ICC-01/04-01/10-353, para. 13 and ICC-01/04-01/10-103, para. 5. See ICC-01/04-01/10-378, footnote 25.

³⁴ ICC-01/04-01/10-378, paras. 15-19.

the Defence had waived its complaint. However, it chose not to penalize the Suspect. Rather, attempting to protect the rights of the Suspect, it required that written summaries be quickly prepared in time for the Suspect to benefit from it in collaborating with counsel in the preparation of his defence.

23. In so doing, the Chamber noted that the Defence “prolonged lack of reaction” to the Prosecution’s non-production could have been “legitimately regarded as tacit approval” of the disclosure of the Kinyarwanda audiotapes of the witness interviews.³⁵ The Chamber thus accepted that the Prosecution was never alerted that the Defence found that mode of disclosure to be inadequate.
24. It also found that the Defence failure to raise the issue limited the Chamber’s ability to act. As it explained, “Further, the Defence’s failure to promptly inform the Chamber of its disclosure concerns made it impossible for the Chamber to intervene in a way that enabled the Prosecutor to disclose the required transcripts and/or translations in adequate time before the confirmation hearing.”³⁶
25. In short, the Chamber correctly attributed to the Defence the need for the delay, in its failure to object to the Prosecution or to alert the Chamber was the proximate cause of the late resolution of the issue. Indeed, the Chamber went further and characterised the *Defence’s* delay as “inexcusable”.
26. That characterisation is clearly supported by the record. The Defence failure to make a timely objection was not, however, inexplicable. To the contrary, it is clear that the Defence made a strategic decision to not raise the issue in a timely fashion. It complained at the eleventh hour in order to argue that the Prosecution had passed the 15 day deadline for offering additional evidence, including transcripts or summaries of existing evidence. In its 7 August application, the Defence did not request an order directing the Prosecution to provide the Suspect with immediate access to written statements or summaries in his language;

³⁵ ICC-01/04-01/10-378, para. 17.

³⁶ ICC-01/04-01/10-378, para. 18

rather, it sought to preclude the Prosecution from using the witnesses' statements as incriminating evidence at the confirmation hearing.³⁷

27. The Defence, moreover, concedes that it made a tactical choice to not raise the issue at a time when the error could have been remedied and to complain when only remedy available – without continuing the confirmation hearing – would have been exclusion of the Prosecution's evidence. In its Third Request, the Defence stated:

*"[T]he timing of the Defence request should be seen in the context of the best interest of Mr. Mbarushimana; interests which do not [...] require the Defence to assist the Prosecution to comply with court orders so that it is in a better position 'to present its case as intended'"*³⁸

28. Seen in its proper context, the Defence assertion that the prolongation of detention by a month is due to prosecutorial misconduct is fallacious. This attribution of blame, first on the Chamber for detention "for an unreasonable period prior to trial" and then on the Prosecution for causing that unreasonable detention by its "inexcusable delay", ignores entirely the Defence's singular contribution. Had the Defence raised its objection at the appropriate time, the complaint could have been addressed without necessitating a postponement of the confirmation hearing.³⁹

29. Therefore, in the Prosecution's submission, the Defence's deliberate decision to delay its objection, alternatively its failure to exercise due diligence, discredits its contention that the prolonged detention is, in the language of Article 60(4), "due to inexcusable delay by the Prosecutor" and requires the Suspect's interim release.. To the contrary, the Court's jurisprudence,⁴⁰ the jurisprudence of other

³⁷ As the Chamber found, the requested remedy "would substantially disadvantage the Prosecutor in that he would be unable to replace the excluded evidence with other evidence, or otherwise remedy the grievance of the Defence". ICC-01/04-01/10-378, para 19,

³⁸ ICC-01/04-01/10-383, para. 3.

³⁹ ICC-01/04-01/10-378, para. 18.

⁴⁰ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 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

international tribunals⁴¹ and international human rights case law, as argued by the OPCV,⁴² support the conclusion that release is unwarranted.

IV. Conclusion

30. For the foregoing reasons, the Prosecution requests that the Third Request be denied.



Luis Moreno-Ocampo
Prosecutor

Dated this 9th day of September 2011

At The Hague, The Netherlands

Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", ICC-01/04-01/07-2259 OA, para. 54

⁴¹ ICC-01/04-01/10-393, para. 21, footnote 30.

⁴² ICC-01/04-01/10-393, para. 21.