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No.: **ICC-01/04-01/10**

Date: **25/01/2011**

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

**Supplementary Information in support of the
Defence Challenge to the Validity of the Arrest Warrant**

Source: Defence for Mr. Callixte Mbarushimana

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

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Mr. Nicholas Kaufman

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Procedural Background

1. On 10 January 2011, the Defence submitted its Challenge to the Validity of the Arrest Warrant ("the Defence Challenge").¹
2. On 10 January 2011, Judge Sanji Mmasenono Monageng ordered the Prosecution to file a response to the Defence Challenge by 17 January 2011.²
3. On 18 January 2011, a confidential version of the Prosecution's response to the Defence Challenge was notified to the Court.³

Submission

4. Since filing the Defence Challenge, Counsel for Callixte MBARUSHIMANA has had the opportunity to study additional information communicated to him by German Defence Counsel. This additional information is disclosed herewith in the knowledge that herein undersigned Counsel, as an officer of the Court, is duty bound to apprise the learned Pre-Trial Chamber of all information necessary for it to render a correct decision.
5. While confirming the Defence argument that he was the subject of an active investigation (*Ermittlungsverfahren*), the additional information provides conclusive proof that Callixte MBARUSHIMANA was an official suspect (*Beschuldigte*) in the same case file as Ignace MURWANASHYAKA and Straton MUSONI.⁴

¹ ICC-01/04-01/10-32.

² ICC-01/04-01/10-33.

³ ICC-01/04-01/10-35-Conf.

⁴ **Annex 1** comprises an order "*Beschluss*" to German authorities to search the Email accounts of Ignace MURWANASHYAKA and Straton MUSONI. This order did not and could not oblige the German enforcement agencies to act against Callixte MBARUSHIMANA for the simple reason that, at the relevant time, he was resident in France. Notwithstanding, at p.5 of the *Beschluss*, Callixte MBARUSHIMANA is referred to as a *Beschuldigte* and, thus, equally the subject of the investigation. **Annex 2** comprises correspondence in which, *inter alia*, German Counsel was denied access to the Callixte MBARUSHIMANA domestic case file because the investigation was still active: "*Ein Abschluss der Ermittlungen ist in den Akten nicht vermerkt*"

6. Under German law, the term "*Beschuldigte*" is accorded an individual who is the subject of active investigative proceedings formally initiated by a competent law enforcement agency; in the present case, the Federal Prosecuting Authority (*Generalbundesanwalt*) acting, presumably, on the basis of information supplied by the Federal Investigating Agency (*Bundeskriminalamt* or BKA).

7. Neither Article 17(1)(a) of the Rome Statute nor German law distinguishes between an "active" investigation or any other form of investigation - whether it be dormant or "subjectively relinquished". Furthermore, the fact that Callixte MBARUSHIMANA was not formally interviewed by the German authorities is irrelevant since, according to German law, a *Beschuldigte* may be interviewed at any time up until the conclusion of investigations.⁵ In this respect, it will be remembered that the *Ermittlungsverfahren* against Callixte MBARUSHIMANA were active right up until 3 December 2010 when they were prematurely terminated by written notification to German Defence Counsel.

8. If it were to reject the Defence Challenge merely because it does not meet the exact language of Rule 117(3) of the Rules of Procedure and Evidence, the Court would, effectively, be endorsing prosecutorial disregard for due process and setting a highly dangerous precedent for the issuance of future arrest warrants on the basis of mistaken factual assertions. By way of comparison, the Defence suggests that it would be wholly inconceivable for the Court to issue an arrest warrant if it had been misinformed as to its temporal or geographical jurisdiction to entertain a case. Likewise, it ought to be inconceivable for the Court to endorse an arrest warrant issued when it had been misled as to its competence to deal with a case under the principle of complementarity.

⁵ Section 163a of the German Code of Criminal Procedure (Strafprozessordnung): "*Der Beschuldigte ist spätestens vor dem Abschluß der Ermittlungen zu vernehmen, es sei denn, daß das Verfahren zur Einstellung führt. In einfachen Sachen genügt es, daß ihm Gelegenheit gegeben wird, sich schriftlich zu äußern*".

9. The Defence notes that the Prosecution, apart from conveying oral representations of the German authorities, has failed to provide any documentary evidence whatsoever in support of its assertions as to the status of the former domestic proceedings conducted against Callixte MBARUSHIMANA. Indeed, the Defence doubts whether the ICC OTP has even been granted access to the German case file against Callixte MBARUSHIMANA given that a hearing on German Defence Counsel's application for disclosure of the same case file has been fixed for some time after 21 January 2011.⁶

10. In conclusion, having been denied the opportunity to exercise its *proprio motu* power to examine admissibility at the appropriate time, the Pre-Trial Chamber is, once again, requested to render the arrest warrant which it issued at that time void.



Nicholas Kaufman

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Tuesday, January 25, 2011

⁶ Annex 3 comprising a scheduling order of the Bundesgerichtshof.