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

Date: **20/07/2011**

**PRE-TRIAL CHAMBER I**

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

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

**Public Document  
URGENT**

**Second Defence request for interim release**

**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

Mr. Anton Steynberg, Senior Trial Lawyer

**Counsel for the Defence**

Mr. Nicholas Kaufman

Ms. Yaël Vias-Gvirsman

**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**

1. The Defence hereby requests that the learned Pre-Trial Chamber order Mr. Mbarushimana's interim release after finding that the case against him was inadmissible at the time it ordered his arrest.

2. On 10 January 2011, the Defence challenged the validity of the warrant for Mr. Mbarushimana's arrest while Mr. Mbarushimana was still in custody in France.<sup>1</sup>

3. On 28 January 2011, the Pre-Trial Chamber rejected the Defence challenge to the validity of the arrest warrant.<sup>2</sup>

4. Despite receiving the Prosecution response to the aforementioned challenge on 17 January 2011,<sup>3</sup> and notwithstanding Rule 117(3) of the Rules of Procedure and Evidence obligating the Chamber to act "*without delay*", a decision was rendered 11 days later - after Mr. Mbarushimana had been surrendered to the Court.

5. On 1 July 2011, the Pre-Trial Chamber rejected the Defence request for a permanent stay of proceedings.<sup>4</sup>

6. On 19 July 2011, the Pre-Trial Chamber rejected the Defence request for leave to appeal the Decision rejecting the permanent stay of proceedings.<sup>5</sup>

7. In rejecting all of the aforementioned Defence requests, the Pre-Trial Chamber was aware that the Defence was expressing a grievance concerning the admissibility of the case at the time the Pre-Trial Chamber had issued its arrest warrant. Indeed, the Defence drew the Pre-Trial Chamber's particular attention to many items of evidence which proved a contemporaneous German investigation.<sup>6</sup>

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<sup>1</sup> ICC-01/04-01/10-32.

<sup>2</sup> ICC-01/04-01/10-50.

<sup>3</sup> ICC-01/04-01/10-35.

<sup>4</sup> ICC-01/04-01/10-264.

<sup>5</sup> ICC-01/04-01/10-288.

<sup>6</sup> Including more than ten witness statements taken by the German authorities in the context of their investigations against Mr. Mbarushimana disclosed to the Defence on **1 June 2011** !

8. In rejecting all the aforementioned Defence requests, the Pre-Trial Chamber, furthermore, declined to rule whether or not there was an ongoing investigation in Germany at the time the Prosecution sought the warrant for Mr. Mbarushimana's arrest. The challenge to the validity of the arrest warrant was rejected on procedural grounds (namely that admissibility related arguments did not fall within the scope of Rule 117(3)) and the request for a stay of proceedings was dismissed using hypothetical reasoning (namely that "even if the Defence were able to prove its allegations of mischaracterization" it would not reach the threshold necessary for proving an abuse of process). At no stage, did the learned Pre-Trial Chamber entertain the substantial body of evidence emanating from the German investigation with which it had been provided by the Defence.

9. The Defence does not disguise the fact that the present application is designed to persuade the learned Pre-Trial Chamber to reconsider legitimate Defence submissions on their merits. The present application, furthermore, takes into account the Pre-Trial Chamber's observation that the substance of the Defence request for a stay of proceedings, while a legitimate topic for litigation, ought to be presented in the more "appropriate procedural scenario" of an admissibility challenge pursuant to Article 19 of the Rome Statute.

10. Since Appeals Chamber precedent elsewhere would determine that the clearly evinced German intention to relinquish its investigation on 3 December 2010 would render Mr. Mbarushimana's case admissible, the learned Pre-Trial Chamber's observations concerning the more "appropriate procedural scenario" were, with respect, rhetorical. The Pre-Trial Chamber had, effectively, highlighted recourse to a procedure for obtaining relief of which Mr. Mbarushimana could not possibly avail himself either before the closing of the German investigation (because he was denied disclosure)<sup>7</sup> or after the closing of the German investigation (because of Appeals Chamber precedent).

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<sup>7</sup> The Defence stresses that it needed maximum disclosure to make a successful admissibility challenge (something which proved correct in the circumstances given the existence of German investigative

11. In any event, the present request is submitted independently of the request for leave to appeal the refusal to stay the proceedings since it adopts the substance of the alternative and, so it was decided, more "appropriate procedural scenario" mentioned by the Pre-Trial Chamber in its decision rejecting the permanent stay of proceedings. The current request is also *sui generis* in that it presents the admissibility issue as a changed circumstance.

12. In this respect, the Defence reiterates that the full extent of the admissibility-related information in the possession of the Prosecutor only became apparent to it following disclosure - several months after the expiry of the time limit for filing an appeal against the Pre-Trial Chamber's decision on the challenge to the validity of the arrest warrant and the decision on the first Defence request for interim release.<sup>8</sup>

13. For this additional reason, the Pre-Trial Chamber is now requested, in the interests of justice, to consider the admissibility of the case at the time it issued the arrest warrant so that Mr. Mbarushimana is not denied the natural expectation of any person tried before a court of law - to have his well reasoned and substantiated arguments considered on their merits.

14. The admissibility of the case at the time the arrest warrant was issued thus remains a relevant factor when assessing Mr. Mbarushimana's continued detention. The Defence submits that if the Pre-Trial Chamber had entertained the matter on its merits, it would have ruled that it had been supplied with "mischaracterised" information concerning the admissibility of the case at the time it was considering whether to issue an arrest warrant. This in turn, would have obliged the Pre-Trial Chamber to consider the breach of Mr. Mbarushimana's rights and whether it ought to have ordered his surrender to the International Criminal Court by means other than detention.

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material directly implicating and exonerating Mr. Mbarushimana before his arrest). **Article 19(4) of the Rome Statute expressly stipulates that a suspect may only challenge admissibility once.**

<sup>8</sup> ICC-01/04-01/10-163.

15. The Defence accepts the Pre-Trial Chamber's finding that not all breaches of a suspect's basic human rights will attain the threshold required for demonstrating an abuse of process leading to a stay of proceedings. Nevertheless, breaches of procedural rights falling short of the aforementioned threshold may still justify compensating a suspect for illegal deprivation of liberty either by way of conditional release or financial compensation.<sup>9</sup>

16. In the circumstances, the learned Pre-Trial Chamber is respectfully requested to examine all the evidence flowing from the German investigations with which it has been provided to date<sup>10</sup> and to make a determination as to the admissibility of the case at the time that it issued the warrant for Mr. Mbarushimana's arrest.

17. Should the Pre-Trial Chamber find that there was an ongoing investigation as envisaged by Article 17(1)(a) of the Rome Statute prior to 3 December 2010, the Defence requests that this finding be considered a changed circumstance meriting reconsideration of Mr. Mbarushimana's detention. For reasons outlined in paragraph 12 above (i.e.; the late full disclosure of the German investigative materials), the Defence could not plead this changed circumstance previously. In the circumstances, the Pre-Trial Chamber is requested to make a specific finding that Mr. Mbarushimana's arrest was obtained in breach of internationally recognized human rights; namely on the basis of "mischaracterised" information and in contravention of the Appeals Chamber's binding precedent which stipulates the need to assess the existence of "*uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of proprio motu review*".<sup>11</sup>

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<sup>9</sup> Article 85(1) of the Rome Statute.

<sup>10</sup> Including the German witness statements disclosed on 1 June 2011 which the Prosecution has agreed may be submitted for the consideration of the Pre-Trial Chamber.

<sup>11</sup> ICC-01/04-169 at para. 52.

### Urgency

18. The present application concerns the breach of Mr. Mbarushimana's basic human rights in their most fundamental sense; namely, the liberty of the individual. Should the Pre-Trial Chamber rule in favor of the Defence, it could order Mr. Mbarushimana's conditional release. In the circumstances, good cause is shown for substantially reducing the time limits afforded for a Prosecution response or for requesting them in the context of a status conference.

### Relief Sought

19. In light of all the aforementioned, the learned Pre-Trial Chamber is respectfully requested:

- (a) To determine the admissibility of the case against Mr. Mbarushimana at the time that it issued the warrant for his arrest;
- (b) To find that the arrest of Mr. Mbarushimana was ordered when the case against him was inadmissible;
- (c) To find that the inadmissibility of the case against Mr. Mbarushimana at the time of his arrest is a changed circumstance under Article 60(3) of the Rome Statute;
- (d) To order Mr. Mbarushimana's interim conditional release on the terms supplied in the first request for interim release or, in the alternative;
- (e) To order that Mr. Mbarushimana be compensated financially for unlawful arrest pursuant to Article 85(1) of the Rome Statute.




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Wednesday, July 20, 2011