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International Criminal Court

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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
URGENT

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
Mr. Anton Steynberg, Senior Trial Lawyer

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

Deputy Registrar
Mr. Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Pre-Trial Chamber I is hereby requested to find that the warrant for the arrest of Mr. Callixte Mbarushimana is void in light of the fact that it was sought and issued at a time when the case against him was plainly inadmissible.

Submission

1. The Defence is mindful of the established precedent of the Appeals Chamber which has ruled that an initial determination of admissibility is not an essential pre-requisite for the issuance of an arrest warrant. Indeed, Article 58 of the Rome Statute which governs the issuance of an arrest warrant does not specifically provide for an obligation to consider admissibility. Nevertheless, in its *Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58*, (*Bosco Ntganda)*, the Appeals Chamber found as follows:

> "*The Appeals Chamber accepts that the Pre-Trial Chamber may in its own motion address admissibility. However, in the Appeals Chamber's view, when deciding on an application for a warrant of arrest in ex-parte Prosecutor only proceedings the Pre-Trial Chamber should exercise its discretion only when it is appropriate in the circumstances of the case, bearing in mind the interests of the suspect. Such circumstances may include instances where a case is based on the established jurisprudence of the Court, uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of proprio motu review*".[1]

2. In other words, although the Prosecution is not obliged to prove that a case is admissible when applying for an arrest warrant, it is, nevertheless, bound to supply sufficiently accurate information so as to allow the Pre-Trial Chamber to exercise its discretion whether to examine the admissibility of the case before issuing such an arrest warrant:

[1] ICC-01/04-169 at para. 52.

> "*...[t]he Prosecutor is not required to provide the Pre-Trial Chamber with 'the necessary factual information to determine the admissibility of the case' when requesting the issuance of a warrant of arrest. The fact remains that he must provide all decisive information to the Chamber so that it may be in a position to exercise the discretion ascribed to it by the Appeals Chamber in case of well established jurisprudence, uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of proprio motu review.*
>
> *It is in fact only when it has this type of information that the Pre-Trial Chamber is in a position to determine whether one of the circumstances justifying the exercise of its discretion exists. It will then ensure that the Prosecutor has correctly assessed the decisive nature of the information pertaining to admissibility that was available to him."*[2]

3. It will thus be submitted that the obligation to "*provide all decisive information*" - while not a statutory requirement under Article 58 of the Rome Statute - is, nevertheless, a creature of judicial precedent the compliance with which is an essential requirement for ensuring the validity of an arrest warrant. Indeed, had it been known to Pre-Trial Chamber I that a genuine investigation was being conducted against Mr. Mbarushimana at the time that the arrest warrant was sought, it is almost certain that it would have declined to issue such.

4. When applying for the arrest warrant on 20 August 2010, the Prosecution submitted, in a most forthright manner, that the acts imputed to Mr. Mbarushimana were not the subject of an investigation in <u>any</u> State:

> "*Pursuant to the Chamber's finding in the Lubanga case, the jurisprudence of the Court has* […] *held that "it is a condition sine qua non for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court. As shown below, no investigation or prosecution has been undertaken in any State in relation to the conduct which forms the subject of the Prosecutor's application. While there has been some domestic activity in relation to the alleged criminal responsibility of Callixte MBARUSHIMANA in the events which occurred in Rwanda during 1994, such efforts relate to conduct which is irrelevant to the present case.*"[3]

[2] ICC-01/04-01/07-1213 at paras 65 & 66.
[3] ICC-01/04-01/10-11-Red at para. 67.

5. Moreover, in specifically addressing the state of affairs in the Federal Republic of Germany, the Prosecution stated as follows:

> "*The German Federal Public Prosecutor General's office conducted an investigation into crimes committed by the FDLR in North and South Kivu in 2009. As a result of the investigation, MURWANASHYAKA and MUSONI were accused of being responsible for war crimes and crimes against humanity [REDACTED]. Callixte MBARUSHIMANA was considered a potential suspect in the investigation, but the German Federal Public Prosecutor General's office took no measures to question him, to conduct search and seizure operations of his living quarters, or to have him arrested in France and extradited to Germany.*
> *The Federal Public Prosecutor General's office has assisted the Prosecution with its own investigation into the crimes committed in North and South Kivu in 2009 by sharing information and evidence at the OTP's request, consistent with Article 93 of the Statute* [REDACTED]".[4]

6. In summarizing its position, the Prosecution made the following emphatic submission:

> "*... no investigation or prosecution has been or is being undertaken by any national jurisdictions, including those of the DRC, Rwanda, France and Germany, in relation to the person and the conduct which forms the subject of the Prosecutor's application.*"[5]

7. On the basis of these unequivocal assertions, Pre-Trial Chamber I apparently accepted the Prosecution's claims as to the *prima facie* admissibility of the case and ruled as follows:

> "*The Chamber declines, at this stage, to use its discretionary proprio motu power to determine the admissibility of the case against Callixte Mbarushimana as the Prosecutor's Application still remains confidential and ex parte and there is no ostensible cause or self evident factor which impels the Chamber to exercise its discretion pursuant to article 19(1) of the Statute.*"[6]

[4] ICC-01/04-01/10-11-Red at paras. 172 &173.
[5] ICC-01/04-01/10-11-Red at para. 174.
[6] ICC-01/04-01/10-1 at para. 9.

8. The question in the present instance is, therefore, whether Pre-Trial Chamber I was correctly informed as to the true nature of the proceedings in the Federal Republic of Germany such that it was appropriately disposed to exercise its discretion to examine admissibility.

9. The Prosecution does not deny that the German authorities took an interest in Mr. Mbarushimana on account of his alleged involvement with Ignace Murwanashyaka and Straton Musoni – both of whom were being investigated in Germany for crimes committed in the Kivus in 2009. In its arrest warrant application, however, the Prosecution stated that Mr. Mbarushimana was only a "potential" suspect[7] and thus, by inference, not an actual suspect. As if to clarify things, the Prosecution added that the German Federal Public Prosecutor General's office had taken no measures to question Mr. Mbarushimana, to conduct search and seizure operations of his living quarters, or to have him arrested in France and extradited to Germany.

10. The Prosecution's categorization of Mr. Mbarushimana as a "potential" suspect in the German proceedings was artificial, misleading and, it is submitted, designed to persuade the Pre-Trial Chamber that he was not under "investigation" for the purposes of Article 17(1)(a) of the Rome Statute. The failure to perform the procedures outlined by the Prosecution (questioning, search, seizure and arrest) does not indicate that Mr. Mbarushimana was not under investigation. Indeed, and by way of comparison, Mr. Mbarushimana had long been under "investigation" by the OTP before he was arrested and no search or seizure was carried out at his domicile until after the execution of the arrest warrant.

11. Contrary, therefore, to the Prosecution submission, the Defence submits that at the time of the Prosecution's application for an arrest warrant, Mr.

[7] ICC-01/04-01/10-11-RED at para. 172.

Mbarushimana was being jointly investigated with Ignace Murwanashyaka and Straton Musoni for the commission of war crimes and crimes against humanity. Indeed, the evidence on which the Prosecution specifically relies at paragraph 158 and footnotes 193 & 194 of its arrest warrant application, in order to prove Article 25(3)(d) "common purpose" liability, can only have been the product of a genuine German investigation which encompassed Mr. Mbarushimana.

12. The Pre-Trial Chamber is reminded that the Prosecution has refused, to date, to disclose to the Defence information from the criminal files held by the German authorities. In these circumstances, the Defence was obliged to petition Counsel acting for Mr. Mbarushimana in Germany with a request that he seek information pertaining to the fate of the German criminal proceedings.

13. Among the items delivered to the herein undersigned Counsel was a letter[8] from the *Generalbundesanwalt* based in Karlsruhe informing German Counsel that the preliminary proceedings (*Ermittlungsverfahren*) against Mr. Mbarushimana were being discontinued - specifically in order to effect committal to the International Criminal Court. The statutory basis cited for this decision was, *inter alia*, Sections 153c and 153f of the German Code of Criminal Procedure:[9]

Section 153c

[Non-Prosecution of Offences Committed Abroad]

> *(1) The public prosecution office may dispense with prosecuting criminal offences:*
>
> *1. which have been committed outside the territorial scope of this statute, or which an inciter or an accessory before the fact to an act committed outside the territorial scope of this statute has committed within the territorial scope thereof;*

[8] Annex 1. This letter was not supplied to the Pre-Trial Chamber.
[9] http://bundesrecht.juris.de/englisch_stpo/englisch_stpo.html#StPO_000P153f.

2. which a foreigner committed in Germany on a foreign ship or aircraft;
3. if in the cases referred to in sections 129 and 129a, in each case also in conjunction with section 129b subsection (1) of the Criminal Code, the group does not, or does not mainly, exist in Germany and the participatory acts committed in Germany are of lesser importance or are limited to mere membership.

Offences for which there is criminal liability pursuant to the Code of Crimes against International Law shall be subject to Section 153f.

(2) The public prosecution office may dispense with prosecuting a criminal offence if a sentence for the offence has already been executed against the accused abroad, and the sentence which is to be expected in Germany would be negligible after taking the foreign sentence into account or if the accused has already been acquitted abroad by a final judgment in respect of the offence.

(3) The public prosecution office may also dispense with prosecuting criminal offences committed within, but through an act committed outside, the territorial scope of this statute, if the conduct of proceedings poses the risk of serious detriment to the Federal Republic of Germany or if other public interests of overriding importance present an obstacle to prosecution.

(4) If charges have already been preferred, the public prosecution office may, in the cases referred to in subsection (1), numbers 1 and 2, and in subsection (3), withdraw the charges at any stage of the proceedings and terminate the proceedings if the conduct of proceedings poses the risk of serious detriment to the Federal Republic of Germany, or if other public interests of overriding importance present an obstacle to prosecution.

(5) If criminal offences of the nature designated under section 74a subsection (1), numbers 2 to 6, and under section 120 subsection (1), numbers 2 to 7, of the Courts Constitution Act are the subject of the proceedings, such powers shall be vested in the Federal Public Prosecutor General

Section 153f

[Dispensing with Prosecution of Criminal Offences under the Code of Crimes against International Law]

(1) The public prosecution office may dispense with prosecuting a criminal offence for which there is criminal liability pursuant to sections 6 to 14 of the Code of Crimes against International Law in the cases referred to in Section 153c subsection (1), numbers 1 and 2, if the accused is not resident in Germany and is not expected to so reside. If, in the cases referred to in Section 153c subsection (1), number 1, the accused is a German, however, this shall only apply if the offence is being prosecuted before an international court of justice or by a state on whose territory the offence was committed or a citizen of which was injured by the offence.

> *(2) The public prosecution office may dispense with prosecuting an offence for which there is criminal liability pursuant to sections 6 to 14 of the Code of Crimes against International Law in the cases referred to in Section 153c subsection (1), numbers 1 and 2, in particular if:*
>
> *1. no German is suspected of having committed the crime;*
> *2. the offence was not committed against a German;*
> *3. no suspect is, or is expected to be, resident in Germany;*
> *4. the offence is being prosecuted by an international court of justice or by a country on whose territory the offence was committed, a citizen of which is either suspected of the offence, or suffered injury as a result of the offence.*
>
> *The same shall apply if a foreigner who is accused of a criminal offence that was committed abroad is resident in Germany but the requirements of the first sentence, numbers 2 and 4, are met and transfer to an international court of justice or extradition to the prosecuting state is admissible and intended.*
>
> *(3) If, in the cases referred to in subsections (1) or (2) public charges have already been preferred, the public prosecution office may, at any stage of the proceedings, withdraw the charges and terminate the proceedings*

14. Firstly, it will be noted that the decision to terminate the German proceedings was taken on 3 December 2010 which indicates that they were active not only at the time of the issuance of the arrest warrant but, also, at the very time that herein undersigned Counsel was requesting that the OTP disclose admissibility related information.[10] Secondly, the German criminal proceedings can only have covered the same conduct envisaged in the OTP investigation otherwise, by relinquishing its control over the proceedings, the German authorities would have been acting in contravention of its own criminal code. Thirdly, the statutory provisions cited above are to be found in a section of the German Code of Criminal Procedure which deals with the means of terminating criminal proceedings before charges are preferred:

> "*German criminal procedure combines principles of the inquisitorial process with those of an accusatorial approach. The prosecuting authorities (state attorneys and police) and the courts are independent of each other. By and large, the courts are not involved in* ***the investigating procedure (Ermittlungsverfahren)****. The state attorney's office has to bring charges before a court may consider the case. Once the charges have been brought, however, certain inquisitorial elements enter into the*

[10] c.f. Defence Request for Disclosure; ICC-01/04-01/10-29.

> *picture. The judge now takes control of the proceedings. The court first decides whether the case will actually go to trial (intermediate procedure – Zwischenverfahren). At the trial itself, the judge is in charge of the proceedings as well."*[11]

15. *Ermittlungsverfahren*, therefore, while not part of the court supervised investigation are nevertheless investigative proceedings in which the German prosecuting authorities and police may supervise the gathering of such evidence which will put them in a position to decide whether or not to prefer charges. This, for all intents and purposes, is an investigation for the purposes of Article 17(1)(a) of the Rome Statute.

16. In summary, by failing to supply "*decisive information*" concerning the nature of the contemporaneous and genuine investigative proceedings being conducted against Mr. Mbarushimana in the Federal Republic of Germany, the Prosecution prevented the Pre-Trial Chamber from ruling on admissibility in such circumstances where its case would, undoubtedly, have been deemed inadmissible.

Urgency

17. This application is filed as urgent since the import of the Defence submission is that Mr. Mbarushimana's current detention - being predicated, as it is, on a defectively obtained arrest warrant - is unlawful and his surrender to the International Criminal Court should be prevented. Should the Prosecution be entitled to respond to this motion within the normal time limits stipulated in Regulation 34(b) of the Regulations of the Court, the above stated purpose of this motion will be frustrated. In addition to the aforementioned, Rule 117(3) stipulates that challenges to the validity of an arrest warrant shall, after the

[11] Reimann, M. & Zekoll, J.; Introduction to German Law, 2005, p.420.

receipt of Prosecution observations, be decided upon "without delay". This provision would be meaningless if the Prosecution were to be entitled to file its response at leisure.

Relief Sought

18. In light of all the aforementioned, the learned Pre-Trial Chamber is requested to receive the Prosecution's response to this filing as soon as possible and, if necessary, at a status conference convened to deal with this issue. Thereafter, the Pre-Trial Chamber will be requested to find that the arrest warrant is void and that Mr. Mbarushimana should be released from detention immediately.

Nicholas Kaufman

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Nicholas Kaufman

Counsel for Callixte Mbarushimana

Done in Jerusalem, Israel

Sunday, January 09, 2011