Cour
Pénale
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Criminal
Court

Original: **English**

No.: **ICC-01/04-01/10**
Date: **08/08/2011**

**THE APPEALS CHAMBER**

**Before:** Judge Anita Ušacka, Presiding Judge
Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Daniel David Ntanda Nsereko

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

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

**Public Document**
**with confidential annex A**

**CORRIGENDUM**

**Document in support of the Defence Appeal**
**against Decision: ICC-01/04-01/10-319**

**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. Yael 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

**Deputy Registrar**

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

Introduction

1. Pursuant to Article 82(1)(b) of the Rome Statute, Rule 154 of the Rules of Procedure and Evidence and Regulation 64(2) of the Regulations of the Court, the Defence for Mr. Callixte Mbarushimana hereby submits a document in support of its appeal against Pre-Trial Chamber I's *Decision on the second Defence request for interim release* rendered on 28 July 2011 ("the Impugned Decision").[1]

2. In the operative part of the Impugned Decision, the learned Single Judge of Pre-Trial Chamber I declined to exercise his discretion to entertain the second Defence request for interim release ruling that it sought "*reconsideration of matters that [had] been previously decided upon*".[2]

3. The Defence raises **one** ground of appeal alone; namely that the learned Single Judge erred in finding that the Defence Request sought reconsideration of matters that had been previously decided.

4. The Defence will request the Appeals Chamber to reverse the Impugned Decision and to remit the matter to Pre-Trial Chamber I for reconsideration of the second request for interim release. In so doing, the Appeals Chamber is requested to oblige the Pre-Trial Chamber to perform a substantive review of the evidence emanating from pre-surrender proceedings in Germany which would tend to show that the warrant for Mr. Mbarushimana's arrest was unlawful since it was issued when the case was clearly inadmissible. The Appeals Chamber will also be requested to remit the matter to Pre-Trial Chamber I for the purpose of determining whether Mr. Mbarushimana should be entitled to compensation for unlawful arrest.

[1] ICC-01/04-01/10-319.
[2] *ibid* at page 7.

Submission

5. In its second request for interim release, the Defence reiterated its submission that the Pre-Trial Chamber's warrant for Mr. Mbarushimana's arrest was unlawful given that the case against Mr. Mbarushimana was clearly inadmissible at the time it was issued. On the several occasions that it raised this submission, the Defence referred to copious materials showing that Mr. Mbarushimana was the subject of an active German investigation at the time that the Prosecution requested a warrant for his arrest. The German proceedings with respect to Mr. Mbarushimana were not "a naming without more" and "a mere opening of a case file"[3] but a proper full-blown investigation with several witnesses being interrogated concerning Mr. Mbarushimana's alleged role in the FDLR and, on at least one occasion, being asked if there was any objection to their statement being disclosed to the ICC/OTP. This was an investigation for the purposes of Article 17(1)(a) of the Rome Statute and according to Appeals Chamber precedent[4] would have rendered the case clearly inadmissible or, at the very least, would have comprised ostensible cause impelling the exercise of Pre-Trial Chamber I's *proprio motu* review pursuant to Article 19(1)of the Rome Statute.

6. As it was, such *proprio motu* review was never conducted because the Prosecution failed, so it is submitted, to supply the Pre-Trial Chamber with the relevant documentation which it had in its possession (a substantial proportion of which it had received from the German authorities on 4 May 2010 and 26 July 2010) attesting to the full extent of the German proceedings at the time it sought the arrest warrant. The true nature of the German investigation only became apparent to the Defence upon receiving disclosure of the witness statements of a number of German witnesses at the beginning of June 2011.[5]

[3] As argued by the Prosecution.
[4] Precedent which demands the consideration of admissibility "when it is appropriate in the circumstances **bearing in mind the interests of the suspect**" [emphasis added – NK]; *c.f.;* Judgement in ICC-01/04 of 13 July 2006.
[5] Confidential Annex A.

This was well after the expiry of the time limit for filing an appeal against the Decision of the Pre-Trial Chamber on the Defence challenge to the validity of the arrest warrant[6] and well after the German authorities had evinced a clear intention not to prosecute Mr. Mbarushimana by closing his case file and deferring the matter to the International Criminal Court.[7]

7. Despite being aware, so it is submitted, that the Defence could not have filed an admissibility challenge either before surrender (due to lack of disclosure) or after surrender (because of Appeals Chamber precedent[8]), the Pre-Trial Chamber still refused to consider whether Mr. Mbarushimana's interests had otherwise been harmed by the failure to supply it with admissibility related information to the at the appropriate time. This refusal was felt even more sorely by the Defence in light of the fact that the Prosecution had agreed to permit the Pre-Trial Chamber to review the statements taken from German witnesses before ruling on the Defence request for a permanent stay of proceedings.[9]

8. The second defence request for interim release, nevertheless, sought to persuade the Pre-Trial Chamber to view the prior inadmissibility of the case as a changed circumstance for the purpose of Article 60(3) of the Rome Statute - specifically because the true nature of the German proceedings was only disclosed by the Prosecution on 1 June 2011 – two whole months after the filing of the first request for interim release.[10] Changed circumstances need not be confined to events post-dating a first-instance decision on detention but, as a

[6] ICC-01/04-01/10-32 which raised the same admissibility issue.
[7] 3 December 2010.
[8] Appeals Chamber precedent has clearly established that a case will be admissible once a national authority has specifically relinquished its investigation or prosecution of a matter in favour of the ICC.
[9] ICC-01/04-01/10-220 at paragraph 3.
[10] ICC-01/04-01/10-86 filed on 30 March 2011.

matter of justice, should also include circumstances not known previously to the Defence through no fault of its own.[11]

9. The Pre-Trial Chamber, however, declined to examine the belatedly disclosed admissibility information and to consider whether it warranted a modification of its previous ruling on detention.[12] Instead, the Single Judge declared that the Defence had merely sought reconsideration of an issue on which the Pre-Trial Chamber had previously ruled. This however was not the case. At no stage did the Pre-Trial Chamber consider and rule on whether the supply of incorrect and misleading admissibility information could lead to an annulment of an arrest warrant and, subsequently, give rise to a claim for compensation. More particularly, the Pre-Trial Chamber had never substantively ruled on whether there was an ongoing investigation in Germany at the time that the arrest warrant was sought –knowing full well that the Defence had no appropriate forum to raise an admissibility challenge.[13] The challenge to the validity of the arrest warrant was rejected on purely procedural grounds (namely that admissibility related arguments did not fall within the scope of Rule 117(3))[14] and the request for a stay of proceedings[15] 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).[16]

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[11] The Defence reiterates and stresses that it sought appropriate disclosure and despite putting the Prosecution on notice of the substance of its arguments in the Defence challenge to the validity of the arrest warrant did not receive such appropriate disclosure until **after** the filing of the first request for interim release.
[12] ICC-01/04-01/10-163.
[13] *c.f.*; Schabas, W. The International Criminal Court: A Commentary on the Rome Statute [2010] at p. 367; " It [the Appeals Chamber] explained that the problem with allowing the Pre-Trial Chamber to address admissibility when the arrest warrant is being issued, where the accused is absent and the proceedings are ex parte, is the making of a determination that the accused person will have great difficulty challenging subsequently.". In the circumstances, Mr. Mbarushimana has fallen victim to this difficulty and the Pre-Trial Chamber, for one reason or another, has prevented a proper review of the circumstances which induced it to conclude that the case was in fact admissible.
[14] ICC-01/04-01/10-50.
[15] ICC-01/04-01/10-
[16] ICC-01/04-01/10-264.

10. Moreover, the Single Judge singularly neglected even to entertain the alternative Defence request to find that Mr. Mbarushimana was a potential victim of unlawful arrest and, thus, entitled to compensation under article 85 of the Rome Statute. Even if the learned Single Judge could be said to possess a discretion not to entertain such an application for compensation (which he does not), he should, nevertheless, have stated his reasons for refusing to exercise such discretion (something which he did not do).

11. The learned Single Judge cited the rule of finality as grounds for refusing to entertain the second request for interim release. The Defence, however, argues that, in the pursuit of "finality", the Single Judge denied Mr. Mbarushimana the more basic right to have his well-founded arguments heard on their merits. Such a failure, it is most respectfully submitted, constitutes a breach of the principle enunciated in Article 10 of the Universal Declaration of Human Rights; namely an individual's expectation of a fair hearing for the determination of his rights.

Relief Sought

12. In light of all the aforementioned, the learned Appeals Chamber is respectfully requested to reverse the Impugned Decision and to remit the matter to the Pre-Trial Chamber with the conditions set out in paragraph 4 hereinabove.

Nicholas Kaufman

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Monday, August 08, 2011