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Date: **24/05/2011**

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
with confidential annexes 1, 2 & 3

URGENT

Defence request for a permanent stay of proceedings

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

Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Introduction

1. On 10 January 2011, the Defence filed a challenge to the validity of the arrest warrant ("the Defence Challenge") arguing that the Prosecution had misled the Pre-Trial Chamber as to the nature of proceedings conducted against Mr. Mbarushimana in the Federal Republic of Germany at the time that it requested an arrest warrant.[1] The Defence submitted that the arrest warrant was void because the Prosecution had denied the Pre-Trial Chamber vital information[2] which would have led the Court to rule the case against Mr. Mbarushimana inadmissible pursuant to Article 17(1)(a) of the Rome Statute.

2. On 28 January 2011, Pre-Trial Chamber I rejected the Defence Challenge on procedural grounds ruling that it did not meet the criteria enunciated in Rule 117(3) of the Rules of Procedure and Evidence.[3] In the circumstances, Pre-Trial Chamber I declined to rule on the substantive Defence submissions as to the propriety of the Prosecution conduct.

3. The Defence will hereinafter submit that the aforementioned Prosecution conduct constitutes an abuse of process. The fact that the case against Mr. Mbarushimana may now be admissible is irrelevant to the present application. The only issue to be decided is the propriety of the Prosecution conduct at the time it sought the arrest warrant and at the time it denied the Defence any form of disclosure and/or failed to correct the record. The Defence will argue that the willful or grossly negligent supply of misleading information and the subsequent suppression of the correct information or failure to correct the record at the appropriate time indicates that the Prosecution acted in such an unconscionable manner that it ought not to be entrusted with the prosecution of Mr. Mbarushimana. The only remedy in the present

[1] ICC-01/04-01/10-32.
[2] Information which the Pre-Trial Chamber ought to have received pursuant to the precedent established by the ICC Appeals Chamber 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)*, ICC-01/04-169 at paragraph 52.
[3] ICC-01/04-01/10-50.

circumstances is for the Pre-Trial Chamber to order a permanent stay of the current proceedings on the grounds of an abuse of process.

Submission

4. In order to prove an abuse of process requiring a permanent stay, the Defence will show: (i) that the Prosecution presented misleading information to the Court; (ii) that the Prosecution knew that this information was misleading or was grossly negligent as to its misleading content; (iii) that such Prosecution conduct should be seen as so "repugnant" to the administration of justice that the current proceedings should be discontinued, and; (iv) that no other less drastic remedy is appropriate.

The Abuse of Process Doctrine

5. The Defence submits that in so far as it bears the burden of satisfying the Pre-Trial Chamber that the Prosecution has committed an abuse of process it need only "properly substantiate"[4] its factual assertions. Where the burden of proof rests with the Defence – the standard of proof has been recognized as the "balance of probabilities".[5]

6. There is no need for the Defence to produce "*clear and convincing evidence*" as demanded by the Prosecution in the case against *Thomas Lubanga Dyilo*.[6] Accordingly, should the Pre-Trial Chamber be of the opinion that it is more likely than not that the factual elements of the criteria enunciated in paragraph 4 hereinabove are satisfied and no other suitable remedy is available, then it should order the permanent stay of proceedings sought.

7. Based on its interpretation of Appeals Chamber jurisprudence, Trial Chamber I recently provided the following test for the existence of an abuse of process.

> *"The Chamber therefore, in this context, needs to ask the following two questions: **first**, would it be "odious " or "repugnant" to the administration of*

[4] ICC-01/04-01/06-2690-RED2 at paragraph 169.
[5] R. v. Derby Crown Court, ex p. Brooks *per* Ormorod LCJ; 80 Cr. App.R. at 168.
[6] ICC-01/04-01/06-2690-RED2 at paragraph 169.

> *justice to allow the proceedings to continue,* ***or*** [emphasis added – NK] ***second****, have the accused's rights been breached to the extent that a fair trial has been rendered impossible.*"[7]

The two-pronged test cited above is disjunctive and not cumulative. The Defence submission is thus based on the first prong of this test - instances of which may be wide and varied:

> *"No single formulation will readily cover all cases, but there must be something so gravely wrong as to make it unconscionable that a trial should go forward, such as some fundamental disregard for basic human rights or some gross neglect of the elementary principles of fairness."*[8]

(i) The Prosecution presented misleading information to the Court

8. On 20 August 2010, the Office of the Prosecutor applied for an arrest warrant submitting that the acts it imputed to Mr. Mbarushimana were not the subject of an active investigation in any 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."*[9]

9. Specifically concerning matters in 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*

[7] ICC-01/04-01/06-2690-RED2 at paragraph 166.
[8] *R. v. Martin (Alan)* [1998] 2 W.L.R. 1, at 25 *per* Lord Clyde.
[9] ICC-01/04-01/10-11-Red at para. 67

> *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]*".[10]

10. 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."*[11]

11. On the basis of these unequivocal assertions, the learned Pre-Trial Chamber 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."*[12]

12. Far from being a "potential" suspect, however, Mr. Mbarushimana was the concrete subject of an active police/intelligence agency investigation (*Ermittlungsverfahren*) and specifically classified as an actual suspect: (*Beschuldigte*)[13].

[10] *ibid* at paragraphs 172 & 173.
[11] *ibid* at paragraph 174.
[12] ICC-01/04-01/10-1 at paragraph 9.
[13] ICC-01/04-/104-Anx-1 comprising an order - "*Beschluss*" to German authorities to search the Email accounts of Ignace MURWANASHYAKA and Straton MUSONI. This order could not encompass Mr. Mbarushimana for the simple reason that he was, at the time, resident in France. Notwithstanding, at p.5 of the Beschluss, Mr. Mbarushimana is referred to as a *Beschuldigte* and equally the subject of the investigation. Under German law, the term "*Beschuldigte*" is accorded an individual who is the subject of 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).

Mr. Mbarushimana remained an actual target of the same German investigative proceedings (which covered exactly the same conduct as the ICC investigations)[14] until they were terminated on 3 December 2010. *Ermittlungsverfahren*, while not, as a rule, a part of a court supervised investigation are, nevertheless, investigative proceedings in which the German prosecuting authorities and law-enforcement agencies may supervise the gathering of such evidence which will put them in a position to decide whether or not to prefer charges.[15] This, for all intents and purposes, is an investigation for the purposes of Article 17(1)(a) of the Rome Statute.

13. The existence of a German investigation against Mr. Mbarushimana was clearly an uncontested fact. In the circumstances, the OTP was duty bound to inform the Pre-Trial Chamber of this decisive information in order to enable the latter to exercise its discretion as appropriate:

> *"...[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."*[16]

[14] C.f. DRC-OTP-2024-2442 (English) paragraph 1 and DRC-OTP-2024-2437 (German) paragraph 1.
[15] *c.f.*; Reimann, M. & Zekoll, J.; Introduction to German Law, 2005, p.420: "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 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."
[16] ICC-01/04-01/07-1213 at paras 65 & 66.

Whether the OTP's failure so to inform the Pre-Trial Chamber was intentional or the product of willful neglect will be examined hereinafter.

(ii) The Prosecution knew of or was grossly negligent as to the misleading nature of the information supplied to the Pre-Trial Chamber.

14. The Defence is careful to draw a distinction between the two subjective states of mind which may be imputed to the Prosecution at the time it presented the misleading information in support of its application for an arrest warrant. It goes without saying that the wanton supply of false information is tantamount to lying in the face of the Court – something which should attract the strongest censure and undeniably terminate the proceedings. At this stage, however, the Defence will proceed on the basis that the Prosecution was grossly negligent in the way it portrayed the status of the German investigations and, thereafter, knowingly suppressed information which could have been of material benefit to the Defence or failed to correct the Court record.

15. The fact that the decision to terminate the German investigative proceedings was taken on 3 December 2010 clearly indicates that the same proceedings were active, not only at the time of the issuance of the arrest warrant, but also at the very time that the ICC Prosecution, in a letter dated 8 November 2010,[17] was actively refusing to perform any type of disclosure – admissibility related or otherwise. By the time the issue came to be litigated before the Pre-Trial Chamber, the German investigation had been shelved and the OTP was able to assert that there was no duty to effect disclosure safe in the knowledge that there was no "live admissibility issue".[18] While rejecting this Prosecution argument and upholding the Defence's right to admissibility related disclosure, the Court, nevertheless, deferred the implementation of such pending a further decision on the modalities of disclosure.[19] Had the Court been made privy, however, to the actual content of the

[17] *c.f.*; **Confidential Annex 1** (letter from the OTP to Counsel for Mr. Mbarushimana).
[18] ICC-01/04-01/10-31 at paragraphs 2 and 15 to18 inclusive filed on 5 January 2011.
[19] ICC-01/04-01/10-47 at paragraphs 12 to 14 and 19 rendered on 27 January 2011.

communications which had taken place between the OTP and the German authorities at the time it issued its arrest warrant, Mr. Mbarushimana's fate would have been entirely different.

16. On 13 April 2011, well after the Pre-Trial Chamber had taken its decision on the Defence Challenge and pursuant to the judicially imposed deadline for the disclosure of admissibility related material,[20] the Prosecution communicated[21] to the Defence a letter – ERN DRC-OTP-2024-2435 (English trans. DRC-OTP-2024-2440) ("the Letter") which sets out the true nature of the proceedings in Germany. The Letter was addressed to Mr. Pascal Turlan – an ICC Prosecution official charged with handling diplomatic affairs and was sent from the Federal Prosecutor General of Germany ("the Federal Prosecutor"). From the associated metadata provided by the OTP, the document was purportedly received by the Registry of the Court on 28 January 2011 (the very same day that the decision on the Defence Challenge was rendered) and delivered to Mr. Turlan on 31 January 2011. It is inconceivable, however, that Mr. Turlan would have lacked prior knowledge of the very aspect of the case which was pertinent to his job description – jurisdiction, complementarity and cooperation. Indeed, written evidence exists to prove that Mr. Turlan was most certainly aware of the Federal Prosecutor's deliberations on the matter given that the latter had contacted the OTP "*at an early stage in order to discuss the possibility of conducting the initial investigations* (**Ermittlungsverfahren** in the original – NK) *itself or of providing the prosecuting authority of the ICC with assistance*".[22] Should the OTP, nevertheless, maintain that Mr. Turlan was not aware of a complementarity bar prior to the closure of the German investigation, it should, as will be suggested hereinafter, produce him for testimony on the witness stand.[23]

[20] ICC-01/04-01/10-87 at page 14.
[21] Rule 77 Pre-Trial Disclosure Package #5.
[22] DRC-OTP-2024-2443 (English) final paragraph and DRC-OTP-2024-2438 (German) final paragraph.
[23] Defence Counsel's request to produce Mr. Turlan for evidence with respect to jurisdictional issues was summarily refused.

17. In light of the portion of the Letter cited above, it should not be thought that the Defence has shrunk from trying to clarify the nature of the Prosecution's knowledge of the investigative proceedings in Germany. On 14 April 2011 - the day after disclosure of the Letter - Counsel for Mr. Mbarushimana wrote to the Prosecution requesting that all previous communications between the Prosecution and the Federal Prosecutor be disclosed in order to allow "*the Defence to evaluate to what extent the OTP was aware of the status of the investigative proceedings in Germany at the stage that it requested the warrant for Mr. Mbarushimana's arrest*".[24] Four days later, on 18 April 2011, the Prosecution replied to Counsel stating as follows: "*Since the admissibility of your client's case falls to be determined on the basis of the existence of* ***present*** [emphasis in the original] *investigations or prosecutions, the Prosecution considers that the material which you have requested is not material to the preparation of an admissibility challenge*".[25]

18. The terminology employed in the Letter is of crucial importance. The term *Ermittlungsverfahren* is used equally to describe the proceedings active in Germany[26] **and** to describe the proceedings active at the ICC enabling termination of the German proceedings.[27] A potential Prosecution argument, therefore, that the German proceedings were not a proper investigation triggering Article 17(1)(a) of the Rome Statute would be both fallacious and misleading. Indeed sections 153(c) and 153(f) of the German Code of Criminal Procedure are the recognised legal means for terminating a "proper" investigation and not a "potential" investigation.

19. Further support for the substantive nature of the investigative proceedings against Mr. Mbarushimana in Germany may be found in two additional documents – disclosed by the Prosecution on 2 May 2011. Both these documents (DRC-OTP-2022-0627 and DRC-OTP-2022-0629) mention Mr. Mbarushimana by name as being the subject of *Ermittlungsverfahren* and comprise internal memoranda of the investigating

[24] **Confidential Annex 2**.
[25] **Confidential Annex 3**.
[26] DRC-OTP-2024-2443 (English) final paragraph and DRC-OTP-2024-2438 (German) final paragraph.
[27] DRC-OTP-2024-2440 (English) first sentence and DRC-OTP-2024-2435 (German) first sentence.

authority – the *Bundeskriminalamt* – detailing its dealings with the www.fdlr.org website which Mr. Mbarushimana is alleged to have technically maintained.[28] It is also worth noting that these documents have been assigned internal numbering – 14 and 16 respectively. This would suggest that the ICC Prosecution has retained some of the information that it received from the German authorities.

(iii) The Prosecution conduct was so repugnant to the administration of justice that the current proceedings should be discontinued.

20. There can be no doubt that Mr. Mbarushimana's procedural rights have been grievously prejudiced. The ICC Prosecution knew that once the German file against Mr. Mbarushimana was formally closed, an admissibility challenge under Article 17(1)(a) of the Rome Statute would inevitably fail. For this reason, it is submitted, after the ICC Prosecution had misled the Court as to the status of the German investigation, it avoided correcting the Court record and actively denied the Defence admissibility related disclosure until the German investigation had been closed. In a similar vein, the Prosecution persists in refusing to disclose the relevant correspondence passing between it and the Federal Prosecutor.

21. The Defence submits that the behaviour exhibited by the ICC Prosecution, at worst, suggests a willful disregard for the accuracy of facts placed before the Court. At best, it amounts to a manipulation of the Court's process and the conscious deprivation of Mr. Mbarushimana's right to challenge the admissibility of the proceedings against him after the issuance of the arrest warrant yet before the termination of German proceedings on 3 December 2010. In this respect, it is worth noting the dicta of Lord Chief Justice Ormorod in *R. v. Derby Crown Court, ex p. Brooks*:[29]

> "*The power to stop a prosecution arises only when it is an abuse of the process of the court…*

[28] DRC-OTP-2022-0633 (German) at the first paragraph.
[29] 80 Cr. App. R. at 168.

> *It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable… The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution".*

22. Should the Pre-Trial Chamber indeed find that the Prosecution acted as submitted above – misleading the Court and, thereafter, failing to correct its error – (even if such an initial error was the product of gross negligence) - it ought to justifiably conclude that the ICC Prosecution does not balk at the use of unscrupulous means in order to bring Mr. Mbarushimana to justice. In light of such "repugnant" conduct not only would it be offensive to the international community's sense of justice to try Mr. Mbarushimana but there would also be no reason to expect the ICC Prosecution to engage in the legal process in a fair manner.

(iv) The lack of a lesser less draconian measure than a permanent stay

23. The situation in the present case is different to that where, for the sake of example, malicious use is made of deceitful intermediaries. In such a case, the appropriate remedy would be acquittal at the end of trial. No alternative and less drastic remedy than a permanent stay of proceedings, however, can guarantee the rights of a suspect in the face of an unprincipled prosecuting authority. No alternative remedy, such as sanctions pursuant to Article 71 of the Rome Statute, can redeem that which was wrongfully denied Mr. Mbarushimana – namely his procedurally protected right to raise a legal challenge and/or defence to the admissibility of the case prior to surrender as specifically protected under Article 19(2)(a) of the Rome Statute.

Further Evidence

24. The Defence submits that as a result of the ICC Prosecution's refusal to disclose its previous correspondence with the Federal Prosecutor, it has been

hampered in presenting to the Pre-Trial Chamber further evidence which could assist in distinguishing between the Prosecution's alleged gross negligence and the Prosecution's willfully misinforming the Court. The Defence notes the observations of Trial Chamber III in the case against *Jean-Pierre Bemba Gombo*, which stated its view that the facts establishing an abuse of process should, where necessary, be supported by documentary evidence or *viva voce* testimony introduced pursuant to Article 69(2) of the Rome Statute and/or Regulation 54(g) of the Regulations of the Court.[30] In the circumstances, therefore, the learned Pre-Trial Chamber is requested to order the Prosecution to produce its previous correspondence with the Federal Prosecutor and, if necessary, to allow the Defence to make supplementary submissions on the contents thereof. Furthermore, and should the issue still remain unclear after the aforementioned disclosure, the Defence requests that an oral hearing be convened in order to hear the evidence of Mr. Pascal Turlan and/or any other relevant OTP official.

Urgency

25. The confirmation hearing in the present case is set down for 4 July 2011 and should not be postponed. For this reason Counsel for the Defence has combined an inherent request for disclosure pursuant to Rule 77 together with his substantive submission. Should the present application succeed, the confirmation hearing will be rendered redundant. In the circumstances, therefore, good cause exists under Regulation 35(2) of the Regulations of the Court for shortening the time limit for a Prosecution response.

Relief Sought

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

(i) To shorten the time-limit for a Prosecution response;

[30] ICC-01/05-01/08-802 at paragraph 254.

(ii) To order the disclosure of all previous correspondence between the OTP and the Federal Prosecutor;

(iii) To convene, if necessary, a status conference for hearing the evidence of Mr. Pascal Turlan or any other relevant OTP official, and;

(iv) To find the facts adduced properly substantiated and to permanently stay the proceedings against Mr. Mbarushimana on account of an abuse of process.

Nicholas Kaufman

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Tuesday, May 24, 2011