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

Date: **18/10/2010**

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 Request for an Order to Preserve the Impartiality of the 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

Legal Representatives of the Victims

Ms. Paolina Massidda

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

Mr. Xavier-Jean Keita

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Defence Support Section

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparation Other
 Section**

Counsel for Mr. Callixte Mbarushimana (“Mr. Mbarushimana”) hereby requests that Pre-Trial Chamber I exercise its powers under the Rome Statute to ensure the impartiality of the proceedings and to order the Prosecutor to publish an immediate and public retraction of a press release issued by his office on 11 October 2010.

Procedural Background

1. On 28 September 2010, Pre-Trial Chamber I issued a warrant for the arrest of Mr. Mbarushimana.

2. On 11 October 2010, pursuant to the aforementioned warrant, Mr. Mbarushimana was arrested at his residence in Paris.

3. Within hours of Mr. Mbarushimana’s arrest two press releases were published on the website of the International Criminal Court; one emanating from the Registry¹ and one from the Office of the Prosecutor.²

Submission

4. The present application does not concern the press release issued by the Registry which observes commonly accepted principles of *sub-judice* reporting and tempers its description of the charges against Mr. Mbarushimana with the caveat that they are allegations.

5. The self-congratulatory press release emanating from the Office of the Prosecutor, however, made no attempt whatsoever to respect the principles of fair judicial reporting or to remind the general public that the charges against Mr.

¹ <http://www.icc-cpi.int/NR/exeres/7119036D-EE20-449B-862C-19D5B90AC45C.htm>; ICC-CPI-20101011-PR581

² <http://www.icc-cpi.int/NR/exeres/769E2333-D2AE-46B8-BDCD-651BF5A67CD3.htm>; ICC-OTP-20101011-PR582 and <http://www.icc-cpi.int/NR/rdonlyres/6DAFDF03-58A7-481B-A97D-B4EBB132A839/282536/WBENG.pdf>; Prosecutor’s Weekly Briefing dated 13.10.10.

Mbarushimana are, at present, no more than allegations. The content of this press release is printed below in its entirety:

New ICC Arrest: Leader of Movement involved in massive rapes in the DRC is apprehended in Paris

ICC-OTP-20101011-PR582

11 October 2010, Mr. Callixte Mbarushimana, a leader of the *Forces Démocratiques pour la Libération du Rwanda* (FDLR), was arrested today, in Paris, by the French authorities following a sealed arrest warrant issued by the International Criminal Court.

ICC Prosecutor Luis Moreno-Ocampo thanked France for a smooth and efficient operation. He described the arrest of Mr. Mbarushimana as a *“crucial step in efforts to prosecute the massive sexual crimes committed in the DRC”* where over 15,000 cases of sexual violence were reported in 2009 alone. As late as August 2010, the FDLR was involved in the commission of more than 300 rapes in DRC’s North Kivu province, yet Callixte Mbarushimana blatantly continued to refute any allegation against his movement.

The arrest is the result of almost two years of investigations conducted by France, Germany, DRC, Rwanda and the ICC, into the activities of the FDLR *“We are grateful to the French authorities for executing the arrest warrant and we are thankful for the excellent cooperation of the many parties involved in the investigation, including France, Germany, the DRC and Rwanda. This is a clear example of positive complementarity in action”* said the Prosecutor

Callixte Mbarushimana is the first senior leader arrested by the ICC for the massive crimes committed in the Kivu provinces of the Democratic Republic of the Congo (DRC). He is charged with 11 counts of crimes against humanity and war crimes including killings, rape, persecution based on gender and extensive destruction of property committed by the FDLR during most of 2009.

FDLR, a group calling itself a “liberation force” is the most recent incarnation of Rwandan rebel groups established by former *génocidaires* who fled to DRC after the 1994 Rwandan genocide. From the DRC, they regrouped, organized and launched attacks on Rwanda, with the goal of removing its new government through violence. Their activities contributed to triggering the two Congo wars, 1996-2002, which resulted in an estimated 4 million victims, the largest number of civilian casualties since the Second World War. Since then, the FDLR has continued to commit horrific crimes against the civilian population.

In 2009, the FDLR leadership decided to attack civilians in the North and South Kivu provinces in order to create a massive humanitarian catastrophe; the FDLR then tried to blackmail the international community and to extort concessions of political power, in exchange for ending the atrocities. As a result of this deadly blackmail, victims were killed, raped, and forcibly displaced, and entire villages were razed to the ground.

“After 16 years of continuous violence, this could be an opportunity to finally demobilize the group led by the former génocidaires” added the Prosecutor. *“Their leaders are gone.”*

“This is a good day for the victims. This is a good day for justice. But there is still a lot to do to break the cycle of impunity in the DRC. Callixte Mbarushimana is in custody. But another commander sought by the ICC for massive crimes, Bosco Ntaganda, is still at large in Goma and his forces roam the Kivus killing and raping. He must be next”.

6. From the above cited press release, it is quite clear that the Prosecutor is willfully oblivious to his assigned role of an impartial functionary tasked with assisting the Court in determining the truth. It is even clearer that the Prosecutor does not feel that the general public ought to be reminded that, until the conclusion of a successful prosecution, an accused is entitled to the presumption of innocence. Any reasonable person reading the press release would be drawn to the conclusion that the FDLR's alleged involvement in "300" rapes committed in the North Kivu province in the month of August 2010 was undisputed and that Mr. Mbarushimana is presently acting unreasonably by "*blatantly*" refuting such - despite the fact that this is now his statutory right under the Rome Statute.

7. Moreover, given that the press release defines Mr. Mbarushimana as a "*senior leader of the FDLR*" - the fact of whose present detention is in the Prosecutor's eloquent parlance the state of being "*gone*", the only possible conclusion that can be drawn from the penultimate paragraph of the press release is that the Prosecutor also imputes to Mr. Mbarushimana the status of a former *génocidaire*. The wholly egregious nature of this reportage is exacerbated by the fact that Mr. Mbarushimana has never been found guilty of the crime of genocide nor do the charges to be found in the present arrest warrant contain counts of genocide.

8. For the sake of good working relations, Counsel did not wish to initiate the litigation in this case by way of the present application and, accordingly, personally petitioned the Prosecutor, on 13 October 2010, by way of Email offering him the opportunity to retract the press release of his own accord.

9. Nevertheless, on 15 October 2010, the Prosecutor's spokesperson replied to Counsel for Mr. Mbarushimana stating that the interpretation of the press release, as presented in this filing, was disputed.³

³ "*Dear Mr. Kaufman, I acknowledge receipt of your email to the Prosecutor dated 13 October 2010. The OTP does not agree with your interpretation of the relevant press release and does not consider that the*

10. Article 67(1) of the Rome Statute guarantees the rights of an accused including the right that he *"shall be entitled ... to a fair hearing conducted impartially"*. Article 64(2) of the Rome Statute, furthermore, empowers the Trial Chamber (and, *mutatis mutandis*, the Pre-Trial Chamber) with the duty *"to ensure that a trial is fair and expeditious and conducted with full respect for the rights of the accused"*.

11. The Prosecutor's injudicious press release rides roughshod over this statutorily protected right. It, furthermore, seriously defames Mr. Mbarushimana who, at this stage of the proceedings, is entitled to the presumption of innocence not just before the Court but, also, in the eyes of the world. Counsel for Mr. Mbarushimana need do no more than refer this learned Pre-Trial Chamber to the dicta of Trial Chamber I in the case against Thomas Lubanga Dyilo:⁴

"Ms Béatrice Le Fraper du Hellen [a former employee of the Office of the Prosecutor] seriously intruded on the role of the Chamber in her unequivocally expressed conclusions - before the end of the evidence, the submissions of counsel and any decisions on the part of the Bench".

12. Despite this warning, it is suggested that the Prosecutor himself and, so it appears, a former member of his consultancy staff continue to show scant regard for procedural propriety - whether it be by way of unfair reporting through the Office of the Prosecutor's own *"discrete media department"*⁵ as in the present instance, by penning his name to an editorial comment in the respected *Guardian* Newspaper,⁶ or by way of publishing a purportedly fictional yet seemingly perverse account of an ongoing trial at the International Criminal Court.⁷

correction you request is necessary. Concerns about the contents of press releases should be addressed to me. If you wish to raise concerns about the legal process and the substance of charges, please contact the Senior Trial Attorney, Anton Steynberg. Yours sincerely, Nicola Fletcher, Public Information Officer".

⁴ ICC-01/04-01/06-2433 at para. 49.

⁵ ICC-01/04-01/06-2433 at para. 35.

⁶ <http://www.guardian.co.uk/commentisfree/libertycentral/2010/jul/15/world-cannot-ignore-darfur>; "Now end this Darfur denial" where the Prosecutor was alleged to have misrepresented the findings of this Pre-Trial Chamber concerning its decision to issue a warrant for the arrest of Omar al-Bashir for genocide: *c.f.*; ICC-02/05-01/09-102, ICC-02/05-01/09-103, ICC-02/05-01/09-104 & ICC-02/05-01/09-110.

⁷ ; where the Defence for Mr. Thomas Lubanga Dyilo formally complained about the publication of a book entitled *"Un lézard au Congo"* published on 10 August 2010 by a former consultant and speech writer to the Prosecutor – M. Gil Courtemanche.

13. Counsel does not doubt that the professional judges of Pre-Trial Chamber I appreciate the *sub judice* nature of the charges against Mr. Mbarushimana. Nonetheless, it is submitted that the wording of the Prosecutor's press release brings the International Criminal Court into serious disrepute and should lead this Pre-Trial Chamber to fear that, if surrender to The Hague be effected, the Prosecutor's apparent pre-conceived view of Mr. Mbarushimana's guilt will cause him to neglect his duties under the Rome Statute; *inter alia*, the expectation that he will faithfully investigate incriminating and exonerating circumstances equally.⁸ In the circumstances, therefore, there exists a substantial risk of prejudice to Mr. Mbarushimana.

Conclusion

14. In light of all the aforementioned, and in order to preserve the fairness of the proceedings,⁹ the learned Pre-Trial Chamber is respectfully requested to order the Prosecutor to publish an immediate public retraction of the offending press release.



Nicholas Kaufman

Counsel for Callixte Mbarushimana

Dated this 18th day of October 2010,
Jerusalem, Israel.

⁸ Article 54(1)(a) of the Rome Statute.

⁹ Articles 64(2) and 67(1) of the Rome Statute.