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Date: **9 November 2010**

PRE-TRIAL CHAMBER I

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. Callixte MBARUSHIMANA

Public Document

**Prosecution Response to "Defence Request for an Order to Preserve the
Impartiality of the Proceedings"**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. Introduction

1. The Prosecution opposes the Defence Request for an Order to Preserve the Impartiality of the Proceedings¹ (“the Request”) and asks that the Request be dismissed.
2. The Prosecution submits that the Request is premature and legally flawed. It falls to be dismissed on these grounds alone. On the merits, the Prosecution submits that the Request misinterprets the press release, draws unsound conclusions, relies on irrelevant facts and makes unsubstantiated allegations. It falls to be dismissed on these grounds too.

II. Statement of facts

3. On 20 August 2010, the Prosecution filed an Application under Article 58² for the issue of a warrant of arrest for Callixte Mbarushimana (“the Suspect”).
4. On 28 September 2010 this Chamber issued a warrant of arrest,³ which was notified to the French authorities on 30 September 2010 and executed on the Suspect on 11 October 2010 in Paris.
5. Later the same day, the Office of the Prosecutor issued a press release pertaining to the arrest.⁴
6. The Suspect is presently detained in France pending his surrender by the custodial state on to the International Criminal Court (“the Court”) in terms of Article 59. On 3 November 2010, the *Chambre de l’Instruction près la Cour*

¹ Defence Request for an Order to Preserve the Impartiality of the Proceedings, ICC-01/04-01/10-14, 18 October 2010. It is noted that the title of this request bears little relation to the relief actually sought and the grounds advanced therefore.

² Prosecution’s Application under Article 58, ICC-01/04-01/10-11-Red, 20 August 2010.

³ Warrant of Arrest for Callixte Mbarushimana, ICC-01/04-01/10-2-tENG, 28 September 2010.

⁴ The press release is quoted verbatim in the Request. However, for ease of reference a copy is attached as **Annexure 1**.

d'Appel de Paris issued their decision in favor of surrendering Callixte Mbarushimana to the ICC, with one reservation.⁵

7. The Suspect has a right to challenge this decision (“*pourvoi en cassation*”) before the *Cour de Cassation*, which must give its decision within a further period of two months.⁶ According to press reports, he intends to exercise this right.⁷ Accordingly, the fact and the timing of his surrender to the Court remain uncertain.

III. Submissions

8. This Request is opposed on four grounds. The Prosecution will address three legal issues and subsequently will address the merits.

The Request is premature

9. The Suspect is not yet before this Court. Although he has been arrested pursuant to a warrant of arrest issued by this Chamber, he has opposed his surrender to this Court and the French authorities have not yet finally ruled on this issue. Unless and until he is surrendered to this Court, any issue as to the impartiality of any future proceedings before it are entirely moot.⁸
10. In opposing his surrender to this Court, the Suspect has disputed the authority of the Court on the grounds that its procedures infringe upon his

⁵ That is, that in no way should he be surrendered, expelled, extradited or handed over to Rwanda. Note that the surrender is realised in the month following the final decision, pursuant to article 627-10 of the *Code de Procédure pénale*.

⁶ Article 627-8 of the *Code de Procédure pénale*.

⁷ The New York Times, Marlise Simons, "France: Extradition Order for Rwandan", 3 November 2010, available at: <http://www.nytimes.com/2010/11/04/world/europe/04briefs-France.html?scp=1&sq=France:%20Extradition%20Order%20for%20Rwandan&st=cse>, (last accessed 8 November 2010) reported that "Mr. Mbarushimana, 47, plans to appeal the extradition ruling, his lawyer told The Associated Press."; The Washington Times, "France orders Rwandan extradited to the world court", 3 November 2010, available at <http://www.washingtontimes.com/news/2010/nov/3/briefly-136608343/> (last accessed 8 November 2010), reported that "Mbarushimana, 47, plans to appeal the extradition ruling, lawyer Christophe Gouget told The Associated Press."

⁸ This is apparent from paragraph 13 the Request itself, in which the Applicant prefaces his main complaint with the phrase "[...] if surrender to The Hague be effected [...]" (Emphasis added) Clearly the harm apprehended will not eventuate unless this condition precedent is fulfilled.

human rights.⁹ It is inappropriate for him to question the Court's authority in one breath and to call upon its assistance in the next.

11. Accordingly, the Prosecution submits that the Chamber should not even entertain this Request prior to the actual surrender of the Suspect.

The Request is ill-founded in law

12. The Request is conspicuously silent as to the legal basis upon which the Suspect relies for the relief sought, namely an order that the Prosecutor "publish an immediate retraction of the offending press release."¹⁰ He fails to identify any provision of the Statute or Rules which empowers the Chamber to issue such an order. The Suspect simply asserts his fair trial rights, as provided for in Articles 67(1) and 64(2) respectively, and submits that the Pre-Trial Chamber has the same powers as the Trial Chamber, *mutatis mutandis*.

13. Stripped of its verbiage, adjectives and extraneous facts, the Request is essentially nothing more than a request to the Pre-Trial Chamber to censure the Prosecutor for alleged misconduct *ex facie curiae*.¹¹

14. However, this Chamber has already ruled that such relief falls outside the scope of the powers vested in it by the legal framework of the Court.¹²

⁹ See ICC-01/04-01/10-18-Conf-Anx1, page 7, as reported by the *Arrêt de La Cour d'Appel de Paris rendu le 27 octobre 2010 par la Chambre de l'instruction de la Cour d'Appel de Paris* : « Mais la défense entend surtout soutenir que la procédure devant la Cour Pénale Internationale est contraire aux droits de l'Homme. La procédure serait incertaine, il n'est pas assuré que le procès de M, MBARUSHIMANA Callixte ait lieu à La Haye devant la CPI, dans des délais raisonnables, puisqu'il est également recherché par d'autres Etats, notamment le Rwanda, qu'il a fui pour des raisons politiques, Etat vers lequel il risquerait d'être remis, puisque l'Etat rwandais n'a pas renoncé à ces poursuites. La procédure devant la CPI mépriserait les droits de la défense. Se référant à l'art, 59 du Statut, le Procureur Général a saisi d'initiative la chambre préliminaire d'une demande de recommandation sans attendre la communication préalable du mémoire de la défense. Cette demande viole les droits de la défense, car il appartenait à la chambre de l'instruction de déférer elle-même cette question à la Cour pénale internationale, étant précisé que la Chambre de l'instruction n'est pas obligée de suivre cette recommandation. »

¹⁰ Defence Request for an Order to Preserve the Impartiality of the Proceedings, ICC-01/04-01/10-14, 18 October 2010, para. 14. It is noted that no further or alternative relief is sought.

¹¹ In its essence, this request is remarkably similar to the OPCD Request for Authorization to Submit Observations Concerning Guardian Article dated 15 July 2010, *Prosecutor v. Omar Hassan Ahmad Al Bashir*; ICC-02/05-01/09-110, 3 September 2010, in which the OPCD complains at paragraph 18 that the news article in question "directly raises issues concerning the presumption of innocence, the rights of the defendant and the fairness and impartiality of the proceedings." In the Chamber's decision on this request, Judge Tarfusser, sitting as Single Judge for the Chamber, considered at paragraph 6 that "in its essence, the Request appears to condemn what, in the view of the [OPCD], is an inappropriate behaviour on the part of the Prosecutor."

15. It is therefore submitted that the Request falls to be dismissed on this ground alone and that it is unnecessary for the Chamber to enquire any further into the merits or otherwise thereof.

The prejudice relied upon by the Suspect is purely speculative

16. Although the purported object of the Request is to “preserve the impartiality of the proceedings”, the Suspect specifically distances himself from any suggestion that the Pre-Trial Chamber might be improperly influenced by the press release in question.¹³ There is accordingly no allegation that the press release will actually impact upon the fairness of his hearing before the Court.

17. The crux of the Suspect’s complaint, however, is 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. In the circumstances, therefore, there exists a substantial **risk** of prejudice to Mr. Mbarushimana.” (Third emphasis added, others in original).¹⁴ This is entirely speculative.

18. The Prosecution submits that it is keenly aware of its obligation to investigate exonerating circumstances. It is noteworthy that the Suspect has not even seen, far less reviewed, the evidence collected by the Prosecution to date.

¹² *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on “OPCD Request for authorization to submit observations concerning Guardian Article dated 15 July 2010”. ICC-02/05-01/09-112, 13 September 2010. The Chamber noted in paragraph 8 that the statutory instruments of the Court to sanction acts or behaviour when they amount to misconduct can be found “specifically within the framework of rules 170 and 171 of the Rules (respectively addressing ‘Disruption of proceedings’ and ‘Refusal to comply with a direction by the Court’).” The Chamber accordingly ruled that “... the behaviour addressed in the Request neither occurred in the context of proceedings, nor was in violation of any direction given by the Court and that, accordingly, falls outside the scope of the powers vested in the Chamber by rules 170 and 171 of the Rules.” Hence the Single Judge declined to address the merits of the request. The Suspect in the instant matter has not referred in his founding papers to any other legal provision in terms of which the relief sought may be granted. The legal framework specifically provides (in article 47 read with Rule 26) for other mechanisms for complaints of this nature. These mechanisms do not, however, include approaching the Chamber for relief such as that sought in this Request.

¹³ Defence Request for an Order to Preserve the Impartiality of the Proceedings, ICC-01/04-01/10-14, 18 October 2010, para. 13. Presumably, the same would apply to the Trial Chamber should charges be confirmed.

¹⁴ Defence Request for an Order to Preserve the Impartiality of the Proceedings, ICC-01/04-01/10-14, 18 October 2010, para. 13.

Accordingly, the Suspect has no factual basis whatsoever to allege that the Prosecution has in fact neglected its duties in this regard. In the absence of any factual foundation, the Suspect's allegations amount to no more than idle speculation.

19. The Prosecution submits that it is inappropriate in the circumstances for the Chamber to pronounce upon speculative prejudice which may or may not eventuate and that the Request falls to be dismissed on this ground too.

The Request is factually and logically flawed and falls to be dismissed on the merits

20. The Suspect's first complaint is that "the general public ought to [have been] reminded" by the Prosecutor that the charges against the Suspect "are, at present, no more than allegations"¹⁵ and that "until the conclusion of a successful prosecution an accused is entitled to the presumption of innocence" (emphasis in original).¹⁶ In this regard the Prosecution submits that the only mention of the present charges in the release is the following:

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.

21. This is nothing more than a bland statement of the charges which the Prosecution will bring against the suspect and makes no comment on his guilt or innocence. Charges are, by definition, no more than allegations. It is clear that Mr Mbarushimana has not been convicted. Charges precede a trial, which in turn precedes a verdict and unless and until the Court convicts an accused, he is not guilty of anything.

¹⁵ Defence Request for an Order to Preserve the Impartiality of the Proceedings, ICC-01/04-01/10-14, 18 October 2010, para. 5.

¹⁶ *Ibid.*, para. 6.

22. The Suspect refers to various other instances of alleged injudicious press releases. The Prosecution submits that these are either irrelevant¹⁷ or distinguishable on the facts.¹⁸ Notwithstanding this, it is noteworthy that in none of the instances cited has any Chamber of this Court issued an order such as the one sought by the Suspect in this request. Thus, they provide no support for the relief which he seeks.

IV. Conclusion

23. In the result, the Prosecution submits that the Suspect fails to make out a case, either in law or on the merits, for the relief sought.

V. Relief Requested

24. For the reasons set out above, the Prosecution respectfully requests that the Pre-Trial Chamber dismiss the Request.



Luis Moreno-Ocampo,

Prosecutor

Dated this 9th day of November 2010

At The Hague, The Netherlands

¹⁷ *Vide* footnote 7 of the request. A fictional publication by a person who is no longer in the employ of the OTP is clearly irrelevant to the present issue.

¹⁸ *Vide* paragraph 11 and footnote 4 of the Request. In this matter, the press release in issue expresses no conclusions whatsoever of any decisions by the Court.