

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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

Confidential

**Prosecution response to the "Defence Challenge to the Validity of the Arrest
Warrant"**

Source: Office of the Prosecutor

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Court to:

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I. Introduction

1. Mr Callixte Mbarushimana ("the Suspect"), relying on Rule 117(3) of the Rules of Procedure and Evidence, challenges the validity of the Arrest Warrant issued by Pre-Trial Chamber I ("the Chamber") on 28 September 2010. He alleges that in its arrest warrant Application ("the Prosecution Application"), the Prosecution omitted decisive information relating to an alleged investigation in the Federal Republic of Germany ("Germany"), which if disclosed would have persuaded the Chamber to conclude the case was inadmissible and to deny the warrant request.
2. Rule 117 does not provide a legal foundation for the Defence admissibility challenge. Additionally the unredacted Prosecution Application adequately and accurately set forth the salient information with respect to admissibility. Most critically, it made clear the uncontested point that the German authorities did not in fact pursue a criminal case against the Suspect nor did they intend to do so.

II. Statement of Facts

3. On 20 August 2010, the Prosecution filed an Application under Article 58 of the Rome Statute ("the Statute") for a warrant of arrest for the Suspect.¹
4. On 28 September 2010, the Chamber issued an arrest warrant, which was executed by French authorities on 11 October in Paris.²
5. On 11 October 2010, the Chamber ordered the Prosecution to file a public redacted version of the Prosecution Application.³ The Prosecution filed the public version on 14 October 2010.⁴

¹ Prosecution's Application under Article 58, ICC-01/04-573US-Exp, 20 August 2010.

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

³ Decision on issues relating to the publicity of proceedings in the case, ICC-01/04-01/10-7, 11 October 2010.

⁴ Prosecution's Application under Article 58, ICC-01/04-01/10-11-Red, 14 October 2010; Prosecution's Submissions on Jurisdiction, ICC-01/04-577, 14 October 2010.

6. On 10 November 2010 the Chamber authorised the Prosecution to file a "Confidential - Prosecution and Defence only" version of its Application that included fewer redactions than in the public version.⁵ The Prosecution filed the document that day,⁶ and defence counsel was notified accordingly.⁷
7. On 3 November 2010, the *Chambre de l'Instruction près la Cour d'Appel de Paris* authorised surrender of the Suspect to the ICC. The Suspect brought a *pourvoi en cassation* before the *Cour de Cassation*, which was rejected by that Court on 4 January 2011.
8. The Suspect is presently detained in France pending his surrender to this Court. According to French law, surrender must be effected within one month of the *Cour de Cassation's* 4 January decision.⁸
9. On 10 January 2011, the Suspect filed the "Defence Challenge to the Validity of the Arrest Warrant"⁹ ("the Challenge") and requested the Chamber to shorten the period for the Prosecution to respond. The Single Judge ordered the Prosecution to respond by 17 January 2011.¹⁰

III. Submissions

The Challenge does not fall within the scope of Rule 117(3)

10. Rule 117(3), on which the Suspect bases his Challenge, permits "[a] challenge as to whether the warrant of arrest was properly issued **in accordance with article 58, paragraph 1 (a) and (b)...**". (Emphasis added) Article 58(1) requires (a) reasonable grounds to believe that the person has committed a crime within the

⁵ Decision on the "Prosecution's Application for Re-Classification of the "Application under Article 58" and Request for Authorization of Redactions", ICC-01/04-01/10-22-Conf-Exp, 9 November 2010. For the redacted version of the Prosecution's Application, see ICC-01/04-01/10-11-Conf-Red, 20 August 2010.

⁶ Prosecution's Application under Article 58, ICC-01/04-01/10-11-Conf-Red, 20 August 2010.

⁷ Email from Court Management – Court Records, sent on 10 November 2010 at 4:57 PM.

⁸ See Article 627-10 of the *Code de Procédure pénale*.

⁹ ICC-01/04-01/10-32.

¹⁰ Order on the Time Limit for the Prosecutor's Response to the "Defence Challenge to the Validity of the Arrest Warrant", ICC-01/04-01/10-33, 0 January 2011.

jurisdiction of the Court; and (b) that arrest is necessary. Rule 117 does not directly authorize a challenge based on the Prosecution's alleged failure to provide "decisive information" pertaining to the admissibility of the case.

11. The Prosecution accordingly suggests that present Challenge, which argues solely that the Prosecution omitted information regarding admissibility, does not fall within Rule 117(3) and should be dismissed for this reason alone.

The Prosecution's Application did not omit information required by Article 58

12. The Suspect contends that the Prosecution Application falsely stated to the Chamber that "*no investigation or prosecution has been or is being undertaken by any national jurisdictions . . . in relation to the person and the conduct which forms the subject of the Prosecution's application*". He contends that this assertion mischaracterized the ongoing German investigation. He also contends that the Prosecution failed to include "decisive information" regarding that national investigation, rendering the Application "artificial, misleading and [...] designed to persuade the Pre-Trial Chamber that [the suspect] was not under 'investigation'".¹¹ He urges that the Prosecution was bound to inform the Chamber that Germany was actively investigating, even though Germany itself took a contrary position. Finally, he concludes that had the Chamber been apprised of the information "it is almost certain that it would have declined to issue" the arrest warrant on admissibility grounds,¹² and that the Chamber's arrest warrant is therefore void.¹³

13. An Application for a warrant requires the Prosecution to provide the content set out in Article 58(2). This Application contained the information required under that Article, and indeed the Suspect does not allege that the Application omitted any of those requirements. So long as the Application satisfies the Chamber that

¹¹ Challenge Para. 10.

¹² Challenge paras. 3, 8 and 16.

¹³ Challenge para. 18.

there are reasonable grounds to believe the person committed a crime within the Court's jurisdiction and it appears necessary to order his arrest, Article 58(1) states that the Chamber "shall" issue the warrant.¹⁴

14. Admissibility is not identified in the Statute or Rules as an issue at the arrest warrant stage. However, since it would be a waste of time for all concerned to initiate a case that is indisputably inadmissible, the Appeals Chamber has held that an arrest warrant application shall include "*decisive information*" bearing on admissibility "so that the Chamber may be in a position to exercise the discretion" to consider admissibility on its own motion at the arrest warrant stage. The Appeals Chamber clarified that decisive information consists of "uncontested facts" in the possession of the Prosecution "that render a case clearly inadmissible or an ostensible cause impelling the exercise of *proprio motu* review".¹⁵

15. Under that narrow requirement, an Application is not defective for omitting information regarding other investigations, unless the omitted information constitutes "uncontested facts . . . that render a case clearly inadmissible" or impel the Chamber's exercise of *proprio motu* review. Omission of information that falls short of that standard cannot affect the propriety of the subsequent warrant.

16. In this instance, the Prosecution disclosed to the Chamber details of Germany's investigation of the FDLR.¹⁶

17. The Suspect quotes selectively from the Prosecution's Article 58 application at paragraphs 4, 5 and 6 of his Challenge and, on the strength of these extracts, argues that the Prosecution's description was "misleading" and "artificial". Notably, the quotes come from the public redacted version of the Prosecution's Application,¹⁷ rather than the less-redacted confidential version that the Suspect

¹⁴ See [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"](#), ICC-01/04-169, 13 July 2006, para. 44. See also paras 42 – 45.

¹⁵ *Prosecutor v Bosco Ntaganda* ICC-01/04-169 at paragraph 52

¹⁶ See para 17 below

¹⁷ ICC-01/04-01/10-22-Conf-Exp, 9 November 2010; See ICC-01/04-01/10-32, footnotes 3, 4, 5 and 7.

received on 9 November 2010.¹⁸ The unredacted text of the relevant paragraphs of the Prosecution's Application reads as follows (with previously redacted portions underlined):

172. 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. As part of the investigation, the German Federal Public Prosecutor General's office searched their residences and seized evidence found therein. 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.

173. 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. The Senior Public Prosecutor of Germany has expressed to the Prosecution on several occasions²¹⁴ that the Federal Public Prosecutor General's office has the intention to forward all information collected on Callixte MBARUSHIMANA to the Prosecution in order to assist with the OTP's investigation,²¹⁵ as the Federal Public Prosecutor General's office considers that the OTP is the relevant authority in position to prosecute this case. (Footnotes omitted)

The underlined portions and the original redacted text together reflect the critical facts that the Suspect was a "potential suspect" in Germany but German authorities were taking no active investigative steps against him, that the Senior Public Prosecutor of Germany had repeatedly stated that the ICC

¹⁸ ICC-01/04-01/10-11-Conf-Red. Email from Court Management – Court Records, sent on 10 November 2010 at 4:57 PM.

Prosecutor should prosecute the case against the Suspect, and that Germany intended to forward the matter to the OTP for investigation.¹⁹

18. Thus, the Prosecution's statement in its Application that no investigation or prosecution directed at the Suspect has been or is being undertaken by any national jurisdiction (including Germany)²⁰ is accurate and not misleading, and is substantiated by the facts set out above (in paragraphs 172 and 173 of the Prosecution Application).

19. The Suspect also disputes the Prosecution's characterisation of the German investigation. First, he asserts that the Prosecution's Application is based on evidence that "could only have been the product of a genuine German investigation *which encompassed Mr. Mbarushimana*" (emphasis added).²¹ But the Prosecution's Application makes clear that the evidence derives from a conversation that was recorded during the interceptions of telephone calls to and from Mr Murwanashyaka. That the Suspect's conversation was captured in the interception of Mr. Murwanashyaka's calls was fortuitous, not the result of an investigation that necessarily also encompassed the Suspect himself.

20. Second, he argues at length that Germany's domestic legislation obligated it to actively pursue an investigation of the Suspect that focused on the conduct set out in the Prosecution's Application, notwithstanding the German authorities' representations to the Prosecution to the contrary.²²

21. The Prosecution submits that in terms of the admissibility of the case the only relevant issue is the lack of an active national investigation against Mbarushimana. Whether a State was obligated to investigate should not be considered or discussed at this stage.

¹⁹ See Annexe 1 to ICC-01/04-01/10-32.

²⁰ See paragraph 167 (incorrectly referred to in footnote 3 of the Suspect's Challenge as paragraph 67) and paragraph 174 of the Application. Paragraph 167 explicitly refers to the detailed explanation which follows ("...as shown below..."), while paragraph 174 immediately follows this explanation.

²¹ Challenge para 11, citing paragraph 158 and footnotes 193 and 194 of Prosecution's Application.

²² Challenge paras. 13-15, 18.

Confidentiality

22. This response is filed as "confidential, Prosecution and Defence only" since reference is made to portions of paragraphs 172 and 173 of the Prosecution's Application, which are at present redacted in the public version, although not in the confidential version.²³
23. Since the German authorities have subsequently notified the Suspect of their decision to refer their proceedings to this Court²⁴, the reason for the relevant redactions has fallen away. Thus, the Chamber may lift the redactions to paragraphs 172 and 173 in the public redacted version of the Prosecution Application and then reclassify this response as "Public".

IV. Conclusion

24. Accordingly, the Prosecution respectfully submits that the Chamber should dismiss the Challenge.



Luis Moreno-Ocampo,

Prosecutor

Dated this 17th day of January 2011

At The Hague, The Netherlands

²³ Regulation 23 *bis* (3) of the Regulations of the Court

²⁴ Suspects Challenge, para 13 and Annex 1