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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

Prosecution's Response to the "Defence request for a permanent stay of 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 Defence requests to permanently stay the proceedings against Callixte Mbarushimana ("the Suspect") on the grounds of abuse of process (the "Defence Request").¹ The Defence argues that the German authorities were investigating the Suspect at the time the Prosecution requested the arrest warrant (the "Application") and continued their investigation until 3 December 2011, when they formally announced that they would not prosecute the Suspect.² The Defence further asserts that the Prosecution, either knowingly or with gross negligence, failed to disclose in its Application -- and subsequently concealed -- the existence of this investigation and the communications between the Prosecution and German authorities.³ The Defence further argues that the Prosecution concealed this information because it knew that once the German file against the Suspect was closed, an admissibility challenge would inevitably fail.⁴ According to the Defence this conduct is so "repugnant" that the Chamber must impose a permanent stay of proceedings.⁵
2. The Defence advances no new argument. Rather, the arguments presented in the Defence Request merely reiterate prior litigated arguments. Thus, the abuse of process claim is meritless and as such it should be summarily dismissed.
3. The Prosecution stated in the Application to this Pre-Trial Chamber ("Chamber") that, while Mbarushimana was a named suspect in a German investigation together with two other individuals, those authorities were not taking specific investigative measures with respect to him and hence not conducting an investigation involving the Suspect within the terms of Article 17(1)(a). The Prosecution's Application contained all relevant and available

¹ ICC-01/04-01/10-177, para.26 (iv).

² *Ibid.*, para.15.

³ *Ibid.*, paras. 14-19.

⁴ *Ibid.*, paras.15, 20.

⁵ *Ibid.*, paras.7, 21-23.

information, including the fact that the Prosecution had communicated with German authorities, who indicated that the Court was the competent authority to prosecute the Suspect.⁶

4. Following the relevant jurisprudence of this Court regarding assessment of admissibility at the arrest warrant stage, the Prosecution accordingly concluded that there were no uncontested facts that would render the case inadmissible or justify the Chamber's *proprio motu* review of the admissibility of the case.⁷ The Chamber subsequently confirmed this view when it rejected the Defence request to set aside the warrant of arrest.⁸
5. The Defence further seeks an order of disclosure of the said correspondence between the Prosecution and the German Federal Public Prosecutor General's office at the Federal Court of Justice ("German authorities") and to convene a status conference to hear the Prosecution on this matter.⁹ The Prosecution reiterates that these communications were not relevant to the determination of the admissibility of the case and remain irrelevant for the purpose of the instant litigation.

II. Statement of facts

6. In 2009 the Prosecution began discussions with the German authorities regarding the two offices' parallel investigations into crimes allegedly committed by the FDLR in North and South Kivu, DRC. By April 2009, the two offices agreed to share information relevant to both investigations.
7. On 17 November 2009 German authorities arrested Ignace Murwanashyaka and Straton Musoni, rendering potential Prosecution cases against them inadmissible.

⁶ ICC-01/04-01/10-11-Red, paras. 172-173.

⁷ ICC-01/04-538 OA, paras.42,52. See also ICC-01/04-01/10-50, para.10.

⁸ ICC-01/04-01/10-50, paras.9-10.

⁹ Defence Request, para. 26(ii)-(iii).

8. The Prosecution subsequently focused its investigative efforts on other FDLR leaders including the Suspect. In April 2010 the Prosecution inquired from German authorities about the position of the Suspect in the German investigation. The Prosecution was informed that he was a “formal suspect” but that the evidence against him was insufficient to obtain a warrant for his arrest. Consequently, there were no prospects of a successful prosecution in Germany and it was the intention of German authorities “to forward all information about CM to OTP/ICC in order to assist you to prosecute him”.
9. In a subsequent meeting on 8 June 2010 German authorities repeated their intention to hand over to the Prosecution all evidence against the Suspect and to stop their investigation as soon as the Prosecution obtained a warrant for his arrest.
10. On 20 August 2010, the Prosecution filed an Application under Article 58 of the Rome Statute for a warrant of arrest for the Suspect (“the Application”).¹⁰ The Prosecution revealed in it the existence of an investigation in Germany in which the Suspect was regarded as a suspect, although no concrete investigative steps had been taken against him.¹¹ On the strength of this and the stated intention of the German authorities to close their investigation and refer the matter to the Court, the Prosecution concluded that there was no investigation being undertaken against the Suspect which would render the case inadmissible.¹²
11. On 28 September 2010, the Chamber issued an arrest warrant, which was executed by French authorities on 11 October in Paris.¹³ With respect to the admissibility of the case, the Chamber “decline[d] [...] to use its discretionary proprio motu power [...] as there [was] no ostensible cause or self evident

¹⁰ ICC-01/04-573US-Exp, 20 August 2010.

¹¹ *Ibid.* paras 172 – 173.

¹² *Ibid.* Paras 167 and 174.

¹³ ICC-01/04-01/10-2-tENG, 28 September 2010 .

factor which impels the Chamber to exercise its discretion pursuant to article 19(1) of the Statute".¹⁴

12. The Prosecution filed a public version of its Application on 14 October 2010,¹⁵ and on 10 November a "Confidential - Prosecution and Defence only" version that included fewer redactions than in the public version.¹⁶
13. On 3 December 2010 the German authorities formally decided to close their investigation as regards the Suspect.¹⁷
14. On 14 December 2010 the Defence filed its Request for Disclosure whereby it requested the Prosecution to disclose almost all its case file.¹⁸ The Prosecution opposed this request on 5 January 2011.¹⁹
15. On 10 January 2011, the Defence filed its Challenge to the Validity of the Arrest Warrant ("the Challenge").²⁰ The Prosecution responded on 17 January.²¹ On 25 January 2011, the Defence provided supplementary information to the Challenge.²² The Prosecution sought to strike the latter filing on 27 January.²³
16. On 27 January the Chamber granted in part the Defence Request for Disclosure ordering the Prosecution to disclose those materials that had been specifically referred to in the Request (such as intercepts and supporting documentation to the referral of the DRC situation to the Prosecutor) but it deferred the remaining Defence requests to a decision setting out the modalities of disclosure that would be issued in due course.²⁴
17. On 28 January the Pre-Trial Chamber rejected the Defence Challenge to the Validity of the Arrest Warrant, noting that based on the facts presented there

¹⁴ ICC-01/04-01/10-11-Red, para. 9.

¹⁵ ICC-01/04-01/10-11-Red.

¹⁶ ICC-01/04-01/10-11-Conf-Red.

¹⁷ ICC-01/04-01/10-209-Conf-Anx1, 3 June 2011.

¹⁸ ICC-01/04-01/10-29.

¹⁹ ICC-01/04-01/10-31.

²⁰ ICC-01/04-01/10-32.

²¹ ICC-01/04-01/10-35.

²² ICC-01/04-01/10-40.

²³ ICC-01/04-01/10-49.

²⁴ ICC-01/04-01/10-47.

were no grounds that would compel it to review *proprio motu* the admissibility of the case.²⁵ On the same day, the Suspect first appeared before this Court.²⁶

18. On 30 March 2011 the Pre-Trial Chamber issued its decision on issues relating to disclosure whereby it ordered, inter alia, the Prosecution to permit the Defence access pursuant to Rule 77 to all documentation material to the preparation of the Defence related to admissibility and jurisdiction no later than 13 April 2011, and material to the preparation of the Defence, or intended for use by the Prosecutor as evidence at the confirmation hearing not later than 2 May 2011.²⁷ The Prosecution complied with these deadlines.

19. On 14 April 2011, the Defence requested to the Prosecution any communication between the Prosecution and the German prosecuting authorities.²⁸ The Prosecution responded on 18 April that the Defence was aware of the exchanges with the German authorities since the Application had been made available to the Suspect, but that the communications were irrelevant to the preparation of the admissibility challenge, since the German investigation of the Suspect had been formally closed.²⁹

20. On 24 May 2011 the Defence filed its request for a permanent stay of proceedings on account of abuse of process.³⁰ The Pre-Trial Chamber, upon the Defence request, shortened the time limit for the Prosecution response to Friday 3 June.³¹ The Prosecution hereby complies with the Chamber's order and responds to the Defence Request.

21. On 3 June, the very date set for the Prosecution response, the Defence filed its "Provision of evidence in support of the Defence request for a permanent stay

²⁵ ICC-01/04-01/10-50, para.11.

²⁶ ICC-01/01-01/10-T-1-ENG ET WT, 28 January 2011.

²⁷ ICC-01/04-01/10-87, p.15, last paragraph and p.16, first paragraph.

²⁸ See Annex II of the Defence Request.

²⁹ See Annex III of the Defence Request.

³⁰ ICC-01/04-01/10-177 ("Defence Request").

³¹ ICC-01/04-01/10-180, p.3.

of proceedings”. No reasons are advanced for the late ³²submission of this evidence.

III. Submissions

(1) The Prosecution accurately presented all relevant information in its Application

22. The Prosecution provided the relevant information to the Chamber in the Application. It acknowledged that Mbarushimana had been named as a suspect in a national investigation by the German authorities of two other individuals (Ignace Murwanashyaka and Straton Musoni) but no concrete investigative steps had been taken in respect of him. The Prosecution accordingly explained that there was no active investigation (in Germany or in other domestic jurisdictions) within the meaning of Article 17(1)(a):³³ “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”.³⁴

23. The Prosecution did not allege, however, that no investigation at all had been conducted which involved Callixte. For instance, witnesses who were questioned by German authorities in connection with Murwanashyaka and Musoni were also posed certain questions pertaining to the Suspect,³⁵ albeit very limited and general ones.³⁶ The point is, however, that the Germans had decided not to take any formal investigative steps pertaining to the Suspect, and they conveyed this explicitly to the Prosecution.

³² ICC-01/04-01/10-209.

³³ ICC-01/04-01/10-11-Red, para. 174; A contrario, Defence Request, para.12.

³⁴ ICC-01/04-01/10-11-Red, para. 172.

³⁵ They also elicited information from these witnesses about several persons (such as Sylvestre Mudacumura) who were never named as suspects in their investigation.

³⁶ Copies of the statements taken by the German BKA were disclosed to the Defence on 1 June 2011, after the necessary redactions had been approved by the Chamber.

24. On 17 January and in response to the Defence Challenge to the Validity of the Arrest Warrant, the Prosecution reiterated that “in terms of the admissibility of the case the only relevant issue is the lack of an active national investigation against Mbarushimana”.³⁷ As the Appeals Chamber has stated, instances of inaction “render a case admissible before the Court”.³⁸
25. The Defence ignores the Prosecution’s submissions and chooses to enter into a linguistic discussion of the German term “*Ermittlungsverfahren*”.³⁹ The Prosecutor has never denied or concealed the fact that there was an investigation (*Ermittlungsverfahren*) where Mbarushimana was named as a suspect.⁴⁰ However, naming a person as a suspect in a national investigation, without more, is not an investigation within the meaning of Article 17(1)(a). An investigation requires that actual investigative steps be taken with respect to that particular person. In the *Katanga and Ngudjolo case*, the accused Katanga was also considered to be a suspect and even detained for over two years in a domestic (DRC) investigation. But without more, the Trial Chamber found inaction by the DRC authorities and, accordingly, it concluded that the case was admissible before this Court.⁴¹ The Appeals Chamber affirmed.⁴² Moreover, Pre-Trial Chamber II, in dismissing the admissibility challenge brought by the Government of Kenya, has held that national investigations must evidence “concrete investigative steps” regarding the person in question for article 17 to be triggered.⁴³ Similarly, in the instant case, although Mbarushimana was considered a suspect in a German investigative procedure – a fact that the Prosecution has never hidden⁴⁴ – the fact remains that German authorities did not take any concrete investigative steps specifically targeting

³⁷ ICC-01/04-01/10-35, para.21; see also ICC-01/04-01/10-49, para.6.

³⁸ ICC-01/04-01/07-1497OA8, para. 78.

³⁹ Defence Request, paras.12, 18. The Prosecution notes that the Defence made the exact same arguments in its Challenge to the Validity of the Arrest Warrant: see ICC-01/04-01/10-32, paras.13,15.

⁴⁰ ICC-01/04-01/10-11-Red, para. 172; ICC-01/04-01/10-35, paras. 16-17; ICC-01/04-01/10-49, para.6. See Juy-Birmann R., *The German System*, in Delmas-Marty and Spencer “European Criminal Procedures”, (Cambridge University Press, 2002), pp.305.

⁴¹ ICC-01/04-01/07-1213, para.69. The Trial Chamber also found that the DRC authorities were unwilling.

⁴² ICC-01/04-01/07-1497 OA8, paras.2, 89.

⁴³ ICC-01/09-02/11-96 30-05-2011, paras 60-65.

⁴⁴ ICC-01/04-01/10-11-Red, paras.172-173.

the Suspect within the terms of Article 17(1)(a).⁴⁵ This is in stark contrast to the position with the primary objects of their investigation, Murwanashyaka and Musoni, who had their communications intercepted, residential and work premises searched and were arrested and subsequently charged. Mbarushimana was not the focus of the said German investigation despite his name appearing in the formal case. The mere opening of a case-file is a preliminary step, but it neither constitutes the adoption of investigative measures nor signifies that the investigation will target all the persons named as suspects. The fact that the German authorities arrested and charged the other two persons (Murwanashyaka and Musoni on 19 November 2009), but took no steps to extradite the Suspect from France, further corroborates this fact.

26. The letter of 6 December 2010⁴⁶ only confirms - contrary to the Defence's submissions - that the German authorities determined that its investigation did not establish grounds to pursue the case against the Suspect,⁴⁷ in substantial part because he had no territorial nexus with Germany.⁴⁸ In addition the notes of the German federal police dated 19 October 2009 – to which the Suspect refers in his Request – confirms that the investigation was focused on Musoni and Murwanashyaka.⁴⁹ The Suspect's name appears in the case heading and he is mentioned in the German notes – but together with other (non-suspect) individuals - as a person “who was consulted and technically supported” Murwanashyaka when the latter changed the FDLR website.⁵⁰ The notes mention the Suspect and others whose names appeared in

⁴⁵ ICC-01/04-01/10-11-Red, para.172; ICC-01/04-01/10-35, para.21. The Prosecution has always maintained that Mbarushimana was named “suspect” within a German investigation that had as main targets two other suspects, whose residences were searched and property seized, contrary to Mbarushimana.

⁴⁶ The letter from the German Federal Prosecutor dates 6 December and attaches a memo of 3 December 2010. The Prosecution will refer to both documents as the “Letter” for the purposes of this filing. Those were provided to the Prosecution on 31 January 2011.

⁴⁷ DRC-OTP-2024-2440 (English); DRC-OTP-2024-2435 (German). A contrario Defence Request, para.16.

⁴⁸ DRC-OTP-2024-2440 at 2443, second paragraph (English); DRC-OTP-2024-2435 at 2438, second paragraph (German).

⁴⁹ See for instance DRC-OTP-2022-0631 (German) where the authorities assess the connection of certain individuals only to Murwanahskaya. A contrario Defence Request, para.19. The Prosecution notes that it received these notes of the German police on 29 October 2010.

⁵⁰ DRC-OTP-2022-0632 (last two paragraphs) and 0633 (first paragraph).

the course of an investigation again, not because of their own indicia of criminality subject to German criminal jurisdiction, but because they dealt with Musoni and/or Murwanashyaka. Similarly, the fact that the German authorities gathered evidence regarding the FDLR website is no indication that investigative steps were taken against the Suspect. Such steps were clearly relevant to their investigation against their other suspects and the fact that this evidence might also coincidentally incriminate the Suspect does not advance his case at all.

27. To support its assertion that the Prosecution has misled the Chamber, the Defence selectively quotes extracts of the Prosecution's Application and misrepresents the letter of 6 December 2010 and the notes of 19 October 2009.⁵¹ First, the conclusion included at paragraphs 167 and 174 of the Application – stating that there is no investigation and prosecution at a domestic level involving the Suspect and the relevant conduct - must be read together with paragraphs 172 and 173 of the said Application, which explain the basis of the stated conclusion. In those paragraphs the Prosecution acknowledges that Mbarushimana had been considered a suspect in a German investigation but subsequently explains that no concrete investigative steps had been taken related to him and that the German authorities had indicated that the Court was the relevant authority to prosecute the case. The Prosecution also stated that this information was conveyed in meetings and communications between his representatives and German authorities.⁵² Hence, at no time did the Prosecution conceal or misrepresent the facts.⁵³ The Prosecution notes that the Defence has previously advanced the same flawed arguments in its Challenge to the Validity of the Arrest Warrant - a fact which was noted by the Prosecution in its Response.⁵⁴ Despite the Prosecution's protests, it now

⁵¹ A contrario, Defence Request paras.8-10.

⁵² See ICC-01/04-01/10-11-Red, fns. 214 and 215.

⁵³ A contrario, Defence Request paras.12-13.

⁵⁴ ICC-01/04-01/10-35, para.17.

chooses to repeat these arguments and the selective quotations on which they are based, perhaps interpreting the Chamber's silence as acquiescence.

28. Second, the Defence assertion that the Prosecution has deliberately delayed or refused the disclosure of information up until the German authorities formally closed the case involving the Suspect on 3 December 2011 is not only false and unsupported but also amounts to a charge that a crime has been committed by the members of the Prosecution Office.⁵⁵ As noted above the Prosecution had already provided all relevant information with respect to the German case at the Application stage. The Defence argues that the Prosecution "was actively refusing to perform any type of disclosure" before 3 December 2010 and attaches an email from counsel for the Prosecution dated 8 November that would purportedly support this argument.⁵⁶ This email is also taken out of its true context: shortly after the Suspect was arrested in France, and prior to his surrender to this Court, his counsel endeavored a wide and ever-expanding request for disclosure of practically *all* the case file (see the three Defence requests for disclosure of 31 October and 3 November 2010, in which no specific reference to the German proceedings was made).⁵⁷ The Prosecution's position was – and is – that disclosure of certain information should be effected only once the Suspect is before the Court. As the Prosecution argued in its Response of 5 January 2011 (after the case was formally closed in Germany) disclosure of the Prosecution's case file before the surrender of the Suspect before the Court would entail serious risks that the Court would be unable to manage.⁵⁸ On 27 January 2011, the Chamber ordered the Prosecution to disclose those materials that had been specifically identified by the Defence in its requests and deferred the disclosure of the bulk of the remaining documentation to a later decision on modalities of disclosure that would be

⁵⁵ A contrario, Defence Request paras.15, 20.

⁵⁶ Annex I of the Defence Request.

⁵⁷ See ICC-01/04-01/10-29, in particular paras. 4 (first request for disclosure), 6 (second request for disclosure) and 8 (third request for disclosure).

⁵⁸ ICC-01/04-01/10-31, para.2 – which provides a summary of the Prosecution's position and underlying arguments.

rendered once the Suspect was before this Court.⁵⁹ It is noteworthy that the Defence at no time (including on the letters mentioned in Annex I) requested the German material purportedly relevant to an admissibility challenge. To the contrary it focused its requests to the intercepted conversations of the Suspect and the supporting material that accompanied the DRC referral to the Prosecutor.⁶⁰

29. Third, the Defence claims that the Prosecution withheld information received from the German authorities on the basis that the internal numbering of some documents would indicate that a page (15) of the police German notes is missing. This argument is technically correct, the Prosecution did omit page 15. It did not, however, withhold *information*, far less information that was material to the preparation of the defence.⁶¹ The page, attached herein, was literally blank, it was a divider page.⁶²

30. In summary, the Prosecution disputes that it misled the Chamber in the Application or that any “correction of the record” was required. Although the Prosecution considers it inappropriate as a matter of principle to disclose to the Defence confidential communications between the Prosecution and State authorities, the Prosecution has no objection to making all such correspondence available to the Chamber, should it wish to confirm what was conveyed to the Prosecution by the German authorities. Furthermore, should the Chamber so direct, the Prosecution will request the German authorities to forward to the Court a formal letter clarifying the status of their investigation at the time of the Application and the nature of their communications with the Prosecution.⁶³

⁵⁹ ICC-01/04-01/10-47, pp.10-11.

⁶⁰ ICC-01/04-01/10-29, paras.4,6,8.

⁶¹ The Prosecution is required to exercise its discretion as to what material is required to be disclosed in terms of Rule 77. The fact, therefore, that there is a gap in a sequence of disclosed documents cannot and should not be seen as an opportunity to raise speculative allegations that the Prosecution is hiding relevant evidence.

⁶² See Annex I.

⁶³ Due to the shortened time afforded to the Prosecution to respond to this filing, it has not been possible to obtain such confirmation in order to annex it hereto.

(2) Inapplicability of the Abuse of Process Doctrine

31. From all of the above it should be clear that there is no abuse of process. The Prosecution maintains that it accurately put before the Chamber all the relevant information available to it. Although the Defence omits this fact in this and prior filings,⁶⁴ the German authorities consistently maintained – long before the closing of his case on 3 December 2010 – that this Court was the appropriate authority to prosecute the Suspect.⁶⁵ The evidence establishes that the German authorities did not undertake any concrete investigative steps in respect of the Suspect, did not intend to pursue such an investigation, did not believe they were the appropriate authority to conduct the investigation, and did not indicate at any time that they were preparing to or even interested in proceeding against him. The evidence also establishes that the German authorities conveyed this position to the Prosecution, deferred to the Prosecutor of the International Criminal Court and cooperated with the ICC investigation.

32. Without restating all the relevant jurisprudence,⁶⁶ the Prosecution stresses that a stay of proceedings on the grounds of abuse of process requires a high threshold of gravity with respect to the Prosecution's conduct, or a seriously detrimental impact on the fairness of the proceedings.⁶⁷ Here, the Prosecutor did not mislead the Chamber and commit conduct of such a repugnant or egregious nature that it is essential that the case be stayed in the interests of justice. To the contrary, in the absence of any wrongdoing attributable to the Prosecution, the Defence submissions qualifying the Prosecution's conduct as "repugnant", and "a willful disregard for the accuracy of the facts placed

⁶⁴ ICC-01/04-01/10-32. The Prosecution pointed out this fact in ICC-01/04-01/10-35, para.17.

⁶⁵ ICC-01/04-01/10-11-Red, para.173; DRC-OTP-2024-2440 at 2444, first paragraph (English); DRC-OTP-2024-2435 at 2439, first paragraph (German). Note that the Appeals Chamber has held that "there may be merit in the argument that the sovereign decision of a State to relinquish its jurisdiction in favour of the Court may well be seen as complying with the 'duty to exercise [its] criminal jurisdiction', as envisaged in the sixth paragraph of the Preamble": ICC-01/04-01/07-1497 OA8, para.85.

⁶⁶ See ICC-01/04-01/06-772OA4, paras.26, 30, 31, 33, 37 and 39; ICC-01/04-01/06-1486 OA13, para.76; ICC-01/04-01/06-2582 OA18, para.61.

⁶⁷ ICC-01/04-01/06-772OA4, para.31.

before the Court” or “a manipulation of the Court’s process and conscious deprivation of [the Suspect’s] right to challenge the admissibility of the proceedings” are misplaced and should be summarily dismissed.⁶⁸

33. As regards the alleged misconduct in failing to disclose communications between the Prosecution and the German authorities, even if the Pre-Trial Chamber had the communications before it at the Application stage,⁶⁹ the Chamber would have found that these exchanges did not contain decisive information on the circumstances of the case, as understood in the relevant jurisprudence, which ought to have been brought to the attention of the Pre-Trial Chamber by the Prosecutor. Hence this material would have not led the Pre-Trial Chamber to exercise its discretion to conduct a *proprio motu* review of the admissibility of the case.⁷⁰

(3) Abuse of the Defence’s discretion to present and conduct its case

34. The Defence has accused the Prosecution of “lying in the face of the Court” or being “grossly negligent” and “knowingly suppress[ing] information”. These serious allegations of crimes committed by the Prosecutor are unsubstantiated and repetitious,⁷¹ as if by mere repetition they might somehow gain credence. They are also untrue. Allegations of either gross negligence or deliberate misconduct are serious and for that reason should not be made lightly and without support. Defence counsel should also be mindful of his obligations toward this Court, in particular, a duty not to deceive or knowingly mislead the Court, including the taking of necessary steps to correct erroneous statements.⁷² The Defence strategy of consistently misquoting the Prosecution’s submissions and misrepresenting the relevant facts is

⁶⁸ Defence Request, para.21.

⁶⁹ The Prosecution notes that the time of the Application it did not have the 19 October 2009 notes of the German police nor obviously the 6 December 2011 letter.

⁷⁰ ICC-01/04-01/07-1213, para.72.

⁷¹ Most of the arguments put forward in the Defence Request have also been made in the prior Defence Challenge to the Validity of the Arrest Warrant: ICC-01/04-01/10-32.

⁷² Article 24(3) of the Code of Professional Conduct for counsel.

inconsistent with the overall interests of the administration of justice⁷³ and disregards the Appeals Chamber jurisprudence.⁷⁴ The Prosecution will consider further ways to address these false allegations.

(4) The irrelevance of the provision of further evidence

35. The Defence seeks an order for the disclosure of the communications between the German authorities and the Prosecution, as well an oral hearing to hear the evidence of Prosecution officials. The Defence argues that this is necessary to establish Prosecution's willful intent or gross negligence in order to substantiate its allegation of abuse of process. The Defence further refers to a decision in the *Bemba case* that would purportedly support the need for supporting evidence in the framework of abuse of process proceedings.⁷⁵
36. The Prosecution opposes this request: first, the Defence knew of the communications between the Prosecution and German authorities since the Application was made available but at no time requested them until April 2011 – as the Prosecution noted in the email attached as Annex 3 to the Defence Request. In addition, and as also indicated in that email exchange the requested material refers to a national proceeding that has been closed, hence the material was – and remains - irrelevant to the preparation of an admissibility challenge with respect to present investigations and prosecutions.⁷⁶ Finally, the Defence once more misrepresents this Court's jurisprudence in its citation of the *Bemba case*: in that case Trial Chamber III reprimanded the Defence because it had provided additional material without seeking prior leave from the Chamber.⁷⁷

⁷³ ICC-01/04-01/07-2259 OA10, para. 77.

⁷⁴ ICC-01/04-01/06-2582 OA18, para.51.

⁷⁵ Defence Request, para.24.

⁷⁶ ICC-01/04-01/07-1497 OA8, paras.75,111.

⁷⁷ ICC-01/05-01/08-802, para.254.

IV. Relief sought

37. For all the above-explained reasons, the Prosecution respectfully requests that the Chamber summarily dismiss the Defence Request to stay the proceedings and disclosure of additional evidence and oral hearing.



Luis Moreno-Ocampo
Prosecutor

Dated this 3rd day of June 2011

At The Hague, The Netherlands