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PRE-TRIAL CHAMBER I

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
THE PROSECUTOR
*v. CALLIXTE MBARUSHIMANA***

Public Document

Defence request for leave to reply to the "Prosecution's response to the 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

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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
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Detention Section

**Victims Participation and Reparations
Section Other**

Pursuant to Regulation 24(5) of the Regulations of the Court, the Defence for Mr. Callixte Mbarushimana hereby requests leave to reply to the "Prosecution's response to the Defence request for a permanent stay of proceedings" ("Prosecution Response").¹

1. On 3 June 2011, before the filing of the Prosecution Response, Counsel wrote to the Office of the Prosecutor ("OTP") as follows:

"On 1 June 2011, the OTP disclosed to the Defence a package containing potentially exonerating information; namely, 11 witness statements taken from various FDLR related individuals by the Bundeskriminalamt (BKA) (German Security Services). All of these statements, bar one - unless I am mistaken - were taken in the course of the investigation against Ignace Murwanashyaka, Straton Musoni and Callixte Mbarushimana (as stipulated in the introductory paragraphs of each statement). Several of these statements include questions of the interviewed individual as to his familiarity with Mr. Mbarushimana and his knowledge of Mr. Mbarushimana's role within the FDLR. On at least one occasion which I have been able to identify (given the short time which these statements have been in my possession), one of the interviewees gives details as to Mr. Mbarushimana's role. All of these statements were delivered to the OTP (JCCD) in the latter half of 2010 and all before the closing of the German investigation on 3 December 2010.

I would be grateful if the OTP would admit to these aforementioned facts as formulated above in order to avoid the need for me to submit all of these PEXO statements to the Pre-Trial Chamber in support of my contention that up to 3 December 2010, there was an active investigation against Mr. Mbarushimana pursued by the German authorities. A wholesale supply of PEXO would also not serve the interests of the Prosecution.

As you will appreciate, the OTP is obliged to file its response today to ICC-01/04-01/10-177 (Defence request for a permanent stay of proceedings) and the information disclosed on 1 June 2011, is information which I would have used in support of this request - had it been disclosed to me beforehand.

*I therefore seek your approval to the admissions in the first paragraph and put you on notice of the extreme relevance of these 11 statements in the view that you are obliged to address their impact on the Defence request in the context of your response to be filed today."*²

2. As of the filing of this request, Counsel has received no reply from the OTP. The OTP did, nevertheless, make passing reference to the substance of Counsel's request in the Prosecution Response by submitting as follows:

¹ ICC-01/04-01/10-211 (3 June 2011).

² Email from Counsel to OTP Senior Trial Lawyer sent at 10:10 (GMT +2).

"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, albeit very limited and general ones".³

3. On the basis of its reported and undisclosed communications with the German authorities,⁴ the OTP asserts that German proceedings against Mr. Mbarushimana were *"a naming without more"*⁵ and *"a mere opening of a case file"*⁶ but not a real investigation with *"concrete"*⁷ or *"formal"*⁸ investigative steps such as *"measures to question him, to conduct search and seizure operations [...] or to have him arrested"*.⁹

4. The existence of an investigation for the purpose of Article 17(1)(a), however, is a legal test the determination of which falls to the Pre-Trial Chamber on the basis of evidence. This legal test is not satisfied, it is submitted, by reports of the contents of communications and meetings with the German authorities which the Prosecution has not produced.

5. The Defence reiterates that the use of the words **"potential suspect"** to describe Mr. Mbarushimana's status in Germany was misleading. If the word **"suspect"** had been used without the preceding word **"potential"** and the Pre-Trial Chamber had been supplied with **all** the German materials concerning Mr. Mbarushimana, the Pre-Trial Chamber would have found a *"self-evident factor"*¹⁰ obliging examination of the admissibility of the case under Article 17(1)(a) of the

³ Prosecution Response at paragraph 23; c.f., paragraphs 1 and 6 herein.

⁴ Prosecution Response at paragraphs 8 and 9.

⁵ Prosecution Response at paragraph 25.

⁶ Prosecution Response at paragraph 25.

⁷ Prosecution Response at paragraph 22.

⁸ Prosecution Response at paragraph 23.

⁹ Prosecution Response at paragraph 22: According to the OTP, these are the essential hallmarks of an investigation. If this were in fact the case, then it has conducted no "investigation" against either Omar al-Bashir or Muammar Gaddafi.

¹⁰ ICC-01/04-01/10-1 at paragraph 9.

Rome Statute. Acute, now, to the importance of such a distinction, the OTP makes reference to its former application for an arrest warrant and asserts:

"In those paragraphs [172 & 173] the Prosecution acknowledges that Mbarushimana had been considered a suspect in a German investigation....".¹¹

6. But that is **not** what the OTP stated at the time that it requested the ICC arrest warrant. The OTP formerly stated that Mr. Mbarushimana was considered a **"potential"** suspect.¹² The OTP further stated that the German authorities were sharing information implying that this was a gesture "*consistent*" with Article 93¹³ – something which in fact requires a Court order. At no stage did the OTP indicate that the German authorities were asking its witnesses as to the role of Mr. Mbarushimana in the FDLR. Either the German authorities were investigating Mr. Mbarushimana's liability for FDLR acts in the Kivus or they were not. Only the documentary evidence will tell and not the manner in which the OTP expresses German intentions.

7. Leave to reply is sought, therefore, to enable the provision of further evidence¹⁴ - received by the OTP in 2010¹⁵ and only communicated to the Defence on 1 June 2011. This evidence will further support the Defence contention that there existed a genuine German investigation against Mr. Mbarushimana of such a nature so as to constitute "*ostensible cause*" for the Pre-Trial Chamber to exercise its discretion pursuant to Article 19(1) of the Rome Statute.¹⁶



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Jerusalem, Israel
Monday, June 06, 2011

¹¹ Prosecution Response at paragraph 27.

¹² ICC-01/04-01/10-11-RED2 at paragraph 172.

¹³ ICC-01/04-01/10-11-RED2 at paragraph 173.

¹⁴ As set out in paragraph 1 above.

¹⁵ Before and after the arrest warrant application on 4.5.10, 26.7.10 and 30.11.10.

¹⁶ ICC-01/04-01/10-1 at paragraph 9.