

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 1 July 2011

PRE-TRIAL CHAMBER I

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR V. CALLIXTE MBARUSHIMANA**

**URGENT
Public document**

Decision on the "Defence request for a permanent stay of proceedings"

Decision 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
Mr Anton Steynberg, Senior Trial Lawyer

Counsel for the Defence

Mr Nicholas Kaufman
Ms. Yael Vias-Gvirsman

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Mr Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

PRE-TRIAL CHAMBER I of the International Criminal Court (“Chamber” and “Court” respectively);

NOTING the “Defence request for a permanent stay of proceedings” dated 24 May 2011 (“Defence Request”), whereby the Defence (i) reiterated the submission made in its challenge to the validity of the arrest warrant¹, to the effect that “the Prosecution had misled the Pre-Trial Chamber as to the nature of the proceedings conducted against Mr Mbarushimana in the Federal Republic of Germany at the time it requested an arrest warrant” (which challenge had been rejected by the Chamber on 28 January 2011²), since he was “the concrete subject of an active police/intelligence agency investigation (*Ermittlungsverfahren*)”; (ii) submitted that the Prosecutor’s conduct constituted an abuse of process; and, (iii) accordingly, requested that the Chamber 1. shorten the time-limit for the response by the Prosecutor; 2. order “the disclosure of all previous correspondence between the OTP and the German Federal Prosecutor”; 3. convene, if necessary, “a status conference for hearing the evidence of any other relevant OTP officials”; 4. find “the facts adduced properly substantiated” and 5. “permanently stay the proceedings against Mr. Mbarushimana on account of an abuse of process”;³

NOTING the “Prosecution response to the ‘Defence request for a permanent stay of proceedings’”⁴ (“Prosecutor’s Response”), filed on 3 June 2011 in compliance with the “Order setting a time limit for the response of the Prosecution”⁵, whereby the Prosecutor (i) submitted that the Defence merely reiterated arguments previously submitted in its challenge to the validity of the warrant of arrest; (ii) noted that, far from concealing the fact that there was an investigation (*Ermittlungsverfahren*) where Mr Mbarushimana was named as a suspect in Germany, the Prosecution’s Application for a warrant of arrest for Mr Mbarushimana (“Prosecutor’s Application”) contained all relevant and available information, including the fact that the Prosecution had communicated with German authorities, who had “indicated that the Court was the competent authority to prosecute the suspect”; (iii) argued that the the communications between the Prosecution and the German Federal Public Prosecutor Office

¹ ICC-01/04-01/10-32 and Annex 1.

² ICC-01/04-01/10-50.

³ ICC-01/04-01/10-177, with confidential annexes 1, 2 and 3.

⁴ ICC-01/04-01/10-211.

⁵ ICC-01/04-01/10-180.

were not relevant to the determination of the admissibility of the case; and, accordingly (iv), requested that the Chamber summarily dismiss the Defence Request in its entirety;

NOTING all the arguments put forward by the Defence and the Prosecutor in support of their respective requests, both in fact and in law;

NOTING articles 17, 19, 21, 55 and 67 of the Rome Statute ("Statute");

CONSIDERING that the principle of abuse of process, its ambit and applicability in proceedings before the ICC have been repeatedly addressed by the case-law of the Court, including by the Appeals Chamber⁶;

CONSIDERING that, accordingly, the Defence Request must be assessed in light of the established case-law of the Court;

CONSIDERING on the one hand that, whilst a well-known feature of the common law tradition, the principle of abuse of process leading to the court's authority to stay proceedings is not provided by the Statute, nor is it "generally recognised as an indispensable power of a court of law"⁷;

CONSIDERING, on the other hand, that the Statute safeguards the rights of the suspect and the accused, most notably under articles 55 and 67, and that article 21(3) requires that the Court exercises its jurisdiction in accordance with internationally recognised human rights norms, first and foremost the right to a fair trial;⁸

CONSIDERING, accordingly, that "if no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped";⁹

CONSIDERING, however, that not each and every breach of the rights of the suspect and/or the accused is tantamount to an abuse of process entailing the need to stay the relevant proceedings and that only gross violations of those rights, such as to make it

⁶ ICC-01/04-01/06-772; ICC-01/04-01/06-1401; ICC-01/04-01/06-1486; ICC-01/04-01/06-2582; ICC-01/04-01/06-2690-Red2.

⁷ ICC-01-04-01/06-772, paragraph 35.

⁸ Ibidem, paragraphs 36-37.

⁹ Ibidem, paragraph 37.

impossible for the accused “to make his/her defence within the framework of his rights”¹⁰, justify that the course of justice be halted;

CONSIDERING that the Appeals Chamber has recently reiterated that a stay of proceedings is a “drastic” and “exceptional” remedy¹¹;

CONSIDERING that, as stated by the case-law of the Court¹², behaviours which may trigger a stay of proceedings are those that entail unfairness of such a nature that it cannot be resolved, rectified or corrected in the subsequent course of the proceedings;

CONSIDERING that the Prosecutor’s behaviour which, in the view of the Defence, would amount to an abuse of process, consists of having allegedly “misled the Chamber as to the nature of proceedings conducted against Mr Mbarushimana in the Federal Republic of Germany *at the time that [he] requested an arrest warrant*” (emphasis added);¹³

CONSIDERING that the Defence itself concedes that “by the time the issue came to be litigated before the Pre-Trial Chamber, the German investigation had been shelved”;¹⁴

CONSIDERING that the Prosecutor clarified that the statements released by the German authorities at the beginning of December 2010¹⁵ did nothing more than mirror a position which the same German authorities had previously conveyed to the Prosecutor throughout contacts preceding the submission of the Prosecutor’s Application;

CONSIDERING that, also in light of the clarifications put forward by the Prosecutor in his Response, the behaviour complained of by the Defence amounts to a mischaracterisation by the Prosecutor of the specific nature of the procedural initiatives taken vis-à-vis Mr Mbarushimana by the German investigative authorities at the time of and immediately preceding the submission of the Prosecutor’s Application;

CONSIDERING that, in the absence of evidence to the contrary, the Defence’s submission to the effect that the Prosecutor would have supplied misleading information

¹⁰ Ibidem, paragraph 39.

¹¹ ICC-01/04-01/06-2582, paragraph 55.

¹² ICC-01/04-01/06-1401, paragraph 91.

¹³ ICC-01/04-01/10-177, paragraph 1.

¹⁴ ICC-01/04-01/10-177, paragraph 15.

¹⁵ ICC-01/04-01/10-209-Conf-Anx2.

in a “wilful or grossly negligent way”¹⁶ appears to be of a speculative nature and that, accordingly, there is no reason to question the good faith of the Prosecutor in submitting the Application to the Chamber;

CONSIDERING that, even if it were to be determined that the Prosecutor erred in characterizing the nature of the proceedings concerning Mr Mbarushimana pending before the German authorities at the time of the submission of the Application, such behaviour cannot be equated to the types of conduct that usually form a basis for a stay of proceedings due to an abuse of judicial process (which typically include delays in bringing the accused to justice, broken promises to the accused with regard to his prosecution and bringing the accused to justice by illegal or devious means¹⁷);

CONSIDERING that, accordingly, such behaviour fails to reach the threshold of gravity which must be present in a purported violation of the rights of the accused for such violation to trigger the stay of the proceedings;

CONSIDERING that, accordingly, there is no need for the Chamber to embark upon an in-depth assessment of the specific nature of the “*Ermittlungsverfahren*”¹⁸ proceedings in accordance with German law;

CONSIDERING moreover that the appropriate procedural scenario where the issue of the determination of the nature of the proceedings concerning Mr Mbarushimana which were outstanding in Germany at the time of the submission of the Prosecutor’s Application is a challenge to the admissibility of the case pursuant to article 19 of the Statute;

CONSIDERING that, accordingly, there is no need for the Chamber to address the other requests of the Defence, namely to order “the disclosure of all previous correspondence between the OTP and the German Federal Prosecutor”; and to “convene, if necessary, a status conference for hearing the evidence of any other relevant OTP officials”;

¹⁶ ICC-01-04-01/06-177, paragraph 3

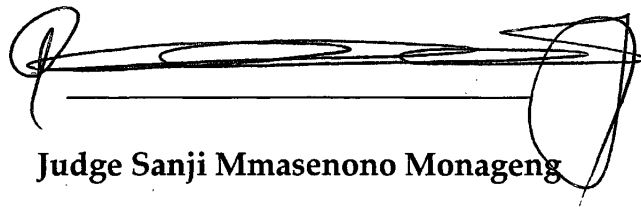
¹⁷ ICC-01-04-01/06-772, paragraph 29.

¹⁸ See ICC-01/04-01/10-209-Conf-Anx2.

FOR THESE REASONS, the Chamber

REJECTS the Defence Request.

Done in English and French, the English version being authoritative.

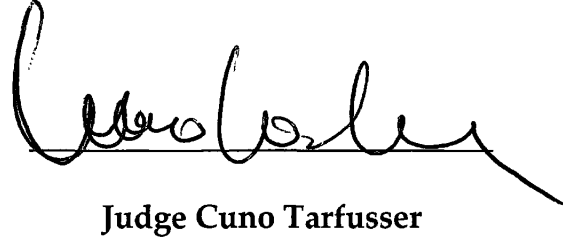


Judge Sanji Mmasenono Monageng

Presiding Judge



Judge Sylvia Steiner



Judge Cuno Tarfusser

Dated this Friday, 1 July 2011

At The Hague, The Netherlands