

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: **27 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***

Confidential

**Prosecution's response to the Second Defence request for
interim release ICC-01/04-01/10-294**

Source: Office of the Prosecutor

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

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Unrepresented Victims

**Unrepresented Applicants
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I. Introduction

1. The Defence requests¹ the Chamber to order the release of the Suspect based on allegedly "new circumstances",² namely that the case against the Suspect was inadmissible at the time of his arrest. In the alternative, the Defence seeks financial compensation on the basis of his unlawful arrest.³ The Prosecution submits that the request has no merit either in law or on the facts.

II. Submissions

The Request should be rejected in limine

2. The Prosecution submits that the request falls to be rejected *in limine* on one or all of the following three grounds. Firstly, as the Defence candidly admits, the request is submitted for the ulterior purpose of forcing the Pre-Trial Chamber ("Chamber") to rule on the merits of the Defence's well-worn argument that the case was inadmissible at the time the warrant of arrest was issued, due to the alleged existence of a contemporaneous German investigation. This is a separate substantive issue which has already been litigated by the Defence both in its challenge to the warrant of arrest⁴ and its request for a stay of proceedings.⁵ By the Defence's own admission, therefore, this filing reiterates an argument that has already been repeatedly raised and rejected and should not be entertained by the Chamber for this reason alone.
3. Rather, the fact that the claim has re-emerged in an application for release, notwithstanding that there is no statutory basis for release on this ground, suggests that the Defence is instead using the interim release provision in order to exercise the right to appeal the underlying issue. The Defence request for leave to appeal the application to stay the proceedings on this exact ground was denied. It

¹ ICC-01/04-01/10-294, 19 July 2011.

² *Ibid.*, paras.11 and 17.

³ *Ibid.*, para 15.

⁴ ICC-01/04-01/10-32, 10 January 2011.

⁵ ICC-01/04-01/10-177, 24 May 2011.

now seeks to circumvent the latter decision of the Chamber by disguising the same substantive objection as a request for interim release. That this is a pretext is borne out by the fact that this request, purportedly for interim release, does not even pretend to address any of the factors relevant to such a request set forth in Article 60(2).

4. Secondly, the Defence is asking the Chamber to fashion a "*sui generis*" ground for release⁶ which is not provided for by the Rome Statute ("Statute") or the Rules of Procedure and Evidence ("Rules").⁷ The Statute is clear: if the Chamber is satisfied that the conditions set forth in Article 58 are met, "the person **shall** continue to be detained".⁸ There is no basis for the Chamber to decide that the person is a flight risk or will obstruct justice or continue to commit crimes but nonetheless must be released as compensation for a prior violation of his rights or as a sanction against the Prosecution for past misconduct. Thus, the Statute does not permit the Chamber to fashion a discretionary remedy of the sort requested by the Defence. For this reason also the request should be dismissed.
5. Thirdly, the Chamber is not competent to deal with requests for compensation. These must be addressed to the Presidency of the Court as required by Rule 173(1). The Defence may not bring a request for compensation in the absence of a finding that the Suspect has been the victim of unlawful arrest or detention.⁹

The Request should also be rejected on the merits

6. The Prosecution submits that the request also falls to be rejected on its merits. In the first instance, the fact relied upon by the Defence to support the request, namely the alleged existence of the German investigation at the time the warrant

⁶ *Ibid.*, para. 11.

⁷ The grounds for interim release are clearly spelled out in Art 60(2), read with Art 58(1). The Statute does not recognize any other grounds for interim release.

⁸ Article 60(2); emphasis added. This was explicitly confirmed by the Appeals Chamber in *Prosecutor v. Lubanga*, Judgment on Interim Release Appeal, ICC-01/04-01/06-824 OA7, 13 February 2007, paras. 134, 140: "[A] decision on continued detention or release pursuant to article 60 (2) read with article 58 (1) of the Statute **is not of a discretionary nature. Depending upon whether or not the conditions of article 58 (1) of the Statute continue to be met, the detained person shall be continued [sic] to be detained or shall be released**", and for this reason "there was no reason for the Pre-Trial Chamber to make the principle of necessity and proportionality an independent consideration in its decision" (emphasis added).

⁹ Article 85(1) read together with Rule 173(1) and (2)(a).

of arrest was issued, was well known to all parties at the time of the initial request for interim release.¹⁰ It is therefore not a “changed circumstance” at all. Furthermore, the Defence has not demonstrated any ground upon which the Chamber might reconsider its initial decision refusing interim release, which has since been comprehensively confirmed by the Appeals Chamber.¹¹

7. Furthermore, the Chamber has previously considered the Prosecution’s alleged mischaracterization of the German investigation and concluded that there were no grounds impelling it to exercise its *proprio motu* power of review.¹² This decision was not appealed. And, once again, the Defence has failed to demonstrate any ground upon which the Chamber might reconsider its initial decision. Therefore, there is no logical connection between the Prosecution’s alleged mischaracterization of the facts and the Suspect’s detention. Furthermore, the Defence provides no statutory or other authority to support its argument that the interim release of the Suspect, irrespective of the merits of his detention under Article 58, is an appropriate “compensation” for the Prosecution’s alleged misconduct.¹³
8. Finally, the Prosecution reiterates its argument that it **did not** in fact misrepresent the facts relating to the German investigation in its Application under Article 58.¹⁴ The Prosecution respectfully refers the Chamber to its previous submissions,¹⁵ which clearly established that there was no investigation in Germany, within the

¹⁰ Nothing in the information disclosed by the Prosecution on 1 June, in compliance with the Chamber’s directions, took the position any further. In particular, the 10 statements referred to by the Defence were not taken in furtherance of any specific investigation against the Suspect. A brief perusal of these statements will confirm that they were all concerned with the real targets of the German investigations, namely Messrs. Murwanashyaka and Musoni, and only referred in passing to the Suspect. Thus they do not constitute concrete investigative steps taken in respect of the Suspect. It should also be noted that it was the Suspect’s election not to bring the admissibility challenge before 3 December. Had he done so, this would have triggered earlier disclosure of all the relevant evidence. The Defence cannot now complain that they are prejudiced by developments that occurred while they waited for the most opportune moment to do so.

¹¹ In order to do so, the Defence would have to establish that the decision was “manifestly unsound” and its consequences “manifestly unsatisfactory”; *Prosecutor v. Thomas Lubanga*, ICC-01/01-01/06-2705, para. 18. In that decision, the majority of Trial Chamber I emphasized the need to apply this test strictly.

¹² ICC-01/04-01/10-50 at p. 4. The clear implication of the Chamber’s decision is that even if the Chamber had been informed of additional details of the German investigation, it would nevertheless have issued the warrant of arrest.

¹³ It is clear from the language of Art 85 and Rule 173 that the “compensation” which may be awarded to an unlawfully arrested person is only financial.

¹⁴ ICC-01/04-01/10-11-Red.

¹⁵ See ICC-01/04-01/10-211, paras 22 to 30. The Prosecution relies on these submissions as if specifically incorporated herein.

meaning of Article 17, involving “concrete investigative steps” against the Suspect.¹⁶

III. Conclusion

9. For all of the above reasons, the Prosecution submits that the Defence request should be rejected *in limine*, alternatively on its merits.



Luis Moreno-Ocampo,
Prosecutor

Dated this 27th day of July 2011

At The Hague, Netherlands

¹⁶ See ICC-01/09-02/11-96, paras. 60 – 65.