

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 28 July 2011

**PRE-TRIAL CHAMBER I**

**Before: Judge Cuno Tarfusser, Single Judge**

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

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

**Public**

**Decision on "Second Defence request for interim release"**

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  
 Ms Fatou Bensouda, Deputy Prosecutor  
 Mr Anton Steynberg, Senior Trial Lawyer

**Counsel for the Defence**

Mr. Nicholas Kaufman  
 Ms. Yaël 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**

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**Registrar**

Ms Silvana Arbia

**Deputy Registrar**

Mr Didier Preira

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
 Section**

**Others**

**I, Judge Cuno Tarfusser**, the Single Judge of Pre-Trial Chamber I of the International Criminal Court (“Chamber” and “Court” respectively) responsible for carrying out the functions of the Chamber in relation to the case of *The Prosecutor v. Callixte Mbarushimana* in the absence of Judge Sanji Mmasenono Monageng;<sup>1</sup>

**NOTING** the “Warrant of Arrest for Callixte Mbarushimana”, issued by the Chamber on 28 September 2010 (“Warrant of Arrest”);<sup>2</sup>

**NOTING** the “Defence Challenge to the Validity of the Arrest Warrant”, filed on 9 January 2011,<sup>3</sup> wherein the Defence first argued that Mr. Mbarushimana should be released because the case before the Court was inadmissible at the time the Warrant of Arrest was issued due to a then contemporaneous German investigation;<sup>4</sup>

**NOTING** the “Decision on the Defence Challenge to the Validity of the Arrest Warrant”, issued by the Chamber on 28 January 2011,<sup>5</sup> rejecting the Defence Challenge to the Validity of the Arrest Warrant while considering that “the admissibility of a case is not a substantive requisite for the issuance of a warrant of arrest, unless there are uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of proprio motu review”;<sup>6</sup>

**NOTING** the “Defence Request for Interim Release”, filed on 30 March 2011;<sup>7</sup>

**NOTING** the “Decision on the Defence Request for Interim Release”, issued by the Chamber on 19 May 2011 (“Decision on Request for Interim Release”),<sup>8</sup> wherein the Chamber denied the Defence Request for Interim Release;

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<sup>1</sup> ICC-01/04-583.

<sup>2</sup> ICC-01/04-01/10-2-tENG.

<sup>3</sup> ICC-01/04-01/10-32.

<sup>4</sup> *Ibid.*, para. 16.

<sup>5</sup> ICC-01/04-01/10-50.

<sup>6</sup> *Ibid.*, p. 4.

<sup>7</sup> ICC-01/04-01/10-86.

<sup>8</sup> ICC-01/04-01/10-163.

**NOTING** the “Defence request for a permanent stay of proceedings”, filed on 24 May 2011 (“Defence Request for Stay of Proceedings”),<sup>9</sup> whereby the Defence argued that the proceedings should be stayed because the German investigation rendered the case inadmissible at the time the Warrant of Arrest was issued and that the Prosecutor, either wilfully or through gross negligence, misled the Chamber of the nature of this investigation;<sup>10</sup>

**NOTING** the “Decision on the ‘Defence request for a permanent stay of proceedings’”, issued by the Chamber on 1 July 2011 (“Decision on Stay of Proceedings”),<sup>11</sup> whereby the Chamber rejected the Defence Request for Stay of Proceedings as unfounded;<sup>12</sup>

**NOTING** the “Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled “Decision on the ‘Defence Request for Interim Release’”, issued by the Appeals Chamber on 14 July 2011,<sup>13</sup> unanimously confirming the Decision on Interim Release;

**NOTING** the “Decision on the Defence request for leave to appeal the “Decision on the ‘Defence request for a permanent stay of proceedings’ (ICC-01/04-01/10-264)”, issued by the Chamber on 15 July 2011 (“Decision on Leave to Appeal”),<sup>14</sup> rejecting a Defence request for leave to appeal the Decision on Stay of Proceedings;

**NOTING** the “Second Defence request for interim release”, filed on 20 July 2011 (“Defence Request”),<sup>15</sup> whereby the Defence: i) requests the Chamber to order Mr. Mbarushimana’s interim release after finding that the case against him was inadmissible at the time it ordered his arrest due to a contemporaneous German investigation,<sup>16</sup> ii) argues that the Chamber has, to this point, declined to rule on whether or not there was an

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<sup>9</sup> ICC-01/04-01/10-177.

<sup>10</sup> *Ibid.*, paras 1-3.

<sup>11</sup> ICC-01/04-01/10-264.

<sup>12</sup> *Ibid.*, p. 5.

<sup>13</sup> ICC-01/04-01/10-283.

<sup>14</sup> ICC-01/04-01/10-288.

<sup>15</sup> ICC-01/04-01/10-294.

<sup>16</sup> Defence Request, paras 1, 7.

ongoing investigation in Germany at the time the Prosecutor sought a warrant of arrest<sup>17</sup> iii) indicates that it does not “disguise the fact that the [Defence Request] is designed to persuade the learned Pre-Trial Chamber to reconsider legitimate Defence submissions [regarding past inadmissibility of the case] on their merits”<sup>18</sup> and iv) submits that inadmissibility of the case against Mr. Mbarushimana at the time of his arrest is a changed circumstance under article 60(3) of the Rome Statute (“Statute”);<sup>19</sup>

**NOTING** the “Prosecution’s response to the Second Defence request for interim release ICC-01/04-01/10-294”, filed confidentially on 27 July 2011 (“Response”),<sup>20</sup> whereby the Prosecutor objects to the Defence Request and argues: i) that the Defence Request should be rejected *in limine*, as it pretextually raises previously litigated issues as a request for interim release so as to be able to appeal the matter and circumvent the Decision on Leave to Appeal<sup>21</sup> and ii) that, alternatively, the Defence Request should be rejected on its merits, as the existence of a German investigation at the time the Warrant of Arrest was issued was known at the time the Defence first requested interim release and thus does not constitute a changed circumstance;<sup>22</sup>

**NOTING** articles 21 and 60(3) of the Statute, rule 118 of the Rules of Procedure and Evidence (“Rules”) and regulation 23 *bis* of the Regulations of the Court (“Regulations”);

**CONSIDERING**, in accordance with article 60(3) of the Statute and rule 118(2) of the Rules, that the Chamber is only *required* to review its ruling on the suspect’s detention at least every 120 days and that, in view of the date of the issuing of the Decision on Request for Interim Release, the Chamber is not required to do so at this point;

**CONSIDERING** that, pursuant to the same provisions, the Chamber is given discretion to conduct an earlier review when requested by a party and may modify its ruling if it is

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<sup>17</sup> Defence Request, para. 8.

<sup>18</sup> Defence Request, para. 9.

<sup>19</sup> Defence Request, para. 19.

<sup>20</sup> ICC-01/04-01/10-316-Conf.

<sup>21</sup> Response, para. 3.

<sup>22</sup> Response, para. 6.

satisfied that changed circumstances so require, but that no arguments have been advanced to warrant the Chamber's exercise of such discretion in this instance;

**CONSIDERING** that, as the Defence admits, the Defence filing solely seeks reconsideration of matters which have already been examined by the Chamber in its previous rulings;

**CONSIDERING** therefore that the Defence Request is no more than a request for reconsideration;

**CONSIDERING** that there is no statutory basis in the Court's instruments accommodating such a motion for reconsideration and that other Chambers have allowed such motions only exceptionally for reasons that are clearly not applicable to the present case;<sup>23</sup>

**CONSIDERING** that legal certainty and finality in judicial decisions serve important purposes in achieving the orderly administration of justice;<sup>24</sup>

**CONSIDERING** that the Prosecutor has not identified the factual or legal basis, required by regulation 23 *bis* of the Regulations, for the filing of the Prosecutor's Response as confidential;

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<sup>23</sup> ICC-01/09-02/11-96, para. 38; ICC-01/09-01/11-82, para. 11; ICC-02/04-01/05-60, para. 18; ICC-01/04-01/06-123, p. 3; ICC-01/04-01/06-166, para. 10; ICC-01/04-457, p. 4; ICC-01/04-01/07-477, p. 5 (decisions of Pre-Trial Chambers I and II all denying reconsideration on reasoning that the Court's statutory provisions do not accommodate such requests). See also ICC-01/04-01/06-2705, para. 18, whereby a Trial Chamber I Majority articulates that there should be strong limits on reconsideration of past decisions to preserve legal certainty, only permitting reconsideration when the earlier decision is "manifestly unsound and their consequences are manifestly unsatisfactory".

<sup>24</sup> *Ibid.* Legal certainty and finality in judicial decisions are also principles consistent with internationally recognized human rights, as required by article 21(3) of the Statute. See ECtHR, Grand Chamber, *Case of J.A. Pye (Oxford) Ltd. and J.A. Pye (Oxford) Land Ltd. v. The United Kingdom*, "Judgment", 30 August 2007, application no. 44302/02, para. 68, citing to ECtHR, *Stubbings and Others v. United Kingdom*, "Judgment", 22 October 1996, application nos 22083/93 and 22095/93, para. 51.

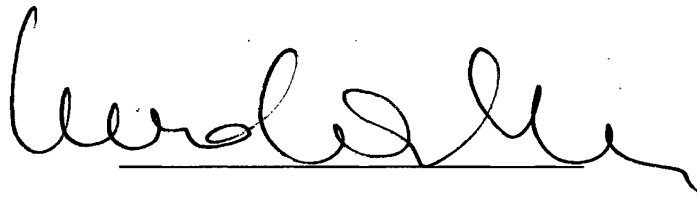
**FOR THESE REASONS,**

**DISMISS** the Defence Request in so far as it seeks reconsideration of matters that have been previously decided upon,

**DECLINE** to review Mr. Mbarushimana's continued detention at this time, and

**ORDER** the Registrar to re-classify the Prosecutor's Response as a public document.

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

A handwritten signature in black ink, appearing to read 'Cuno Tarfusser', written over a horizontal line.

**Judge Cuno Tarfusser**

**Single Judge**

Dated this Thursday, 28 July 2011

At The Hague, The Netherlands