Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/04-01/10**
Date: **31 January 2011**

PRE-TRIAL CHAMBER I

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR V. CALLIXTE MBARUSHIMANA

Public Document

Decision on the Defence Request for an Order to Preserve the Impartiality of the 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
Ms Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence
Mr Nicholas Kaufman

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
Mr Xavier-Jean Keita

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 (the "Chamber" and the "Court" respectively) issues the following decision on the "Defence Request for an Order to Preserve the Impartiality of the Proceedings":

Procedural background

1. On 28 September 2010, the Chamber issued a warrant of arrest for Mr Callixte Mbarushimana ("Mr Mbarushimana"). On 11 October 2010, pursuant to this arrest warrant, Mr Mbarushimana was arrested in France. A few hours after the arrest, the Office of the Prosecutor ("Prosecutor") issued a press release ("Press Release")[1] concerning Mr Mbarushimana.

2. On 18 October 2010, the Defence for Mr Mbarushimana ("Defence") filed the "Defence Request for an Order to Preserve the Impartiality of the Proceedings" ("Request"),[2] whereby the Defence requests the Chamber to (i) exercise its power under the Rome Statute ("Statute") to ensure the impartiality of the proceedings; and (ii) order the Prosecutor to publish an immediate and public retraction of the Press Release.

3. The Defence alleges that some of the statements included in the Press Release run counter to Mr Mbarushimana's right to a fair hearing conducted impartially.[3] The Defence

---

[1] http://www.icc-cpi.int/NR/exeres/769E2333-D2AE-46B8-BDCD-651BF5A67CD3.htm. The Press Release states, *inter alia*, "(...) As late as August 2010, the FDLR was involved in the commission of more than 300 rapes in DRC's North Kivu province, yet Callixte Mbarushimana blatantly continued to refute any allegation against his movement. (...) Callixte Mbarushimana is the first senior leader arrested by the ICC for the massive crimes committed in the Kivu provinces of the Democratic Republic of the Congo (DRC). (...) FDLR, a group calling itself a "liberation force" is the most recent incarnation of Rwandan rebel groups established by former génocidaires who fled to DRC after the 1994 Rwandan genocide. From the DRC, they regrouped, organized and launched attacks on Rwanda, with the goal of removing its new government through violence. Their activities contributed to triggering the two Congo wars, 1996-2002, which resulted in an estimated 4 million victims, the largest number of civilian casualties since the Second World War. Since then, the FDLR has continued to commit horrific crimes against the civilian population. (...) "After 16 years of continuous violence, this could be an opportunity to finally demobilize the group led by the former génocidaires" added the Prosecutor. "Their leaders are gone." (...)".

[2] ICC-01/04-01/10-14.

[3] Request, paras 10, 14.

also contends that from the Press Release "it is quite clear that the Prosecutor is wilfully oblivious to his assigned role of an impartial functionary tasked with assisting the Court in determining the truth."[4] Furthermore, the Defence submits that the Press Release defames Mr Mbarushimana, who is protected by the principle of the presumption of innocence.[5] In particular, the Defence submits that the Press Release presents as undisputed that the *Forces Démocratiques pour la Libération du Rwanda* ("FDLR"), of which, it is alleged, Mr Mbarushimana was one of the leaders, was involved in more than 300 rapes committed in the North Kivu province.[6] The Defence also submits that it may be inferred from the Press Release that Mr Mbarushimana is a *génocidaire*.[7]

4. On 9 November 2010, the Prosecutor filed the "Prosecution Response to 'Defence Request for an Order to Preserve the Impartiality of the Proceedings'" ("Response"),[8] whereby the Prosecutor submits that Mr Mbarushimana failed to make out a case, either in law or on merits, for the relief sought and argues that (i) the Request is premature, (ii) the Request is ill-founded in law; (iii) the prejudice relied upon by Mr Mbarushimana is purely speculative; and (iv) the Request is factually and logically flawed and falls to be dismissed on the merits; and consequently asks the Chamber to dismiss the Request.

5. On 25 January 2011, Mr Mbarushimana was surrendered to the representatives of the Court and is currently in custody at the Court's detention centre at The Hague.

---

[4] Request, para. 6.
[5] Request, paras 6, 11.
[6] Request, para. 6.
[7] Request, para. 7.
[8] ICC-01/04-01/10-21.

Preliminary issues

6. As regards the Prosecutor's contention that the Request should not be entertained by the Chamber, as Mr Mbarushimana was at that time not yet before the Court,[9] and the argument that the Defence failed "to identify any provision of the Statute or Rules which empowers the Chamber to issue [the order sought by the Defence]",[10] the Chamber finds such arguments ill-founded, since Mr Mbarushimana enjoys certain rights irrespective of his surrender to the Court. The Chamber notes that in a previous decision of this Chamber,[11] the Single Judge held that "according to articles 55, 57 and 67, one of the functions of the Chamber is to be the ultimate guarantor of the rights of the defence, including the right to presumption of innocence." As provided for in article 57(3)(c) of the Statute, in addition to its other functions under the Statute, the Pre-Trial Chamber may "[w]here necessary, provide for [...] the protection of persons who have been arrested or appeared in response to a summons."[12] The Pre-Trial Chamber therefore has a specific responsibility to protect the rights of a suspect. In order to fulfil its duties relating to this responsibility and to its role of the guarantor of the suspect's rights, the Chamber has the necessary powers to take appropriate measures to protect these rights.[13]

Presumption of innocence

7. The Chamber is of the view that allegations of prejudice to suspects on account of public statements suggesting their guilt before a conviction by a court, such as the allegations made by the Defence in the Request, are primarily of relevance to the issue of

---

[9] Response, para. 9.

[10] Response, para. 12.

[11] Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga, ICC-01/04-01/07-330, 18 March 2008, p. 8.

[12] The Chamber also notes article 57(3)(b) of the Statute, which states that "[u]pon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, [the Pre-Trial Chamber may] issue such orders [...] as may be necessary to assist the person in the preparation of his or her defence".

[13] Pre-Trial Chamber I considered itself responsible for the protection of the right of a suspect to presumption of innocence when it found that it was unacceptable that a publication of the Court referred to Thomas Lubanga Dyilo as an "accused person" while at the time he was still a suspect. The publication was subsequently corrected; *Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Hearing, 9 November 2006, ICC-01/04-01/06-T-30-EN, p. 19.

presumption of innocence.[14] The Chamber shall thus examine the allegations made in the present case in the light of Mr Mbarushimana's right to be presumed innocent until proved guilty.

8. The Chamber notes that the right to be presumed innocent until proved guilty, set forth in article 66(1) of the Statute, is guaranteed to "everyone", as opposed to a number of other rights set forth in Part VI of the Statute, which are specifically addressed to the accused persons.[15] The right to be presumed innocent is therefore guaranteed by the Statute not only to accused persons, but also to those with respect to whom a warrant of arrest or a summons to appear has been issued, before their surrender to the Court.

9. Article 66, setting out the presumption of innocence, as any other provision of the Statute, must be interpreted and applied consistently with internationally recognized human rights, as required by article 21(3) of the Statute. The right to be presumed innocent until proved guilty is enshrined in many international human rights instruments.[16] Consequently, the respective case-law of the judicial and other authorities dealing with alleged violations of international treaties can be an important source for the interpretation of the scope of article 66 of the Statute. The jurisprudence of the European Court of

---

[14] *Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Hearing, 9 November 2006, ICC-01/04-01/06-T-30-EN, p. 19.

[15] The Chamber would observe that the rights set forth in article 67 of the Statute are applicable also to a person subject to a warrant of arrest or a summons to appear, in accordance with rule 121(1) of the Rules of Procedure and Evidence ("Rules"). It is to be noted, however, that these rights apply "[s]ubject to the provisions of articles 60 and 61" of the Statute, which articles relate to the proceedings conducted upon the surrender of the person to the Court and later during the proceeding leading to the decision regarding the confirmation of the charges. It may thus be argued that the rights listed in article 67 are only vested on the accused and the persons who have surrendered to the Court. The Chamber notes that the persons subject to a warrant of arrest or a summons to appear who have not yet surrendered to the Court enjoy rights guaranteed elsewhere in the Statute, such as the rights relating to investigations (article 55(2)) or the right to apply for interim release in the custodial State (article 59(3)).

[16] Article 11(1) of the Universal Declaration of Human Rights (United Nations General Assembly, GA/RES/217 A(ni) of 10 December 1948); article 14(2) of the International Covenant on Civil and Political Rights (adopted and opened for signature on 19 December 1966, UN Treaty Series, vol. 999); article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (signed at Rome on 4 November 1950, UN Treaty Series, vol. 213); Article 8(2) of the American Convention on Human Rights (also referred to as the Pact of San José, Costa Rica, adopted on 22 November 1969, UN Treaty Series, vol. 1144).

Human Rights ("European Court") and the European Commission of Human Rights ("Commission") is of relevance, as both have dealt with issues similar to the issue raised in the Request in a considerable number of cases.

10. The European Court held that while the presumption of innocence cannot prevent the authorities from informing the public about criminal investigations in progress, it requires that they do so "with all the discretion and circumspection necessary if the presumption of innocence is to be respected."[17] Similarly, the Commission held that the presumption of innocence "protects everybody against being treated by public officials as being guilty of an offence before this is established according to law by a competent court."[18] The Commission further emphasized that public authorities, in particular those involved in criminal investigations and proceedings, "should be careful when making statements in public, if at all, about matters under investigation and on the persons concerned thereby, in order to avoid as much as possible that these statements could be misinterpreted by the public and possibly lead to the [person]'s innocence being called into question even before being tried."[19]

11. Both, the Commission and the European Court have specified which statements are permissible. The European Court ruled that "[a] fundamental distinction must be made between a statement that someone is merely suspected of having committed a crime and a clear declaration, in the absence of a final conviction, that an individual has committed the crime in question".[20] In another case the European Court found some statements permissible, as they "may be interpreted as a mere assertion (...) that there was sufficient

---

[17] *Allenet de Ribemont v. France*, "Judgment", 10 February 1995, application no. 15175/89, para. 38.
[18] *Krause v. Switzerland*, "Decision", 3 October 1978, application no. 7986/77. The Chamber notes that the "public officials" referred to in this and other cases discussed in this section were in fact prosecutors or other persons in charge of the relevant investigations. The Chamber thus finds these cases to be of sufficient similarity to the present case to be of direct relevance.
[19] *X. v. the Netherlands*, "Decision", 17 December 1981, application no. 8361/78.
[20] *Fatullayev v. Azerbaijan*, "Judgment", 22 April 2010, application no. 40984/07, para. 160.

evidence to support a finding of guilt by a court".[21] Yet the Court stated that it is incompatible with the presumption of innocence when statements made by public officials encourage the public to believe the suspect to be guilty and prejudge the assessment of the facts by the competent judicial authority.[22] In another case, the Commission held that public officials will not violate the right to presumption of innocence if "they state that a suspicion exists, that people have been arrested, that they confessed etc. What is excluded, however, is a formal declaration that somebody is guilty."[23]

Defence arguments

(a) Statements prejudging the assessment of facts by the Court

12. Turning to the specific arguments of the Defence with respect to the text of the Press Release, the Chamber notes that it is stated in the Press Release that Mr Mbarushimana is a leader of the FDLR and that "[a]s late as August 2010, the FDLR was involved in the commission of more than 300 rapes in [Democratic Republic of the Congo]'s North Kivu province, yet Callixte Mbarushimana blatantly continued to refute any allegation against his movement." The Chamber finds that the suggestion that the FDLR is responsible for the commission of acts of rape, read in conjunction with the allegation that Mr Mbarushimana was a leader of that group, may give the impression that the Prosecutor asserts in the Press Release that Mr Mbarushimana is responsible for these alleged crimes. The Chamber finds that a clear indication that these are only allegations made by the Prosecutor would have been desirable with respect to the passage in question. The Chamber is also concerned that the words "blatantly continued to refute any allegation" may further add to the impression that the alleged involvement of the FDLR in the alleged crimes is an established fact.

---

[21] *Butkevičius v. Lithuania*, "Judgment", 26 March 2002, application no. 48297/99, para. 52.
[22] ECtHR, *Allenet de Ribemont v. France*, "Judgment", 10 February 1995, application no. 15175/89, para. 41; ECtHR, *Khuzhin and Others v. Russia*, "Judgment", 23 October 2008, application no. 13470/02, para. 93.
[23] *Krause v. Switzerland*, "Decision", 3 October 1978, application no. 7986/77.

13. The Chamber notes that the above-mentioned impression that certain facts have already been established is to some degree minimised by other information provided in the Press Release, which specifies that Mr Mbarushimana was arrested in France "following a sealed arrest warrant issued by the International Criminal Court" and that he is "charged with 11 counts of crimes against humanity and war crimes including killings, rape, persecution based on gender and extensive destruction of property committed by the FDLR during most of 2009". This information, which makes it clear that the proceedings are at an early stage and attributes the perpetration of crimes to an armed group, contributes to a better understanding of the Press Release and reduces the risk of misunderstanding of the alleged responsibility of Mr Mbarushimana for the listed crimes.

(b) Suggestion that Mr Mbarushimana is a former *génocidaire*

14. The Chamber further notes that the Prosecutor is quoted in the Press Release as referring to "the group led by the former *génocidaires*" and saying that "[t]heir leaders are gone". In view of the above-mentioned statement that Mr Mbarushimana is a leader of the FDLR, these quotes may be understood as a suggestion that Mr Mbarushimana is himself a *génocidaire*. However, in view of the fact that no allegation of genocide was made in the Prosecutor's application for a warrant of arrest against Mr Mbarushimana and, to the knowledge of the Chamber, he has not been convicted of genocide by any other court, the impugned suggestion appears to be the result of an oversight, rather than an intended statement.

(c) The alleged lack of impartiality of the Prosecutor

15. With regard to the allegation that the Press Release reveals the Prosecutor's lack of impartiality, the Chamber recalls that a number of provisions of the Statute and the Rules require the Prosecutor to act impartially. For example, pursuant to article 54(1)(a) of the Statute, "[i]n order to establish the truth" the Prosecutor shall "investigate incriminating and exonerating circumstances equally". In view of its above findings regarding the Press

Release, the Chamber, however, finds that the issue of lack of impartiality does not arise in this case.

16. In addition, in so far as the Defence Request can be understood as seeking sanctions with respect to an alleged lack of impartiality of the Prosecutor, under article 71 of the Statute and rules 170 and 171 of the Rules, the Chamber notes that the Prosecutor's conduct does not amount to a deliberate refusal to comply with any direction by the Chamber. It therefore falls outside of the scope of the powers of the Chamber set out in rules 170 and 171 of the Rules.[24]

Conclusion

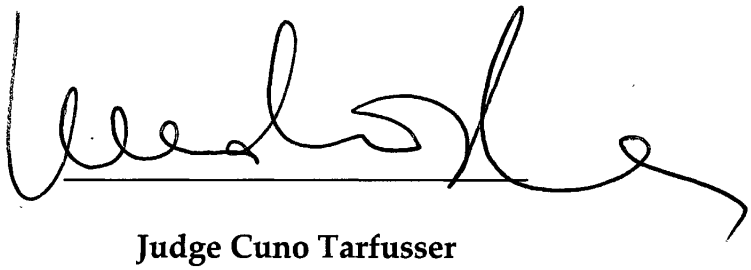
17. The Chamber is concerned that some of the above-mentioned parts of the Press Release were formulated without due care and may lead to misinterpretation. It would have been preferable if the Press Release had made it clear that *there are reasonable grounds to believe* that acts of rape were committed by the FDLR in the North Kivu province and that Mr Mbarushimana *is alleged* to bear individual criminal responsibility for these acts. It could also have been made more clear that no allegation of genocide has been made with respect to Mr Mbarushimana in the present case. The Chamber is of the view that when making his future public statements, the Prosecutor should be mindful of the suspects' right to be presumed innocent until proved guilty. Having said this, however, the Chamber finds that, in this instance, the risk that the Press Release might have encouraged the public to believe that Mr Mbarushimana is guilty of the alleged crimes and that it prejudged the assessment of the facts by the Court is not of such seriousness as to warrant the ordering of the measures sought by the Defence.

[24] *See Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber I, "Decision on the 'OPCD Request for authorization to submit observations concerning Guardian Article dated 15 July 2010'", 13 September 2010, ICC-02/05-01/09, para. 9.

FOR THESE REASONS, the Chamber:

- **REJECTS** the Defence Request.

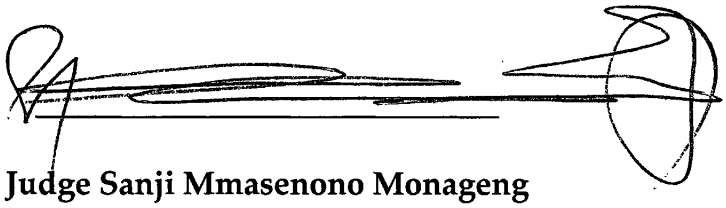
Done in English and French, the English version being authoritative.



Judge Cuno Tarfusser

Presiding Judge

Judge Sylvia Steiner



Judge Sanji Mmasenono Monageng

Dated this Monday, 31 January 2011

At The Hague, The Netherlands