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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
URGENT

Defence Request for Interim Release

Source: **Defence for Mr. Callixte Mbarushimana**

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

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Introduction

Pursuant to Article 60(2) of the Rome Statute ("the Statute"), the Defence hereby requests, for the first time, the interim release of Mr. Callixte Mbarushimana pending trial.

In the context of the present request for interim release, the Defence will only argue that the grounds for arrest stipulated under Article 58(1)(b) of the Statute have not been met. Given that full unredacted disclosure is yet to be effected by the Office of the Prosecutor ("OTP"),[1] the Defence reserves its right to submit a future request for interim release, if necessary, in which it will challenge the evidential basis for the issuance of the arrest warrant pursuant to Article 58(1)(a) of the Statute.

The Defence respectfully submits that given the nature of this request which concerns the liberty of the individual, good cause is shown for reducing the time limit for a Prosecution response pursuant to Regulation 35(2) of the Regulations of the Court.

Procedural Background

1. On 20 August 2010, the OTP submitted the *Prosecution's Application under Article 58*[2] requesting that the learned Pre-Trial Chamber issue a warrant for Mr. Mbarushimana's arrest ("the Prosecution Application").

2. On 2 September 2010, herein undersigned Counsel wrote to the Prosecutor of the International Criminal Court informing him of Mr.

[1] *c.f.*; paragraph 32 below.
[2] ICC-01/04-01/10-11-Conf-Red

Mbarushimana's "*accessibility and immediate availability at all times and of his keen desire to afford such legitimate cooperation as may be required of him*".[3]

3. On 28 September 2010, after due consideration of the Prosecution Application, the learned Pre-Trial Chamber decided to issue a warrant for Mr. Mbarushimana's arrest ("the Arrest Warrant Decision").[4]

4. On 11 October 2010, pursuant to the aforementioned arrest warrant, Mr. Mbarushimana was arrested at his residence in Paris.

5. On 25 January 2011, after the exhaustion of domestic legal proceedings, Mr. Mbarushimana was surrendered to the International Criminal Court.

6. On 6 February 2011, Counsel for Mr. Mbarushimana wrote to the Prosecutor of the International Criminal Court asking him to support the Defence request for Mr. Mbarushimana's interim release and the Defence request for Mr. Mbarushimana to be received onto French territory.[5]

7. On 10 February 2011, the OTP responded to undersigned Counsel stating that it could not agree to the interim release of Mr. Mbarushimana and that it would respond in writing - if and when the Defence should make an application to the Pre-Trial Chamber.[6]

<u>Submission</u>

8. In the Prosecution Application, the OTP argues that all three grounds under Article 58(1)(b) of the Statute justify Mr. Mbarushimana's pre-trial

[3] **Annex 1**. Contrary to the case of Bahr Idriss Abu-Garda where a voluntary offer of surrender was accepted, the Prosecutor declined to reply in substance to Mr. Mbarushimana's offer.
[4] ICC-01/04-01/10-1.
[5] The Defence petitioned the French Embassy in The Hague on 10 February 2011 seeking approval for Mr. Mbarushimana's return to French territory in the event that his interim release should be ordered by Pre-Trial Chamber I: *c.f.*; ICC-01/04-01/10-76.
[6] Email from Ms. Julieta Solano to Counsel for Mr. Mbarushimana sent at 11:54.

detention. The Defence will challenge this argument and, further, assert that the interests protected under Article 58(1)(b) may be guaranteed by an alternative to the deprivation of liberty.

Article 58(1)(b)(i) – The need to ensure Mr. Mbarushimana's appearance at trial.

9. The Defence submits that the perceived risk of flight should not be construed in the abstract but, rather, taking into account Mr. Mbarushimana's specific individual circumstances. The International Criminal Court ("ICC") is obliged to apply the Rome Statute in a manner which is consistent with internationally recognized human rights law.[7] Accordingly, the learned Pre-Trial Chamber's predictive assessment as to the risk of flight should be founded on relevant and specific information[8] and not on speculation.

10. Should the Prosecution argue, as it does in the present instance, that Mr. Mbarushimana is likely to flee by exploiting international contacts, then such specific contacts ought to be identified - as should the manner in which their relationship to Mr. Mbarushimana would render it more likely that he would abscond if released. In this regard, the ICC Appeals Chamber has ruled that the Prosecution bears the burden of submitting sufficient information to establish that the existence of such international contacts renders it "more likely"[9] (not just theoretically possible) that a suspect would abscond. A hypothetical possibility that a suspect might abscond is insufficient to justify such a draconian measure as pre-trial detention since a hypothetical possibility, by its very nature, can never be discounted.[10]

[7] Article 21(3) of the Statute
[8] *Iljikov v. Bulgaria*; ECHR Application 33977/96, 26 July 2001 at para 84.
[9] Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo", ICC-01/04-01/06-824, 13 February 2007. para 136.
[10] *Prosecutor v. Hadzihasanovic*; Decisions granting Provisional Release to Enver Hadzihasanovic, Mehmed Alagic and Amir Kubura,19 December 2001 at para. 9 where the International Criminal Tribunal for the Former Yugoslavia has recognized that "there will never be a total guarantee that an accused will appear for trial and, if released, will not pose a danger to sources of evidence".

11. Nor, it is submitted, may the risk that Mr. Mbarushimana might abscond be determined solely by reference to the gravity of the offences with which he is charged or the possible lengthy sentence which he may face. Given that one of the threshold requirements for the admissibility of a case at the ICC is the gravity of the preferred charges, a finding that severity alone could warrant pre-trial detention would always constitute an *a priori* obstacle to interim release which is, nonetheless, a recognised right under Article 60(2) of the Rome Statute.

12. As with the other grounds for arrest, when considering detention as a result of the risk of flight, the Court must examine all relevant factors; for example, if it is possible to obtain guarantees in the form of a bail bond or whether the accused has strong social connections in the State to which he seeks release rendering it unlikely that he would flee from the jurisdiction of the Court.[11]

13. Applying the aforementioned principles to the specific circumstances of the present case, much may be learned from Mr. Mbarushimana's conduct on previous occasions when he has faced the threat of criminal prosecution.

14. From 1992 to 1994, Mr. Mbarushimana worked out of Kigali, Rwanda for the United Nations Development Programme ("UNDP"). Thereafter, in December 1996, Mr. Mbarushimana worked for UNDP-Angola in Luanda until 31 December 1999. During 1999, Mr. Mbarushimana was accused by Mr. Gregory Alex - an employee of the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) in Rwanda - of being complicit in "genocide" at the time of his employment in Kigali. Despite the gravity of such an

[11] Smirnova v. Russia, ECHR Judgement of 24 July 2003. The Pre-Trial Chamber is also respectfully referred to the precedent of the ECHR which has held that when the only remaining reason for continued detention is the fear that the individual concerned will abscond, his release pending trial must be ordered if it is possible to obtain from him sufficient guarantees that will ensure his appearance: c.f.; Wemhoff v. Germany, Judgment of 27 June 196, Series A, No. 7, at para. 15; also Letellier v. France, Judgment of 26 June 1991, Series A No. 207, p. 19 at para 46

allegation and the destructive impact it proved to have on Mr. Mbarushimana's career and reputation, the UNDP made no attempt to open an official inquiry to investigate whether Mr. Alex's claims were well founded. Committed, therefore, to removing such an unwarranted stain on his reputation and placing his full trust in international justice, Mr. Mbarushimana petitioned the UNDP Administrator[12] that same year and the UN Secretary-General[13] at the beginning of 2000 requesting that they both initiate investigations into the allegations.

15. Notwithstanding Mr. Alex's malicious allegations, Mr. Mbarushimana was, in due course, re-employed by the United Nations at its Mission in Kosovo ("UNMIK"). On 15 March 2001, however, the Rwandan Government issued an international arrest warrant against him alleging genocide and crimes against humanity and proceedings were perforce instituted in order to deprive Mr. Mbarushimana of the immunity he enjoyed as a UN employee. It is highly relevant to note that despite being aware of the intent of the Rwandan authorities to file for an arrest warrant as early as 4 February 2001,[14] Mr. Mbarushimana made absolutely no attempt to flee Kosovo (by exploiting his diplomatic status) or to conceal his whereabouts. He was thus subsequently arrested by UNMIK police on 11 April 2011. On 11 June 2001, the District Court in Kosovo released Mr. Mbarushimana after finding that the Rwandan request for his extradition failed to make out even a *prima facie* case against him.[15] On 19 June 2001, this decision was confirmed by the Supreme Court of Kosovo.[16]

16. Contemporaneously with the Kosovo proceedings, an investigation was opened on 4 May 2001 against Mr. Mbarushimana at the International

[12] **Annex 2**, letter to Mr. Mark Malloch-Brown dated 26 November1999.
[13] **Annex 3**, letter to the former UNSG - Mr. Kofi Annan dated 22 February 2000.
[14] From an article published in the British Sunday Times Newspaper; http://www.1worldcommunication.org/jobtowarcrimesuspect.htm (last accessed 28 March 2011); Swain, J.: "UN gave job to war crimes suspect" dated 4 February 2001.
[15] DRC-REG-0001-3561
[16] DRC-REG-0001-3569

Criminal Tribunal for Rwanda ("ICTR").[17] The existence of the ICTR investigation was also no secret to Mr. Mbarushimana since it had been publicly announced by an anonymous UN spokesman in an article published in the British "Independent" newspaper.[18] After his release from detention in Kosovo, therefore, and notwithstanding the threat of being arrested once more pursuant to the on-going ICTR investigation, Mr. Mbarushimana made no attempt to abscond or to conceal his whereabouts. Quite to the contrary, in August 2002, Mr. Mbarushimana actually increased his accessibility to law enforcement agencies by formally applying for refugee status in France and surrendering to the French authorities[19] the only document in his possession with which could effectively abscond – his Rwandan passport. Furthermore, far from lowering his profile, Mr. Mbarushimana subsequently wrote to the then incumbent prosecutor of the ICTR – Ms. Carla del Ponte, enquiring as to the status of the investigation against him, offering his cooperation and supplying contact details for future communication. Thereafter, in late 2002, Mr. Mbarushimana received from the ICTR a copy of an *ordonnance de non-lieu* dated 11 September 2002 whereby he was informed that, after having interviewed 24 witnesses, the ICTR had closed its file against Mr. Mbarushimana for lack of incriminating evidence.[20]

17. By 31 December 2003, Mr. Mbarushimana had been awarded refugee status in France and granted a "*titre de séjour*" which <u>still</u> remains valid until 31 December 2013. Despite the rejection of the previous attempt to extradite Mr. Mbarushimana from Kosovo, the Rwandan authorities continued to demand that the French authorities execute the international arrest warrant it had issued

[17] **Annexe 4**, ICTR, *Ordonnance de Non-Lieu* of ICTR Prosecutor dated 11 September 2002.

[18] <u>http://www.independent.co.uk/news/world/europe/un-employee-faces-extradition-for-alleged-genocide-crimes-753488.html</u> (last accessed 21 March 2011); "Mbarushimana landed a job in Angola with a branch of UNDP. But after allegations about his activities in Rwanda began to surface, UNDP let him go in November 1999 <u>and turned the allegations against him over to the UN tribunal prosecuting crimes related to the genocide</u>, a UN official said, speaking on condition of anomymity." *c.f.*, also; [AT/DEC/1192] at p.4.

[19] OFPRA (the French Refugee Agency).

[20] Annex 4.

against Mr. Mbarushimana in 2001. In the summer months of 2005, although considerably harassed by the ongoing efforts of the Rwandan government to effect his forcible repatriation,[21] Mr. Mbarushimana took no steps to abscond but, rather, petitioned the President of the French Republic, as well as the French Prime Minister, the French Minister for Foreign Affairs and the French Minister of Justice informing them all of his predicament – once again supplying full contact details.[22] The receipt of two of these petitions was acknowledged on 1 August 2005.[23]

18. If the aforementioned facts are not sufficient to prove that Mr. Mbarushimana has never posed a flight risk, the learned Pre-Trial Chamber is referred to the criminal complaint (*plainte civile*) for genocide filed by the *Collectif des Parties Civiles pour le Rwanda* (CPCR) in February 2008 and made the subject of a preliminary investigation instigated by the Parquet de Paris in March 2008. Fully aware of this investigation which was publicly announced by the President of CPCR on 8 July 2008,[24] Mr. Mbarushimana maintained a stoic attitude and continued to reside peacefully with his family without ever attempting to conceal his whereabouts. Indeed, it was at this same address that Mr. Mbarushimana was arrested on 11 October 2010 pursuant to the ICC arrest warrant.

19. Mr. Mbarushimana has thus consistently shown a demonstrable respect for judicial authority and a strong commitment to clearing his name through the judicial process. This is reflected in the fact that the French investigating judge – M. René Cros - seized of the criminal complaint mentioned in the previous paragraph, found that Mr. Mbarushimana did not represent such a

[21] *c.f.;* paragraph 23 *infra*; efforts which later led to his arrest at Frankfurt airport yet the subsequent refusal of a Rwandan extradition request, this time, by the German authorities.
[22] **Annex 5**, letter to the President of the French Republic, Prime Minister, Minister of Foreign Affairs and Minister of Justice, 1 July 2005.
[23] **Annex 6**, letters from the office of the President of the French Republic, and from the office of French Prime Minister, attesting to the receipt of Mr. Mbarushimana's letter of 1 July 2005.
[24] DRC-OTP-2004-0019.

flight risk or a threat to victims and witnesses that he ought to be placed in detention. Notwithstanding the ICC arrest warrant and although he had the prerogative to order M. Mbarushimana's detention, Judge Cros opted, by contrast, to place Mr. Mbarushimana under "contrôle judiciaire" imposing terms similar to those stipulated under Rule 119 of the Rules of Procedure and Evidence and ordering as follows: (a) the restriction of Mr. Mbarushimana's movement by obliging him not to travel outside the region of Ile-de-France without prior authorization; (b) the obligation to present himself monthly at the Paris Tribunal de Grande Instance; (c) the surrender of his passport to the Registrar of the Tribunal de Grande Instance; (d) to abstain from and not to have any contact whatsoever with anyone on the list of witnesses in the case. [25] It should be stressed that Judge Cros used his discretionary power not to order Mr. Mbarushimana's pre-trial detention notwithstanding the extreme gravity of allegations against him, namely crimes against humanity and genocide.

20. It should not be forgotten that from May 2010, Mr. Mbarushimana was fully aware that he was subject to an ICC investigation yet made no attempt to abscond.[26] Indeed, in a letter sent a month or so prior to the arrest, herein undersigned Counsel assured the OTP of Mr. Mbarushimana's willingness to cooperate and his availability to meet with representatives of the Prosecution and the Court. The fact that Mr. Mbarushimana volunteered to cooperate with the authorities of the ICC is a highly relevant factor militating against the risk of flight. Moreover, the decision of the OTP to reject this offer of cooperation or its determination that the cooperation proffered by Mr. Mbarushimana was not sufficiently valuable does not detract from the weight that the learned Pre-Trial Chamber should attribute to his voluntary offer to cooperate.[27]

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[25] **Annexe 7**, *Ordonnance de placement sous contrôle judiciaire, cour d'Appel de Paris, Cabinet de M. René Cros, Vice Président chargée de l'Instruction* dated 21 December 2010.

[26] From comments attributed to a spokesman for the Rwandan Prosecuting authorities – M. Augustin Nkusi as reported on the AllAfrica.com website: http://allafrica.com/stories/201005120029.html (last accessed on 29 March 2011).

[27] *Prosecutor v. Stanisic*, Decision on Provisional Release 28 July 2004 at paras. 15 and 16.

21. The copious documentation seized from his abode, including credit card statements, and other tracing measures presumably requested by the OTP[28] fail to reveal that Mr. Mbarushimana has tapped the allegedly vast resources of the FDLR let alone exploit them for his own personal ends. What has been proved, nevertheless, is the frugality of Mr. Mbarushimana's daily lifestyle and his meagre resources.

22. Even if Mr. Mbarushimana were minded to flee, there is no obvious destination for him to seek shelter. Mr. Mbarushimana is currently a refugee in France – a status which he gratefully enjoys given that the French authorities have recognized that he is at risk of persecution by the present Rwandan regime.

23. Mr. Mbarushimana is also subject to an asset freeze and a travel ban imposed on 3 March 2009 within the framework of the sanctions regime established under United Nations Security Council Resolutions 1596 (2005) and 1807 (2008).[29] Mr. Mbarushimana has always viewed these restrictive measures as limiting his movements to the territory in which he resided. In any event, the non-substantiated fears evoked by the OTP at paragraph 178 of the Prosecution Application fly in the face of the rationale for one of the "pillars" of the European Community and the establishment of the Schengen area – namely to increase freedom of movement while ensuring security and well policed border control mechanisms. Furthermore, the Prosecution's allusion to Mr. Mbarushimana's trip to Russia in July 2008, prior to the imposition of the travel ban and armed with allegedly non-existent travel documentation[30] is, quite simply, false innuendo intended to support a contention that Mr.

[28] Presumably under redacted Section G of the Prosecution Application.
[29] DRC-OTP-2010-0366; List of Individuals and Entities Subject to the Measures imposed by paragraphs 13 and 15 of Security Council Resolution 1596(2005), as renewed by paragraphs 9, 11 and 14 of UNSC Resolution 1807(2008), 3 March 2009.
[30] Prosecution Application at para. 179.

Mbarushimana could acquire forged documents in an attempt to abscond. Contrary to the Prosecution assertion, Defence investigations have ascertained that French travel document No. 06ZX32561-1 **did, in fact, exist**.[31]

24. Both logic and personal circumstances firmly dictate that Mr. Mbarushimana has no incentive to flee France. In light of the pending and patently unjustified demand for his extradition to Rwanda, France constitutes a safe and welcome haven for Mr. Mbarushimana.[32] He has three children - all of whom are enrolled in French schools. Two of his sons are presently at a critical stage in their studies finishing their preparations for the French baccalaureate - an essential prerequisite for entry into higher education and the key to success in future employment. Mr. Mbarushimana has established firm roots in his local community with an active role in his local parish[33] and the promise of continued salaried employment.[34]

25. Finally, Mr. Mbarushimana's strong commitment to the welfare of his family should not be neglected. His present detention is a source of severe moral and financial hardship to both his wife and children who, until his arrest, were financially dependent on him. This grievous situation would only be compounded should Mr. Mbarushimana flee Paris and the stable employment that he still enjoys.

Article 58(1)(b)(ii) – The need to ensure that Mr. Mbarushimana will not obstruct or endanger the investigations or proceedings.

26. The Defence submits that argument posited by the Prosecution in support of the potential for witness intimidation is pure conjecture. The

[31] **Annex 8**.
[32] **Annex 9**, Decision of the Chambre d'Appels of Paris, 3 November 2010, whereby Mr. Mbarushimana was surrendered to the ICC on the strict condition that he not thereafter be extradited to Rwanda.
[33] **Annex 10**, letter from Father Frederic Lanthonie of the St. Luc Parish dated 10 March 2011.
[34] **Annex 11**, Letter from M. Gilbert Vinit, Director General of ACTIF DPS dated 14 February 2011.

relevant part of the Prosecution Application reads as follows: "*in light of his senior role within the FDLR's leadership, of his ongoing contact with FDLR members in the field, and of his ability to disseminate messages on behalf of the FLDR at will, MBARUSHIMANA is able to obstruct the investigation, as well as to foster an atmosphere of intimidation against FDLR victims, potential ICC witnesses and FDLR rank-and-file soldiers with a desire to demobilize*".

27. Mr. Mbarushimana enjoys, as do all citizens in most democratic societies, the freedom of association. Even if he were to have contacted FDLR members in the field (for which the Prosecution evidence is scanty), this does not permit the conclusion that Mr. Mbarushimana would exploit such links to terrorise unknown victims and witnesses in any way. As with the risk of flight, the assessment of whether a suspect might pose a danger to victims, witnesses or other persons may not be made in the abstract and international judicial precedent has shown that "a concrete danger needs to be identified".[35] The Prosecution must, it is submitted, demonstrate that Mr. Mbarushimana presents a personal, concrete and not just hypothetical risk to the security of witnesses and/or victims. Indeed, even if it might be shown that Mr. Mbarushimana has contacts with various third parties who could, in turn, have access to victims and potential witnesses this, in itself, would be insufficient to deny provisional release. Mr. Mbarushimana's propensity for witness interference needs to be judged on the basis of his past conduct and not on unfounded speculation.[36] In most jurisdictions, such a concrete foundation

[35] *Prosecutor v. Haradinaj*, 'Decision on Ramush Haradinaj's Motion for Provisional Release', 10 September 2010, at para 29 citing Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release, 20 July 2007, para l7; *Prosecutor v. Hadzihasanovic et al.*, Decision Granting Provisional Release to Enver Hadzihasanovic, Trial Chamber, 19 December 2001, para. 11; *Prosecutor v. Haradinaj et al.*, Decision on Ramush Haradmaj's Motion for Provisional Release, Trial Chamber, 6 June 2005, para. 22; *Prosecutor v. Stanisic*, Decision on Prosecution's Interlocutory Appeal of Mico Stanisic's Provisional Release, Appeals Chamber, 17 October 2005, para. 27.
[36] *Prosecutor v. Jadranko Prlic, Bruno Stojic, Slobodan Praljak, Milivoj Petkovic, Valentin Coric, Berislav Pusic*, Case Nos. IT-04-74-AR65.1, IT-04-74-AR65.2, IT-04-74-AR65.3, Decision on Motions for Re-Consideration, Clarification, Request for Release and Applications for Leave to Appeal, 8 September 2004 at para 28. In this case one of the accused possessed "considerable influence with law enforcement and intelligence agencies in the areas where the crimes are alleged to have occurred" and in circumstances where each of the accused was for a period of time aware of investigations against him,

would be provided by reference to previous instances in which the suspect concerned had been personally involved in witness intimidation.[37] In the present instance, however, Mr. Mbarushimana cannot pose any threat to victims and witnesses whose names he cannot know since they are currently redacted. Additionally and specifically with respect to the potential for obstructing the Prosecution's investigation, the learned Single Judge properly noted when refusing the Defence's request for the disclosure of redacted information "that the applied redactions are, at this stage, adequate to minimize this risk."[38]

28. The Defence notes, in particular, that when arrested in Kosovo, an unredacted list of 5 witnesses and their accompanying statements were communicated to Mr. Mbarushimana. Similarly in 2010, Judge Cros communicated to Mr. Mbarushimana the names and whereabouts of complainants relevant to the CPCR case initiated in 2008, the unredacted names and whereabouts of 13 ICTR witnesses and an additional list of unredacted witnesses provided by the Rwandan Prosecutor General. In all these previous judicial proceedings, where the names of actual (and not potential) witnesses were communicated to him, there is absolutely no evidence to suggest that Mr. Mbarushimana exploited such information by attempting to threaten any of them. It is furthermore clear that Judge Cros did not deem Mr. Mbarushimana to constitute such a risk to witnesses that he ought to be placed in detention pending trial.

[and] there was no evidence that any one of the accused had undertaken any activity to interfere with the administration of justice.

[37] *Prosecutor v. Haradinaj*; 'Decision on Ramush Haradinaj's Motion for Provisional Release', 10 September 2010 at para 30-32. See also *Prosecutor v. Stanisic*, Prosecutor v. Stanisic, Decision on Provisional Release 28 July 2004 in which the Chamber rejected the arguments of the Prosecution concerning witness intimidation because they were based on "generalised concern rather than an apprehension linked to any specific acts or conduct of the Accused" (at para 32).

[38] ICC-01/01-01/10-84 at para. 8.

29. Moreover, as mentioned previously, Mr. Mbarushimana has been aware of the ICC investigation, at the latest, from May 2010 and, despite this, there is no evidence to suggest that he has exploited his so-called contacts, at any stage, to obstruct the investigation or to contact potential Prosecution witnesses.

30. Most pertinently, the perpetually operating wire-tap placed by the French authorities on Mr. Mbarushimana's telephone communications has not provided any evidence of attempts to interfere with witnesses in either the ICC case or with complainants in the CPCR case. Nor for that matter, has the wire-tap disclosed any evidence to support the Prosecution's contention that Mr. Mbarushimana could abscond or constitute a source of future criminal activity.

31. In the present case, the Pre-Trial Chamber predicated its finding that Mr. Mbarushimana could interfere with witnesses by accepting the following Prosecution assertions: a) that after the arrest of two senior FDLR officials, Mr. Mbarushimana became a temporary leader of the FDLR and, thus, presumably capable of wielding influence for improper ends, and; b) that Mr. Mbarushimana enjoyed contacts with FDLR members in the field. For proposition a) the learned Pre-Trial Chamber based itself on paragraph 184 of the Prosecution Application[39] and pages 45-47 of Annex 6 to the Prosecution Application.[40] For proposition b), the Pre-Trial Chamber based itself on pages 35-36 of Annex 5 to the Prosecution Application.[41]

32. Before examining the evidentiary basis for the aforementioned propositions, the Defence respectfully registers the difficulties it has encountered as a result of the OTP's reliance on redacted information and the rudimentary extracts contained in Annexes 5 and 6 to the Prosecution

[39] Which in the redacted version does not touch on the issue of Mr. Mbarushimana's alleged temporary leadership.
[40] *fn* 75 of the Arrest Warrant Decision.
[41] *fn* 76 of the Arrest Warrant Decision.

Application. Despite the learned Pre-Trial Chamber's *Decision on matters raised at the status conference of 14 February 2011*[42] in which it confirmed the redactions applied by the Prosecution to Section F of the Prosecution's Application and the rudimentary extracts supplied in Annexes 5 and 6, the Defence would have been better placed to challenge the Prosecution's justification of the grounds for arrest if it had been given more comprehensive access to the witness statements provided by demobilized FDLR soldiers and not just to the selective excerpts which suit the Prosecution Application. In this regard, it is worth noting that the European Court of Human Rights has recently held that an individual's right to challenge the lawfulness of his detention would be violated in those circumstances where the Defence has only received disclosure of general allegations yet correspondingly more specific allegations justifying the detention had been filed with the Chamber on an *ex parte* basis.[43]

Paragraph 184 of the Prosecution Application

33. As mentioned above, redactions have been applied to that part of paragraph 184 which qualifies the nature of the so-called "FDLR support network" mentioned in the Prosecution Application and, as a consequence, deny the Defence the specific knowledge required to defend Mr. Mbarushimana against the charge of exploiting such a network.[44]

34. In any event, the call logs[45] for telephone lines allegedly belonging to Mr. Mbarushimana and referred to in paragraph 184 of the Prosecution Application are of no consequence whatsoever. Even if it may be proved that these telephone lines were registered in Mr. Mbarushimana's name (which the Prosecution Application fails to do), there is no proof that it was Mr.

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[42] ICC-01/04-01/10-84.

[43] *A and others v United Kingdom* (Application No 3455/05) at para. 220.

[44] Anticipating an OTP response that leave ought to have been sought to appeal Decision ICC-01/04-01/10-84 – the Defence argues that the right to request interim release is immediate and should not have to be delayed until the exhaustion of a lengthy interlocutory appeal process.

[45] The pedigree of which cannot be proved since the Prosecution, despite a specific Defence request, has failed to provide the documentation to prove the chain of custody.

Mbarushimana himself who spoke with people in the DRC. Moreover, even if it may be proved that Mr. Mbarushimana indeed contacted people in the DRC, there is no proof that these telephone conversations were criminal or even the slightest bit sinister in content.

Annex 6 to the Prosecution Application/Pages 45-47

35. The assertions contained within Annex 6 in relation to Mr. Mbarushimana's alleged position as the 'temporary leader of the FDLR' are, it is submitted, both contradictory and ambiguous. It is not clear from the relevant transcript as to whether W-552's information concerning Mr. Mbarushimana's alleged leadership stems from an internal FDLR directive or from a BBC report that there was such a directive. W-552 repeatedly emphasizes that the leadership structure of the FDLR had not changed. In the absence, therefore, of information concerning the identity and position of W-552, it is not possible for the Defence to verify whether the witness was in a position to be reliably informed of such matters.

Annex 5 to the Prosecution Application/Pages 35-36

36. Although adduced to support the contention that Mr. Mbarushimana maintained contacts with FDLR members in the field, pages 35-36 of Annex 5 to the Prosecution Application record an intercepted conversation allegedly between Mr. Mbarushimana and Mr. Ignace Murwanashyaka. Mr. Murwanashyaka, however, prior to his arrest and at the time of the intercepted communication was based in Germany and not in the Democratic Republic of the Congo. The intercepted communications do not, therefore, support a conclusion that Mr. Mbarushimana was colluding with individuals in the crime base.

Article 58 (1)(b)(iii) – the need to ensure that Mr. Mbarushimana refrains from continuing with the commission of the crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

37. The evidence relied upon by the Pre-Trial Chamber in support of its finding that Mr. Mbarushimana's arrest is necessitated to prevent the continued commission of crimes is to be found at footnote 78 of the Arrest Warrant Decision. The Washington Times article cited at footnote 78 does not, however, report Mr. Mbarushimana as having admitted to being the "temporary leader" of the FDLR nor does it provide any substantive example whatsoever of him "giving orders" from Paris. The Defence's request to clarify this with the Associated Press ("AP") journalist - Rukmini Callimachi who authored the Washington Times article was refused.[46] Furthermore, the Radio Okapi item entitled "*Shabunda: libération des 45 otages après de violents affrontements*" although dealing with alleged FDLR activity does not mention Mr. Mbarushimana. Nor do the FDLR press releases - allegedly authored by Mr. Mbarushimana himself - contain the slightest piece of evidence from which it may be inferred that Mr. Mbarushimana was delivering instructions to FDLR forces based in the Kivus.

38. For the sake of completeness, it should be added that the Prosecution's reliance on the allegations of Mr. Gregory Alex[47] - the very same individual who had raised <u>unfounded</u> allegations against him in 1999[48] - that Mr. Mbarushimana had "slipped into the role of group leader" and was "preventing the others from surrendering"[49] is <u>reported speculation</u> – the exact nature and credibility of which may not be checked due to AP's principled refusal to allow Ms. Rukmini Callimachi to be interviewed. Moreover, the Prosecution's central

[46] Counsel for Mr. Mbarushimana received the following response from Ms. Rukmini Callimachi on 21 February 2011: "Hello Nick, I forwarded your request to David Tomlin, AP's legal counsel, who advised me as follows: "We never agree to provide voluntary testimony, information, documents etc. for use in investigative or legal proceedings of any kind, civil or criminal. The policy behind this practice is to protect our independence and impartiality, both the reality and the appearance, and to avoid being forced into the role of de facto investigative tool for any interested party." I'm sorry not to be able to help you further. Best, Rukmini Callimachi".
[47] At the date of the Arrest Warrant Decision - the Director of the MONUC DDRRR program in Goma.
[48] See Par. 10 of the present request
[49] Prosecution Application at para. 188.

assertion that "in 2010, MBARUSHIMANA has continued to conduct FDLR activities from French territory and thus to contribute to the commission of crimes"[50] is not sourced to any item of evidence.

39. Nonetheless, even if Mr. Mbarushimana were to pose a future threat of criminal activity, the wording of Article 58(1)(b)(iii) requires that such criminal activity – in order to constitute a ground for arrest - be the same or arise out of the same circumstances. To this end, the means by which Mr. Mbarushimana is said to have perpetrated his criminal activity should not be ignored. Mr. Mbarushimana's alleged mode of liability was his supposed contribution to the common criminal purpose of creating a "humanitarian catastrophe" by extorting the international community through media disinformation. The potential for reoffending (which is categorically denied) must be understood within this strictly defined context. Were it not for his alleged (and denied) abuse of the media, Mr. Mbarushimana could not have committed the crimes with which he was charged. Any perceived threat to the international community may therefore be completely neutralised by obtaining an undertaking from Mr. Mbarushimana that, as a condition for release, he temporarily abstain from any contacts with the international media.

Conclusion

40. Possessing a "*titre de sejour de refugié*" valid until 31 December 2013, Mr. Mbarushimana has a statutory right to return to France should his release be ordered by the Pre-Trial Chamber.[51] Moreover, should Mr. Mbarushimana be released by the International Criminal Court, the French authorities would, it is submitted, be legally obliged to ensure his return to Paris in order to guarantee implementation of the residential curfew ordered by Judge René Cros in the

[50] Prosecution Application at para. 188.
[51] cf. French "Code de l'entrée et du séjour des étrangers et du droit d'asile" (CESA), Titre VII and articles Article L742-6 and Article L314-11 par.8

CPCR case.[52] Pursuant, therefore, to Regulation 51 of the Regulations of the Court and in light of the learned Single Judge's decision "that it is for the Chamber to request observations from the State concerned, only if and when an application for interim release is made",[53] Pre-Trial Chamber I is hereby requested to obtain the following information from the French authorities:

a) Confirmation of the Defence submission that, in light of his "titre de séjour de réfugié" valid until 31 December 2013, there exists no legal impediment, under French law, to Mr. Mbarushimana's return to French territory should he be released by the learned Pre-Trial Chamber;

b) Confirmation of the Defence submission that if the Pre-Trial Chamber should release Mr. Mbarushimana, his return to Paris would be obligatory in order to permit implementation of Judge René Cros's order which is legally binding on both Mr. Mbarushimana and the French administrative authorities, and;

c) Confirmation that the French authorities will agree to enforce any additional terms and/or restrictions imposed by the Pre-Trial Chamber pursuant to Rule 119 of the Rules of Procedure and Evidence ("Rules").

41. In light of all the aforementioned, the Defence respectfully requests that the learned Pre-Trial Chamber order the interim release of Mr. Mbarushimana to his French domicile and stipulate any conditions for such release as deemed appropriate under Rule 119 of the Rules.

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The Hague, the Netherlands
Wednesday, March 30, 2011

[52] *c.f.;* paragraph 19 hereinabove.
[53] ICC-01/04-01/10-85.