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Date: **15 April 2011**

PRE-TRIAL CHAMBER I

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. Callixte MBARUSHIMANA

Public Document, with Public Annex 1 and Confidential Annex 2

Prosecution response to the "Defence Request for Interim Release"

Source: **Office of the Prosecutor**

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

The Office of the Prosecutor
Luis Moreno-Ocampo
Fatou Bensouda

Counsel for the Defence
Nicholas Kaufman

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence
Xavier-Jean Keita

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Ms. Silvana Arbia
Deputy Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. Introduction

1. On 1 April 2011, Pre-Trial Chamber I ("Chamber") issued its "Decision requesting observations on the 'Defence Request for Interim Release'" ("Decision"), requesting the Office of the Prosecutor to submit its observations on the Defence Request for Interim Release ("Defence Request"). The Prosecution submits that detention of the Suspect/Accused must continue for the following reasons:

   (i) The conditions justifying detention under article 58(1) of the Rome Statute ("Statute") continue to subsist;

   (ii) There has been no inexcusable delay by the Prosecution, nor has the Suspect been detained for an unreasonable period within the meaning of Article 60(4).

2. Mr Callixte Mbarushimana ("the Suspect") seeks interim release pursuant to Article 60(2) of the Rome Statute ("the Statute") subject to appropriate conditions imposed under Rule 119 of the Rules of Procedure and Evidence ("the Rules").

3. The Defence argues that he should not be detained because the grounds for arrest (and thereafter for detention) in Article 58(1)(b) – to ensure his appearance at trial, to ensure that he does not obstruct or endanger the investigation or the proceedings, and to prevent him from continuing or committing crimes within the jurisdiction of the Court -- are not met.[1] The Prosecution disagrees and submits that the Chamber correctly determined that arrest was necessary,[2] and the same factors support his continued detention.[3] To that point, the Prosecution

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[1] The Suspect has signalled his intent to make a future request for release based on the inadequacy of the evidence that there exists reasonable grounds to believe he committed the alleged crimes. .See Request for interim release, ICC-04/01-01-10-8; Introduction, para 2. Accordingly, that claim is not part of this application and need not be considered by the Chamber. See: *Prosecutor v. Bemba*, Decision on application for interim release, ICC-01/05-01/08-73, 20 August 2008, para. 52

[2] Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, ICC-01/04-01/10-1, 28 September 2010, paras. 45 - 50.

[3] The reasons for detention pursuant to Article 58(1)(b) (i) – (iii) are in the alternative and the existence of any one of these grounds will justify ongoing detention. *Prosecutor v. Lubanga Dyilo*, 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. 139.

disputes that there has been any material change of circumstances that would justify the interim release of the Suspect. On the contrary, there is even more damning evidence against the Suspect, which would increase the incentive to flee. Furthermore new evidence has emerged which strengthens the conclusion that his interim release would carry the risk that the Suspect would obstruct or endanger the investigation or the court proceedings and/or continue with the commission of the alleged or related crimes within the jurisdiction of the Court.

4. Finally, The Prosecution disputes that the imposition of conditions under Rule 119 of the Rules would provide sufficient safeguards against the risks envisaged in this Article.

II. Statement of Facts

5. On 28 September 2010, the Chamber issued an arrest warrant against the Suspect on 11 counts of war crimes and crimes against humanity.[4] In its decision to issue the arrest warrant, the Chamber ruled that it was satisfied:

   a. That an arrest was necessary to ensure the Suspect's appearance at trial;[5]

   b. That the arrest was also justified by the risk of interference or intimidation of FDLR victims and ICC witnesses and potential witnesses;[6] and

   c. That the arrest was further justified by the risk of the Suspect's continuing contribution to the commissions of the crimes alleged.[7]

6. On 11 October 2010 the Suspect was arrested in Paris. In the ensuing months, the Suspect exhausted every available legal avenue to resist his surrender to this Court. Notwithstanding this, he was surrendered to the Court on 25 January 2011.

7. On 30 March 2011 the Defence filed its Urgent Request.

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[4] Warrant of Arrest for Callixte Mbarushimana, ICC-01/04-01/10-2-tENG, 28 September 2010.
[5] ICC-01/04/01/10-1, para. 47.
[6] *Ibid.*, para. 48.
[7] *Ibid.*, para. 49.

8. On 1 April the Single Judge issued the Decision requesting observations on the "Defence Request for Interim Release"[8] in which it ordered the Prosecution to file its Response by 15 April.

9. On 14 April the Defence filed its "Soumission d'éléments de preuves supplémentaires á l'appui de la Requête de la Défense pour la mise en liberté provisoire (ICC-01/04-01/10-86)" In which it submitted 6 new Annexes in support of its Request.

III. Legal criteria for detention

10. According to the Appeals Chamber, Article 60(2) provides the detainee with an early opportunity to contest his or her arrest and sequential detention by reference to Article 58, upon which the Chamber must address anew the issue of detention in light of the material placed before it.[9] If the conditions of Article 58(1) continue to be met, the detained person *shall* continue to be detained.[10]

IV. The Prosecution's Observations

11. The Prosecution submits that the conditions of Article 58(1) continue to be met and that accordingly, the detention of the Suspect must continue.[11]

12. In relation to the conditions enshrined in Article 58(1)(a), the Prosecution submits that there has been no change in the circumstances underlying the Chamber's finding that there are reasonable grounds to believe that the Suspect committed

[8] ICC-01/04-01/10-8, 1 April 2011.

[9] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment on the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release", 9 June 2008, ICC-01/04-01/07-572, para. 12.

[10] *Prosecutor v. Thomas Lubanga Dyilo*, "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", 13 February 2007, ICC-01/04-01/06-824, para. 134.

[11] *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the Appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa", 2 December 2009, ICC-01/05-01/08-631-Red, paras. 1, 60.

the crimes as detailed in the Arrest Warrant.[12] The Defence has not provided any legal or factual basis that would justify the Chamber altering this determination.

13. As determined by the Appeals Chamber, the reasons for detention pursuant to Article 58(1)(b)(i)-(iii) of the Statute are set out in the alternative.[13] Consequently, the Chamber needs only be satisfied that any <u>one</u> of the three alternative reasons justifies the continued detention of the person. In the instant matter, the Chamber was satisfied that <u>all three</u> reasons were met.

14. Moreover, continued detention under Article 58(1)(b) of the Statute need only "appear" to be necessary. As confirmed by the Appeals Chamber, the question therefore revolves around the possibility, not the inevitability, of a future occurrence.[14] In short, the Chamber *shall* order detention (Article 58(1)) if there is a possibility either that the person may abscond, obstruct or endanger the investigation or Court proceedings or commit further crimes within the jurisdiction of the Court.

15. The Prosecution submits that there has been no material change in the circumstances underlying the Chamber's ruling that the conditions under Article 58(1)(b) are met and that the Suspect's continued detention is necessary: (i) to ensure his appearance at trial;[15] (ii) to ensure that he does not obstruct or endanger the investigation or the court proceedings; or (iii) to prevent him from committing crimes within the jurisdiction of the Court and which arise out of the

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[12] ICC-01/04-01/10-2-tENG.
[13] *Prosecutor v. Thomas Lubanga Dyilo,* "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", 13 February 2007, ICC-01/04-01/06-824, para. 139.
[14] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* "Judgment on the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release", 9 June 2008, ICC-01/04-01/07-572, para. 21.
[15] With one exception: The Prosecution has subsequently established that the travel document No. 06ZX32561, mentioned in para 179 of the Application under Article 58, did in fact exist, contrary to the information initially provided by the French authorities.

same circumstance.[16] On the contrary, further evidence has emerged which would increase the possibility of these risks eventuating.[17]

A. The Detention remains necessary to ensure the Accused's appearance at trial (Art 58(1)(b)(i))

16. The Prosecution submits that the continued detention of the Suspect is necessary to prevent the risk of flight and to ensure the Suspect's appearance at trial, pursuant to article 58(1)(b)(i). The Prosecution submits that the Suspect has both the motive and ability to abscond, and he also has a history of refusing to submit voluntarily to a criminal court's jurisdiction. Thus, he presents a substantial flight risk.

(i) Gravity of the crimes and length of sentence

17. The gravity of the charges against the Suspect coupled with the possibility that he faces long prison sentence, if convicted, supports the conclusion that the Suspect might flee if released.[18] The charges which the Suspect faces, 11 counts of war crimes and crimes against humanity committed against the civilian population over a protracted period, are serious by any standard.

18. The Suspect seems to argue that this is an inappropriate factor because all crimes alleged in this Court are serious and can result in a substantial prison sentence. The Prosecution disagrees that the factor must be discounted on that ground; to

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[16] In this regard, the Chamber is respectfully referred to the Prosecution's submissions in section F of the Prosecution's Application under Article 58, ICC-01/04-01/10-11-Conf-Red2, p. 60 – 64.

[17] See paras. 31 – 37 below.

[18] The Appeals Chamber has consistently found that the seriousness of the crimes allegedly committed is a relevant factor in assessing the risk of absconding. See *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled 'Decision on application for interim release'", 16 December 2008, para. 55: *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment on the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release", 9 June 2008, ICC-01/04-01/07-572, para. 21: and *Prosecutor v. Thomas Lubanga Dyilo*, "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", 13 February 2007, ICC-01/04-01/06-824, para. 136.

the contrary, the fact that this Court only pursues the most serious crimes explains why release is not to be presumed.

(ii) The Suspect's political position and international or national contacts

19. Through the Suspect's former position as Executive Secretary of the FDLR, he has established numerous contacts in France, Europe generally, Africa and beyond,[19] which could provide him with the necessary means of absconding.[20] As confirmed by the Appeals Chamber, it is not necessary to establish that the Suspect has already made use of these contacts and ties in order to abscond.[21]

20. Relying on the Judgment of the Appeals Chamber in the *Lubanga* case,[22] the Suspect asserts that the Prosecution bears the burden of "submitting sufficient information to establish that the existence of such international contacts renders it 'more likely' (not just theoretically possible) that a suspect would abscond". The quoted authority, however, does not support his assertion. Indeed, the Appeals Chamber stated that the Pre-Trial Chamber was justified in considering the person's international contacts even though there was no evidence that he would use them to further his flight. In other words, the decision in fact contradicts the Defence argument.[23] Moreover, it is clear that a person with an international network of contacts would be more able to abscond than a person without such a

[19] See: ICC-01/04-01/10-11-Conf-Red2, para. 180 – 182.
[20] *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo"10 June 2008, ICC-01/05-01/08-14-tENG, para.87; *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the Appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa", 2 December 2009, ICC-01/05-01/08 -631-Red, para. 72.
[21] *Prosecutor v. Thomas Lubanga Dyilo*, "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", 13 February 2007, ICC-01/04-01/06-824, para. 137.
[22] 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 proviso ire de Thomas Lubanga Dyilo", ICC-01/04-01/06-824 at para. 136 *et seq.*
[23] *Ibid.*, para. 137.

network. It is thus entirely appropriate for the Chamber to consider that factor in assessing the risk of flight.[24]

21. Even without an extended network, it would be relatively easy for the Suspect to travel unhindered and lose himself within the very large extended Schengen area. Though the Defence Request takes issue with this assertion, it provides no factual basis to dispute it. The Chamber thus should take into account the fact that a person with the right to reside in one of the EU countries may travel without documents to other member countries.

(iii) The Suspect's personal circumstances

22. The Suspect claims that his past cooperation with law enforcement authorities and his personal situation in France refute any claim that he presents a flight risk. The Prosecution disagrees.

23. First, the Suspect makes much of his supposed cooperation with the authorities on previous occasions in which he faced the threat of criminal prosecution. Alleged to have participated in the 1994 Rwanda genocide,[25] the Suspect in fact has fought all efforts to extradite him to answer those charges. His alleged cooperation thus has not included cooperating with the authorities that actually wished to prosecute him -- namely the Rwandan judicial authorities and the French judicial authorities. To the contrary, he persistently has contested efforts by authorities in the former Yugoslavia and Germany to return him to Rwanda. This track record does not support the assertion that he has proven his willingness to voluntarily subject himself to the Court's jurisdiction. The fact of

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[24] The Suspect suggests that his "freedom of association" with FDLR members cannot be used against him (ICC-01/04-01/10-86, para. 27). This suggestion mis-states the point: the Prosecution does not question his "right" to associate with other members of the FDLR, but at the same time cannot overlook the fact that this network of associates would assist or enable him to abscond and/or interfere with witnesses or the investigation.

[25] Allegations which the former chief of prosecutions of the ICTR, Ken Fleming, QC, has said were substantiated. The former chief of prosecutions is on record stating that there was a case to answer, but that MBARUSHIMANA wasn't prosecuted because he was not a "ring-leader" or "a big fish". See DRC-OTP-2000-0044, available on http://www.youtube.com/watch?v=l44lQxMSvdw, at 15:00, last accessed on 14 April 2011.

the matter is that an indictment has been issued against him in Rwanda and he remains a fugitive from that prosecution.

24. Nor would it be a sufficient answer that the Suspect genuinely believes he is innocent of the genocide charges, but would not receive a fair trial in Rwanda. He presumably also would claim to be innocent of these charges, and in his attempts to persuade the French courts not to surrender him to the ICC, he stated that he would not receive a fair trial in *this* court.[26] In short, his background exemplifies unequivocal non-cooperation on the very point at issue here – willingness to submit to a court's criminal jurisdiction.

25. In France, while the Suspect had been under preliminary examination ("*enquête préliminaire*") since March 2008 as recalled by the Defence,[27] this was upgraded into a more coercive level of investigation first ("*information judiciaire*") on 29 September 2010 and led to his indictment ("*mise en examen*") on 21 December 2010, for his alleged involvement in the 1994 Rwanda genocide. Far from cooperating with the French authorities in these new circumstances, his Defence has challenged this and filed a request to quash the indictment ("*requête en nullité de la mise en examen*") on 30 December 2010. The Prosecution submits here again that this new fact is also certainly not one which *reduces* the risk of him absconding.[28]

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[26] The Chambre de l'instruction summarised the Suspect's objections as follows: *"Mais la défense entend surtout soutenir que la procédure devant la Cour Pénale Internationale est contraire aux droits de l'Homme. La procédure serait incertaine, il n'est pas assuré que le procès de M, MBARUSHIMANA Callixte ait lieu à La Haye devant la CPI, dans des délais raisonnables, puisqu'il est également recherché par d'autres Etats, notamment le Rwanda, qu'il a fui pour dés raisons politiques, Etat vers lequel il risquerait d'être remis, puisque l'Etat Rwandais n'a pas renoncé à ces poursuites. La procédure devant la CPI mépriserait les droits de la défense. Se référant à l'art, 59 du Statut, le Procureur Général a saisi d'initiative la chambre préliminaire d'une demande de recommandation sans attendre la communication préalable du mémoire de la défense. Cette demande viole les droits de la défense, car il appartenait à la chambre de l'instruction de déférer elle-même cette question à la Cour pénale internationale, étant précisé que la Chambre de l'instruction n'est pas obligée de suivre cette recommandation."*

[27] ICC-01/04-01/-10-86, para. 18.

[28] See in particular http://www.rwamucyo.com/index.php?id=5&tx_ttnews%5Btt_news%5D=231&cHash=0770030605, last accessed on 14 April 2011; and at http://www.jambonews.net/actualites/20110102-genocide-rwandais-mbarushimana-demande-l-annulation-de-son-inculpation/ , last accessed on 14 April 2010.

26. Similarly, the Suspect's offer of cooperation with the Prosecution in this matter is irrelevant,[29] given his strenuous subsequent effort to avoid surrender to the Court. Not only did he utilise every available legal avenue within the French courts to bar his surrender by the French authorities, but he also petitioned the Constitutional Court in Germany (unsuccessfully) to overturn the decision of the German Federal Prosecutor to close its investigation against him, in order to render the case inadmissible.[30]

27. With regards to the Suspect's alleged "strong social connections" with France, these should not be overstated. France is not his country of birth, though it has offered him refugee status. There is no evidence that he owns property there. Though employed, he has IT skills and qualifications that would enable him to find a job elsewhere, should he be of a mind to abscond. Furthermore, since his arrest the *plainte civile* opened against him in France in 2008 on allegations of genocide has been upgraded to a *mise en examen*. Thus he has new reason to flee France and seek refuge elsewhere.

(iv) Sufficiency of conditional release

28. The Suspect argues that a French judge opted to allow his release on conditions similar to those available under Rule 119.[31] The Suspect omits, however, that the French magistrate imposed these terms on 21 December 2010, at a time when the Suspect was detained by a different French court based on this Court's warrant. Thus, the significance of Judge Cros's determination is diminished, since he was obviously aware that the Suspect would remain in custody regardless of the conditions that might be imposed in the French case. The Suspect's two attempts to persuade the French court's to release him in this matter were unsuccessful.

29. The Prosecution submits that the imposition of conditions under Rule 119 would not prevent the possibility of flight. There is, in fact, no incentive for the Suspect

[29] ICC-01/04-01/-10-86-Anx1.This offer was already pertinently considered by the Chamber, which nevertheless determined that the Suspect's arrest was necessary. , ICC-01/04-01/10-1, para. 47.
[30] See Annex 1.
[31] See ICC-01/04-01/10-86, para. 19.

to voluntarily submit to the Court's jurisdiction. He does not appear to own property that would be pledged as surety for his presence at trial. And conditions such as those set by Judge Cros – requiring authorization to travel outside his home region, a requirement that he present himself monthly to the court, and a surrender of his passport – will not prevent flight. In fact, anything short of round-the-clock monitoring is simply inadequate to guarantee his presence. Thus, if the Chamber determines that there is indeed a real risk of the Suspect absconding, the Prosecution submits that the only satisfactory response is to order his continued detention.

B. Detention remains necessary to ensure that the Accused does not obstruct or endanger the investigation or the court proceedings (Art 58(1)(b)(ii))

30. Of at least equal importance as the risk of flight, the Prosecution submits that the detention of the Suspect is necessary to ensure that he does not obstruct or endanger the investigation or the court proceedings, as envisaged in article 58(1)(b)(ii). Indeed, not only do the circumstances described in its Application under Article 58[32] continue to subsist, new developments and evidence have heightened the risk.

31. In the first instance, the situation concerning the safety of witnesses has changed. At the time of the Prosecution's Request under Article 58, all the witnesses relied on were based in Rwanda. However, the Prosecution has since gathered statements from crime-base witnesses and victims who reside in the Eastern DRC, in areas where the FDLR continues to be engaged in an armed conflict and otherwise wields considerable influence. Further statements from such witnesses are anticipated.

32. MONUSCO forces play an important role in providing security in the Kivus. Amongst the documents seized from the Suspect's residence, the Prosecution

[32] ICC-01/04-01/10-11-Conf-Red2, para 183 – 185.

discovered several confidential and restricted MONUC/MONUSCO and UN documents.[33] Furthermore, printed copies of emails[34] indicate that the FDLR has sources within MONUC/MONUSCO who are able to provide confidential information that is in turn passed along to the Suspect. This is further evidence of the existence of a network of sympathisers prepared to assist the FDLR cause, by leaking confidential information. For all these reasons, the Prosecution submits that the Suspect has a network that could assist him to interfere with the investigations, witnesses or Prosecution staff in the field if he is released.

33. Two further pieces of evidence have emerged which indicate that the Suspect has no qualms about interfering with investigations and witnesses.

34. The first is an email[35] from one "Itsinzi Jean" (itsinzi@yahoo.fr)[36] to the FDLR Secretariat (fdlrse@yahoo.fr) dated of 20 February 2010. The subject of the e-mail is "*Transmission de l'état des besoins*" (Transmission of statement of needs). It represents a February 2010 request addressed to the Suspect for financial support for a team of investigators to counter the German prosecution of MURWANASHYAKA and MUSONI. The team is headed by President's Chef de Cabinet, Mukiza David, and is composed by seven individuals, including civilians and high ranking FDLR officers. Of particular importance is item 4, which reflects a request for 1000$ for *"achat témoignages"* (purchase of testimonies). On the face of it, this appears to indicate an intention, communicated to the Suspect, to improperly procure or influence testimony in order to bolster the defence of the President and 1st Vice President of the FDLR. The prosecution submits that this indicates the predisposition of the FDLR, in consultation with the Suspect, to interfere with a criminal investigation.

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[33] See Confidential Annex 2.
[34] DRC-REG-0001-1631 & DRC-REG-0001-1632.
[35] DRC-REG-0003-2537.
[36] This is the e-mail used by the FDLR Deputy Executive Secretary, Col. Laurent NDAGIJIMANA, based in the Kivus.

35. Secondly, in a notebook seized from the Suspect's residence, a note dated 30 May 2010 appears, in which the Suspect recorded names and details of a number of prosecution witnesses in the above-mentioned German prosecution.[37] It appears that the Suspect in turn communicated these names to FDLR cadres in the field, as on 17 June 2010 he received another email from the Deputy Executive Secretary[38] providing information on several of the witnesses whose details are recorded in the notebook.

36. At the conclusion of the list of witnesses, the following words appear:

"Idea:

- make public the proceedings
- a blog – names of witnesses
- (english)"[39]

37. The Prosecution alleges that these notes provide evidence that the Suspect contemplated publishing the names of the prosecution witnesses in the case against MURWANASHYAKA and MUSONI. Such an action would be likely, and in all probability was intended, to intimidate the witnesses.

38. In his supplementary filing, the Suspect alleges that he is aware of the witnesses against him in the French proceedings relating to the 1994 genocide charges, but has not taken any steps to intimidate or interfere with them. The Prosecution notes that at the stage the witnesses were revealed, the matter was still a *plainte civile.* By the time this investigation was elevated to a *mise en examen* the suspect was already detained. Furthermore, the situation in that matter where the witnesses are presumably mainly located in the relative stability of Rwanda cannot be compared to the instant matter, where many of the witnesses and potential witnesses reside in the volatile Kivus. Finally, the Suspect omits to mention that he was also aware of the witnesses in the German prosecution. In

[37] DRC-REG-0007-3466 – 3471.
[38] "Itsinzi Jean" (itsinzi@yahoo.fr); DRC-REG-0007-0010.
[39] DRC-REG-0007- 3471.

that matter there is evidence of his intention to interfere with the witnesses, as outlined above.

39. The Prosecution therefore submits that the Suspect has the capacity and apparent willingness to interfere with criminal proceedings. While the Suspect's continued detention will not guarantee that the witnesses will be free of intimidation from other FDLR associates, it can prevent him from taking steps directly or indirectly to obstruct or endanger the investigation or the court proceedings.

40. Nor can the imposition of conditions under Rule 119 adequately guard against the risks described above. The Suspect can access the internet in any number of manners which would be impossible to monitor, such as at internet cafés, through free WiFi points or using the computers or mobile phones of friends or family. The Suspect, with his IT experience, would be quite aware of this.

41. Furthermore, the Prosecution has discovered a number of telephone cards amongst the seized documents, indicating that the Suspect has used prepaid international call services to contact FDLR members in the field. The use of such services would make it difficult, if not impossible, for the French authorities to keep track of his calls. The use of prepaid mobile phones would also be impossible to monitor.

C. Detention remains necessary to prevent further commission of the crimes (Art 58(1)(b)(iii))

42. The Prosecution submits that continued detention of the Suspect is necessary to prevent him from continuing to commit the crimes stipulated in the arrest warrant or a related crime which falls within the jurisdiction of the Court and which arises out of the same circumstances, as envisaged by article 58(1)(b)(iii).

43. As long as the FDLR's presence as an armed force in the Eastern DRC continues, the risk exists that they will continue to commit the sort of atrocities for which the Suspect is charged. The mode of the Suspect's participation in the commission of

the crimes charged does not require his physical presence at the scene of the crime. The Prosecution submits that it is to be expected that, if released, the Suspect would revert to his role as *de facto* leader of the FDLR abroad, including the coordination of activities and managing their media campaign. Thus, the Prosecution submits that, if released, a real risk exists that the Suspect will continue to contribute to the commission of those crimes. In this regard, the Prosecution notes that the Suspect's awareness of the German investigation, from early 2010 and professed awareness the ICC investigation, from May 2010, did not dissuade him from continuing to cover up the FDLR involvement, including in last summer's mass-rapes in Luvungi that were widely attributed to his organisation.

44. The Prosecution submits that, here again, no conditions imposed under Rule 119 can adequately guard against this possibility. As long as the Suspect is able to communicate with other members of the FDLR and its international network, he is able to participate in these crimes. For the reasons described in paragraphs 40 - 41 above, the Prosecution submits that the French authorities would not be able to effectively control the Suspect's ability to communicate with these persons.

The Suspects supplementary filing of 14 April

45. The Prosecution objects to the Suspect filing further evidence in support of his Request just one day prior to the deadline set for the Prosecution response. This is exacerbated by the fact that four of the six Annexes are filed *ex parte*, notwithstanding the fact that the filing does not provide any justification for this classification.

46. In the circumstances, the Prosecution submits that the Chamber should refuse to consider this additional material. Alternatively, it should order the reclassification of the *ex parte* Annexes as "confidential" and provide the Prosecution with a reasonable opportunity to respond.

Confidentiality

47. Annex 2 contains details of confidential and restricted UN and MONUC documents. The Prosecution submits that this information should not be disclosed publically and that the confidential classification of this Annex is accordingly justified.

V. Conclusion

48. For the foregoing reasons, the Prosecution respectfully submits that the conditions in article 58(1) of the Statute continue to subsist and that accordingly, the detention of the Suspect must continue.

Luis Moreno-Ocampo,

Prosecutor

Dated this 15th day of April 2011

At The Hague, The Netherlands