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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
with Confidential Annexes 1, 2 & 3, ex parte, Prosecution & Defence Only

**Defence Reply to the Prosecution Response
to the 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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With the leave of the learned Pre-Trial Chamber,¹ the Defence hereby files its five page² point-by-point reply to the Prosecution response³ to the Defence request for interim release.⁴

Article 58(1)(b)(i)

Prosecution's submission on the gravity of the crimes

1. The Prosecution argues that because “*this Court only pursues the most serious crimes...release is not to be presumed*”.⁵ This argument is fallacious. ICC precedent clearly indicates that release or liberty is most definitely “*to be presumed*” unless detention - being the exception to the rule – is warranted.⁶

Prosecution's observations on the Suspect's contacts and freedom to travel

2. The Prosecution continues to allege that Mr. Mbarushimana has established numerous contacts that could facilitate his escape. Such an allegation remains no more than a casual slogan repeated by the Prosecution in every case it brings before the ICC. In the present instance, reference is made to paragraphs 180-182 of the arrest warrant application⁷ which, in so far as they contain material directly pertinent to Mr. Mbarushimana, remain subject to redactions which the Defence has, albeit unsuccessfully, sought to lift. The Defence remains extremely puzzled by the fact that the Prosecution persists in justifying Mr. Mbarushimana's detention on the basis of information which it is not prepared to divulge.

3. The Prosecution challenges the Defence to provide a factual basis for its argument that Mr. Mbarushimana would not “*lose himself [sic] within the very large extended Schengen area*”.⁸ The Defence takes up the gauntlet and avers that since being unfairly subjected to the travel ban imposed by the United Nations Security Council, Mr. Mbarushimana has never left French territory. “*Losing oneself*” within the Schengen area would, for the sake of argument, be broadly equivalent to “*losing oneself*” within the geographical boundaries of Canada (which is also a State Party to the Rome Statute). The Defence is pretty sure, however, that if a suspect were to ask to be released to Toronto – the Prosecution would not argue that he could “*lose*

¹ ICC-01/04-01/10-111.

² ICC-01/04-01/10-107 at footnote 3; Five pages not including the template cover pages.

³ ICC-01/04-01/10-101.

⁴ ICC-01/04-01/10-86.

⁵ Prosecution Response at paragraph 18.

⁶ ICC-01/04-01/07-330, Decision on the powers of the Pre-Trial Chamber to review proprio motu the pre-trial detention of Germain Katanga at pages 6 & 7: “*pre-trial detention is not the general rule, but it is the exception, and shall only be resorted to when the Pre-Trial Chamber is satisfied that the conditions set forth in article 58 (1) of the Statute are met.*” c.f.; also, ICC-01/04-01/07-345, Decision on the application for interim release of Mathieu Ngudjolo Chui, 7 May 2008 at page 6.

⁷ Prosecution Response at paragraph 19 and footnote 19.

⁸ Prosecution Response at paragraph 21.

himself” in Montreal. Most, if not all, EU countries are State Parties to the Rome Statute and the EU signed a Cooperation and Assistance Agreement⁹ with the ICC on 10 April 2006; all would be obliged to surrender Mr. Mbarushimana to the Court were he to abscond.

Prosecution’s observations on the Suspect’s personal circumstances

4. The Defence notes - with incredulity - the spin that the Prosecution places on Mr. Mbarushimana’s desire to challenge his surrender to the ICC¹⁰ and to avoid extradition to Rwanda¹¹ by legal means. Mr. Mbarushimana’s refusal to accept the Prosecution’s blinkered opinion that he should be detained, his protestation of innocence¹² and his recourse to legitimate and recognised avenues of appeal against the decision to surrender him to the ICC do not constitute “*unequivocal non-cooperation*”¹³ with judicial authorities. The Defence finds similarly absurd the Prosecution contention that Mr. Mbarushimana could use his IT skills “*to find a job elsewhere should he be of a mind to abscond*”.¹⁴ A potential employer would hardly be able to keep the fact of Mr. Mbarushimana’s lawful employment a secret. Moreover, in a country where homeownership currently stands at 54% of the registered population,¹⁵ Mr. Mbarushimana’s lack of “property”¹⁶ does not indicate an absence of strong roots in the community but, rather, that he is not a man of means and devoid of the wherewithal to abscond.

5. With respect to Mr. Mbarushimana’s alleged involvement in the 1994 Rwanda genocide, the Defence is not sure whether to be outraged by or to rejoice in the Prosecution’s reliance on the ramblings of a disgruntled former ICTR employee.¹⁷ On the one hand, the request that the learned Pre-Trial Chamber prefer the salacious gossip peddled in a scurrilous “youtube” video-clip over Carla del Ponte’s clearly reasoned and legally binding *ordonnance de non-lieu* is both incomprehensible and sullies Mr. Mbarushimana’s name. On the other

⁹ Agreement on Cooperation and Assistance, 7871/06, 10 April 2006.

¹⁰ Prosecution Response at paragraph 26,

¹¹ Prosecution Response at paragraph 23. The Prosecution totally ignores the finding of the French Cour de Cassation which protects Mr. Mbarushimana from repatriation to Rwanda as follows : “*qu’eu égard à la teneur des dispositions des articles 107§ 3 et 108 de la Convention de Rome et compte tenu des imprécisions de la demande quant à un éventuel transfert vers un Etat tiers, on peut craindre que M. X..., si par hypothèse, il se trouvait éventuellement et ultérieurement déchu du statut de réfugié politique par la France après poursuites et condamnation par la Cour pénale internationale, il convient de s’assurer qu’en aucun cas M. X... ne sera, de quelle que manière que ce soit, expulsé, refoulé ou extradé vers le Rwanda, et ce en application de l’article 33, alinéa 1, de la Convention de Genève susévoquée, en cas d’acquittement ou après avoir purgé la peine à laquelle il aurait été condamné*”; Cour de Cassation, Ch. Crim., Arrêt, Pourvoi n°10-87760, 4/01/2011.

¹² Prosecution Response at paragraph 24.

¹³ Prosecution Response at paragraphs 25

¹⁴ Prosecution Response at paragraph 27.

¹⁵ <http://www.nationmaster.com/red/country/fr-france/peo-people&all=1> (last accessed 25 April 2011).

¹⁶ Prosecution Response at paragraph 27.

¹⁷ Prosecution Response at paragraph 23 and footnote 25.

hand, the Defence derives a certain degree of hope from the fact that this Prosecution team believes that a Chief Prosecutor's faulty exercise of discretion may be countermanded by his or her hierarchical inferior.

Prosecution's observations on the sufficiency of conditional release

6. The Prosecution, it is submitted, does His Honour Judge René Cros an unwarranted and unsubstantiated disservice by presuming that his judicial discretion was subordinated to the will of this learned Pre-Trial Chamber.¹⁸ Furthermore, if the Prosecution had read the Defence request for interim release with due care, it would have noted that far from "omitting"¹⁹ such, specific reference was indeed made to the fact that "*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'*".²⁰

7. The Prosecution concludes its observations on the risk of flight by stating that "*anything short of round-the-clock monitoring is simply inadequate to guarantee*"²¹ Mr. Mbarushimana's presence at trial. If this submission is to be taken at face-value – and the Defence would not presume otherwise – it would appear that the Prosecution is expressing its complete satisfaction with electronic tagging as a suitable alternative to detention. Indeed, the Defence notes that by virtue of a recent amendment to the French Code of Criminal Procedure,²² detention may only be ordered if electronic tagging is not suffice to obtain the objectives of *contrôle judiciaire*.

Article 58(1)(b)(ii)

8. The Prosecution refers to allegedly confidential and restricted MONUC/MONUSCO documents seized from Mr. Mbarushimana's house. Only one of these documents is listed as confidential whereas the Prosecution assumes the restricted nature of the rest. Moreover, the argument that these documents were leaked "*by a network of sympathisers prepared to assist the FDLR cause*"²³ (or, for that matter, originated from a source within MONUC/MONUSCO) is speculative fantasy in so far as it attributes motive to unidentified individuals. There is absolutely no proof that Mr. Mbarushimana solicited these documents or that he would exploit his purported links with such a mysterious cabal for nefarious ends. The same may be said for

¹⁸ Prosecution Response at paragraph 28.

¹⁹ *ibid.*

²⁰ Defence Request at paragraph 19.

²¹ Prosecution Response at paragraph 29.

²² Article 137 as modified by Loi n° 2009-1436 of 24 November 2009 and a Décret of 1 April 2010.

²³ Prosecution Response at paragraph 32.

the e-mail sent by a certain “*Itsinzi Jean*”²⁴ produced as proof of the fact that Mr. Mbarushimana “*has no qualms about interfering with investigations and witnesses*”.²⁵ The Prosecution does not prove that the communications sent to the fdlrse@yahoo.fr e-mail address (which was a publicly recognised address) were solicited by Mr. Mbarushimana. Furthermore, the phrase “*achat témoignages*” does not indicate the procurement of perjured any more than truthful testimony and cannot, in any way, be linked to an act or request of Mr. Mbarushimana.

9. The Prosecution further alleges that Mr. Mbarushimana contemplated publishing the names of Prosecution witnesses in the German criminal proceedings against Ignace Murwanashyaka and Straton Musoni.²⁶ This theory is based on the contents of a notebook seized from Mr. Mbarushimana’s house and set out on six pages²⁷ concerning which the Prosecution claims the sixth page sequentially follows and is related to those preceding it. Assuming, therefore, that these pages are indeed sequential, the question needs to be asked as to why the Prosecution did not deem it appropriate to follow the Pre-Trial Chamber’s rulings on the review of potentially privileged material²⁸ given that the name of one of Mr. Mbarushimana’s lawyers appears on the very same page as the alleged “idea” to publish witness’ names.²⁹ Notwithstanding the aforementioned, and without accepting the need to address any substantive allegations on the matter, the Defence submits that the allegedly incriminating phrase “*a blog–names of witnesses*” is open to exactly the opposite interpretation to that placed on it by the Prosecution. The symbol “–” may equally be read as the subtraction operator such that the relevant phrase means “*a blog minus names of witnesses*”.

10. While celebrating the discovery of new evidence of such dubious value and building its case for detention on the fly, the Prosecution has, meanwhile, either abandoned or neglected to defend its former arguments in support of the alleged threat posed by Mr. Mbarushimana to the investigation and witnesses. One of the most “compelling” of these previous arguments comprised an allegation that Mr. Mbarushimana had given a BBC interview in which he claimed to be a temporary leader/decision maker in the FDLR – the implication being that he

²⁴ Prosecution Response at paragraph 34.

²⁵ Prosecution Response at paragraph 33.

²⁶ Neither of the Parties can know whether these are indeed German prosecution witnesses.

²⁷ DRC-REG-0007-3466 to DRC-REG-0007-3471 inclusive.

²⁸ ICC-01/04-01/10-67; Although the Prosecution excuses its decision to examine the notebook concerned by stating that Counsel misspelled the name of Mr. Mbarushimana’s German lawyer, the item concerned would, nevertheless, have rendered a positive hit with a fuzzy keyword search (were it conducive to optical character recognition) and would, thereafter, have been quarantined pending the final decision of the Pre-Trial Chamber.

²⁹ *c.f.*; **Confidential Annex 1**: Letter from Counsel to Mr. Anton Steynberg of 19 April 2011 and **Confidential Annex 2**: E-mail response from Mr. Anton Steynberg to Counsel of 20 April 2011 sent at 18:10 (GMT+02:00).

had the power to influence witnesses.³⁰ Defence investigations have now resoundingly proved this to be untrue³¹ – as they did when the Prosecution implied that Mr. Mbarushimana had travelled abroad using false or forged documentation.

Article 58(1)(b)(iii)

11. Defence investigations and a re-evaluation of Rukmini Callimachi’s article in light of her principled refusal to cooperate with the ICC³² now confirm that there is no evidential basis for the allegation that Mr. Mbarushimana was, at any stage, the *de facto* temporary leader of the FDLR. Accordingly, there are no grounds for asserting that should Mr. Mbarushimana be released, he will “revert” to “*the coordination of [FDLR] activities*”.³³

12. The Defence finds it distinctly telling that the Prosecution justifies Mr. Mbarushimana’s alleged “continued” role in “covering up” crimes by reference to the “Luvungi” rapes.³⁴ With a coy display of candour, the Prosecution admits that these incidents were only “widely attributed”³⁵ to the FDLR. Put otherwise, the Prosecution frankly acknowledges that its own submission is the product of popular gossip.

Relief Sought

13. In light of all the aforementioned, the Defence respectfully reiterates its request for Mr. Mbarushimana’s interim conditional release. If, contrary to the Defence submission, the learned Pre-Trial Chamber should deem it necessary to monitor his movements on a “round-the-clock” basis – as the Prosecution proposes – Mr. Mbarushimana would be prepared to submit to electronic tagging as recognised by French law.



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Tuesday, April 26, 2011

³⁰ ICC-01/04-01/10-11-Conf-Red2, Prosecution Application under Article 58 at paragraph 188 and footnote 226.

³¹ **Confidential Annex 3:** A witness statement filed confidentially pending a final decision of BBC legal counsel on the publication thereof.

³² Defence Request for Interim Release at paragraph 37.

³³ Prosecution Response at paragraph 43.

³⁴ *ibid.*

³⁵ *ibid.*