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Date: **29/05/2011**

THE APPEALS CHAMBER

Before: Judge Anita Ušacka, Presiding Judge
Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Daniel David Ntanda Nsereko

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR
v. CALLIXTE MBARUSHIMANA

Public Document

Defence document in support of its appeal against Pre-Trial Chamber I's decision on 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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Legal Representatives of the Applicants

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Victims Participation and Reparations Section

Other

Introduction

1. Pursuant to Article 82(1)(b) of the Rome Statute, Rule 154 of the Rules of Procedure and Evidence and Regulation 64(2) of the Regulations of the Court, the Defence for Mr. Callixte Mbarushimana hereby submits a document in support of its appeal against Pre-Trial Chamber I's *Decision on the Defence Request for Interim Release* rendered on 19 May 2011 ("the Impugned Decision").[1]

2. The Defence raises **one** ground of appeal alone; namely, that in formulating the Impugned Decision, the learned Pre-Trial Chamber erroneously evaluated the evidence presented against and in support of the grounds of arrest either by failing to attribute it appropriate weight in the circumstances or by misinterpreting it.

3. The Defence requests that the Appeals Chamber reverse the Impugned Decision and remit the matter to the Pre-Trial Chamber for fixing conditions of release.

Submission

Article 58(1)(b) - General Observations

4. The Defence went to extraordinary lengths to provide many discrete circumstances and examples of conduct on the part of Mr. Mbarushimana militating against his posing a threat to the interests protected under Article 58(1)(b) of the Rome Statute – in particular the risk of flight. In light of the systematic rejection of every one of these submissions (bar one),[2] it would appear that the need for Mr. Mbarushimana's detention was reinforced. This is not the case. Devoid of critique, all that remains of the Impugned Decision is the Pre-Trial Chamber's original reasoning for finding that Mr. Mbarushimana's arrest was justified (which was not examined *de novo*)[3] and the Prosecution's belated submissions on witness intimidation. The

[1] ICC-01/04-01/10-163.
[2] Impugned Decision at paragraph 55 where the Pre-Trial Chamber conceded that Mr. Mbarushimana's resort to legitimate legal procedures was not to be viewed as a reticence to cooperate with judicial authorities.
[3] The Pre-Trial Chamber cannot simply adopt the findings of its previous decision to issue an arrest warrant. *c.f.*; *Prosecutor v Katanga & Ngudjolo*, in the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the

determination of the Pre-Trial Chamber to defend its decision issuing the arrest warrant appears most pronounced given the alacrity with which it dismissed the Defence's submissions – one after the other – in contrast with its total omission to comment on the Prosecution's failure to substantiate two of its most prejudicial submissions; that Mr. Mbarushimana had attempted to flee with false documentation and that he was the *de facto*/temporary leader of the FDLR.[4] This one-sided approach adopted by the Pre-Trial Chamber tainted its evaluation of the evidence and is particularly noteworthy in its provision of reasons for substantiating the grounds of arrest which were not raised by the Prosecution at first instance.

Article 58(1)(b)(i) – Discrete Analysis

5. **Paragraph 45**: The Pre-Trial Chamber erred by attributing inappropriate weight to the consideration that the prospect of a lengthy prison sentence would increase the likelihood of Mr. Mbarushimana's flight. As the Defence has previously argued, all atrocity crimes prosecuted before the International Criminal Court ("the ICC") need to satisfy a certain threshold of gravity for admissibility and most will attract a substantial prison sentence if established.[5] Bearing this in mind, the Pre-Trial Chamber neglected to take into due consideration its previous finding that there were reasonable grounds to believe that Mr. Mbarushimana was not a principal perpetrator of the crimes with which he is charged but, rather, an accessory.[6]

6. **Paragraph 46:** The Pre-Trial Chamber erred in the inappropriate weight it accorded the UN Group of Experts' report S/2009/603 contained in Annex 7 to the

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Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release," 9 June 2008 (ICC-01/04-01/07 OA 4), paragraphs 10-12: "The power of the Pre-Trial Chamber is not conditioned by its previous decision to direct the issuance of a warrant of arrest. The Pre-Trial Chamber must inquire anew into the existence of facts justifying detention … Thereupon, the Chamber must address anew the issue of detention in light of the material placed before it".

[4] The Prosecution formerly claimed that Mr. Mbarushimana's alleged position as the *de facto/temporary* leader of the FDLR would enable him to exert some form of malevolent influence over victims and witnesses. Defence investigations refuted this allegation and the Trial Chamber subsequently made no reference to this submission in the Impugned Decision.

[5] *c.f.*; *Prosecutor v. Haradinaj et al.*, Decision on Ramush Haradinaj's Motion for Provisional Release at paragraph 24: "the expectation of a lengthy sentence cannot be held against an accused *in abstracto* because all accused before this Tribunal, if convicted, are likely to face heavy sentences".

[6] ICC-01/04-01/10-1 at paragraphs 38-44.

Prosecution's application under Article 58 of the Rome Statute.[7] The fact that the FDLR has many supporters spread throughout the world is merely recognition of the fact that it constitutes a unifying movement for those members of the Rwandan diaspora opposed to the regime in Kigali. This, however, is not evidence of it being a "support" network of criminal sympathizers or individuals devoted to frustrating the operation of justice. There is nothing in the UN report to support the contention that the alleged FDLR international network has assisted or would assist a suspect such as Mr. Mbarushimana to flee. The transfers of monies mentioned in the relevant pages of the UN report are not substantial (no more than a few thousand dollars at a time) and there is no suggestion that these monies found their way into Mr. Mbarushimana's hands. In this respect, the Pre-Trial Chamber neglected to apportion sufficient weight to the Defence's uncontested assertion that the copious financial documentation seized from Mr. Mbarushimana's house and the preliminary findings of the Registry as to Mr. Mbarushimana's indigence both attest to his extremely meager resources. The Pre-Trial Chamber also neglected to note that even when faced with previous criminal proceedings and the threat thereof, Mr. Mbarushimana did not resort to the assistance of this alleged "support" network of contacts.[8] Finally, given that "the most responsible" suspects are normally the most politically or militarily prominent suspects, it would be hard to envisage a situation at the ICC where an arrestee would not have an extensive network of "contacts". Once again, as with its argument on gravity, the Pre-Trial Chamber established a threshold for detention so low that no ICC suspect could ever be released.

7. **Paragraph 47:** The Pre-Trial Chamber erred by finding that Mr. Mbarushimana did not face the subjective fear of imprisonment at the time of his employment at the United Nations Mission in Kosovo. He was accused before his employers of having

[7] ICC-01/04-01/10-11-RED2.
[8] The existence of contacts is normally only deemed relevant to 58(1)(b)(i) if it is a potential destination – something which is not apparent in the present instance. It would be inconceivable for Mr. Mbarushimana to flee to his native Rwanda where he faces persecution. Furthermore, it would not have been reasonable for Mr. Mbarushimana to leave France where he enjoys the protection afforded by his refugee status – something not available at present in any other country.

been complicit in genocide (a fact not disputed by the Pre-Trial Chamber). It is hard to understand why the Pre-Trial Chamber believed that such a grave accusation would not lead to Mr. Mbarushimana sensing that he was "at risk of being sentenced to imprisonment if the charges were proven". Genocide is a charge so serious that in certain states it would attract not just a custodial sentence for life but the death penalty! The simple fact of the matter is that Mr. Mbarushimana did feel a serious threat to his personal liberty and the Pre-Trial Chamber gives no justification for rejecting such fears. It is implausible to believe that Mr. Mbarushimana petitioned the highest authority in the UN hierarchy – Mr. Kofi Annan - merely to protect his good name and employment and not because he feared that if the slur went unchecked it would develop into criminal proceedings. Contrary to the Pre-Trial Chamber's finding, therefore, the Defence submission is extremely pertinent to the charge that Mr. Mbarushimana poses a flight risk; it shows that he would rather fight to clear his name within the system as opposed to without.

8. **Paragraph 48:** The Pre-Trial Chamber's deliberation as to whether or not Mr. Mbarushimana enjoyed diplomatic status was, with respect, an irrelevant consideration. The Pre-Trial Chamber did not reject the fact that Mr. Mbarushimana knew that Rwanda was seeking his arrest as early as 4 February 2001. Consequently, until his arrest by UNMIK police on 11 April 2001, Mr. Mbarushimana could have fled Kosovo with the same ease that he shortly thereafter left that country for France seeking refugee status. Mr. Mbarushimana's decision not to flee only serves to reinforce the submission that he does not shirk judicial authority.

9. **Paragraph 49:** The Pre-Trial Chamber gives no reasoning for rejecting Mr. Mbarushimana's assertion that he learned of the ICTR investigation against him from the media in 2001. The article speaks for itself: "*… after allegations about his activities in Rwanda began to surface, UNDP let him go in November 1999 and turned the allegations*

against him over to the UN tribunal prosecuting crimes related to the genocide".[9] At the time, the ICTR was the only UN tribunal which could have had jurisdiction over Mr. Mbarushimana for the crime of genocide. The finding that the article was published on 17 April 2001, when Mr. Mbarushimana was detained in Kosovo and thus denied access to the press is, with respect, illogical. The Defence never argued that Mr. Mbarushimana learned of the article or the information contained therein on the day of its publication as opposed to after his release from custody on 19 June 2001. Even in the latter half of 2001, Mr. Mbarushimana was at complete liberty to flee one UN agency (UNMIK) for fear of arrest by another UN agency (ICTR) – something which he chose not to do. Quite to the contrary, he traveled to France in 2002 and surrendered his passport to the authorities for the purpose of gaining refugee status and with a view to **lawfully** safeguarding himself against continued harassment by the Rwandan authorities.

10. Moreover, the Pre-Trial Chamber erred by refusing to accept that Mr. Mbarushimana had sufficient prior notice of a pending ICTR investigation so as not to flee. Five paragraphs later, the Impugned Decision deals with the ICC investigation concerning which Mr. Mbarushimana had, by implication, more knowledge since he was at liberty as distinct from Kosovo where, according to the Pre-Trial Chamber, he was detained and thus "presumably had limited access to the international press and the internet". Here,[10] the Pre-Trial Chamber states the complete opposite by finding that "based on his limited knowledge, he could not have anticipated with any certainty that the Prosecution [of the ICC] would seek an arrest warrant against him".

11. **Paragraph 50:** The Pre-Trial Chamber repeats its erroneous finding that Mr. Mbarushimana's ability to move in and out of Kosovo was limited. No justification is provided for this conclusion and common knowledge dictates that the opposite was

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[9] http://www.independent.co.uk/news/world/europe/un-employee-faces-extradition-for-alleged-genocidecrimes-753488.html.
[10] Impugned Decision at paragraph 54.

the case.[11] In addition, while the Schengen area may very well have increased free movement of the individual, almost concurrently with Mr. Mbarushimana's arrival in France, the European Union had harmonized and streamlined its criminal justice system and with the issue of the *Framework decision of 13 June 2002 on the European arrest warrant and surrender procedures (EAW)*,[12] the apprehension of fugitives from justice was made far simpler. The Pre-Trial Chamber also failed to deal with the Defence submission that the potential for a suspect to lose himself within the Schengen area is no different from the potential for a suspect to lose himself, by way of example, in Canada (or Australia for that matter).[13] The only aspect of the Schengen area (which is a borderless entity) relevant to the Prosecution argument is its size yet the upshot of Pre-Trial Chamber's acceptance of this argument is that suspects should never be released to geographically vast countries.

12. The Pre-Trial Chamber erroneously asserts that Mr. Mbarushimana failed to support his petition to the ICTR Chief Prosecutor by way of evidence. The fact that Mr. Mbarushimana submitted the *ordonnance de non lieu* to the Pre-Trial Chamber is, of itself, evidence of the fact that he obtained it as a result of his having petitioned the ICTR Chief Prosecutor. The document is not publicly available and the facsimile numbers appearing on the document itself clearly indicate that it was sent from the Office of the ICTR/ICTY Prosecutor in The Hague to French Counsel then acting for Mr. Mbarushimana.[14]

13. **Paragraph 51:** The fact that he may have been reassured by his success in fighting off previous Rwandan extradition requests does not mean that Mr. Mbarushimana did not fear that the French authorities would decide differently. Indeed another similarly enlightened country – Germany – actually re-initiated Rwandan extradition proceedings after arresting Mr. Mbarushimana at Frankfurt

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[11] Kosovo is and was not, at the time, a political entity with closed borders.
[12] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:190:0001:0018:EN:PDF.
[13] ICC-01/04-01/10-120 at paragraph 3.
[14] ICC-01/04-01/10-86- Anx4.

airport in 2008!! While not disputing the Pre-Trial Chamber's findings as to the objective danger facing Mr. Mbarushimana in Rwanda, no such danger faced him at the ICTR to which the French could have surrendered him with ease. The issue at stake, therefore, is whether Mr. Mbarushimana's subjective fears would have induced him to abscond and, in this respect, the Pre-Trial Chamber erred by unjustifiably imputing to Mr. Mbarushimana a surfeit of confidence. The Defence also notes an inherent contradiction in this aspect of the Pre-Trial Chamber's reasoning. At Paragraph 50 of the Impugned Decision it was argued that Mr. Mbarushimana had had almost unfettered capacity to avoid extradition by losing himself within the Schengen area. At Paragraph 51, however, the Pre-Trial Chamber finds that Mr. Mbarushimana need not have fled even France being safe in the knowledge that his refugee status would have protected him against extradition.

14. **Paragraph 52:** The Pre-Trial Chamber erred by assuming that Mr. Mbarushimana had no reason to fear the outcome of the *plainte civile*. The Pre-Trial Chamber found, without evidential basis, that Mr. Mbarushimana possessed a high degree of confidence as a result of his previous legal victories. It should not be forgotten, however, that the *plainte civile* was not designed to effect Mr. Mbarushimana's extradition to Rwanda but, rather, to facilitate his prosecution in France on the basis of "universal jurisdiction". The favourable outcome of the earlier extradition proceedings, therefore, did not detract from the subjective fears that Mr. Mbarushimana possessed and still possesses as a result of the CPCR proceedings.

15. **Paragraph 53:** If the French Investigating Judge had felt that Mr. Mbarushimana posed a flight risk or a threat to witnesses he would have written such and would have ordered his detention. Legal judgments, it is submitted, are normally interpreted by what they contain and not by what they lack. The fact that the French Investigating Judge did not order Mr. Mbarushimana's detention and did not expressly mention his being a threat to witnesses or a flight risk enables the justifiable conclusion that the French Investigating Judge did not, indeed, believe Mr.

Mbarushimana to be so inclined. Such a conclusion is certainly more justifiable and less speculative than the Pre-Trial Chamber's finding that the French Investigative Judge was familiar with the details of the Pre-Trial Chamber's findings at to the risk of flight and witness intimidation.

16. **Paragraph 54:** The Pre-Trial Chamber erred by speculating as to Mr. Mbarushimana's knowledge of the ICC investigation. Prior to his arrest, Mr. Mbarushimana was represented by herein undersigned Counsel who frankly advised him that, in light of ongoing ICC investigations revealed in the press, it would be in his best interests to offer full cooperation to the Court without waiting the issue of an arrest warrant. The fact that the Chief Prosecutor did no more than acknowledge receipt of Counsel's letter is indicative of the fact that he never had any interest in receiving Mr. Mbarushimana's version of the events[15] – an offer which in many systems of law is considered a necessary prerequisite to filing a criminal indictment. Furthermore, the Pre-Trial Chamber underestimated the relevance of the German proceedings against Ignace Murwanashyaka and Straton Musoni in which Mr. Mbarushimana was a co-suspect – something which ought to have led him to fear arrest by the German authorities and flee Europe with the assistance of his alleged "international support network". The fact that he did not so abscond strongly points to Mr. Mbarushimana's equanimity regarding judicial proceedings and the tokenistic nature of the finding that there exists a network of FDLR supporters ready to spirit Mr. Mbarushimana away.

17. **Paragraph 56:** The Defence provided substantial documentation attesting to Mr. Mbarushimana's strong links to the community in which he resided, the promise

[15] In the *Prosecutor v. Cermak and Markac*, Decision on Interlocutory Appeal Against Trial Chamber's Decision Denying Provisional Release, the ICTY Appeals Chamber stated that the willingness of an accused to be interviewed is one factor the Chamber must consider when determining provisional release, irrespective of whether the OTP actually interviews the accused. *c.f.*, also, *Prosecutor v. Haradinaj et al*, Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying His Provisional Release at paragraph 18: "The Trial Chamber should place most, if not all, of the emphasis on the willingness of the accused to be interviewed, rather than the interview itself."…[T]he fact that the Prosecution does not accept the information provided by an accused to be credible or as extensive as the accused could provide, is irrelevant".

of continued employment and his family's economic situation. The Pre-Trial Chamber dismissed all this well adduced evidence with the mere assertion that "it was not persuaded that these bonds are a sufficient guarantee that Mr. Mbarushimana would remain in France if released". No reasoning is provided for this finding. No weight was accorded to Mr. Mbarushimana's status as a legally recognized refugee in France – a status which by its very nature afforded him protection which would not make it worth his while absconding and risking arrest by the authorities of a country more favourably disposed to the Rwandan regime. The Defence is not sure what more it could have been produced – other than that which it supplied – in order to convince the Pre-Trial Chamber of Mr. Mbarushimana's strong social and familial ties to France. It should not be neglected that Mr. Mbarushimana actively sought refugee status in France knowing full well that France could have easily surrendered him to the ICTR if the case against him was not subsequently closed.

18. **Paragraph 57**: The Pre-Trial Chamber failed to attribute sufficient weight to Mr. Mbarushimana's uncontroverted assertion that, since being subject to the UNSC travel ban, he has never left French territory. Strict compliance with a stringent travel ban - the breach of which would not lead to incarceration - would surely be excellent evidence of Mr. Mbarushimana's propensity to comply with a similar travel ban should it be imposed on him as a condition of release. Indeed, the Pre-Trial Chamber provided no specific reason as to why Mr. Mbarushimana, in particular, would be liable to lose himself in the Schengen area. The Pre-Trial Chamber's findings are framed in a very general manner implying that release to a Schengen country would always entail a risk of flight no matter the identity of the suspect. It is respectfully submitted that the Appeals Chamber should not let this finding stand. It would create an insurmountable precedent preventing any suspect brought before the ICC from being released to a European Country.

19. **Paragraph 58:** The Trial Chamber erred when it found that the circumstances existing at the time of the Impugned Decision were materially different from the

circumstances which existed prior to the issue of the arrest warrant. At the time of the Impugned Decision, the Defence had no knowledge of the core of the Prosecution case – namely incriminating witness statements (which only very partially started to be disclosed on 23 May 2011) and the list of evidence which, at the time of drafting, is yet to be disclosed. The precedent of this Court has established that full disclosure of materials supporting an application for arrest should be released to the Defence as soon as possible after surrender. The Pre-Trial Chamber's finding, therefore, intimates that every arrestee - once brought before the ICC - will automatically be predisposed to flee after receiving his first batch of disclosed information.

20. The Pre-Trial Chamber also erred by finding that the proximity of the confirmation hearing (4 July 2011) would make it more likely that Mr. Mbarushimana would flee. The precedent of the ICC has recognised that the likelihood of flight increases after confirmation and not necessarily before.[16] In the circumstances, Mr. Mbarushimana requested that the confirmation hearing be expedited and the Prosecution is presently requesting that it be delayed pursuant to Rule 121(7) of the Rules of Procedure and Evidence.[17] Furthermore, the Defence request for interim release was filed on 30 March 2011 with a request for an oral hearing. Instead of convening an urgent status conference in order to hear the Prosecution response and Defence reply thereto,[18] the Pre-Trial Chamber delivered the Impugned Decision more than <u>one month and a half</u> later.[19] It is manifestly unfair for the Pre-Trial Chamber to use its own procedural directions (as legitimate as they may be) as a means for justifying the continued detention of a suspect.

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[16] "Whilst the confirmation of charges in itself constitutes a 'changed circumstance' the finding by the Pre-Trial Chamber that there were substantial grounds to believe that Mr. Bemba committed the crimes charged, increased the likelihood that he might abscond." "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 OA 2), paragraph 70.

[17] ICC-01/04-01/10-189.

[18] Rule 118(3) stipulates that there is an obligation to convene a hearing on interim release at least once every year.

[19] In stark contrast with an ill-founded and subsequently rejected Prosecution request for measures associated with an alleged "unique investigative opportunity" for which the Pre-Trial Chamber convened a Status Conference within a week and, within a few days thereafter, issued a procedural direction; ICC-01/04-01/10-126.

21. **Paragraph 59:** The Defence can only reiterate that all four considerations enunciated as being particularly liable to increase the risk of flight are objective considerations which would apply, *mutatis mutandis*, to any arrestee brought before the Court. The Pre-Trial Chamber thus failed to comply with the general principle formulated by the Appeals Chamber and approved in the Impugned Decision that pre-trial detention should be the exception and not the rule.[20]

Article 58(1)(b)(ii) – Discrete Analysis

22. **Paragraph 60:** The Pre-Trial Chamber erred by not attributing sufficient weight to its own finding that Mr. Mbarushimana's previous conduct in judicial proceedings was "of significance" in so far as there is no evidence that he has ever interfered with witnesses despite having access to their non-redacted statements, identities and whereabouts. The Defence argues that this argument should be given prevailing weight in light of the rejection of the Pre-Trial Chamber's critique as will be detailed below.

23. **Paragraph 61:** The Pre-Trial Chamber erred by unduly emphasizing the potential for intimidation arising out of the disclosure of witness names.[21] All, of the names of witnesses disclosed, <u>except one who is a personal acquaintance of Mr. Mbarushimana,</u> are of ex-FDLR combatants who currently reside in Rwanda[22] and, given their demobilization, were undoubtedly interviewed with the permission of the Rwandan Government which ensures their protection. Mr. Mbarushimana – even if he had the means or the desire (which are totally denied) – could not reach these witnesses in order to intimidate them. The names of the more obviously vulnerable

[20] When dealing with the right to liberty, one should be mindful of the fundamental principle that deprivation of liberty should be an exception and not a rule," Pre-Trial Chamber II, *Prosecutor v Bemba*, ICC-01/05-01/08-403, para. 36. *See also* Inter-American Court of Human Rights (the "IACtHR"), Case of Tibi v. Ecuador, Judgment of 7 September 2004, Series C No 114, para. 106; IACtHR, Case of Acosta-Calderón v. Ecuador, Judgment of 24 June 2005, para. 74; lACtHR, Case of Children's Rehabilitation, Judgment of 2 September 2004, Series C No. 112, para. 228; Human Rights Committee, Communication 526/1993, Hill and Hill v. Spain, 23 June 1997, para.12.3; ECtHR, Ilijkov v. Bulgaria, Judgment of 26 July 2001, Application no. 33977/96, para. 85.
[21] The Appeals Chamber has previously considered mere knowledge of witnesses identities and the concomitant general risk of witness intimidation as "scarce" reasoning, and thereby refused to analyze 58(1)(b)(ii) in its reasoning; 01/04-01/06 OA 7, para. 139.
[22] ICC-01/04-01/10-101 at paragraph 31.

witnesses (*i.e.* victims) have not been released to the Defence and will, for the foreseeable future, remain redacted.

24. **Paragraph 62:** The Pre-Trial Chamber erred by failing to require the Prosecution to prove the legitimacy of the seizure of the MONUC documentation before drawing speculative conclusions from their alleged receipt by Mr. Mbarushimana. Despite being fully aware that the Defence was challenging the legality of the seizure of materials at Mr. Mbarushimana's house, the Pre-Trial Chamber accepted that the MONUC documents were in Mr. Mbarushimana's possession without satisfying itself that the Prosecution had produced the requisite judicial order/s attesting to the validity of the search. No evidence was placed before the Pre-Trial Chamber to contradict the possibility that the search at Mr. Mbarushimana's residence was conducted in contravention of international human rights law – a far more serious charge than being in the possession of allegedly leaked documentation. In any event, even if the MONUC documents were leaked, the Pre-Trial Chamber apparently accepts that there is no evidence to suggest that they were both willfully and directly leaked to Mr. Mbarushimana. The fact that the documentation might have been leaked to someone in the FDLR is of no consequence to Mr. Mbarushimana since there is no evidence that he received the same documentation by virtue of his alleged membership of the FDLR. This conclusion was unwarranted speculation both on the part of the Prosecution[23] and the Pre-Trial Chamber. Mr. Mbarushimana could very well have received these materials (including the one confidential document) from open sources.

25. **Paragraph 63:** The basis for all of the Pre-Trial Chamber's findings regarding the present role of MONUC and the ongoing activity of the FDLR in the Kivus is to be found at paragraphs 31 and 32 of the Prosecution response to the Defence request for

[23] ICC-01/04-01/10-101 at paragraph 32: "Furthermore, printed copies of emails indicate that the FDLR has sources within MONUC/MONUSCO who are able to provide confidential that is in turn passed along to the Suspect". The existence of "sources within MONUC/MONUSCO" and the fact that information is "passed along to the Suspect" are purely speculative.

interim release ("the Prosecution Response").[24] Paragraph 31 of the Prosecution Response makes the sweeping allegation that the FDLR "continues to be engaged in armed conflict and otherwise wields considerable influence" but fails to provide any supporting evidence whatsoever. Similarly, paragraph 32 of the Prosecution Response alleges that MONUSCO forces "play an important role in providing security in the Kivus" but whether or not this is indeed the case at present, especially in the areas where the Prosecution is recruiting its witnesses, is also unsupported by evidence. The Pre-Trial Chamber erred, therefore, by reaching conclusions without a sufficient grounding in the evidence.

26. The finding that there is a potential for Mr. Mbarushimana to obstruct the Prosecution's crime base investigations is also unsupported by evidence. The Prosecution did not identify nor did the Pre-Trial Chamber elicit any information from the documents allegedly received by Mr. Mbarushimana which could be of use in obstructing the specific investigation which the Prosecution is conducting. The upshot of the Pre-Trial Chamber's finding is that Mr. Mbarushimana would have to be detained merely because he had been the innocent recipient of unsolicited information (which he hoarded along with thousands of other items of ephemera).

27. **Paragraph 64:** With reference to the entry in what is alleged[25] to be Mr. Mbarushimana's notebook, the Pre-Trial Chamber erred by placing decisive weight on the Prosecution's interpretation of the phrase "a blog - names of witnesses" rejecting alternative interpretations and thereby pronouncing on Mr. Mbarushimana's credibility. A future Trial Chamber, rendering its final judgment, could indeed reject the interpretation placed on the phrase by the Defence but the assessment of credibility is inappropriate at the pre-confirmation stage – where all evidential standards are satisfied by the existence of "reasonable grounds to believe". By stating that the Defence interpretation was "implausible" (a charge totally denied) the Pre-

[24] ICC-01/04-01/10-101.
[25] *c.f.*; Paragraph 24 of this document where the Defence asserts that the Prosecution abjectly failed to prove the legality of the search conducted at Mr. Mbarushimana's residence.

Trial Chamber reached a conclusion which it would only have been entitled to reach after hearing all the evidence in the case. Only after hearing all the evidence in the case would a tribunal be able to pronounce its verdict beyond a reasonable doubt. In so far as it could not pronounce beyond a doubt at this stage of the proceedings, the Pre-Trial Chamber erred in its application of the principle *in dubio pro reo*.[26]

28. Notwithstanding, the Pre-Trial Chamber gives no reasoning as to why the context of the disputed phrase renders the Defence's suggested interpretation as "implausible". Nor does the Impugned Decision explain why the contents of the offending page should be seen as sequentially following the pages referring to witnesses which the Prosecution alleges, without evidence, to be witnesses in German criminal proceedings. Finally, having accepted, without evidence,[27] the Prosecution assertion that the notebook entry referred to German witnesses and that Mr. Mbarushimana intended to publish their names, the Pre-Trial Chamber neglected to consider the potential for client-attorney privilege to attach to the contents of the offending page.

29. **Paragraph 65:** Erring in its interpretation of notebook entries attributed to Mr. Mbarushimana and in the construction placed on the alleged possession of documents

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[26] The principle *in dubio pro reo* is recognised at the ICC; *c.f.*: Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo," No.ICC-01/05-01/08, paragraph 31: "Lastly, in making this determination the Chamber wishes to underline that it is guided by the principle *in dubio pro reo* as a component of the presumption of innocence, which as a general principle in criminal procedure applies, mutatis mutandis, to all stages of the proceedings, including the pre-trial stage". The Defence believes that this principle has also been violated at other places throughout the Impugned Decision: *viz.* paragraph 47 (assumes that the lack of criminal proceedings has little relevance to Mr. Mbarushimana's willingness to cooperate), paragraph 48 (in absence of convincing evidence, the Pre-Trial Chamber assumes lack of diplomatic status of Mr. Mbarushimana), paragraph 49 (despite evidence, it is assumed that Mr. Mbarushimana is not aware of ICTR investigation), paragraph 50 (it is assumed that Mr. Mbarushimana never enquired of the ICTR Prosecutor as to the status of investigations), paragraph 51 (requires an assumption that a French court would make the same determination as the Gjilan District Court regarding Rwanda's extradition request), paragraph 53 (assumes that the French Investigating Judge was aware of detainment under ICC Arrest Warrant despite no supporting evidence), paragraph 57 (assumes Mr. Mbarushimana will take advantage of the freedom of movement within Schengen area), paragraph 62 (assumes the leakage of information despite no conclusive evidence), paragraph 63 (assumes that documents have usable information *and* that Mr. Mbarushimana will use said hypothetical information against witnesses in the Kivus), paragraph 66 (assumes that Mr. Mbarushimana has technical ability to circumvent communication controls of the ICC *and* that he would use this ability).

[27] The Pre-Trial Chamber made no finding on the matter expressing its speculation as follows: "After a review of witnesses **apparently** testifying in the proceedings in Germany" and "As an **apparent** means to implement this "idea",….".

authored by sources within MONUC/MONUSCO, the Defence reiterates that the Pre-Trial Chamber failed to attach sufficient weight to Mr. Mbarushimana's history of respect for the privacy and security of the many witnesses whose unredacted details have been communicated to him during several legal processes instituted against him.

Article 58(1)(b)(iii)

30. **Paragraph 66:** In so far as the Pre-Trial Chamber deemed relevant the allegation that "the situation in Eastern DRC, where the FDLR is still active, remains volatile", such a consideration is, once again, unsupported by evidence. Furthermore, the reason apparently given by the Pre-Trial Chamber for rejecting Mr. Mbarushimana's offer to temporarily abstain from contacts with the international media was the fear that he would resort to continuing his alleged press campaign though deviously exploiting his information technology ("IT") skills. The Pre-Trial Chamber received no evidence as to those IT skills possessed by Mr. Mbarushimana which would permit him to exploit cunning means of communication. Furthermore, despite daily interception of all of Mr. Mbarushimana's alleged Email and telephone traffic (before he was assumed to be cognizant of the details of an ICC investigation), the Prosecution has yet to produce a single piece of evidence that a telephone call or Email emanating from Mr. Mbarushimana was responsible for contributing to the commission of crimes. The Pre-Trial Chamber, thus, erred by placing undue emphasis on speculation as opposed to drawing appropriate conclusions from the lack of any previous criminal activity by way of telephone or Email.

Conclusions

31. **Paragraph 67: T**he Pre-Trial Chamber apparently accepts that "electronic tagging" is an option which could be considered were it not for the fear that Mr. Mbarushimana could tamper with witnesses or obstruct the investigation though "obtaining confidential information".[28] On the assumption, therefore, that the Appeals

[28] Mr. Mbarushimana is only alleged to have received one confidential document. Once again, the Defence can only reiterate that there is no evidence to suggest that this document was illicitly gained or that Mr. Mbarushimana even contemplated using it for improper purposes. The risk identified is wholly speculative.

Chamber is satisfied that the two latter criteria do not apply, it would be obliged to return the matter to the Pre-Trial Chamber to consider the application of "electronic tagging" or, failing that, other forms of electronically supervised house-arrest.

32. **Paragraph 68:** The Pre-Trial Chamber erroneously evaluated the portion of Annex 7 cited as support for its conclusion (not even promoted by the Prosecution) that Mr. Mbarushimana would collaborate with two FDLR "commissioners" residing in France. The report makes it clear that, in formulating their findings on the FDLR presence in France, the UN Group of Experts were deprived of "access to relevant information from the French authorities in order to exclude the conclusion that France is being used as a base for the activities of FDLR leaders and supporters in the diaspora".[29] Furthermore, the status of the two commissioners was only reported and not validated.

Relief Sought

33. In light of all the aforementioned, the learned Appeals Chamber is respectfully requested to overturn the Impugned Decision and to remit the matter to the Pre-Trial Chamber for fixing conditions of release.

Nicholas Kaufman

Nicholas Kaufman

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Done in Jerusalem, Israel

Sunday, May 29, 2011

[29] Annex 7 to Prosecution Application for a Warrant of Arrest at page 26.