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PRE-TRIAL CHAMBER I

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. CALLIXTE MBARUSHIMANA***

Public Document

**Observations of participating victims on the interim release of Mr Callixte
Mbarushimana**

Source: The legal representative of 93 participating victims

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

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I. Preliminary Observations

1. The present observations are submitted to Pre-Trial Chamber I (hereinafter “the Chamber”) of the International Criminal Court (hereinafter “the Court”), in the name of and on behalf of:

a) *Principally*: the following 63 Victims, whose legal representation was organised, by decision of the Chamber, following the Registry’s report of 16 August 2011:¹

a/2166/11, a/2167/11, a/2168/11, a/2169/11, a/2170/11, a/2171/11, a/2172/11, a/2173/11, a/2174/11, a/2175/11, a/2177/11, a/2178/11, a/2179/11, a/2180/11, a/2181/11, a/2182/11, a/2183/11, a/2184/11, a/2185/11, a/2186/11, a/2187/11, a/2188/11, a/2189/11, a/2190/11, a/2191/11, a/2192/11, a/2193/11, a/2194/11, a/2196/11, a/2197/11, a/2198/11, a/2205/11, a/2206/11, a/2207/11, a/2221/11, a/2234/11, a/2239/11, a/2240/11, a/2580/11, a/2582/11, a/2583/11, a/2584/11, a/2585/11, a/2586/11, a/2587/11, a/2588/11, a/2589/11, a/2590/11, a/2591/11, a/2593/11, a/2594/11, a/2595/11, a/2596/11, a/2597/11, a/2598/11, a/2599/11, a/2600/11, a/2602/11, a/2619/11, a/2620/11, a/2621/11, a/2622/11 and a/2624/11.

b) *On an interim basis*: the following 30 Victims, whose legal representation was proposed to the Chamber following the Registry’s report of 23 August 2011:²

a/2000/11, a/2006/11, a/2007/11, a/2008/11, a/2022/11, a/2023/11, a/2024/11, a/2025/11, a/2027/11, a/2028/11, a/2029/11, a/2030/11, a/2031/11, a/2203/11, a/2208/11, a/2212/11, a/2220/11, a/2223/11, a/2224/11, a/2226/11, a/2228/11, a/2229/11, a/2230/11, a/2572/11, a/2573/11, a/2574/11, a/2575/11, a/2576/11, a/2578/11 and a/2579/11.

The Victims in a) and b) shall be referred to collectively hereinafter as “the Represented Victims”.

2. The observations of the Represented Victims are submitted in response to:

¹ “Report on the legal representation of participating victims”, 16 August 2011, ICC-01/04-01/10-379 and ICC-01/04-01/10-379-Anx1.

² “Registry report concerning the representation of participating victims formerly represented by Maitre Herve

² “Registry report concerning the representation of participating victims formerly represented by Maitre Herve Diakiese”, 23 August 2011, ICC-01/04-01/10-387 and ICC-01/04-01/10-387-ANX.

- a) a decision of the Chamber dated 12 August 2011, whereby the Chamber requests “the Prosecutor and legal representatives of victims to submit their views on interim release no later than Friday, 2 September 2011”;³
 - b) a decision of the same Chamber, dated 19 August 2011, setting 9 September 2011 as the date by which the Prosecutor, the Legal Representatives of the Victims and the Office of Public Counsel for Victims must file their observations on the third request for the interim release of Mr Callixte Mbarushimana, hereinafter referred to as “the Suspect”.⁴
3. In order to edify the Chamber more on this issue of interim release of the Suspect, the Represented Victims will provide a brief statement of the facts and proceedings (II) before discussing the legal problems raised by this issue (III).

II. Statement of the facts and proceedings

- 4. On 28 September 2010, the Chamber decided to grant an application, dated 20 August 2010, in which the Prosecutor requested the Chamber to issue a warrant for the arrest of the Suspect.⁵
- 5. On the same date, a warrant for the arrest of the Suspect was issued on the ground “that there are reasonable grounds to believe that the arrest of Callixte Mbarushimana appears necessary at this stage to ensure his appearance at trial, to ensure that he will not obstruct or endanger the investigation or the court proceedings, and to prevent him from continuing with the commission of those crimes or related crimes, within the meaning of sub-paragraphs (i), (ii) and (iii) of article 58(1)(b) of the Statute”.⁶

³ *Decision requesting observations on interim release*, 12 August 2011, ICC-01/04-01/10-360, p. 5.

⁴ *Decision requesting observations on the “Third Defence request for interim release”*, 19 August 2011, ICC-01/04-01/10-384, p. 4.

⁵ *Decision on the Prosecutor’s Application for a Warrant of Arrest Against Callixte Mbarushimana*, 28 September 2010, ICC-01/04-01/10-1.

⁶ *Warrant of Arrest for Callixte Mbarushimana*, 28 September 2010, ICC-01/04-01/10-2, para. 11.

6. In execution of this arrest warrant, the Suspect was arrested by the French authorities on 11 October 2010 at his residence in Paris, before being transferred to the Court on 25 January 2011.
7. On 30 March 2011, the Defence requested the Chamber to “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”.⁷
8. In a decision of 19 May 2011, the Chamber rejected that request on the ground that “the Chamber is satisfied that the continued detention of Mr Mbarushimana appears necessary to ensure his appearance at trial, to ensure that he does not obstruct or endanger the investigations and the proceedings before the Court, and to prevent him from continuing with the commission of crimes”.⁸
9. On 31 May 2011, the Chamber postponed, at the Prosecutor’s request, the opening of the confirmation hearing, initially scheduled for 4 July 2011, to 17 August 2011.⁹
10. In a unanimous judgment of 14 July 2011, the Appeals Chamber, in response to an appeal lodged by the Defence, confirmed the decision of 19 May 2011 in which the Chamber had rejected the request for the interim release of the Suspect.¹⁰
11. Less than one week later, on 20 July 2011, the Defence filed a second request with the Chamber for interim release of the Suspect.¹¹
12. That request was rejected in a decision of the single judge of the Chamber dated 28 July 2011 which, *inter alia*, “DISMISS[ed] the Defence Request in so far as it seeks reconsideration of matters that have been previously decided upon”.¹²

⁷ “Defence Request for Interim Release”, 30 March 2011, ICC-01/04-01/10-86, para. 41.

⁸ *Decision on the “Defence Request for Interim Release”*, 19 May 2011, ICC-01/04-01/10-163, para. 69.

⁹ *Decision on the Prosecution’s request for the postponement of the confirmation hearing*, 31 May 2011, ICC-01/04-01/10-207, p. 10.

¹⁰ *Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled “Decision on the ‘Defence Request for Interim Release’”*, ICC-01/04-01/10-283, para. 63.

¹¹ “Second Defence request for interim release”, 20 July 2011, ICC-01/04-01/10-294.

¹² *Decision on “Second Defence request for interim release”*, 28 July 2011, ICC-01/04-01/10-319, p. 7.

13. On 5 August 2011, the Defence filed an appeal with the Appeals Chamber against that decision.¹³ This matter is currently pending before the Appeals Chamber.
14. On 11 August 2011, the Chamber rendered a decision authorising, *inter alia*, the Represented Victims to participate in the proceedings at the pre-trial stage.¹⁴
15. Acting pursuant to rule 118(1) of the Rules and regulation 51 of the Regulations of the Court, the Chamber, in a decision dated 12 August 2011, invited the parties and participants to submit their observations on the review – to be conducted by 16 September 2011 – of its decision to maintain the Suspect in detention.¹⁵
16. On 16 August 2011, the Chamber rendered a decision, the operative part of which reads:

FOR THESE REASONS, THE CHAMBER (...):

DECIDES that the Prosecutor may not use the transcript of the interview of witness 561, disclosed without any Kinyarwanda audio or transcript, identified in paragraph 6 of the present decision;

ORDERS the Prosecutor to provide, by 31 August 2011, either: (i) full written translations of the Interviews in French or transcriptions in Kinyarwanda or (ii) French summaries of those Interviews; and

CONFIRMS the Postponement Decision, postponing the start of the confirmation hearing to 16 September 2011 with proceedings continuing on 19 and 20 September 2011.¹⁶

17. On 19 August 2011, the Defence submitted to the Chamber a third request for interim release on the ground that “the delay caused is ‘inexcusable delay’ as defined under Article 60(4) and, for this reason, respectfully requests that the Pre-Trial Chamber consider the release of Mr. Mbarushimana with or without conditions”.¹⁷

¹³ “Document in support of the Defence Appeal against Decision: ICC-01/04-01/10-319”, 5 August 2011, ICC-01/04-01/10-337.

¹⁴ *Decision on the 138 applications for victims’ participation in the proceedings*, 11 August 2011, ICC-01/04-01/10-351, pp. 18-21.

¹⁵ *Decision requesting observations on interim release*, op. cit., p. 4, *in fine*.

¹⁶ *Decision on “Defence request to deny the use of certain incriminating evidence at the confirmation hearing” and postponement of confirmation hearing*, 16 August 2011, ICC-01/04-01/10-378, pp. 12-13.

¹⁷ “Third Defence request for interim release”, 19 August 2011, ICC-01/04-01/10-383, para. 11.

18. On the same date, the Chamber issued a decision inviting the parties and participants to submit their observations on that third request for interim release;¹⁸ hence the present filing.

III. Discussion

19. The issue of the interim release of the Suspect arises within the dual context of a) the review of his detention pursuant to article 60(3) of the Statute, and b) a request for interim release under article 60(4) of the Statute.

A. Review of the Suspect's detention on the basis of article 60(3) of the Statute

20. Article 60(3) allows the Chamber to review its ruling on release or detention periodically, with the possibility of amending it should the occurrence of new developments render such ruling inappropriate.

21. In the instant case, the Chamber must, by 16 September 2011, review its ruling to maintain the Suspect in detention. To that effect, it must ask itself whether there now exist new circumstances that allow it to reverse its previous ruling. That question can only be answered by revisiting the various decisions ordering both the arrest and the continued detention of the Suspect.

22. The Represented Victims would like to recall, in this regard, that:

- In its decision of 28 September 2011, the Chamber justified the arrest of the Suspect in the following terms:

The arrest of Callixte Mbarushimana appears necessary in order to guarantee that he will appear at trial, to protect the victims, witnesses and potential witnesses in the field, and to safeguard the investigations currently being conducted by the Prosecutor, and to prevent the Suspect from continuing to contribute to the commission of the aforementioned crimes.¹⁹

- Ruling on the request for interim release of the Suspect of 19 May 2011, the Chamber ordered his continued detention on the same grounds:

¹⁸ *Decision requesting observations on the "Third Defence request for interim release"*, op. cit., p. 4.

¹⁹ *Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana*, op. cit., para. 50.

The Chamber is satisfied that the continued detention of Mr Mbarushimana appears necessary to ensure his appearance at trial, to ensure that he does not obstruct or endanger the investigations and the proceedings before the Court, and to prevent him from continuing with the commission of crimes.²⁰

- In its judgment of 14 July 2011, which was just over a month ago, the Appeals Chamber confirmed that decision, stating that, “in the present case it is appropriate to confirm the Impugned Decision as no clear errors in the Impugned Decision have been identified”.²¹

23. Yet, nothing in the case file to date suggests that the circumstances prevailing at the time these decisions were taken have changed. The same applies to the risk of the Suspect absconding (para. 24), obstructing the investigations or proceedings before the Court (para. 25), or contributing to the commission of the alleged crimes or related crimes (para. 26).

24. *Risk of the Suspect absconding.* The Represented Victims submit that, to date, the Chamber’s assertion that “these alleged crimes [are] of such gravity that it is reasonable to conclude that the lengthy prison sentence that might be imposed for these crimes makes Mr Mbarushimana more likely to abscond”²² is still valid. The same applies to the assertion that “the FDLR has an international support network capable of providing financial support to the FDLR leaders”²³ or that “the release of Mr Mbarushimana to France would make it easier for him to flee”.²⁴

It is evident from the above that less than two months after the Appeals Chamber’s latest decision on the interim release of the Suspect, the latter’s ability to abscond remains undiminished. Accordingly, pursuant to article 58(1)(b)(i) of the Statute, the continued detention of the Suspect will satisfy the Chamber that

²⁰ Decision on the “Defence Request for Interim Release”, op. cit., para. 69.

²¹ Judgement on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled “Decision on the ‘Defence Request for Interim Release’”, op. cit., para. 63.

²² Decision on the “Defence Request for Interim Release”, idem, para. 45.

²³ Decision on the “Defence Request for Interim Release”, op. cit., para. 46.

²⁴ Idem, para. 57.

he will appear at trial, in particular at the confirmation of charges hearing scheduled to commence on 16 September 2011.

25. *Obstruction of investigations or court proceedings.* The Represented Victims also submit that, to date, no objective element in the case file suggests that the Chamber's assertion that "there is a risk that he (the Suspect) may use the information obtained from the source in MONUC to interfere with the ongoing investigations and with witnesses residing in the Kivus"²⁵ is no longer applicable. Consequently, interim release of the Suspect may seriously compromise the continuation of the proceedings both at the pre-trial phase and the subsequent trial phase.

26. *Contribution to the commission of alleged crimes or related crimes.* In its aforementioned decision of 19 May 2011, the Chamber declared that it was "satisfied that the risk of Mr Mbarushimana continuing to contribute to the commission of the crimes detailed in the Arrest Warrant 'by organising and conducting an international campaign through media channels' continues to exist".²⁶ Besides the fact that there is nothing to suggest that this assertion is no longer valid, the Represented Victims submit that at this particular time when the FDLR are still operational in the field, the interim release of the Suspect would leave a highly negative impact upon them.

Indeed, such a measure would have the effect of reinforcing a sense of impunity amongst the armed FDLR combatants, who would thus in fact be motivated and encouraged to commit further war crimes and crimes against humanity within communities located in areas already severely affected by the crimes for which the Suspect is currently being prosecuted.

Furthermore, such a release would have the effect of enhancing the Suspect's charisma amongst his troops, with the consequence that, as the most senior leader of the FDLR still at large, he could then easily render himself guilty of related

²⁵ *Idem*, para. 63.

²⁶ *Idem*, para. 66.

crimes, this time as perpetrator within the meaning of article 25(3)(b) of the Statute, since his new political stature would allow him readily to order, solicit or induce the commission of war crimes and crimes against humanity in pursuit of the FDLR's policy to obtain political power from the Rwandan and Congolese authorities.

27. In light of the above, the Chamber should hold in the instant case that no new circumstance has arisen to date which might modify the decision to maintain the Suspect in detention.

B. Third request for the interim release of the Suspect (article 60(4) of the Statute)

28. In an application dated 19 August 2011, the Defence claims that "the present delay to the start of the confirmation hearing has been caused by the Prosecution which, regardless of any criticism delivered by the Pre-Trial Chamber, still failed to comply with the Language Proficiency Decision".²⁷

It concludes therefrom that "the delay caused is 'inexcusable delay' as defined under Article 60(4) and, for this reason, respectfully requests that the Pre-Trial Chamber consider the release of Mr. Mbarushimana with or without conditions".²⁸

29. The Represented Victims have no intention of interfering in the dispute between parties over the cause of the current delay in commencing the confirmation of charges hearing. They would simply observe that article 60(4) cannot be interpreted as establishing interim release as a sanction for procedural delay by the Prosecutor. Such reasoning would lead the Chamber to automatically order the interim release of the Suspect whenever such a delay occurs, regardless of whether it is satisfied that the Suspect would not appear at trial, would obstruct the investigation or the proceedings before the Court or would continue to

²⁷ "Third Defence request for interim release", op. cit., para. 10.

²⁸ *Idem*, para. 11.

commit the crimes alleged or related crimes. Clearly, this was never the intention of the drafters of the Statute.

30. This statutory provision simply offers the Suspect or the Accused *the possibility* of having his or her detention reviewed *prior to the automatic review period provided in paragraph 3*, which is 120 days. Hence, it leaves the Chamber with full discretion to determine whether or not to amend its decision, in accordance with paragraph 2: “If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions”.

31. Yet, in the instant case, it has been sufficiently demonstrated in point A above that the conditions set forth in article 58(1) remain applicable. If the Chamber were to consider, however, that there has been an “unjustifiable delay”, the sole consequence of such a finding would be to allow the Chamber to review the Suspect’s detention prior to the review date provided for in article 60(3), namely 16 September 2011.²⁹ In so doing, it would only be able to find that fulfilment of the conditions set forth in article 58(1) excludes, for the time being, any possibility of interim release of the Suspect at this stage.

IV. In light of the foregoing,

32. The Represented Victims respectfully request the Chamber:

- Concerning the review of the Suspect’s detention under article 60(3):
 - o To find that the conditions, listed in article 58(1), which prevailed at the time of issue of both the arrest warrant and its *Decision on the “Defence Request for Interim Release”* of 19 May 2011, confirmed by the Appeals Chamber’s judgment of 14 July 2011, remain applicable;
 - o Accordingly, to order the continued detention of the Suspect.

²⁹ Nothing prevents the Chamber, however, from ruling on this third request for interim release on the same date, 16 September 2011, if necessary in the same decision reviewing the Suspect’s detention.

- Concerning the third defence request for interim release of the Suspect under article 60(4):
 - o To find that, regardless of whether the delay in the proceedings is justifiable and whether such delay may be attributed to the Prosecutor, an examination of the conditions provided in article 58(1) of the Statute does not, at this stage, offer any possibility of interim release for the Suspect;
 - o Accordingly, to order his continued detention.

[signed]
Ghislain M. Mabanga
Legal Representative

Dated this 29 August 2011.

At Paris, France