Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/04-01/10**

Date: **19 May 2011**

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

Decision on the "Defence Request for Interim Release"

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor
Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Anton Steynberg, Senior Trial Lawyer

Counsel for the Defence
Mr Nicholas Kaufman
Ms. Yael Vias Gvirsman

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

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

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Deputy Registrar
Mr. Didier Preira

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Defence Support Section

Pre-Trial Chamber I of the International Criminal Court ("Chamber" and "Court" respectively) hereby renders a decision on the "Defence Request for Interim Release" ("Request for Interim Release") filed on 30 March 2011 by the Defence of Mr Callixte Mbarushimana ("Mr Mbarushimana").[1]

Procedural History

1. On 20 August 2010, the Prosecution filed the "Prosecutor's Application under Article 58" against Mr Mbarushimana ("Prosecution's Application for the Warrant of Arrest"), with annexes, whereby it sought the issuance of a warrant of arrest against Mr Mbarushimana.[2]

2. On 28 September 2010, the Chamber rendered the "Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana" ("Decision on Warrant of Arrest"),[3] wherein the Chamber found, *inter alia,* (i) "that there are reasonable grounds to believe that Callixte Mbarushimana is criminally responsible under article 25(3)(d) of the Statute for having contributed to the commission of war crimes and crimes against humanity allegedly committed by the *Forces démocratiques de libération du Rwanda*'s ("FDLR") troops in North and South Kivu Provinces in 2009",[4] and (ii) "that the arrest of Callixte Mbarushimana appears necessary to ensure his appearance before the Court, for protecting victims, witnesses and potential witnesses in the field and the prosecutor's ongoing investigations, and to prevent the suspect from continuing to contribute to the commission of the above-mentioned crimes".[5]

---

[1] ICC-01/04-01/10-86, with Annexes.
[2] ICC-01/04-01/10-11-Red2 (public redacted version of the "Prosecution's Application under Article 58"), filed on 27 January 2011.
[3] ICC-01/04-01/10-1 (re-classified "Public" pursuant to Decision ICC-01/04-01/10-7, dated 11 October 2010).
[4] Decision on Warrant of Arrest, para. 44.
[5] Decision on Warrant of Arrest, para. 50.

3. On 28 September 2010, following the Decision on Warrant of Arrest, the Chamber issued a warrant of arrest ("Arrest Warrant") for Mr Mbarushimana on 11 counts of war crimes and crimes against humanity.[6]

4. On 11 October 2010, pursuant to the Arrest Warrant, Mr Mbarushimana was arrested in France.

5. On 25 January 2011, Mr Mbarushimana was surrendered to the Court and is currently in custody in the Court's detention centre in The Hague.

6. On 30 March 2011, the Defence filed the Request for Interim Release,[7] whereby it requested the Chamber to order the interim release of Mr Mbarushimana, pursuant to article 60(2) of the Rome Statute ("Statute"), to his domicile in the Republic of France, subject to any conditions to be determined by the Chamber under rule 119 of the Rules of Procedure and Evidence ("Rules").

7. On 1 April 2011, Judge Sanji Mmasenono Monageng, acting as Single Judge on behalf of the Chamber, issued the "Decision Requesting Observations on the 'Defence Request for Interim Release'",[8] whereby she (i) requested the Prosecution's views on the Request for Interim Release; (ii) invited the competent authorities of the Kingdom of the Netherlands, as the Host State, to submit their observations, in particular, with regard to the practical aspects of Mr Mbarushimana's release to the French Republic; and (iii) invited the competent authorities of the French Republic, the State to which Mr Mbarushimana sought to be released, to submit their observations with respect to any potential legal impediment to Mr Mbarushimana's return to French territory and as to whether they would be in a position to impose one or more of the conditions provided for

---

[6] ICC-01/04-01/10-2.
[7] *See supra* p. 3.
[8] ICC-01/04-01/10-89.

in rule 119 of the Rules, should the Chamber order the conditional release of Mr Mbarushimana.[9]

8. On 15 April 2011, the Prosecution filed the "Prosecution's response to the "Defence Request for Interim Release"' ("Prosecution's Response"), with annexes, whereby the Prosecution submitted that the detention of Mr Mbarushimana must continue since the conditions set out in article 58(1) of the Statute subsist.[10]

9. On 26 April 2011, with the leave of the Single Judge,[11] the Defence filed the "Defence Reply to the Prosecution Response to the Defence Request" ("Defence's Reply"), with annexes, whereby the Defence reiterates its request for Mr Mbarushimana's interim conditional release and suggests "electronic tagging" as an alternative to continued detention in the event that the Chamber would deem it necessary to monitor Mr Mbarushimana's movements on a "round-the-clock" basis .[12]

10. On 26 April 2011, the Registrar filed the observations received from the Republic of France and the Kingdom of the Netherlands,[13] in response to the Single Judge's decision of 1 April 2011.

11. On 3 May 2011, the Prosecutor filed the "Prosecution's Application to strike portion of 'Defence Reply to the Prosecution's Response to the Defence Request for Interim Release', or alternatively, for leave to reply to a new Defence argument" ("Prosecution's Application to Strike a Portion of the Reply"),[14] whereby the Prosecution requested the

---

[9] *Ibid.*, pp. 4-5.
[10] ICC-01/04-01/10-101.
[11] "Decision the Defence Request for Leave to Reply to the Prosecution's Response to the Defence Request for Interim Release", ICC-01/04-01/10-111, rendered on 18 April 2011, following the "Defence Request for Leave to Reply to the Prosecution's Response to the Defence Request for Interim Release", ICC-01/04-01/10-107, filed on 16 April 2011.
[12] ICC-01/04-01/10-120.
[13] "Transmission des observations formulees en vertu de la norme 51 du Reglement de la Cour", 26 April 2011, ICC-01/04-01/10-121; ICC-01/04-01/10-Conf-Anx1; ICC-01/04-01/10-Conf-Anx2.
[14] ICC-01/04-01/10-133.

Chamber to strike a portion of the Defence's Reply or, alternatively, to grant leave to reply to that portion.

12. On 8 May 2011, the Defence filed the "Defence observations on Prosecution filing ICC-01/04-01/10-133".[15]

13. On 8 May 2011, the Defence filed the "Defence response to the Republic of France's observations on the Defence request for interim release".[16]

Submissions of the Parties and States

The Request for Interim Release and Arguments

14. The Defence argues that the conditions for arrest set forth in article 58(1)(b) of the Statute have not been fulfilled and, thus, the detention of Mr Mbarushimana is not necessary on any of the grounds stipulated in the Statute. The Defence submits that the interests protected under article 58(1)(b) of the Statute may be guaranteed by an alternative to the deprivation of liberty.[17]

15. The Defence submits that the arrest of Mr Mbarushimana does not appear necessary under article 58(1)(b)(i) of the Statute. The Defence suggests that the perceived risk of flight should be construed by reference to the personal circumstances of and specific information pertaining to Mr Mbarushimana,[18] and not solely by reference to the gravity of the offences with which Mr Mbarushimana is charged or the possible lengthy sentence which he may face.[19] The Defence further argues that the Prosecution's submission regarding the risk of Mr Mbarushimana exploiting his international contacts to evade

[15] ICC-01/04-01/10-138.
[16] ICC-01/04-01/10-139-Conf.
[17] Request for Interim Release, p. 3 and para. 8.
[18] Request for Interim Release, para. 9.
[19] Request for Interim Release, para. 11.

prosecution is predicated upon a "hypothetical possibility" which cannot warrant the pre-trial detention of Mr Mbarushimana.[20]

16. By reference to Mr Mbarushimana's conduct on previous occasions, the Defence submits that Mr Mbarushimana has never made an attempt to abscond or to conceal his whereabouts when faced with prosecution.[21] According to the Defence, Mr Mbarushimana has shown "a demonstrable respect for judicial authority and a strong commitment to clearing his name through the judicial process"[22] and has demonstrated his willingness to cooperate with the Prosecutor and the authorities of the Court.[23] In addition, the Defence contends that Mr Mbarushimana has strong social connections in France where he has been awarded refugee status.[24] The Defence explains that, in light of Mr Mbarushimana's difficult financial situation due to the freezing of his assets along with the travel ban imposed on him by the United Nations Security Council, Mr Mbarushimana deems his freedom of movement limited to French territory.[25] The Defence submits that not only is the present detention unnecessary but it is also "a source of severe moral and financial hardship" to his family.[26]

17. The Defence submits that the arrest of Mr Mbarushimana does not appear necessary under article 58(1)(b)(ii) of the Statute. In this regard, the Defence argues that Mr Mbarushimana is not in a position to intimidate or interfere with witnesses and/or victims as the names of victims and witnesses are currently redacted.[27] To support its argument, the Defence makes reference to the past conduct of Mr Mbarushimana in previous judicial instances where he did have access to the names and whereabouts of witnesses.[28] The Defence also states that the Prosecution fails to establish that Mr Mbarushimana "presents

---

[20] Request for Interim Release, para. 10.
[21] Request for Interim Release, paras 13-18.
[22] Request for Interim Release, paras 18-19.
[23] Request for Interim Release, para. 20.
[24] Request for Interim Release, paras 22, 24.
[25] Request for Interim Release, para. 23.
[26] Request for Interim Release, para. 25.
[27] Request for Interim Release, para. 27
[28] Request for Interim Release, paras 27-28.

a personal, concrete and not just hypothetical risk to the security of witnesses and/or victims" due to his alleged contacts and links with FDLR members.[29] The Defence further submits that it has not been given access to all the relevant information underlying the issuance of the Arrest Warrant, which has caused difficulties to the work of the Defence.[30]

18. The Defence submits that the arrest of Mr Mbarushimana does not appear necessary under article 58(1)(b)(iii) of the Statute. In this respect, the Defence argues that the evidence on which both the Chamber, in its Decision on Warrant of Arrest, and the Prosecution relied does not show that Mr Mbarushimana was a temporary leader of the FDLR and gave orders from Paris.[31] Furthermore, the Defence submits that, as the alleged mode of liability attributed to Mr Mbarushimana is his "contribution to the common criminal purpose of creating a 'humanitarian catastrophe' by extorting the international community through media disinformation", the Chamber should, in light of article 58(1)(b)(iii) which requires that criminal activity arises out of the "same circumstances", order the release of Mr Mbarushimana on the condition that he "temporarily abstain from any contacts with the international media".[32]

The Prosecution's Response and Arguments

19. The Prosecution submits that the detention of Mr Mbarushimana must continue because the conditions set out in article 58(1) of the Statute still subsist. In addition, the Prosecution submits that there has been no change in the circumstances that could warrant a different subsequent determination by the Chamber in respect of article 58(1)(a) and 58(1)(b) of the Statute.[33]

20. The Prosecution contends that the detention of Mr Mbarushimana continues to appear necessary pursuant to article 58(1)(b)(i) of the Statute. In this respect, the

[29] Request for Interim Release, paras 26, 27.
[30] Request for Interim Release, paras 32-36.
[31] Request for Interim Release, para. 37.
[32] Request for Interim Release, para. 39.
[33] Prosecution's Response, paras 11-15.

Prosecution submits that Mr Mbarushimana "presents a substantial flight risk", which, according to the Prosecution, is underpinned by Mr Mbarushimana's alleged "motive" and "ability to abscond" and reinforced by his alleged "history of refusing to submit voluntarily to a criminal court's jurisdiction".[34] The Prosecution, thus, asserts that the imposition of conditions under rule 119 of the Rules and the ensuing conditional release of Mr Mbarushimana will not be sufficient to ensure his presence at the Court.[35]

21. The Prosecution argues, in particular, that the risk that Mr Mbarushimana would flee becomes feasible in view of the charges against him in combination with the length of the possible sentence if he were to be convicted.[36] Moreover, the Prosecution submits that the risk of the suspect absconding or fleeing becomes more tangible in view of Mr Mbarushimana's political position, as former Executive Secretary of the FDLR, and his network of international and national contacts with people that could provide him with the means to abscond. The Prosecution, invoking the Appeals Chamber Judgment in the Lubanga case, underlines that "it is not necessary to establish that the Suspect has already made use of these contacts and ties in order to abscond".[37] In addition, the Prosecution argues that Mr Mbarushimana's ability, as an EU resident, "to travel unhindered and lose himself within the very large extended Schengen area", increases the likelihood of Mr Mbarushimana absconding, if released, "even without an extended network of contacts".[38]

22. The Prosecution, dwelling on Mr Mbarushimana's past conduct and personal circumstances, further submits that, contrary to the Defence's allegations, Mr Mbarushimana has demonstrated a lack of cooperation with law enforcement and judicial authorities and a lack of willingness to voluntarily submit himself to a court's criminal jurisdiction, including that of the ICC.[39] Moreover, the Prosecution contests the Defence's

---

[34] Prosecution's Response, para. 16.
[35] Prosecution's Response, para. 29.
[36] Prosecution's Response, paras 17-18.
[37] Prosecution's Response, para. 19, citing *The 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.
[38] Prosecution's Response, paras 19-21.
[39] Prosecution's Response, paras 22-26.

argument with respect to Mr Mbarushimana's "strong social connections" in France, arguing that there is no evidence that Mr Mbarushimana owns property there and that "though employed, he has IT skills and qualifications that would enable him to find a job elsewhere, should he be of mind to abscond".[40]

23. The Prosecution contends that the detention of Mr Mbarushimana continues to appear necessary pursuant to article 58(1)(b)(ii) of the Statute. In this respect, the Prosecution submits that the risk to witnesses has increased by virtue of the fact that witness statements have been collected and are anticipated from witnesses and victims who reside in Eastern DRC, whereas at the time of the Prosecution's Application for the Warrant of Arrest all witnesses were based in Rwanda.[41] In addition, the Prosecution argues that the evidence found amongst the documents seized from Mr Mbarushimana's residence substantiates the Prosecution's contentions that Mr Mbarushimana "has a network that could assist him to interfere with the investigations, witnesses or Prosecution staff in the field if he is released".[42] According to the Prosecution, there is evidence showing Mr Mbarushimana's inclination, "capacity and apparent willingness" to interfere with criminal proceedings.[43]

24. The Prosecution submits that the release of Mr Mbarushimana subject to the imposition of conditions under Rule 119 could hardly serve as an adequate safeguard against the risks of interference with criminal proceedings and witnesses, taking into consideration Mr Mbarushimana's experience in information technology and his ability to have internet and telephone access through a variety of means which are difficult, if not impossible, to monitor and control.

25. The Prosecution contends that the detention of Mr Mbarushimana continues to appear necessary pursuant to article 58(1)(b)(iii) of the Statute. In light of Mr

[40] Prosecution's Response, para. 27.
[41] Prosecution's Response, para. 31.
[42] Prosecution's Response, paras 32-35.
[43] Prosecution's Response, paras 33-39.

Mbarushimana's affiliation with the FDLR and the alleged mode of his participation in the crimes, which "does not require his physical presence at the scene of the crime", the Prosecution submits that the conditional release of Mr Mbarushimana under rule 119 of the Rules would not be adequate to prevent Mr Mbarushimana from communicating with other members of the FDLR and its international network, which would render him able to participate in these crimes.[44] The Prosecution also submits that the fact that neither the German investigation of other members of the FDLR nor the ICC investigation has discouraged Mr Mbarushimana from "continuing to cover up" the FDLR's involvement in crimes committed in the DRC points towards the existence of the "real risk" that Mr Mbarushimana will continue the commission of the crimes within the meaning of article 58(1)(b)(iii) of the Statute.

The Defence's Reply to the Prosecution's Response and Arguments

26. In relation to the Prosecution's arguments with respect to article 58(1)(b)(i) of the Statute, the Defence underlines that, notwithstanding the gravity of the crimes falling within the Court's jurisdiction, "ICC precedent clearly indicates that release or liberty is most definitely '*to be presumed*' unless detention – being the exception to the rule – is warranted".[45] The Defence further affirms that the Prosecution's allegation in relation to Mr Mbarushimana's established network of numerous contacts "remains no more than a casual slogan repeated by the Prosecution in every case it brings before the Court" and notes that "the Prosecution persists in justifying Mr Mbarushimana's detention on the basis of information which it is not prepared to divulge".[46]

27. Further, the Defence submits that "most, if not all, EU countries are State Parties to the Rome Statute and the EU signed a Cooperation and Assistance Agreement with the ICC on 10 April 2006" and all EU countries are, thus, under the obligation to surrender Mr Mbarushimana to the Court. On this basis, the Defence disputes the Prosecution's

---

[44] Prosecution's Response, paras 42-44.
[45] Defence's Reply, para. 1 (emphasis in original).
[46] Defence's Reply, para. 2.

allegation that Mr Mbarushimana's release and ensuing freedom to travel would result in giving Mr Mbarushimana the leeway to "lose himself within the very large extended Schengen area".[47] The Defence further submits that Mr Mbarushimana's lawful exercise of his rights does not amount to what the Prosecution has presented as "'*unequivocal non-cooperation*' with judicial authorities".[48] The Defence, responding to the Prosecution's contention regarding Mr Mbarushimana's alleged facility for finding employment elsewhere due to his skills in the field of information technology, argues that "a potential employer would hardly be able to keep the fact of Mr Mbarushimana's lawful employment a secret".[49] The Defence further contends that Mr Mbarushimana's "lack of 'property'" in France could hardly serve as a manifestation of the "absence of strong roots" in the community, but rather as an indication of his lack of resources.[50]

28. The Defence also submits that the Prosecution's reference to "Mr Mbarushimana's alleged involvement in the 1994 Rwanda Genocide" is premised on the "ramblings of a disgruntled former ICTR employee".[51] The Defence suggests "electronic tagging as a suitable alternative to detention" which would accommodate the Prosecution's concern regarding the inadequacy of "anything short of round-the-clock monitoring" *vis-à-vis* the risk of flight.[52]

29. The Defence submits that the Prosecution's submissions with respect to article 58(1)(b)(ii) of the Statute are built on the Prosecution's own unsubstantiated assumption and speculation. The Defence notes that the Prosecution failed to identify the individuals–members of the alleged "network of sympathisers prepared to assist the FDLR cause" allegedly implicated in the leak of the United Nations Organization Mission in the Democratic Republic of the Congo's ("MONUC" or "MONUSCO") confidential documents to Mr Mbarushimana, and argues that only one such document was found

---

[47] Defence's Reply, para. 3.
[48] Defence's Reply, para. 4 (emphasis in original) and fn 11.
[49] Defence's Reply, para. 4.
[50] *Ibid.*
[51] Defence's Reply, para. 5.
[52] Defence's Reply, para. 7.

among the seized material. The Defence further argues that the Prosecution does not prove that the alleged leak of documents, Mr Mbarushimana's allegedly incriminating communications and the alleged *"achat temoignages"* were solicited or requested by Mr Mbarushimana.[53] The Defence goes on to say that the Prosecution's arguments in relation to the content of a notebook seized from Mr Mbarushimana's house are predicated upon a misinterpretation of the phrase *"a blog-names of witness"*.[54] The Defence also argues that, in light of Defence investigations, the Prosecution's implication, based upon Mr Mbarushimana's alleged BBC interview, that Mbarushimana had the power to influence witnesses is unsubstantiated.[55]

30. In relation to the Prosecution's submissions with respect to article 58(1)(b)(iii) of the Statute, the Defence rebuts the alleged risk that Mr Mbarushimana, if released, "will '*revert*' to the '*coordination of the [FDLR] activities*'", since "Defence investigations [...] now confirm that there is no evidential basis for the allegation that Mr Mbarushimana was, at any stage, the *de facto* leader of the FDLR".[56] The Defence further contends that the Prosecution's submission regarding "Mr Mbarushimana's alleged 'continued' role in 'covering up' crimes" in relation to the "Luvungi rapes" is based on "popular gossip".[57]

Observations of the Republic of France and the Kingdom of the Netherlands

31. The Republic of France submits, *inter alia,* that there is no impediment to Mr Mbarushimana's return to France, upon release.[58] The Kingdom of the Netherlands submits that given the fact that Mr Mbarushimana has requested to be released to the Republic of France, the Netherlands, in compliance with the agreement between the ICC

[53] Defence's Reply, para. 8 (emphasis in original).
[54] Defence's Reply, para. 9 (emphasis in original).
[55] Defence's Reply, para. 10.
[56] Defence's Reply, para. 11.
[57] Defence's Reply, para. 12.
[58] ICC-01/04-01/10-Conf-Anx1.

and the host State, "will facilitate the transfer of Mr Mbarushimana into the French Republic should he be granted interim release".[59]

The Law – legal basis and jurisprudence

32. The Chamber takes note of articles 21, 55, 58, 59, 60, 66 of the Statute, rules 118 and 119 of the Rules and regulations 20, 24(5) and 51 of the Regulations of the Court.

33. At the outset, with due regard to the presumption of innocence envisaged in article 66 of the Statute and in accordance with internationally recognised human rights standards pursuant to article 21(3) of the Statute,[60] it is important to note that "when dealing with the right to liberty, one should bear in mind the fundamental principle that deprivation of liberty should be an exception and not the rule"[61] and, thus, "pre-trial detention [...] 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".[62]

34. The interim release or the continued detention of a person within the Court's statutory framework is governed by article 60 in conjunction with article 58(1) of the Statute. The criteria which must be assessed before the Chamber can pronounce upon the

---

[59] ICC-01/04-01/10-Conf-Anx2.

[60] *The Prosecutor v. Mathieu Ngudjolo Chui*, Appeals Chamber, "Judgment of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release" ("*Ngudjolo Chui* Appeals Judgment"), 9 June 2008, ICC-01/04-01/07-572 (OA4), where the Appeals Chamber held in para. 15 that "the provisions of the Statute relevant to detention, like every other provision of it, must be interpreted and applied in accordance with internationally recognized human rights".

[61] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III, "Decision on Application for Interim Release", 16 December 2008, ICC-01/05-01/08-321, para. 31; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, "Decision on Application for Interim Release", 14 April 2009, ICC-01/05-01/08-403, para. 36.

[62] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, "Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga", 18 March 2008, ICC-01/04-01/07-330, pp. 6-7; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, "Decision on the Conditions of the Pre-Trial Detention of Germain Katanga", 21 April 2008, ICC-01/04-01/07-426 ,p. 6.

interim release or the continued detention of a suspect are stipulated in article 58(1) of the Statute.

35. Article 60(2) of the Statute provides as follows:

> 2. A person subject to a warrant of arrest may apply for interim release pending trial. 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.

36. Article 58(1) of the Statute provides:

> At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:
>
> (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
>
> (b) The arrest of the person appears necessary:
>
> (i) To ensure the person's appearance at trial;
>
> (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or
>
> (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

37. At this juncture, it should be underscored that, as the Appeals Chamber has held, "the decision on continued detention or release pursuant to article 60 (2) read with article 58 (1) of the Statute is not of a discretionary nature. Depending upon whether or not the conditions of article 58 (1) of the Statute continue to be met, the detained person *shall* be continued to be detained or *shall* be released".[63] Accordingly, a Chamber must be satisfied

[63] *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Decision sur la demande de mise en

that the conditions under article 58(1) of the Statute, as required by article 60(2) of the Statute, continue to exist. To this end, "the Chamber must address anew the issue of detention in light of the material placed before it".[64]

38. It is important to observe that "the reasons for detention pursuant to article 58(1)(b)(i) to (iii) of the Statute are in the alternative".[65] Hence, if one of the conditions laid down in article 58(1)(b) of the Statute is fulfilled, the other conditions need not be addressed for a ruling under article 60(2) of the Statute.

39. It is worth recalling that, in relation to the apparent necessity of arrest and, in this context, the continued detention of the suspect within the meaning of article 58(1)(b) of the Statute, the Appeals Chamber has held that "the question revolves around the possibility, not the inevitability, of a future occurrence".[66] Moreover, the Appeals Chamber has held that "the apparent necessity of continued detention in order to ensure the detainee's appearance at trial does not necessarily have to be established on the basis of one factor taken in isolation. It may also be established on the basis of an analysis of all relevant factors taken together".[67]

---

liberte provisoire de Thomas Lubanga Dyilo'" ("*Lubanga* Appeals Judgment"), 13 February 2007, ICC-01/04-01/06-824 (OA7), para. 134; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, "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 (OA6) ("*Bemba* Appeals Judgment *(OA6)*"), para. 59.

[64] *Ngudjolo Chui* Appeals Judgment, para. 12.

[65] *Lubanga* Appeals Judgment, para. 139; *Bemba* Appeals Judgment *(OA6)*, para. 89.

[66] *Ngudjolo Chui* Appeals Judgment, para. 21; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, "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'" ("*Bemba* Appeals Judgment *(OA)*"), 16 December 2008, ICC-01/05-01/08-323 (OA), para. 55.

[67] *Bemba* Appeals Judgment *(OA)*, para. 55.

40. With respect to article 58(1)(b)(i) of the Statute, the Appeals Chamber has noted that "any determination by a Pre-Trial Chamber of whether or not a suspect is likely to abscond necessarily involves an element of prediction".[68]

41. With regard to the seriousness and gravity of the crimes allegedly committed and attributed to the suspect, the Appeals Chamber has held that "[e]vading justice in fear of the consequences that may befall the person becomes a distinct possibility; a possibility rising in proportion to the consequences that conviction may entail",[69] and that "[i]f a person is charged with grave crimes, the person might face a lengthy prison sentence, which may make the person more likely to abscond".[70] Accordingly, the gravity of the offences, alongside the threatened sentence, should be taken into account as one of the factors that has a bearing on detention and as part of the assessment of the risk of absconding from the jurisdiction of the Court.

42. It is worth noting that the Pre-Trial Chamber has found that considerations relating to the suspect's "past and present political position, international contacts, financial and professional background and availability of the necessary network and financial resources" are relevant to the determination of the existence of a risk of flight.[71]

43. With regard to the suspect's professed willingness to cooperate with the Court, it has been noted by the Pre-Trial Chamber that it "does not consider that such a statement is

---

[68] *Lubanga* Appeals Judgment, para. 137.

[69] *Ngudjolo Chui* Appeals Judgment, para. 21; *Bemba* Appeals Judgment *(OA)*, para. 55; *Bemba Appeals Judgment (OA6)*, para. 67.

[70] *Lubanga* Appeals Judgment, para. 136; *Bemba* Appeals Judgment *(OA)*, para. 55; *Bemba* Appeals Judgment *(OA6)*, where the Appeals Chamber held in para. 70 that "[...] the length of sentence that Mr Bemba is likely to serve if convicted on these charges is a further incentive for him to abscond".

[71] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III, "Decision on application for interim release", 20 August 2008, ICC-01/05-01/08-80-Anx, paras 54-55; *See* also *Lubanga* Appeals Judgment, para. 137; *Bemba* Appeals Judgment *(OA6)*, para. 72; *Ngudjolo Chui* Appeals Judgment, para. 22

sufficient *per se* to grant the suspect interim release. This may be only regarded as a factor that needs to be assessed alongside other factors, [...] before coming to a decision".[72]

Discussion

Preliminary matter

44. The Chamber notes that in the Prosecution's Application to Strike a Portion of the Reply the Prosecution requests the Chamber to strike a portion of the Defence's Reply or, alternatively, grant leave to reply to that portion, arguing that the issue of Mr Mbarushimana's current position within the FDLR, discussed in that portion, was not raised in the Prosecution's Response. The Chamber finds that this issue was raised in the Prosecution's Response[73] and that there is no need to strike that portion of the Defence's Reply, or allow further submissions from the Prosecution on this matter. The Prosecution's Application to Strike a Portion of the Reply shall thus be rejected.

Whether the continued detention of Mr Mbarushimana appears necessary to ensure his appearance at trial (article 58(1)(b)(i) of the Statute)

45. The Chamber recalls its finding that there are reasonable grounds to believe that Mr Mbarushimana is criminally responsible for a number of crimes allegedly committed by the FDLR, including murder, rape, torture and attacks against the civilian population,

[72] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III, "Decision on Application for Interim Release", 16 December 2008, ICC-01/05-01/08-321, para. 37; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, "Decision on Application for Interim Release", 14 April 2009, ICC-01/05-01/08-403, para. 50. *See* also *Bemba* Appeals Judgment *(OA6)*.

[73] Prosecution's Response, para. 43.

charged as either crimes against humanity or war crimes, or both.[74] The Chamber considers these alleged crimes to be 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.

46. The Chamber further reiterates its finding that the FDLR has an international support network capable of providing financial support to the FDLR leaders.[75] The evidence provided by the Prosecution shows that supporters of the FDLR are based in Europe, North America and Africa, and that they provide support to the movement by, *inter alia,* fund raising. Evidence of money transfers to, *inter alia,* Germany in order to help Ignace Murwanashyaka, alleged to be the FDLR President,[76] in relation to criminal proceedings against him has also been provided.[77] While not directly demonstrating that Mr Mbarushimana has ever obtained assistance from the said network in order to abscond, this evidence is indicative of the existence of efficient means, available to him by virtue of his membership of the FDLR, which would enable him to evade justice.

47. The Chamber takes note of the Defence's argument that when faced with allegations of complicity in genocide, at the time of his employment at the United Nations Development Programme ("UNDP"), Mr Mbarushimana petitioned the competent authorities to open an official inquiry into the allegations.[78] The Chamber, however, notes that no criminal proceedings were instituted and, therefore, at that time Mr Mbarushimana was not at risk of being sentenced to imprisonment if the allegations were proven. This argument of the Defence is thus of little relevance to the present case.

48. As regards the Defence's argument that Mr Mbarushimana made no attempt to flee Kosovo, where he resided in 2001, after an international arrest warrant was issued against

---

[74] Arrest Warrant, pp. 4-7.
[75] Decision on Warrant of Arrest, para. 47.
[76] Prosecution's Application for the Warrant of Arrest, p. 5.
[77] Annex 7 to the Prosecution's Application for the Warrant of Arrest, pp. 25-29.
[78] Request for Interim Release, para. 14; Annexes 2, 3 to the Request for Interim Release.

him by the Rwandan Government,[79] the Chamber notes that, contrary to the Defence's contention, Mr Mbarushimana would have been unable to exploit a diplomatic status to flee. First, none of the evidence provided by the Defence shows that Mr Mbarushimana enjoyed such status. Rather, he enjoyed the status of a member of the personnel of the United Nations Interim Administration Mission in Kosovo ("UNMIK") and the status of an official of the United Nations ("UN"). Such status differs from the diplomatic status in that the immunities attached thereto are limited.[80] Furthermore, it appears from the documents appended to the Request for Interim Release that the Secretary General of the UN had waived the immunity of Mr Mbarushimana related to his status as an UNMIK personnel member and a UN official, in particular, his immunity from legal process and from arrest and detention.[81] The Chamber is thus not persuaded that in that specific instance Mr Mbarushimana was in a position to leave the territory under UNMIK administration on the basis of privileges and immunities attached to his status.

49. Turning to the Defence's contention that Mr Mbarushimana made no attempt to abscond or to conceal his whereabouts despite being aware of the investigation by the International Criminal Tribunal for Rwanda ("ICTR"),[82] the Chamber notes that the only evidence of Mr Mbarushimana's awareness of that investigation at the time is a press article in which "a UN official, speaking on condition of anonymity", stated that allegations against Mr Mbarushimana had been turned over to the ICTR.[83] The Defence's submission appears to be that Mr Mbarushimana learned of the ICTR investigation from the said article, there being no suggestion that he was officially notified thereof. The Chamber is not persuaded that the said article put Mr Mbarushimana on notice of the existence of that investigation. At the time of its publication, on 17 April 2001, Mr Mbarushimana was detained in Kosovo pursuant to the international arrest warrant

---

[79] Request for Interim Release, para. 15.

[80] *See* Article V, Section 18 of the Convention on the Privileges and Immunities of the United Nations.

[81] *See* Decision of the Gjilan District Court, DRC-REG-0001-3561, at DRC-REG-0001-3565.

[82] Request for Interim Release, para. 16.

[83] The article is available at http://www.independent.co.uk/news/world/europe/un-employee-faces-extradition-for-alleged-genocide-crimes-753488.html.

issued by the *Parquet de la République* in Kigali[84] and thus, presumably, had limited access to the international press and the internet. In addition, even if it were to be accepted that during his detention in Kosovo, or shortly after his release, Mr Mbarushimana learned about the ongoing ICTR investigation, he would not have been able to easily leave the territory under UNMIK administration, for the reasons detailed in the preceding paragraph.

50. As regards the Defence's contention that Mr Mbarushimana's application for refugee status in France increased his "accessibility to law enforcement agencies",[85] the Chamber notes that, at that time, France was already part of the Schengen area of the European Union, which would allow Mr Mbarushimana much more freedom of movement than that which he had within the confines of Kosovo, at that time under the administration of UNMIK. Further, the Defence's assertion that Mr Mbarushimana enquired of the then Prosecutor of the ICTR as to the status of investigations against him is not supported by any evidence.

51. With regard to the Defence's contention that Mr Mbarushimana made no attempts to abscond after having been awarded refugee status in France in spite of further efforts of the Rwandan government to have him extradited,[86] the Chamber notes that he was aware of the outcome of previous extradition proceedings, in which the Gjilan District Court had refused a request for extradition, finding that the Rwandan government had not provided sufficient evidence to support the allegations against him.[87] In addition, the Gjilan District Court found that there was reason to believe that the extradition of Mr Mbarushimana would lead to violations of his right to life, his right not to be subjected to inhuman treatment and his right to a fair trial.[88] Mr Mbarushimana could thus reasonably expect that further requests for extradition to Rwanda were likely to be refused by France or

---

[84] *See* Decision of the Gjilan District Court, DRC-REG-0001-3561, at DRC-REG-0001-3561.
[85] Request for Interim Release, para. 16.
[86] Request for Interim Release, para. 17.
[87] Decision of the Gjilan District Court, DRC-REG-0001-3561, at DRC-REG-0001-3568. *See* also Judgment of the Supreme Court of Kosovo (DRC-REG-0001-3569) approving the District Court's Decision.
[88] Decision of the Gjilan District Court, DRC-REG-0001-3561, at DRC-REG-0001-3568.

other European countries on the same grounds. The Chamber also notes that article 33(1) of the United Nations Convention relating to the Status of Refugees prohibits the expulsion of refugees "to the frontiers of territories where [their] life or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group or political opinion". Mr Mbarushimana could thus expect that as a refugee he would be protected against expulsion in the circumstances outline above.

52. The Chamber takes note of the Defence's contention that Mr Mbarushimana did not conceal his whereabouts after it became known that the criminal complaint (*plainte civile*) alleging his involvement in genocide and filed by the *Collectif des Parties Civiles pour le Rwanda* ("CPCR") was made the subject of a preliminary investigation by the *Parquet de Paris*.[89] While accepting the Defence's contention as true, the Chamber notes that the filing of the *plainte civile* itself did not open criminal proceedings against Mr Mbarushimana. Rather, a preliminary examination was instituted in order to determine whether or not there were grounds for issuing an indictment.[90] In view of the outcome of the extradition proceedings, which also related to crimes allegedly committed in Rwanda and during which the extradition request was refused, *inter alia*, for lack of sufficient evidence, Mr Mbarushimana had little incentive to flee at the time. It appears that the indictment ("mise en examen") was only issued on 21 December 2010[91] and thus at the time when he was detained pursuant to the Arrest Warrant.

53. The Chamber also takes note of the Defence's assertion that the French investigating judge dealing with the above-mentioned complaint of the CPCR chose not to order the detention of Mr Mbarushimana because he "found that Mr Mbarushimana did not represent such a flight risk or a threat to victims and witnesses that he ought to be placed in detention".[92] The Chamber observes that there is no such express finding in the order issued by that investigating judge. Moreover, the order was issued on 21 December

[89] Request for Interim Release, para. 18.
[90] *See* Prosecution's Response, para. 25.
[91] *See* Prosecution's Response, para. 25.
[92] Request for Interim Release, para. 19.

2010, at the time when Mr Mbarushimana was detained by the French authorities pursuant to the Arrest Warrant.[93] While this is not specifically mentioned in that order, it is highly unlikely that the investigating judge was unaware of the Arrest Warrant and the detention of Mr Mbarushimana. Therefore, it cannot be argued that the said order is based on the investigating judge's finding that Mr Mbarushimana posed no risk of flight or a threat to victims and witnesses.

54. The Defence further argues that although from May 2010 Mr Mbarushimana had been aware that he was subject to an ICC investigation, he made no attempt to abscond.[94] The Chamber accepts the Defence's assertion that Mr Mbarushimana was aware of that investigation, as the Defence filed a declaration of Mr Mbarushimana's willingness to cooperate before the Chamber issued the Arrest Warrant and long before the proceedings became public. The Chamber, however, notes that at the time very little could have been known to Mr Mbarushimana about the subject of the Prosecution's investigation, its scope and intended outcome. Based on his limited knowledge, he could not have anticipated with any certainty that the Prosecution would seek an arrest warrant against him. The Chamber thus finds that at the time Mr Mbarushimana had far less incentive to flee than he has now, when he is aware of the allegations by the Prosecution and the Chamber's finding that there are reasonable grounds to believe that he is responsible for the crimes alleged by the Prosecution.

55. The Chamber cannot, however, accept the Prosecution's argument that Mr Mbarushimana's challenge to the indictment issued against him in France for crimes allegedly committed in Rwanda is a fact that "is [...] certainly not one which reduces the risk of him absconding".[95] The Chamber is of the view that the mere use by Mr Mbarushimana of an available legal remedy against that indictment cannot be regarded as proof of his willingness to abscond. Similarly, Mr Mbarushimana's recourse to a constitutional complaint in Germany, allegedly aimed at rendering the ICC case against

[93] *See supra*, para. 4.
[94] Request for Interim Release, para. 20.
[95] Prosecution's Response, para. 25.

him inadmissible,[96] cannot be deemed to be a manifestation of his lack of cooperation with the Court and an indication that he may flee if released.

56. The Chamber takes note of the Defence's arguments regarding Mr Mbarushimana's family residing in France and the prospect of his continued employment in France if released.[97] The Chamber is, however, not persuaded that these bonds with France are a sufficient guarantee that Mr Mbarushimana would remain in France if released.

57. The Chamber also notes that, pursuant to the travel ban imposed on him by the United Nations Security Council, Mr Mbarushimana's movement is restricted to French territory.[98] The Chamber, however, notes that in practice there are no restrictions on movement from one country to another within the Schengen area of the European Union. Mr Mbarushimana can thus move from one country to another each time he suspects that he is at risk of being apprehended. The Chamber is thus of the view that the release of Mr Mbarushimana to France would make it easier for him to flee.[99]

58. The Chamber takes note of Mr Mbarushimana's declaration of willingness to cooperate with the Court, submitted prior to the issue of the Arrest Warrant.[100] The Chamber, however, notes that the circumstances are materially different at the present stage, as the Arrest Warrant has been issued and the disclosure of Prosecution evidence is ongoing. Mr Mbarushimana thus has knowledge not only of the allegations made by the Prosecution, but also of the evidence it intends to use. Further, the confirmation hearing is scheduled for 4 July 2011. The Chamber is of the view that these factors make Mr Mbarushimana more likely to abscond.

59. In view of the foregoing considerations, and in particular: (i) the gravity of the crimes alleged against Mr Mbarushimana and his knowledge thereof at this stage, (ii) the

[96] Prosecution's Response, para. 26.
[97] Request for Interim Release, paras 24-25.
[98] Request for Interim Release, para. 23.
[99] As regards the Defence's argument that electronic tagging may reduce the flight risk, see *infra* para. 67.
[100] *See* Decision on Arrest Warrant, para. 47. Request for Interim Release, para. 20.

existence of an international network of FDLR supporters able and willing to assist him if need be, (iii) his freedom of movement within the Schengen area, and (iv) the advanced stage of the disclosure process in view of the proximity of the confirmation hearing, the continued detention of Mr Mbarushimana appears necessary to ensure his appearance at trial.

Whether the continuing detention appears necessary to ensure that Mr Mbarushimana does not obstruct or endanger the investigation or the court proceedings (article 58(1)(b)(ii) of the Statute)

60. The Chamber notes the Defence's argument relating to Mr Mbarushimana's conduct in situations where he was previously implicated in judicial proceedings, with respect to which there is no evidence of him having interfered with witnesses, despite having had access to information as to their identity and whereabouts.[101] The Chamber accepts that the absence of evidence of such interference is of significance.

61. As regards the Defence argument that Mr Mbarushimana is not in a position to interfere with witnesses and/or victims as their names are currently redacted,[102] the Chamber notes that the Prosecution is expected to disclose to the Defence the names of witnesses by 23 May 2011.

62. The Chamber notes that the Prosecution provides a list of 7 documents found at Mr Mbarushimana's place of residence, which appear to have been prepared by or for MONUC.[103] While only one of them is marked "confidential", the content of the other documents reveals that they were also for internal use. The fact that they were found at Mr Mbarushimana's premises suggests that the leakage of information has occurred. It is of significance that the documents contain information in which one would reasonably

[101] Request for Interim Release, paras 27-28.
[102] Request for Interim Release, para. 27
[103] Prosecution's Response, para. 32.

expect the FDLR to be interested. The Prosecution also provides copies of two e-mails,[104] forwarding information received from a named individual to the FDLR Secretariat. The words "agent de la MONUC" appear in the cover emails, suggesting that the forwarded emails originate from a MONUC employee. The forwarded emails contain information that could have been obtained from internal sources within MONUC. While it cannot be conclusively established that these emails originated from a MONUC employee or from someone receiving information from a source within MONUC, both their content and the fact that Mr Mbarushimana had possession of a number of internal MONUC documents point towards the existence of a leakage of information from MONUC to the FDLR.

63. The Chamber is of the view that this evidence is of particular importance when viewed in the context of other information provided by the Prosecution. Since, in the Prosecution's submission, MONUC plays an important role in providing security in the Kivus and the FDLR remains active in the area,[105] the existence within MONUC of a source of information accessible to the FDLR may have an impact on the investigations in the Kivus. In view of the existence of an international network of supporters of the FDLR, the position of Mr Mbarushimana within the organisation and the fact that he actually had in his possession MONUC's internal documents relevant to the FDLR, the Chamber finds that there is a risk that he may use the information obtained from the source in MONUC to interfere with the ongoing investigations and with witnesses residing in the Kivus. The Chamber notes in this connection that, according to the Prosecution, the witnesses on whom it intends to rely for the purposes of the confirmation hearing reside in the Eastern DRC, in areas where the FDLR remains active.[106]

64. Further, the Prosecution provided a copy of a notebook containing notes apparently made by Mr Mbarushimana in relation to the proceedings in Germany.[107] After a review of evidence of witnesses apparently testifying in the proceedings in Germany, the notebook

---

[104] DRC-REG-0001-1631; DRC-REG-0001-1632.
[105] Prosecution's Response, para. 31.
[106] Prosecution's Response, para. 31.
[107] DRC-REG-0007-3438. *See* Prosecution's Response, paras 35-37.

makes reference to an "idea" to make the proceedings public. As an apparent means to implement this "idea", Mr Mbarushimana lists "a blog – names of witnesses".[108] The Chamber finds this to be indicative of the intention to publish on the internet names of witnesses testifying in the German proceedings. The Defence's contention that the dash before the words "names of witnesses" is in fact the subtraction operator[109] is implausible in light of the context in which the words appeared. The Chamber finds that the purpose of publication of witnesses' names would very likely be the intimidation of those witnesses. The Chamber thus concludes that this document indicates that Mr Mbarushimana is predisposed to witness intimidation.

65. The Chamber points out that while there is no evidence of past instances of Mr Mbarushimana having obstructed or endangered investigations or court proceedings, the evidence provided to the Chamber shows the concrete possibility of such obstruction.[110] The evidence of Mr Mbarushimana contemplating intimidating witnesses in the German proceedings and the evidence of him having in his possession documents obtained through leakage show that the risk of Mr Mbarushimana obstructing or endangering the proceedings is real. The Chamber thus concludes that the continued detention of Mr Mbarushimana appears necessary to ensure that he does not obstruct or endanger the investigations and the proceedings before the Court.

Whether the continued detention of Mr Mbarushimana appears necessary to prevent him from continuing with the commission of the alleged crimes listed in the Arrest Warrant or related crimes within the jurisdiction of the Court and arising out of the same circumstances (article 58(1)(b)(iii) of the Statute)

66. With respect to article 58(1)(b)(iii) of the Statute, on the basis of the information and evidence provided by the Prosecution and to the extent that the Defence's submissions do

---

[108] DRC-REG-0007-3438, at DRC-REG-0007-3471.
[109] Defence's Reply, para. 9.
[110] *Cf. Ngudjolo Chui* Appeals Judgment, para. 21.

not detract from the Chamber's relevant finding in the Decision on Warrant of Arrest, the Chamber is 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"[111] continues to exist. In light of the following: (i) the mode of liability attributed to Mr Mbarushimana, which "does not require his physical presence at the scene of the crime";[112] (ii) the fact that the situation in Eastern DRC, where the FDLR is still active, remains volatile, and (iii) Mr Mbarushimana's information technology experience and his ability to have internet and telephone access in ways which cannot be easily monitored or controlled[113], the Chamber notes that, irrespective of Mr Mbarushimana's position within the hierarchy of the FDLR organisation, the continued detention of Mr Mbarushimana continues to appear necessary under article 58(1)(b)(iii) of the Statute.

Conditional release

67. The Chamber is not persuaded that conditional release under rule 119 of the Rules would be a sufficient means to prevent Mr Mbarushimana's obstruction of the proceedings or the continuing commission of crimes. While "electronic tagging"[114] could be considered as an option, which may increase the likelihood of Mr Mbarushimana's appearance at trial, the manner in which he apparently planned to intimidate witnesses testifying before the German court is such that none of the conditions restricting liberty listed in rule 119 of the Rules, or suggested by the Defence, could prevent such intimidation. Similarly, none of these conditions would prevent Mr Mbarushimana from obtaining confidential information and using it to obstruct the proceedings.

68. The Chamber also recalls in this regard Mr Mbarushimana's experience in information technology and his ability to have internet and telephone access in ways

[111] Decision on Warrant of Arrest, para. 49.
[112] Prosecution's Response, para. 43.
[113] Prosecution's Response, paras. 40-41, 44.
[114] Defence's Reply, paras 7, 13.

which cannot be easily monitored or controlled[115] as well as the fact that, according to the evidence provided by the Prosecution, two Commissioners of the FDLR Executive Commission reside in France.[116] The Chamber does not thus consider that the conditions suggested by the Defence, including the "undertaking from Mr Mbarushimana to temporarily abstain from any contact with the international media",[117] would be sufficient to eliminate the risk that Mr Mbarushimana upon release would continue to participate in the commission of the crimes, attributed to him, through media channels.

Conclusion

69. For the foregoing reasons, 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.

FOR THESE REASONS, THE CHAMBER:

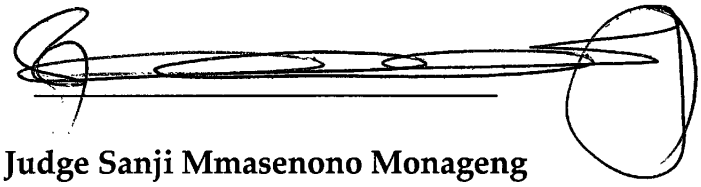
REJECTS the Prosecution's Application to Strike a Portion of the Reply; and

REJECTS the Request for Interim Release.

---

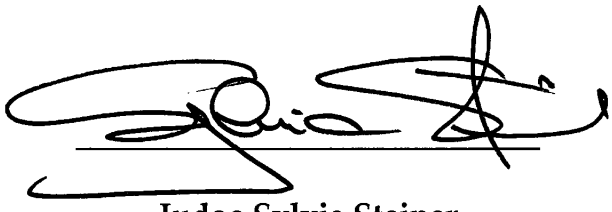
[115] Prosecution's Response, paras 40-41, 44.
[116] Annex 7 to the Prosecution's Application of the Warrant of Arrest, p. 26.
[117] Request for Interim Release, para. 39.

Done in English and French, the English version being authoritative.

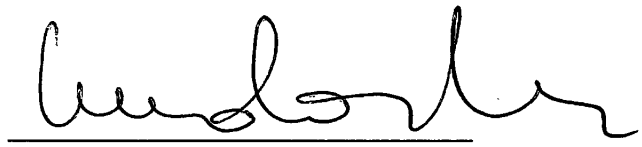


Judge Sanji Mmasenono Monageng

Presiding Judge



Judge Sylvia Steiner



Judge Cuno Tarfusser

Dated this Thursday, 19 May 2011

At The Hague, The Netherlands