

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 16 September 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

**Review of Detention and Decision on the “Third 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

Mr Kassongo Mayombo
 Mr Ghislain Mabanga

Legal Representatives of Applicants

Mr Joseph Keta
 Mr Jean-Louis Gilissen

Unrepresented Victims

**Unrepresented Applicants for
 Participation/Reparation**

**The Office of Public Counsel for
 Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
 Defence**

States Representatives

Competent authorities of
 the French Republic and
 the Kingdom of the Netherlands

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
 Section**

Counsel Support Section

Pre-Trial Chamber I of the International Criminal Court (“Chamber” and “Court” respectively) hereby renders the following decision:

Procedural History

1. 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”),¹ wherein the Chamber found, *inter alia*, (i) “that there are reasonable grounds to believe that Callixte Mbarushimana (“Mr Mbarushimana”) is criminally responsible under article 25(3)(d) of the Rome Statute (“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”,² 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”.³
2. 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 on 28 September 2010.⁴
3. On 11 October 2010, pursuant to the Arrest Warrant, Mr Mbarushimana was arrested in France.
4. 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.

Procedural history relevant to periodic review of detention pursuant to Article 60(3) of the Statute

5. The Defence made its first request for interim release on 30 March 2011.⁵ On 19 May 2011, the Chamber issued the “Decision on the Defence Request for Interim Release” (“19

¹ ICC-01/04-01/10-1 (re-classified “Public” pursuant to Decision ICC-01/04-01/10-7, dated 11 October 2010).

² Decision on Warrant of Arrest, para. 44.

³ *Ibid.*, para. 50.

⁴ ICC-01/04-01/10-2.

⁵ “Request for Interim Release”, ICC-01/04-01/10-86.

May 2011 Decision”),⁶ rejecting this Defence request. The Chamber recalls and incorporates by reference the procedural history detailed in the 19 May 2011 Decision.⁷

6. The Appeals Chamber unanimously upheld the 19 May 2011 Decision in its Judgment dated 14 July 2011.⁸

7. On 20 July 2011, the Defence filed its “Second Defence request for interim release” (“Second Release Request”),⁹ wherein the Defence argued: (i) that a German investigation of the suspect from the time the Arrest Warrant was issued until 3 December 2010 rendered the case inadmissible¹⁰ and (ii) that the Chamber should make a finding to this effect and consider this as a changed circumstance that merits reconsideration of detention.¹¹ On 28 July 2011, a decision was rendered¹² in which Single Judge Cuno Tarfusser: (i) dismissed the Defence request to the extent it merely sought reconsideration of previously examined arguments¹³ and, (ii) as permitted by article 60(3) of the Statute, declined to review the suspect’s detention at that time.¹⁴ The 28 July 2011 Decision is currently before the Appeals Chamber.

⁶ ICC-01/04-01/10-163.

⁷ *Ibid.*, at paras 1-13.

⁸ “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 (OA) (“Mbarushimana OA Judgment”).

⁹ ICC-01/04-01/10-294.

¹⁰ *Ibid.*, at paras 7, 16-17.

¹¹ *Ibid.*, at para. 17.

¹² ICC-01/04-01/10-319.

¹³ *Ibid.*, at pp. 6-7. The Defence made this same argument on two previous occasions, once when challenging the validity of the arrest warrant and once in a request for a stay of proceedings. “Defence Challenge to the Validity of the Arrest Warrant”, 10 January 2011, ICC-01/04-01/10-32, para. 16; “Defence request for a permanent stay of proceedings”, 24 May 2011, ICC-01/04-01/10-177, paras 10-11. The Chamber rejected both Defence requests. “Decision on the Defence Challenge to the Validity of the Arrest Warrant”, 28 January 2011, ICC-01/04-01/10-50; “Decision on the ‘Defence request for a permanent stay of proceedings’”, 1 July 2011, ICC-01/04-01/10-264. The day before the “Second Defence request for interim release”, the Chamber also rejected a Defence request seeking leave to appeal the decision rejecting the request for a stay of proceedings. “Decision on the Defence request for leave to appeal the ‘Decision on the ‘Defence request for a permanent stay of proceedings’” (ICC-01/04-01/10-264)”, 19 July 2011, ICC-01/04-01/10-288.

¹⁴ ICC-01/04-01/10-319, at p. 7.

8. On 12 August 2011, the Chamber initiated a *proprio motu* review of the suspect's detention ("Article 60(3) Review"), seeking observations from all concerned and asking for the Defence's observations first.¹⁵

9. In turn, observations on interim release were filed by: (i) the Defence on 26 August 2011 ("Defence Article 60(3) Observations"),¹⁶ (ii) legal representative Mr Ghislain Mabanga on behalf of the victims he represents on 30 August 2011 ("Mr Mabanga's Observations"),¹⁷ (iii) the Office of Public Counsel for Victims on 2 September 2011 ("OPCV Observations"),¹⁸ (iv) the Prosecutor on 2 September 2011 ("Prosecutor Article 60(3) Observations"),¹⁹ (v) the French Republic on 9 September 2011²⁰ and (vi) the Kingdom of the Netherlands on 9 September 2011.²¹ Though they were notified and given an opportunity to file observations, legal representatives Kassongo and Diakiese did not file observations regarding the Article 60(3) Review.

Procedural history relevant to determining unreasonably long detention due to inexcusable delay of the Prosecutor pursuant to Article 60(4) of the Statute

10. The confirmation hearing in this case was originally set for 4 July 2011.²²

11. On 30 March 2011, the Chamber issued the "Decision on issues relating to disclosure",²³ whereby the Chamber ordered the Prosecutor to disclose to the Defence, by 23 May 2011, "the names and statements of the witnesses [...] on which he intends to rely

¹⁵ ICC-01/04-01/10-360. Following a Defence request to make observations last, the Chamber granted the Defence leave to reply to the issues raised by the other submissions. See "Defence request for an extension of the time-limit to submit observations on interim release", 15 August 2011, ICC-01/04-01/10-363; "Decision on 'Defence request for an extension of the time-limit to submit observations on interim release' and request for OPCV observations", 18 August 2011, ICC-01/04-01/10-381. The Chamber's decision also appointed the Office of Public Counsel for Victims to file observations on behalf of unrepresented applicants in this decision.

¹⁶ "Defence observations on interim release pursuant to Decision ICC-01/04-01/10-360", ICC-01/04-01/10-389.

¹⁷ "Observations de victimes autorisées à participer à la procédure sur la liberté provisoire de M. Callixte Mbarushimana", ICC-01/04-01/10-391.

¹⁸ "Observations du Bureau du conseil public pour les victimes en tant que représentant légal des demandeurs sur les Deuxième et Troisième requêtes de la Défense de mise en liberté datées des 20 juillet et 19 août 2011", ICC-01/04-01/10-393.

¹⁹ "Prosecution's Observations on interim release", ICC-01/04-01/10-396, with public annex.

²⁰ "Transmission of the observations made pursuant to regulation 51 of the Regulations of the Court", ICC-01/04-01/10-408-Corr, confidential annex 1.

²¹ *Ibid.*, confidential annex 2.

²² Oral Decision of the Chamber, 28 January 2011, ICC-01/04-01/10-T-1-ENG, p. 10.

²³ ICC-01/04-01/10-87.

at the confirmation of charges hearing” in original and in a language which Mr. Mbarushimana fully understands and speaks.²⁴ On 12 May 2011, the Single Judge responded to a Prosecutor request²⁵ by issuing the “Decision on the ‘Prosecution’s request for the assessment of the English proficiency of Callixte Mbarushimana’”,²⁶ whereby the Single Judge: (i) found that the suspect did not understand English well enough for the Prosecutor to satisfy his disclosure obligations by only disclosing evidence in English²⁷ and (ii) ordered the Prosecutor to “disclose to the Defence, as soon as possible and no later than 1 June, the French translations [...] of all witness statements which have not been previously disclosed in Kinyarwanda”.²⁸

12. On 25 May 2011, the Prosecutor requested a postponement of the confirmation hearing due to technical problems that arose while processing a large volume of potentially privileged communications.²⁹ The Chamber granted this request on 31 May 2011 (“31 May 2011 Decision”),³⁰ moving the confirmation date to 17 August 2011 while finding that “the Prosecution b[ore] no responsibility” for the technical problems and that the Prosecutor “cannot be said to have caused ‘inexcusable delay’, within the meaning of article 60(4) of the Statute.”³¹

13. As explained by the Defence in their “Defence request to deny the use of certain incriminating evidence at the confirmation hearing” (“Witness Statement Exclusion Request”),³² the Prosecutor disclosed audio and transcripts for the outstanding witness statements on 1 June 2011.³³ While Kinyarwanda versions of all witness interviews were disclosed, some interviews were disclosed only with Kinyarwanda audio and English

²⁴ *Ibid.*, pp. 17-18.

²⁵ “Prosecution’s request for the assessment of the English proficiency of Callixte Mbarushimana”, 28 April 2011, ICC-01/04-01/10-125.

²⁶ ICC-01/04-01/10-145.

²⁷ *Ibid.*, p. 6.

²⁸ *Ibid.*, p. 8.

²⁹ “Prosecution’s request in terms of Rule 121(7) for the postponement of the confirmation hearing to preserve the fairness of the proceedings”, ICC-01/04-01/10-189.

³⁰ “Decision on the Prosecution’s request for the postponement of the confirmation hearing”, ICC-01/04-01/10-207.

³¹ *Ibid.*, pp. 9-10.

³² 8 August 2011, ICC-01/04-01/10-343.

³³ *Ibid.*, para. 2.

transcripts, but not Kinyarwanda transcripts.³⁴ Other interviews were disclosed with both English and Kinyarwanda transcripts, but no corresponding audio.³⁵ The Prosecutor informed the Defence on 1 June 2011 that he would provide the Defence with Kinyarwanda translations for the remaining interview transcripts “in due course”.³⁶

14. The Defence sent the Prosecutor an email asking for the promised transcripts on 28 June 2011, but the Prosecutor’s response indicated that no additional disclosure was forthcoming.³⁷

15. On 8 August 2011, the Defence filed the Witness Statement Exclusion Request and informed the Chamber for the first time that the witness statements had not been disclosed in a “unified media”.³⁸ The Defence asked to exclude: (i) transcripts of witness interviews disclosed in English, for which only Kinyarwanda audio files, as opposed to transcripts, were available,³⁹ and (ii) interviews where English and Kinyarwanda transcripts were disclosed to the Defence, but without the corresponding audio files.⁴⁰

16. The Prosecutor responded to the Witness Statement Exclusion Request on 11 August 2011⁴¹ and insisted that he had complied with his disclosure obligations by disclosing all witness statements in English and Kinyarwanda, either in written or audio form.⁴²

17. In view of the aforementioned, the Chamber decided to postpone the confirmation hearing to 16 September 2011.⁴³ In the corresponding filing (“Postponement Decision”) explaining the necessity of postponement and partially granting the Witness Statement Exclusion Request,⁴⁴ the Chamber indicated that it felt “compelled to postpone the hearing

³⁴ *Ibid.*

³⁵ *Ibid.*, para. 10.

³⁶ *Ibid.*, para. 2.

³⁷ *Ibid.*, paras 3-4.

³⁸ *Ibid.*, paras 2, 9.

³⁹ *Ibid.*, para. 12(i).

⁴⁰ *Ibid.*, para. 12(ii).

⁴¹ “Prosecution’s response to Defence Request to deny the use of certain incriminating evidence at the Confirmation Hearing”, ICC-01/04-01/10-353. This filing was reclassified to public on 12 August 2011. See “Decision requesting further information on the ‘Defence request to deny the use of certain incriminating evidence at the confirmation hearing’”, ICC-01/04-01/10-359, p. 5.

⁴² ICC-01/04-01/10-353, para. 11.

⁴³ “Decision postponing the commencement of the confirmation hearing”, ICC-01/04-01/10-374.

⁴⁴ “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.

in the wake of both parties' failure to handle their pre-trial obligations in a manner befitting the professionalism demanded when litigating before the International Criminal Court".⁴⁵ Specifically, the Chamber found: (i) that the Defence failed to exercise due diligence in asserting its rights by waiting until nine days before the confirmation hearing to say that the disclosure was deficient⁴⁶ and (ii) that the Prosecutor's disclosure had not given the Defence an opportunity to meaningfully prepare their defence pursuant to article 67(1) of the Statute.⁴⁷

18. The "Third Defence request for interim release" was filed on 19 August 2011 ("Third Release Request"),⁴⁸ wherein the Defence asks for interim release by arguing, pursuant to article 60(4) of the Statute, that the delay caused by the Postponement Decision is the result of the "inexcusable delay" of the Prosecutor.⁴⁹

19. On 19 August 2011, the Chamber issued the "Decision requesting observations on the 'Third Defence request for interim release'",⁵⁰ requesting observations from the Prosecutor, the victims that have communicated with the Court in the case, the Host State and the French Republic.

20. Observations on the Third Release Request were filed by: (i) the Prosecutor on 9 September 2011 ("Prosecutor Article 60(4) Observations"),⁵¹ (ii) legal representative Mr Hervé Diakiese on behalf of the victims he represents on 9 September 2011 ("Mr Diakiese's Observations"),⁵² (iii) the French Republic on 12 September 2011⁵³ and (iv) the Kingdom of

⁴⁵ *Ibid.*, para. 15.

⁴⁶ *Ibid.*, para. 19.

⁴⁷ *Ibid.*, para. 22.

⁴⁸ ICC-01/04-01/10-383.

⁴⁹ *Ibid.*, para. 11.

⁵⁰ ICC-01/04-01/10-384.

⁵¹ "Prosecutor's Response to the 'Third Defence Request for Interim Release'", ICC-01/04-01/10-407, with confidential annex.

⁵² "Observations de 30 victimes autorisées à participer à la procédure sur la liberté provisoire de M. Callixte Mbarushimana", ICC-01/04-01/10-404. The Chamber notes that, later on the same date, the Presidency filed a decision upholding a Registry decision that removed Mr Diakiese from the list of counsel. See Presidency, "Decision on the 'Requête urgente portant recours contre la Décision du Greffier sur la radiation d'un conseil et sollicitant une suspension immédiate des effets de cette décision'", 9 September 2011, ICC-RoC72-01/11-4. Suspensive effect had been given to the Registry's decision by the Presidency on 26 August 2011. "Interim decision concerning the 'REQUETE URGENTE PORTANT RECOURS CONTRE LA DECISION DU GREFFIER SUR LA RADIATION D'UN CONSEIL ET SOLLICITANT UNE SUSPENSION IMMEDIATE

the Netherlands on 12 September 2011.⁵⁴ Mr Mabanga's Observations and the OPCV Observations address both the Article 60(3) Review and the Third Release Request. The Defence filed a reply on issues related to the Third Release Request on 12 September 2011 ("Defence Reply").⁵⁵ Though he was notified and given an opportunity to file observations, legal representative Kassongo did not file observations on the Third Release Request.

Submissions of the Parties and States

Submissions relevant to periodic review of detention pursuant to Article 60(3) of the Statute

21. The Defence did not make any arguments on interim release in their Defence Article 60(3) Observations.⁵⁶

22. In his Observations, Mr Mabanga argues that nothing has happened to suggest that the circumstances that underlie the need to keep the suspect in detention have changed.⁵⁷ Mr Mabanga outlines why the suspect should continue to be detained, emphasising *inter alia* that: (i) the possibility of lengthy imprisonment for serious crimes continues to exist,⁵⁸ (ii) releasing the suspect could gravely jeopardise further proceedings in this case⁵⁹ and (iii) releasing the accused would increase the morale of the still operational FDLR.⁶⁰

23. The OPCV Observations initially base their arguments on the Second Release Request. The OPCV argues: (i) that the Defence arguments of the past inadmissibility of the case lack any real and objective basis and are "purely speculative"⁶¹ and (ii) that the Defence arguments in the Second Release Request have already been dealt with by the Chamber on past occasions and do not qualify as changed circumstances or new facts that

DES EFFETS DE CETTE DECISION. (REQUETE PUBLIQUE AVEC 15 ANNEXES CONFIDENTIELLES)", ICC-RoC72-01/11-2. Mr Diakiese's Observations were filed during this period of suspensive effect.

⁵³ "Transmission of the observations made pursuant to regulation 51 of the Regulations of the Court", ICC-01/04-01/10-414, confidential annex 2. The Registry reports that the observations were received on 9 September 2011.

⁵⁴ *Ibid.*, public annex 3. The Registry reports that the observations were received on 9 September 2011.

⁵⁵ "Defence Reply to the Observations on Interim Release", ICC-01/04-01/10-415.

⁵⁶ Defence Article 60(3) Observations, p. 3.

⁵⁷ Mr Mabanga's Observations, paras 23, 27.

⁵⁸ *Ibid.*, para. 24.

⁵⁹ *Ibid.*, para. 25.

⁶⁰ See *Ibid.*, para. 26.

⁶¹ OPCV Observations, para. 15.

permit a modification on detention.⁶² As to other changed circumstances, the OPCV also emphasises that disclosure is in a more advanced state now than it was on 19 May 2011 and that the risk of the suspect's flight is higher now following the disclosure of additional incriminating materials.⁶³

24. In the Prosecutor Article 60(3) Observations, the Prosecutor submits that there are no changed circumstances that would justify releasing the suspect.⁶⁴ The Prosecutor argues that the FDLR are still operational in the Eastern Democratic Republic of Congo ("DRC") and provides an annex detailing evidence of major incidents attributed to the FDLR in 2011.⁶⁵

25. Though acknowledging that legal and practical difficulties could be involved, the French Republic repeats their previous observations⁶⁶ that there are no legal obstacles to the suspect's return to France.⁶⁷

26. The Kingdom of the Netherlands also repeats their previous observations⁶⁸ by noting that they will facilitate the transfer of the suspect to the French Republic should he be granted interim release.⁶⁹

Submissions relevant to determining unreasonably long detention due to inexcusable delay of the Prosecutor pursuant to Article 60(4) of the Statute

27. The Defence argues in the Third Release Request that the Postponement Decision resulted from the Prosecutor's failure to comply with the Language Proficiency Decision, thus causing an inexcusable delay justifying consideration of interim release by the Chamber.⁷⁰ The Defence emphasises that the Chamber granted a postponement of the confirmation hearing "that Mr. Mbarushimana neither requested nor desired" and that the

⁶² *Ibid.*, paras 15, 17.

⁶³ *Ibid.*, para. 26.

⁶⁴ Prosecutor Article 60(3) Observations, paras 6-11.

⁶⁵ *Ibid.*, at annex 1.

⁶⁶ See 19 May 2011 Decision, para. 31 ("The Republic of France submits, *inter alia*, that there is no impediment to Mr Mbarushimana's return to France, upon release").

⁶⁷ ICC-01/04-01/10-408, confidential annex 1.

⁶⁸ See 19 May 2011 Decision, para. 31.

⁶⁹ ICC-01/04-01/10-408, confidential annex 2.

⁷⁰ Third Release Request, paras 10-11.

Postponement Decision is a “concession for the benefit of the Prosecution team alone”.⁷¹ The Defence insists that it did nothing to contribute to the postponement of the confirmation hearing and the extension of the suspect’s pre-trial detention, alleging that: (i) the Defence is under no obligation to assist the Prosecutor in complying with court orders so that he can be in a better position to convict the suspect,⁷² (ii) the Defence had no reason to believe, as of 28 June 2011, that the Prosecutor would fail to abide by its undertaking to communicate the Kinyarwanda transcripts it had promised⁷³ and (iii) the Defence filed the Witness Statement Exclusion Request promptly after the deadline had passed for the Prosecutor to file new evidence before the confirmation hearing.⁷⁴

28. In his discussion of the Third Release Request, Mr Mabanga’s Observations note that any procedural delay imputable to the Prosecutor does not automatically lead to a suspect’s release under article 60(4) of the Statute.⁷⁵ Mr Diakiese’s Observations argue that no inexcusable delay has occurred because the suspect’s detention has been regularly reviewed and no changed circumstances justifying a modification of detention have occurred.⁷⁶

29. In their discussion of the Third Release Request, the OPCV argues that the Defence “without any doubt” contributed substantially to the delay caused by the Postponement Decision and that this makes it impermissible to conclude that there has been inexcusable delay under article 60(4) of the Statute.⁷⁷

30. In the Prosecutor Article 60(4) Observations, the Prosecutor: (i) argues that, given the typical length of proceedings before this Court and other international tribunals, the

⁷¹ *Ibid.*, para. 7. But see “Defence Response to the Prosecution’s filing of an amended list of evidence in compliance with decision ICC-01/04-01/10-378”, 5 September 2011, ICC-01/04-01/10-398, para. 5 (Defence acknowledgment that “the decision postponing the confirmation hearing was designed to protect Mr. Mbarushimana’s rights”).

⁷² Third Release Request, para. 3.

⁷³ *Ibid.*, para. 4.

⁷⁴ *Ibid.*, paras 4, 9. The deadline was 2 August 2011, which was, pursuant to rule 121(5) of the Rules of Procedure and Evidence, fifteen days before the confirmation hearing’s commencement as it was formerly scheduled.

⁷⁵ Mr Mabanga’s Observations, paras 29-30.

⁷⁶ Mr Diakiese’s Observations, para. 28.

⁷⁷ OPCV Observations, para. 23.

detention of the suspect is “not unreasonable by any definition”,⁷⁸ (ii) submits that the Prosecutor’s witness statement disclosure was not manifestly unreasonable, as it met the literal requirements of the Language Proficiency Decision, the Statute, and the Rules of Procedure and Evidence (“Rules”)⁷⁹ and (iii) argues that the Defence’s deliberate conduct, or at least lack of due diligence, in delaying the filing of the Witness Statement Exclusion Request made the postponement delay attributable to the Defence and not the Prosecutor.⁸⁰

31. The French Republic and the Kingdom of the Netherlands make identical observations on both the Article 60(3) Review and the Third Release Request.⁸¹

32. In the Defence Reply, the Defence reiterates its position that it is not responsible for the events that led the Chamber to postpone the confirmation hearing.⁸² The Defence also mentions that the Prosecutor failed to disclose other evidence beyond translated statements before the disclosure deadline⁸³ and argues that the thirty day postponement of the confirmation hearing unreasonably prolonged the suspect’s detention.⁸⁴

Applicable Law

33. The Chamber takes note of articles 21, 55, 58, 60, 66 and 67 of the Statute and rules 76, 118 and 119 of the Rules.

34. At the outset, the Chamber recalls the following passage from the 19 May 2011 Decision:

[...] 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, 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” and, thus, “pre-trial detention [...] shall only be

⁷⁸ Prosecutor Article 60(4) Observations, para. 14.

⁷⁹ *Ibid.*, para. 19.

⁸⁰ *Ibid.*, paras 22-29.

⁸¹ ICC-01/04-01/10-414, confidential annex 2 and public annex 3.

⁸² Defence Reply, para. 2.

⁸³ *Ibid.*, para. 2.

⁸⁴ *Ibid.*, para. 3.

resorted to when the Pre-Trial Chamber is satisfied that the conditions set forth in article 58 (1) of the Statute are met".⁸⁵

Applicable law for making a determination under article 60(3) of the Statute

35. In accordance with article 60(3) of the Statute, the Pre-Trial Chamber is required to periodically review its determination on the release or detention of the person. In doing so, the Chamber must satisfy itself that the conditions under article 58(1) of the Statute, as examined in its previous ruling, continue to be met.⁸⁶

36. The Article 60(3) Review does not require a review of the decision on detention *ab initio*.⁸⁷ In conducting this review, the Chamber needs only to determine whether there has been a change in the circumstances underpinning the ruling and whether there are any new circumstances that have a bearing on the conditions set forth in article 58(1) of the Statute.⁸⁸ As the Appeals Chamber has stated, "the requirement of 'changed circumstances' imports either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary."⁸⁹ Furthermore, the Chamber must consider all available information when assessing changed circumstances and should not restrict itself to only considering the arguments of the detained person.⁹⁰

Applicable law for making a determination under article 60(4) of the Statute

37. A determination pursuant to article 60(4) of the Statute ("Article 60(4) Determination") is independent of an Article 60(3) Review in the sense that, even if a detainee is found to be appropriately detained pursuant to an Article 60(3) Review, the Pre-Trial Chamber shall consider releasing the detainee under article 60(4) of the Statute if

⁸⁵ 19 May 2011 Decision, para. 33 (further citations omitted).

⁸⁶ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled 'Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence'", 19 November 2010, ICC-01/05-01/08-1019 (OA4) ("Bemba OA4 Judgment"), para. 52.

⁸⁷ Bemba OA4 Judgment, para. 53.

⁸⁸ Article 60(3) of the Statute; Bemba OA4 Judgment, para. 52.

⁸⁹ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber 11'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 (OA2) ("Bemba OA2 Judgment"), para. 60.

⁹⁰ Bemba OA4 Judgment, para. 52.

the detainee is detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor.⁹¹ The relevant detention period for an Article 60(4) Determination commences as soon as someone is detained as part of the process for bringing that person to justice for the crimes that form the subject-matter of the proceedings before the Court.⁹²

38. An Article 60(4) Determination involves two main components: (i) a determination as to whether the overall period of pre-trial detention has been “unreasonable” and, (ii) if this is the case, then there is a need to consider whether this unreasonably long detention was caused by an “inexcusable delay” attributed to the Prosecutor.⁹³ The unreasonableness of any period of detention prior to trial cannot be determined in the abstract, but has to be determined on the basis of the circumstances of each case.⁹⁴ The complexity of the case is particularly important when making this determination.⁹⁵ If the period of detention is not considered to be unreasonable, then the question of inexcusable delay becomes moot.⁹⁶

⁹¹ See *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 ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’”, 13 February 2007, ICC-01/04-01/06-824 (OA7) (“Lubanga OA7 Judgment”), para. 120; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III, 16 December 2008, ICC-01/05-01/08-321 (“16 December 2008 Bemba Decision”), para. 44.

⁹² Lubanga OA7 Judgment, para. 121. See also *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, “Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006”, 14 December 2006, ICC-01/04-01/06-772 (OA4), para. 44.

⁹³ 16 December 2008 Bemba Decision, para. 45.

⁹⁴ Lubanga OA7 Judgment, para. 122; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, “Review of the ‘Decision on the Application for Interim Release of Mathieu Ngudjolo Chui’”, 23 July 2008, ICC-01/04-01/07-694 (“23 July 2008 Ngudjolo Decision”), p. 11. This requirement is consistent with human rights law. See ECtHR, Grand Chamber, *Case of Bykov v. Russia*, “Judgment”, 10 March 2009, application no. 4378/02, paras 62-63 (must examine all the facts to determine if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty); ECtHR, *Case of Wiensztal v. Poland*, “Judgment”, 30 May 2006, application no. 43748/98, para. 50; ECtHR, *Case of Van der Tang v. Spain*, “Judgment”, 13 July 1995, application no. 19382/92 (finding no human rights violation occurred for a delay of just over three years).

⁹⁵ 23 July 2008 Ngudjolo Decision, pp. 10-11 n. 30; *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, “Decision on the Application for the interim release of Thomas Lubanga Dyilo”, 30 October 2006, ICC-01/04-01/06-586-tEN, p. 7. Without commenting on the weight to be given to this factor, the Appeals Chamber has acknowledged that the complexity of the case may be taken into consideration for an Article 60(4) Determination in Lubanga OA7 Judgment, para. 123.

⁹⁶ Lubanga OA7 Judgment, para. 124; 16 December 2008 Bemba Decision, para. 47; 23 July 2008 Ngudjolo Decision, p. 12.

Discussion

Article 60(3) Review

39. For purposes of the Article 60(3) Review below, the Chamber recalls and incorporates by reference the factual findings made in the 19 May 2011 Decision.⁹⁷

Circumstances grounding the previous finding that continued detention of Mr Mbarushimana appears necessary to ensure his appearance at trial (article 58(1)(b)(i) of the Statute)

40. In making the previous ruling on detention, the Chamber considered that detention appeared necessary to ensure the suspect's appearance at trial due to: (i) the gravity of the crimes alleged against the suspect and his knowledge thereof, (ii) the 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.⁹⁸

Whether circumstances have changed

41. The Chamber will now evaluate, on the basis of the totality of circumstances and all submissions, whether the circumstances grounding the Chamber's previous ruling on detention have changed in a way that satisfies the Chamber that detention no longer appears necessary to ensure the suspect's appearance at trial.

42. Turning to this evaluation, the Chamber notes that none of the charges analysed by the Chamber in the Decision on Warrant of Arrest have been withdrawn or substantially modified since the 19 May 2011 Decision, meaning that the gravity of the crimes and the possibility of lengthy imprisonment remain unchanged. As noted by legal representative Mr Mabanga and the Prosecutor, the FDLR are still operational⁹⁹ and the Chamber does

⁹⁷ 19 May 2011 Decision, paras 45-66.

⁹⁸ *Ibid.*, para. 59.

⁹⁹ See Prosecutor Article 60(3) Observations, annex 1, part II (providing citations to eighteen civilian attacks alleged to be attributable to the FDLR in 2011, including four incidents since 19 May 2011). See also United Nations Security Council, Interim report of the Group of Experts on the DRC submitted in accordance with paragraph 5 of Security Council resolution 1952 (2010), 7 June 2011, S/2011/345 ("7 June 2011 UNSC Report"), paras 32-33 (describing recent FDLR activity and calling them "militarily the strongest armed group in the Democratic Republic of the Congo"); United Nations Security Council, Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, 12 May 2011, S/2011/298, paras 14, 52 (though their numbers have "decreased slightly" in recent months and some

not consider that the risk of the suspect using international FDLR contacts and freedom of movement in the Schengen area to abscond is appreciably less now than it was on 19 May 2011. As correctly pointed out in the OPCV Observations, the disclosure process is more advanced than it was as of 19 May 2011; the confirmation hearing is now imminent and the Prosecutor has made recent disclosures of incriminating evidence in a language the suspect fully understands and speaks.¹⁰⁰ The suspect has an even clearer understanding of the evidence against him now than he did on 19 May 2011, and therefore the risk that he may not appear at trial has, if it has changed at all, increased in the last 120 days. The observations by the Republic of France and the Kingdom of the Netherlands are essentially identical to the observations considered in the 19 May 2011 Decision, and neither State identifies anything that would qualify as a changed circumstance justifying modification of its previous ruling on detention.¹⁰¹

43. Additionally, the Chamber notes that the OPCV Observations consider the Defence allegations made in the Second Release Request. It is plainly evident that the issues raised in the Second Release Request are irrelevant to the conditions set forth in article 58(1) of the Statute and were only advanced by the Defence with the aim of reconsidering issues that had been addressed by the Chamber multiple times before.¹⁰² Even if the Defence arguments in the Second Release Request were to be reconsidered and unconditionally accepted, a finding that the case against Mr Mbarushimana was inadmissible from September 2010 to December 2010 would not mean that the suspect is *presently* any less of a flight risk, less likely to obstruct or interfere with the investigation or less likely to commit additional crimes within the jurisdiction of the Court. The Defence conceded in the Second Release Request that the German investigation concluded in December 2010,¹⁰³

“officers” have left the group, the FDLR has continued recruitment of new members); United Nations Security Council, “Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo”, 17 January 2011, S/2011/20, para. 9 (“the FDLR military leadership structure remained largely intact” despite recent military and judicial pressure).

¹⁰⁰ See “Prosecution’s filing of amended list of evidence in compliance with decision ICC-01/04-01/10-378”, 30 August 2011, ICC-01/04-01/10-392 (noting disclosure of Kinyarwanda witness statements, or French summaries thereof, to the Defence).

¹⁰¹ Though this sentence appears in the section ensuring the suspect’s appearance at trial, the Chamber considers that the determination made in the sentence is equally applicable across all article 58(1) conditions.

¹⁰² See *supra*, footnote 13.

¹⁰³ Second Release Request, para. 10.

meaning that any bearing the German investigation could conceivably have had on the existence or absence of the article 58(1) conditions were already moot at the time of the Second Release Request.

44. In agreement with the Prosecutor and victims that have communicated with the Court, the Chamber finds that there has been no change in circumstances justifying a modification of the Chamber's finding that the suspect's detention appears necessary to ensure the suspect's appearance at trial.

Circumstances grounding the previous finding that 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)

45. In making the previous ruling on detention, the Chamber considered that the suspect's detention appeared necessary to ensure that the suspect did not obstruct or endanger the investigation or the court proceedings. This finding was premised on: (i) evidence found at the suspect's residence that suggests that a source within the United Nations Organization Mission in the Democratic Republic of the Congo ("MONUC" or "MONUSCO") was leaking information to the FDLR, creating a risk that the suspect could use this information to interfere with the investigation if released,¹⁰⁴ (ii) the fact that the FDLR is still active in the Eastern DRC¹⁰⁵ and (iii) evidence suggesting that the suspect was intending to publish the names of witnesses testifying against the FDLR in Germany in order to intimidate them.¹⁰⁶

Whether circumstances have changed

46. The Chamber will now evaluate, on the basis of the totality of circumstances and all submissions, whether the circumstances grounding its previous ruling on detention have changed in a way that satisfies the Chamber that detention no longer appears necessary to

¹⁰⁴ 19 May 2011 Decision, paras 62-63. See also Mbarushimana OA Judgment, para. 46 (outlining MONUC's role in the Democratic Republic of the Congo and agreeing with the Prosecutor that part of MONUC's mandate is provide security to civilians against, *inter alia*, attacks from the FDLR).

¹⁰⁵ 19 May 2011 Decision, para. 63.

¹⁰⁶ *Ibid.*, para. 64.

ensure that the suspect does not obstruct or endanger the investigation or court proceedings.

47. Turning to this evaluation, the Chamber notes that MONUSCO is still active in the Eastern DRC¹⁰⁷ and has had its mandate extended to 30 June 2012;¹⁰⁸ there is thus no evidence to suggest that the source leaking information to the FDLR is no longer capable of assisting the suspect in interfering with the investigation in the DRC. The FDLR are also still active in the Eastern DRC, and there remains a risk that the suspect could forward information to FDLR compatriots which could be used to interfere with the ongoing investigation.¹⁰⁹ There is also no evidence to suggest that the suspect's predisposition to intimidate witnesses, as was demonstrated by evidence of his intentions to publish the names of witnesses testifying against the FDLR in German proceedings,¹¹⁰ has decreased in the last 120 days.

48. In agreement with the Prosecutor and victims that have communicated with the Court, the Chamber finds that there has been no change in circumstances justifying a modification of the Chamber's finding that the suspect's detention appears necessary to ensure that the suspect does not obstruct or endanger the investigation or court proceedings.

Circumstances grounding the previous finding that 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)

49. In making its previous ruling on detention, the Chamber found that the suspect's detention appeared necessary in view of the risk that further crimes within the jurisdiction of the Court would be committed should he be released. This finding was based on: (i) the

¹⁰⁷ See 7 June 2011 UNSC Report. See especially *Ibid.*, paras 32-34 (outlining recent MONUSCO efforts in response to the FDLR).

¹⁰⁸ United Nations Security Council Resolution 1991, S/RES/1991 (2011).

¹⁰⁹ See *supra*, footnote 99. See also 19 May 2011 Decision, para. 65 (concluding detention appeared necessary on the basis that a concrete possibility of obstruction existed, even though there was no evidence of past instances where the suspect obstructed or endangered investigations or court proceedings).

¹¹⁰ 19 May 2011 Decision, para. 64.

mode of liability attributed to the suspect, according to which he was allegedly contributing to crimes in a way that does not require his physical presence at the scene of the crime, (ii) the fact that the situation in the Eastern DRC remains volatile and (iii) the suspect's information technology experience and his ability to have internet and telephone access in ways that cannot be easily monitored or controlled.¹¹¹

Whether circumstances have changed

50. The Chamber will now evaluate, on the basis of the totality of circumstances and all submissions, whether the circumstances grounding its previous ruling on detention have changed in a way that satisfies the Chamber that detention no longer appears necessary to ensure that the suspect is prevented 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.

51. Turning to this evaluation, the Chamber notes that the mode of liability alleged in this case, namely contributing to a crime pursuant to article 25(3)(d) of the Statute, has not changed since 19 May 2011; the suspect faces allegations that he was able to contribute to crimes committed in the DRC from Europe and there remains a risk that he could continue to make such contributions if released. There is no evidence that the Eastern DRC has become significantly less volatile in the last 120 days.¹¹² There is also no evidence to suggest that the risk of the suspect contributing to crimes through telephones and emails in a way difficult to be monitored or controlled by the Chamber has decreased since the 19 May 2011 Decision was rendered.

52. In agreement with the Prosecutor and victims that have communicated with the Court, the Chamber finds that there has been no change in circumstances justifying a modification of the Chamber's finding that the suspect's detention appears necessary to ensure that the suspect is prevented 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.

¹¹¹ *Ibid.*, para. 66.

¹¹² See *supra*, note 99.

Conclusion

53. The Chamber finds that there has been no change in circumstances justifying a modification of its previous ruling on detention. There are no changes in the facts underlying the previous ruling or any new facts that the Chamber is aware of that justify a modification of its previous ruling. Based on the same analysis of changed circumstances listed above and recalling paragraphs 67-68 of the 19 May 2011 Decision, the Chamber also finds that conditional release would still be insufficient to prevent the risk that the suspect could obstruct the proceedings or commit additional crimes.

Article 60(4) Determination

Whether the period of detention has been unreasonable

54. The Chamber notes that the relevant detention period in this case is from 11 October 2010 to the present, which is slightly more than eleven months.

55. The Chamber agrees with the Prosecutor and considers this length of detention not to be unreasonable on the facts of this case. First, as observed above, the suspect faces very serious charges and there is a persistent risk that he may abscond or obstruct proceedings if released. Second, this case is quite complex when considering that: (i) there are over a dozen international crimes alleged across a variety of crime bases, (ii) the suspect's alleged contribution occurs a significant distance from the crime scenes and raises novel issues as one of the first cases presented to the Court relying on article 25(3)(d) of the Statute to establish criminal responsibility and (iii) there is an enormous amount of evidence sought to be relied upon in this case which has been obtained as a result of an investigation across at least three countries. Third, the first postponement in the case was caused by technical difficulties in processing a significant amount of potentially privileged evidence.¹¹³ These difficulties were determined not to be the Prosecutor's fault,¹¹⁴ and the Chamber considers that the delay caused by the 31 May 2011 Decision reasonably extended the suspect's detention. Fourth, the recent Postponement Decision, which is notably the only delay the Defence focuses upon in the Third Release Request and the Defence Reply, only delayed

¹¹³ 31 May 2011 Decision.

¹¹⁴ *Ibid.*, at p. 9.

the confirmation hearing by one month. The Chamber was mindful of the need to conduct the proceedings expeditiously and of the fact that the suspect was being detained when selecting an appropriate date to reschedule the confirmation hearing, as evidenced by the fact that the Prosecutor was only given fifteen days to summarise or translate almost 2700 pages of witness interviews.¹¹⁵ Moreover, and as discussed below, the delay caused by the Postponement Decision is significantly attributable to Defence counsel.

56. Based on the above, the Chamber finds that the suspect has not been detained for an unreasonable period of time in this case.

Whether there has been an inexcusable delay attributable to the Prosecutor

57. Even though the fact that the period of detention is not unreasonable renders any question of inexcusable delay moot, the Chamber nevertheless deems it appropriate, in the present case, to examine whether an inexcusable delay attributable to the Prosecutor has occurred. The Chamber will proceed by looking at the delays in the proceedings allegedly caused by the Prosecutor's conduct in context in order to determine if the Prosecutor has behaved in a way so lacking in justification that release of the suspect becomes appropriate. Given that there have been two delays to the commencement of the confirmation hearing purportedly attributable to the Prosecutor and that the Chamber already found in the 31 May 2011 Decision that the Prosecutor bore "no responsibility" for the first delay,¹¹⁶ the Chamber will focus on the delay created by the Postponement Decision.

58. As a preliminary issue, the Chamber notes that the Defence alleges in the Defence Reply that the Prosecutor allegedly had not disclosed other evidence besides the translations of the witness interview transcripts.¹¹⁷ Even if the Defence allegation was assumed to be correct, the Chamber considers this argument to be irrelevant to the present analysis because the only disclosure issue before the Chamber when deciding the Postponement Decision was the issue of the translations of the interview transcripts.

¹¹⁵ Postponement Decision, para. 13, p. 12.

¹¹⁶ 31 May 2011 Decision, p. 9.

¹¹⁷ Defence Reply, para. 2.

59. Turning to the Prosecutor's role in the recent delay in proceedings, and contrary to what the Defence repeatedly argues, the Postponement Decision only found that the Prosecutor's actions violated the "rationale", as opposed to the letter, of the Language Proficiency Decision and rule 76(3) of the Rules.¹¹⁸ The Chamber notes that, by promising to disclose Kinyarwanda transcripts of the interviews "in due course", the Prosecutor demonstrated awareness that he had an obligation in this specific case to disclose transcripts in Kinyarwanda or French translation to enable the Defence to adequately prepare for the confirmation hearing.¹¹⁹ However, the Prosecutor evidently believed that he had made the "statements" of Prosecution witnesses sufficiently available to the Defence in a language the suspect fully understands and speaks, as required by the Language Proficiency Decision and rule 76(3) of the Rules, by disclosing Kinyarwanda audio with English transcripts before the confirmation hearing.¹²⁰ The Chamber declined to examine such an interpretation in the Postponement Decision;¹²¹ instead, the Chamber based its finding on the fact that these witness statements had not been disclosed to the Defence in a way that allowed them to meaningfully prepare their Defence as required by article 67(1) of the Statute.¹²² Thus, the Prosecutor was found to have contributed to the delay created by the Postponement Decision by engaging in a course of conduct that, though arguably compliant with the Language Proficiency Decision and rule 76(3) of the Rules, had the result of violating the rights of the Defence under article 67(1)(b) of the Statute. The Chamber is of the view that the Prosecutor did not deliberately, or through gross negligence, violate the Statute, the Rules or an order of the Chamber.

60. Moreover, the Chamber considers that the Defence also contributed to the delay caused by the Postponement Decision by not immediately alerting the Chamber that they were unable to process the evidence being disclosed to them. The Chamber is not at all persuaded by the Defence arguments that they were justified in filing the Witness

¹¹⁸ Postponement Decision, para. 20.

¹¹⁹ *Ibid.*, para. 21.

¹²⁰ See ICC-01/04-01/10-353, para. 11; Prosecutor Article 60(4) Observations, para. 19.

¹²¹ *Ibid.*, para. 22 n. 36 ("The Chamber declines to examine the issue as to whether the Prosecutor in another case could satisfy its disclosure obligations under rule 76(3) of the Rules by disclosing evidence in only audio format").

¹²² *Ibid.*, para. 22.

Statement Exclusion Request when they did. As the Chamber noted in the Postponement Decision, the Defence failed to exercise due diligence in presenting the Witness Statement Exclusion Request in a timely manner.¹²³

61. First, contrary to the argument made in the Third Release Request,¹²⁴ the Chamber did not expect the Defence to raise the disclosure issues earlier to assist the Prosecutor's efforts to convict the suspect. Rather, an earlier intervention by the Chamber was required because the Defence was asking for an extreme remedy (exclusion of the evidence), there was disagreement as to whether a disclosure violation occurred and, as mentioned in the Postponement Decision, the "prolonged lack of reaction on the part of the Defence to what it perceived as a breach of its procedural rights could be legitimately regarded by the Prosecutor as a tacit approval of the manner in which the disclosure was effected."¹²⁵

62. Second, the facts suggest that the Defence actually had strong reasons to believe that the Prosecutor was unlikely to provide any additional transcript translations as early as 28 June 2011, or shortly thereafter. The Defence communication with the Prosecutor in late June 2011 put them on notice that no further disclosure was forthcoming as of that time.¹²⁶ Then, after *doing nothing about this problem for over a month*, the Defence asked the Chamber for relief at a point where supplemental disclosure was impossible and exclusion of the relevant pieces of evidence was the only available remedy short of postponement.

63. Third, subsequent events since the Postponement Decision suggest that the Defence's Witness Statement Exclusion Request misled the Chamber as to the extent of the difficulties the Defence was having in processing the interview transcripts in English only. After the Prosecutor disclosed several French interview summaries¹²⁷ by the deadline of 31 August 2011 imposed by the Postponement Decision, the Defence in fact added nearly all of the excluded witness statements onto the Defence list of evidence on 9 September

¹²³ Postponement Decision, para. 19.

¹²⁴ Third Release Request, para. 3.

¹²⁵ Postponement Decision, para. 17.

¹²⁶ See Witness Statement Exclusion Request, paras 3-4. See also Prosecutor Article 60(4) Observations, confidential annex 1 (containing full email exchange).

¹²⁷ ICC-01/04-01/10-392.

2011.¹²⁸ The Defence's newfound appreciation for the full, English only interview transcripts suggests that the confirmation hearing was postponed on the basis of problems the Defence overstated.

64. Under the circumstances, the Chamber considers it entirely inappropriate to release the suspect pursuant to an Article 60(4) Determination when so much of the delay at issue was a result of the Defence's actions.

65. In view of his actions in context, the Chamber determines that the Prosecutor has not behaved so unjustifiably that the Chamber finds it necessary to consider releasing the suspect. The Chamber finds that no inexcusable delay attributable to the Prosecutor has occurred within the meaning of article 60(4) of the Statute.

Conclusion

66. 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.

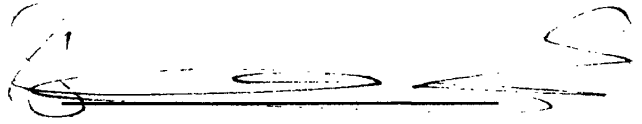
FOR THESE REASONS, THE CHAMBER:

DECIDES that Mr Callixte Mbarushimana shall continue to be detained; and

REJECTS the Third Release Request.

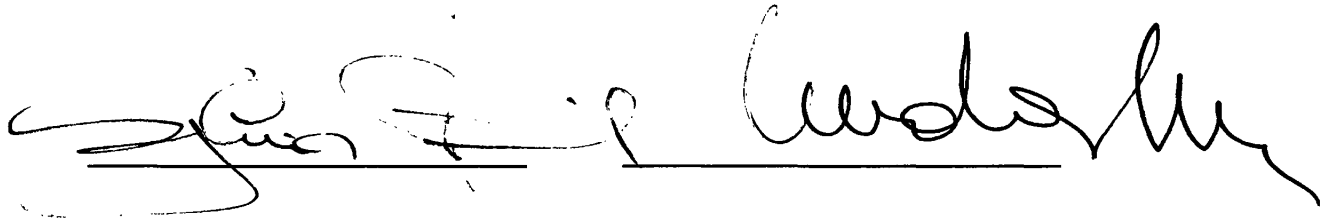
¹²⁸ "Defence Submission of an Updated List of Evidence", ICC-01/04-01/10-405, corrigendum to confidential annex A. See also "Decision on amended list of evidence", 12 September 2011, ICC-01/04-01/10-419, p. 5 (considering that the Defence included in its updated list of evidence "substantially the same Witness Statements it had previously sought to exclude").

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



Judge Sanji Mmasenono Monageng

Presiding Judge



Judge Sylvia Steiner

Judge Cuno Tarfusser

Dated this Friday, 16 September 2011

At The Hague, The Netherlands