Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/04-01/10**
Date: **2 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 Document

Observations of the Office of Public Counsel for Victims as Legal Representative of the Applicants on the Second and Third Defence requests for release dated 20 July and 19 August 2011

Source: **Office of Public Counsel for Victims**

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

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I. BACKGROUND

1. On 28 September 2010, Pre-Trial Chamber I issued a warrant of arrest against Mr Callixte Mbarushimana for eleven counts of war crimes and crimes against humanity.[1]

2. On 11 October 2010, Mr Mbarushimana was arrested in France pursuant to said arrest warrant and surrendered to the Court on 25 January 2011.

3. In its decision of 19 May 2011,[2] the Chamber denied the Defence request for Mr Mbarushimana's release, finding in particular 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."[3]

4. In its judgment of 14 July 2011,[4] the Appeals Chamber wholly affirmed said findings on the need for Mr Mbarushimana's continued detention.[5]

5. On 20 July 2011, the Defence filed its "Second Defence request for interim release"[6] ("the Second Request for Release").

6. On 18 August 2011, the Chamber invited the Office of Public Counsel for Victims ("the OPCV") to submit its views on the detention of Mr Mbarushimana on behalf of unrepresented applicants by 2 September 2011.[7]

7. On 19 August 2011, the Defence filed its "Third Defence request for release"[8] ("Third Request for Release").

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[1] See *Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana*, (Pre-Trial Chamber I), No. ICC-01/04-01/10-1, 28 September 2010, pp. 27 and 28.
[2] See *Decision on the "Defence Request for Interim Release"* (Pre-Trial Chamber I), No. ICC-01/04-01/10-163, 19 May 2011 ("the Decision on Release").
[3] *Idem*, para. 69.
[4] See *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'"*, (Appeals Chamber), No. ICC-01/04-01/10-283 OA, 14 July 2011.
[5] *Idem*, para. 63.
[6] See "Second Defence request for interim release", No. ICC-01/04-01/10-294, 20 July 2011 (the "Second Request for Release").
[7] See *Decision on "Defence request for an extension of the time-limit to submit observations on interim release" and request for OPCV observations* (Pre-Trial Chamber I), No. ICC-01/04-01/10-381, 18 August 2011, p. 5.

8. That same day, the Chamber invited the OPCV to submit its views on the Third Request for Mr Mbarushimana's release on behalf of unrepresented applicants by 9 September 2011.[9]

9. Accordingly, the OPCV, as legal representative of the unrepresented applicants ("the Legal Representative"), hereby submits the following views on the Second and Third Requests for Mr Mbarushimana's release.

II. THE OPCV'S VIEWS

10. Article 60(3) of the Rome Statute binds the Pre-Trial Chamber to periodically review its ruling on release or detention and, upon such review, to modify it "*if it is satisfied that changed circumstances so require*". At the same time, article 60(2) of the Statute prescribes the continued detention of the person "[*i*]*f the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met*". In this regard, the established jurisprudence of the Court holds that: "[t]he 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".[10]

11. The Legal Representative submits that Mr Mbarushimana must remain in detention since the conditions of article 58(1) of the Rome Statute continue to be met and there has been no change within the meaning of article 60(3) of the Statute in respect of the circumstances as established by the Chamber in the Decision on Release,[11] the most recent ruling of the Chamber on the matter.

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[8] See "Third Defence request for release", ICC-01/04-01/10-383, 19 August 2011, ("the Third Request for Release").

[9] See *Decision requesting observations on the "Third Defence request for interim release"* (Pre-Trial Chamber I), ICC-01/04-01/10-384, 19 August 2011, p. 4.

[10] See *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"* (Appeals Chamber), No. ICC-01/05-01/08-631-Red OA2, 2 December 2009, paras. 1 and 60. See also *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* (Trial Chamber III), No. ICC-01/05-01/08-743, 1 April 2010, para. 26.

[11] See Decision on Release, *supra* footnote 3.

12. In the Decision on Release, the Chamber found, in particular, that: "[i]n view of […] (i) the gravity of the crimes alleged against Mr Mbarushimana and his knowledge thereof at this stage, (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, the continued detention of Mr Mbarushimana appears necessary to ensure his appearance at trial."[12] The Chamber further determined 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", particularly since "[t]he 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."[13] Lastly, the Chamber found that "the risk of Mr Mbarushimana's continuing to contribute to the commission of the crimes detailed in the Arrest Warrant 'by organising and conducting an international campaign through media channels' continues to exist", particularly in view of "(i) the mode of liability attributed to Mr Mbarushimana, which does not require his physical presence at the scene of the crime; (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".[14]

13. In its Second Request for Release, the Defence argued in particular: (i) that the Chamber must order Mr Mbarushimana's release on grounds of inadmissibility of the case against him at the time of issuance of the warrant for his arrest, on account of contemporaneous German investigations into the crimes charged in the warrant

[12] *Idem*., para. 59.
[13] *Ibid*., para. 65.
[14] *Ibid*., para. 66.

of arrest;[15] (ii) the Chamber declined to rule whether or not there was an ongoing investigation in Germany at the time the Prosecutor applied to the Pre-Trial Chamber for a warrant of arrest;[16] and (iii) that the inadmissibility of the case against Mr Mbarushimana at the time of his arrest is a changed circumstance under article 60(3) of the Statute.[17]

14. In this regard, the Legal Representative submits that the sole ground advanced by the Defence in support of its Second Request for Release is the inadmissibility of the case against Mr Mbarushimana at the time of his arrest on account of the existence, at the time of the events, of contemporaneous German investigations into the crimes alleged in the warrant of arrest. However, this ground does not in any way constitute a sufficient basis for the Chamber to modify its ruling on the suspect's detention. Indeed, the admissibility of a case is not a substantive requisite for the issuance of a warrant of arrest,[18] nor, by analogy, for the detention of the suspect under article 58(1) of the Rome Statute. Moreover, there is no real or objective basis for the Defence allegations which have never been substantiated, and are therefore pure speculation.

15. Furthermore, these allegations have been submitted to the Chamber for consideration on numerous occasions and it has always reiterated that they (i) have already been adjudged in previous decisions of the Chamber;[19] (ii) are an insufficient basis for the Chamber to reconsider its ruling on Mr Mbarushimana's detention

[15] See Second Request for Release, *supra* footnote 6, paras. 1 and 7.
[16] *Idem*, para. 8.
[17] *Ibid*., para. 19(c).
[18] See *Decision on the Defence Challenge to the Validity of the Arrest Warrant* (Pre-Trial Chamber I), No. ICC-01/04-01/10-50, 28 January 2011, paras. 10 and 11.
[19] See *Décision on "Second Defence request for interim release"* (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/10-319, 28 July 2011, p. 6.

under article 60(3) of the Rome Statute;[20] and (iii) were without merit and/or amounted to speculation.[21]

16. The mere fact that in its Second Request for Release the Defence moved the Chamber to determine the admissibility of the case against Mr Mbarushimana at the time of his arrest[22] is not of itself sufficient for the Chamber to review the Decision on Release. On the contrary, since the Defence has failed to demonstrate any changed circumstances as laid down in the said decision, Mr Mbarushimana's continued detention remains necessary for the reasons set forth by the Chamber, and, to say the least, for the duration of article 19 proceedings, if any.

17. It follows that the Defence Second Request for Release fails to provide any evidence of changed circumstances within the meaning of article 60(3) of the Rome Statute, or any new fact for the Chamber to modify its previous ruling on Mr Mbarushimana's detention.

18. In its Third Request for Release, the Defence prayed the Chamber to consider Mr Mbarushimana's release, with or without conditions, describing the delay to the start of the confirmation hearing as "inexcusable" within the meaning of article 60(4) of the Rome Statute.[23]

19. The Legal Representative observes that, pursuant to article 60(4) of the Rome Statute, the Pre-Trial Chamber may only consider the possibility of releasing Mr Mbarushimana, with or without conditions, if he is detained for an unreasonable period prior to trial "due to inexcusable delay by the Prosecutor". Yet, in its 16

[20] *Idem*., pp. 5 to 6.
[21] See *Decision on the "Defence request for a permanent stay of proceedings"* (Pre-Trial Chamber I), No. ICC-01/04-01/10-264, 1 July 2011, pp. 5 to 6. See also *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)* (Pre-Trial Chamber I), No. ICC-01/04-01/10-288, 15 July 2011, pp. 6 and 7.
[22] See Second Request for Release, *supra* footnote 6, para. 19(a).
[23] See Third Request for Release, *supra* footnote 8.

August 2011 decision,[24] the Chamber postponed the commencement of the confirmation hearing not only on account of the Prosecutor's failure to disclose material, but on the further ground that "the Defence failed to exercise due diligence in asserting its right to receive witnesses' statements in a language which the suspect fully understands and speaks. The request for exclusion of the evidence affected by the issue identified by the Defence was not filed in a timely manner".[25]

20. The Legal Representative recalls, as has the Chamber,[26] the established jurisprudence of the Court on the matter:

> […] a party to a proceeding who claims to have an enforceable right must exercise due diligence in asserting such a right. This is as it should be in order for the Trial Chamber to take account of the interests of the other parties to and participants in the proceedings and of the statutory injunction for fairness and expeditiousness. The Appeals Chamber agrees with the Trial Chamber's conclusion that parties must submit motions that have repercussions on the conduct of the trial in "a timely manner". The Appeals Chamber interprets 'timely manner' to mean that the parties must act within a reasonable time. However, what is reasonable or unreasonable in relation to time always turns on all the circumstances of the case, including the conduct of the person seeking the Court's assistance. [27]

21. Furthermore, under international human rights jurisprudence, judicial authorities, when determining the reasonableness of pre-trial detention of suspects or accused, should consider, *inter alia*, the conduct of the proceedings[28] and the conduct of the accused.[29] In particular, the International Criminal Tribunal for the former Yugoslavia has held that "the conduct of both parties can cause the trial of an Accused to be unduly delayed and [it is incumbent on] both parties to perform their

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[24] See *Decision on "Defence request to deny the use of certain incriminating evidence at the confirmation hearing" and postponement of confirmation hearing* (Pre-Trial Chamber I), No. ICC-01/04-01/10-378, 16 August 2011.
[25] *Idem*., para. 19.
[26] *Ibid*., para. 18.
[27] See *Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings"* (Appeals Chamber), No. ICC-01/04-01-07-2259 OA10, 12 July 2010, para. 54.
[28] See ECHR, *Barfuss v. The Czech Republic*, Application No. 35848/97, 31 July 2000, para. 72; *Toth v. Austria*, Application No. 11894/85, 12 December 1991, para. 76.
[29] See ECHR, *W. v. Switzerland*, Application No. 14379/88, 26 January 1993, para. 42; *Herczegfalvy v. Austria*, Application No. 10533/83, 24 September 1992, para. 72.

duties in a manner to expedite the proceedings so as to ensure respect of the Accused's fundamental human right to trial without undue delay" .[30]

22. In this respect, the concept of "integrity of the proceedings" encompasses much more than "fairness of the proceedings" vis-à-vis the accused[31] since it strives to safeguard not only the rights of the accused, but all the fundamental values articulated in the Rome Statute,[32] such as, *inter alia*, the protection of witnesses and victims, principles governing the effective punishment of offenders, State sovereignty[33] and the participation of victims in the Court's proceedings.[34] Furthermore, the need to preserve the integrity of the administration of justice always takes precedence over the specific interests of the parties,[35] including those of the Defence. Moreover, guarantees of a fair and impartial trial do not apply to the

[30] See ICTR, *The Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-I, *Decision on the Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings*, 23 May 2000, para. 69.

[31] See ICTY, *Prosecutor v. Zejnil Delalić*, Case No. IT-96-21-T, *Decision on Zdravko Mucić's Motion for the Exclusion of Evidence*, 2 September 1997, paras. 43 to 44 and 55. See also ICTY, *Prosecutor v. Radoslav Brjdanin*, Case No. IT-00-36-T, *Decision on the Defence "Objection to Intercept Evidence"*, 3 October 2003, para. 63. See lastly, ICTR, *The Prosecutor v. Edouard Karembera et al*., Case No. ICTR-98-44-T, *Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nairorera and Mathieu Ngirumpatse*, 2 November 2007, para. 25.

[32] The Preamble to the Rome Statute makes express reference to the victims of atrocities, the interests of the international community and the need to put an end to impunity for the perpetrators of the most serious international crimes as those fundamental values which guide States Parties to the Rome Statute. See Preamble to the Rome Statute adopted by the Assembly of States Parties on 17 July 1998, UN Doc. A/CONF.183/9, 17 July 1998.

[33] See *Decision on the admission of material from the 'bar table'* (Trial Chamber I), No. ICC-01/04-01/06-1981, 24 June 2009, para. 42. See also Trapp, K., *Excluding Evidence: The Timing of a Remedy*, unpublished manuscript (1998), Faculty of Law, McGill University, Canada, p. 21; cited in Triffterer, O., *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article,* Verlag C.H Beck, Munich, 2008, p. 1335, footnote p. 139.

[34] See Piragoff, D., "Article 69 Evidence", *in* Triffterer, O., (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article,* Verlag C.H Beck, Munich, 2008, p. 1335.

[35] See SCSL, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, *Written Reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process due to the Infringement of Principles of Nullum Crimen Sine Lege and Non-Retroactivity as to Several Counts*, Case No. SCSL-04-16-PT, 31 March 2004, para. 26.

suspect alone but also to all parties and participants in the proceedings before the Court.[36]

23. Lastly, it is for the Defence to file any motion, including for the disclosure of material, within a reasonable time limit, and with due regard to the requirements of fairness to all parties and participants as well as the requirements of a trial conducted within a reasonable time.[37] The Legal Representative submits that, irrespective of the reasons advanced by the Defence to justify the lateness of its motions to the Chamber on prosecutorial disclosure problems, it is manifest that the conduct of the Defence, when considered as a whole,[38] has undoubtedly contributed, to say the least, substantially to the situation which compelled the Chamber to postpone the commencement of the confirmation hearing "in the wake of both parties' failure to handle their pre-trial obligations in a manner befitting the professionalism demanded when letigating before the International Criminal Court".[39] This finding by the Chamber renders inadmissible any attempt by the Defence to ground its claims in an inexcusable delay to the proceedings under article 60(4) of the Rome Statute.

24. Furthermore, under international human rights jurisprudence, the following grounds may be considered "relevant" and "sufficient" to justify the continued detention of the person concerned:[40] (i) the existence and persistence of serious

[36] See *Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, (Pre-Trial Chamber I), No. ICC-01/04-135, 31 March 2006, para. 38.
[37] See *Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings*, *supra* footnote 27, paras. 38 to 49.
[38] See *Decision on "Defence request to deny the use of certain incriminating evidence at the confirmation hearing" and postponement of confirmation hearing*, *supra* footnote 24, paras. 16 to 19.
[39] *Idem*., para. 15.
[40] See ECHR, *Prencipe v. Monaco*, Application No. 43376/06, 16 July 2009, para. 74; *Tum v. Turkey*, Application No. 11855/04, 17 June 2008, para. 41; *Lelievre v. Belgium*, Application No. 11287/03, 8 November 2007, para. 92.

indications of guilt;[41] (ii) the existence of a risk of pressure being brought to bear on the witnesses and of collusion between the co-accused;[42] (iii) danger of the applicant's absconding;[43] (iv) the existence of a risk of reoffending;[44] and (v) the requirements of the investigation.[45]

25. The Legal Representative submits that all of the said grounds found the Decision on Release and confirm the lawfulness and reasonableness of Mr Mbarushimana's detention, not only in respect of the Court's legal framework, but also of universally recognised human rights principles.

26. Lastly, the Legal Representative submits that to argue changed circumstances would be to Mr Mbarushimana's detriment since the sole change to have occurred since the Decision on Release is the disclosure to the Defence of certain additional material substantiating Mr Mbarushimana's criminal responsibility. In this respect, various Chambers of the Court have ruled that the risk of a detained person absconding is heightened by the progress of the proceedings.[46] In fact, given the eleven counts of which Mr Mbarushimana stands accused, the incriminating material disclosed by the Office of the Prosecutor, and the fact that the Court's jurisdiction is

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[41] See ECHR, *Tum v. Turkey*, Application No. 11855/04, 17 June 2008, para. 41; *Mansur v. Turkey*, Application No. 16026/90, 8 June 1995, para. 56; *Tomasi v. France*, Application No. 12850/87, 27 August 1992, para. 89.

[42] See ECHR, *Contrada v. Italy*, Application No. 27143/95, 24 August 1998, para. 61; *Tomasi v. France*, Application No. 12850/87, 27 August 1992, paras. 92-95.

[43] See ECHR, *Cetin Agdas v. Turkey*, Application No. 77331/01, 19 September 2006, paras. 27-28; *Mansur v. Turkey*, Application No. 16026/90, 8 June 1995, para. 55; *Tomasi v. France*, Application No. 12850/87, 27 August 1992, para. 98 ; *Letellier v. France*, Application No. 12369/86, 26 June 1991, para. 43.

[44] See ECHR, *Paradysz v. France*, Application No. 17020/05, 29 October 2009, para. 70; *Muller v. France*, Application No. 21802/93, 17 March 1997, para. 44; *Clooth v. Belgium*, Application No. 12718/87, 12 December 1991, para. 40.

[45] See ECHR, *Lelievre v. Belgium*, Application No. 11287/03, 8 November 2007, para. 92; *Bouchet v. France*, Application No. 33591/96, 20 March 2001, para. 41.

[46] See *Decision on the review of detention of Mr Jean-Pierre Bemba Gombo pursuant to the Appeals Judgment of 19 November 2010*, No. ICC-01/05-01/08-1088, 17 December 2010, para. 40. See also *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'*, No. ICC-01/05-01/08-631-Red OA2, 2 December 2009, para. 70. See lastly the Decision on Release, *supra* footnote 3**Error! Bookmark not defined.**, para. 42.

being exercised over the most serious crimes of concern to the international community as a whole, the alleged facts are extremely serious such that Mr Mbarushimana's interim release can, under no circumstances, be justified.

27. The Legal Representative further notes – as stated in the Decision on Release[47] – that the existence of an international network of FDLR supporters able and willing to assist the suspect if need be and the existence of evidence of the suspect contemplating intimidating witnesses in the German proceedings and the evidence of him having in his possession documents obtained through leakage are factors which the Chamber should take into consideration in assessing the potential risk of Mr Mbarushimana's release to victims and witnesses and of his obstructing or endangering the proceedings.

28. Furthermore, article 68 of the Rome Statute places particular emphasis on the nature of the crime: "[…] where the crime involves sexual or gender violence or violence against children". In the instant case, many of the acts of violence of which the suspect is charged are sexual in nature, and some appear to have been committed against minors.[48]

29. Accordingly, in light of all of the foregoing arguments, the Legal Representative submits that were the Chamber to grant Mr Mbarushimana's interim release, there is no guarantee that the suspect would not abscond from the jurisdiction of the Court.

[47] See Decision on Release, *supra* footnote 3, paras. 59 and 65.
[48] See "*Document de notification des charges présenté par l'Accusation en application de l'article 61-3 du Statut de Rome*", No. ICC-01/04-01/10-311-AnxA-Red, 15 July 2011. See also "REDACTED - Defence request for disclosure of information related to the alleged victims of sexual violence", No. ICC-01/04-01/10-358-Red, 26 August 2011.

FOR THESE REASONS, the Legal Representative respectfully requests that the Chamber reject the Second and Third Defence Requests for Mr Mbarushimana's release.

[signed]

Paolina Massidda
Principal Counsel

Dated this 2 September 2011

At The Hague, the Netherlands