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No. ICC-01/04-01/10 OA
Date: 14 July 2011

THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. CALLIXTE MBARUSHIMANA

Public document

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'"

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

The Office of the Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence
Mr Nicholas Kaufman
Ms Yaël Vias Gvirsman

Registrar
Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I entitled "Decision on the 'Defence Request for Interim Release'" of 19 May 2011 (ICC-01/04-01/10-163),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The "Decision on the 'Defence Request for Interim Release'" is confirmed. The appeal is dismissed.

REASONS

I. KEY FINDING

1. In reviewing a claim that a Pre-Trial or Trial Chamber has misappreciated facts in a decision on interim release, the Appeals Chamber will defer or accord a margin of appreciation both to the inferences the Chamber drew from the available evidence and to the weight it accorded to the different factors militating for or against detention. The Appeals Chamber will not interfere with a Pre-Trial or Trial Chamber's evaluation of the evidence just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case of a clear error, namely where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it.

II. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

2. On 20 August 2010, the Prosecutor submitted an application for a warrant of arrest for Mr Callixte Mbarushimana.[1]

3. On 28 September 2010, the Pre-Trial Chamber rendered the "Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana"[2] in which Pre-Trial Chamber I (hereinafter: "the Pre-Trial Chamber") found that there were reasonable grounds to believe that Mr Mbarushimana was criminally responsible under article 25 (3) (d) of the Statute for having contributed to the commission of war crimes and crimes against humanity in the North and South Kivu Provinces of the Democratic Republic of the Congo in 2009. The Pre-Trial Chamber determined that the arrest of Mr Mbarushimana appeared necessary to (i) ensure that he would appear at trial, (ii) ensure that he would not obstruct or endanger the investigation or the court proceedings and (iii) prevent him from continuing with the commission of the crimes for which the arrest warrant was sought.[3] On the same day, the Pre-Trial Chamber issued a warrant of arrest for Mr Mbarushimana on 11 counts of war crimes and crimes against humanity.[4]

4. Mr Mbarushimana was arrested by French authorities at his residence in Paris, France on 11 October 2010 and was surrendered to the International Criminal Court on 25 January 2011.[5]

5. On 30 March 2011, Mr Mbarushimana filed the "Defence Request for Interim Release"[6] (hereinafter: "Request for Interim Release").

6. On 14 April 2011, Mr Mbarushimana submitted further evidence in support of the Request for Interim Release.[7]

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[1] "Prosecution's Application under Article 58", ICC-01/04-01/10-11-Red.
[2] ICC-01/04-01/10-1 (re-classified "Public" pursuant to "Decision on issues relating to the publicity of proceedings in the case", 11 October 2010, ICC-01/04-01/10-7).
[3] ICC-01/04-01/10-1, paras 44-50.
[4] "Warrant of Arrest for Callixte Mbarushimana", ICC-01/04-01/10-2-tENG.
[5] *See* "Decision on the 'Defence Request for Interim Release'", ICC-01/04-01/10-163, 19 May 2011, paras 4-5.
[6] ICC-01/04-01/10-86, para. 41.

7. On 15 April 2011, the Prosecutor filed his response to Mr Mbarushimana's Request for Interim Release[8] (hereinafter: "Response to the Request for Interim Release") in which he submitted that Mr Mbarushimana should continue to be detained.

8. On 16 April 2011, Mr Mbarushimana filed the "Defence Request for Leave to Reply to the Prosecution's Response to the Defence Request for Interim Release".[9] The Pre-Trial Chamber subsequently granted leave to reply,[10] and Mr Mbarushimana filed his reply[11] (hereinafter "Reply to the Response to the Request for Interim Release") on 26 April 2011.

9. On 26 April 2011, the Registrar filed observations received from the French authorities and the host State.[12] The French authorities submitted, *inter alia*, that there would be no impediment to Mr Mbarushimana's return to France upon release.[13] The Netherlands noted that Mr Mbarushimana had requested to be released to France and further stated that it will, in compliance with the Headquarters Agreement between the International Criminal Court and the Host State, "facilitate the transfer of Mr. Mbarushimana into the French Republic should he be granted interim release".[14]

10. On 19 May 2011, the Pre-Trial Chamber issued its "Decision on the 'Defence Request for Interim Release'"[15] (hereinafter: "Impugned Decision") in which it rejected Mr Mbarushimana's request for interim release, finding 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 proceedings before the Court, and to prevent him from continuing with the commission of crimes".[16]

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[7] "Submission of Further Evidence in Support of the Defence Request for Interim Release (ICC-01/04-01/10-86)", ICC-01/04-01/10-99-tENG.
[8] "Prosecution response to the 'Defence Request for Interim Release'", ICC-01/04-01/10-101.
[9] ICC-01/04-01/10-107.
[10] "Decision the [*sic*] Defence Request for Leave to Reply to the Prosecution's Response to the Defence Request for Interim Release", 18 April 2011, ICC-01/04-01/10-111.
[11] "Defence Reply to the Prosecution Response to the Defence Request for Interim Release", ICC-01/04-01/10-120.
[12] "Transmission des observations formulées en vertu de la norme 51 du Règlement de la Cour", ICC-01/04-01/10-121.
[13] "Decision on the 'Defence Request for Interim Release'", 19 May 2011, ICC-01/04-01/10-163, para. 31 (citing ICC-01/04-01/10-121-Conf-Anx1).
[14] *Ibid.*, para. 31 (quoting ICC-01/04-01/10-121-Conf-Anx2).
[15] ICC-01/04-01/10-163.
[16] Impugned Decision, para. 69.

B. Proceedings before the Appeals Chamber

11. On 23 May 2011, Mr Mbarushimana submitted his notice of appeal against the Impugned Decision.[17]

12. On 24 May 2011, Mr Mbarushimana requested an extension of the time-limit for filing the document in support of his appeal, originally scheduled for 27 May 2011, to 10h00 on 30 May 2011, on the basis that his counsel had been summoned unexpectedly to military duty.[18] The Appeals Chamber granted this request after hearing from the Prosecutor who had no objection.[19]

13. On 29 May 2011, Mr Mbarushimana submitted the "Defence document in support of its appeal against Pre-Trial Chamber I's decision on the Defence request for interim release"[20] (hereinafter: "Document in Support of the Appeal"). He filed a corrigendum thereto on 31 May 2011.[21] In the Document in Support of the Appeal, Mr Mbarushimana advances one ground of appeal, "namely, that in formulating the Impugned Decision, the learned Pre-Trial Chamber erroneously evaluated the evidence presented against and in support of the grounds of arrest either by failing to attribute it appropriate weight in the circumstances or by misinterpreting it".[22] He asks that the Appeals Chamber "reverse the Impugned Decision and remit the matter to the Pre-Trial Chamber for fixing conditions of release".[23]

14. On 6 June 2011, the Prosecutor filed the "Prosecution's response to Defence document in support of its appeal against Pre-Trial Chamber I's decision on the Defence Request for Interim Release (ICC-01/04-01/10-163)"[24] (hereinafter: "Response to the Document in Support of the Appeal"). The Prosecutor submits that the appeal should be rejected on the bases that: (1) Mr Mbarushimana has not

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[17] "Defence Notice of Appeal of Pre-Trial Chamber I's Decision ICC-01/04-01/10-163", ICC-01/04-01/10-170.
[18] "Defence request for an extension of the time limit for filing the document in support of its appeal against Pre-Trial Chamber I's Decision: ICC-01/04-01/10-163", ICC-01/04-01/10-182.
[19] "Decision on the 'Defence request for an extension of the time limit for filing the document in support of its appeal against Pre-Trial Chamber I's Decision: ICC-01/04-01/10-163'", 26 May 2011, ICC-01/04-01/10-193.
[20] ICC-01/04-01/10-201.
[21] ICC-01/04-01/10-201-Corr. Mr Mbarushimana identifies two errors which are corrected in the Corrigendum, but which are immaterial to the ultimate resolution of this appeal.
[22] Document in Support of the Appeal, para. 2.
[23] *Ibid.*, para. 3.
[24] ICC-01/04-01/10-217.

established any factual or legal error in the Pre-Trial Chamber's findings that continued detention appears necessary; and (2) even if the Appeals Chamber would find an error, such error would not materially affect the Impugned Decision which is based on a "cumulative effect of [the Pre-Trial Chamber's] multiple findings under Articles 58 (1) (b) (i), (ii) and (iii)".[25]

III. MERITS

A. Standard of Review

15. In considering appeals against decisions granting or denying interim release, the Appeals Chamber has held that it

> will not review the findings of the Pre-Trial Chamber *de novo*, instead it will intervene in the findings of the Pre-Trial Chamber only where clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision.[26]

16. Mr Mbarushimana bases his appeal solely on allegations of errors of fact. The Appeals Chamber has held that a Pre-Trial or Trial Chamber commits an error of fact if it misappreciates facts, disregards relevant facts or takes into account facts extraneous to the *sub judice* issues.[27]

17. The Appeals Chamber recalls that the appraisal of evidence lies, in the first place, with the Pre-Trial Chamber.[28] In reviewing a claim that a Pre-Trial or Trial Chamber has misappreciated facts in a decision on interim release, the Appeals Chamber will defer or accord a margin of appreciation both to the inferences that Chamber drew from the available evidence and to the weight it accorded to the different factors militating for or against detention.[29] The Appeals Chamber will not

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[25] Response to the Document in Support of the Appeal, para. 12.
[26] *Prosecutor v. Jean-Pierre Bemba Gombo*, "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 (OA 2) (hereinafter: "*Bemba* OA 2 Judgment"), para. 62.
[27] *Ibid.*, para. 61 (citing *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release", 9 June 2008, ICC-01/04-01/07-572 (OA 4) (hereinafter: "*Katanga and Ngudjolo Chui* OA 4 Judgment"), para. 25); *see also Prosecutor v. Jean-Pierre Bemba Gombo*, "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'", 16 December 2008, ICC-01/05-01/08-323 (OA) (hereinafter: "*Bemba* OA Judgment"), para. 52.
[28] *Katanga and Ngudjolo Chui* OA 4 Judgment, para. 25.
[29] *Cf. Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled 'Decision on the Prosecution's Urgent Request for

interfere with a Pre-Trial or Trial Chamber's evaluation of the evidence just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case of a clear error, namely where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it. In the absence of any clear error on the part of the Pre-Trial Chamber, the Appeals Chamber defers to the Pre-Trial Chamber.

18. Finally, the Appeals Chamber recalls that the obligation is on the appellant "not only to set out the alleged error, but also to indicate, with sufficient precision how [an] error would have materially affected the impugned decision".[30] Failure to do so will result in the Appeals Chamber rejecting a ground of appeal *in limine*, without consideration of the merits.[31]

B. Necessity of Detention to Ensure Mr Mbarushimana's Appearance at Trial

19. In relation to article 58 (1) (b) (i) of the Statute, the Pre-Trial Chamber determined that Mr Mbarushimana's detention appeared necessary on the bases that (1) the gravity of the crimes and the concomitant possibility of a lengthy prison sentence made it more likely Mr Mbarushimana would try to abscond[32] and (2) he had access to means which would enable him to abscond.[33] Mr Mbarushimana does not contest the Pre-Trial Chamber's general conclusion that detention may be necessary where a suspect has sufficient means and motivation to abscond. Rather, he contests the Pre-Trial Chamber's underlying findings that, in this instance, he had either

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Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU'", 8 October 2010, ICC-01/04-01/06-2582 (OA 18), para. 56 and citations therein (recalling that the Appeals Chamber will not substitute its judgment for that of Pre-Trial or Trial Chambers but will accord them a margin of appreciation in factual determinations).

[30] *See Prosecutor v. Jean-Pierre Bemba Gombo,* "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 (OA 4) (hereinafter: "*Bemba* OA 4 Judgment"), para. 69 (citing *Prosecutor v. Joseph Kony et al.*, "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", 16 September 2009, ICC-02/04-01/05-408 (OA 3) (hereinafter: "*Kony et al.* OA 3 *Judgment*"), para. 48); and *Prosecutor v. Jean-Pierre Bemba Gombo*, "*Corrigendum to* Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility and Abuse of Process Challenges'", 26 October 2010, ICC-01/05-01/08-962-Corr (OA 3), para. 102.

[31] *See Bemba* OA Judgment, paras 69-71; *Kony et al.* OA 3 Judgment, para. 51.

[32] Impugned Decision, para. 45.

[33] *Ibid.*, para. 46.

sufficient motivation or sufficient means to abscond.[34] He also puts forward a number of arguments, addressed below, concerning other factors which, in his view, should have been interpreted differently or given more weight.

1. Mr Mbarushimana's motivation to abscond

20. The Pre-Trial Chamber noted that Mr Mbarushimana was suspected of crimes (charged as either crimes against humanity, war crimes or both) including murder, rape, torture and attacks against a civilian population and found these crimes to be of such gravity as to result in a potentially significant prison sentence if Mr Mbarushimana were convicted. The Pre-Trial Chamber concluded that the potential for a significant prison sentence made it more likely that Mr Mbarushimana would be motivated to abscond.[35] On appeal, Mr Mbarushimana argues that the Pre-Trial Chamber gave inappropriate weight to the prospect that a potential lengthy prison sentence would increase the likelihood of his flight and neglected to give due consideration to its previous finding that there were reasonable grounds to believe Mr Mbarushimana was not a principal perpetrator but an accessory.[36]

21. As noted by the Prosecutor,[37] the Appeals Chamber has previously held that the gravity of the crimes charged and the likelihood of a lengthy prison sentence, in the event of conviction, are factors that may increase the incentive of a person to abscond.[38] As set out above, it is for the Pre-Trial Chamber to determine whether these factors exist in a particular case and what weight they should be given. The Appeals Chamber will not substitute its own judgment for that of the Pre-Trial Chamber but rather will defer to the latter's findings unless they are clearly erroneous.

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[34] Document in Support of the Appeal, paras 5-6.
[35] Impugned Decision, para. 45.
[36] Document in Support of the Appeal, para. 5.
[37] Response to the Document in Support of the Appeal, para. 14.
[38] *See Bemba* OA 2 Judgment, para. 70 (finding 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"); *Bemba* OA Judgment, para. 55 (recalling that the Appeals Chamber "has held in the past that the seriousness of the crimes allegedly committed is a relevant factor and may make a person more likely to abscond"); *Katanga and Ngudjolo Chui* OA 4 Judgment, para. 21 (noting 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"); *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 [*sic*] provisoire de Thomas Lubanga Dyilo'", 13 February 2007, ICC-01/04-01/06-824 (OA 7) (hereinafter: "*Lubanga* OA 7 Judgment"), para. 136 (finding 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").

Mr Mbarushimana has, at most, identified a disagreement between himself and the Pre-Trial Chamber as to the proper weight to give these factors. He has not, however, identified any clear error in the Impugned Decision. Accordingly, his arguments must be dismissed.

2. Mr Mbarushimana's access to means to enable him to abscond

22. The Pre-Trial Chamber found that Mr Mbarushimana has access to means to enable him to abscond on the basis that (1) he is believed to be a member of the *Forces démocratiques de libération du Rwanda* (hereinafter: "FDLR"),[39] (2) the FDLR has an international financial support network engaged in fundraising around the world,[40] and (3) Mr Mbarushimana could therefore benefit from this network.[41] Taken together, these factors led the Pre-Trial Chamber to conclude he had access to the means to abscond.

23. On appeal, Mr Mbarushimana advances four arguments against this aspect of the Impugned Decision. For the reasons set out below, the Appeals Chamber finds that the first three of these arguments are not relevant to the adjudication of this appeal and that the fourth does not establish a clear error.

24. First, Mr Mbarushimana argues that all suspects before the ICC are likely to have an international financial support network and that, by taking into account the suspects' access to international networks, the Pre-Trial Chamber "established a threshold for detention so low that no ICC suspect could ever be released".[42] The Appeals Chamber notes that Mr Mbarushimana has not substantiated in any way his claim that other suspects have access to such networks. However, even if this claim were to be substantiated, this would be inconsequential. The Appeals Chamber is of the view that whether all other suspects are likely to possess financial support networks has no bearing on the question of whether Mr Mbarushimana had potential access to such a network.

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[39] Impugned Decision, para. 46.
[40] *Ibid.*, para. 46.
[41] *Ibid.*, para. 46.
[42] Document in Support of the Appeal, para. 6.

25. Second, Mr Mbarushimana argues that there is no evidence that the FDLR has used or would use its funds to assist Mr Mbarushimana or other suspects to flee justice.[43] The Appeals Chamber has previously found that access to international contacts could provide the means to enable a suspect to abscond, whether or not there was evidence that the suspect would actually utilise such contacts.[44] Even if there was no evidence that funds had been or definitely would be used for such purposes, this would not affect the Pre-Trial Chamber's narrow determination that the FDLR could potentially provide Mr Mbarushimana with such funds in the future.

26. Third, Mr Mbarushimana argues that the Pre-Trial Chamber neglected to note that he had never previously benefited from the assistance of FDLR when faced with criminal proceedings or the threat thereof.[45] For the same reasons set out in the preceding paragraph, whether or not Mr Mbarushimana had accessed such resources in the past was not relevant to the Pre-Trial Chamber's narrow determination that the FDLR could provide such funds in the future.

27. Fourth, Mr Mbarushimana argues that, in finding that this network could provide him with means to abscond, the Pre-Trial Chamber gave too little weight to Mr Mbarushimana's own meagre resources in light of the "not substantial" amount of money transfers by the FDLR.[46] The implication is that the FDLR network could not provide sufficient means to enable Mr Mbarushimana to abscond because the amount of money he could receive from the network would be insufficient. This argument mischaracterises the findings of the Pre-Trial Chamber. The Pre-Trial Chamber based its findings in the Impugned Decision on a report to the United Nations Security Council which documented that the FDLR maintained an extensive worldwide support network, that it was involved in "managing large sums of money" and that it managed to transfer money in violation of a United Nations asset freeze.[47] Even though each of the transfers identified in the report involved small amounts of money,

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[43] *Ibid.*, para. 6.
[44] *Lubanga* OA 7 Judgment, para. 137 (stating that "the Appeals Chamber is not persuaded by the argument of the Appellant that the Pre-Trial Chamber should not have taken into account the international contacts of the Appellant because there had been no evidence before that Chamber that the Appellant actually would make use of these contacts to abscond").
[45] Document in Support of the Appeal, para. 6.
[46] *Ibid.*, para. 6.
[47] Impugned Decision, para. 46 (citing Annex 7 to "Prosecution's Application under Article 58", 20 August 2010, ICC-01/04-01/10-11-Anx7, pp. 25-29).

this would not vitiate the conclusion of the Pre-Trial Chamber that the FDLR network had access to significant resources and the ability to transfer these resources despite a United Nations asset freeze, factors which, taken together, could provide Mr Mbarushimana with the means to abscond.[48] The Appeals Chamber agrees with the Prosecutor that this inference is not unreasonable.[49]

28. For the above reasons, the Appeals Chamber finds no clear error in the Pre-Trial Chamber's determination that Mr Mbarushimana had access to sufficient means to abscond. Taken together with a motivation to abscond, these factors would, in accordance with the Appeals Chamber jurisprudence, justify continued detention unless they are outweighed by other factors.

3. Other factors

29. In the Impugned Decision, the Pre-Trial Chamber reviewed a number of additional factors put forward by Mr Mbarushimana in his Request for Interim Release as mitigating the necessity of detention. The Pre-Trial Chamber reviewed eight instances in which Mr Mbarushimana alleged that he either did not abscond from justice or increased his accessibility to law enforcement agencies on previous occasions when facing the threat of criminal prosecution.[50] In particular, the Pre-Trial Chamber reviewed Mr Mbarushimana's claims with respect to his allegedly (1) requesting to open an inquiry into allegations made by a co-worker concerning genocide,[51] (2) not absconding from Kosovo after the issuance of an international arrest warrant,[52] (3) not absconding following the opening of an investigation by the International Criminal Tribunal for Rwanda (hereinafter: "ICTR"),[53] (4) seeking refugee status in France,[54] (5) enquiring with the ICTR as to the status of investigations against him,[55] (6) not absconding from France following Rwandan extradition efforts,[56] (7) not concealing his whereabouts following the filing of a *plainte civile* in France,[57] and (8) not absconding once he became aware of an

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[48] Impugned Decision, para. 46.
[49] *See* Response to the Document in Support of the Appeal, para. 15.
[50] Impugned Decision, paras 47-55.
[51] *Ibid.*, para. 47 (addressing arguments raised in the Request for Interim Release, para. 14).
[52] *Ibid.*, para. 48 (addressing arguments raised in the Request for Interim Release, para. 15).
[53] *Ibid.*, para. 49 (addressing arguments raised in the Request for Interim Release, para. 16).
[54] *Ibid.*, paras 50 (addressing arguments raised in the Request for Interim Release, paras 16-17).
[55] *Ibid.*, para. 50 (addressing arguments raised in the Request for Interim Release, para. 16).
[56] *Ibid.*, para. 51 (addressing arguments raised in the Request for Interim Release, para. 17).
[57] *Ibid.*, para. 52 (addressing arguments raised in the Request for Interim Release, para. 18).

investigation by the International Criminal Court.[58] In addition to these incidences of his alleged past good behaviour, the Pre-Trial Chamber reviewed four other factors identified by Mr Mbarushimana in the Request for Interim Release, namely an alleged finding by a French judge that he is not a flight risk,[59] his bonds to France,[60] his being subject to a United Nations travel ban,[61] and his previous willingness to cooperate with the Prosecutor.[62]

30. The Appeals Chamber observes that the Pre-Trial Chamber meticulously addressed each of these arguments put forward in the Request for Interim Release and found that the argument was either unsustainable, significantly distinguishable from the circumstances of the present case or, if relevant, did not outweigh the other factors necessitating his detention in order to ensure his appearance at trial. The Appeals Chamber notes that Mr Mbarushimana does not argue that the Pre-Trial Chamber failed to consider any relevant argument. To the contrary, he accepts that the Pre-Trial Chamber responded to each argument but argues that the evidence should have been interpreted differently or given different weight.[63]

31. The Appeals Chamber has carefully reviewed each of Mr Mbarushimana's arguments on appeal. The Appeals Chamber finds that Mr Mbarushimana's arguments concerning these additional factors comprise primarily a list of disagreements with either the conclusions drawn by the Pre-Trial Chamber from the available facts or the weight accorded to particular instances of his past alleged good behaviour. At most, he has merely offered alternative conclusions which *could have been drawn* by the Pre-Trial Chamber. He has not established any clear errors in either the inferences drawn by the Pre-Trial Chamber from the available evidence or in the weight that it accorded to each factor. The question is not whether the Pre-Trial Chamber could also have reached other conclusions. The question is whether the Pre-Trial Chamber could not have reasonably reached the conclusions it did on the available evidence. As has been stated previously, absent any clear error, the Appeals Chamber defers to the findings of the Pre-Trial Chamber.

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[58] *Ibid.*, para. 54 (addressing arguments raised in the Request for Interim Release, para. 20).
[59] *Ibid.*, para. 53 (addressing arguments raised in the Request for Interim Release, para. 19).
[60] *Ibid.*, para. 56 (addressing arguments raised in the Request for Interim Release, paras 24-25).
[61] *Ibid.*, para. 57 (addressing arguments raised in the Request for Interim Release, para. 23).
[62] *Ibid.*, para. 58 (addressing arguments raised in the Request for Interim Release, para. 20).
[63] Document in Support of the Appeal, paras 7-14, 16.

32. The Appeals Chamber has identified only two instances in the relevant portion of the Document in Support of the Appeal in which Mr Mbarushimana can be understood to be asserting something other than a mere disagreement with the Pre-Trial Chamber as to the proper appreciation of evidence. However, as explained below, the Appeals Chamber is not persuaded by Mr Mbarushimana's arguments on these points.

33. First, Mr Mbarushimana argues that, in considering whether or not he could have easily fled Kosovo, the Pre-Trial Chamber took into account an irrelevant consideration, namely his alleged diplomatic status.[64] The Appeals Chamber notes that it was Mr Mbarushimana himself who suggested that this was a relevant consideration,[65] and the Pre-Trial Chamber rejected its relevance.[66] Having failed to persuade the Pre-Trial Chamber on this point, Mr Mbarushimana seeks now to argue the opposite before the Appeals Chamber. Bearing in mind the appropriate standard of review, this argument must be dismissed.

34. Second, with respect to the Pre-Trial Chamber's consideration of the relevance of a United Nations travel ban to the present proceedings, Mr Mbarushimana argues that the Pre-Trial Chamber provided no specific reason as to why he would be liable to lose himself in the Schengen area and that upholding the Pre-Trial Chamber's decision would prevent any suspect from being released to a European country.[67] The Appeals Chamber notes that the Pre-Trial Chamber's consideration of the relevance of the Schengen area was limited to the context of its narrow finding that the United Nations travel ban does not, as a practical matter, restrict Mr Mbarushimana to French territory as Mr Mbarushimana had suggested.[68] The Pre-Trial Chamber made no finding that Mr Mbarushimana was liable to lose himself in the Schengen area. Nor does its finding bear on the question of release of other suspects, an issue which, in any event, is irrelevant to the question of whether the conditions of article 58 (1) (b) (i) of the Statute are met in this particular case. As such, Mr Mbarushimana has not identified any error in the Impugned Decision. Accordingly his arguments must be dismissed.

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[64] *Ibid.*, para. 8.
[65] Request for Interim Release, para. 15.
[66] Impugned Decision, para. 48.
[67] Document in Support of the Appeal, para. 18.
[68] Impugned Decision, para. 57.

35. For the above reasons, the Appeals Chamber finds that Mr Mbarushimana has failed to identify any clear error in the Impugned Decision in relation to its findings under article 58 (1) (b) (i) of the Statute.

C. Necessity of Detention to Ensure Mr Mbarushimana Does Not Obstruct or Endanger Investigations or Proceedings

36. Based on its evaluation of the evidence presented, the Pre-Trial Chamber concluded, pursuant to article 58 (1) (b) (ii) of the Statute, that the continued detention of Mr Mbarushimana appeared necessary to ensure that he would not obstruct or endanger the investigation or proceedings against him.[69] The Pre-Trial Chamber reached this conclusion on the basis of findings that he had both the ability and the intention to do so. On appeal, Mr Mbarushimana challenges each of the Pre-Trial Chamber's findings.[70] The Prosecutor argues that the Pre-Trial Chamber's findings evince no error.[71]

1. Mr Mbarushimana's ability to intimidate witnesses and obstruct investigations or proceedings

37. The Pre-Trial Chamber concluded that Mr Mbarushimana had the potential to interfere with witnesses on the basis that (a) there appears to have been a leak of internal information from the United Nations Organization Mission in the Democratic Republic of the Congo (hereinafter: "MONUC") to the FDLR[72] and (b) there is a risk that Mr Mbarushimana may use this source within MONUC or leaked information to interfere with ongoing investigations and with witnesses residing in the Kivu regions of the Democratic Republic of the Congo.[73] On appeal, Mr Mbarushimana argues that the Pre-Trial Chamber erred in evaluating and weighing the evidence underpinning each of these two findings. He also alleges a third error, namely that he did not have access to the names of any witnesses in the Democratic Republic of the Congo and therefore could not interfere with them.

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[69] *Ibid.*, para. 65.
[70] Document in Support of the Appeal, paras 22-29.
[71] Response to the Document in Support of the Appeal, paras 28-37.
[72] Impugned Decision, para. 62.
[73] *Ibid.*, para. 63.

(a) Leak of information from MONUC to the FDLR

38. The Pre-Trial Chamber inferred a leak of information from MONUC to the FDLR from the fact that a number of internal MONUC documents[74] and two e-mails[75] sent by a source within MONUC, all of which were related in some way to the FDLR, were found at Mr Mbarushimana's residence.[76]

39. Mr Mbarushimana challenges the Pre-Trial Chamber's inference on two bases. First, he argues that the Pre-Trial Chamber should have requested the Prosecutor to prove the legality of the seizure of these documents from Mr Mbarushimana's residence before relying on them.[77] Second, he argues that there is no evidence that Mr Mbarushimana received these materials by virtue of his alleged membership in the FDLR.[78]

40. As to Mr Mbarushimana's first argument, the Appeals Chamber notes that, in the proceedings leading up to the Pre-Trial Chamber's decision on his interim release, Mr Mbarushimana did not specifically challenge the legality of the search conducted at his residence.[79] Even though the Prosecutor, in his Response to Mr Mbarushimana's Request for Interim Release, specifically referred to the documents found in Mr Mbarushimana's residence,[80] Mr Mbarushimana did not challenge the legality of the search when granted leave to reply to this response.[81] The Appeals Chamber therefore cannot discern any clear error in the Pre-Trial Chamber's decision not to consider the legality of the search in relation to these arguments and dismisses Mr Mbarushimana's argument in this regard.

41. With respect to Mr Mbarushimana's second argument, that there is no evidence that Mr Mbarushimana received the relevant documents by virtue of his alleged

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[74] DRC-REG-0001-2000; DRC-REG-0001-2008; DRC-REG-0001-2013; DRC-REG-0001-3790; DRC-REG-0002-0085; DRC-REG-0003-0061; DRC-REG-0003-1070.
[75] DRC-REG-0001-1631; DRC-REG-0001-1632.
[76] Impugned Decision, para. 62.
[77] Document in Support of the Appeal, para. 24.
[78] *Ibid.*, para. 24.
[79] The issue was only raised peripherally in the context of other proceedings concerning the review of potentially privileged material seized from Mr Mbarushimana's residence. *See* "Defence Response to Prosecution's Request for the Review of Potentially Privileged Material", 18 February 2011, ICC-01/04-01/10-58. The Pre-Trial Chamber found that these issues were not relevant to the issue of deciding whether evidence was privileged and therefore did not examine them in its "Decision on the 'Prosecution's request for a review of potentially privileged material'", ICC-01/04-01/10-67, 4 March 2011. This issue has not been raised subsequently, except in the Document in Support of the Appeal.
[80] Response to the Request for Interim Release, paras 32-34.
[81] *See* Reply to the Response to the Request for Interim Release.

membership in the FDLR, the Appeals Chamber finds that the Pre-Trial Chamber drew a reasonable inference from the fact that documents of a confidential and/or internal character were found in Mr Mbarushimana's residence.[82] Whether Mr Mbarushimana could have received the documents from open sources as he argues,[83] even if plausible, would only suggest an alternative conclusion that could have been reached. It would not refute the Pre-Trial Chamber's conclusion that Mr Mbarushimana and the FDLR potentially had access to confidential information leaked from MONUC.

42. Accordingly, the Appeals Chamber finds no clear error in the Pre-Trial Chamber's findings with respect to the alleged leak of information from MONUC.

(b) The risk that Mr Mbarushimana may use leaked information to interfere with the ongoing investigations and with witnesses residing in the Kivus

43. Having found that there was evidence suggesting a leak within MONUC to the FDLR, the Pre-Trial Chamber further found that "there [was] a risk that [Mr Mbarushimana] may use the information obtained from the source in MONUC to interfere with the ongoing investigations and with witnesses residing in the Kivus".[84] Mr Mbarushimana challenges this conclusion on two grounds.

44. First, Mr Mbarushimana submits that the MONUC documents found at his residence are unrelated to the Prosecutor's investigation and therefore could not support the inference that he would be able to obstruct the Prosecutor's investigation.[85] The Appeals Chamber finds that this argument distorts the Pre-Trial Chamber's finding. The Pre-Trial Chamber did not find that the information contained in the specific documents seized from Mr Mbarushimana's residence would enable him to intimidate witnesses. Rather, the Pre-Trial Chamber concluded that the existence of a channel of communication between MONUC and the FDLR, through which relevant and confidential information could be leaked,[86] created a risk that Mr Mbarushimana might use such information to interfere with the ongoing

[82] *See* Impugned Decision, para. 62.
[83] Document in Support of the Appeal, para. 24.
[84] Impugned Decision, para. 63.
[85] Document in Support of the Appeal, para. 26.
[86] Impugned Decision, para. 63.

investigations and with potential witnesses.[87] Whether the specific documents found at his residence would enable Mr Mbarushimana to interfere with investigations or witnesses is irrelevant to the Pre-Trial Chamber's findings. Accordingly, the Appeals Chamber cannot discern any clear error in the finding of the Pre-Trial Chamber and dismisses Mr Mbarushimana's argument.

45. Second, Mr Mbarushimana argues that Pre-Trial Chamber's conclusions as to the present role of MONUC and the current activity of the FDLR in the Kivus were "without a sufficient grounding in the evidence" in that the Pre-Trial Chamber only cited to two paragraphs in the Response to the Request for Interim Release which, themselves, were not supported by evidence.[88]

46. The Appeals Chamber finds that, while citations to relevant evidence may have further demonstrated the support underlying the Pre-Trial Chamber's conclusions, the lack of such evidence does not vitiate the Pre-Trial Chamber's conclusions on these points.[89] In the present instance, the Appeals Chamber observes that Pre-Trial Chamber I has been assigned the situation in the Democratic Republic of the Congo,[90] there exists a Memorandum of Understanding between the International Criminal Court and the United Nations concerning cooperation between MONUC and the ICC in the Democratic Republic of the Congo[91] and that the Pre-Trial Chamber deals extensively in the Impugned Decision with issues related to MONUC.[92] On the basis of these facts, the Appeals Chamber agrees with the Prosecutor that "MONUSCO's role in supporting the Government of the DRC in providing security to civilians in the Eastern DRC against, *inter alia*, attacks from the FDLR is part of their mandate which

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[87] *Ibid.*, para. 63.
[88] Document in Support of the Appeal, para. 25.
[89] *Cf. Lubanga* OA 7 Judgment, para. 136 (upholding the conclusions of a Pre-Trial Chamber on interim release where there was sufficient information available to the Pre-Trial Chamber to justify its conclusions even if more detailed explanation of the reasoning was desirable).
[90] Presidency, "Decision Assigning the Situation in the Democratic Republic of the Congo to Pre-Trial Chamber I", 5 July 2004, ICC-01/04-1.
[91] "Memorandum of Understanding between the United Nations and the International Criminal Court Concerning Cooperation between the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the International Criminal Court", 8 November 2005, *reproduced in* ICC-01/04-01/06-1267-Anx2, 7 April 2008.
[92] *See* Impugned Decision, paras 62-63.

is widely published and a fact of common knowledge".[93] Accordingly, the Appeals Chamber discerns no clear error on the part of the Pre-Trial Chamber.

(c) Disclosure of witness names

47. Mr Mbarushimana's third argument with respect to his ability to intimidate witnesses or obstruct investigations or proceedings is that he could not interfere with witnesses in the Democratic Republic of the Congo because their names had not been disclosed to him.[94] Mr Mbarushimana notes that only the names of witnesses who were residing in Rwanda have been disclosed and that the "names of the more obviously vulnerable witnesses [...] have not been released to the Defence and will, for the foreseeable future, remain redacted".[95]

48. The Appeals Chamber agrees with the Prosecutor that Mr Mbarushimana "once again mischaracterizes a finding of the [Pre-Trial] Chamber".[96] With respect to the names of witnesses and/or victims which were then redacted, the Pre-Trial Chamber observed that the disclosure of these names was to occur in a matter of days.[97] Therefore, there is no clear error, and Mr Mbarushimana's arguments must be dismissed.

2. Mr Mbarushimana's intent to obstruct the proceedings or interfere with witnesses

49. In the Impugned Decision, the Pre-Trial Chamber referred to an entry in a notebook, recovered from Mr Mbarushimana's residence, in which the words "a blog – names of witnesses" were written.[98] This entry was preceded by a list of names and brief descriptions of persons who the Pre-Trial Chamber indicated were witnesses testifying in proceedings against two FDLR suspects in Germany.[99] In this context, the Pre-Trial Chamber inferred that Mr Mbarushimana had the intention to publicise

[93] Response to the Document in Support of the Appeal, para. 32.
[94] Impugned Decision, para. 61.
[95] Document in Support of the Appeal, para. 23.
[96] Response to the Document in Support of the Appeal, para. 29.
[97] Impugned Decision, para. 61.
[98] Notebook seized from the home of Mr Callixte Mbarushimana, Undated, DRC-REG-0007-3438 at DRC-REG-0007-3471.
[99] Impugned Decision, para. 64.

the names of these witnesses and further that "Mr Mbarushimana is predisposed to witness intimidation".[100]

50. Mr Mbarushimana challenges the Pre-Trial Chamber's interpretation of and weight given to this notebook entry[101] and argues, in addition, that the Pre-Trial Chamber neglected to consider the potential that attorney-client privilege may attach to the notebook.[102]

(a) The interpretation of and weight accorded to the entry in the notebook

51. Mr Mbarushimana argues that the Pre-Trial Chamber should not have rejected as implausible an alternative interpretation of the notebook entry (i.e. that he would start a blog *without* revealing the names of witnesses),[103] that the Pre-Trial Chamber violated the principle of *in dubio pro reo* in doing so,[104] and that the notebook entry should have been given less weight relative to his past respect for the privacy and security of witnesses.[105]

52. The Appeals Chamber finds Mr Mbarushimana's argument concerning the principle of *in dubio pro reo* to be misguided. It is precisely the role of the Pre-Trial Chamber to assess the arguments put forward by the parties, to evaluate evidence and to reach findings thereon. As to the other arguments, the Appeals Chamber notes that the Pre-Trial Chamber considered and addressed each of these factors in the Impugned Decision[106] and that Mr Mbarushimana merely offers alternatives regarding the interpretation and weighing of the evidence. He does not establish that it was clearly erroneous for the Pre-Trial Chamber to reach the conclusions or apportion the weight in the way that it did. Accordingly his arguments must be dismissed.

(b) The potential that attorney-client privilege may attach to the notebook

53. In the Impugned Decision, the Pre-Trial Chamber did not address the question of whether the hand-written information in the notebook was subject to attorney-client

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[100] *Ibid.*, para. 64.
[101] Document in Support of the Appeal, paras 27-29.
[102] *Ibid.*, paras 28.
[103] *Ibid.*, para. 27.
[104] *Ibid.*, para. 27.
[105] *Ibid.*, para. 29.
[106] *Ibid.*, paras 64-65.

privilege although there were other ongoing proceedings before the Pre-Trial Chamber concerning the review of other material to which such privilege might attach.[107] On appeal, Mr Mbarushimana argues that the Pre-Trial Chamber committed an error insofar as it "neglected to consider the potential for client-attorney privilege to attach to the contents of the offending page".[108]

54. The Appeals Chamber notes that failure to properly consider the potential for attorney-client privilege in respect of certain evidence before a Chamber might in some cases constitute a legal error. However, for the reasons set out below, the Appeals Chamber finds that in the instant case there was no error in the Pre-Trial Chamber's failure to consider whether attorney-client privilege should protect the contents of the notebook.

55. The Appeals Chamber notes that, at the time the Impugned Decision was rendered, a considerable amount of material seized from Mr Mbarushimana's house was in the process of being reviewed for whether it was potentially covered by attorney-client privilege. However, as pointed out by the Prosecutor, the notebook was not amongst the material submitted for such review.[109] In response to a request of Mr Mbarushimana's counsel, the Office of the Prosecutor explained why the notebook had not been included in the list of potentially privileged material and why he was of the view that the notebook was not privileged.[110] Thereafter, in relation to the notebook, Mr Mbarushimana stated in his Reply to the Response to the Request for Interim Release:

> [T]he question needs to be asked as to why the Prosecution did not deem it appropriate to follow the Pre-Trial Chamber's rulings on the review of potentially privileged material given that the name of one of Mr. Mbarushimana's lawyers appears on the very same page as the alleged "idea" to publish witness' names [footnote omitted].[111]

56. The Appeals Chamber observes, however, that in the Reply to the Prosecutor's Response to the Request for Interim Release, Mr Mbarushimana did not actually

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[107] *See* "Decision on the 'Prosecution's request for a review of potentially privileged material'", 4 March 2011, ICC-01/04-01/10-67.
[108] Document in Support of the Appeal, para. 28.
[109] *See* "Decision on the 'Prosecution's request for a review of potentially privileged material'", 4 March 2011, ICC-01/04-01/10-67; Response to the Document in Support of Appeal, para. 36.
[110] Response to the Document in Support of the Appeal.
[111] Para. 9.

assert that the notebook entry was subject to privilege. He merely raised a question of whether the Prosecutor had followed the right procedure in reviewing the material. Neither is it apparent from the record that Mr Mbarushimana has ever claimed privilege in respect of the notebook on any other occasion, including in his submissions on appeal, even though the question of privilege was very much a live issue in relation to other materials. This suggests that even by Mr Mbarushimana's own assessment, privilege did not attach to the notebook. In these circumstances, and absent any other convincing reason to conclude that privilege might attach to the notebook, the Appeals Chamber finds no clear error in the fact that the Pre-Trial Chamber did not examine whether attorney-client privilege attached to the notebook. Mr Mbarushimana's argument must therefore be dismissed.

57. For the above reasons, the Appeals Chamber finds that Mr Mbarushimana has failed to identify any clear error in the Impugned Decision in relation to its finding under article 58 (1) (b) (ii) of the Statute.

D. Necessity of Detention to Prevent Mr Mbarushimana from Continuing Commission of Crimes within Jurisdiction of Court arising from Same Circumstances

58. In the Impugned Decision, the Pre-Trial Chamber found that the risk that Mr Mbarushimana may continue to contribute to the crimes described in the arrest warrant "'by organising and conducting an international campaign through media channels' continues to exist",[112] thereby necessitating his detention under article 58 (1) (b) (iii) of the Statute. The Pre-Trial Chamber reached this finding in light of the mode of liability attributed to Mr Mbarushimana (whereby Mr Mbarushimana could commit crimes without being physically present at their scene), the volatility of the situation in eastern Democratic Republic of the Congo where the FDLR is active, and Mr Mbarushimana's information technology (hereinafter: "IT") experience and ability to have telephone and internet access in ways that cannot easily be monitored or controlled.[113] Mr Mbarushimana challenges the evidentiary basis of the Pre-Trial Chamber's findings with respect to the current activity of the FDLR in eastern Democratic Republic of the Congo and to his IT skills. He also submits that there is no evidence that he has ever contributed to the commission of crimes through phone

[112] Impugned Decision, para. 66.
[113] *Ibid.*, para. 66.

calls or e-mails.[114] He claims that the Pre-Trial Chamber was therefore engaged in unwarranted speculation.[115]

59. The Appeals Chamber finds that Mr Mbarushimana has not demonstrated any clear error in the Pre-Trial Chamber's conclusion. First, with respect to the activity of the FDLR, the Appeals Chamber recalls its reasoning above that it was not a clear error for the Pre-Trial Chamber to reach this finding.[116] Second, with respect to Mr Mbarushimana's IT skills, Mr Mbarushimana misrepresents the Pre-Trial Chamber's finding. The Pre-Trial Chamber did not find that he had particular IT skills, but merely "information technology experience".[117] In light of Mr Mbarushimana's job which includes providing IT training for job seekers,[118] the Appeals Chamber agrees with the Prosecutor that the Pre-Trial Chamber's finding that Mr Mbarushimana had IT experience was reasonable.[119] Furthermore, the Pre-Trial Chamber's finding that Mr Mbarushimana had the "ability to have telephone and internet access in ways which could not easily be monitored or controlled" did not depend on his specialized IT skills but rather on his ability to use internet cafés, free wi-fi points, borrowed computers or mobile phones or pre-purchased telephone calling cards.[120] Accordingly, Mr Mbarushimana does not identify any errors in the Pre-Trial Chamber's decision.

60. Finally, the Appeals Chamber recalls that in determining the necessity of detention, "[t]he question revolves around the possibility, not the inevitability, of a future occurrence".[121] It is precisely the task of the Pre-Trial Chamber, on the basis of the available evidence, to weigh such evidence and, on that basis, to make a prediction as to the likelihood of future events. In making such a prediction, it was not material whether Mr Mbarushimana had in the past contributed to the commission of crimes through phone calls or e-mails. What is material is that there was a sufficient basis for the Pre-Trial Chamber reasonably to predict that they may be used for such purposes in the future. In the specific context of this case, it is not an unreasonable

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[114] Document in Support of the Appeal, para. 30.
[115] *Ibid.*, para. 30.
[116] *See* para. 46 above.
[117] Impugned Decision, para. 66.
[118] Annex 11 to the Defence Request for Interim Release, 14 February 2011, ICC-01/04-01/10-86-Anx11.
[119] Response to the Document in Support of the Appeal, para. 38.
[120] Response to the Request for Interim Release, paras 40-41 (cited in Impugned Decision, para. 66).
[121] *Bemba* OA Judgment, para. 55 (citing *Katanga and Ngudjolo Chui* OA 4 Judgment, para. 21).

prediction that phone calls or e-mails may be used to continue to contribute to the commission of crimes. The Pre-Trial Chamber's prediction reveals no clear error.[122] Accordingly, Mr Mbarushimana's argument must be dismissed.

61. For the above reasons, the Appeals Chamber finds that Mr Mbarushimana has failed to identify any clear error in the Impugned Decision in relation to the Pre-Trial Chamber's finding under article 58 (1) (b) (iii) of the Statute that his detention appeared necessary to prevent him from continuing with the commission of crimes.

E. Conditional Release

62. The Pre-Trial Chamber considered that, while conditional release might provide more assurance that Mr Mbarushimana would appear at trial, none of the conditions specified in rule 119 of the Rules of Procedure and Evidence or suggested by Mr Mbarushimana would be sufficient to prevent him from obstructing proceedings or continuing to commit crimes.[123] Mr Mbarushimana does not contest this finding. It is only in the event that the Appeals Chamber were to reverse the Impugned Decision's findings with respect to article 58 (1) (b) (ii) and (iii) that Mr Mbarushimana submits that the Appeals Chamber should consider the issue of conditional release.[124] Given that the Appeals Chamber affirms the Impugned Decision with respect to article 58 (1) (b) (ii) and (iii), the Appeals Chamber finds the question of conditional release to be moot.

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[122] *See Lubanga* OA 7 Judgment, para. 137.
[123] Impugned Decision, para. 67.
[124] Document in Support of the Appeal, para. 31.

IV. APPROPRIATE RELIEF

63. On an appeal pursuant to article 82 (1) (b) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case it is appropriate to confirm the Impugned Decision as no clear errors in the Impugned Decision have been identified.

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

Judge Anita Ušacka
Presiding Judge

Dated this 14th day of July 2011
At The Hague, The Netherlands