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Original: **English**

No.: **ICC-01/04-01/10 OA**
Date: **6 June 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

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)

Source: **Office of the Prosecutor**

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Introduction

1. Callixte Mbarushimana ("Appellant") appeals the "Decision on the 'Defence Request for Interim Release'" ("Decision"),[1] in which Pre-Trial Chamber I ("Chamber" or "Pre-Trial Chamber") ruled 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."[2]

2. The Appellant raises a single ground of appeal, that the Pre-Trial Chamber "erroneously evaluated the evidence […] either by failing to attribute it appropriate weight in the circumstances or by misinterpreting it."[3] In support of this ground, the Appellant challenges every paragraph in the Decision relating to the arguments submitted by the Appellant.[4]

3. The Appellant has not demonstrated that the Pre-Trial Chamber committed any reversible error in the exercise of its discretion which would materially affect the Decision.[5] Therefore, the Appeals Chamber should dismiss the Appeal.

Procedural Background

4. On 28 September 2010, the Pre-Trial Chamber issued an arrest warrant for the Appellant,[6] who was arrested in France on 11 October 2010 and surrendered to the Court on 25 January 2011.[7]

5. On 30 March 2011, the Appellant filed, the "Defence Request for Interim Release" ("Defence Request")[8] pursuant to Article 60(2). He requested to be released to his

[1] ICC-01/04-01/10-163.
[2] Decision, para.69.
[3] ICC-01/04-01/10-201, para.2.
[4] ICC-01/04-01/10-201, paras.5-32.
[5] See ICC-01/04-01/07-2259 OA10, para.34; ICC-02/04-01/05-408 OA3, para.80.
[6] ICC-01/04-01/10-2.
[7] ICC-01/04-01/10-163, paras.4-5.

domicile in France, subject to any conditions to be determined by the Pre-Trial Chamber under Rule 119. On 15 April 2011, the Prosecution filed its response to the Defence Request ("Prosecution Response"),[9] and on 26 April 2011, the Appellant filed a reply to the Prosecution Response ("Defence Reply").[10]

6. On 19 May 2011, the Pre-Trial Chamber rendered its Decision that the detention of the Appellant is necessary on each of the three grounds under Article 58(1)(b).[11] It did so based on all the facts and arguments before it.[12] The Pre-Trial Chamber further entertained and dismissed the arguments of the Appellant regarding any conditions that might be imposed pursuant to Rule 119.[13] The Chamber concluded that that the Suspect shall remain in detention.[14]

7. The Appellant filed a notice of appeal on 23 May 2011,[15] and the document in support of its appeal on 30 May 2011 ("Appeal Brief").[16]

Applicable Standard of Review

8. The Appeals Chamber has ruled that it "will interfere with a discretionary decision only under limited conditions".[17] It will not reverse an impugned decision "simply because it would have decided differently. It can only do so when it finds that the Trial Chamber exercised its discretion incorrectly"[18] "[T]he conditions justifying appellate interference [in a discretionary decision are]: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where

[8] ICC-01/04-01/10-86.
[9] ICC-01/04-01/10-101.
[10] ICC-01/04-01/10-120.
[11] Decision, para.69.
[12] For Article 58(1)(b)(i), see Decision, paras.45-59; for Article 58(1)(b)(ii), see Decision, paras.60-65; for Article 58(1)(b)(iii), see Decision, para.66.
[13] Decision, paras.67-68.
[14] Decision, para.69.
[15] ICC-01/04-01/10-170 OA.
[16] ICC-01/04-01/10-201 OA.
[17] ICC-02/04-01/05-408 OA3, para.80.
[18] ICC-01/04-01/07-2259 OA10, para.34.

the decision is so unfair and unreasonable as to constitute an abuse of discretion."[19]

9. The weighing of evidence offered in connection with the application for release is a discretionary judgment that is reversible only if the Chamber abuses that discretion. Findings of fact in support of the decision are not reviewable unless, as cited above, they are "patently incorrect". "Appraisal of the evidence relevant to continued detention lies, in the first place, with the Pre-Trial Chamber".[20] The Appeals Chamber will "not review the findings of the Pre-Trial Chamber *de novo*".[21]

10. In addition, the Appeals Chamber requires that for a successful appeal, the error raised by an appellant must have materially affected the impugned decision.[22] Where "the alleged error […] cannot be said to have materially affected the decision [...] this error would not, in itself, be a reason to reverse the [Chamber's] decision" [...] "even if the Appeals Chamber were to conclude that the [Chamber] made an error in respect of [a finding]".[23] Accordingly, "as part of the reasons in support of a ground of appeal, an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision."[24]

Prosecution's Submissions

11. The Appellant criticises in general terms the "alacrity with which [the Pre-Trial Chamber] dismissed [its] submissions – one after the other" and alleges that the "one sided approach adopted by the Pre-Trial Chamber tainted its evaluation of

[19] ICC-02/04-01/05-408 OA3, para.80.
[20] ICC-01/04-01/07-572 OA6, para. 25; ICC-01/05-01/08-323 OA, para.52; ICC-01/05-01/08-631-Red OA2, paras.61-63.
[21] ICC-01/05-01/08-631-Red, para.62.
[22] ICC-01/04-01/07-1497 OA8, para.37.
[23] ICC-01/04-01/07-1497 OA8, para.38.
[24] ICC-02/04-01/05-408 OA3, para.48; ICC-01/05-01/08-962 OA3, paras.102, 106, 133-134; ICC-01/05-01/08-1019 OA4, para.69.

the evidence."[25] Alacrity is not indicative of indifference, nor was this decision issued with undue speed. To the contrary, the Chamber had almost two months from the Appellant's filing of his application for release. Nor is there any apparent "one-sided approach" other than that the Chamber rejected the Appellant's arguments. That result, however, is not proof of either bias or error. On the contrary, the Decision's detailed reasoning shows that the Chamber carefully considered all submissions and evidence before it.

12. The Appellant challenges every paragraph of the Decision that includes findings supporting the conclusion that the continued detention of the Suspect appears necessary. As demonstrated below, none of these arguments has merit. The Appellant has not established any factual or legal error in the appealed Decision. However, even if the Appeals Chamber were to find that individual factual findings of the Pre-Trial Chamber were erroneous, any such individual errors would not materially affect the Decision, because the overall conclusion of the Pre-Trial Chamber that the Suspect must remain in detention is based on the <u>cumulative</u> effect of its multiple findings under Articles 58(1)(b)(i), (ii) and (iii).[26]

13. The Prosecution stresses that findings pursuant to Article 58(1)(b) are made under a lower standard of proof (that the arrest of the person *appears* necessary) and do not require that the Chamber eliminate every reasonable doubt or apply the principle of *in dubio pro reo*, which, as a general rule, is only applicable for decisions under Article 74(2).[27] Even for the arguably higher standard of proof under Article 58(1)(a) (there are *reasonable grounds to believe* that the person committed a crime), it is not necessary to demonstrate that a particular inference is the only reasonable one available on the evidence, which means that the

[25] Appeal Brief, para.4.
[26] The Appeals Chamber has found that "the apparent necessity of continued detention in order to ensure the detainee's appearance at trial does not necessarily have to be established on the basis of one factor taken in isolation. It may also be established on the basis of an analysis of all relevant factors taken together." (see ICC-01/05-01/08-323 OA, para. 55).
[27] Appeal Brief, para.27.

existence of other inferences – even if they are more favourable to the accused – is not a relevant consideration at this stage.[28]

Arguments concerning the Pre-Trial Chamber's findings pursuant to Article 58(1)(b)(i)

14. Paragraph 45 of the Decision:[29] Contrary to the Appellant's contention, the Pre-Trial Chamber correctly gave weight to the consideration that the prospect of a lengthy prison sentence would increase the likelihood of the Suspect's flight. The Appeals Chamber has previously found 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."[30] It also found 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."[31]

15. Paragraph 46 of the Decision:[32] Although the Appellant contents otherwise, the Pre-Trial Chamber appropriately considered the UN Group of Experts' report. The Chamber acknowledges that the report does "not directly demonstrate[…] that Mr Mbarushimana has ever obtained assistance from the said network". However, it inferred from the evidence "the existence of efficient means available to [the Suspect] by virtue of his membership [in] the FDLR, which would enable him to evade justice". This inference is certainly not unreasonable.

16. Paragraph 47 of the Decision:[33] The Appellant misrepresents the relevant findings of the Pre-Trial Chamber. The Chamber found that "no criminal proceedings were instituted [against him]", and correctly concluded that as a result, the Appellant was "not at risk of being sentenced to imprisonment". It did not

[28] ICC-02/05-01/09-73 OA, paras.30 and 33
[29] Appeal Brief, para.5.
[30] ICC-01/04-01/06-824 OA7, para. 136; ICC-01/04-01/07-572 OA6, paras.21, 24; ICC-01/05-01/08-323 OA, para. 55; ICC-01/05-01/08-631-Red OA2, para.67.
[31] ICC-01/04-01/07-572 OA6, paras.21, 24.
[32] Appeal Brief, para.6.
[33] Appeal Brief, para.7.

further address the Suspect's mental state at all; thus, the Appellant is incorrect in attributing to the Chamber a finding that the Suspect "did not face the subjective fear of imprisonment at the time of his employment [in Kosovo]". Nor was the Pre-Trial Chamber obliged to consider as a weighty factor that the Appellant did not flee even though the UN believed him guilty of genocide. "[B]eing accused before his employers" might result in being fired – in other words, the same result as would follow if he had quit and left Kosovo – but does not carry with it the sanction of imprisonment.

17. Paragraph 48 of the Decision:[34] The Appellant also fails to show that the Pre-Trial Chamber erred by making an "irrelevant" assessment of the Appellant's status while in Kosovo. The Chamber considered and rejected the Defence claim that between 4 February 2001 (when the Appellant claims he learned that there was a Rwandan arrest warrant) and 11 April 2001 (when he was arrested), he chose not to flee Kosovo, an option he could have exercised by virtue of his diplomatic status. The Chamber can hardly be faulted for considering whether the Appellant in fact had any diplomatic status – and for finding he did not -- since he argued his purported freedom to move (pursuant to his diplomatic status) as proof that he could have fled unhindered and thus that he did not avoid prosecution. Nor can the Chamber be faulted for rejecting the argument – that the Appellant could easily have left Kosovo for some other country but willingly remained to face the anticipated arrest on the Rwandan charges – after it found that the predicate fact (diplomatic status) was untrue. Finally, even if the Appellant could have easily have left Kosovo 10 years ago, the circumstances then are markedly different. In 2001 he did not have his influence in the FDLR and was not realistically facing the same likelihood of prosecution.

18. Paragraph 49 of the Decision:[35] The Pre-Trial Chamber provides abundant reasons for rejecting the Appellant's assertion that he had been put on notice of the ICTR's

[34] Appeal Brief, para.8.
[35] Appeal Brief, paras.9-10.

investigations against him by the media in 2001. The Chamber based its conclusion on the fact that information provided by the Appellant only relates to a news article quoting one "UN official, speaking on condition of anonymity" and notes that when the article was published, the Suspect was in detention in Kosovo, where he presumably had limited access to international media and internet. Considering also that this news article is the only source of notice adduced by the Appellant, the Pre-Trial Chamber correctly rejected that he had notice of the ICTR investigation prior to the publication of this article. Even if, *arguendo,* the Chamber erred by finding that he had no prior notice of the ICTR investigation, the error is irrelevant since, with or without notice the Appellant would not have been able to easily leave Kosovo, for the reasons in paragraph 48 of the Decision.[36] Moreover, the findings of the Chamber in paragraph 49 of the Decision are consistent with those in paragraph 54: in both instances, the Pre-Trial Chamber concluded that the Appellant's limited knowledge did not give him any incentive to flee at that time.

19. Paragraph 50 of the Decision:[37] The findings of the Pre-Trial Chamber on the Appellant's argument that his application for refugee status in France allegedly increased his "accessibility to law enforcement agencies" are unassailable. The Appellant's contention that Kosovo is not and was not at the time a political entity with closed borders is unsupported.[38] Moreover, he has not demonstrated error in the Chamber's conclusion that he would have freedom of movement within the Schengen area. It is irrelevant whether he would also have enjoyed similar freedom of movement in Canada or Australia. The Appellant further mischaracterizes the document attached in Annex 4 to the Defence Request. This document is a decision of the ICTR prosecutor that "there are no grounds for the continuation of investigations of the suspect Callixte Mbarushimana". It is not, as alleged by the Appellant, proof that he was informed of this decision. The

[36] See Decision, para.49, last sentence.
[37] Appeal Brief, paras.11-12.
[38] Appeal Brief, footnote 11.

Appellant has also failed to provide any evidence that the fax number appearing on the document was that of an unnamed French counsel allegedly acting for him at the time.

20. Paragraph 51 of the Decision:[39] The Pre-Trial Chamber correctly dismissed the Appellant's claim that he made no attempts to abscond after having been awarded refugee status in France, in spite of further efforts of the Rwanda's government to have him extradited. Based on the outcome of extradition proceedings before the Gjilan District Court, as well as Article 33(1) of the United Nations Convention relating to the Status of Refugees, the Pre-Trial Chamber reasonably concluded that the Appellant could expect that France was likely to refuse further requests for extradition to Rwanda. This conclusion is also not affected by any German efforts to extradite him to Rwanda, as argued by the Appellant, especially since the German proceedings would likely not have succeeded for the same reasons set out by the Chamber. In addition, this fact was not before the Pre-Trial Chamber,[40] so the Appellant cannot fault the Chamber for failing to consider it. Moreover, the findings contained in paragraphs 50 and 51 are true and are not mutually contradictory.

21. Paragraph 52 of the Decision:[41] The Appellant yet again misrepresents the findings of the Chamber: the Chamber did not find, or assume, that the Appellant had no reason to fear the outcome of the *plainte civile*. Rather, based on the facts before it, the Pre-Trial Chamber correctly concluded that no criminal proceedings had yet been opened in Paris. It added that, in view of the outcome of the extradition proceedings, the Appellant had little incentive to flee at the time. The Appellant, although disagreeing with the Chamber's conclusion, has not demonstrated any error in its facts or reasoning.

[39] Appeal Brief, para.13.
[40] The Appellant has not raised this argument in para.17 of the Defence Request or in the Defence Reply. Nor does it provide any proof in support of this assertion.
[41] Appeal Brief, para.14.

22. Paragraph 53 of the Decision:[42] The Appellant relied below on the fact that his detention was not ordered by a French investigating magistrate in a proceeding that took place while this Court's surrender request was pending. The Appellant stated that the French investigating judge made a positive finding that the Appellant "did not represent a flight risk or a threat to victims and witnesses that he ought to be placed in detention". This argument was factually untrue, as the Chamber noted. Though the Appellant argues that the Chamber should have "inferred" this positive finding from the magistrate's decision,[43] the Chamber properly inferred instead that the magistrate was likely aware that the Appellant was in custody awaiting surrender. Thus, it concluded, "it cannot be argued that the said order is based on the investigating judge's finding that Mr. Mbarushimana posed no risk of flight or a threat to victims and witnesses". Short of demonstrating a reversible error, the Appellant simply argues that his preferred inference is "more justifiable and less speculative that that of the Pre-Trial Chamber". So long as the Chamber's inference is reasonable – and it manifestly is – it is within the Chamber's proper discretion.

23. Paragraph 54 of the Decision:[44] The Appellant argued that he did not flee before the arrest warrant was issued even though he knew that the Prosecution was investigating him. The Pre-Trial Chamber accepted that the Appellant was aware of the investigation but concluded that he was not likely aware of the details, much less that it would result in his arrest. The Appellant's complaint that the Chamber committed error by speculating as to his knowledge of the ICC investigations is unfounded. The Chamber based its finding on the Appellant's claim that that he had learned of the ICC proceedings from comments attributed to a spokesman for the Rwandan Prosecuting authorities,[45] but that source did not include any detail at all. Under these circumstances, the Chamber did not err

[42] Appeal Brief, para.15.
[43] *Ibid.* This, it is noted, flies in the face of his preceding submission that "[l]egal judgments … are normally interpreted by what they contain and not what they lack".
[44] Appeal Brief, para.16.
[45] Defence Request, para.20 and fn.26.

in finding that the Appellant lacked knowledge whether he would be charged or the substance of the investigation. Nor was it dispositive that the Appellant did not flee despite the German investigation since, as the Prosecution has repeatedly established in multiple filings, the German authorities were not actively pursuing a case against him.[46] In any event, as the Chamber noted, there is a significant difference between being merely a suspect in an investigation and facing criminal charges; accordingly, even a deliberate decision to not flee or obstruct an investigation has little predictive value on the likelihood of flight or obstruction after charges are brought.

24. Paragraph 56 of the Decision:[47] The Pre-Trial Chamber's conclusions concerning the implication of the Appellant's family ties on his risk of flight are correct. The Chamber considered the arguments regarding the Appellant's family residing in France and the prospect of his continued employment in France if released. The Appellant, although disagreeing with the Chamber's conclusion, has not demonstrated that the Chamber ignored or misinterpreted any of the evidence before it. Moreover, the Appeals Chamber has already stated that close family ties are not necessarily a guarantee that a person would not flee.[48]

25. Paragraph 57 of the Decision:[49] The Chamber's conclusion that the UN travel ban against the Appellant did not prevent him from moving within the Schengen area is reasonable. The fact that the Appellant allegedly chose to remain in France following the imposition of the travel ban -- even though, as the Chamber found, he was able to cross borders -- is no indication that if he is released now he would continue to remain notwithstanding his greater incentive to leave.

26. Paragraph 58 of the Decision:[50] The Pre-Trial Chamber's finding that the circumstances now are materially different from what they were before it issued

[46] See for instance ICC-01/04-01/10-211.
[47] Appeal Brief, para.17.
[48] ICC-01/05-01/08-631-Red, OA2, para.68.
[49] Appeal Brief, para.18.
[50] Appeal Brief, paras.19-20.

an arrest warrant is not erroneous. Nor is it unreasonable to find that disclosure of the evidence increase the likelihood that the Appellant will determine that it is now in his interests to flee or obstruct the case. The Chamber did not find that every arrestee "will automatically be predisposed to flee" after receiving disclosure, but the fact that an arrestee knows the substance and strength of the case against him is clearly relevant to the assessment of likelihood of flight. It is also illogical to argue, as the Appellant does, that the proximity of the confirmation hearing does not affect the likelihood of flight. The Appeals Chamber has acknowledged that the progress in the proceedings may make it more likely for a suspect to abscond.[51] If the rule were as the Appellant now urges – that, as a matter of law, the likelihood of flight cannot increase until after the confirmation of charges -- a suspect who is released pending confirmation and believes that confirmation is likely may well take advantage of his short-lived freedom to flee before the hearing.

27. <u>Paragraph 59 of the Decision</u>:[52] Paragraph 59 merely summarized the conclusion that "in view of the foregoing considerations" detention was required. Contrary to the Appellant's claim, the considerations identified by the Chamber – in particular, the Appellant's wide network of support and his ability to move freely in the Schengen area -- are not automatically applicable to all arrested persons. Appellant complains generally that the approach taken by the Pre-Trial Chamber violates the principle that detention should remain the exception but makes no particular argument in support of that allegation. He also ignores that Article 58(1) states that if the conditions under this Article are met, then the Chamber "shall" order the detention of a person.[53]

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[51] ICC-01/05-01/08-631-Red OA2, para.70, see also paras. 67-69. Although the findings of the Appeals Chamber in that context related to a decision on the confirmation of charges, the underlying principle - that a progress in the proceedings increases the risk of absconding - equally applies. The argument that the delay in the Chamber's decision is manifestly unfair to the suspect (para. 20) is irrelevant to the ground of appeal brought by the Appellant and should therefore be disregarded.
[52] Appeal Brief, para.21.
[53] ICC-01/04-169, para.44: "The use of the word 'shall' indicates that the Pre-Trial Chamber is under an obligation to issue a warrant of arrest, provided that the prerequisites listed in article 58 (1) of the Statute are

Arguments concerning the Pre-Trial Chamber's findings pursuant to Article 58(1)(b)(ii)

28. Paragraph 60 of the Decision:[54] The Appellant alleges that the Chamber did not give sufficient weight to the fact that there was no evidence that he had interfered with witnesses when being investigated previously by other jurisdictions. This allegation is incorrect. Indeed, the Chamber found that this fact "is of significance", but also implicitly concluded that this factor in and of itself does not outweigh the other relevant considerations before it relevant to its determination on whether the arrest of the Suspect appeared necessary to ensure that he does not obstruct the investigations or proceedings.[55]

29. Paragraph 61 of the Decision:[56] The Appellant once again mischaracterizes a finding of the Chamber. Concerning the Appellant's potential ability to interfere with witnesses, the Chamber did not conclude that he is in a position to intimidate only those witnesses whose names have already been disclosed. It specifically referred to witnesses whose names will be disclosed in the future. This approach is correct, especially since the Prosecution had been ordered to disclose witness statements on 23 May,[57] four days after the issuance of the Decision. Decisions under Article 58(1)(b), as stated by the Appeals Chamber necessarily include an element of prediction.[58]

30. Paragraph 62 of the Decision:[59] The Pre-Trial Chamber did not err by considering what are apparently MONUC documents that were seized in the Appellant's

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met." Therefore, the Chamber has discretion to determine if the test in Article 58 is met, but having made the relevant factual findings it has no residual discretion to deny detention, notwithstanding the facts, except in an "exceptional" case.

[54] Appeal Brief, para.22.

[55] Although the fact that someone has previously interfered with witnesses may be a strong indication that he/she will do so again, the converse is not necessarily true. The fact that someone has not done something in the past does not, logically, indicate that he/she will not do so in the future. Prisons are full of first time offenders.

[56] Appeal Brief, para.23.

[57] The deadline for disclosure was thereafter extended to 1 June 2011. This is irrelevant, however, to the underlying principle -- the Appellant would receive access to additional information through future disclosure, eviscerating his claim that he cannot interfere with witnesses because their identities are "currently redacted".

[58] ICC-01/04-01/06-824 OA7,para.137.

[59] Appeal Brief, para.24.

Parisian residence by French police acting pursuant to a request made by the Chamber. Although the Appellant repeatedly announced his intention to challenge the legality of the search of his apartment, he has not yet done so. The Chamber cannot be criticized for not having considered that the Court-authorized search "was conducted in contravention of international human rights law" in the absence of a motion to that effect. Thus, the material relied on was at all times properly before the Chamber.

31. On the merits, it was perfectly reasonable for the Chamber to conclude that UN documents in Appellant's apartment were leaked to the FDLR and obtained by the Appellant because of his membership in the FDLR and his senior position as Executive Secretary and member of the Steering Committee. The Chamber was not obliged to accept Appellant's unsupported speculation that he could have received the confidential documents from open sources.

32. Paragraph 63 of the Decision:[60] The Appellant argues that the Prosecution failed to support its submissions that the FDLR continues to be engaged in armed conflict and otherwise wields considerable influence and that MONUSCO forces play an important role in providing security in the Kivus. The fact of the FDLR's activities in the Kivus and the role played by MONUSCO,[61] together with supporting information, was placed before the Chamber in the Prosecution's application for a warrant of arrest against the Appellant. Nothing in the record of the case suggests that the *status quo* changed since. Moreover, 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 is widely published and a fact of common knowledge.[62] This fact is also provided for in the Memorandum of Understanding between the International Criminal Court and MONUC, which is applicable, *mutatis mutandis*, to

[60] Appeal Brief, paras.25-26.
[61] Then MONUC.
[62] See for instance UNSC Resolution 1925 (2010), para 12.

MONUSCO.[63] As a result, the conclusions of the Chamber are reasonable and properly based on information before it.

33. The Chamber did also not err by not specifically indicating which portion of the confidential MONUC information found in the Appellant's residence could be used to interfere with the ongoing investigation. The Chamber looked at the information as a whole and came to the conclusion that such a risk exists, considering also the existence of an international network of supporters of the FDLR and the position of the suspect within the organization. Nor is the conclusion unreasonable. One of the documents found in the Appellant's possession, for instance, was a list of recently demobilized FDLR combatants, from whose ranks the Prosecution has drawn several witnesses.[64] This fact was certainly known to the Chamber due to its prior review of several redaction requests pertaining to such witnesses. Moreover, the significance of the found documents is not necessarily their particular content, but that they demonstrate the Appellant's access to MONUSCO materials. Given MONUSCO's protective role in the Kivus, leaked disclosure to the Appellant of its documents would present at least the possibility of significant risk to the investigation and to witnesses.

34. <u>Paragraph 64 of the Decision:[65]</u> The Pre-Trial Chamber found that the Appellant is "predisposed to witness intimidation" based on a notebook entry that refers to an "idea" to make public the names of witnesses testifying against the FDLR officials in the German proceeding. The Chamber rejected as implausible an alternate interpretation of this entry suggested by the Appellant. This, the Appellant suggests, is a legal error; he argues that in rejecting his suggestion the Chamber

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[63] See Article 17(8) of the *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).
[64] ICC-01/04-01/10-101 Conf-Anx2, item 7.
[65] Appeal Brief, paras.27-28.

made a credibility assessment, an action he asserts is "inappropriate at the pre-confirmation stage".

35. Not surprisingly, the Appellant cites no authority for that proposition. If he were correct, every accused need only assert, through his lawyer, that he is innocent and that the Prosecution's evidence in support of the arrest warrant is untrue or subject to another interpretation, and the Chamber would be bound to accept that assertion as proven and order his release. That cannot be the rule. Nor does a rejection of a Suspect's assertion violate the principle of *in dubio pro reo*. First, the *in dubio pro reo* principle does not require the Pre-Trial Chamber to credit every fact and inference and interpretation proffered by the Suspect or Accused. Second, and as already advanced, the principle does not apply at the Article 58 stage, where it is not necessary for the Prosecution to demonstrate that a particular inference is the only reasonable one available on the evidence.[66]

36. The Appellant further claims that the Chamber failed to properly consider "the potential for client-attorney privilege to attach to the contents of the [relevant] page [of the notebook]".[67] First, the Appellant did not properly claim that this information was privileged.[68] Nor does it appear to be privileged on its face. On this basis, the Prosecution was not under a duty to submit it to the Chamber for a privilege review, and the Chamber was under no duty to consider the issue of privilege *proprio motu*. As detailed by the Prosecution in an email response to the Appellant prior to the filing of the Defence Reply,[69] any suggestion that the document in question was privileged pursuant to Rule 73(1) was entirely unfounded. Among the many reasons, the notebook entry appears to be the Appellant's note of a conversation with someone who was not formally representing him at the time, and the conversation was not for the purpose of providing legal assistance to Appellant. Rather, it was related to the criminal

[66] ICC-02/05-01/09-73 OA, paras.30 and 33
[67] Appeal Brief, para.28.
[68] Defence Reply, para.9 and Anx1-Conf.
[69] Defence Reply, Anx2-Conf-Exp.

proceedings against other FDLR persons, and the attorney with whom Appellant spoke represented one of the other individuals. Finally, the Chamber is obligated to provide a reasoned analysis but not to analyze completely unfounded assertions;[70] the Appellant's claim that the note was a privileged communication was before the Chamber,[71] which under these facts could properly decline to entertain the speculation by the Appellant concerning privilege.

37. Paragraph 65 of the Decision:[72] The Appellant does not present any new argument to challenge the Chamber's findings in paragraph 65 of the Decision, but merely complains that the Chamber failed to give sufficient weight to the fact that he did not threaten witnesses or obstruct prior criminal investigations. The Chamber reasonably explained why those prior matters were different and provide little assurance of the Appellant's likely conduct in this matter.[73]

Arguments concerning the Pre-Trial Chamber's findings pursuant to Article 58(1)(b)(iii)

38. Paragraph 66 of the Decision:[74] The Chamber's conclusion that the detention of the Appellant appears necessary to prevent him from continuing with the commission of the alleged crimes is unassailable. It is based on multiple grounds, and the Appellant has not demonstrated an error with respect to any of them. The Appellant does not challenge the relevance of the mode of liability charged and its implications for the Appellant's ability to continue to commit the crimes. Concerning the continued activity of the FDLR and the volatile situation in Eastern DRC, the Appellant merely reiterates prior submissions that have been addressed above.[75] Moreover, the Appellant's skills and experience in information

[70] ICC-01/04-01/06-773 OA5, para.20; ICC-01/04-01/06-774 OA6, para. 30.
[71] Defence Reply, Anx2-Conf-Exp.
[72] Appeal Brief, para.29.
[73] See paras.28-34 above.
[74] Appeal Brief, para.30.
[75] See para.32 above.

technology can reasonably be inferred from his occupation as an IT professional,[76] as well as from the volume and complexity of the computer materials seized in his apartment, which have in part been made available to the Chamber.

Conditional release

39. While the Chamber found that "electronic tagging" *could* be considered as an option, it did not enter a finding that it would in fact be an appropriate and sufficient measure to ensure the Suspect's appearance at trial.[77] As the Appellant has not demonstrated any reversible error in the Chamber's findings that the arrest of the Suspect appears necessary based on the ground of Article 58(1)(b)(ii) and (iii), there is no need to return the matter to the Chamber for further consideration.

40. Finally, the Appellant disagrees with the conclusion of the Chamber that two members of the FDLR Executive Commission are present in France. The Prosecution submits that based on the evidence before the Chamber and cited by the Chamber,[78] this conclusion is reasonable.[79]

[76] See letter from the employer of the Appellant confirming that his job profile includes providing ICT training to job seekers (Defence Request, Annex 11).
[77] Decision, para.67, Appeal Brief, para.31. The Appellant misinterpreted the Prosecution's submission that "anything short of round-the-clock monitoring is simply inadequate to guarantee" the Suspect's appearance at trial (see Prosecution Response, para.29). Contrary to the contention of the Appellant, this does not suggest "electronic tagging as a suitable alternative to detention" (Defence Reply, para.8). Electronic tagging is not monitoring; it cannot stop a person from fleeing, all it can do is alert the authorities, after the fact, that the person has fled.
[78] Prosecution's Application for a Warrant of Arrest, Annex7, p.26.
[79] The Appellant does not challenge the inference that the Chamber drew from this fact, namely that any of the conditions suggested by the Appellant, including the Suspect's undertaking "to temporarily abstain from any contact with the international media" would be insufficient to eliminate the risk of the Suspect's continued commission of crimes, if released.

Conclusion

41. For the reasons set out above, the Prosecution submits that this appeal should be rejected.

Luis Moreno-Ocampo,

Prosecutor

Dated this 6th day of June 2011

At The Hague, The Netherlands