

1 International Criminal Court
2 Appeals Chamber - Courtroom 1
3 Situation: Democratic Republic of the Congo
4 In the case of The Prosecutor v. Callixte Mbarushimana -
5 ICC-01/04-01/10
6 Presiding Judge Anita Ušacka
7 Appeals Decision
8 Thursday, 14 July 2011
9 (The hearing starts in open session at 3.00 p.m.)
10 THE COURT USHER: All rise. The International Criminal Court is now in session.
11 Please be seated.
12 JUDGE UŠACKA: Good afternoon. Would the court officer please call the case.
13 THE COURT OFFICER: Situation in the Democratic Republic of the Congo, in the
14 case of The Prosecutor versus Callixte Mbarushimana, case reference ICC-01/04-01/10.
15 JUDGE UŠACKA: Thank you very much. Today the Appeals Chamber is
16 delivering the judgment on the appeal of Mr Mbarushimana against the decision of
17 Pre-Trial Chamber I of 19 May 2011 entitled, "Decision on the 'Defence Request for
18 Interim Release.'" (ICC-01/04-01/10-163) In today's summary, I will refer to this
19 decision as the "Impugned Decision."
20 I apologise, I forgot to introduce myself. I am Judge Anita Ušacka and I am the
21 Presiding Judge of this appeal arising from the case of The Prosecutor versus Callixte
22 Mbarushimana.
23 I shall now summarise the Appeals Chamber's judgment. Please note that not this
24 summary, but the judgment which will be filed and notified to the parties and
25 participants shortly is authoritative.

1 On 30 March 2011, Mr Mbarushimana filed the "Defence Request for Interim Release."
2 On 19 May 2011, the Pre-Trial Chamber rendered the Impugned Decision in which it
3 rejected Mr Mbarushimana's request for interim release. The Pre-Trial Chamber
4 found that, and I quote, "The continued detention of Mr Mbarushimana appears
5 necessary to ensure his appearance at trial, to ensure that he does not obstruct or
6 endanger the investigations and proceedings before the Court and to prevent him
7 from continuing with the commission of crimes."
8 On 23 May 2011 Mr Mbarushimana submitted a notice of appeal against the
9 Impugned Decision, and on 29 May 2011 filed a document in support of the appeal.
10 Mr Mbarushimana raises only one ground of appeal, namely whether - and I
11 quote - "The Pre-Trial Chamber erroneously evaluated the evidence presented against
12 and in support of the grounds of arrest either by failing to attribute its appropriate
13 weight in the circumstances, or by misinterpreting it."
14 On 6 June 2011 the Prosecutor filed a response to the document in support of its
15 appeal, submitting generally that Mr Mbarushimana had not established any factual
16 or legal error in the Pre-Trial Chamber's findings.
17 I will now turn to the Appeals Chamber's determination of the merits of the appeal,
18 beginning with the applicable standard of review.
19 Mr Mbarushimana bases his appeal solely on allegation of errors of fact. The
20 Appeals Chamber has held that a Pre-Trial or Trial Chamber commits an error of fact
21 if it misappreciates facts, disregards relevant facts, or takes into account facts
22 extraneous to the sub judice issues.
23 The Appeals Chamber also recalls that the appraisal of evidence lies, in the first place,
24 with the Pre-Trial Chamber. In reviewing a claim that a Pre-Trial or Trial Chamber
25 has misappreciated facts in a decision on interim release, the Appeals Chamber will

1 defer or accord a margin of appreciation both to the inferences the Chamber draw
2 from the available evidence and to the weight it accorded to the different factors
3 militating for or against detention. The Appeals Chamber will not interfere with
4 Pre-Trial or Trial Chamber's evaluation of the evidence just because it might have
5 come to a different conclusion. It will interfere only in the case of a clear error;
6 namely, where it cannot discern how the Chamber's conclusion could have
7 reasonably been reached from the evidence before it. In the absence of any clear
8 error on the part of the Pre-Trial Chamber, the Pre-Trial Chamber defers to the
9 Pre-Trial Chamber.

10 Having set out the applicable standard of review, I will now summarise the Appeals
11 Chamber's determination on the appeal.

12 In the impugned decision, Pre-Trial Chamber I rejected Mr Mbarushimana's request
13 for interim release on the basis that Mr Mbarushimana's continued detention
14 appeared necessary first to ensure his appearance at trial; second to ensure he does
15 not obstruct or endanger investigations or court proceedings; and third to prevent
16 him from continuing with the commission of crimes in accordance with Article
17 58(1)(b) of the Statute.

18 With respect to all three conditions, Mr Mbarushimana argues that the Pre-Trial
19 Chamber committed numerous errors of fact, which he identifies with references to
20 the Impugned Decision paragraph by paragraph.

21 Article 58(b)(i) of the Statute:

22 I will now turn to the Pre-Trial Chamber's finding that detention was necessary to
23 ensure Mbarushimana's appearance at trial.

24 Specifically, the Pre-Trial Chamber found that the gravity of the crimes and the
25 associated possibility of a lengthy prison sentence made it more likely

1 Mr Mbarushimana would try to abscond and he had access to means which would
2 enable him to abscond. Mr Mbarushimana does not contest the Pre-Trial Chamber's
3 general conclusion that detention may be necessary where a suspect has sufficient
4 means and motivation to abscond. However, Mr Mbarushimana challenges the
5 Pre-Trial Chamber's evaluation of the evidence underlying its findings that he had
6 either the motivation or means to abscond and puts forward a number of arguments
7 concerning other factors which, in his view, should have been interpreted differently,
8 or given more weight.

9 As to Mr Mbarushimana's challenges to the Pre-Trial Chamber's evaluation of the
10 evidence, in the view of the Appeals Chamber it is primarily for the Pre-Trial
11 Chamber to determine which factors exist and what weight they should be given.

12 As is explained more fully in the judgment, the Appeals Chamber considers that
13 Mbarushimana has, at most, identified a series of disagreements between himself and
14 the Pre-Trial Chamber as to the proper weight to be given to the factors. He has not,
15 however, identified any clear errors in the Impugned Decision in relation to the
16 Pre-Trial Chamber's finding.

17 With respect to the additional factors that Mr Mbarushimana argues should have
18 been taken into account, the Appeals Chamber observes that the Pre-Trial Chamber
19 meticulously addressed each of the arguments put forward in Mr Mbarushimana's
20 request for interim release and found that the argument was either unsustainable,
21 significantly distinguishable from the circumstances of the present case, or if relevant
22 did not outweigh the other factors necessitating his detention in order to ensure his
23 appearance at trial.

24 In sum, as to the Pre-Trial Chamber's finding that detention was necessary to ensure
25 Mr Mbarushimana's appearance at trial, the Appeals Chamber is of the view that

1 Mr Mbarushimana has merely offered alternative conclusions which could have been
2 drawn by the Pre-Trial Chamber. He has not established any clear errors in either
3 the inferences drawn by the Pre-Trial Chamber from the available evidence, or the
4 weight that it accorded to each factor.

5 Article 58(1)(b)(ii) of the Statute:

6 In relation to Article 58(1)(b)(ii) of the Statute, whether detention of a person appears
7 necessary to ensure that the person does not obstruct or endanger the investigation,
8 the Pre-Trial Chamber concluded that Mr Mbarushimana had the potential means to
9 interfere with witnesses on the basis that (a) there appears to have been a leak of
10 internal information from MONUC to the FDLR and (b) there is a risk that
11 Mr Mbarushimana may use this source within MONUC or leaked information to
12 interfere with ongoing investigations and with witnesses residing in the Kivu regions
13 of the Democratic Republic of Congo.

14 On appeal, Mr Mbarushimana challenges the Pre-Trial Chamber's conclusions
15 concerning the leak from MONUC on two bases: Firstly, that the Pre-Trial Chamber
16 should have requested the Prosecutor to prove the legality of the seizure of the
17 documents from Mr Mbarushimana's residence before relying on them, and secondly
18 there is no evidence that Mr Mbarushimana received these materials by virtue of his
19 alleged membership in the FDLR.

20 As to the first, the Appeals Chamber concludes that Mr Mbarushimana never actually
21 formally challenged before the Pre-Trial Chamber the legality of the search at his
22 residence, despite ample opportunity to do so. Thus, the Appeals Chamber cannot
23 discern any clear error in the Pre-Trial Chamber's decision not to consider the legality
24 of the search and dismisses Mr Mbarushimana's argument in this regard.

25 With respect to Mr Mbarushimana's second argument concerning the connection

1 between the documents found at his residence and the FDLR, the Appeals Chamber
2 finds that the Pre-Trial Chamber drew a reasonable inference from the fact that
3 documents of a confidential and/or internal character all concerning the FDLR in
4 some way were found in Mr Mbarushimana's residence. Accordingly, the Appeals
5 Chamber finds no clear error in the Pre-Trial Chamber's findings with respect to the
6 alleged leak of information from MONUC.

7 With respect to Pre-Trial Chamber's findings concerning an intent to interfere with
8 witnesses, the Pre-Trial Chamber referred to an entry in a notebook recovered from
9 Mr Mbarushimana's residence as evidence to support its inference that
10 Mr Mbarushimana had the intention to publicise the names of witnesses testifying in
11 other proceedings in Germany.

12 Mr Mbarushimana challenges the Pre-Trial Chamber's interpretation of and weight
13 given to this notebook entry and argues, in addition, that the Pre-Trial Chamber
14 neglected to consider the potential that attorney-client privilege may attach to the
15 notebook.

16 In relation to the first argument, the Appeals Chamber concludes that
17 Mr Mbarushimana merely offers alternatives regarding the interpretation and
18 weighting of the evidence, but does not establish that it was clearly erroneous for the
19 Pre-Trial Chamber to reach the conclusions or apportion the weight in the way that it
20 did.

21 As to the second argument, the Appeals Chamber observes that Mr Mbarushimana
22 has never actually asserted, in the proceedings leading up to the Impugned Decision
23 or before this Chamber, that the notebook entry was protected by or subject to
24 attorney-client privilege. Absent any other convincing reason to conclude that
25 privilege should attach to the notebook, the Appeals Chamber finds no clear error in

1 the fact that the Pre-Trial Chamber did not examine whether attorney-client privilege
2 attached to the notebook. Therefore, Mr Mbarushimana's arguments as to these
3 points are dismissed.

4 Article 58(1)(b)(iii) of the Statute: In relation to the Pre-Trial Chamber's findings in
5 the Impugned Decision under Article 58(1)(b)(iii) of the Statute, the Appeals Chamber
6 again finds that Mr Mbarushimana has not demonstrated any clear errors in the
7 Pre-Trial Chamber's conclusion that the risk that Mr Mbarushimana may continue to
8 contribute to the crimes described in the arrest warrant necessitates his detention. In
9 the view of Appeals Chamber, on appeal, Mr Mbarushimana either mischaracterises
10 the findings made by Pre-Trial Chamber or puts forward arguments that are not
11 material to the findings the Pre-Trial Chamber made. For the above reasons, the
12 Appeals Chamber finds that Mr Mbarushimana has failed to identify any clear errors
13 in relation to this portion of the Impugned Decision.

14 Appropriate relief. On an appeal pursuant to Article 82(1)(b) of the Statute, the
15 Appeals Chamber may confirm, reverse or amend the decision appealed (Rule 158(1)
16 of the Rules of Procedure and Evidence). In the present case, the Appeals Chamber
17 confirms the Impugned Decision as no errors in the Impugned Decision have been
18 identified.

19 This concludes my summary of the judgment. It remains for me only to thank the
20 interpreters and court reporters. Thank you. The session is now closed.

21 THE COURT USHER: All rise.

22 (The hearing ends in open session at 3.18 p.m.)