Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/04-01/10**
Date: **15 August 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 "Document in support of the Defence Appeal against Decision: ICC-01/04-01/10-319"

Source: **Office of the Prosecutor**

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

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Introduction

1. In his Second Defence request for interim release,[1] the Appellant stated that "[t]he Defence does not disguise the fact that the present application is designed to persuade the learned Pre-Trial Chamber to reconsider legitimate Defence submissions [regarding complaints that the Prosecution failed to apprise the Chamber of an ongoing German investigation of the Suspect at the time it sought the arrest warrant]."[2] He now seeks to appeal, raising a single issue: that the Single Judge "erred in finding that the Defence Request sought reconsideration of matters that had been previously decided."[3]

2. On any number of bases, this Appeal should be dismissed as improperly brought and as totally meritless. Having conceded that its Second Defence request was "designed to persuade the learned Pre-Trial Chamber to reconsider legitimate Defence submissions on their merits," the Defence cannot now reasonably argue that the Single Judge erred in agreeing with it.

3. Nor did the Defence demonstrate changed circumstances that would warrant his release under Article 60(3). The application did not even allude to the statutory factors that govern interim release decisions. It solely relied on a ground – alleged misrepresentation by the Prosecution of information that would purportedly demonstrate the inadmissibility of the case at the time of the arrest warrant -- that, even if proven, would not entitle the Appellant to interim release. Indeed, it would have been an abuse of discretion for the Single Judge to have ordered release of a person who is a flight risk or a danger to the investigation or the community as a remedy for some unrelated past wrong, which the Defence has in addition failed to establish.

[1] ICC-01/04-01/10-294.
[2] Id, at para. 9.
[3] ICC-01/04-01/10-337-Corr, para. 3.

4. Thus, the Defence application for interim release – a self-admitted effort to find a "more appropriate procedural scenario" in which to raise the admissibility challenge[4] -- was properly rejected.

5. Since the Defence claim regarding the alleged failure by the Prosecution to apprise the Chamber of an ongoing German investigation of the Suspect was improperly couched as a request for interim release, so too is the present appeal improperly couched as an appeal as of right under Article 82(1)(b) (allowing appeals from a decision denying or granting release). The current appeal is simply an attempt to circumvent the Pre-Trial Chamber's rejection of an earlier Defence request for leave to appeal. As such, it should be rejected *in limine*. If the Chamber sanctions the misuse of the release provision to obtain substantive review of an unrelated procedural issue, then it runs the risk that every procedural complaint will be presented as a demand for interim release and appealed as of right to this Chamber.

6. Finally, the Appeals Chamber should dismiss the appeal from the Single Judge's failure to award financial compensation for a purportedly unlawful arrest, which does not have even the pretence of being appealable as of right under Article 82(1)(b).

Statement of facts

The Prosecution's Application for the issuance of an arrest warrant against the Appellant

7. On 20 August 2010, the Prosecution filed its Application under Article 58 of the Rome Statute for a warrant of arrest for the Appellant.[5] The Application cited the existence of an investigation in Germany in which the Appellant was regarded as a suspect, although no concrete investigative steps had been taken against him.[6] On the strength of this and the stated intention of the German authorities to close their investigation and refer the matter to the Court – both indisputably accurate

[4] ICC-01/04-01/10-294, para. 11.
[5] ICC-01/04-573-Red, 20 August 2010.
[6] *Ibid.* paras 172–173.

facts -- the Prosecution concluded that there was no investigation being undertaken against the Appellant which would render the case inadmissible.[7]

8. On 28 September 2010, the Chamber issued an arrest warrant.[8] With specific respect to the admissibility of the case, the Chamber "decline[d] [...] to use its discretionary proprio motu power [...] as there [was] no ostensible cause or self evident factor which impels the Chamber to exercise its discretion pursuant to article 19(1) of the Statute".[9]

9. On 3 December 2010 the German authorities formally closed the investigation as regards the Suspect.[10]

The Appellant's Challenge to the Arrest Warrant

10. On 10 January 2011, while the Appellant was still in custody in France, he challenged the validity of the arrest warrant relying on Rule 117(3) ("10 January Challenge").[11] The Appellant argued that the Prosecution omitted decisive information relating to an alleged investigation in the Federal Republic of Germany ("Germany") in its arrest warrant application.

11. On 17 January 2011, the Prosecution responded.[12] Among other points, it argued that the unredacted Prosecution Application accurately and adequately set forth the relevant information, referring to the German investigation and making clear that the German authorities did not pursue a criminal case against the Suspect and did not intend to do so.

12. On 28 January 2011, the Pre-Trial Chamber rejected the 10 January Challenge on the basis that "the admissibility of a case is not a substantive requisite for the issuance of a warrant of arrest, unless there are uncontested facts that render a case clearly inadmissible […]" and that issues relating to the admissibility of the

[7] *Ibid.* Paras 167 and 174.
[8] ICC-01/04-01/10-2-tENG, 28 September 2010 .
[9] ICC-01/04-01/10-11-Red, para. 9.
[10] ICC-01/04-01/10-209-Conf-Anx1, 3 June 2011.
[11] ICC-01/04-01/10-32.
[12] ICC-01/04-01/10-35.

case are not relevant to determine "whether a warrant of arrest was properly issued" within the meaning of Rule 117(3) ("28 January Decision").[13]

The Decision on the First Request for Interim Release

13. On 30 March 2011, the Appellant requested interim release ("First Request"),[14] which the Prosecution opposed on 15 April.[15] On 19 May, the Pre-Trial Chamber denied the First Request for Interim Release and found that the Appellant's continued detention was necessary under Article 58(1)(b)(i) to (iii), 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 ("First Decision").[16] This Chamber affirmed the First Decision on 14 July.[17]

The Appellant's Request for a Stay of Proceedings

14. On 24 May 2011, the Appellant filed a request for a permanent stay of proceedings ("Request for Stay"). In his request, the Appellant reiterated the arguments made previously in the 10 January Challenge: that the Prosecution misled the Chamber regarding the proceedings against him in Germany, thereby committing an abuse of process that required that the proceedings be permanently stayed. The Prosecution responded that the Application was accurate and did not exclude relevant information, that it identified the Prosecution's contacts with the German authorities, that these contacts were not relevant to the determination of the admissibility of the case, and that there was no abuse of process warranting termination (permanent stay) of the case.[18]
15. On 1 July 2011, the Pre-Trial Chamber denied the Request for Stay ("Stay Decision").[19] Without resolving the factual issues, the Chamber found that the

[13] ICC-01/04-01/10-50.
[14] ICC-01/04-01/10-86.
[15] iCC-01/04-01/10-101.
[16] ICC-01/04-01/10-163.
[17] ICC-01/04-01/10-283OA.
[18] ICC-01/04-01/10-177.
[19] ICC-01/04-01/10-264.

Appellant's allegations on prosecutorial misconduct were "of a speculative nature", that only gross violations justified the drastic remedy of a stay, and that even if the Prosecution erred in characterizing the nature of the German proceedings, that error did not meet the threshold of gravity necessary to justify a stay.

16. On 5 July the Appellant sought leave to appeal this decision;[20] on 19 July the Pre-Trial Chamber denied the application.[21]

The Second Request for Interim Release

17. On 20 July 2011, the Appellant filed his "Second Defence Request for Interim Release" ("Second Request").[22] The Appellant qualified his Request as "sui generis" as "it presents the admissibility issue as a changed circumstance".[23] He conceded that he had resorted to numerous procedural avenues (challenging the arrest warrant and seeking a stay of proceedings) unsuccessfully, and that this Second Request expressly sought "to persuade the learned Pre-Trial Chamber to reconsider" and to rule that the Prosecution had "mischaracterized" and omitted the full facts regarding the German investigation, which the Prosecution allegedly failed to put before the Chamber. According to the Appellant, these facts would have established the inadmissibility of the case under Article 17(1)(a) at the arrest warrant stage.[24] Accordingly, he requested interim release (under Article 60) and financial compensation for his unlawful arrest (under Article 85(1)).[25]

18. On 27 July 2011, the Prosecution opposed the request. [26] The next day, 28 July, the Single Judge of Pre-Trial Chamber I denied the request.[27] In the Decision on the "Second Defence Request for Interim Release", the Single Judge explained that there were no new circumstances justifying any change in the detention determination. He also found that (a) the Request for Release really constituted a

[20] ICC-01/04-01/10-266.
[21] ICC-01/04-01/10-288.
[22] ICC-01/04-01/10-294.
[23] Second Request for Interim Release, paras.11.
[24] Ibid., para.8, 9, 11,13-14, 16.
[25] Ibid., paras.17,19.
[26] ICC-01/04-01/10-316-Conf.
[27] ICC-01/04-01/10-319.

request for reconsideration of prior rulings; (b) reconsideration, if allowed at all only be ordered exceptionally; and (c) there was no reason to apply that exception in this matter.

Submissions

The appeal is an abuse of the provision allowing appeal of right from orders denying release

19. The statutory provisions related to interim release establish that persons shall be detained if they constitute a flight risk or would obstruct the proceedings or commit crimes within the Court's jurisdiction.[28] A person found to be a flight risk or to create a danger of obstruction or further crimes has no right to release.

20. Nothing in the Statute or in precedent of this Court justifies the release of a person notwithstanding the acknowledged risk of flight, obstruction, or continued criminal activity, solely in order to compensate him for alleged prosecutorial misconduct. If the person is wrongly being held because the case should be dismissed, as the Defence alleged here, the remedy is to discharge that person and dismiss the case. If the alleged basis for the dismissal is the existence of national investigations or proceedings, then the adequate process is to challenge the admissibility of the case, as previously indicated by the Pre-Trial Chamber.[29] The Defence may have termed its request an application for "interim release", but the remedy it sought is something quite different than what is contemplated in Article 60.

21. Thus, it is irrelevant whether the unspecified information that the Defence alleges the Prosecution failed previously to disclose was a newly discovered fact – i.e. a purported "changed circumstance" -- or a regurgitation of previously known facts.[30] The allegation of misconduct has no bearing on the factors justifying

[28] Article 58(1)(b) and 60(2).
[29] ICC-01/04-01/10-50 and ICC-01/04-01/10-264.
[30] See ICC-01/04-01/10-337, para.8.

detention and, even if true, provides no entitlement to "interim release" under Article 60. The impugned Decision was manifestly appropriate.

22. Having openly invoked interim release as a device to obtain reconsideration of his claim that had nothing to do with the factors applicable to interim release, the Appellant now relies on the right to appeal the denial of release as a device to obtain review. For the same reasons that the request was rejected, the appeal should be dismissed: the Appellant argues an issue – alleged mischaracterisation by the Prosecution of the status of the German investigation in 2010, and failure of the Pre-Trial Chamber to appreciate the significance of this fact -- that is unrelated to the statutory factors bearing on a right to release.

23. This Chamber recently dismissed an appeal on a similar basis. The Government of Kenya couched the Pre-Trial Chamber's denial of its request for legal assistance as a decision "with respect to admissibility which may be appealed as of right."[31] The Appeals Chamber explained that "it is the nature, and not the ultimate effect or implication of a decision, that determines whether an appeal falls under article 82(1)(a) of the Statute."[32] The approach – that it is the *nature* of the Decision (i.e., its substance) that determines whether it is within the category of matters appealable as of right -- is applicable with equal force here. The nature of the request, and not its caption or characterization, should control. Thus, just as Kenya's request for legal assistance was not an admissibility challenge, and accordingly the denial of that request not an admissibility decision appealable as of right, so too the Appellant's request for reconsideration of its prosecutorial misconduct claim was not a detention challenge, and accordingly denial of the request is not an automatically appealable decision "denying release".

[31] ICC-01/09-78 OA, 10 August 2011, para. 11.
[32] Id. At para. 17.

The Single Judge correctly characterised the Second Request for Interim Release as a request for reconsideration of prior rulings

24. The Appellant argues that the Single Judge of Pre-Trial Chamber I erred in finding that the Second Request for Interim Release sought reconsideration of matters that had been previously decided.[33] As stated previously, the request below stated that "[the Defence does not disguise the fact that the present application is designed to persuade the […] Chamber to reconsider legitimate Defence submissions on their merits".[34] Having (properly) made that concession to the Pre-Trial Chamber, the Appellant cannot now complain that the Single Judge agreed.[35]

25. Moreover, in his Appeal Brief, the Appellant himself confirms that in his Second Request "[he] reiterated [his] submission that the […] warrant for [his] arrest was unlawful given that the case against [him] was inadmissible […]"[36] and that he "sought to persuade the Pre-Trial Chamber to view the prior inadmissibility of the case as a changed circumstance".[37] Accordingly, the Brief concedes again that the substance of the Defence claim -- that the Prosecution withheld information that, if disclosed, would have compelled the Pre-Trial Chamber to find the case inadmissible *proprio motu* and refuse to issue a warrant -- was identical to that which the Chamber rejected twice before, when the Chamber dismissed the Appellant's Challenge to the Arrest Warrant, and when it rejected the stay of proceedings on the grounds of abuse of process.

The Appellant failed to demonstrate any "changed circumstance" that would make unnecessary the Appellant's continued detention under Article 58(1)(b) and 60(2)-(3)

26. The Appellant argues that the case was inadmissible at the arrest warrant stage, and that this constitutes a changed circumstance under Article 60(3) that would

[33] Appeal Brief, para.3; see Decision, pp. 6-7.
[34] Second Request, para.9. See also paras.13-14,16.
[35] Decision, p.6, paras.2-3.
[36] Appeal Brief, para.5.
[37] Ibid., para.8.

justify compensation by way of either interim release or a financial payment.[38] On the merits, this allegedly new information did not establish a change in circumstances. The Pre-Trial Chamber did not find the case admissible when it issued the arrest warrant; it instead stated and reiterated that it did not find any ostensible cause to review *proprio motu* the admissibility of the case.[39] Second and more pertinently, the alleged changed circumstances had nothing to do with the circumstances previously found to require the Appellant's continued detention. In the First Decision on Interim Release the Chamber found that the Appellant's continued detention was "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".[40] At no time did the Appellant argue that the purported "changed circumstance" would impact on any of the Chamber's findings that deemed his detention necessary under Article 58(1)(b)(i) to (iii).[41]

27. In fact, the Appellant requests interim release (and monetary payment) as a remedy or "compensation" to the purported Prosecution's misconduct. However, the Statute is clear in that release can only be granted if the conditions under Article 58(1)(b) are not met; if the Chamber is satisfied that those conditions are met, "the person shall continued to be detained".[42] The Statute and the Rules do not envisage interim release as a means of compensating a person for purported acts of misconduct of the Prosecution. The Prosecution further notes that, as stated above, a specific request for relief in the form of an application for stay of proceedings was made by the Defence, without success.[43]

28. For the above reasons this Chamber should not entertain the merits of the Appeal Brief; otherwise it will condone the Appellant's abuse and encourage other persons appearing before this Court to do the same. However, and for the sake of

[38] Appeal Brief, para.8; see also Second Request for Interim Release, paras.17,19.
[39] ICC-01/04-01/10-11-Red, para. 9, and Decision on Challenge Arrest Warrant, para.10.
[40] First Decision on Interim Release, para.69.
[41] The Appeals Chamber has stated that "the requirement of changed circumstances [in Article 60(3)] imports either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary". ICC-01/05-01/08-1019OA4, para.51.
[42] Article 60(2). See ICC-01/04-01/06-824OA7, paras.134,140.
[43] See paras. 14 et seq above.

completeness the Prosecution reiterates the flawed nature of the Appellant's submissions regarding the "[Prosecution's] supply of incorrect and misleading admissibility information".[44] The Prosecution's Application adequately presented the information relevant to the admissibility of the case: in paragraphs 167, 172-174 of its Application, the Prosecution indicated that the Appellant had been considered a suspect in a German investigation but that no concrete investigative steps had been taken related to him, and that the German authorities had indicated that the Court was the relevant authority to prosecute the case. The Prosecution also stated that this information was conveyed in meetings and communications between his representatives and German authorities.[45]

Conclusion

29. For the above-referred reasons, the Prosecution requests that the Chamber reject the Appeal Brief.

Luis Moreno-Ocampo,
Prosecutor

Dated this 15th day of August 2011
At The Hague, The Netherlands

[44] Appeal Brief, para.9.
[45] ICC-01/04-01/10-11-Red, paras.167, 172-174, fns.214-215.