Cour Pénale Internationale

International Criminal Court

Original: **French**

No.: **ICC-01/04-01/10**
Date: **20 December 2011**

APPEALS CHAMBER

Before: **Judge Anita Ušacka, Presiding Judge**
Judge Akua Kuenyehia
Judge Sang-Hyun Song
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

Defence observations pursuant to the order of the Appeals Chamber (ICC-01/04-01/10-472)

Source: Defence for Mr Callixte Mbarushimana

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

The Office of the Prosecutor
Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparations

Office of Public Counsel for Victims

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Amicus Curiae

REGISTRY

Registrar
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Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

1. On 19 December 2011 at 4.00 p.m., the Prosecutor of the International Criminal Court (ICC) lodged with the Appeals Chamber the "Prosecution's Appeal against 'Decision on the confirmation of charges' and Request for Suspensive Effect/In the alternative, Prosecution's Appeal against 'Decision on the Prosecution's Request for stay of order to release Callixte Mbarushimana'"[1] ("the Prosecutor's Appeal"), wherein he seeks, as a main submission, to appeal against the decision rendered on 16 December 2011 declining to confirm the charges against Mr Callixte Mbarushimana (hereinafter "the Decision").[2]

The Prosecutor's appeal against the Decision on the charges

2. In his application, the Prosecutor states that his appeal relies on article 82(1)(b) of the Rome Statute and rule 156(5) of the Rules of Procedure and Evidence ("the Rules").

3. The Defence for Mr Mbarushimana notes *in limine* that the legal instruments cited by the Prosecutor do not apply to the situation at hand.

4. Article 82(1)(b) of the Statute only allows parties in a trial directly to lodge an appeal against a decision granting or denying the release of a person "***being investigated or prosecuted***".

5. However, following the Decision of 16 December 2011, Mr Mbarushimana is no longer "***being investigated or prosecuted***", since the charges the Prosecutor brought against him were rejected.

6. It is obvious that article 82(1)(b) provides for appeals against rulings on applications for the release of a person being proceeded against and assuredly not, as in the case in point, decisions whose principal purpose is to reject the charges

[1] ICC-01/04-01/10-470-OA3.
[2] ICC-01/04-01/10-465-RED.

preferred by the Prosecutor and whose logical consequence is the release of the person concerned.

7. The Appeals Chamber inherently confirmed this position in its *Decision on the admissibility of the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "*Décision sur la confirmation des charges*" of 29 January 2007*,[3] wherein it notes that:

> 15. Article 82 (1) (b) of the Statute is explicit in what it imports. It confers a right to appeal decisions "granting or denying release". Such decisions may be given in the context of article 60 of the Statute, as the Prosecutor submits. The decision confirming the charges neither grants nor denies release. The effect or implications of a decision confirming or denying the charges do not qualify or alter the character of the decision. The submission of the Appellant that both decisions confirming charges and decisions of the Trial Chamber under article 74 of the Statute fall within the ambit of article 82 (1) (b) of the Statute is irreconcilable with the content and meaning of article 82 (1) (b) of the Statute.[4]

8. Indeed, even if in its decision dismissing the charges, Pre-Trial Chamber I had not stated that Mr Mbarushimana should be properly released, there is no doubt that the ICC should have released the detained person, failing which it would commit a serious trespass to the person in the form of arbitrary detention. Moreover, article 61(10) of the Statute enshrines the rule that if a charge is not confirmed, the warrant of arrest pertaining to such charge shall cease to have effect.

9. As regards rule 156(5) of the Rules, on which the Prosecutor also relies, it merely affords an appellant the opportunity to seek suspension of the effects of the impugned decision. As previously argued, the Prosecutor's application being unsound, an analysis of the applicability of this rule is not immediately relevant. No effort will therefore be expended here in such analysis.

10. In truth, the Prosecutor's only avenue for lodging an appeal against the Decision would be to employ the interlocutory appeal procedure as understood from a joint reading of articles 81 and 82 of the Statute and from the settled

[3] ICC-01/04-01/06-926.
[4] *Ibid*, para. 15.

jurisprudence of the ICC. In the first case brought before the Court, the Pre-Trial Chamber defined the decision on the charges as an interlocutory decision, stating:

> 19. The drafters of the Statute intentionally excluded decisions confirming charges against a suspect from the categories of decisions which may be appealed directly to the Appeals Chamber.
>
> 20. The case-law of the Court indicates that appeals of interlocutory decisions were intended to be "admissible only under the limited and very specific circumstances stipulated in article 82, paragraph 1(d)" of the Statute.[5]

This jurisprudence has therefore become settled since then.[6] Nonetheless, the Prosecutor has yet to seek the only relief open to him thus far, and instead persists in misrepresenting the basic legal instruments and in seeking remedies not available to him.

11. The appeal against the Decision, as set out in his "Urgent Application", should therefore be firmly declared inadmissible and rejected.

The Prosecutor's appeal against the Decision rejecting the application to stay the release of Mr Mbarushimana

12. Continuing his lopsided reasoning, the Prosecutor then states that, in the alternative, he is lodging an appeal against Pre-Trial Chamber I's decision no. ICC-01/04-01/10-469 rendered on 19 December 2011. It will be recalled that by this decision, Pre-Trial Chamber I rejected the Prosecutor's application for the stay of one of the consequences of the abandonment of the charges: the immediate release of Mr Mbarushimana.

13. Here again, the Prosecutor relies on article 82(1)(b) of the Rome Statute and rule 156(5) of the Rules. Echoing his previous stance, the Prosecutor claims that Mr Mbarushimana is still a suspect being investigated or prosecuted, whereas that is no longer the case. As has been argued above, decisions dismissing charges are not

[5] ICC-01/04-01/06-915, paras. 19 and 20.
[6] See ICC-02/05-02/09-267, ICC-01/04-01/07-727; ICC-01/05-01/08-532.

directly appealable and remedies must be routed through the chamber which rendered the impugned decision.

14. Accordingly, the Prosecutor's second application should be declared inadmissible and dismissed.

The Prosecutor's reasoning and his misrepresentation of the Decision of Pre-Trial Chamber I to reject his application for a stay of the release of Mr Mbarushimana

15. Continuing his application, the Prosecutor forays into a historical analysis of the proceedings for the sole purpose of contending that the applicable texts before the ICC are unclear in that they have never envisaged the dismissal of all the charges preferred by the Prosecutor, which *de facto* entails the immediate release of the person concerned.

16. Having made this nice point, the Prosecutor then claims that, in the absence of clear-cut rules, his position is logical and consists in using the two existing avenues for appeal: an interlocutory appeal (of which the Prosecutor gives notice, although he is yet to lodge one), and a direct appeal to the Appeals Chamber.

17. Contrary to the Prosecutor's assertion, not only is the situation abundantly clear, but it has also been resolved in *Lubanga*, in which the Defence filed both an interlocutory appeal (which has not even been filed here, only notified) and a direct appeal to the Appeals Chamber.[7] In that case, both the Pre-Trial Chamber and the Appeals Chamber rejected the reasoning now being rehearsed by the Prosecutor and found that the proper proceeding for lodging an appeal against a decision on the charges was an interlocutory appeal.[8]

[7] Furthermore, the Appeals Chamber stated that it was not an advisory body for participants in the proceedings and cannot therefore be used to resolve the prosecutor's quandaries. Moreover, the Appeals Chamber has rejected the broad interpretation of its powers. See ICC-01/04-01/07-3132 and ICC-01/04-01/06-2823 respectively.

[8] ICC-01/04-01/06-915, para. 19.

18. With commensurate bad faith, the Prosecutor next attempts to interpret the penultimate consideration of Pre-Trial Chamber I's decision no. ICC-01/04-01/10-469, rendered on 19 December 2011 ("Considering, that the Prosecution's Application seeks suspensive effect of the Decision, a measure envisaged in article 82(3) of the Statute and which only the Appeals Chamber can order"), as if it amounted to an invitation to the Prosecution to lodge a direct appeal.

19. In fact, this consideration is merely a rehearsal of the rules of procedure which would certainly not call into question the "basal" rule governing the issue at stake, *viz*. that the proper appellate procedure in case of a dismissal of the charges is an interlocutory appeal.

20. In the final analysis, the Prosecutor's strategy is:

(i) to refuse to accept the consequences of the Decision;

(ii) to refuse to accept the reality of the procedure clearly set forth in the legal instruments and in jurisprudence;

(iii) to claim that it is Pre-Trial Chamber I which is encouraging it to attempt to circumvent this legal procedure; and

(iv) to feign to seek the opinion of the Appeals Chamber in the hope that the Appeals Chamber will arrogate power not vested in it either in the texts or by its own jurisprudence.

21. The Appeals Chamber should not be lured into these labyrinthine arguments and should apply the texts in force to reject purely and simply all the Prosecutor's applications.

[signed]

Arthur Vercken

Counsel for Mr Callixte Mbarushimana

Dated this Tuesday, 20 December 2011
At Paris, France