



Original: **French**

No.: **ICC-01/04-01/10**

Date: **7 March 2012**

**APPEALS CHAMBER**

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO  
 IN THE CASE OF  
 THE PROSECUTOR *v.* CALLIXTE MBARUSHIMANA**

**Public Document**

**Application for leave to participate in the appellate proceedings against the  
*Decision on the confirmation of charges (ICC-01/04-01/10-465-Conf)***

**Source: Ghislain M. Mabanga, acting as the legal representative of 95 victims  
 authorised to participate in the proceedings**

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

**Office of the Prosecutor**

Mr Luis Moreno-Ocampo

Ms Fatou Bensouda

Mr Anton Steynberg

**Counsel for the Defence**

Mr Arthur Vercken

Ms Yaël Vias-Gvirsman

Mr Philippe Larochelle

**Legal representatives of victims**

Mr Mayombo Kassongo

Mr Ghislain M. Mabanga

**Legal representatives of applicants**

**Unrepresented victims**

**Unrepresented applicants for  
participation/reparations**

**Office of Public Counsel for Victims**

**Office of Public Counsel for the  
Defence**

**States' representatives**

Democratic Republic of the Congo

**Amicus curiae**

**REGISTRY**

---

**Registrar and Deputy Registrar**

Ms Silvana Arbia and Mr Didier Preira

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Other  
Section**

## I. Introduction

1. *Purpose.* – The present observations are submitted to the Appeals Chamber of the International Criminal Court (“the Appeals Chamber” and “the Court”, respectively) in the name of and on behalf of 95 victims (“Represented Victims”), whose reference numbers are as follows:

a/2166/11, a/2167/11, a/2168/11, a/2169/11, a/2170/11, a/2171/11, a/2172/11, a/2173/11, a/2174/11, a/2175/11, a/2177/11, a/2178/11, a/2179/11, a/2180/11, a/2181/11, a/2182/11, a/2183/11, a/2184/11, a/2185/11, a/2186/11, a/2187/11, a/2188/11, a/2189/11, a/2190/11, a/2191/11, a/2192/11, a/2193/11, a/2194/11, a/2196/11, a/2197/11, a/2198/11, a/2205/11, a/2206/11, a/2207/11, a/2221/11, a/2234/11, a/2239/11, a/2240/11, a/2580/11, a/2582/11, a/2583/11, a/2584/11, a/2585/11, a/2586/11, a/2587/11, a/2588/11, a/2589/11, a/2590/11, a/2591/11, a/2593/11, a/2594/11, a/2595/11, a/2596/11, a/2597/11, a/2598/11, a/2599/11, a/2600/11, a/2602/11, a/2619/11, a/2620/11, a/2621/11, a/2622/11, a/2624/11, a/2000/11, a/2006/11, a/2007/11, a/2008/11, a/2022/11, a/2023/11, a/2024/11, a/2025/11, a/2027/11, a/2028/11, a/2029/11, a/2030/11, a/2031/11, a/2203/11, a/2208/11, a/2212/11, a/2220/11, a/2223/11, a/2224/11, a/2226/11, a/2228/11, a/2229/11, a/2230/11, a/2572/11, a/2573/11, a/2574/11, a/2575/11, a/2576/11, a/2578/11, a/2579/11, a/2176/11 and a/2195/11.

The observations are submitted pursuant to the decision of 1 March 2012 by which Pre-Trial Chamber I (“the Pre-Trial Chamber”) granted the Prosecutor leave to appeal against the decision on the confirmation of charges issued on 16 December 2011 (“Impugned Decision”).<sup>1</sup>

2. *Structure of the filing.* – The Represented Victims will provide in support of their application a concise statement of the facts and proceedings (II) before

---

<sup>1</sup> Decision on the “Prosecution’s Application for Leave to Appeal the ‘Decision on the confirmation of charges’”, 1 March 2012, ICC-01/04-01/10-487.

turning to the legal arguments for their application (III) and setting out the consequences (IV).

## II. Concise statement of the facts and proceedings

3. On 28 September 2010, the Pre-Trial Chamber decided to grant an application by the Prosecutor dated 20 August 2010 seeking the issuance of a warrant of arrest for Mr Callixte Mbarushimana ("the Suspect"). In that decision,<sup>2</sup> the Chamber found that there were reasonable grounds to believe that FDLR combatants:

- (i) in late January 2009, attacked the village of Remeka, Ufamandu *groupement*, Walikale territory, and during such attack, gathered all the population and local leaders, accused them of betraying them and told them they would not be allowed to leave the village and killed those who tried to flee;
- (ii) in late January 2009, attacked the village of Busheke, in Kalehe territory, South Kivu, killing 14 civilians, including 12 women and girls whom they raped before killing;
- (iii) in mid-February 2009, after they had come into contact with some Rwandan Defence Forces ("RDF") troops, perpetrated 28 rapes and killed a local chief around the village of Pinga, Masisi territory, North Kivu;
- (iv) on 13 February 2009, after the *Forces Armées de la République Démocratique du Congo* ("FARDC") and RDF soldiers had passed through the village of Kipopo, Masisi territory, North Kivu, set on fire some 100 houses in the village with civilians locked therein;
- (v) in February 2009 in Miriki, Lubero territory, North Kivu, stopped a group of six young people, forcing the three boys to rape the three girls who were with them;
- (vi) in late February 2009, abducted from Remeka village, Ufamandu *groupement*, Walikale territory, at least a dozen women and girls and killed 9 of them when they resisted attempts to rape them;
- (vii) on 12 April 2009, having neutralised an FARDC position in the village, attacked and burned down the village of Mianga, Waloa-Loanda *groupement*, Walikale, North Kivu, killing at least 6 civilians, including the local chief;
- (viii) on 18 April 2009, attacked the villages of Luofu and Kasiki in Lubero territory, North Kivu, burning 250 and 50 houses respectively and killing at least 17 civilians;
- (ix) nearby Busurungi, Walikale territory, North Kivu, raped, killed and mutilated three women who on 28 April 2009 were found tied up, with

---

<sup>2</sup> *Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana*, 28 September 2010, ICC-01/04-01/10-1, para. 12. Footnotes omitted.

sticks in their vaginas, cuts over their bodies and crushed skulls, and, in the same locations, on 5 May 2009, raped and mutilated three other women;

- (x) on the night of 9-10 May 2009, carried out a thoroughly planned attack, the initial target of which was an FARDC battalion, and which was directed to the village of Busurungi, Walikale territory, North Kivu and the nearby settlements; in the course of that attack at least 60 civilians were killed, female residents of the village raped and in some instances their wombs cut open and fetuses removed from their bodies, and over 700 lodgings were destroyed;
- (xi) on the night of 20-21 July 2009, attacked the village of Manje, Masisi, North Kivu, accusing the villagers of being collaborators of the Congolese army, and killing at least 16 civilians, setting on fire over 180 houses and raping at least 10 women;
- (xii) in mid-August 2009, carried out a planned attack on the village of Malembe, in Walua-Loanda *groupement*, Walikale, North Kivu, burning down a large number of houses;
- (xiii) on 15 September 2009, during another attack perpetrated near Malembe, raped a woman who was 5-months pregnant, causing her to lose her unborn child.

4. After the confirmation hearing, which was held from 16 to 21 September 2011, the Pre-Trial Chamber issued a decision whose operative part reads as follows:

**FOR THESE REASONS, the Chamber, by majority, the Presiding Judge, Sanji M. Monageng, dissenting, hereby**

**DECLINES** to confirm the charges against Mr Callixte Mbarushimana;

**DECLARES** that the Warrant of Arrest against Mr Callixte Mbarushimana ceases to have effect in its entirety;

**DECIDES** that Mr Callixte Mbarushimana shall be released from the custody of the Court immediately upon the completion of the necessary modalities;

**ORDERS** the Registrar to make necessary arrangements for the release of Mr Callixte Mbarushimana pursuant to rule 185 of the Rules;

**ORDERS** the Registrar to arrange for an expedited translation of the present Decision into French; and

**DECIDES** that the five-day period to present an application for leave to appeal set out in rule 155(1) of the Rules shall start running for the Defence as of the date of notification of the French translation of this decision.<sup>3</sup>

---

<sup>3</sup> *Decision on the confirmation of charges*, 16 September 2011, ICC-01/04-01/10-465-Conf, pp. 151-152.

5. On 27 December 2011, the Prosecutor submitted to the Pre-Trial Chamber an application for leave to file an interlocutory appeal under article 82(1)(d) of the Statute.<sup>4</sup>
6. The Defence responded by a filing dated 27 February 2012 requesting the Pre-Trial Chamber to dismiss the application.<sup>5</sup>
7. On 1 March 2012, the Pre-Trial Chamber issued its decision, the operative part of which reads:

**FOR THESE REASONS, THE CHAMBER:**

**GRANTS** the Prosecution Application with respect to the following issues:

(i) Whether the correct standard of proof in the context of Article 61 allows the Chamber to deny confirmation of charges supported by the Prosecution evidence, by resolving inferences, credibility doubts and perceived inconsistencies against the Prosecution and thereby preventing it from presenting its case at trial;

(ii) Whether a proper interpretation of the scope and nature of a confirmation hearing, as defined by Article 61, allows the Pre-Trial Chamber to evaluate the credibility and consistency of witness interviews, summaries and statements without the opportunity to examine the witnesses that would be possible at trial; and

(iii) Whether the mode of liability under Article 25(3)(d) requires that the person make a 'significant' contribution to the commission or attempted commission of the crime.

and

**REJECTS** the remainder of the Prosecution Application.

8. The Represented Victims hereby seek leave to participate in the resultant appellate proceedings via their Legal Representative.

### **III. Discussion**

9. In accordance with the consistent findings of the Appeals Chamber,<sup>6</sup> victims' participation in appeals proceedings must satisfy the following conditions:

---

<sup>4</sup> "Prosecution's Application for Leave to Appeal the 'Decision on the confirmation of charges'", 27 December 2011, ICC-01/04-01/10-480.

<sup>5</sup> "Réponse de la Défense à « Prosecution's Application for Leave to Appeal the "Decision on the confirmation of charges" (ICC-01/04-01/10-480) »", ICC-01/04-01/10-486.

- (i) the individuals seeking participation must be victims in the case;
- (ii) their personal interests must be affected by the issues on appeal;
- (iii) their participation must be at an appropriate stage of the proceedings; and lastly
- (iv) the manner of participation should neither cause prejudice to nor be inconsistent with the rights of the accused [the Suspect in this instance] and a fair and impartial trial.

10. The Represented Victims will endeavour to demonstrate that they fulfil all of these criteria.
11. *The applicants are victims in the case.* – The Represented Victims were granted victim status in this case by a decision of the Pre-Trial Chamber dated 11 August 2011,<sup>7</sup> with the exception of Victims a/2176/11 and a/2195/11, who were granted victim status by a decision of the same chamber dated 23 September 2011.<sup>8</sup>
12. *The issues on appeal affect the personal interests of the victims.* – The issues raised by the Prosecutor’s appeal go to the merits of the Impugned Decision, insofar as the Appeals Chamber will be moved to rule on whether the Pre-Trial Chamber was right or wrong to decline to confirm the charges brought against the Suspect. Accordingly, the issues directly affect the personal interests of the Represented Victims for the plain and simple reason that the

---

<sup>6</sup> *Judgement 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 provisoire de Thomas Lubanga Dyilo”, 13 February 2007, ICC-01/04-01/06-824 (OA 7), paras. 44-45; Reasons for the “Decision on the Participation of Victims in the Appeal against the ‘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’”, 20 October 2009, ICC-01/05-01/08-566 (OA 2), para. 15; Decision on the Participation of Victims in the Appeal of Mr Katanga Against the “Decision on the Modalities of Victim Participation at Trial”, 24 May 2010, ICC-01/04-01/07-2124, para. 5; Decision on the Participation of Victims in the Appeal against Trial Chamber I’s Decision to Stay the Proceedings, 18 August 2010, ICC-01/04-01/06-2556, para. 7; Decision on the Participation of Victims in the Appeal against the “Decision on Applications for Provisional Release” of Trial Chamber III, 14 July 2011, para. 7.*

<sup>7</sup> *Decision on the 138 applications for victims’ participation in the proceedings, 11 August 2011, ICC-01/04-01/10-351, pp. 18-21.*

<sup>8</sup> *Decision on the applications for participation of victim applicants a/2176/11 and a/2195/11, 23 September 2011, ICC-01/04-01/10-441, p. 4.*

Impugned Decision declining to confirm the charges against the Suspect denies the Represented Victims any recourse for seeking reparations before the Court.

Under article 75(2) of the Statute, orders for reparations are made “against a convicted person”. However, there can be no conviction without a trial, and there can be no trial without a confirmation of charges. In this regard, the Impugned Decision before the Appeals Chamber directly affects the personal interests of all of the Represented Victims.

13. *The Victims’ participation must be at an appropriate stage of the proceedings.* – It is at precisely this stage of the proceedings, where the charges brought against the Suspect are at issue, that the Victims seek to present their views and concerns, since the forthcoming decision of the Appeals Chamber will have a direct impact on the confirmation or dismissal of the charges and hence on the possibility of holding a trial.

In this respect, the Represented Victims note that, since the beginning of these appellate proceedings, the Appeals Chamber has been called upon to determine important issues which will be decisive for the further course of the appeal. One such issue is the problem of working languages.<sup>9</sup> This issue is of utmost interest to the Victims, whose legal assistance does not permit their legal representative to form a team, which, if bilingual, would have enabled him to best defend his clients’ interests.

It follows that the participation of the Victims at this specific stage of the appellate proceedings is appropriate.

---

<sup>9</sup> Order on the filing of responses to the “Requête pour la traduction de tout document essentiel a [sic] l’appel du Procureur contre la décision de la Chambre Préliminaire ICC-01-04/01/10-465” and to the “Prosecution’s Request for an Extension of the Page Limit for its Document in Support of Appeal against the ‘Decision on the Confirmation of charges’ (ICC-01-04/01/10-465-Red)”, 6 March 2012, ICC-01-04/01/10-491.



14. *The manner of participation should neither cause prejudice to nor be inconsistent with the rights of the accused [the Suspect in this instance] and a fair and impartial trial. –*  
At this stage of the proceedings, the participation of the Represented Victims is neither prejudicial to nor inconsistent with the rights of the Suspect, still less a fair and impartial trial. For if the victims are granted leave to participate in the appeal, all of their written and oral submissions will be subject to the adversarial principle, allowing the Defence full opportunity to respond.
15. *Conclusion.* – In light of the above submissions, it follows that the Represented Victims fulfil all the criteria enabling them to participate in the proceedings arising from the Prosecutor's appeal. Accordingly, they request the Appeals Chamber to grant this application.

**IV. In light of the foregoing,**

16. The Represented Victims respectfully request the Appeals Chamber to declare this application admissible as to form and well-founded in substance; and
- Accordingly,*
- o To grant the Represented Victims leave to participate in the proceedings related to the Prosecutor's appeal against the decision of 16 September 2011 by which the Pre-Trial Chamber declined to confirm the charges brought against the Suspect;
  - o To rule that they will participate via their Legal Representative according to the format determined by the Appeals Chamber.

[signed]  
Ghislain M. Mabanga  
Legal Representative

Dated this 7 March 2012  
At Paris, France