



Original: **English**

No.: **ICC-01/04-01/10**
Date: **19 December 2011**

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Akua Kuenyehia
Judge Erkki Kourula
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**

URGENT APPLICATION

Public Document

**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"**

Source: Office of the Prosecutor

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The Office of the Prosecutor

Counsel for the Defence

Mr Arthur Vercken

Ms Yael Vias-Gvirsman

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Mr Mayombo Kassongo

Mr Ghislain M. Mabanga

Unrepresented Applicants for

Participation/Reparation

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. Pursuant to Article 82(1)(b) and Rule 154(1), the Prosecution hereby appeals the Decision on the Confirmation of Charges and the resulting order to release Callixte Mbarushimana (“the Suspect”) from custody and requests the Appeals Chamber to grant suspensive effect of that appeal, pursuant to Article 82(3) and Rule 156(5), and in particular to immediately suspend the release of the Suspect until the Appeals Chamber has ruled on the merits of this appeal.
2. In the alternative, pursuant to Article 82(1)(b) and Rule 154(1), the Prosecution appeals the 19 December 2011 Decision, rejecting the Prosecution’s request for a stay of the order to release the Suspect, and requests the Appeals Chamber to immediately modify the Pre-Trial Chamber Decision and order the stay of the release of the Suspect until the Decision on the Confirmation of Charges is final.¹

Background

3. On 16 December 2011, the Majority of Pre-Trial Chamber I declined to confirm the charges against and ordered that he “shall be released from the custody of the Court immediately upon the completion of the necessary modalities” (“Confirmation Decision”).²
4. On 16 December 2011, the Prosecution urgently requested for stay of order to release of the Suspect. It announced that it would file an application for leave to appeal against the Decision on the Confirmation of Charges, pursuant to article 82(1)(d) and that, in case the leave to appeal were granted, it would request that the Appeals Chamber attach suspensive effect to the appeal under Rule 156(5). In order to prevent irreparable prejudice to the Prosecution, the

¹ ICC-01/04-01/06-2582 OA18, para. 48.

² ICC-01/04-01/10-465-Red, p. 149.

Prosecution requested the Pre-Trial Chamber to stay its order on release until such a time as it ruled on the Prosecution's Application or, if leave were granted, until the Appeals Chamber ruled on the request for suspensive effect.³

5. On 19 December 2011, the Pre-Trial Chamber rejected the Prosecution's application for a stay of the order to release the Suspect. It found that preventing "irreparable prejudice to the Prosecution" is not among the conditions for detention recognized in Article 58(1). It also found that the "suspensive effect of the Decision" can only be ordered by the Appeals Chamber pursuant to Article 82(3) ("19 December 2011 Decision").⁴ The latter ruling, namely that the Pre-Trial Chamber lacks power to stay or suspend its own decision on release, is contrary to the consistent practice of this Court.⁵
6. However, the Pre-Trial Chamber's reliance on Article 82(1)(b) and Rule 154(1) as among the legal grounds for its ruling⁶ appears to indicate that it is of the view that an appeal against its Confirmation Decision, and in particular its order to release the Suspect, is available as of right. In addition, the Pre-Trial Chamber refers to Rule 154(5). Since this sub-rule is non-existent, it appears that this is a typographical error, and that the Pre-Trial Chamber in fact intended to refer to Rule 156(5).⁷
7. The Prosecution hereby files its appeal against the Confirmation Decision pursuant to Article 82(1)(b) and Rule 154. The Confirmation Decision constitutes a "decision granting [...] release" within the terms of Article 82(1)(b). The Pre-Trial Chamber expressly ordered the release of the Suspect.

³ ICC-01/04-01/10-466.

⁴ ICC-01/04-01/10-469.

⁵ ICC-01/04-01/06-1418, para.35; ICC-01/05-01/08-475, p.35. In the case against Abu Garda, the only other case, where a Pre-Trial Chamber had decided to confirm the charges, the Prosecution sought leave to appeal the decision pursuant to Article 82(1)(d) only, since in that case, the suspect was not detained and therefore there was no decision on release.

⁶ See 19 December 2011 Decision, p.5. This is contrary to the Prosecution's application, which referred only to Article 82(1)(d).

⁷ Rule 156(5) refers to the possibility of a party to seek suspensive effect pursuant to Article 82(3) when filing an appeal.

Moreover, the Pre-Trial Chamber ordered the release even though the Confirmation Decision is not final and the Suspect remains the subject of prosecution at least until the Prosecution's appeal options are exhausted.

8. Following the Pre-Trial Chamber's decision of 19 December 2011, the Prosecution has decided to appeal the Confirmation Decision pursuant to Article 82(1)(b), in addition to filing a request for leave to appeal before the Pre-Trial Chamber pursuant to Article 82(1)(d). The jurisprudence has not squarely addressed whether an appeal of a denial of confirmation of charges which results in an order of release is to be brought under Article 81(1)(b) or 81(1)(d), but the premise of the Pre-Trial Chamber decision appears to be that the Prosecution must file an appeal under Article 81(1)(b) and seek suspensive effect from the Appeals Chamber. In the alternative, in the event the Appeals Chamber finds that the Prosecution must seek leave to appeal under Article 82(1)(d), the Prosecution files its notice of appeal of the 19 December 2010 decision of the Pre-Trial Chamber in which the Pre-Trial Chamber concludes that it lacks the power to suspend the effect of its decision pending the exhaustion of appellate remedies by the Prosecution.
9. In the Prosecution's submission, an appeal under Article 82(1)(b) of the Confirmation Decision is available because it effectively orders the release of the Suspect. Under this remedy, the Prosecution may appeal on any ground arising from the Confirmation Decision, including the merits of the finding that "there are no substantial grounds to believe that the [Suspect] is individually responsible under article 25(3)(d) of the Statute for the crimes committed by the FDLR",⁸ as the order to release the Suspect is directly based on that finding.
10. Finally, the Prosecution suggests that the Appeal Chamber must resolve this dilemma – whether the Prosecution may appeal as of right from a decision finally terminating the proceedings by denying confirmation of charges that

⁸ Confirmation Decision, para.340.

operates expressly as an order to release the suspect (as the Pre-Trial Chamber seemingly believes) or whether the Pre-Trial Chamber must certify leave to appeal that decision – now. Given the Pre-Trial Chamber’s belief that it lacks the power to temporarily suspend release or consider an application for leave to appeal an order that terminates the proceedings altogether, there is no other way to give effect to whatever statutory appeal rights lie with the Prosecution. This appeal is the only mechanism by which the issue can be resolved, whether by an order of the Appeals Chamber directing the Pre-Trial Chamber to consider an application for leave to appeal or a decision considering the merits of the confirmation decision and release order.

Appeal pursuant to Article 82(1)(b)

11. The Prosecution is appealing Pre-Trial Chamber I’s Decision on the Confirmation of charges, delivered on 16 December 2011 in the case of *The Prosecutor v Callixte Mbarushimana*, pursuant to Article 82(1)(b), Rule 154(1) and Regulation 64(1).⁹
12. The Prosecution will request that the Appeals Chamber overturn the Pre-Trial Chamber’s confirmation decision and in particular the Chamber’s conclusion that “there are no substantial grounds to believe that the [Suspect] is individually responsible under article 25(3)(d) of the Statute for the crimes committed by the FDLR” and the order to release the Suspect, and order his continued detention.
13. In the alternative (i.e. in the event that the Appeals Chamber finds that the Prosecution must seek leave to appeal this decision under Article 82(1)(d)), the Prosecution is appealing the “Decision on the Prosecution’s Request for stay of order to release Callixte Mbarushimana” rendered on 19 December 2011 in the

⁹ “An appeal filed under rule 154 shall state: (a) The name and number of the case or situation; (b) The title and date of the decision being appealed; (c) The specific provision of the Statute pursuant to which the appeal is filed; (d) The relief sought.”

case of *The Prosecutor v Callixte Mbarushimana*, pursuant to Article 82(1)(b), Rule 154(1) and Regulation 64(1).

14. Under this alternative, the Prosecution requests that the Appeals Chamber immediately overturn the Pre-Trial Chamber's 19 December 2011 Decision and modify that decision by ordering the stay of the release of the Suspect until the Decision on the Confirmation of Charges is final.¹⁰ This remedy is necessary because the Pre-Trial Chamber declined to suspend the effect of its own judgment on the apparent belief that the Prosecution could go immediately to the Appeals Chamber under Article 82(1)(b). If the Appeals Chamber finds otherwise, the Prosecution is left with no place to seek suspensive effect and therefore requests that the Appeals Chamber overturn the 19 December 2010 decision pending the Prosecution's filing of an application for leave to appeal.

Request for Suspensive Effect

15. The Appeals Chamber has previously recognised in similar circumstances that releasing a Suspect pending appeal against the release decision could defeat the purpose of the appeal, as well as the appeals against other related decisions.¹¹ The decision is equally applicable to the release of a suspect against whom charges have not yet been confirmed. Where the release of the Suspect has been ordered, suspensive effect is required in order to avoid pre-empting the subject of the appeal – i.e. the Decision whether to release the Suspect – and rendering its outcome moot.¹²

¹⁰ ICC-01/04-01/06-2582 OA18, para. 48.

¹¹ ICC-01/04-01/06-1444 OA12, see in particular para. 9.

¹² Decisions on suspensive effect are left to the discretion of the Chamber, which should “consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances.” (ICC-01/04-01/06-1290 OA11, 22 April 2008, para. 7). In determining whether to exercise such discretion, it has been stated that the “guiding principle in the exercise of the discretion of the Court lies in the evaluation of the consequences that enforcement of an erroneous decision, if that is found to be the case by the decision of the Appeals Chamber, could have on the proceedings before the first instance court.” (ICC-01/04-01/06-1290-Anx OA11, 13 May 2008, Dissenting Opinion of Judge Pikis, para. 9).

16. Additionally, releasing the Suspect in the present circumstances, pending the outcome of this appeal, would have “far reaching”,¹³ “adverse and possibly dire consequences”¹⁴ on the proceedings against the Suspect themselves.

17. In order to prevent irreparable prejudice to the Prosecution, it is requested that the Appeals Chamber suspend the release of the Suspect until such time that it has ruled on the merits of this appeal. The Suspect is being held in detention pursuant to an order of the Pre-Trial Chamber on all three grounds under Article 58(1)(b).¹⁵ As found by the Pre-Trial Chamber, the Suspect, if released, has the means to interfere with the investigation, to commit crimes, and to abscond,¹⁶ with the financial support of the FDLR’s international network.¹⁷ Thus, releasing him could effectively render any reversal of the decision by the Appeals Chamber futile due to the Court’s inability to secure his re-arrest and/or to the Suspect’s interference with the investigation or his renewed commission of crimes within the jurisdiction of the Court. A stay of the release is thus appropriate under the circumstances.

¹³ ICC-01/04-01/06-1347 OA9 & 10, 22 May 2008, paras.22-23.

¹⁴ ICC-01/04-01/06-1290-Anx OA11, 13 May 2008, Dissenting Opinion of Judge Pikis, para. 12.

¹⁵ ICC-01/04-01/10-428.

¹⁶ ICC-01/04-01/10-163, para 46; ICC-01/04-01/10-428, para. 43; ICC-01/04-01/10-283, para 28.

¹⁷ ICC-01/04-01/10-7, para 47; ICC-01/01-01/10-163, para. 46.

Relief Sought

18. Accordingly, the Prosecution requests that the Appeals Chamber:

- (1) Accept this appeal against the “Decision on the confirmation of charges” pursuant to Article 82(1)(b), and Rule 154(1) and Regulation 64(1); and
- (2) Grant suspensive effect to such an appeal, pursuant to Article 82(3) and Rule 156(5), on an expedited basis.

19. In the alternative, the Prosecution requests that the Appeals Chamber:

- (1) Accept this appeal against the “Decision on the Prosecution's Request for stay of order to release Callixte Mbarushimana” pursuant to Article 82(1)(b), and Rule 154(1) and Regulation 64(1); and
- (2) Immediately to modify that decision by ordering the stay of the release of the Suspect until all appeal proceedings against the Decision on the Confirmation of Charges are finalised.



Luis Moreno-Ocampo,
Prosecutor

Dated this 19th day of December 2011
At The Hague, The Netherlands