



Original: **English**

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

Date: **05/07/2011**

PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Sylvia Steiner
Judge Cuno Tarfusser

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
THE PROSECUTOR
*v. CALLIXTE MBARUSHIMANA***

Public Document

Defence request for leave to appeal decision: ICC-01/04-01/10-264

Source: Defence for Mr. Callixte Mbarushimana

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

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Ms. Fatou Bensouda, Deputy Prosecutor

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

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Applicants

(Participation/Reparation)

The Office of Public Counsel for the Victims

The Office of Public Counsel for the Defence

States' Representatives

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Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

1. The Defence for Mr. Callixte Mbarushimana hereby applies for leave to appeal *Pre-Trial Chamber I's Decision on the "Defence request for a permanent stay of proceedings"* ("the Impugned Decision").¹

2. Pursuant to Article 82(1)(d) of the Rome Statute, the Defence requests that the learned Pre-Trial Chamber certify three issues for appeal:

(a) Whether the Pre-Trial Chamber erred by declining to receive and hear evidence² necessary for determining whether the Prosecution had, indeed, willfully or otherwise, mischaracterized the pre-surrender proceedings in Germany;

(b) Whether the Pre-Trial Chamber erred by finding that "even if" the Prosecution had mischaracterized the nature of the proceedings in Germany at the time of its arrest warrant application, such behaviour would not have satisfied the threshold of gravity necessary for a stay of proceedings which the Pre-Trial Chamber, itself, identified as follows: "bringing the accused to justice by illegal or devious means", and;

(c) Whether the Pre-Trial Chamber erred by finding that the more "appropriate procedural scenario" in the circumstances was a challenge to the admissibility of the case pursuant to Article 19 of the Rome Statute.

3. The aforementioned issues clearly arise out of the Impugned Decision and are direct citations from and fundamental aspects of the Impugned Decision. These issues, furthermore, do not constitute a mere disagreement with the learned Pre-Trial Chamber's exercise of discretion but substantial topics requiring resolution.³ As the

¹ ICC-01/04-01/10-264.

² The refusal to "embark on an in depth assessment of the specific nature of the *"Ermittlungsverfahren"*, the refusal to order the disclosure of all previous correspondence between the OTP and the German Federal Prosecutor, the refusal to convene a status conference for hearing the evidence of OTP officials and the refusal to entertain the German witness statements disclosed to the Defence on 1 June 2011.

³ ICC-01/04-168 at paragraph 9.

Prosecution has argued on many an occasion, the correctness of the Court's decision is irrelevant to an application for leave to appeal under Article 82(1)(d) of the Rome Statute.⁴

4. With respect to the **first** issue, the Defence notes that the Pre-Trial Chamber made no specific finding that the request for disclosure and the production of evidence was procedurally inappropriate but rather that it was unnecessary. The first issue, therefore, concerns a tautological procedural decision denying the Defence disclosure and its right to present evidence, the lack of which was then used to justify denying the application to stay the proceedings. On the one hand, the Pre-Trial Chamber found that the Defence's submission that the Prosecution "would have supplied misleading information in a willful or grossly negligent way" was speculative in nature. On the other hand, the Pre-Trial Chamber refused the Defence the essential tools it sought and needed in order to shed light and not to "speculate" on the extent of the Prosecution's knowledge or "state of mind" at the time it supplied admissibility related information in the context of its arrest warrant application.

5. With respect to the **second** issue, it is respectfully submitted that the Pre-Trial Chamber used similar tautological reasoning. On the one hand, the Pre-Trial Chamber predicated its finding regarding the Defence's failure to meet the requisite threshold of gravity for a stay of proceedings on its ruling that the Prosecution's conduct could only have amounted to "mischaracterization" (apparently innocent) of the German proceedings. The Pre-Trial Chamber, thereafter, used such a finding as the pretext for denying the Defence the means for adducing evidence to clarify the Prosecutor's state of mind which, as argued in paragraph 4 above, was the only available means of assessing whether such prosecutorial mischaracterization of the German proceedings would have been innocent or willful.

⁴ ICC-02/04-01/05-20-US-Exp, para.22.

6. With respect to the **third** issue identified for appeal, the Defence notes that the Pre-Trial Chamber has now twice⁵ declined to entertain the substantive merits of Mr. Mbarushimana's grievance concerning the Prosecution's misrepresentation of pre-surrender proceedings in Germany stating, in the present instance, that it was more appropriate to an admissibility challenge. Such a ruling ignores the fact that Mr. Mbarushimana was unfairly deprived of his right to raise an admissibility challenge at the appropriate time.⁶ Such a ruling also ignores the fact that the Court was deprived of precise admissibility-related information at the time it issued its arrest warrant and the fact that any admissibility challenge filed after 3 December 2010⁷ (when the Defence was eventually afforded disclosure) would inevitably have failed.⁸ Given the denial of timely disclosure and the subsequent inability to launch an admissibility challenge, Mr. Mbarushimana's substantive grievance has not been entertained by the Pre-Trial Chamber on its merits and should now, in the interests of justice, be resolved by the Appeals Chamber.

7. The Defence agrees with the learned Pre-Trial Chamber's finding that a stay of proceedings for abuse of the judicial process may arise where an accused is brought to justice "by illegal or devious means". In these circumstances, the Defence asserts that the identified issues ought to be resolved by the Appeals Chamber in order to determine whether the Prosecution's portrayal of the pre-surrender proceedings in Germany was, indeed, calculated to effect Mr. Mbarushimana's surrender by "devious means".

8. Immediate resolution of all three identified issues is essential for the fair and expeditious conduct of proceedings, may affect the outcome of a potential trial and will materially advance the proceedings. Decisions granting and refusing a stay of

⁵ The first time being the Pre-Trial Chamber's Decision on the Defence Challenge to the Validity of the Arrest Warrant: ICC-01/04-01/10-50.

⁶ Immediately after the issuance of the arrest warrant in order to enable a pre-surrender admissibility challenge.

⁷ The date on which the German authorities closed the *Ermittlungsverfahren* and evinced a clear intention to relinquish the matter to the International Criminal Court.

⁸ By the time the Defence was afforded a sufficient degree of disclosure enabling it to gauge the extent of the Prosecution's pre-surrender interaction with the German authorities, the German proceedings had been closed rendering the case clearly admissible according to the jurisprudence of the Court.

proceedings in the first instance have been certified for appeal in other cases - most notably in the Lubanga case and the Katanga case. The Defence adopts the principles enunciated in those cases set out hereinafter.

9. In the Lubanga case, when Trial Chamber I stayed proceedings for the second time, it stated as follows:

"Given the Chamber has halted the trial unconditionally, the Prosecution's submissions in support of this application do not require any exhaustive analysis. The decision is centrally concerned with the fairness of the proceedings, for the reasons analysed by the Chamber in its judgment on the stay, and, in the most fundamental sense, their expeditiousness.

Furthermore, the outcome of the trial clearly arises following the stay and an immediate resolution of this issue will materially advance the proceedings inter alia by establishing whether or not the trial should continue to a conclusion".⁹

In the present instance, despite the fact that the Pre-Trial Chamber declined to order a stay of proceedings, the issues raised by the Defence are "centrally concerned with the fairness of the proceedings". Moreover, should the Appeals Chamber concur with the Defence's arguments, the judicial process could be terminated.

10. In the Katanga case, Trial Chamber II considered the circumstances surrounding Mr. Katanga's arrest and an accompanying application for stay of proceedings as follows:

"The Chamber believes that the issue of challenges to the lawfulness of the Accused's arrest and detention is an important one, that clearly has a bearing on the fairness of the proceedings. The issue at stake may involve a number of rights guaranteed to the Accused by virtue of Article 21 (3) of the Statute, which makes the interpretation and application of law subject to internationally recognized human rights. The Chamber finds that the impugned decision involves an issue which could significantly affect the fair and expeditious conduct of the proceedings."¹⁰

⁹ ICC-01/04-01/06-T-314-ENG at line 8 onwards.

¹⁰ ICC-01/04-01/07-1859 at paragraph 18.

11. Trial Chamber II, in addition, found that immediate resolution of the issues identified for appealing its decision refusing a stay of proceedings would materially advance the proceedings:

*"Concerning the second requirement of Article 82(l)(d), the Chamber has to consider whether a prompt reference of the issue to the Appeals Chamber will ensure that the proceedings follow the right course, pre-empting any repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial. The Chamber considers that given the nature of the issue and the repercussion an erroneous decision on this matter would have on the overall fairness of the proceedings, an immediate decision from the Appeals Chamber is necessary. The Chamber therefore believes that a resolution of this matter by the Appeals Chamber at this stage would materially advance the proceedings, and is satisfied that the second requirement of Article 82(l)(d) of the Statute is also met."*¹¹

Relief Sought

12. In light of all the aforementioned, the learned Pre-Trial Chamber is respectfully requested to grant leave to appeal the Impugned Decision.



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Tuesday, July 05, 2011

¹¹ ICC-01/04-01/07-1859 at paragraph 19.