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

Date: **8 July 2011**

PRE-TRIAL CHAMBER I

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public Document

Prosecution's Response to the "Defence request for leave to appeal decision ICC-01/04-01/10-264"

Source: Office of the Prosecutor

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

The Office of the Prosecutor

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Background and argument

1. On 5 July 2011, counsel for Callixte Mbarushimana (“the Defence”) filed a document entitled “Defence request for leave to appeal decision: ICC-01/04-01/10-264”.¹ The Defence is asking the Pre-Trial Chamber to certify three issues for appeal: (i) whether the Pre-Trial Chamber erred by declining to receive and hear evidence necessary for determining whether the Prosecution had, willfully or otherwise, mischaracterized the pre-surrender proceedings in Germany; (ii) whether the Pre-Trial Chamber erred by finding that “even if” the Prosecution had mischaracterized the nature of the proceedings in Germany, such behavior would not have satisfied the threshold gravity necessary for a stay of proceedings; and (iii) 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 Statute.
2. The Prosecution notes that the first and third issues are derivative of, or closely related to the second one, which is the true crux of the Defence’s submission. The Prosecution will accordingly address the second issue first.
3. The Prosecution opposes that the second issue be certified for appeal. Even assuming, *arguendo*, that the issue has the potential to affect the fairness of the proceedings vis-à-vis the Defence, the Defence still fails to bring any arguments explaining how the expeditious conduct of the proceedings is affected by the Decision *in this case*.² The same applies to the requisite that intervention by the Appeals Chamber at this stage will materially advance the proceedings, a determination that is necessarily case-specific and cannot be dealt with by merely relying on a prior decision from another Chamber in a

¹ ICC-01/04-01/10-266 (hereinafter, “Request”).

² In the Prosecution’s view, however, this omission is not necessarily determinative of the Request: the Prosecution has consistently maintained that it suffices for the purposes of obtaining leave to appeal to demonstrate that the first element of the test enshrined in Article 82 (1) (d) is met, i.e. that the issue affects the “fair” conduct of the proceedings.

different case, as the Defence does.³ Not only is it not apparent in this case how allowing for appellate review of the Decision would materially advance the proceedings; on the contrary, certifying the issue for appeal would arguably delay the current proceedings unnecessarily and obstruct the efficient organization of the confirmation hearing.

4. In relation to the first issue, the Prosecution notes that the Pre-Trial Chamber considered that even if the Prosecution had mischaracterized the nature of the domestic proceedings in Germany, this would not constitute a fault of sufficient gravity to justify a remedy as drastic as the stay of proceedings. It did not qualify this conclusion in any particular manner.⁴ Thus, the Defence's contention that the denial of the application was based on the lack of evidence supporting the Defence's claim is wholly inaccurate. The issue, as portrayed by the Defence, simply does not arise out of the Decision.
5. In addition, the Defence again only includes a general reliance on prior decisions from other Chambers for the purposes of establishing the requirements of Article 82 (1) (d), and fails to provide any specific arguments as to how this issue affects the fair and expeditious conduct of the instant proceedings. It also fails to explain why intervention by the Appeals Chamber is required at this stage to materially advance the proceedings. Thus, the same considerations related to the second issue apply here.
6. The same flaws are present in the third issue, which deals with a residual finding from the Pre-Trial Chamber, which did not have any decisive impact on the outcome of the Decision. The application for a stay of proceedings was fundamentally rejected on the basis that even if the Prosecution had wilfully or negligently erred in the characterization of the national proceedings, this would not justify the drastic remedy of a stay of proceedings. The Chamber's

³ See Request, para. 11.

⁴ A plain reading of the Decision shows that the Chamber considered that *any* error in the characterization of the German proceedings – even if it were wilful or grossly negligent, as claimed by the Defence – would be insufficient to justify a stay of proceedings. See Decision, p. 7.

assertion that the appropriate procedural scenario to discuss the Defence's claims would be an admissibility challenge under Article 19⁵ was accordingly peripheral in nature and did not determine the fate of the application. The Defence's claim that the Chamber declined to entertain the substantive merits of the Defence's position on the basis that the underlying arguments should be raised in the context of an admissibility challenge⁶ misrepresents the Chamber's reasoning. Also in this case, the issue identified by the Defence does not arise from the Decision.

7. Finally, and as in the case of the first and second issues, the Defence fails to advance any specific arguments supporting the position that the issue satisfies the requirements of Article 82 (1) (d).

Conclusion

8. The Prosecution accordingly requests that the Pre-Trial Chamber reject the Request in its entirety.



Luis Moreno-Ocampo
Prosecutor

Dated this 8th day of July 2011

At The Hague, The Netherlands

⁵ See Decision, p. 6.

⁶ See Request, para. 6.