

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 15 July 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

Decision on the Defence request for leave to appeal the "Decision on the 'Defence request for a permanent stay of proceedings'" (ICC-01/04-01/10-264)

Decision 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
Mr Anton Steynberg, Senior Trial Lawyer

Counsel for the Defence

Mr Nicholas Kaufman
Ms Yaël Vias-Gvirsman

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**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

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

PRE-TRIAL CHAMBER I ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Callixte Mbarushimana* (Mr Mbarushimana);

NOTING the "Defence request for a permanent stay of proceedings" ("Defence's request for stay of proceedings"),¹ filed on 24 May 2011, whereby the Defence for Mr Mbarushimana ("Defence")

- (i) requested the Chamber to permanently stay the proceedings against Mr Mbarushimana on account of abuse of process;
- (ii) argued that the Office of the Prosecutor ("Prosecutor") had misled the Chamber as to the nature of the proceedings conducted against Mr Mbarushimana in the Federal Republic of Germany at the time it requested an arrest warrant and that such conduct should be seen as so "repugnant" to the administration of justice that the proceedings should have been discontinued, since no other less dramatic remedy was appropriate;²
- (iii) affirmed that the Prosecutor had presented misleading information to the Court; and knew that this information was misleading or was grossly negligent as to its misleading content.³
- (iv) requested the Chamber to, *inter alia*, (i) order the disclosure of all previous correspondence between the Prosecutor and the German Federal Prosecutor; (ii) convene a status conference for hearing evidence; and (iii) permanently stay the proceedings against Mr. Mbarushimana on account of an abuse of process;⁴

NOTING the "Decision on the 'Defence request for a permanent stay of proceedings'" dated 1 July 2011 ("Decision on the stay of proceedings"),⁵ whereby the Chamber

¹ ICC-01/04-01/10-177, with confidential annexes 1, 2 and 3.

² ICC-01/04-01/10-177, para. 4.

³ Ibid.

⁴ ICC-01/04-01/10-177, para. 26.

⁵ ICC-01/04-01/10-264.

- (i) reaffirmed the case-law of the Court and stressed that only gross violations of the rights of the suspect justify the drastic and exceptional remedy of a stay of proceedings, since behaviour which may trigger such a stay is that which may entail “unfairness of such nature that it cannot be resolved, rectified or corrected in the subsequent course of the proceedings”;⁶
- (ii) found that the Prosecutor’s behaviour alleged by the Defence only amounted to a “mischaracterisation” of the specific nature of the procedural initiatives taken by the German investigative authorities,⁷ which could not be “equated to the types of conduct that usually form a basis for a stay of proceedings due to abuse of judicial process”⁸, and that, accordingly, the Prosecutor’s alleged behaviour failed to reach the required threshold of gravity necessary to trigger a stay of proceedings;
- (iii) rejected the Defence’s request for stay of proceedings and found no need to address the other requests of the Defence;

NOTING the “Defence request for leave to appeal decision: ICC-01/04-01/10-264” filed by the Defence on 5 July 2011 (“Defence’s Request for Leave to Appeal” or “Defence’s Request”)⁹ in which it seeks, pursuant to article 82(1)(d) of the Rome Statute (“Statute”), leave to appeal in relation to the following three issues:

- a. “Whether the Pre-Trial Chamber erred by declining to receive and hear evidence necessary for determining whether the Prosecution had, indeed, wilfully or otherwise, mischaracterized the pre-surrender proceedings in Germany” (“First Issue”);
- 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

⁶ ICC-01/04-01/10-264, page 4 to 5.

⁷ ICC-01/04-01/10-264, page 5.

⁸ ICC-01/04-01/10-264, page 6.

⁹ ICC-01/04-01/10-266.

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” (“Second Issue”); 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” (“Third Issue”);¹⁰

NOTING the “Prosecution’s Response to the “Defence request for leave to appeal decision: ICC-01/04-01/10-264”, filed on 8 July 2011,¹¹ whereby the Prosecutor requests that the Defence’s Request be rejected in its entirety;

NOTING article 82(1)(d) of the Statute;

CONSIDERING that, according to the established jurisprudence of the Court, interlocutory appeals are meant as remedies of an exceptional character, which makes it mandatory to narrowly construct the statutory requirements and, in order for the Chamber to grant leave to appeal under article 82(1)(d) of the Statute, the issues identified by the party seeking leave must:

- (i) have been dealt with in the relevant decision; and
- (ii) meet the following two cumulative criteria :
 - a. it must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
 - b. in the opinion of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings;¹²

¹⁰ ICC-01/04-01/10-266, para. 2.

¹¹ ICC-01/04-01/10-272.

CONSIDERING that, as stated by the Appeals Chamber, for the purposes of article 82(1)(d) of the Statute, (i) “[o]nly an ‘issue’ may form the subject-matter of an appealable decision”; (ii) “[a]n issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”; further, (iii) the issue “is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”¹³;

CONSIDERING that, in light of the established jurisprudence of the Court, the requirements set forth in article 82(1)(d) of the Statute are cumulative and therefore failure to establish any of such requirements makes it unnecessary for the Chamber to determine whether all or either of the others are met;

CONSIDERING that the first two issues are closely related in as much as they both refer to the fact that the Chamber allegedly denied the Defence’s “disclosure and its right to present evidence”¹⁴, which alleged denial prevented the Defence from demonstrating that the Prosecutor had wilfully or otherwise mischaracterised the German proceedings (First Issue), and led the Chamber to take the view that the Prosecutor’s behaviour failed to satisfy the threshold of gravity necessary for a stay of proceedings (Second Issue);

CONSIDERING that the Defence’s assertion that the Chamber reached its conclusions based on the lack of available evidence is erroneous, since the Chamber specifically established that, even if the Defence were able to prove its allegations of the mischaracterisation made by the Prosecutor, “such behaviour cannot be equated to the

¹² ICC-01/04-01/10-116, para. 5; ICC-01/04-01/10-106, page 5.

¹³ *Situation in the Democratic Republic of the Congo*, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 9.

¹⁴ ICC-01/04-01/10-266, para. 4.

types of conduct that usually form a basis for a stay of proceedings due to an abuse of judicial process";¹⁵

CONSIDERING that, accordingly, the Defence's request for a permanent stay of proceedings was rejected because the alleged misconduct of the Prosecutor failed to reach the threshold of gravity, regardless of the evidence the Defence might have presented;

CONSIDERING that therefore the First and the Second Issues do not qualify as subjects or topics requiring a decision for their resolution, but merely as questions over which the Defence disagrees with the Chamber's findings;

CONSIDERING that the Third Issue refers to a residual finding which had no decisive impact on the outcome of the decision, since the Defence's request for stay of proceedings was fundamentally rejected because the allegations did not reach the necessary threshold to amount to an abuse of process by the Prosecutor;

CONSIDERING that, accordingly, the Defence failed to identify any issue requiring a decision for its resolution or which would be essential for the matters arising in the judicial cause under examination, which have been dealt with in the relevant decision, since none of the matters raised by the Defence constitute appealable issues in accordance with Article 82(1)(d) of the Statute;

CONSIDERING that, since the requirements of Article 82(1)(d) are cumulative and the Defence's Request does not meet the first requirement, the Chamber deems it unnecessary to consider any subsequent criteria in relation to the Defence's Request;

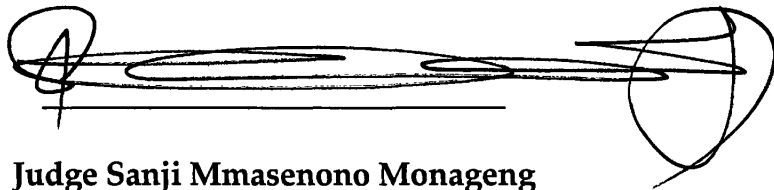
¹⁵ ICC-01/04-01/10-264, page 6.

FOR THESE REASONS, the Chamber

REJECTS

the Defence's Request for Leave to Appeal.

Done in English and French, the English version being authoritative.

A stylized, handwritten signature in black ink, consisting of several loops and a long horizontal stroke.

Judge Sanji Mmasenono Monageng
Presiding Judge

Two handwritten signatures in black ink. The signature on the left is more complex with many loops, while the one on the right is more fluid and cursive.

Judge Sylvia Steiner

Judge Cuno Tarfusser

Dated this Friday 15 July 2011

At The Hague, The Netherlands