

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/04-01/10 OA 2

Date: 21 September 2011

THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. CALLIXTE MBARUSHIMANA

Public document

**Decision on the admissibility of the appeal of Mr Callixte Mbarushimana against
the decision of Pre-Trial Chamber I of 28 July 2011 entitled “Decision on
‘Second Defence request for interim release’”**

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

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence

Mr Nicholas Kaufman
Ms Yaël Vias-Gvirsman

REGISTRY

Registrar

Ms Silvana Arbia



The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I entitled “Decision on ‘Second Defence request for interim release’” of 28 July 2011 (ICC-01/04-01/10-319),

Unanimously,

Renders the following

DECISION

1. The “Defence request to expedite the proceedings in the appeal against Pre-Trial Chamber I’s decision: ICC-01/01-01/10-319” of 13 August 2011 (ICC-01/04-01/10-362) is rejected.

2. The appeal is dismissed.

REASONS

I. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

1. On 20 August 2010, the Prosecutor applied to Pre-Trial Chamber I (hereinafter: “the Pre-Trial Chamber”) for a warrant of arrest¹ (hereinafter: “Arrest Warrant Application”) against Mr Callixte Mbarushimana (hereinafter: “Mr Mbarushimana”). In the Arrest Warrant Application, the Prosecutor informed the Pre-Trial Chamber that the German Federal Prosecutor had conducted an investigation into crimes allegedly committed by the *Forces démocratiques de la libération du Rwanda* (hereinafter: “FDLR”) resulting in accusations against two other individuals.² According to the Prosecutor, Mr Mbarushimana was considered a “potential suspect”,

¹ “Prosecution’s Application under Article 58”, ICC-01/04-573-Red.

² Arrest Warrant Application, para. 172.

but the German authorities had not conducted and were not conducting any investigation into him.³

2. On 28 September 2010, the Pre-Trial Chamber decided to issue a warrant of arrest for Mr Mbarushimana⁴ (hereinafter: “Arrest Warrant Decision”). In deciding to issue the arrest warrant, the Pre-Trial Chamber found that there was no ostensible cause or self-evident factor impelling it to examine the admissibility of the case against Mr Mbarushimana, and it declined therefore to exercise its discretion to consider the admissibility of the case.⁵

3. On 9 January 2011, Mr Mbarushimana filed the “Challenge to the Validity of the Arrest Warrant”⁶ (hereinafter: “Arrest Warrant Challenge”). Mr Mbarushimana argued that he was the subject of an investigation by German authorities at the time of the Arrest Warrant Application, that this investigation was only closed on 3 December 2011 and that the Prosecutor had failed to provide “decisive information” which would have led the Pre-Trial Chamber “undoubtedly” to conclude that the case against him was inadmissible on the basis of the German investigation.⁷ Mr Mbarushimana indicated that he would therefore be requesting the Pre-Trial Chamber to declare the arrest warrant against him void and to order his immediate release from detention.⁸

4. On 28 January 2011, the Pre-Trial Chamber issued the “Decision on the Defence Challenge to the Validity of the Arrest Warrant”⁹ (hereinafter: “Decision on Arrest Warrant Challenge”), rejecting Mr Mbarushimana’s challenge on the basis that “consistently with the established case law of the Court, the admissibility of a case is not a substantive requisite for the issuance of a warrant of arrest, unless there are uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of proprio motu review”.¹⁰

³ Arrest Warrant Application, paras 172-74.

⁴ ICC-01/04-01/10-2-tENG.

⁵ Arrest Warrant Decision, para. 9.

⁶ ICC-01/04-01/10-32.

⁷ Arrest Warrant Challenge, paras 10-16.

⁸ Arrest Warrant Challenge, para. 18.

⁹ ICC-01/04-01/10-50.

¹⁰ Decision on Arrest Warrant Challenge, para. 10.

5. On 30 March 2011, Mr Mbarushimana filed the “Defence Request for Interim Release”¹¹ in which he argued that the conditions of article 58 (1) (b) of the Statute were not met. On 19 May 2011, the Pre-Trial Chamber rejected his request.¹² On 14 July 2011, the Appeals Chamber confirmed the Pre-Trial Chamber’s decision denying interim release.¹³

6. On 24 May 2011, Mr Mbarushimana filed the “Defence Request for a Permanent Stay of Proceedings”¹⁴ (hereinafter: “Request for Stay of Proceedings”). He reiterated the argument of his Arrest Warrant Challenge that the Prosecutor had misled the Pre-Trial Chamber as to the nature of proceedings in Germany against him at the time of the Arrest Warrant Application.¹⁵ He argued that the Prosecutor’s conduct, which he submitted was at least grossly negligent if not wilful, and the Prosecutor’s subsequent failure to correct the record constituted an abuse of process requiring a permanent stay of proceedings.¹⁶

7. On 1 July 2011, the Pre-Trial Chamber issued the “Decision on the ‘Defence request for a permanent stay of proceedings’”¹⁷ (hereinafter: “Stay Decision”), rejecting Mr Mbarushimana’s request for a stay of proceedings. The Pre-Trial Chamber found that there was no evidence that the Prosecutor had been wilfully or grossly negligent and that, even if the Prosecutor had erred in characterising the German proceedings against Mr Mbarushimana, such a mischaracterisation could not be equated to the types of conduct which may form the basis for a stay of proceedings.¹⁸ The Pre-Trial Chamber found that the appropriate procedural basis for determining whether there was an investigation by German authorities was to

¹¹ ICC-01/04-01/10-86.

¹² “Decision on the ‘Defence Request for Interim Release’”, ICC-01/04-01/10-163.

¹³ “Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled ‘Decision on the ‘Defence Request for Interim Release’”, ICC-01/04-01/10-283 (OA).

¹⁴ ICC-01/04-01/10-177.

¹⁵ Request for Stay of Proceedings, para. 1.

¹⁶ Request for Stay of Proceedings, paras 1-3.

¹⁷ ICC-01/04-01/10-264.

¹⁸ Stay Decision, p. 6.

challenge the admissibility of the case pursuant to article 19 of the Statute.¹⁹ Mr Mbarushimana thereafter sought and was denied leave to appeal this decision.²⁰

8. On 20 July 2011, Mr Mbarushimana filed the “Second Defence request for interim release”²¹ (hereinafter: “Second Defence Request for Interim Release”) in which he requested that he be conditionally released or granted financial compensation for unlawful arrest under article 85 (1) of the Statute. He recalled his Arrest Warrant Challenge and Request for Stay of Proceedings and argued that, in rejecting those requests, the Pre-Trial Chamber had never addressed the merits of his claim concerning the admissibility of the case at the time of the Arrest Warrant Application.²² He stated that he “does not disguise the fact that the present application is designed to persuade the learned Pre-Trial Chamber to reconsider legitimate Defence submissions on their merits”.²³ He requested the Pre-Trial Chamber to examine all the evidence which it had been provided in respect of the German investigation, some of which had only been disclosed to Mr Mbarushimana on 1 June 2011, in order to determine the admissibility of the case against him at the time the arrest warrant was issued.²⁴ If the Pre-Trial Chamber considered that there was an ongoing German investigation as envisaged by article 17 (1) (a) of the Statute prior to 3 December 2010, Mr Mbarushimana requested the Pre-Trial Chamber to treat this finding as a changed circumstance under article 60 (3) of the Statute warranting his interim release.²⁵

9. On 28 July 2011, the Pre-Trial Chamber, sitting as a Single Judge, rendered the “Decision on ‘Second Defence request for interim release’”²⁶ (hereinafter: “Impugned Decision”), rejecting Mr Mbarushimana’s request for interim release. The Pre-Trial Chamber found that Mr Mbarushimana’s request constituted solely a request for reconsideration of matters previously decided upon in the Decision on Arrest Warrant

¹⁹ Stay Decision, p. 6.

²⁰ “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)”, dated 15 July 2011 and registered on 19 July 2011, ICC-01/04-01/10-288.

²¹ ICC-01/04-01/10-294.

²² Second Defence Request for Interim Release, paras 1-8.

²³ Second Defence Request for Interim Release, para. 9.

²⁴ Second Defence Request for Interim Release, para. 16.

²⁵ Second Defence Request for Interim Release, para. 17.

²⁶ ICC-01/04-01/10-319.

Challenge and the Stay Decision²⁷ and that he had advanced no arguments which would warrant the Pre-Trial Chamber's exercise of its discretion to review its prior ruling on detention pursuant to article 60 (3) of the Statute.²⁸ The Pre-Trial Chamber did not address Mr Mbarushimana's request for financial compensation.

B. Proceedings before the Appeals Chamber

10. On 29 July 2011, Mr Mbarushimana appealed the Impugned Decision.²⁹ On 5 August 2011, he filed the "Document in support of the Defence Appeal against Decision ICC-01/04-01/10-319"³⁰ (hereinafter: "Document in Support of the Appeal"). Mr Mbarushimana requests the Appeals Chamber to reverse the Impugned Decision and to remit the matter to the Pre-Trial Chamber to reconsider the Second Defence Request for Interim Release and to determine whether he is entitled to compensation for unlawful arrest.³¹

11. On 13 August 2011, Mr Mbarushimana filed the "Defence request to expedite the proceedings in the appeal against Pre-Trial Chamber I's decision: ICC-01/01-01/10-319"³² (hereinafter: "Request to Expedite Proceedings"). He drew the Appeals Chamber's attention to the facts that the Pre-Trial Chamber was conducting a periodic review of its prior ruling on detention pursuant to article 60 (3) of the Statute and rule 118 (2) of the Rules of Procedure and Evidence and that he had been requested by the Pre-Trial Chamber to submit, by 26 August 2011, observations in relation to this review. He requested the Appeals Chamber to render its decision on the present appeal before that date.

12. On 15 August 2011, the Prosecutor filed the "Prosecution's Response to 'Document in support of the Defence Appeal against Decision: ICC-01/04-01/10-319'"³³ (hereinafter: "Response to the Document in Support of the Appeal"). The

²⁷ Impugned Decision, pp. 3-5.

²⁸ Impugned Decision, pp. 5-6.

²⁹ "Defence Notice of Appeal of Pre-Trial Chamber I's Decision ICC-01/04-01/10-319", ICC-01/04-01/10-321.

³⁰ ICC-01/04-01/10-337. A corrigendum thereto was filed on 8 August 2011. ICC-01/04-01/10-337-Corr. All references herein are to the corrigendum.

³¹ Document in Support of the Appeal, paras 4, 12.

³² ICC-01/04-01/10-362.

³³ ICC-01/04-01/10-371.

Prosecutor argues that the current appeal is inadmissible and should be rejected *in limine*.³⁴

II. DECISION ON THE REQUEST TO EXPEDITE PROCEEDINGS

13. Mr Mbarushimana links his Request to Expedite Proceedings to the “Decision requesting observations on interim release”.³⁵ In that decision, the Pre-Trial Chamber initiated a periodic review of Mr Mbarushimana’s detention pursuant to article 60 (3) of the Statute and requested Mr Mbarushimana to submit, by 26 August 2011, any observations regarding his detention or release. Mr Mbarushimana asks the Appeals Chamber to render its decision in the present appeal before that date “so that the Defence may argue, should the Appeal be allowed, that the Pre-Trial Chamber is obliged to consider the prior admissibility of the case”.³⁶

14. The Appeals Chamber observes that Mr Mbarushimana does not identify any Statutory or jurisprudential basis for the Request to Expedite Proceedings save to state that “[r]ule 156 (4) of the Rules of Procedure and Evidence mandate the Appeals Chamber to hear an appeal ‘as expeditiously as possible’”.³⁷ However, this rule neither imposes any specific time limits on the Appeals Chamber nor provides for parties to request the Appeals Chamber to issue a decision or judgment within a specific time limit. In addition, the Appeals Chamber notes that Mr Mbarushimana has not provided any convincing reason for granting the Request to Expedite Proceedings. The present appeal and the review of Mr Mbarushimana’s detention initiated by the Pre-Trial Chamber are entirely distinct proceedings, the resolution of neither of which is dependent on the other. For these reasons, the Appeals Chamber rejects the Request to Expedite Proceedings.

III. ADMISSIBILITY OF THE APPEAL

15. Mr Mbarushimana brings his appeal on the basis of article 82 (1) (b) of the Statute which provides that either party may appeal, as of right, “a decision granting or denying release of the person being investigated or prosecuted”. The Prosecutor,

³⁴ Response to the Document in Support of the Appeal, para. 5.

³⁵ 12 August 2011, ICC-01/04-01/10-360.

³⁶ Request to Expedite Proceedings, para. 10.

³⁷ Request to Expedite Proceedings, para. 8.

citing the Appeals Chamber's jurisprudence, argues that the Impugned Decision does not constitute such a decision, that the appeal constitutes an abuse of this Statutory provision and that it should therefore be rejected.³⁸ According to the Prosecutor, the current appeal is unrelated to the factors applicable to interim release under article 60 (3) of the Statute, and is "simply an attempt to circumvent the Pre-Trial Chamber's rejection of an earlier Defence request for leave to appeal".³⁹ He also submits that, insofar as it concerns the request for financial compensation, the appeal should be dismissed as it "does not have even the pretence of being appealable as of right under Article 82(1)(b) [of the Statute]".⁴⁰

16. The Impugned Decision concerns the rejection of the Second Defence Request for Interim Release. The Appeals Chamber notes that, on its face, the Second Defence Request for Interim Release purports to be a request for interim release and that, in this document, Mr Mbarushimana specifically requested the Pre-Trial Chamber, among four other requests, "[t]o order [his] interim conditional release".⁴¹ However, as the Prosecutor correctly states, the Second Defence Request on Interim Release "did not even allude to the statutory factors that govern interim release decisions".⁴² No mention was made of the conditions set forth in article 58 (1) of the Statute or of article 60 (4) of the Statute which enables the Pre-Trial Chamber to grant release in case of inexcusable delay by the Prosecutor. Rather, in his prayer for relief, Mr Mbarushimana requested the Pre-Trial Chamber:

(a) To determine the admissibility of the case against Mr. Mbarushimana at the time that it issued the warrant for his arrest; (b) To find that the arrest of Mr. Mbarushimana was ordered when the case against him was inadmissible; (c) To find that the inadmissibility of the case against Mr. Mbarushimana at the time of his arrest is a changed circumstance under Article 60(3) of the Rome Statute; (d) To order Mr. Mbarushimana's interim conditional release on the terms supplied in the first request for interim release or, in the alternative; (e) To order that Mr. Mbarushimana be compensated financially for unlawful arrest pursuant to Article 85(1) of the Rome Statute.⁴³

³⁸ Response to the Document in Support of the Appeal, paras 19-23.

³⁹ Response to the Document in Support of the Appeal, para. 5.

⁴⁰ Response to the Document in Support of the Appeal, para. 6.

⁴¹ Second Defence Request for Interim Release, para. 19 (d).

⁴² Response to the Document in Support of the Appeal, para. 3.

⁴³ Second Defence Request for Interim Release, para. 19.



Stated in this manner, Mr Mbarushimana's request for interim release was predicated on the Pre-Trial Chamber first finding that the case against him would have been inadmissible at the time of the issuance of the arrest warrant. Mr Mbarushimana admitted as much in his Second Defence Request for Interim Release when he acknowledged that the request has been made in order to persuade the Pre-Trial Chamber to reconsider his prior challenges based on the admissibility of the case at the time of the arrest warrant.⁴⁴ He further states on appeal that his claim to be released is conditional on the Pre-Trial Chamber finding the case against him inadmissible which would lead to the "annulment of the arrest warrant".⁴⁵ As such, Mr Mbarushimana effectively grounds his right to appeal on the claim that, if the Pre-Trial Chamber were to review the admissibility of the case against him as it stood at the time of the arrest warrant, it would find the arrest warrant invalid and would have to order his release; by not reviewing the admissibility of the case and the validity of the arrest warrant and reaching these conclusions, the Impugned Decision had the effect of denying his release.

17. The Appeals Chamber finds that the Second Defence Request for Interim Release did not constitute a request for release but rather a request that the Pre-Trial Chamber consider the admissibility of the case as it stood at the time of the issuance of the arrest warrant and, based on this, the validity of the arrest warrant. As such, the Impugned Decision constituted a decision rejecting this request, on the basis that these issues had already been decided, rather than a decision on the question of whether to grant or deny Mr Mbarushimana release. Even if the Pre-Trial Chamber's rejection of Mr Mbarushimana's request meant that, as a consequence, it did not consider whether to detain or release Mr Mbarushimana, this would not transform the Impugned Decision into a "decision granting or denying release". As the Appeals Chamber has held previously, it is the nature or character of a decision and not its implications or effects which determine whether a party is entitled to bring an appeal pursuant to article 82 (1) (b) of the Statute.⁴⁶ Accordingly, the Appeals Chamber

⁴⁴ Second Defence Request for Interim Release, para. 9.

⁴⁵ Document in Support of the Appeal, para. 9.

⁴⁶ *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'D cision sur la confirmation des charges' of 29 January 2007", 13 June 2007, ICC-01/04-01/06-926 (OA 8), para. 15. *See also Situation in Kenya*, "Decision on the admissibility of the 'Appeal of the Government of Kenya against the "Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of

finds, without addressing the merits of the appeal, that Mr Mbarushimana may not bring an appeal against the Impugned Decision on the basis of article 82 (1) (b) of the Statute. With respect to Mr Mbarushimana's request for financial compensation, the Appeals Chamber can only concur with the Prosecutor's statement that this "does not have even the pretence of being appealable as of right under Article 82(1)(b) [of the Statute]".⁴⁷ The Appeals Chamber therefore finds the appeal inadmissible and dismisses it.

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



Judge Anita Ušacka
Presiding Judge

Dated this 21st day of September 2011

At The Hague, The Netherlands

Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence""", 10 August 2011, ICC-01/09-78 (OA)

⁴⁷ Response to the Document in Support of the Appeal, para. 6.