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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
URGENT**

Application for leave to participate in the appeal proceedings against the *Decision on the confirmation of charges* (ICC-01/04-01/10-465-Conf) and the *Decision on the Prosecution's Request for stay of order to release Callixte Mbarushimana* (ICC-01/04-01/10-469)

Source: Ghislain M. Mabanga, acting as the Legal Representative of 95 victims authorised to participate in the proceedings

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

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Section**

I. Introduction

1. The present observations are submitted to the Appeals Chamber of the International Criminal Court (“the Appeals Chamber” and “the Court” respectively) in the name of and on behalf of the Victims (hereinafter “the Represented Victims”) with the following reference numbers:¹

a/2166/11, a/2167/11, a/2168/11, a/2169/11, a/2170/11, a/2171/11, a/2172/11, a/2173/11, a/2174/11, a/2175/11, a/2177/11, a/2178/11, a/2179/11, a/2180/11, a/2181/11, a/2182/11, a/2183/11, a/2184/11, a/2185/11, a/2186/11, a/2187/11, a/2188/11, a/2189/11, a/2190/11, a/2191/11, a/2192/11, a/2193/11, a/2194/11, a/2196/11, a/2197/11, a/2198/11, a/2205/11, a/2206/11, a/2207/11, a/2221/11, a/2234/11, a/2239/11, a/2240/11, a/2580/11, a/2582/11, a/2583/11, a/2584/11, a/2585/11, a/2586/11, a/2587/11, a/2588/11, a/2589/11, a/2590/11, a/2591/11, a/2593/11, a/2594/11, a/2595/11, a/2596/11, a/2597/11, a/2598/11, a/2599/11, a/2600/11, a/2602/11, a/2619/11, a/2620/11, a/2621/11, a/2622/11, a/2624/11, a/2000/11, a/2006/11, a/2007/11, a/2008/11, a/2022/11, a/2023/11, a/2024/11, a/2025/11, a/2027/11, a/2028/11, a/2029/11, a/2030/11, a/2031/11, a/2203/11, a/2208/11, a/2212/11, a/2220/11, a/2223/11, a/2224/11, a/2226/11, a/2228/11, a/2229/11, a/2230/11, a/2572/11, a/2573/11, a/2574/11, a/2575/11, a/2576/11, a/2578/11, a/2579/11, a/2176/11 and a/2195/11.

2. The observations are submitted further to the Prosecutor’s appeal of the decision dated 16 December 2011 by which Pre-Trial Chamber I (hereinafter “the Pre-Trial Chamber”) declined to confirm the charges brought against Mr Callixte Mbarushimana (hereinafter “the Suspect”) and ordered his immediate release, as well as further to the decision dated 19 December 2011 by which the Pre-Trial Chamber rejected the Prosecutor’s request of 16 December 2011 for a stay of the order on the Suspect’s immediate release pending the Prosecutor’s appeal.²

¹ See “Report on the legal representation of participating victims”, 16 August 2011, ICC-01/04-01/10-379.

² “Prosecution’s Appeal against ‘Decision on the confirmation of charges’ and Request for Suspensive Effects. In Alternative, Prosecution’s Appeal against ‘Decision on the Prosecution’s Request for stay of order to release Callixte Mbarushimana’”, 19 December 2011, ICC-01/04-01/10-470.

3. The Represented Victims, who are directly affected by the impugned decisions, will justify the present application for leave to participate in the appeal proceedings (III), after providing a concise statement of the facts and proceedings (II).

II. Concise statement of the facts and proceedings

4. On 28 September 2010, the Chamber decided to grant the Prosecutor's 20 August 2010 application for a warrant of arrest against the Suspect. In that decision,³ the Chamber found that there were reasonable grounds to believe that FDLR troops:

- (i) in late January 2009, attacked the village of Remeka, Ufamandu *groupement*, Walikale territory, and during such attack, gathered all the population and local leaders, accused them of betraying them and told them they would not be allowed to leave the village and killed those who tried to flee;
- (ii) in late January 2009, attacked the village of Busheke, in Kalehe territory, South Kivu, killing 14 civilians, including 12 women and girls whom they raped before killing;
- (iii) in mid-February 2009, after they had come into contact with some Rwandan Defence Forces ("RDF") troops, perpetrated 28 rapes and killed a local chief around the village of Pinga, Masisi territory, North Kivu;
- (iv) on 13 February 2009, after the *Forces Armées de la République Démocratique du Congo* ("FARDC") and RDF soldiers had passed through the village of Kipopo, Masisi territory, North Kivu, set on fire some 100 houses in the village with civilians locked therein;
- (v) in February 2009 in Miriki, Lubero territory, North Kivu, stopped a group of six young people, forcing the three boys to rape the three girls who were with them;
- (vi) in late February 2009, abducted from Remeka village, Ufamandu *groupement*, Walikale territory, at least a dozen women and girls and killed 9 of them when they resisted attempts to rape them;
- (vii) on 12 April 2009, having neutralised an FARDC position in the village, attacked and burned down the village of Mianga, Waloa-Loanda *groupement*, Walikale, North Kivu, killing at least 6 civilians, including the local chief;
- (viii) on 18 April 2009, attacked the villages of Luofu and Kasiki in Lubero territory, North Kivu, burning 250 and 50 houses respectively and killing at least 17 civilians;

³ *Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana*, 28 September 2010, ICC-01/04-01/10-1, para. 12. Footnotes not reproduced.

- (ix) nearby Busurungi, Walikale territory, North Kivu, raped, killed and mutilated three women who on 28 April 2009 were found tied up, with sticks in their vaginas, cuts over their bodies and crushed skulls, and, in the same locations, on 5 May 2009, raped and mutilated three other women;
 - (x) on the night of 9-10 May 2009, carried out a thoroughly planned attack, the initial target of which was an FARDC battalion, and which was directed to the village of Busurungi, Walikale territory, North Kivu and the nearby settlements; in the course of that attack at least 60 civilians were killed, female residents of the village raped and in some instances their wombs cut open and fetuses removed from their bodies, and over 700 lodgings were destroyed;
 - (xi) on the night of 20-21 July 2009, attacked the village of Manje, Masisi, North Kivu, accusing the villagers of being collaborators of the Congolese army, and killing at least 16 civilians, setting on fire over 180 houses and raping at least 10 women;
 - (xii) in mid-August 2009, carried out a planned attack on the village of Malembe, in Waloa-Loanda *groupement*, Walikale, North Kivu, burning down a large number of houses;
 - (xiii) on 15 September 2009, during another attack perpetrated near Malembe, raped a woman who was 5-months pregnant, causing her to lose her unborn child.
5. On the same date, a warrant of arrest was issued against the Suspect on the ground “that there are reasonable grounds to believe that the arrest of Callixte Mbarushimana appears necessary at this stage to ensure his appearance at trial, to ensure that he will not obstruct or endanger the investigation or the court proceedings, and to prevent him from continuing with the commission of those crimes or related crimes, within the meaning of sub-paragraphs (i), (ii) and (iii) of article 58(1)(b) of the Statute”.⁴
6. Pursuant to this warrant of arrest, the Suspect was arrested at his residence in Paris by the French authorities on 11 October 2010, before being transferred to the Court on 25 January 2011.

⁴ *Warrant of Arrest for Callixte Mbarushimana*, 28 September 2010, ICC-01/04-01/10-2-tENG, para. 11.

7. On 28 January 2011, the first appearance of the Suspect was organised. The Suspect was assisted by his counsel.⁵
8. The date for the confirmation hearing was initially set for 4 July 2011⁶ but was subsequently postponed to 17 August 2011⁷ and then to 16 September 2011.⁸
9. Pursuant to article 61(3) of the Statute, the Office of the Prosecutor notified the Suspect on 15 July 2011 of the charges which it intended to submit to the Chamber.⁹
10. The confirmation hearing was held from 16 to 21 September 2011. At the end of the hearing, the Chamber invited the Prosecutor and the Legal Representatives of the victims authorised to participate in the proceedings to file their closing submissions on 6 October 2011, and the Defence on 21 October 2011.¹⁰
11. On 6 October 2011, the Prosecutor¹¹ and the Legal Representatives of the Victims¹² filed their respective submissions to the Chamber. The Defence filed its submissions on 21 October 2011.¹³

⁵ Transcript of the hearing of 28 January 2011, ICC-01/04-01/10-T-1-FRA ET WT, pp. 9-10.

⁶ Transcript of the hearing of 28 January 2011, ICC-01/04-01/10-T-1-FRA ET WT, p. 11, lines 6-7.

⁷ *Decision on the Prosecution's request for the postponement of the confirmation hearing*, 31 May 2011, ICC-01/04-01/10-207, p. 10.

⁸ *Decision postponing the commencement of the confirmation hearing*, 16 August 2011, ICC-01/04-01/10-374, p. 3.

⁹ *"Document de notification des charges présenté par l'Accusation en application de l'article 61-3 du Statut de Rome"*, 15 July 2011, ICC-01/04-01/10-311-Conf-AnxA. Hereinafter "Document containing the charges".

¹⁰ Transcript of the hearing of 21 September 2011, ICC-01/04-01/10-T-9-FRA ET WT, page 27, lines 12-14.

¹¹ "Prosecution's written submissions on the confirmation of charges", 6 October 2011, ICC-01/04-01/10-448-Conf.

12. On 16 December 2011, the Majority of the Chamber rendered a decision (hereinafter “the Decision of 16 December 2011”), by which it declined to confirm the charges against the Suspect, declared that the warrant of arrest against the Suspect ceased to have effect in its entirety, and ordered the Suspect’s immediate release.¹⁴ Presiding Judge Sanji M. Monageng issued a dissenting opinion.¹⁵
13. That same day, the Prosecutor submitted to the Chamber a request to stay the execution of the Decision of 16 December 2011 ordering the Suspect’s immediate release.¹⁶
14. On 19 December 2011, the Defence submitted a filing seeking the dismissal of the Prosecutor’s request.¹⁷ The Represented Victims submitted observations requesting the Pre-Trial Chamber to grant the request.¹⁸
15. By decision of 19 December 2011 (hereinafter “Decision of 19 December 2011”), the Pre-Trial Chamber dismissed the Prosecutor’s request.¹⁹

¹² Ghislain M. Mabanga, “Observations de victimes autorisées à participer à la procédure au terme de l’audience de confirmation des charges retenues contre M. Callixte Mbarushimana”, 6 October 2011, ICC-01/04-01/10-446; Mayombo Kasongo, “Observations et ‘conclusions finales’ aux fins de confirmation des charges retenues contre C:MBARUSHIMANA Par les 37 victimes en vertu de l’article 68 alinéa 3 du Statut de Rome. En vertu de la jurisprudence ICCn°ICC-01/04-01y07-474-tFRA ch.prél.du13mai2008par.127à13”, 6 October 2011, ICC-01/04-01/10-447.

¹³ “Defence Written Submissions Pursuant to the Oral Order of Pre-Trial Chamber I of 16 September 2011”, 21 October 2011, ICC-01/04-01/10-450.

¹⁴ *Decision on the confirmation of charges*, op. cit., p. 149.

¹⁵ *Dissenting opinion of Judge Sanji Mmasenono Monageng*, 16 December 2011, ICC-01/04-01/10-465-Red, pp. 151-215.

¹⁶ “Prosecution’s request for stay of order to release Callixte Mbarushimana”, op. cit.

¹⁷ “Réponse de la Défense et demande d’application immédiate de la décision infirmant les charges”, ICC-01/04-01/10-465-Red, 19 December 2011, ICC-01/04-01/10-468.

¹⁸ “Observations des victimes autorisées à participer à la procédure sur la ‘Prosecution’s request for stay of order to release Callixte Mbarushimana’”, 19 December 2011, ICC-01/04-01/10-467.

¹⁹ *Decision on the Prosecution’s Request for stay of order to release Callixte Mbarushimana*, 19 December 2011, ICC-01/04-01/10-469.

16. The Prosecutor lodged an appeal, in the main and in the alternative, with the Appeals Chamber against the Decisions of 16 December 2011 and 19 December 2011 by a filing dated 19 December 2011 (hereinafter “the Prosecutor’s Appeal”).²⁰

17. By Order dated 19 December 2011, the Appeals Chamber invited the Defence to file its observations on the Prosecutor’s Appeal by midday on 20 December 2011 at the latest.²¹

18. The Represented Victims hereby seek leave to participate in those appellate proceedings via their Legal Representative.

III. Discussion

19. In accordance with the settled jurisprudence of the Appeals Chamber,²² the following criteria must be fulfilled in order for victims to be permitted to participate in appellate proceedings:

- (i) the individuals seeking participation must be victims in the case;

²⁰ “Prosecution’s Appeal against ‘Decision on the confirmation of charges’ and Request for Suspensive Effects. In Alternative, Prosecution’s Appeal against ‘Decision on the Prosecution’s Request for stay of order to release Callixte Mbarushimana’”, *op. cit.*

²¹ *Order on the filing of a response to the request of the Prosecutor of 19 December 2011 for suspensif effect*, 19 December 2011, ICC-01/04-01/10-472.

²² *Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”*, 13 February 2007, ICC-01/04-01/06-824 (OA 7), paras. 44-45; *Reasons for the “Decision on the Participation of Victims in the Appeal against the ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’”*, 20 October 2009, ICC-01/05-01/08-566 (OA 2), para. 15; *Decision on the Participation of Victims in the Appeal of Mr Katanga Against the “Decision on the Modalities of Victim Participation at Trial”*, 24 May 2010, ICC-01/04-01/07-2124, para. 5; *Decision on the Participation of Victims in the Appeal against Trial Chamber Ps Decision to Stay the Proceedings*, 18 August 2010, ICC-01/04-01/06-2556, para. 7; *Decision on the Participation of Victims in the Appeal against the “Decision on Applications for Provisional Release” of Trial Chamber III*, 14 July 2011, para. 7.

- (ii) their personal interests must be affected by the issues on appeal;
- (iii) their participation must be at an appropriate stage of the proceedings; and lastly
- (iv) the manner of participation should neither cause prejudice to nor be inconsistent with the rights of the accused [the Suspect in this instance] and a fair and impartial trial.

The Represented Victims will demonstrate below that they fulfil all of these criteria.

20. *The applicants have the status of victims in the case.* – The Represented Victims were granted the status of victims in this case by a decision of the Pre-Trial Chamber dated 11 August 2011,²³ with the exception of Victims a/2176/11 and a/2195/11, who were granted victim status by a decision of the same chamber dated 23 September 2011.²⁴

21. *Their personal interests must be affected by the issues on appeal.* – The issues raised by the Prosecutor's Appeal concern both the merits of the dismissal of the charges and the order on the Suspect's immediate release.

- o *Charges brought against the Suspect.* – In their application forms submitted to the Court, all the Represented Victims sought not only to participate in the proceedings, but also to receive reparations for the harm they suffered as a result of the crimes of which the Suspect was accused. As a result of the dismissal of the charges brought against the Suspect, the victims have

²³ *Decision on the 138 applications for victims' participation in the proceedings*, 11 August 2011, ICC-01/04-01/10-351, pp. 18-21.

²⁴ *Decision on the applications for participation of victim applicants a/2176/11 and a/2195/11*, 23 September 2011, ICC-01/04-01/10-441, p. 4.

no means of seeking reparations before the Court since, under article 75(2) of the Statute, reparations orders are made “against a convicted person”. However, there can be no conviction without a trial, and there can be no trial without a confirmation of charges. In this respect, the Decision of 16 December 2011 directly affects the personal interests of all the Represented Victims.

- o *The Suspect’s immediate release.* – Both the Decision of 16 December 2011 and that of 19 December 2011 order the Suspect’s immediate release. At this stage of the proceedings, it cannot be assumed that the Prosecutor’s Appeal will be dismissed. Accordingly, the issue of whether these two decisions will be upheld or set aside has not been settled.

Assuming that the Appeals Chamber finds that the Pre-Trial Chamber erred in declining to confirm the charges against the Suspect, his outright release would enable him to intimidate and physically eliminate victims and potential witnesses in order to frustrate any subsequent Court proceedings against him under article 61(8) of the Statute.

The Victims’ fears in connection with the Suspect’s release are grounded, particularly since, in its unanimous decision of 14 July 2011,²⁵ the Appeals Chamber upheld in its entirety the decision of 19 May 2011 by which the Pre-Trial Chamber denied the Suspect’s release on the grounds that “the Chamber is satisfied that the continued detention of Mr Mbarushimana appears necessary to ensure his appearance at trial, to ensure that he does not obstruct or endanger the investigations and the proceedings before the

²⁵ *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, para. 63.*

Court, and to prevent him from continuing with the commission of crimes".²⁶

It therefore follows that the issue of the Suspect's release also directly affects the personal interests of the Represented Victims since, in addition to the intimidation and physical elimination they risk, there is a likelihood that the normal conduct and outcome of a trial which they are entitled to expect from the Court will be affected.

22. *Their participation must be at an appropriate stage of the proceedings.* – It is precisely at this stage of the proceedings, when the charges against the Suspect are in question, that the Victims seek to present their views and concerns, since only the confirmation of the charges will lead to a trial during which they can request reparations for the harm suffered.

23. *The manner of participation should neither cause prejudice to nor be inconsistent with the rights of the accused [the Suspect in this instance] and a fair and impartial trial.* – At this stage of the proceedings, the participation of the Represented Victims is neither prejudicial to nor inconsistent with the rights of the Suspect, still less a fair and impartial trial. For if the victims are granted leave to participate in the appeal, all of their written and oral submissions will be subject to the adversarial principle, allowing the Defence full opportunity to respond.

24. *Conclusion.* – In light of the above submissions, it follows that the Represented Victims fulfil all the criteria enabling them to participate in the proceedings

²⁶ *Decision on the "Defence Request for Interim Release"*, 19 May 2011, ICC-01/04-01/10-163, para. 69.

arising from the Prosecutor's Appeal. Accordingly, they request the Appeals Chamber to grant this application.

IV. In light of the foregoing,

25. The Represented Victims respectfully request the Appeals Chamber to declare this application admissible as to form and well-founded in substance; and

Accordingly,

- To grant the Represented Victims leave to participate in the proceedings related to the Prosecutor's Appeal;
- To rule that they will participate via their Legal Representative according to the format determined by the Appeals Chamber.

[signed]

Ghislain M. Mabanga
Legal Representative

Dated this 20 December 2011,
At Paris, France