



Original: **French**

No.: ICC-01/04-01/10
Date: 18 December 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
URGENT**

**Observations of the victims authorised to participate in the proceedings on the
“Prosecution’s request for stay of order to release Callixte Mbarushimana”
(ICC-01/04-01/10-466)**

**Source: Ghislain M. Mabanga, acting as 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:

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 Arthur Vercken
Ms Yaël Vias-Gvirsman

Legal Representatives of the Victims

Mr Mayombo Kassongo
Mr Ghislain M. Mabanga

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

**Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar and Deputy Registrar

Ms Silvana Arbia and Mr Didier Preira

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The present observations are submitted to Pre-Trial Chamber I of the International Criminal Court (“the Chamber” and “the Court” respectively) in the name of and on behalf of the victims (“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 request, filed with the Chamber on 16 December 2011 (“the Prosecutor’s Request”), seeking a stay of the immediate release of Mr Callixte Mbarushimana (“the Suspect”)² ordered in the Chamber’s *Decision on the confirmation of charges* dated 16 December 2011 (“the Impugned Decision”).³
3. The Represented Victims, who are directly affected by the Chamber’s decision, will submit the present observations on the Prosecutor’s Request (III), after providing a concise statement of the facts and proceedings (II).

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

² “Prosecution’s request for stay of order to release Callixte Mbarushimana”, 16 December 2011, ICC-01/04-01/10-466.

³ *Decision on the confirmation of charges*, 16 December 2011, ICC-01/04-01/10-465-Red, p. 149.

II. Concise statement of 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, the Chamber found that there were reasonable grounds to believe that FDLR troops:⁴

- (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;
- (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;

⁴ *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.

- (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”.⁵
 6. Pursuant to that 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.
 7. On 28 January 2011, the first appearance of the Suspect was organised. The Suspect was assisted by his counsel.⁶
 8. The date for the confirmation hearing was initially set for 4 July 2011⁷ but was subsequently postponed to 17 August 2011⁸ and then to 16 September 2011.⁹

⁵ *Warrant of Arrest for Callixte Mbarushimana*, 28 September 2010, ICC-01/04-01/10-2-tENG, para. 11.

⁶ Transcript of the hearing of 28 January 2011, ICC-01/04-01/10-T-1-FRA ET WT, pp. 9-10.

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

⁸ *Decision on the Prosecution’s request for the postponement of the confirmation hearing*, 31 May 2011, ICC-01/04-01/10-207, p. 10.

⁹ *Decision postponing the commencement of the confirmation hearing*, 16 August 2011, ICC-01/04-01/10-374, p. 3.

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.¹⁰
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 2011.¹¹
11. On 6 October 2011, the Prosecutor¹² and the Legal Representatives of the Victims¹³ filed their respective submissions to the Chamber. The Defence filed its submissions on 21 October 2011.¹⁴
12. On 16 December 2011, the Majority of the Chamber rendered a decision 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

¹⁰ “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”.

¹¹ Transcript of the hearing of 21 September 2011, ICC-01/04-01/10-T-9-FRA ET WT, page 27, lines 12-14.

¹² “Prosecution’s written submissions on the confirmation of charges”, 6 October 2011, ICC-01/04-01/10-448-Conf.

¹³ 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.

¹⁴ “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.

Suspect's immediate release.¹⁵ Presiding Judge Sanji M. Monageng issued a dissenting opinion.¹⁶

13. That same day, the Prosecutor submitted to the Chamber a request to stay the execution of the Impugned Decision where the decision ordered the Suspect's immediate release.¹⁷ The present observations are submitted for the purposes of supporting that request.

III. Discussion

A. Content of the Prosecutor's Request

14. The Prosecutor's Request seeks,

- o *in the main*, a stay of the Suspect's immediate release until such time as the Chamber has ruled on the application for leave to appeal which he intends to submit under article 82(1)(d) and, if leave is granted, until the Appeals Chamber has ruled on the request for suspensive effect of the appeal which he intends to file under rule 156(5).
- o *in the alternative*, should the Chamber uphold the order on the Suspect's immediate release, that such release be subject to strict judicial supervision and confined to the territory of the Netherlands so as to enable the Suspect's re-incarceration in the event that the appeal which the Prosecutor intends to submit succeeds.

¹⁵ *Decision on the confirmation of charges*, *op. cit.*, p. 149.

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

¹⁷ "Prosecution's request for stay of order to release Callixte Mbarushimana", *op. cit.*

B. The Represented Victims' submissions in support of the Prosecutor's Request

15. *The matter at issue.*— In accordance with article 61(7) of the Statute, the Chamber held that, in the circumstances, there was not sufficient evidence to establish substantial grounds to believe that the Suspect committed the crimes charged. Under article 82(1)(d) of the Statute, it is for the pre-trial chamber which rendered a decision on the confirmation of charges to rule on an application for leave to appeal submitted by either party.

In the matter at hand, the Prosecutor clearly notified the Chamber of his intention to appeal against the Impugned Decision.¹⁸ At this stage, the Chamber cannot presume that it will deny an application for leave to appeal when it has not yet been apprised of the grounds. The prevailing assumption is therefore that leave will be granted. Accordingly, it follows that the Impugned Decision is of such a nature as to present the Appeals Chamber with a *fait accompli* (para. 16) and to jeopardise the protection of victims and witnesses in the interim (para. 17), which would, in any event, constitute irreparable harm (para. 18).

16. *Risk of a fait accompli.*— In the event that the Chamber authorises the Prosecutor's appeal and the Appeals Chamber finds that the Chamber erred in declining to confirm the charges, the problem of the Suspect's re-incarceration will necessarily arise if the Impugned Decision has already been executed in the interim. However, in its unanimous decision of 14 July 2011,¹⁹ the Appeals Chamber upheld in its entirety the decision of 19 May 2011 by which the Chamber denied the application for 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

¹⁸ "Prosecution's request for stay of order to release Callixte Mbarushimana", *op. cit.*, para. 2.

¹⁹ *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.

investigations and the proceedings before the Court, and to prevent him from continuing with the commission of crimes”.²⁰

It therefore appears that the Appeals Chamber would be faced with a *fait accompli* if it decided to set aside the Impugned Decision.

17. *Risk of jeopardising victim and witness protection.*— The Represented Victims are pleased to note that the Chamber decided to publish a redacted version of the Impugned Decision. In their view, the fact that the decision has been redacted amply demonstrates that the risk of retaliation and of intimidation of victims and witnesses is not obviated by the mere fact that the charges brought against the Suspect have been dismissed.

Irrespective of the fact that the Prosecutor may request the Chamber to confirm the same charges if his application is supported by additional evidence,²¹ there is now a distinct difficulty with the victims’ and witnesses’ safety pending the Chamber’s consideration of the Prosecutor’s application for leave to appeal and the Appeals Chamber’s consideration of the request for suspensive effect. Accordingly, the Chamber must not fail to contemplate whether, in the circumstances, the Suspect’s outright release would not cause irreparable harm to the victims and witnesses and be prejudicial to the subsequent proceedings.

18. *Irreparable harm.* – As long as there is a possibility of the Impugned Decision being set aside on appeal, releasing the Suspect outright may enable him to intimidate and physically eliminate victims and potential witnesses in order to frustrate any subsequent Court proceedings against him. Obviously, this would constitute irreparable harm, since such an attitude on the part of the Suspect would enable him permanently to obstruct or endanger the investigation or the proceedings

²⁰ Decision on the “Defence Request for Interim Release”, 19 May 2011, ICC-01/04-01/10-163, para. 69.

²¹ Article 61(8) of the Statute.

before the Court, and also to continue to perpetrate crimes against the victims and witnesses with impunity. Such harm would be irreparable not only because the Court cannot bring deceased victims and witnesses back to life, but it would also be unable to re-incarcerate the Suspect immediately to ensure the proper conduct of future proceedings. On this point the Prosecutor's Request is therefore entirely founded.

IV. In light of all of the foregoing,

19. The Represented Victims respectfully request the Chamber to grant the "Prosecution's request for stay of order to release Callixte Mbarushimana" filed by the Prosecutor on 16 December 2011;

20. *And consequently,*

- *in the main,* to rule that the Suspect shall continue to be detained pending consideration of the application for leave to appeal which the Prosecutor intends to file pursuant to article 82(1)(d) and, if leave is granted, until the Appeals Chamber rules on the request for suspensive effect which the Prosecutor intends to file pursuant to rule 156(5);
- *in the alternative,* to subject the Suspect's release to strict judicial supervision in order to enable the Court to obtain him should his re-incarceration become necessary.

[signed]

Ghislain M. Mabanga
Legal Representative

Dated this 18 December 2011

At Paris, France