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

Date: **28 March 2012**

THE APPEALS CHAMBER

Before: Judge Erkki Kourula, Presiding Judge
Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Anita Ušacka
Judge Silvia Fernandez de Gurmendi

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. CALLIXTE MBARUSHIMANA***

Public Document

Mr Callixte Mbarushimana's response to the civil parties' request for leave to participate in the appellate proceedings against the *Decision on the confirmation of the charges* (ICC-01/04-01/10-465-Conf) filed on 7 March 2012

Source: Defence for Mr Callixte Mbarushimana

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

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Other

I – Procedural Background

1. In a decision dated 11 August 2011, the Pre-Trial Chamber authorised the “Represented Victims” to participate in the proceedings relating to the pre-trial stage of this case and, more specifically, to file any motions, responses and replies in relation to any matters for which the Statute does not exclude their intervention (para. 42(9) of the decision).¹

2. On 16 December 2011, the Pre-Trial Chamber dismissed the charges against Mr Mbarushimana and ordered his immediate release.²

3. On that same day, the Prosecutor prayed the Pre-Trial Chamber to grant a stay of the order to release Mbarushimana.³

4. On 18 December 2011, the Represented Victims submitted their observations on the Prosecutor’s request for a stay of the order.⁴

5. On 19 December 2011, the Pre-Trial Chamber rejected the Prosecutor’s 16 December 2011 request.⁵

6. On 19 December 2011, the Prosecutor filed a joint request before the Appeals Chamber directly appealing the decision dismissing the charges and requesting

¹ ICC-01/04-01/10-351.

² ICC-01/04-01/10-465-Red.

³ ICC-01/04-01/10-466.

⁴ ICC-01/04-01/10-467-tENG.

⁵ ICC-01/04-01/10-469.

suspensive effect of the appeal or, in the alternative, appealing the Pre-Trial Chamber's decision refusing to stay Mbarushimana's release.⁶

7. On 20 December 2011, the Represented Victims prayed the Appeals Chamber's leave to participate in the Prosecutor's direct appeal against the 16 December 2011 decision dismissing the charges.⁷

8. On 20 December 2011, the Appeals Chamber rejected the Prosecutor's joint request and the Represented Victims' application for participation. The reasons for this rejection were given subsequently (on 24 January 2012).⁸

9. On 27 December 2011, the Prosecutor filed an application before the Pre-Trial Chamber seeking leave to appeal the 16 December 2011 decision dismissing the charges.⁹

10. On 24 January 2012, the Appeals Chamber gave the reasons for its 20 December 2011 decision. In respect of the Represented Victims' request for participation in the proceedings, it stated that this was unacceptable in light of the risk this posed of jeopardising Mr Mbarushimana's right to be released without delay.¹⁰

11. On 26 February 2012, the Defence for Mr Mbarushimana filed its response to the Prosecutor's application for leave to file an interlocutory appeal against the 16 December 2011 decision dismissing the charges.¹¹

⁶ ICC-01/04-01/10-470.

⁷ ICC-01/04-01/10-474-tENG.

⁸ ICC-01/04-01/10-476.

⁹ ICC-01/04-01/10-480.

¹⁰ ICC-01/04-01/10-483.

¹¹ ICC-01/04-01/10-486.

12. On 1 March 2012, the Pre-Trial Chamber granted the Prosecutor leave to appeal on three issues.¹²

13. In an application dated 7 March 2012, the Represented Victims prayed the Appeals Chamber's leave to participate in the Prosecutor's appellate proceedings against the 16 December 2011 decision dismissing the charges.¹³

14. On 12 March 2012, the Prosecutor filed his notice of appeal before the Appeals Chamber.¹⁴

15. By decision of 23 March 2012, the Appeals Chamber ordered the Defence for Mr Mbarushimana to respond to the Represented Victims' request before 28 March 2012.¹⁵

16. In a few days, the Defence will file before the Appeals Chamber its response to the three issues in the Prosecutor's appeal.

17. For the reasons outlined below, the Defence for Mr Mbarushimana prays the Appeals Chamber to reject the Represented Victims' request for participation.

II – Arguments

18. The Appeals Chamber has already set out the conditions under article 82(1)(d) for a request from the Victims to participate in appellate proceedings to be granted:

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

¹² ICC-01/04-01/10-487.

¹³ ICC-01/04-01/10-494-tENG.

¹⁴ ICC-01/04-01/10-499.

¹⁵ ICC-01/04-01/10-504.

(iv) the manner of participation should neither cause prejudice to nor be inconsistent with the rights of the accused or the suspect and a fair and impartial trial.¹⁶

A. The victims are not vested with an automatic right to participate in appeals

19. The applicable jurisprudence of this Court requires victims first to move the Chamber for a determination as to the appropriateness of the participation in the appeal. Victims are not therefore vested with an automatic right to participate in the appeal and such participation requires authorisation:

14. The Appeals Chamber held that article 68 (3) of the Statute “mandates a specific determination by the Appeals Chamber that the participation of victims is appropriate in the particular interlocutory appeal under consideration.” Hence, regulation 86 (8) of the Regulations of the Court, which provides that “a decision taken by a Chamber under rule 89 shall apply throughout the proceedings in the same case”, is “confined to the stage of the proceedings before the Chamber taking the decision referred to in the text of the regulation.” In the same way, regulations 64 (4) or (5) of the Regulations of the Court were not understood as granting victims an automatic right to participate in an interlocutory appeal, as this would preclude a specific determination by the Appeals Chamber that participation in the particular interlocutory appeal is appropriate. A separate application is necessary in order for the Appeals Chamber to make that determination.¹⁷

B. The victims must have previously expressed a desire to participate in the proceedings concerned

20. In the instant case, it must be observed that the Represented Victims have never hitherto sought leave of the Pre-Trial Chamber to participate in the present appeal, nor have they advanced any reasons to warrant their participation therein.

¹⁶ *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 I’s 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.*

¹⁷ ICC-01/05-01/08-566.

21. The application for participation of the Represented Victims was filed on 7 March 2012 – over two months after the Prosecutor’s initial application for leave to appeal the decision to dismiss the charges. Yet, the jurisprudence of the Appeals Chamber prescribes that applications from victims wishing to participate in an interlocutory appeal be entered as soon as possible after the appeal has been filed.¹⁸

22. Moreover, the application for participation of the Represented Victims followed the initial *inter partes* exchange of documents and the ruling of the Pre-Trial Chamber confining the parameters of the appeal raised by the Prosecutor to three issues.

23. Thus, the Prosecutor has already filed with the Chamber his notice of appeal to which the Defence will respond in the coming days.

24. Hence, absent any prior applications for leave to participate in the present appeal and given the progress in the appellate proceedings, the Defence maintains that the intervention of the Represented Victims will not assist the Appeals Chamber’s adjudication of the issues.

C. The victims must show that their personal interests are affected by the appellate issues if the Chamber considers it appropriate

25. In this respect, the jurisprudence of the Court has consistently held that victims will be granted leave to participate where their personal interests are affected by the appellate issues and the Appeals Chamber finds such participation appropriate.¹⁹

¹⁸ “With regard to the timeline for the filing of such applications, the Appeals Chamber has stated that applications by victims wishing to participate in an interlocutory appeal should in principle be made as soon as possible after the appeal is filed.” ICC-01/04-503, para. 36.

¹⁹ ICC-01/05-01/08-566; ICC-02/05-138, para. 49; and ICC-01/04-503, para. 88.

“participation of victims may be permitted if it can be shown that the victims’ personal interests are affected by the issues on appeal and if the Appeals Chamber deems such participation to be appropriate.”²⁰

26. Moreover, having regard to victims wishing to participate in appellate proceedings, that same decision stated:

the application for participation in appeals proceedings “should include a statement from the victims in relation to whether and how their personal interests are affected by the particular interlocutory appeal, as well as why it is ‘appropriate’ for the Appeals Chamber to permit their views and concerns to be presented.” [...] The Appeals Chamber has further explained that “[i]n seeking to demonstrate that their personal interests are affected, victims should generally ensure, *inter alia*, that express reference is made to the specific facts behind their individual applications, and the precise manner in which those facts are said to fall within the issue under consideration on appeal.”²¹

27. Accordingly, as mandated by the afore-cited excerpt, victims must, *inter alia*, make express reference to the specific facts behind their individual applications.

28. However, the application from the Legal Representative of the Victims makes no such reference, merely summarising the attacks which allegedly took place in the Congo.²²

29. Nor does the application from the Represented Victims specify how their personal interests would be affected by the appeal. It simply takes a very sweeping approach (see paragraph 12 of said application) without addressing the specific legal issues to be determined in the appeal. As concerns legal requirements, the application from the Represented Victims is therefore incomplete.

30. Furthermore, the sole grounds raised by the Represented Victims – that the decision to dismiss the charges denies them compensation and that the issue of the working language is an appropriate stage for their intervention – in no way justify the application for participation.

²⁰ ICC-01/05-01/08-566, para. 14.

²¹ ICC-01/05-01/08-566, para. 15.

²² ICC-01/04-01/10-494.

31. Moreover, as regards the first point, the absence of any recourse for reparation arising from the dismissal of the charges is a logical consequence of the Pre-Trial Chamber's decision rather than an issue which directly affects the Victims' personal interests. By the same token, it is clear from article 81(1)(a) that victims cannot be granted leave to appeal the acquittal of an accused, even though acquittal deprives them of recourse to reparation.

32. In reality, the participation sought by the Represented Victims amounts to a dissimulated appeal against the decision to dismiss the charges and must be denied pursuant to the relevant jurisprudence:

[...] More generally, an assessment will need to be made in each case as to whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor. Even when the personal interests of victims are affected within the meaning of article 68 (3) of the Statute, the Court is still required, by the express terms of that article, to determine that it is appropriate for their views and concerns to be presented at that stage of the proceedings and to ensure that any participation occurs in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.²³

33. Finally, the intervention of the Represented Victims arises at a wholly inappropriate stage of the proceedings insofar as the issues authorised by the Pre-Trial Chamber were determined absent any endeavour by the Victims to impart their views thereon. Therefore at this juncture their participation is inopportune.

D. The rights of the Defence

34. In the present case, the lateness of the intervention of the Represented Victims violates the fundamental rights of the Defence and the manner of intervention prescribed by the 11 August 2011 decision²⁴ on victim participation. Indeed, as previously stated, one of the prerequisites for victim participation is that "the

²³ ICC-01/04-01/06-925.

²⁴ ICC-01/04-01/10-351.

manner of participation is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial”.²⁵

35. However, in the instant case, late intervention by the victims would violate the right of Mr Mbarushimana to be afforded timely notice of their intentions so as to mount a meaningful challenge. The progress in the appellate proceedings now precludes this eventuality.

36. Lastly, the *inter partes* character of the proceedings alone cannot prevent the intervention of the victims from violating the rights of the Accused. Indeed, as explained above, this sudden and unexpected intervention by the Victims comes at an advanced stage of the proceedings and would prejudice Mr Mbarushimana.

III – Conclusion

37. The Defence prays the Appeals Chamber to:

Deny the application for participation of the Represented Victims.

[signed]

Arthur Vercken
Counsel for Mr Callixte Mbarushimana

Dated this Wednesday, 28 March 2012

At Paris, France

²⁵ “In examining the applications, the Appeals Chamber will determine (i) whether their personal interests are affected by the issues on appeal, (ii) whether their participation is appropriate and (iii) that the manner of participation is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial.” ICC-01/05-01/08-566.