

**Cour
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**International
Criminal
Court**

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No. ICC-01/04-01/10 OA 3

Date: 24 January 2012

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

Reasons for

**“Decision on the appeal of the Prosecutor of 19 December 2011 against the
‘Decision on the confirmation of the charges’ and, in the alternative, against the
‘Decision on the Prosecution’s Request for stay of order to release Callixte
Mbarushimana’ and on the victims’ request for participation” of
20 December 2011**

Decision 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 Arthur Vercken
Ms Yaël Vias-Gvirsman

Legal representatives of victims
Mr Ghislain M. Mabanga

REGISTRY

Registrar
Ms Silvana Arbia



The Appeals Chamber of the International Criminal Court (“Court”),

In the appeal of the Prosecutor of 19 December 2011 against the decision of Pre-Trial Chamber I entitled “Decision on the confirmation of charges” of 16 December 2011 (ICC-01/04-01/10-465-Conf), and in the appeal of the Prosecutor, filed in the alternative, against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecution’s Request for stay of order to release Callixte Mbarushimana” of 19 December 2011 (ICC-01/04-01/10-469),

Hereby, gives its reasons for the decision rendered on 20 December 2011 (ICC-01/04-01/10-476):

I. BACKGROUND

A. Proceedings before the Pre-Trial Chamber

1. On 16 December 2011, Pre-Trial Chamber I (hereinafter: “Pre-Trial Chamber”) issued by majority a decision declining to confirm charges against Mr Callixte Mbarushimana¹ (hereinafter: “Confirmation Decision”). In that decision, the Pre-Trial Chamber declared that the warrant of arrest against Mr Mbarushimana “cease[d] to have effect in its entirety” and it decided “that Mr Callixte Mbarushimana shall be released from the custody of the Court immediately upon the completion of the necessary modalities”.²

2. On the same day, the Prosecutor filed the “Prosecution’s request for stay of order to release Callixte MBARUSHIMANA”³ (hereinafter: “Request for Stay of Release”), informing the Pre-Trial Chamber that the Prosecutor would apply for leave to appeal the Confirmation Decision.⁴ “In order to prevent irreparable prejudice to the Prosecution”, the Prosecutor requested the Pre-Trial Chamber to stay the release of Mr Mbarushimana until the Pre-Trial Chamber had decided whether to grant leave to appeal and, if leave was granted, until the Appeals Chamber had decided on the suspensive effect of the appeal.⁵

¹ *Prosecutor v. Callixte Mbarushimana*, “Decision on the confirmation of charges”, 16 December 2011, ICC-01/04-01/10-465-Conf.

² Confirmation Decision, p. 151.

³ ICC-01/04-01/10-466.

⁴ Request for Stay of Release, para. 2.

⁵ Request for Stay of Release, para. 3.

3. On 19 December 2011, after having heard from the victims⁶ and Mr Mbarushimana,⁷ the Pre-Trial Chamber decided to reject the Request for Stay of Release⁸ (hereinafter: “Decision on Request for Stay of Release”). The Pre-Trial Chamber observed that the Prosecutor requested the continued detention of Mr Mbarushimana “solely to prevent ‘irreparable prejudice to the Prosecution’, a condition not recognised in article 58(1) of the Statute, nor elsewhere in the Statute”.⁹ The Pre-Trial Chamber also observed that the Prosecutor was seeking suspensive effect, “a measure envisaged in article 82(3) of the Statute and which only the Appeals Chamber can order”.¹⁰

B. Proceedings before the Appeals Chamber

4. On 19 December 2011, the Prosecutor filed the “Prosecution’s Appeal against ‘Decision on the confirmation of charges’ and Request for Suspensive Effect In the alternative, Prosecution’s Appeal against ‘Decision on the Prosecution’s Request for stay of order to release Callixte Mbarushimana’”¹¹ (hereinafter: “Appeal”).

5. Pursuant to the Appeals Chamber’s “Order on the filing of a response to the request of the Prosecutor of 19 December 2011 for suspensive effect”,¹² Mr Mbarushimana submitted the “Defence Observations pursuant to the order of the Appeals Chamber (ICC-01/04-01/10-472)”¹³ (hereinafter: “Response”).

6. On 20 December 2011, victims who were participating in the pre-trial proceedings filed the “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*

⁶ “Observations de victimes autorisées à participer à la procédure sur la ‘Prosecution’s request for stay of order to release Callixte Mbarushimana’ (ICC-01/04-01/10-466)”, dated 18 December 2011 and registered on 19 December 2011, ICC-01/04-01/10-467.

⁷ “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.

⁸ “Decision on the Prosecution’s Request for stay of order to release Callixte Mbarushimana”, 19 December 2011, ICC-01/04-01/10-469.

⁹ Decision on Request for Stay of Release, p. 5.

¹⁰ Decision on Request for Stay of Release, p. 5.

¹¹ ICC-01/04-01/10-470 (OA 3).

¹² 19 December 2011, ICC-01/04-01/10-472 (OA 3).

¹³ ICC-01/04-01/10-473-tENG (OA 3).

Mbarushimana (ICC-01/04-01/10/469)”¹⁴ (hereinafter: “Victims’ Request for Participation”), applying for participation in the appeal proceedings.

7. On 20 December 2011, the Appeals Chamber issued its “Decision on the appeal of the Prosecutor of 19 December 2011 against the ‘Decision on the confirmation of the charges’ and, in the alternative, against the ‘Decision on the Prosecution’s Request for stay of order to release Callixte Mbarushimana’ and on the victims’ request for participation”¹⁵ (hereinafter: “Decision of the Appeals Chamber”) and indicated that it would issue the reasons in due course.¹⁶

II. REASONS

8. The Decision of the Appeals Chamber rejected all the requests that the Prosecutor made in the Appeal, as well as the Victims’ Request for Participation.¹⁷ In light of the urgency of the matter and bearing in mind that the Prosecutor and Mr Mbarushimana addressed not only the matter of the suspensive effect but also that of admissibility of the appeals, the Appeals Chamber disposed of the Appeal without awaiting further filings.

9. In the Appeal, the Prosecutor appealed against the Confirmation Decision and applied for suspensive effect of this appeal.¹⁸ The reasons for dismissing this appeal as inadmissible and for rejecting the request for suspensive effect are provided in Section A below.

10. In the Appeal, the Prosecutor also appealed, in the alternative, against the Decision on Request for Stay of Release.¹⁹ Section B below sets out the reasons for dismissing this alternative appeal as inadmissible.

11. The reasons for dismissing the Victims’ Request for Participation are given in Section C below.

¹⁴ ICC-01/04-01/10-474-tENG (OA 3).

¹⁵ ICC-01/04-01/10-476 (OA 3).

¹⁶ Decision of the Appeals Chamber, p. 4.

¹⁷ Decision of the Appeals Chamber, pp. 3-4.

¹⁸ Appeal, para. 18.

¹⁹ Appeal, para. 19.

A. Appeal against the Confirmation Decision and the request for suspensive effect of this appeal

1. Arguments of the parties

12. The Prosecutor files the appeal against the Confirmation Decision under article 82 (1) (b) of the Statute, stating that he would request that the Appeals Chamber overturn the Pre-Trial Chamber's conclusion that there were no substantial grounds to believe that Mr Mbarushimana was responsible for the charged crimes.²⁰

13. As to why his appeal is filed under article 82 (1) (b), the Prosecutor argues that the Confirmation Decision "effectively orders the release of the Suspect".²¹ He also refers to the fact that the Pre-Trial Chamber "expressly" ordered the release of Mr Mbarushimana.²²

14. The Prosecutor emphasises that the Pre-Trial Chamber, in the Decision on Request for Stay of Release, made reference to articles 82 (1) (b) and 82 (3) of the Statute and rule 154 (1) of the Rules of Procedure and Evidence. According to him, this indicates that the Pre-Trial Chamber is "of the view that the appeal against its Confirmation Decision, and in particular its order to release the Suspect, is available as of right".²³ The Prosecutor submits that the Appeals Chamber must

resolve this dilemma – whether the Prosecution may appeal as of right from a decision finally terminating the proceedings by denying confirmation of charges that operates expressly as an order to release the suspect (as the Pre-Trial Chamber seemingly believes) or whether the Pre-Trial Chamber must certify leave to appeal – now. Given the Pre-Trial Chamber's belief that it lacks the power to temporarily suspend release or consider an application for leave to appeal an order that terminates the proceedings altogether, there is no other way to give effect to whatever statutory appeal rights lie with the Prosecution.²⁴

15. The Prosecutor seeks suspensive effect of his appeal against the Confirmation Decision. He recalls that the "Appeals Chamber has previously recognised in similar circumstances that releasing a Suspect pending appeal against the release decision could defeat the purpose of the appeal, as well as the appeals against other related

²⁰ Appeal, para. 12.

²¹ Appeal, para. 9.

²² Appeal, para. 7.

²³ Appeal, para. 6.

²⁴ Appeal, para. 10.

decisions”.²⁵ He submits that, by not granting suspensive effect, the appeal against the release of the suspect could be rendered moot.²⁶ Further, he argues that suspensive effect should be granted “to prevent irreparable prejudice to the Prosecution”.²⁷ He recalls that Mr Mbarushimana was detained on all three grounds under article 58 (1) (b) of the Statute and argues that “releasing him could effectively render any reversal of the decision by the Appeals Chamber futile due to the Court’s inability to secure his re-arrest and/or to the Suspect’s interference with the investigation or his renewed commission of crimes within the jurisdiction of the Court”.²⁸

16. Mr Mbarushimana challenges the admissibility of the Prosecutor’s appeal.²⁹ With reference to the wording of article 82 (1) (b) of the Statute, he submits that he is no longer a person “being investigated or prosecuted” since the charges against him were not confirmed.³⁰ Furthermore, he argues that his release is only a “logical consequence” of the decision declining to confirm the charges against him, and that he would have to be released even if the Pre-Trial Chamber had not said this specifically in the Confirmation Decision.³¹ He also submits that the Appeals Chamber, in the “Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘*Décision sur la confirmation des charges*’ of 29 January 2007” of 13 June 2007³² (hereinafter: “*Decision in Lubanga OA 8*”), stated that a decision on the confirmation of charges cannot be directly appealed under article 82 (1) (b) of the Statute.³³ Finally, he recalls jurisprudence of the Pre-Trial Chamber, holding that, as confirmed by the drafting history of article 82 of the Statute, decisions on the confirmation of charges cannot be appealed directly.³⁴

17. As an overarching argument, Mr Mbarushimana points out that the Prosecutor relies heavily on specific formulations in the Decision on the Stay of Release to support his submission that he is entitled to appeal the Confirmation Decision.

²⁵ Appeal, para. 15.

²⁶ Appeal, para. 15.

²⁷ Appeal, para. 17.

²⁸ Appeal, para. 17.

²⁹ Response, paras 2-11.

³⁰ Response, paras 4, 5.

³¹ Response, paras 6, 8.

³² ICC-01/04-01/06-926 (OA 8).

³³ Response, para. 7.

³⁴ Response, para. 10.

According to Mr Mbarushimana, the Prosecutor's arguments are neither based on the law nor on the jurisprudence of the Court.³⁵ In conclusion, Mr Mbarushimana requests that all of the Prosecutor's appeals and requests should be dismissed.³⁶

2. *Determination by the Appeals Chamber*

(a) **Appeal against the Confirmation Decision**

18. Article 82 (1) (b) of the Statute provides that either party may appeal "[a] decision granting or denying release of a person being investigated or prosecuted".

19. The decisive question in resolving this appeal is whether the Confirmation Decision is "[a] decision granting or denying release" in the sense of article 82 (1) (b) of the Statute. As stipulated in article 61 (7) of the Statute, in a confirmation decision, the Pre-Trial Chamber determines whether "there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged". Therefore, by its nature, a confirmation decision is not a "decision granting or denying release".

20. Nevertheless, as pointed out by the Prosecutor, the operative part of the Confirmation Decision, at page 151, gives the impression that the Pre-Trial Chamber decided that Mr Mbarushimana should be released from the custody of the Court.³⁷ Mr Mbarushimana, however, correctly states that his release is the "logical consequence" of a decision declining to confirm the charges.³⁸ Indeed, article 61 (10) of the Statute provides:

Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

21. That the warrant of arrest ceases to have effect is therefore an automatic result of the decision declining to confirm all charges. The consequence thereof is that the person who is subject to the warrant of arrest must be released. The question to be answered is, therefore, whether this consequence, i.e. the release, could alter the

³⁵ Response, paras 15-20.

³⁶ Response, para. 21.

³⁷ Appeal, para. 7.

³⁸ Response, paras 6 and 8.

nature of a confirmation decision and make it a “decision granting or denying release”.

22. The jurisprudence of the Appeals Chamber addresses this question in the context of article 82 (1) (b) of the Statute by pointing out that the “implications” or “effects” of a decision do not change its “character” or “nature”.³⁹ And, more specifically with respect to the concrete question at issue, the Appeals Chamber ruled in the *Decision in Lubanga OA 8* that “[t]he decision confirming the charges neither grants nor denies release. The effect or implications of a decision confirming or denying the charges do not qualify or alter the character of the decision”.⁴⁰ Accordingly, the Pre-Trial Chamber’s order in the Confirmation Decision to release Mr Mbarushimana forms an integral part of the decision not to confirm the charges against him. It has no impact on the nature of the Confirmation Decision, nor does it make it a decision granting release.

23. The Appeals Chamber concludes that the Confirmation Decision is not a “decision granting or denying release” and therefore cannot be appealed under article 82 (1) (b) of the Statute.

24. For these reasons, the appeal of the Confirmation Decision is inadmissible.

25. Finally, the Appeals Chamber notes with concern that the Prosecutor fails to refer to the *Decision in Lubanga OA 8*, even though it is directly relevant to the admissibility of the Prosecutor’s appeal.

(b) Request for suspensive effect

26. The Appeals Chamber has already found that a “right to appeal” the Confirmation Decision under article 82 (1) (b) of the Statute does not exist. Consequently, there is no reason to protect such a right to appeal by ordering the suspensive effect of this appeal under article 82 (3) of the Statute. Therefore, the Appeals Chamber dismisses the request for suspensive effect.

³⁹ See *Prosecutor v. Callixte Mbarushimana*, “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 the “Second Defence request for interim release”’, 21 September 2011, ICC-01/04-01/10-438 (OA 2), para.17, referring also to the *Decision in Lubanga OA 8*, para. 15.

⁴⁰ *Decision in Lubanga OA 8*, para. 15.

B. Alternative Appeal against Decision on the Request for Stay of Release

1. Arguments of the parties

27. The Prosecutor also raises, in the alternative, an appeal against the Decision on the Request for Stay of Release, in the event that the Appeals Chamber would find that the Confirmation Decision could not be appealed under article 82 (1) (b) of the Statute.⁴¹ The Prosecutor submits that the Decision on the Request for Stay of Release could be appealed as of right under article 82 (1) (b) of the Statute.⁴² He requests the Appeals Chamber to “immediately overturn the [Decision on the Request for Stay of Release] and modify that decision by ordering the stay of the release of the Suspect until the Decision on the Confirmation of Charges is final”.⁴³ He submits that this is necessary,

because the Pre-Trial Chamber declined to suspend the effect of its own judgment on the apparent belief that the Prosecution could go immediately to the Appeals Chamber under Article 82(1)(b). If the Appeals Chamber finds otherwise, the Prosecution is left with no place to seek suspensive effect and therefore requests that the Appeals Chamber overturn the [Decision on the Request for Stay of Release] pending the Prosecution’s filing of an application for leave to appeal.⁴⁴

28. The Prosecutor also informs the Appeals Chamber that he will file before the Pre-Trial Chamber a request for leave to appeal the Confirmation Decision under article 82 (1) (d) of the Statute.⁴⁵

29. Mr Mbarushimana argues that article 82 (1) (b) of the Statute provides no basis for appealing the Decision on Stay of Release because Mr Mbarushimana is no longer a person being “investigated or prosecuted”.⁴⁶ He also notes that, at the time of the filing of the Response, the Prosecutor had not yet requested leave to appeal the Confirmation Decision.⁴⁷

⁴¹ Appeal, para. 13.

⁴² Appeal, para. 13.

⁴³ Appeal, para. 14.

⁴⁴ Appeal, para. 14.

⁴⁵ Appeal, para. 8.

⁴⁶ Response, para. 13.

⁴⁷ Response, para. 10.

2. Determination by the Appeals Chamber

30. Crucial to the determination of this alternative appeal is the Appeals Chamber's prior jurisprudence relevant to the distinction between the nature of a decision appealed under article 82 (1) (b) of the Statute and its effects or implications. This jurisprudence is laid out in paragraph 22 above.

31. The Pre-Trial Chamber rejected, in its Decision on the Request for Stay of Release, the Prosecutor's request to stay the release of Mr Mbarushimana pending a decision on an application for leave to appeal under article 82 (1) (d) of the Statute that had yet to be filed. The effect of such a stay would have been that Mr Mbarushimana had to remain in detention until the Pre-Trial Chamber had resolved the Prosecutor's application for leave to appeal the Confirmation Decision under article 82 (1) (d) of the Statute. In other words, the stay would have affected the release of Mr Mbarushimana. Despite this, however, the Decision on the Request for Stay of Release dealt only with the question of whether the Confirmation Decision should have immediate effect. It was, therefore, a procedural decision that did not address the substance of whether release should be granted or whether Mr Mbarushimana should remain in detention. As a result, the Appeals Chamber finds that the Decision on the Request for Stay of Release is not a "decision granting or denying release". Accordingly, it cannot be appealed under article 82 (1) (b) of the Statute and the Prosecutor's appeal is therefore inadmissible.

C. The Victims' Request for Participation

32. Victims participating in the pre-trial proceedings filed a request to participate in the appeal proceedings.

33. Article 68 (3) of the Statute provides that "the Court shall permit [victims'] views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court *and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial*" (emphasis added). The 'right of the accused' at stake in the underlying pre-trial and appeal proceedings is Mr Mbarushimana's fundamental right to liberty.

34. As stated above, the Appeals Chamber has already found that the appeals of the Prosecutor are clearly inadmissible. Any delay for procedural reasons in the delivery

of this admissibility decision could have an effect on the release of Mr Mbarushimana and potentially could jeopardize his fundamental right to liberty. Therefore, the Appeals Chamber finds it unacceptable to delay the delivery of the decision and cannot, in this specific appeal, allow victims to participate.

35. Consequently, the Victims' Request for Participation is denied.

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



Judge Anita Ušacka
Presiding Judge

Dated this 24th day of January 2012

At The Hague, The Netherlands