

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

**No. ICC-01/04-01/10 OA 4**

**Date: 2 April 2012**

**THE APPEALS CHAMBER**

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

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

**Public document**

**Decision on the “Requête tendant à obtenir autorisation de participer à la  
procédure d’appel contre la ‘Décision relative à la confirmation des charges’  
(ICC-01/04-01/10-465-Conf-tFRA)”**



**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 Yael Vias-Gvirsman

**Legal representatives of victims**

Mr Ghislain M. Mabanga

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**Registrar**

Ms Silvana Arbia



The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor 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),

Having before it the “Requête tendant à obtenir autorisation de participer à la procédure d’appel contre la ‘Décision relative à la confirmation des charges’ (ICC-01/04-01/10-465-Conf-tFRA)” of 7 March 2012 (ICC-01/04-01/10-494),

*Renders the following*

## DECISION

- (i) The 95 victims represented by Mr Mabanga, who have applied to participate in the present appeal, are granted the right to participate for the purpose of presenting their views and concerns with respect to their personal interests in the issues raised on appeal. They may file their submissions by 16h00 on Tuesday, 10 April 2012.
- (ii) Mr Mbarushimana and the Prosecutor may file their responses to the submissions presented by the aforesaid victims by 16h00 on Monday, 16 April 2012.

## REASONS

### I. PROCEDURAL BACKGROUND AND SUBMISSIONS

1. On 16 December 2012, Pre-Trial Chamber I (hereinafter: “Pre-Trial Chamber”) rendered its “Decision on the confirmation of charges”,<sup>1</sup> (hereinafter: “Impugned Decision”) by which it declined to confirm the charges against Mr Mbarushimana. The Pre-Trial Chamber granted in part the “Prosecution’s Application for Leave to Appeal the ‘Decision on the confirmation of charges’”<sup>2</sup> on 1 March 2012.<sup>3</sup>

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<sup>1</sup> ICC-01/04-01/10-465-Conf.

<sup>2</sup> 27 December 2011, ICC-01/04-01/10-480.

2. On 7 March 2012, Mr Ghislain M. Mabanga, in his capacity as legal representative of 95 victims authorised to participate in this case,<sup>4</sup> filed the “Requête tendant à obtenir autorisation de participer à la procédure d’appel contre la ‘Décision relative à la confirmation des charges’ (ICC-01/04-01/10-465-Conf-tFRA)”<sup>5</sup> (hereinafter: “Victims’ Application”). He argues that the personal interests of the victims are, at this specific stage of the proceedings, affected by the appeal because the victims would be impeded from seeking reparations before the Court if the Appeals Chamber upheld the Impugned Decision.<sup>6</sup>

3. Following an order of the Appeals Chamber of 23 March 2012,<sup>7</sup> the Prosecutor and Mr Mbarushimana responded on 28 March 2012 to the Victims’ Application.

4. The Prosecutor submits that the Victims’ Application should be granted.<sup>8</sup> He points out that the errors of the Pre-Trial Chamber were material for the non-confirmation of the charges.<sup>9</sup> He agrees with the victims’ submission that the non-confirmation of the charges would deprive the victims of the possibilities to participate in the trial and to seek reparations for the harms they suffered.<sup>10</sup>

5. Mr Mbarushimana submits that the Victims’ Application should be denied.<sup>11</sup> He argues that the victims should have applied at an earlier stage of the proceedings for participation in this appeal,<sup>12</sup> and that the late application violates his rights.<sup>13</sup> Further, he submits that the grounds of appeal do not directly affect the personal interests of

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<sup>3</sup> “Decision on the ‘Prosecution’s Application for Leave to Appeal the “Decision on the confirmation of charges””, ICC-01/04-01/10-487.

<sup>4</sup> “Decision on the 138 applications for victim’s participation in the proceedings”, 11 August 2011, ICC-01/04-01/10-351; and “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.

<sup>5</sup> ICC-01/04-01/10-494 (OA4).

<sup>6</sup> Victims Application, paras 12-13.

<sup>7</sup> “Order on the filing of responses to the ‘Requête tendant à obtenir autorisation de participer à la procédure d’appel contre la “Décision relative à la confirmation des charges” (ICC-01/04-01/10-465-Conf-tFRA)”, ICC-01/04-01/10-504 (OA4).

<sup>8</sup> “Prosecution’s response to the Victims’ “Requête tendant à obtenir autorisation de participer à la procédure d’appel contre la ‘Décision relative à la confirmation des charges’” (ICC-01/04-01/10-494 OA4)”, ICC-01/04-01/10-506 (OA4) (hereinafter: Response of the Prosecutor”).

<sup>9</sup> Response of the Prosecutor, para. 12.

<sup>10</sup> Response of the Prosecutor, para. 12.

<sup>11</sup> “Réponse de Monsieur Callixte MBARUSHIMANA à la Requête des parties civiles tendant à obtenir autorisation de participer à la procédure d’appel contre la «Décision relative à la confirmation des charges » (ICC-01/04-01/10-465-Conf-tFRA) déposée le 7 mars 2012”, ICC-01/04-01/10-507 (OA4) (hereinafter: “Response of Mr Mbarushimana”).

<sup>12</sup> Response of Mr Mbarushimana, paras 20-24.

<sup>13</sup> Response of Mr Mbarushimana, paras 34-36.

the victims and that the victims' submissions are of a general character instead of substantiating how their personal interests are affected.<sup>14</sup>

## II. DETERMINATION BY THE APPEALS CHAMBER


6. The Appeals Chamber has consistently held that, with respect to victims' participation in appeals brought under article 82 (1) (b) of the Statute, the following four cumulative criteria enumerated in article 68 (3) of the Statute must be fulfilled: (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 (iv) the manner of participation should neither cause prejudice to nor be inconsistent with the rights of the accused and a fair and impartial trial.<sup>15</sup>

7. The Victims' Application has been filed in good time. The Appeals Chamber stipulated in previous decisions that any such application should be filed at the latest on the day the response to the document in support of the appeal is due.<sup>16</sup> As Mr Mbarushimana's response is only due on 2 April 2012, Mr Mbarushimana's argument that the appeal was filed late is without foundation.

8. The Appeals Chamber finds that all four criteria for participation of the victims are fulfilled. As to the first criterion, the Appeals Chamber notes that the Pre-Trial

<sup>14</sup> Response of Mr Mbarushimana, paras 25-33.

<sup>15</sup> *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'D cision sur la demande de mise en libert  provisoire de Thomas Lubanga Dyilo'", 13 February 2007, ICC-01/04-01/06-824 (OA 7), paras 44-45; *Prosecutor v. Thomas Lubanga Dyilo*, "Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled 'Decision on Victims' Participation'", 16 May 2008, ICC-01/04-01/06-1335 (OA 9 OA 10), para. 36; *Prosecutor v. Jean-Pierre Bemba Gombo* "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.

<sup>16</sup> *Prosecutor v. Jean-Pierre Bemba Gombo* "Decision on 'Application of Legal Representative of Victims Mr Zarambaud Assingambi for leave to participate in the appeals proceedings following the Defence appeal of 9 January 2012 and addendum of 10 January 2012'" 1 February 2012, ICC-01/05-01/08-2098, para. 10; *Prosecutor v. Thomas Lubanga Dyilo*, "Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled 'Decision on Victims' Participation'", 16 May 2008, ICC-01/04-01/06-1335 (OA 9 OA 10), para. 15. 

Chamber has recognised the 95 applicants represented by Mr Mabanga as victims in the case against Mr Mbarushimana.<sup>17</sup>

9. Regarding the victims' personal interests, the Appeals Chamber recalls that "any determination [...] of whether the personal interests of victims are affected in relation to a particular appeal will require careful consideration on a case-by-case basis".<sup>18</sup> Furthermore, the Appeals Chamber has emphasised 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."<sup>19</sup>

10. The issues on appeal relate to the evaluation of evidence at the confirmation hearing and to the scope of individual criminal responsibility under article 25 (3) (d) of the Statute. The Prosecutor, by raising this appeal, contends that the Pre-Trial Chamber's erroneous findings on those issues materially affected the decision not to confirm the charges against Mr Mbarushimana. If the Impugned Decision is upheld and subject to article 61 (8) of the Statute, the victims will not have an opportunity to present their views and concerns in the course of a trial and will be prevented from seeking reparations before this Court. Therefore, the Appeals Chamber finds that the victim's personal interests are affected by this appeal. The Appeals Chamber is not convinced by Mr Mbarushimana's argument that the issues on appeal do not relate to the personal interests of the victims, as the repercussions of the appeal on the personal interests of the victims are considerable.<sup>20</sup>

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<sup>17</sup> "Decision on the 138 applications for victim's participation in the proceedings", 11 August 2011, ICC-01/04-01/10-351; and "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.

<sup>18</sup> *Prosecutor v. Thomas Lubanga Dyilo*, "Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007", 13 June 2007, ICC-01/04-01/06-925 (OA 8), para. 28.

<sup>19</sup> *Prosecutor v. Joseph Kony and others*, "Decision on the participation of victims in the appeal", 27 October 2008, ICC-02/04-01/05-324 (OA 2), para. 13; *Situation in Uganda*, "Decision on participation of victims in the appeal", 27 October 2008, ICC-02/04-164 (OA), para. 11; *Prosecutor v. Jean-Pierre Bemba Gombo*, "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.


<sup>20</sup> See also *Prosecutor v. Thomas Lubanga Dyilo* "Decision on the participation of victims in the appeal", 6 August 2008, ICC-01/04-01/06-2453, para. 9.

11. The Appeals Chamber considers that participation in this appeal is appropriate in light of the consequences that this appeal might have on the victims' personal interests.<sup>21</sup>

12. As to the manner of participation, the Appeals Chamber considers that the participation of victims in the present appeal will be limited to the written presentation of their views and concerns with respect to their personal interests relating to the issues raised in this appeal. Mr Mbarushimana and the Prosecutor will be permitted to reply to their views and concerns, in accordance with rule 91 (2) of the Rules of Procedure and Evidence. In the view of the Appeals Chamber, this manner of participation does not cause prejudice to and is not inconsistent with the rights of the accused and a fair and impartial trial. The fourth criterion for victim participation under article 68 (3) of the Statute is therefore satisfied.

Judge Song appends a separate opinion.

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

  
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**Judge Erkki Kourula**  
**Presiding Judge**

Dated this 2<sup>nd</sup> day of April 2012

At The Hague, The Netherlands

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<sup>21</sup> See also *Prosecutor v. Thomas Lubanga Dyilo* "Decision on the participation of victims in the appeal", 6 August 2008, ICC-01/04-01/06-2453, para. 10.

### Separate Opinion of Judge Song

I disagree with the approach taken by the majority regarding victim participation in appeals brought under article 82 (1) (d) of the Statute. In my view, victims who have been permitted to participate in proceedings giving rise to an appeal under that provision are participants within the meaning of regulations 64 (4) and 65 (5) of the Regulations of the Court. As participants, they have the right to file a response to the document in support of the appeal. There is need neither for them to apply for participation nor for the Appeals Chamber to rule on such applications. Therefore, I agree that the victims who filed this Victims' Application are entitled to participate before the Appeals Chamber, but in my view there was no need for them to apply for participation or for the Appeals Chamber to rule on this application.

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

  
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Judge Sang-Hyun Song

Dated this 2<sup>nd</sup> day of April 2012

At The Hague, The Netherlands