

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **28/12/2010**

PRE-TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Sylvia Steiner
Judge Sanji Mmasenono Monageng

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
THE PROSECUTOR
v. CALLIXTE MBARUSHIMANA**

Confidential, *ex parte*, Registry Only

**Defence Request under Article 57(3)(b) of the Rome Statute
for State Cooperation from the Democratic Republic of the Congo**

Source: Defence for Mr. Callixte Mbarushimana

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

The Office of the Prosecutor

Counsel for the Defence

Mr. Nicholas Kaufman

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented

Applicants

(Participation/Reparation)

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

**Other
Section**

The Defence for Mr. Callixte Mbarushimana hereby requests Pre-Trial Chamber I to exercise its powers under Article 57(3)(b) and Article 93(1) of the Rome Statute and to order the Government of the Democratic Republic of the Congo ("DRC") to provide such assistance in relation to the Defence investigation as stipulated hereinafter.

Introduction

1. Pursuant to Article 19(2)(a) of the Rome Statute, Mr. Callixte Mbarushimana will challenge the jurisdiction of the International Criminal Court ("ICC") to entertain the case presented against him by the Office of the Prosecutor ("OTP").

2. The Defence for Mr. Mbarushimana will argue, *inter alia*, that the situational referral ("the Referral") effected by the Government of the DRC on 3 March 2004 did not, at that time, envisage the investigation of atrocity crimes¹ committed in the Kivus or by the *Forces démocratiques de libération du Rwanda* ("FDLR"). Accordingly, the Defence will contend that the case against Mr. Mbarushimana – given his alleged role as Executive-Secretary of the FDLR – is in no way linked to the "*ongoing situation of crisis*"² which triggered the jurisdiction of the ICC.

3. The Defence notes the specific language used in Article 14(1) of the Rome Statute stipulating the means by which a State referral ought to be communicated to the Prosecutor of the ICC. If it is accepted that, on or around 3 March 2004, FDLR activity or criminal activity in the Kivus, in general, was not intended by the DRC authorities or the OTP to be the focus of the Referral then neither Mr. Mbarushimana nor any other alleged FDLR member could have been the subject of a request to determine whether "*one or more specific persons*" should be charged with the commission of crimes.

¹ Specifically crimes falling under the subject-matter jurisdiction of the Court as defined in Article 5 of the Rome Statute.

² ICC-01/04-01/10-1 at para. 6.

4. It is this need for clarity as to the subject of a proposed investigation which forms the rationale for Article 14(2) of the Rome Statute and the mandatory obligation, as far as possible, to supply such supporting documentation as is available to the referring State.

5. In order to pursue its jurisdictional challenge pursuant to the strategy outlined in paragraphs 2 and 3 hereinabove, the Defence deems it imperative to review such "supporting documentation" or, alternatively, receive confirmation of the absence thereof. For the aforementioned reasons, the Defence also deems it imperative to obtain any documentation or official record of meetings with the OTP, retained by the DRC authorities, which may shed light on the intended scope of the Referral.

6. When requested to supply the materials mentioned in paragraph 5 above, the OTP replied to Counsel for Mr. Mbarushimana stating that it would "consider" his applications "at the appropriate time".³

Relevant Statutory Provisions

7. Article 57(3)(b) of the Rome Statute provides as follows:

"In addition to its other functions under this Statute, the Pre-Trial Chamber may:

...

... Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;"

8. Article 93(1)(i) of the Rome Statute states as follows:

State Parties shall, in accordance with the Provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:...

³ Letters from Counsel for Mr. Mbarushimana to Mr. Anton Steynberg, Senior Trial Lawyer dated 31 October 2010 and 3 November 2010; Response from Mr. Anton Steynberg to Counsel dated 8 November 2010.

...

(i) *The provision of records and documents, including official records and documents...*

9. Rule 116 of the Rules of Procedure and Evidence provides as follows:

The Pre-Trial Chamber shall issue an order or seek cooperation under article 57, paragraph 3 (b), where it is satisfied:

(a) *That such an order would facilitate the collection of evidence that may be material to the proper determination of the issues being adjudicated, or to the proper preparation of the person's defence; and*

(b) *In a case of cooperation under Part 9, that sufficient information to comply with article 96, paragraph 2, has been provided.*

Submission

10. Pre-Trial Chamber I is respectfully referred to the case of Prosecutor v. Germain Katanga⁴ where a similar request, albeit for admissibility related information, was granted in part. It should be stressed that those items of information which the majority of the Katanga tribunal declined to request from the DRC authorities were held to be in the possession of the Prosecution and the Registry – and thus deemed subject to prior demand from these organs of the Court.

11. Counsel for Mr. Mbarushimana respectfully supports the minority opinion in the Katanga decision and, for two reasons, urges that this request for cooperation be transferred to the DRC regardless of whether the same materials may, in the present instance, be obtained from the Prosecution. Firstly, the Prosecution has, to date, declined even to consider the Defence's request for the relevant materials. Secondly, the present application is to be viewed as a specific Defence investigative procedure designed to collect evidence – the veracity, authenticity and consistency of which will later be evaluated by the Court in the context of the jurisdictional challenge. In support of his argument, Counsel for Mr. Mbarushimana specifically relies on the dicta of Judge Ušacka in her dissenting opinion in the Katanga case:

⁴ ICC-01/04-1/07-444.

However, with regard to Items 3 and 4, the Defence emphasised at the 17 April 2008 ex parte hearing held before the Single Judge that it specifically wanted [REDACTED]. With regard to Item 5, the Defence also emphasised that it specifically wanted [REDACTED]. The majority's solution does not appear to take into account that even if the Prosecution and the Registry provide information relevant to these items, it would not satisfy the Defence's interest in also receiving the DRC's version of the information.

Just as there is no requirement that the Defence must first request information from organs of the Court before requesting that the Chamber issue an order on cooperation from States, there is no indication in the Statute, Rules or Regulations that the Defence may not seek cooperation from a State if there is a better or simply another source for the information requested. Rather, under rule 116 of the Rules, the Defence, in the course of its preparation, should be able to seek the same information from several sources in order to compare or corroborate.

Thus, a request under article 57(3)(b) of the Statute should not be rejected on the grounds that another source may also have access to the information. Clearly, the Chamber may grant the request under article 57(3)(b) and rule 116(1) of the Rules and at the same time direct the Defence to any additional source(s) of the information. In my view, the majority appears to create an extra step for article 57(3)(b) requests, the practical consequence of which is to restrain and delay the Defence's preparation.⁵

12. The Defence request meets the requirements of Rule 116. Firstly, there can be no doubt that the present request will be forwarded to the only agency which can supply the information required. Furthermore, and for the reasons mentioned in the introductory paragraphs hereinabove, the information sought is highly material to the preparation of the Defence's jurisdictional challenge. Secondly, and as far as the requirements of Article 96(2) of the Rome Statute are concerned, the Defence respectfully asserts that it is not in a position to know exactly which organ in the DRC Government is charged with handling relations with the ICC. Nevertheless, the Defence suggests that the same formula used in the *Katanga* case be used in the present circumstances; namely that the request for cooperation be transmitted to the

⁵ ICC-01/04-01/07-444; Dissenting Opinion at para. 22.

relevant authorities of the DRC "*through the proper channels of communication as provided for in article 87 of the Statute and rule 177 of the Rules*".⁶

Justification for filing confidentially and *ex parte*

13. As intimated above, the present application is filed independently of the Defence's request and legitimate expectation that the Prosecution perform its disclosure obligations pursuant to Article 67(2) of the Rome Statute and Rule 77 of the Rules of Procedure and Evidence.⁷

14. In so far as this request, therefore, concerns Defence strategy and is intended to be the means for testing the integrity of Prosecution disclosure with respect to an issue which concerns the legitimacy of the Prosecution's invitation and receipt of the Referral, it should not be disclosed to the OTP.

Relief Sought

15. In light of all the aforementioned, Pre-Trial Chamber I is respectfully requested to order the DRC to cooperate with the Court by providing all **contemporaneous** records and documents, including official records and documents, which specifically comprise the "*supporting documentation*" envisaged under Article 14(1) of the Rome Statute and which may shed light on the scope of the Referral.



Nicholas Kaufman

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Jerusalem, Israel

Tuesday, December 28, 2010

⁶ ICC-01/04-01/07-444 at page 10.

⁷ *c.f.*; ICC-01/04-01/10-29.