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

Date: **3 May 2011**

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***

Public Document

Prosecution's application to strike portion of "Defence Reply to the Prosecution's Response to the Defence Request for Interim Release" or, alternatively, for leave to reply to a new Defence argument

Source: Office of the Prosecutor

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

The Office of the Prosecutor

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**Unrepresented Applicants
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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I.

1. On 30 March 2011 the Defence filed its Request for Interim Release¹ and on 15 April the Prosecution filed the Prosecution Response.²
2. On 18 April the Defence filed its Request for Leave to Reply.³ On the same day the Single judge issued her Decision granting leave to reply.⁴ The Decision notes that the basis for the Request for Leave to reply was that “the Prosecution's Response refers to ‘new developments and evidence’ which would justify the necessity to maintain his arrest, which was not in the Prosecution's possession at the time that it requested the arrest warrant, and that the Defence should be given the opportunity to respond”.⁵
3. On 26 April the Defence filed the Defence Reply.⁶ In it, the Defence disputes that the suspect was the *de facto* leader of the FDLR, a point that it did not specifically dispute in its initial Application⁷ and, therefore, that the Prosecution also did not address in its Response. It also annexes a statement of an employee of the BBC to rebut the Prosecution's claim -- in the arrest warrant Application under Article 58⁸ and not in its Response to the Interim Release Application -- that the Suspect acted as the *de facto* temporary leader of the FDLR following the arrest of MURWANASHYAKA and MUSONI.⁹

¹ Defence Request for Interim Release, ICC-01/04-01/10-86, 30 March 2011.

² Prosecution response to the “Defence Request for Interim Release”, ICC-01/04-01/10-101, 15 April 2011.

³ Defence Request for Leave to Reply to the Prosecution's Response to the Defence Request for Interim Release, ICC-01/04-01/10-107, 18 April 2011.

⁴ Decision [on] the Defence Request for Leave to Reply to the Prosecution's Response to the Defence Request for Interim Release, ICC-01/04-01/10-111.

⁵ ICC-01/04-01/10- 111, page 3, final para.

⁶ Defence Reply to the Prosecution's Response to the Defence Request for Interim Release; ICC-01/04-01/10-120.

⁷ The Defence simply asserted that the evidence of W-552 was “contradictory and ambiguous as to the source of this information and then concluded that “it is not possible for the Defence to verify whether the witness was in a position to be reliably informed of these matters”. Significantly, however, is the absence of any denial that the Suspect was in fact acting as the *de facto* leader of the FDLR.

⁸ Prosecution's Application under Article 58, ICC-01/04-01/10-11-Conf-Red2, para 188.

⁹ ICC-01/04-01/10-120, para 10. The Defence concedes that the Prosecution did not cite this fact as an additional factor in its opposition to release but does not explain why the Prosecution should have been expected to argue it when the Defence failed to advance any evidence in its Request for interim Release to contradict it.

4. Thus, the BBC employee's statement does not address any submission in the Prosecution Response, far less any new evidence adduced therein. Inclusion of the argument is inconsistent with the justification the Defence urged in its application for leave to file a reply.¹⁰ Moreover, the Defence have not advanced any explanation why it did not make the argument at the appropriate time.
5. The Prosecution submits that the Chamber should not entertain new factual or legal arguments, and especially not new evidence, in a reply filing. Not only does this prolong the litigation, it also is unfair to the opposing side that has not had the opportunity to address them. For that reason, the Prosecution requests that the Chamber strike the offending paragraph of and annex to the Defence Reply. Alternatively, pursuant to Regulation 24(5) of the Regulations of the Court, the Prosecution requests an opportunity to reply to this new argument by the Defence.



Luis Moreno-Ocampo,

Prosecutor

Dated this 3rd day of May 2011

At The Hague, The Netherlands

¹⁰ See paragraph 2 above,