



Original: **English**

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

Date: **7 June 2011**

PRE-TRIAL CHAMBER I

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. CALLIXTE MBARUSHIMANA

Public

Prosecution's response to "Defence request for leave to reply to the 'Prosecution's response to the Defence request for a permanent stay of proceedings'"

Source: Office of the Prosecutor

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

Office of the Prosecutor	Counsel for the Defence Nicholas Kaufman
Legal Representatives of the Victims	Legal Representatives of the Applicants
Unrepresented Victims	Unrepresented Applicants (Participation/Reparation)
The Prosecution of Public Counsel for Victims	The Prosecution of Public Counsel for the Defence
States' Representatives	Amicus Curiae
REGISTRY	
Registrar Silvana Arbia Deputy Registrar	Defence Support Section
Victims and Witnesses Unit	Detention Section
Victims Participation and Reparations Section	Other

1. On 1 June the Defence received disclosure that included 11 witness statements taken by German authorities, who asked limited questions about Callixte MBARUSHIMANA ("the Suspect") and his role in the FDLR. On Monday 6 June the Defence filed its "Request for leave to reply to the 'Prosecution's response to the Defence request for a permanent stay of proceedings'" ("the Defence Request").¹
2. The basis of the Defence Request is that the German statements contain information which it alleges is relevant to the pending Defence application for a permanent stay of proceedings ("the Stay Request")² including the name of the Suspect and questions about him. The Defence alleges that these examples were unavailable at the time the Defence filed its Stay Request.³
3. The Prosecution does not object to the Chamber's review of the German statements - the English translations of which are filed in the record of the case⁴ - for the purposes of it ruling on the Stay Request.
4. The Prosecution submits, however, that the Defence Request for the opportunity to make an additional argument in a reply to the Prosecution's Response to its Stay Request should be denied. The Defence had similar information available regarding the German investigation when it sought a stay of proceedings on 24 May 2011, since the Prosecution disclosed one of the German statements⁵ on 2 February as part of the materials relied on in the Prosecution's application under Article 58. The statement was clearly identified as a "BKA witness statement".⁶ As in the 11 statements that form the basis of the Defence Request, in this previously disclosed statement the Suspect was mentioned by his full name -- prominently on the cover page, in the

¹ ICC-01/04-01/10-214.

² ICC-01/04-01/10-177.

³ ICC-01/04-01/10-214, para. 7.

⁴ See ICC-01/04-01/10-135-Conf-Red, para. 11 and ICC-01/04-01/10-135-Conf-Exp-Anx14 through ICC-01/04-01/10-135-Conf-Exp-Anx22.

⁵ DRC-OTP-2016-0606, disclosed to the Defence on 2 February 2011.

⁶ ICC-01/04-01/10-11-Conf-Red and ICC-01/04-01/10-11-Conf-Red2, footnote 150.

introductory paragraph of the statement, and in a question particularly regarding the Suspect.⁷

5. The Prosecution submits that the Defence omitted to rely on this previously-disclosed statement and it attempts to cure its omission by now seeking leave to reply on the ground that it now has new information. But the 11 statements do not add significant new facts, they are simply further examples of witness statements in which the Suspect is identified in the German investigation and questions were asked about him. The Defence's failure to review the evidence in its possession does not justify its request to file a reply to remedy its failure.

6. The Prosecution notes further that the Defence Request contains substantial argument on the merits of the Stay Request, by identifying in detail in the Defence Request the argument it will advance if permitted to submit a Reply.⁸ The tactic of putting forth the substantive argument without permission is intended to pre-empt the Chamber's authority to decide on the Defence request – the Defence succeeds in making its argument even if the Chamber denies it leave to do so -- and prejudices the Prosecution's opportunity to object. For that additional reason, the Defence Request should be denied.

⁷ DRC-OTP-2016-0606 at 0606, 0607 and 0616 and English translation DRC-OTP-2024-0166 at 0167, 0168 and 0177. See ICC-01/04-01/10-135-Conf-Exp-Anx11, pages 3 (0167), 4 (0168) and 13 (0177).

⁸ ICC-01/04-01/10-214, paras. 5 and 6. The argument contained in these paragraphs goes beyond what is necessary for the Defence Request.

7. The Prosecution therefore requests the Chamber to reject the Defence request for leave to reply.



Luis Moreno-Ocampo, Prosecutor

Dated this 7th Day of June, 2011
At The Hague, The Netherlands