

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **06/07/2011**

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**

**Confidential, *ex parte*, Defence Only
URGENT**

**Third Defence request to convene a status conference for the purpose of 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

Ms. Yaël Vias-Gvirsman

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

1. The learned Pre-Trial Chamber will recall the Defence assertion that the letter referring the situation ("the Letter of Referral") in the Democratic Republic of the Congo ("DRC") to the International Criminal Court ("the Court") does not reflect the true intended scope of the referral. The Defence submits that, at or about the time of the referral,¹ the Office of the Prosecutor ("OTP") and the Government of the DRC jointly envisaged the investigation of crimes in the Ituri region alone. In such circumstances, the mandatory letter of notification² subsequently issued by the Prosecutor offends the principle of complementarity in Mr. Mbarushimana's case since it was never intended to invite State Parties to exercise primary jurisdiction over crimes allegedly committed in the Kivus.

2. On 17 May 2011, pursuant to a Defence request, the Single Judge invited the DRC to transmit to the Defence *"tout document de l'époque ou de tout compte rendu de réunion avec le Bureau du Procureur en la possession des autorités de la RDC qui permettrait de mieux cerner la portée du renvoi de la situation en RDC à la Cour"*.³

3. On 27 May 2011, the DRC communicated a response to the Court supplying no more than the very same letter of referral - the scope of which the Defence is seeking to clarify.⁴

4. On 7 June 2011, for the second time, the Defence requested that the Single Judge convene a status conference in light of what it perceived to be the DRC's non-compliance with the Pre-Trial Chamber's invitation.⁵

5. On 17 June 2011, the Single Judge denied the Defence request for a status conference but afforded the DRC as follows: *"une dernière opportunité d'éclaircir la portée de sa réponse à la Demande de Coopération et, notamment, de préciser si la Lettre de*

¹ 3 March 2004.

² Article 18(1) of the Rome Statute.

³ ICC-01/04-01/10-157-Conf-Exp.

⁴ ICC-01/04-01/10-204-Conf-Exp-Anx1.

⁵ ICC-01/04-01/10-219-Conf-Exp.

renvoi est effectivement le seul document pertinent en la possession des autorités de la RDC".⁶

6. On 6 July 2011, the DRC responded, once again, by citing the content of the letter of referral but totally ignoring the invitation to state whether or not it retained any documentation of its own or passing between it and the OTP which could, also, shed light on the scope referral.⁷

7. The Defence suggests that the DRC has now clearly evinced an intention to evade compliance with the request to supply all documentation in its possession which may shed light on the scope of the referral. More particularly, the DRC authorities have ignored the Single Judge's invitation to supply an answer to the question whether they retain pertinent information other than the letter of referral.

8. In the circumstances, the Defence requests, for the third time, that the learned Pre-Trial Chamber convene an urgent status conference for the purpose of inviting a competent representative of the DRC specifically to answer the question as formulated by the Single Judge; namely, whether "*la Lettre de renvoi est effectivement le seul document pertinent en la possession des autorités de la RDC*". The Pre-Trial Chamber is also requested to permit Counsel to question the said competent representative and request his observations on the results of Defence investigations which suggest that the referral was indeed confined to the Ituri region alone.

9. Failing the relief sought in paragraph 8 above, the Defence requests that the Pre-Trial Chamber enter, as it previously indicated, a finding of non-cooperation pursuant to Article 87(7) of the Rome Statute and draw the inference that despite the wording of the Letter of Referral, the DRC retains contemporaneous documentation testifying to an agreement with the OTP that, for the purpose of the referral, OTP investigations would be confined to the Ituri region alone.

⁶ ICC-01/04-01/10-240-Conf-Exp.

⁷ ICC-01/04-01/10-269-Anx1-Conf-Exp.

10. The learned Pre-Trial Chamber is reminded of the Defence request for disclosure of a letter sent by President Joseph Kabila to Mr. Luis Moreno-Ocampo ("the Prosecutor").⁸ This letter, on the face of it, could concern the scope of the referral since it is, ostensibly, a direct reply to the substance of a letter of the Prosecutor dated 8 October 2003 in which the geographical scope of investigations was quite distinctly confined to the Ituri region.⁹ If the Defence surmise is correct, it would appear that the DRC is, indeed, in possession of further documentation capable of shedding light on the scope of the referral.

11. The Defence, furthermore, attaches to this filing confidential correspondence between Counsel and Mr. Serge Brammertz which indicates that the latter – despite his role as the ex-Deputy Prosecutor for Investigations at the relevant time period – has, rather surprisingly, no information to provide on the true intended scope of the referral.¹⁰

12. In the circumstances, the Defence suggests that the exact terms of the referral were negotiated between the immediate office of the Prosecutor and the *cabinet* of the President of the DRC. Given that the Pre-Trial Chamber has declined to order disclosure of relevant OTP memoranda, the Defence reiterates that the only way of clarifying the true scope of the referral is by obtaining a meaningful response from the Government of the DRC.



Nicholas Kaufman

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Jerusalem, Israel

Wednesday, July 06, 2011

⁸ ICC-01/04-01/10-227.

⁹ ICC-01/04-01/10-227-AnxA.

¹⁰ Confidential Annex A.