



Original: **English**

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

Date: **01/08/2011**

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 Document

**Defence request for leave to reply to the Prosecution's response
to the Defence challenge to the jurisdiction of the Court
and Defence request to adduce oral testimony**

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

Mr. Luis Moreno-Ocampo, Prosecutor
 Ms. Fatou Bensouda, Deputy Prosecutor
 Mr. Anton Steynberg, Senior Trial Lawyer

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Mr. Nicholas Kaufman
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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

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Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
 Section**

Other

Pursuant to Regulation 24(5) of the Regulations of the Court, the Defence seeks leave to reply to the *Prosecution's response to the Defence Challenge to the Jurisdiction of the Court* ("the Prosecution Response").¹ The Defence, furthermore, requests that the Pre-Trial Chamber hear the oral testimony of a suitable OTP official in order to determine whether the Prosecutor or the DRC contemplated, at or around 3 March 2004, that the referral of the DRC situation would encompass crimes committed in the Kivus.

1. Notwithstanding the DRC's clarification that the geographical scope of the referral extended "across the territory of the DRC from July 2002",² the Pre-Trial Chamber specifically found the need to prove a causal link to an "ongoing situation of crisis".³ The Pre-Trial Chamber also stipulated that there was a causal link to Mr. Mbarushimana by specifically ruling that "at or around the time of referral" there was evidence of the FDLR's "alleged involvement in the commission of crimes within the jurisdiction of the Court".⁴

2. Section B of the Prosecution Response criticizes that aspect of the jurisdictional challenge⁵ where the Defence argued that it was necessary to prove FDLR involvement in atrocity crimes prior to 3 March 2004. In this respect, however, the Defence had done no more than accept the jurisdictional requirements posited by the Pre-Trial Chamber itself and had, thereafter, demonstrated that they were unsupported by evidence. Indeed, the fact that no evidence exists to prove FDLR involvement in atrocity crimes in the Kivus as of 3 March 2004 is implicit in the failure of the OTP to challenge such an assertion in the Prosecution Response.

3. In so far, however, as the Prosecution alleges that it is only required to show a "situation of crisis" without FDLR involvement in such, the Defence requests leave to provide further submissions for the purpose of showing that the only reasonable and meaningful definition of a "situation of crisis" for the purpose of triggering the Court's

¹ ICC-01/04-01/10-290.

² Which adds nothing to the letter of referral dated 3 March 2004.

³ ICC-01/04-01/10-1 at paragraph 6.

⁴ *ibid* at paragraph 7.

⁵ ICC-01/04-01/10-290.

jurisdiction, is a situation which comprises the commission of crimes within the material jurisdiction of the Court (including the contextual requirements thereof). In so doing, the Defence will show, once again, that the Prosecution has provided no evidence - either in its submissions on jurisdiction or in the Response - to prove, even on a *prima facie* basis, this more general assertion; i.e., that atrocity crimes were being committed in the Kivus "at or around the time of referral".

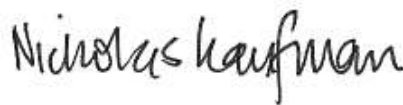
4. The Prosecution relies on the DRC's clarification of the geographical scope of the referral dated 6 July 2002⁶ in support of its submission that the referral extended across all of Congolese territory while rejecting the Defence submission that the Kivu slant to the referral was an *ex post facto* innovation. In this respect, the Defence requests the Pre-Trial Chamber to receive oral testimony from a suitable representative of the OTP – formerly involved in negotiations with the DRC - who can testify as to whether the OTP and the DRC authorities contemporaneously (i.e. not *ex post facto*) viewed the **situation of crisis "qui se déroule"** as encompassing events in the Kivus. The necessity for oral testimony is even more acute in light of the fact that the Prosecution has refused the Defence permission to interview its staff members, the Pre-Trial Chamber has declined to order the OTP to disclose internal memoranda (notwithstanding that such memoranda may be of material benefit to the Defence) and the DRC authorities have refrained from acknowledging the existence of any additional and relevant contemporaneous information apart from the letter of referral.

5. As an alternative to oral testimony, nevertheless, the Defence requests that Pre-Trial Chamber order the Prosecution to disclose the contents of any Kivus orientated meetings the OTP may have held with international NGOs (such as UN/DDRRR) or DRC agencies in the weeks prior to and following the referral. To this day, the Pre-Trial Chamber has not been positively informed of the absence of additional contemporaneous documentation pertinent to the scope of the referral. For this reason, therefore, the Defence begs the Pre-Trial Chamber not to underestimate the

⁶ ICC-01/04-01/10-269-Conf-Anx1 as referenced in ICC-01/04-01/10-282.

importance of obtaining the maximum amount of disclosure necessary to gauge the true intent of the DRC authorities and the OTP at the time of the referral.

6. Finally, the Prosecution states that that Mr. Mbarushimana was “within the jurisdiction of France, at the time of his arrest, not the DRC”.⁷ The Defence seeks leave to submit further submissions on this new issue which, apparently, expresses the Prosecution’s view that France could have investigated Mr. Mbarushimana for the crimes committed in the Kivus. In its reply, the Defence will argue that by 3 March 2004, Mr. Mbarushimana was already on French territory having received refugee status.⁸ The Defence will further argue that since France had, at that time, made a reservation pursuant to Article 124 of the Rome Statute, the situational referral could not then have encompassed war crimes committed by French-protected people such as Mr. Mbarushimana. In any event, in so far as the sum total of Mr. Mbarushimana’s alleged contribution to the criminal common purpose is concerned (i.e. his purported handling of the “deceitful” international media campaign) - all of it was conducted on French territory and not in the DRC. In circumstances such as these, therefore, the Defence will argue that the basic precondition for jurisdiction under Article 12 of the Rome Statute ceases to exist since the referral was not made by the State on the territory of which “the conduct in question” occurred.



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Jerusalem, Israel
Monday, August 01, 2011

⁷ Prosecution Response at paragraph 55.

⁸ ICC-01/04-01/10-311-AnxC; Prosecution list of Evidence at page 1.