

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 2 August 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***

**URGENT
Public document**

Prosecution response to Defence request for leave to reply ICC-04/01-01/10-323

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

Counsel for the Defence

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**

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I. Introduction

1. The Prosecution opposes the Defence application for leave to reply and its request for an evidentiary hearing. The Prosecution also requests that the Chamber strike the Defence application. Finally, in the event that the Chamber agrees to entertain new submissions by way of a reply, the Prosecution requests the right to respond to the new arguments and asks that the Chamber allow the response to be filed after the confirmation hearing.

2. The Defence challenged the jurisdiction of this Court, based on its argument that the referral by the Democratic Republic of the Congo (DRC) in 2004 was inadequate to encompass the prosecution of the Suspect for offenses in the Kivus, DRC, in 2009.¹ The Prosecution responded.²

3. The Defence now requests leave to reply to the Prosecution's response and raises a new legal issue relating to the Suspect's residence in France at the time of the charged crimes. It also makes a new request, that the Court direct a "suitable OTP official" to testify on the issue "whether the Prosecutor or the DRC contemplated, at or about 3 March 2004, that the referral of the DRC situation would encompass crimes committed in the Kivus".³

II. Submissions

4. The Prosecution opposes and moves to strike the request for leave to reply. It also opposes the request for an evidentiary hearing.

¹ ICC-01/01-01/10-290.

² ICC-01/01-01/10-320.

³ ICC-01/01-01/10-323, at para. 4.

5. First, the Prosecution opposes the request for leave to reply, because it is clear that the Defence seeks not to reply to Prosecution arguments that it could not have anticipated. Instead, the Defence seeks leave to make further submissions, in order to articulate better his disagreement with the Prosecution's position.⁴ No good cause has been shown meriting further submissions at this stage.⁵
6. More egregiously, the Defence also intends in its reply to make new arguments that it failed initially to make. That is impermissible.
7. In its response, the Prosecution countered the Defence's argument that the DRC had abdicated its responsibility with respect to the present case.⁶ The Prosecution also noted that, in any event, the Suspect was not within the physical jurisdiction of the DRC at the time.⁷
8. In reply, the Defence proposes a new challenge to this Court's jurisdiction predicated upon the Suspect's residence in France at the time of the charged crimes. The information that he lived in France is a known and foreseeable fact; and the argument that his absence from the DRC affected the ability of the DRC to prosecute him is equally foreseeable. The pretence that this proposed new argument is a legitimate reply to the Prosecution's factual statement that the suspect was within the jurisdiction of France, not the DRC, is fallacious. It is also entirely irrelevant to the central issue raised whether the

⁴ ICC-01/01-01/10-323, at paras 2-3. The Prosecution submits that there was nothing in its response on this point that could not reasonably have been anticipated by the Defence and its proposed reply appears to be no more than mere disagreement with the Prosecution's arguments.

⁵ The Appeals Chamber has similarly dismissed applications by parties for further submissions following receipt of responses where it concerns issues that are already before the Chamber or appear to be mere disagreements with the other party's arguments; ICC-01/09-01/11-239 (1 August 2011), at paras 10-11.

⁶ ICC-01/01-01/10-320, at para 55.

⁷ *Ibid.*

referral of the *situation* by the government of the DRC encompassed the situation in the Kivus.

9. The Prosecution also opposes the new request for an evidentiary hearing. The issue on which it seeks to question a member of the Prosecution – its “contemplation” in March 2004 about the scope of the DRC’s referral – is irrelevant and, in any event, is answered by evidence already in the record.⁸

10. The Prosecution moves to strike the Application because the Defence, once again, attempts to use the process of applying for leave to make substantive submissions. 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. If the Chamber were to consider substantive arguments in the application, it would reward the Defence for skirting the rules and encourage future transgressions.

11. Finally, in the event that the Chamber permits the Defence to reply, the Prosecution requests leave thereafter to respond to the new arguments. The Prosecution further requests that it be permitted to respond after the confirmation hearing and post-hearing briefing is completed. As the Chamber is aware, the hearing is due to begin in 11 working days. There is no urgent need to resolve the jurisdictional issue before the confirmation hearing itself; were there such a need, the Defence surely would not have delayed its challenge until shortly before the hearing was due to begin. Lack of urgency in

⁸ See ICC-01/01-01/10-320, paras 6 – 9, 46, 48 and 49; ICC-01/01-01/10-290-AnxA.

this instance is also apparent from the Defence request for leave to file further submissions and its request for the scheduling of an oral hearing.

III. Conclusion

12. For the foregoing reasons, the Prosecution opposes the Defence Application and moves to dismiss the Application in its entirety. If the Chamber grants the Application and allows the Defence to file a Reply, the Prosecution requests leave in turn to respond to new arguments contained therein, and that it be allowed to respond after the confirmation hearing.



Luis Moreno-Ocampo,
Prosecutor

Dated this 2nd day of August 2011

At The Hague, Netherlands