



Original: **English**

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

Date: **14/08/2011**

PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono, 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
URGENT**

**Defence request for a hearing
pursuant to Rule 58(2) of the Rules of Procedure and Evidence**

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

Counsel for the Defence

Mr. Nicholas Kaufman
 Ms. Yaël Vias-Gvirsman

Legal Representatives of the Victims

Mr. Hervé Diakiese
 Mr. Mayombo Kassongo
 Mr. Ghislain Mabanga

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. On 12 August 2011, the learned Pre-Trial Chamber issued its *Decision on the schedule of the confirmation hearing*¹ whereby it stipulated that the confirmation hearing would terminate on 19 August 2011 as opposed to 24 August 2011 as formerly ordered. The Pre-Trial Chamber, furthermore, clarified that no submissions would be heard at the confirmation hearing on the Defence jurisdictional challenge² given that a decision is pending on the issue.

2. Notwithstanding the aforementioned, Rule 58(2) of the Rules of Procedure and Evidence empowers the Chamber to hold a hearing for the purpose of dealing with a challenge to the jurisdiction of the Court and to join deliberations thereon to the confirmation hearing itself so long as the issue is resolved before the presentation of the Prosecution case.

3. Although the Chamber has announced that it will not hear *viva voce* testimony, it is yet to rule on the Defence request to hear essential evidence from a representative of the Office of the Prosecutor ("OTP") who should be questioned on two **factual** issues central to the Prosecution's very own argument in favour of jurisdiction:

- a) whether the OTP and the authorities of the Democratic Republic of the Congo ("DRC"), as understood by the OTP from the referral negotiations, viewed the contemporaneous situation in the Kivus, at the time of the referral, as linked to the situation which triggered the referral³ and;
- b) whether the OTP or the DRC, as understood from the referral negotiations, had identified, at the time of referral, a situation in the Kivus where a crime under the Rome Statute⁴ had occurred or was ongoing.⁵

¹ ICC-01/04-01/10-356.

² ICC-01/04-01/10-290.

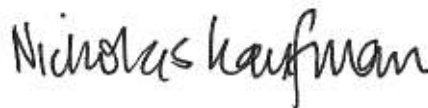
³ ICC-01/04-577 at paragraphs 10 and 15: Prosecution's Submissions on Jurisdiction where the Prosecution stated that it is the referring party which defines the limits of a referral.

⁴ i.e. an atrocity crime with the necessary contextual elements.

⁵ ICC-01/04-577 at paragraph 16: The Defence submits that despite the Prosecution affirmation that this is an essential requirement, no such crime within the jurisdiction of the Court was identified nor has evidence of such since been provided.

4. Trial Chamber III, in the case against *Jean-Pierre Bemba Gombo*,⁶ stressed the need for a party to provide and, by implication, for the Chamber to receive evidence in support of factual assertions at the heart of a request for relief. Such evidence, so it was held, should be submitted either by way of documents or *viva voce* testimony introduced pursuant to Article 69(2) of the Rome Statute or Regulation 54(g) of the Regulations of the Court. The Defence has provided the maximum evidence at its disposal in support of its submission that no jurisdiction exists for the Court to entertain the case against Mr. Mbarushimana. Nevertheless, the essential evidence sought by way oral testimony is something which only the Chamber may order given the OTP's principled refusal to allow its employees to be interviewed by the Defence. The Chamber, it is submitted, is not entitled to rely on the DRC's laconic declaration as to the scope of the referral in light of its refusal to acknowledge the existence of further relevant documentary information from the time period in question. Hearing evidence from an OTP official will, however, address this problem.

5. In the circumstances, therefore, the learned Pre-Trial Chamber is requested to hold a hearing pursuant to Rule 58(2) of the Rules of Procedure and Evidence within the original time-frame which it set down for the confirmation hearing and before it rules on the challenge to its jurisdiction. At this hearing, the learned Pre-Trial Chamber is requested to receive the essential evidence of an OTP official on the matters identified in paragraphs 3(a) and 3(b) hereinabove.



Nicholas Kaufman

Counsel for Callixte Mbarushimana

The Hague, the Netherlands
Sunday, August 14, 2011

⁶ ICC-01/05-01/08-802 at paragraph 254.