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

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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 an evidential finding to be drawn from the failure of the
Democratic Republic of the Congo to file observations on the Defence
Challenge to the Jurisdiction of the Court**

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

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 Ms. Fatou Bensouda, Deputy Prosecutor
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Legal Representatives of the Victims

Mr Mayombo Kassongo
 Mr Ghislain Mabanga

Legal Representatives of the Applicants

Unrepresented Victims

Ms. Paolina Massidda

Unrepresented

(Participation/Reparation)

Applicants

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

The Government of the Democratic Republic of the Congo

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Other Section

1. On 16 August 2011, the Pre-Trial Chamber invited the Democratic Republic of the Congo (“DRC”) to file observations on the Defence Challenge to the Jurisdiction of the Court by 12 September 2011.¹ As of the filing of this request, the DRC authorities have abstained from making any observations on the Defence Challenge.

2. The Defence notes that the issue at hand involves clarifying the intent of the referring party at the time of referral. What more clarity could have been provided than receiving positive affirmation from the DRC that, at the time of the referral, President Joseph Kabila specifically intended to refer the situation of crisis unfolding in the Kivus?² Such affirmation would have acted as a fitting substitute for the information which the DRC was obliged to supply under Article 14(2) of the Rome Statute³. After all, it stands to reason that if the Kivus was a contemporaneous cause for concern then the “relevant circumstances” of the crisis there could have been so specified.

3. The fact that the Government of the DRC has refrained from clarifying that it viewed a contemporaneous situation of crisis in the Kivus as triggering the referral should, in the circumstances, be seen as evidential support for the Defence argument that the contemporaneous situation in the Kivus did not trigger the referral. The learned Pre-Trial Chamber is thus requested to draw an evidential conclusion to this effect.



Nicholas Kaufman
Counsel for Callixte Mbarushimana

The Hague, the Netherlands
Tuesday, September 13, 2011

¹ ICC-01/04-01/10-377 at page 5.

² In response to the test formulated by the Pre-Trial Chamber in ICC-01/04-01/10 at paragraph 7.

³ specifying the relevant circumstances of the referral and providing supporting documentation.