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12/09/2011

International Criminal Court - ICC
 To the Registry of the ICC

Manweg 174
 2516 AB, The Hague,
 The Netherlands

Subject:

Transmission of the Observations –
 Submissions for the 37 victims
 in the case of Calixte Mbarushimana

Dear Sir or Madam,

I have the honour of transmitting to you a document containing my OBSERVATIONS as the legal representative of the 37 victims authorised to participate in the confirmation hearing in the aforementioned case.

Thank you and kind regards,

Mr Mayombo Kassongo

Transmitted by e-mail

Original: French

No. of pages: 8 pages

PRE-TRIAL CHAMBER I
 Hearing of 16 September 11

BEFORE: Judge Sanji Mmasenono Monageng
 Presiding Judge
 Judge Sylvia Steiner
 Judge Cuno Tarfusser

IN THE CASE OF
 THE PROSECUTOR v. CALIXTE MBARUSHIMANA

Submissions of the 37 victims seeking dismissal of the challenge to jurisdiction and requesting confirmation of the charges contained in the indictment

Source:

By:

Mr Mayombo Kassongo

Legal representative of the victims authorised to participate in the confirmation hearing (1)
No. ICC-01/04-01/10 of 11 August 2011

a/2065/11, a/2067/11, a/2095/, a/2099/11, a/2104/11, a/2149/11, a/2151/11, a/2152/, a/2155/11, a/2157/11, a/2158/11, a/2159/11, a/2163/11, a/2603/11, a/2604/11, a/2605/11, a/2606/11, a/2610/11, a/2611/11, a/2612/11, a/2614/11, a/2615/11, a/2616/11, a/2617/11, a/2219/11, a/2609/11, a/2623/11, a/2625/11, a/2626/11, a/2627/11, a/2628/11, a/2630/11, a/2631/11, a/2631/11, a/2632/11, a/2633/11, a/2634/11, a/2635/11, Css/2010/426/AM Registry.

And in the interest of the victims that have communicated with the Court, grouped in a filing which is still pending, referenced as a/2160/11, and who remain eligible to participate by the same decision.

Versus:

The Defence team of Mr Calixte 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 Yael Vias-Gvirsman
Legal Representatives of Victims	Legal Representatives of applicants for participation/reparations
Unrepresented victims	Unrepresented applicants
Office of Public Counsel for Victims	Office of Public Counsel for the Defence
States' representatives	Amicus curiae
REGISTRY Registrar Ms Sylvana Arbia	Defence Support Section
Deputy Registrar	
Victims and Witnesses Unit	Detention Section
Victims Participation and Reparations Other Section	

Public Document

Submissions seeking the dismissal of the Defence challenge to jurisdiction:
pursuant to regulation 68(3) of the Rome Statute* "Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court (...)"

The 37 victims authorised by the Court to participate in the proceedings wish to oppose the Defence challenge to jurisdiction (2) – see public document ICC-01/04-01/10-290 dated 19-07-2011, “Defence Challenge to the Jurisdiction of the Court”, classified as confidential, ex parte, Defence only – and hereby request the Pre-Trial Chamber to confirm the charges brought by the Prosecution and to commit the case for trial on the following legal and factual grounds.

Background to the challenge to jurisdiction:

1. Firstly, as to the merits of the case, the 37 victims submit to the Chamber that they have not been acquainted with all of the documents on which the Defence founds its challenge to the jurisdiction of the Court. Access to those documents in their entirety would have enabled the above victims to comprehend the merits of the challenge.
2. The 37 victims authorised to participate in these proceedings draw the Court's attention to the conduct and attitude of the Defence, which has tardily raised this challenge right before the commencement of the hearing.
3. The Defence founds its challenge to the jurisdiction of the Court on events which date from 3 March 2004 (1.) – *see the Defence document, ICC-01/04-01/10-290 19-07-2011, para. 1* – and alludes to a widespread situation of crisis since 2002 in Ituri and the entire east of the DRC (1. aforementioned document). It represents the content of President Joseph Kabila's letter as a referral to the International Criminal Court not only of the crisis in the country but also of the crimes committed in the Congo.
4. The Defence presents a chronology of the various stages in the proceedings from 22 June 2004 right up to the warrant of arrest issued by the Prosecutor of the International Criminal Court via his application of 20 August 2010.
5. In light of the foregoing, the victims wish to make the following observations:
6. As to the law: The challenge to jurisdiction founded on the existence of the referral letter cannot succeed. Firstly, the letter only contains information for the purposes of an investigation and can in no way impose limits on the Prosecutor of the International Criminal Court, since the Rome Statute grants him broad powers even where the Pre-Trial Chamber decides otherwise. In this respect, see article 15 of the Statute, under which “the Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court”. This challenge to jurisdiction cannot be found admissible, otherwise there is a risk that the suspect Calixte Mbarushimana will never be prosecuted.
7. Similarly, pursuant to the same article 15 of the Rome Statute (2. *See aforementioned provision*), the Prosecutor may reopen the investigation without any temporal or geographical limitations on his powers.
8. The 37 victims draw the Chamber's attention to the continuous nature of criminal acts in the entire eastern DRC, including North and South Kivu, and this new information on crimes should warrant the implementation of article 15(4) of the Rome Statute.
9. Lastly, the challenge founded on the existence of the referral letter from the Congolese President, Joseph Kabila, cannot be binding on the Prosecutor, who is entitled under article 15(1) of the Rome Statute to initiate an investigation *proprio motu*, where there is reliable evidence of serious crimes within the meaning of article 5 of the Rome Statute which fall within the jurisdiction of the Court.

10. All 37 victims rely on the Prosecutor's indictment to submit that the Court's jurisdiction which is being challenged by the Defence is indeed valid as set out in the document with reference ICC-01/04-01/10-311-Anx A-Red 04-08-211 10/48 RH PT, page 11, points 33 and 34, which states that the suspect Mbarushimana and the top leaders based in the field were the key FDLR decision-makers in 2009 and that, according to the indictment, they were responsible for "[TRANSLATION] the existence of an organisational policy to commit an attack against the civilian population. During January 2009, the FDLR leadership decided to launch a series of attacks against the civilian population of the Kivu provinces (...)". Accordingly, the argument submitted by the Defence in its document appears confused both in law and in fact.
11. The Defence wilfully fosters confusion as to the notion of persistent crisis in the DRC by beginning from 2002 (this appears in paragraph 18 on page 9 of the Defence document ICC-01/04-01/10-290 26-08-2011, where it quotes:

[TRANSLATION] On behalf of the DRC, a State Party to the Statute of the International Criminal Court since 1 July 2002, I have the honour of referring to your court, in accordance with articles 13(a) and 14 of the Statute, the situation prevailing in my country since 1 July 2002, in which it appears that crimes falling within the jurisdiction of the International Criminal Court have been committed.

12. The 37 victims authorised to participate in these proceedings request that the Court take into account the crimes perpetrated against them, as defined in the indictment (ICC-01/04-01-311-AnxA-Red 04-08-2011, document containing the charges presented by the Prosecution under article 61(3) of the Rome Statute) within the meaning of article 5 of the Rome Statute, pages 39 to 48 of which set forth the charges founded on substantial grounds which are known and undisputed.
13. Contrary to the Defence's line of argument, the 37 victims oppose the challenge to the jurisdiction of the Court founded on the aforementioned provision – article 13(a) and (b) of the Rome Statute – as interpreted by the Defence for its own benefit and not for the purposes of admissibility. However, the objective of this provision is not to restrict the Prosecutor in the exercise of his authority or to set aside the jurisdiction of the Court.
14. The Defence makes reference to the decision of the Pre-Trial Chamber denying it access to contemporaneous notes of the meetings between the Prosecution and the DRC authorities, and indicates in its document challenging the jurisdiction of the Court (pages 7 to 8, paragraphs 14, 15 and 16) that it would have been able to prove that the situation of crisis described in the referral letter concerned Ituri. In the eyes of the victims, the Defence failure to gain access to such documents does not constitute proof that the Court lacks jurisdiction; hence it continues to have jurisdiction to try the crimes alleged against Mr Calixte Mbarushimana.
15. Furthermore, by limiting itself to a literal interpretation of the rhetoric and correspondence between the Prosecutor and the President of the DRC, Joseph Kabila - page 12 of document ICC-01/04-01/10-290 19-07-2011:

[...] 'The situation on the ground in Ituri remains extremely complex.' [...] The above cited comments make it clear that, as far as both the Prosecutor and the DRC Government were concerned, the contemporaneous events in the Kivus had no role whatsoever in triggering the jurisdiction of the Court.

the Defence team does not provide any evidence of the lack of jurisdiction of the Court, which must rule on the 11 counts contained in the indictment. Hence, despite its presentation of the facts and of the situation of crisis in a manner likely to create confusion, the Defence does not provide any irrefutable evidence of non-jurisdiction. The Court retains jurisdiction as long as the crimes alleged against

Calixte Mbarushimana have not been prosecuted. All of the victims therefore petition the Court not only to commit him for trial as expected but also to convict him.

FOR THESE REASONS:

And any others to be provided, added or raised *ex officio*

May it please the Court:

16. To rule that the Defence challenge to jurisdiction is inadmissible, on the grounds that the Defence has not tendered any substantive evidence in support of its challenge.
17. Furthermore, after reading the jurisdictional challenge document (ICC-01/04-01/10-290 19-07-2011, page 16, paragraphs 34 and 36, which refer to the intervention of the UN Security Council, and in which the Defence in no way denies the suspect's responsibility despite the fact that he was already part of the FDLR leadership);
18. It is clearly apparent that the Defence is no longer challenging the fact that crimes were committed during the Prosecution's period of reference, in particular, the crimes against humanity and war crimes committed in 2009 and which, moreover, are imputable to Mr Mbarushimana in his capacity as a high-ranking leader of the FDLR (see the indictment, ICC-01/10-311-Conf-AnxA 25-07-2011, page 38 paragraph 132, which states: "Throughout 2009, as Executive Secretary, MBARUSHIMANA was technically fourth in command in the political structure of the organisation, but he was in fact a core member of the top leadership. After the arrests of MURWANASHYAKA and MUSONI, he became the only active high-level representative of the FDLR outside of the DRC. By his own admission, MBARUSHIMANA was thereafter responsible for coordinating the daily activities of the organisation." Paragraph 133: "MBARUSHIMANA's role gave him access to details about the FDLR's operations. [...]";
19. And that it is uncontested that he was in post and, as such, considered to be a high-ranking member of the FDLR leadership from 2005 onwards.
20. May it please the Court: To find that the Court does indeed have jurisdiction to rule on all of the charges brought by the Prosecution.
21. In particular, and for the 37 victims whose submissions regarding prejudice to themselves have been briefly brought to your attention above: To commit the case for trial, which will be their only opportunity to obtain justice.
22. To rule pursuant to article 5 of the Statute and not on the basis of a temporal distinction of the acts or the confusion deliberately fostered by the Defence in its depiction of the situation of "crisis".

Without prejudice.

[signed]

Mr Mayombo Kassongo

Counsel and Legal Representative of the 37 victims