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

Date: **16 April 2012**

THE APPEALS CHAMBER

Before: Judge Erkki Kourula, Presiding Judge
Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Anita Ušacka
Judge Silvia Fernandez de Gurmendi

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. CALLIXTE MBARUSHIMANA***

Public Document

**Defence response to the Victims' observations on the Prosecutor's appeal against
the decision on the charges (ICC-01/04-01/10-510)**

Source: Defence for Mr Callixte Mbarushimana

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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**Victims Participation and Reparations
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Other

1. In accordance with the Appeals Chamber judgment of 2 April 2012¹ granting the victims the right to present their views and concerns with respect to the Prosecutor's appeal, the Defence hereby submits its response to the "*Observations des victimes autorisées à participer à la procédure sur l'appel du Procureur contre la « Décision relative à la confirmation des charges (ICC-01/04-01/10-465-Conf-tFRA)»*"² ("the Victims' Observations").

Preliminary application: rejection of the Victims' Observations

The Victims' Observations must be rejected in limine because they contravene the Regulations of the Court on the length of the parties' written submissions

2. Regulation 37 of the Regulations of the Court limits parties' written submissions in proceedings to twenty pages. This rule applies "unless otherwise [...] ordered by the Chamber".

3. Accordingly, before filing their written submissions, the Prosecutor³ and the Defence⁴ expressly applied for an extension of page limit. The Chamber granted an additional 15 pages to each party.⁵

4. However, the Victims' Observations total 31 pages, without prior leave having been sought by the Legal Representative of the Victims or granted by the

¹ ICC-01/04-01/10-509.

² ICC-01/04-01/10-510.

³ ICC-01/04-01/10-489.

⁴ ICC-01/04-01/10-492-tENG.

⁵ ICC-01/04-01/10-495.

Appeals Chamber. This situation demands that these submissions be rejected without regard to their merits.

5. The measure requested is consonant with consistent previous findings of the Court. For example, a recent pre-trial chamber decision rejected the observations of the OPCD because they exceeded the length permitted by the Regulations of the Court⁶ by 2,000 words. Requests must be made prior to the filing of a document and leave must be expressly granted.

Discussion of the merits of the Victims' submissions

The submissions disregard the victims' personal interests and the right to the truth.

6. The Defence notes that the Appeals Chamber granted the victims the right to submit their observations with respect to their personal interests and because the outcome of the appeal could affect their right to reparations. As evidenced by consistent previous findings of the Court, victims' rights transcend a right to reparations, encompassing the *right to the truth*.⁷ However, this latter concept requires not only that those criminally liable for the crimes which caused harm to the victims be found guilty, but also that "those not responsible for such crimes [be]

⁶ Decision of 4 April 2012 in the case of *The Prosecutor v. Saif al-Islam Gaddafi*, ICC-01/11-01/11-100, para. 11. In addition to the stipulations in regulation 37 that a party may not exceed the prescribed limit of 20 pages without express leave of the Chamber, Court practice reaffirms that an exemption from the rule must be expressly granted to the Legal Representatives of Victims even where the Prosecutor and the Defence have already made a request to this effect. See, for example, in *Ngudjolo and Katanga*, the express requests to exceed the prescribed length: by the Prosecutor, ICC-01/04-01/07-3243; by the two Defence teams, ICC-01/04-01/07-3244 and ICC-01/04-01/07-3245; and by the two Legal Representatives of Victims, ICC-01/04-01/07-3246 and ICC-01/04-01/07-3248. See also the Appeals Chamber decision in *Lubanga*, ICC-01/04-01/06-2543, para. 13, in which the Chamber rejected an "extraordinary" request for retroactive leave to exceed the legal length because the Prosecutor's practice violated procedure and delayed the proceedings.

⁷ ICC-01/04-01/07-474, para. 32.

acquitted, so that the search for those who are criminally liable can continue”.⁸ This decision was rendered at the trial stage; nonetheless, the need to apply it at the confirmation stage is all the greater.

7. In the instant case, the Defence wishes to emphasise that the victims’ interests are safeguarded by the decision on the charges,⁹ since it advances the search for the truth inasmuch as it declines to confirm charges that are without merit.

The arguments advanced by the Legal Representative of the Victims on the applicable evidentiary standard for the confirmation hearing

8. The Defence recalls its earlier arguments relating to the evidentiary standard of “substantial grounds to believe”,¹⁰ which arguments it resubmits in response to the submissions of the Legal Representative of the Victims. Each stage of the proceedings before the International Criminal Court is distinguished by the standard which the Prosecutor’s case must meet, not by the discretion and liberty vested in the Chamber to assess the probative value of the evidence.¹¹ Contrary to the contention of the Legal Representative of the Victims in his observations,¹² the Pre-Trial Chamber did no more than apply the standard of “substantial grounds to believe”.

⁸ ICC-01/04-01/07-474, paras. 34-36.

⁹ ICC-01/04-01/10-465-RED.

¹⁰ ICC-01/04-01/10-508.

¹¹ See Defence submissions, ICC-01/04-01/10-508, paras. 1-41, and, more specifically, paras. 12 *et seq*; see also ICC-02/05-02/09-267, para. 9.

¹² ICC-01/04-01/10-510, para. 27.

9. In the Victims' Observations, their representative recalls Pre-Trial Chamber I's analysis of the evidence relating to war crimes¹³ and crimes against humanity¹⁴ in its decision on the charges.

10 Regarding war crimes, the Legal Representative of the Victims finds fault with the Pre-Trial Chamber for dismissing this charge because (i) the Prosecutor provided only indirect evidence in support of the attack on Kipopo. In support of his argument, the Legal Representative of the Victims cites the decision on the charges in *Bemba*,¹⁵ in which Pre-Trial Chamber II stated that although indirect evidence is commonly accepted, its decision on the confirmation of charges could not be solely based on one such piece of evidence. According to the Legal Representative of the Victims in the case against Mr Mbarushimana, the Prosecutor submitted not "[TRANSLATION] a single piece of indirect evidence but several pieces"¹⁶ and, on this basis alone, the Pre-Trial Chamber should have confirmed the charges. He further asserts that (ii) the testimony of some victims confirms that an attack did take place on Kipopo on the alleged date, while some victims go so far as to name loved ones lost during the attack.

11. Aside from the weakness of the argument that the Pre-Trial Chamber is bound to confirming the charges automatically when faced with *several pieces of indirect evidence*, the Defence notes that the criticism being raised by the Legal Representative of the Victims falls outside the scope of the appeal as circumscribed by Pre-Trial Chamber I in its 1 March 2012 decision granting leave to appeal. Indeed, the issue of the weight of indirect evidence in assessing probative value is not one of the issues authorised by the Pre-Trial Chamber. Accordingly, the submissions of the Legal Representative of the Victims on this issue should be dismissed.

¹³ ICC-01/04-01/10-510, paras. 28-34.

¹⁴ ICC-01/04-01/10-510, paras. 35-41.

¹⁵ ICC-01/05-01/08-424, para. 51.

¹⁶ ICC-01/04-01/10-510, para. 30.

12. Furthermore, the Legal Representative recalls that some victims have confirmed the date of the attack and the names of those killed, but he cites the passage in the confirmation decision wherein the Chamber declines to confirm the charges in the absence of sufficient evidence of attacks against civilians (the fact that there were deaths among the victims does not suffice to establish that they were the targets of attacks) and of evidence that property was destroyed.

13 Lastly, the Legal Representative recalls that the Chamber may call victims as witnesses. Whilst this may be true, it does not constitute an obligation. Accordingly, the arguments of the Legal Representative of the Victims do not invalidate the Pre-Trial Chamber's findings.

14 Regarding crimes against humanity, the Legal Representative of the Victims finds fault with the Pre-Trial Chamber for disregarding direct evidence. The Defence recalls the arguments it set out in its response to the document submitted in support of the Prosecutor's appeal¹⁷ on the tasks and discretionary power of analysis inherent in a chamber's work.

15. The Defence disputes the assertion of the Legal Representative of the Victims that the Pre-Trial Chamber applied a higher evidentiary standard than that statutorily required at the confirmation stage. In fact, as the Defence stated in its submissions, the Chamber did not overstep the standard of "substantial grounds to believe" and employed in its analysis a methodology consonant with that employed in the other cases before the International Criminal Court.

¹⁷ ICC-01/04-01/10-508.

16. Lastly, the Legal Representative of the Victims cites the victims' right to seek leave to submit evidence during the proceedings. While interesting, this should not be allowed to overshadow the fact that in the case of *The Prosecutor v. Mr Mbarushimana* the victims made no such request. It must be noted perforce that the Legal Representative of the Victims expresses regret with regard to his strategy at the confirmation stage. This is not the purpose of appellate proceedings.

The arguments of the Legal Representative of the Victims relating to "the Suspect's criminal responsibility under article 25(3)(d) of the Statute"

17. In the Victims' Observations, their Legal Representative sets out his arguments on the third issue raised on appeal regarding the threshold of contribution stipulated in article 25(3)(d).¹⁸ He reviews first the *travaux préparatoires* and then what he refers to as the "[TRANSLATION] content of participation in a crime under article 25(3)(d)".¹⁹ In conclusion, he prays the Appeals Chamber to set aside the decision on the charges inasmuch as the Pre-Trial Chamber found that the contribution under article 25(3)(d) of the Statute must be significant in order for a suspect to be held criminally responsible.

18. As to the merits of the arguments of the Legal Representative of the Victims, the Defence refers the Appeal Chamber to its written submissions in regard to the confirmation hearing,²⁰ as set forth by Professor Kai Ambos (an authority on the issue whom the Legal Representative of the Victims cites in his observations). The Defence also refers the Appeal Chamber to the arguments set forth in its response to the Prosecutor's appeal,²¹ a debate which the Legal Representative of the Victims, like the Prosecutor, appears keen to avoid. The Legal Representative of the Victims

¹⁸ ICC-01/04-01/10-510, paras. 49-73.

¹⁹ ICC-01/04-01/10-510, para. 50.

²⁰ ICC-01/04-01/10-450, paras. 6-38.

²¹ ICC-01/04-01/10-508.

instead engages in abstract and byzantine legal argument in an attempt to decipher *ex post facto* the intentions of the drafters of article 25(3)(d).

19. It is abundantly clear that the provisions governing participation in crimes within the jurisdiction of the Court intentionally seek to ensure that even far-removed and indirect contributions to such crimes may incur the criminal responsibility of those who make them. Nonetheless, these provisions do not undermine the fundamental premises of criminal responsibility.

20. However, both the Prosecutor and the victims have elected to engage in involved analyses of legal texts in an attempt to obscure the real question, which is in fact the subject of the third issue raised on appeal: absent any causal link between an act committed by an individual and a crime; absent, too, any intent on the part of that individual to participate in the crime in question, can the individual who commits the act be held criminally responsible? For the reasons that have been set out in its earlier filings, the Defence submits to the Appeals Chamber that none of the acts ascribed to Callixte Mbarushimana were criminal acts and that the decision not to confirm the charges against him was, therefore, correct and appropriate.

21. In the instant case, a finding on the nature or extent of the contribution required in order for the conditions of article 25(3)(d) to be met would have no effect on the criminal responsibility of Mr Mbarushimana because the Pre-Trial Chamber noted that there was no causal link between Mr Mbarushimana's alleged activities and the crimes charged by the Prosecutor. Absent this causal link, criminal responsibility can in no wise be shown.

FOR THESE REASONS,

The Defence prays the Appeals Chamber to:

- reject *in limine* the Victims' Observations; and

- in the alternative, reject them in full on the merits.

[signed]

Arthur Vercken
Counsel for Mr Callixte Mbarushimana

Dated this Monday, 16 April 2012

At Paris, France