

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 5 August 2011

**PRE-TRIAL CHAMBER I**

Before: Judge Sanji Mmasenono Monageng, Single Judge

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

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

**Public**

**Decision on Prosecution's application to bar the testimony of a Defence expert if  
essential documentation is not provided**

Decision 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**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
 Participation/Reparation**

**The Office of Public Counsel for  
 Victims**

**The Office of Public Counsel for the  
 Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Deputy Registrar**

Mr Didier Preira

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
 Section**

**Other**

I, Judge Sanji Mmasenono Monageng, the Single Judge of Pre-Trial Chamber I (“Chamber”) of the International Criminal Court (“Court”) responsible for carrying out the functions of the Chamber in relation to the case of *The Prosecutor v. Callixte Mbarushimana*;<sup>1</sup>

NOTING the “Defence List of Evidence”, filed on 1 August 2011,<sup>2</sup> wherein the Defence indicated they will be seeking to rely on an expert report prepared by Dr Phil Clark;

NOTING the “Order requesting the parties to submit views and proposals on the schedule of the confirmation hearing”, issued by the Single Judge on 2 August 2011,<sup>3</sup>

NOTING the “Defence response to the order requesting views and proposals on the schedule for the confirmation hearing”, filed on 4 August 2011 (“Defence Views Filing”),<sup>4</sup> wherein the Defence indicated they will not present *viva voce* evidence;<sup>5</sup>

NOTING the “Prosecution’s views and proposals on the schedule of the confirmation hearing and application to bar the testimony of a Defence expert if essential documentation is not provided”, filed on 4 August 2011 (“Prosecution Views Filing”),<sup>6</sup> whereby the Prosecutor *inter alia*: (i) objects to the failure by the Defence to permit the Prosecution inspection of the evidence relied upon in the report of its expert witness, Dr. Phil Clark (“Clark Report”),<sup>7</sup> (ii) requests that the Defence be ordered to disclose all evidence relied upon by Dr. Clark, which is not on the Prosecution List of Evidence no later than 16:00 on 5 August 2011 if Dr. Clark is

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<sup>1</sup> Oral Decision of the Chamber, 28 January 2011, ICC-01/04-01/10-T-1-ENG, p.11

<sup>2</sup> ICC-01/04-01/10-322, with confidential Annex A.

<sup>3</sup> ICC-01/04-01/10-326.

<sup>4</sup> ICC-01/04-01/10-334.

<sup>5</sup> *Ibid.*, para. 2.

<sup>6</sup> ICC-01/04-01/10-335.

<sup>7</sup> *Ibid.*, para. 2.

to testify or have his report presented at the confirmation hearing<sup>8</sup> and (iii) further requests disclosure of a copy of Dr. Clark's unpublished book *Doing Justice during Conflict: The International Criminal Court in the Democratic Republic of Congo and Uganda* ("Unpublished Book");<sup>9</sup>

**NOTING** the "Defence response to Prosecution filing: ICC-01/04-01/10-335", filed on 5 August 2011 ("Response"),<sup>10</sup> wherein the Defence: (i) submits that all essential documents referenced in the Clark Report are accessible on the internet and offers to assist the Prosecutor in finding said documents<sup>11</sup> and (ii) notes that Dr. Clark was not amenable to disclosing the Unpublished Book because the book was still in draft form;<sup>12</sup>

**NOTING** Rules 78 and 122(3) of the Rules of Procedure and Evidence ("Rules"), and regulation 44 of the Regulations of the Court;

**CONSIDERING** that the Defence has already made efforts to comply with the Prosecutor's disclosure requests;

**CONSIDERING** that the objections raised in the Prosecution Views Filing are moot in view of the Defence offer to assist the Prosecutor in obtaining the requested materials;

**CONSIDERING** Dr Clark's legitimate concerns about the disclosure of a copy of a draft of the Unpublished Book;

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<sup>8</sup> *Ibid.*, para. 3.

<sup>9</sup> *Ibid.*

<sup>10</sup> ICC-01/04-01/10-338.

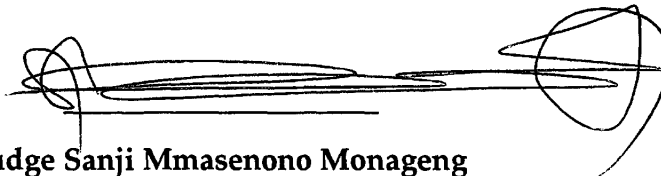
<sup>11</sup> *Ibid.*, para. 2.

<sup>12</sup> *Ibid.*, para. 3.

**FOR THESE REASONS,**

**REJECT** the Prosecution requests.

Done in both English and French, the English version being authoritative.



**Judge Sanji Mmasenono Monageng**  
**Single Judge**

Dated this Friday, 5 August 2011

At The Hague, The Netherlands