

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 9 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 Request for clarification regarding Defence List of Evidence, filing ICC-01/04-01/10-322"

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

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*;¹

NOTING the “Decision on issues relating to disclosure”, issued by the Chamber on 30 March 2011 (“Disclosure Decision”),² whereby the Defence was ordered to provide the “Defence List of Evidence, if any, to be presented at the confirmation hearing” by a deadline of 16 June 2011;³

NOTING the “Decision on the Prosecution’s request for the postponement of the confirmation hearing”, issued by the Chamber on 31 May 2011 (“Deadline Revision Decision”);⁴ whereby the Chamber revised the deadline for submitting the Defence List of Evidence to 1 August 2011;⁵

NOTING the “Defence response to Prosecution filing: ICC-01/04-01/10-311”, filed on 26 July 2011,⁶ wherein the Defence first mentioned that they “reserve[] the right, at the confirmation hearing, to refer to any document procured by and currently in the possession of the Prosecution”;⁷

NOTING the “Defence List of Evidence”, filed on 1 August 2011,⁸ wherein the Defence: i) submitted that its List of Evidence only includes items which are not on the Prosecutor’s List of Evidence⁹ and ii) reserved the right to refer to and

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

² ICC-01/04-01/10-87.

³ *Ibid.*, p. 19.

⁴ ICC-01/04-01/10-207.

⁵ *Ibid.*, p. 10.

⁶ ICC-01/04-01/10-312.

⁷ *Ibid.*, p. 4.

⁸ ICC-01/04-01/10-322, with confidential Annex A.

⁹ *Ibid.*, para. 4.

distinguish all materials on the Prosecutor's List of Evidence "supporting those elements of the charges which are not subject to procedural concessions";¹⁰

NOTING the "Prosecution's Request for clarification regarding Defence List of Evidence, filing ICC-01/04-01/10-322", filed on 2 August 2011,¹¹ whereby the Prosecutor: (i) argues that, by not referencing what specific items on the Prosecutor's List of Evidence the Defence is intending to proffer as evidence, the Defence has violated the terms of the Disclosure Decision,¹² (ii) argues that the purpose of the List of Evidence is to give the opposing party notice of the evidence that will be relied upon in order to allow them to prepare¹³ and (iii) requests clarification that the Defence will not be permitted to rely on any item of evidence at the confirmation hearing ("hearing") not contained on its List of Evidence;¹⁴

NOTING articles 61(3) and 61(6) of the Rome Statute and rule 121(6) of the Rules of Procedure and Evidence;

CONSIDERING that the Prosecutor has accurately described that the purpose of the List of Evidence is to give notice to the opposing party of the evidence to be presented at the hearing;

CONSIDERING that it is unnecessary for the Defence to indicate whether it will refer to or rely on the Prosecution's evidence, as the Prosecutor cannot reasonably be surprised by the use of evidence listed on its own List of Evidence;

¹⁰ *Ibid.*, para. 3.

¹¹ ICC-01/04-01/10-327.

¹² *Ibid.*, para. 4.

¹³ *Ibid.*, para. 5.

¹⁴ *Ibid.*

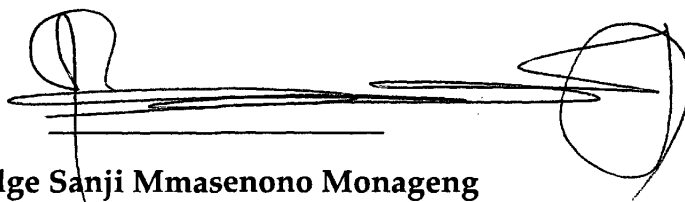
CONSIDERING however that, contrary to the Defence's contention made in its filing of 26 July 2011, the Defence may only refer at the confirmation hearing to documents included in the Prosecutor's List of Evidence and not to "any document procured by and currently in the possession of the Prosecution";¹⁵

CONSIDERING, therefore that, subject to the limitation set out above, the omission from the Defence List of Evidence of the evidence included in the Prosecution List of Evidence causes no prejudice to the Prosecutor;

FOR THESE REASONS,

CLARIFY that the Defence may refer to or rely on any items of evidence included on the Prosecutor's List of Evidence at the confirmation hearing, irrespective of whether such items are also included in the Defence List of Evidence.

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

A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a horizontal line and a large, circular flourish on the right side.

Judge Sanji Mmasenono Monageng

Single Judge

Dated this Tuesday, 9 August 2011

At The Hague, The Netherlands

¹⁵ ICC-01/04-01/10-312, p. 4.