

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 07 September 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 the resubmission of lists of evidence**

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

Ms. Fatou Bensouda

Mr. Anton Steynberg

**Legal Representatives of Victims**

Mr. Hervé Diakiese

Mr. Mayombo Kassongo

Mr. Ghislain Mabanga

**Unrepresented Victims**

**Counsel for the Defence**

Mr. Nicholas Kaufman

Ms. Yaël Vias-Gvirsman

**Legal Representatives of Applicants**

**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**

**Others**

**I, Judge Sanji Mmasenono Monageng**, the Single Judge of Pre-Trial Chamber I of the International Criminal Court (“Chamber” and “Court” respectively) 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 “Decision on “Defence request to deny the use of certain incriminating evidence at the confirmation hearing” and postponement of confirmation hearing”<sup>2</sup> (“Postponement Decision”) issued on 16 August 2011, whereby the Chamber postponed the commencement of the confirmation hearing to 16 September 2011 and ordered the Prosecutor to provide, in a language which Mr Mbarushimana fully understands and speaks, either full written transcripts of witness interviews or summaries thereof containing “the core of the incriminating evidence on which the Prosecutor intends to rely at the confirmation hearing and, as well, all potentially exculpatory information, under a separate title”;

**NOTING** the “Prosecution’s filing of amended list of evidence in compliance with decision ICC-01/04-01/10-378”,<sup>3</sup> filed on 30 August, whereby the Prosecutor submitted amended versions of parts I and II of the list of evidence, as well as an amended explanatory note of part II of the list of evidence (“Prosecutor’s Amended List of Evidence”);

**NOTING** the “Defence Response to the Prosecution’s filing of an amended list of evidence in compliance with decision ICC-01/04-01/10-378”<sup>4</sup>, filed on 5 September 2011, whereby the Defence submitted that (i) summaries of witness interviews are not “a fair substitute for the full transcripts which comprise the most accurate record of the witnesses’ testimony and fully enable the Defence to highlight what *it* deems to be exonerating”, (ii) the Postponement Decision permitted the OTP to amend its list of evidence but made no similar provision for the Defence to modify its list of evidence in response, and (iii) its list of evidence accordingly remains unchanged “in so far as it retains all materials formerly

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<sup>1</sup> ICC-01/04-01/10-192.

<sup>2</sup> ICC-01/04-01/10-378.

<sup>3</sup> ICC-01/04-01/10-392.

<sup>4</sup> ICC-01/04-01/10-398.

on the Prosecution List of Evidence as of the eve of the Postponement Decision”, including materials that have been removed from that list;

**NOTING** article 69(4) of the Statute, rule 63, rule 121(3) and 121(6) of the Rules of Procedure and Evidence;

**CONSIDERING** that the Prosecutor has replaced references to transcripts of a number of witness statements with references to summaries of these statements and has replaced references to English only transcripts of a number of witness statements with references to English-Kinyarwanda transcripts, without specifying exactly where in the Amended List of Evidence such changes were implemented and which document identification numbers were thereby replaced;

**CONSIDERING** that the Prosecutor’s Amended List of Evidence (i) identifies, by using red font, items of evidence on which the Prosecutor does not and cannot rely for the purposes of the confirmation hearing, although identification of these items of evidence has not been consistent throughout the document,<sup>5</sup> and (ii) identifies, by using green and bold font, items of evidence which were incorrectly referenced, although seemingly these errors have not been corrected<sup>6</sup>;

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<sup>5</sup> The Single Judge notes, by way of example, that DRC-REG-0004-1495 and DRC-OTP-2022-0543 have been identified as items of evidence upon which the Prosecutor does not intend to rely at the confirmation hearing, yet appear at page 164, para.114 and page 168, paragraph 116 respectively, of part I of the Amended List of Evidence (ICC-01/04-01/10-392-Conf-Anx1) in black font, indicating that the Prosecutor does in fact intend to rely on them at the confirmation hearing. The Single Judge further notes that DRC-OTP-2001-0047 appears in red font on page 166, paragraph 116 in part I of the Amended List of Evidence, appears elsewhere on the same page in black font and is not contained in the Prosecutor’s Explanatory Note of the List of Evidence (ICC-01/04-01/10-392-Anx3) so that it is entirely unclear whether or not the Prosecutor actually intends to rely on this item of evidence.

<sup>6</sup> The Single Judge notes, however, that the Prosecutor does provide the correct document identification number for most of the items in question in his Explanatory Note of the List of Evidence (ICC-01/04-01/10-392-Anx3). Nevertheless, the Single Judge would also point out, by way of example, the following inconsistencies: (i) DRC-OTP-2032-1438 appears in green font on page 32, paragraph 28 of the Amended List of Evidence (ICC-01/04-01/10-392-Conf-Anx1), indicating, according to paragraph 14 of the Prosecutor’s filing ICC-01/04-01/10-392, that there is an error in the document identification number, although the document identification number in question seems to be correct and no indication of an alternative number has been given in the Prosecutor’s Explanatory Note of the List of Evidence (ICC-01/04-01/10-392-Anx3), and (ii) DRC-OTP-2033-1598 appears in green font on page 164, paragraph 114 of part I of the Amended List of Evidence (ICC-01/04-01/10-392-Conf-Anx1), appears to be a valid number; yet no reason for its appearance in green font has been provided in the Explanatory Note of the List of Evidence (ICC-01/04-01/10-392-Anx3).

**CONSIDERING** that it is necessary for the Chamber and the Defence to be in a position to know on which items of evidence the Prosecutor intends to rely for the purposes of the confirmation hearing;

**CONSIDERING** that the Prosecutor's Amended List of Evidence represents an unnecessarily complex working document and does not appear to give a consistent and reliable account of the evidence upon which the Prosecutor intends to rely at the confirmation hearing;

**CONSIDERING**, therefore, that the Prosecutor's list of evidence must be re-filed in a usable format;

**CONSIDERING** that rule 121(6) of the Rules provides that the Defence shall provide a list of the evidence that it intends to present in response to a new list of evidence presented by the Prosecutor;

**CONSIDERING** that the Prosecutor has excluded several items from his list of evidence and can no longer rely on them for the purposes of the confirmation hearing;

**CONSIDERING** the order of the Single Judge that the Defence will only be allowed to 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"<sup>7</sup>,

**CONSIDERING** that, notwithstanding this clear order, the Defence purports to "clarify" that its list of evidence remains unchanged and retains all materials formerly on the Prosecutor's list of evidence as of the eve of the Postponement Decision;

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<sup>7</sup> "Decision on "Prosecution's Request for clarification regarding Defence List of Evidence, filing ICC-01/04-01/10-322"", 9 August 2011, ICC-01/04-01/10-345, p. 5.

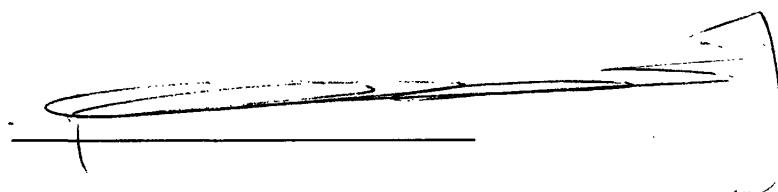
**FOR THESE REASONS,**

**ORDER** the Prosecutor to resubmit his list of evidence, having deleted references to any items of evidence on which he does not intend to rely at the confirmation hearing and having corrected any erroneous citations of the document identification numbers of items of evidence on which he does intend to rely, by Thursday, 8 September 2011,

**ORDER** the Prosecutor to file an explanatory memorandum detailing every change made to the list of evidence as well as the reasons for such changes, by Thursday, 8 September 2011, and

**ORDER** the Defence, in the event that it wishes to rely on an item of evidence which is no longer included in the list of evidence to be filed by the Prosecutor on 8 September 2011, to update its list of evidence to include reference to those items of evidence by Friday, 9 September 2011.

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

A handwritten signature in black ink, consisting of a long, horizontal, slightly wavy line that tapers to a point on the right, with a small vertical stroke at the end. The signature is written over a horizontal line.

**Judge Sanji Mmasenono Monageng**

**Single Judge**

Dated this Wednesday, 7 September 2011

At The Hague, The Netherlands