

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 2 August 2011

PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Sylvia Steiner
Judge Cuno Tarfusser

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

**URGENT
Public document**

**Prosecution's Request for clarification regarding Defence List of Evidence,
filing ICC-01/04-01/10-322**

Source: Office of the Prosecutor

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

Nicholas Kaufman

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(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

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. The Defence filed its List of Evidence (“LoE”) on 1 August, which is comprised exclusively of items that are not contained in the Prosecution’s LoE, subject to certain reservations.¹ The Prosecution seeks clarification regarding the effect thereof.

2. The Defence asserted that “the Defence cannot be expected to present as its evidence materials which the Prosecution is using to incriminate Mr. Mbarushimana. The Defence cannot, furthermore, be expected to present – as evidence – incriminating materials seized from the French and German authorities the very admissibility of which it is challenging. The Defence will, however, *refer to and distinguish* all materials on the Prosecution’s list of evidence supporting those elements of the charge which are not subject to procedural concessions”.²

3. The Prosecution notes that, in its first decision on disclosure, Pre-Trial Chamber I (“the Chamber”) ordered the Defence to file in the record of the case “the Defence list of *Evidence [...] to be presented* at the confirmation hearing”.³

4. The Defence says it cannot be expected to offer Prosecution evidence, but it does not explicitly state that it will not present any item of evidence, or portion thereof, including evidence seized by the German or French authorities, that is contained in the Prosecution’s LoE in support of its case.⁴ Therefore, if in fact the Defence intends to offer evidence that is not included

¹ ICC-01/04-01/10-322-Conf-Anx-A.

² ICC-01/04-01/10-322, para 3 (emphasis added).

³ ICC-01/04-01/10-87, page 19 (emphasis added).

⁴ The phrase used, namely “refer to and distinguish”, is conspicuously vague in its meaning.

on its own LoE, the Prosecution submits that the Defence LoE does not comply with the Chamber's order.⁵

5. The Prosecution submits that the Chamber's decision obliges the Defence to identify all the evidence which it intends to present at the hearing. The purpose of the LoE is to give the opposing party notice of the evidence that will be relied upon in order to allow it to prepare. If the Defence proffers any item of evidence as exculpatory,⁶ the Prosecution submits that it "presents" such evidence as part of its case. The fact that the Prosecution may have included the item, or any part thereof, on its own List of Evidence does not, in the Prosecution's submission, relieve the Defence of this obligation. Consequently, if the Defence has not complied with its obligation to review the Prosecution's evidence for possible exculpatory material in time to identify such items in their LoE, by the statutorily imposed time limit,⁷ the Prosecution submits that it cannot be permitted to rely on any such evidence that it may subsequently discover.⁸
6. Accordingly, the Prosecution requests clarification that the Defence will not be permitted to rely on any item of evidence at the confirmation hearing, for the purpose of presenting substantively exculpatory evidence, which is not contained on its LoE.

⁵ ICC-01/04-01/10-87, page 19, as amended by ICC-01/04-01/10-207.

⁶ As opposed to merely discrediting or distinguishing its incriminating effect. Exculpatory evidence includes evidence presented for the purpose of undermining the credibility of other Prosecution evidence (See Article 61(6)(b) read with Article 67(2)).

⁷ Rule 121(6) read with Article 61(6).

⁸ *Ibid.* This would effectively allow the Defence to circumvent these provisions. If the Defence has not complied with this obligation, their remedy is to request more time, not to deprive the Prosecution of the required notice by presenting exculpatory evidence under the guise of "refer[ring] to and distinguish[ing]" Prosecution evidence.



Luis Moreno-Ocampo,
Prosecutor

Dated this 2nd day of August 2011

At The Hague, Netherlands