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

Date: **05/09/2011**

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***

Public Document

**Defence Response to the Prosecution's filing of an amended list of evidence in
compliance with decision ICC-01/04-01/10-378**

Source: Defence for Mr. Callixte Mbarushimana

Document 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

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Legal Representatives of the Victims

Mr Mayombo Kassongo

Mr Ghislain Mabanga

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented

(Participation/Reparation)

Applicants

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section Other**

1. On 9 August 2011, in her "*Decision on 'Prosecution's Request for clarification regarding Defence List of Evidence, filing ICC-01/04-01/10-322'*",¹ the Single Judge held that "the Prosecutor cannot reasonably be surprised by the use of evidence listed on its own List of Evidence". Accordingly, the Single Judge permitted the Defence to "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."

2. On 16 August 2011, the Pre-Trial Chamber postponed the confirmation hearing ("the Postponement Decision")² because a number of incriminating witness interviews had not been disclosed to the Defence in accordance with the Single Judge's earlier "*Decision on the 'Prosecution's request for the assessment of the English proficiency of Callixte Mbarushimana'*" (the Language Proficiency Decision").³ Pursuant to the Postponement Decision, therefore, the Office of the Prosecutor ("OTP") was ordered to "(i) disclose French or Kinyarwanda transcripts of the witnesses' interviews which are currently transcribed only in English or (ii) provide the Defence, as allowed by article 61(5) of the Statute, with French summaries of this evidence". Where the OTP should decide to disclose French summaries of the evidence, the Chamber noted that "the Prosecutor will also need to modify its Document Containing the Charges and List of Evidence accordingly, in order to relate the facts to the summaries instead of the English only transcripts".

3. Presuming that the OTP would take advantage of the second alternative, Counsel for the Defence petitioned the Senior Prosecuting Trial Lawyer on 29 August 2011, and requested a detailed list of items which the latter intended to remove from the Prosecution list of evidence. The following day, the Senior Trial Lawyer notified Counsel for the Defence as follows:

¹ ICC-01/04-01/10-345.

² ICC-01/04-01/10-378.

³ ICC-01/04-01/10-145.

"In compliance with the Chamber's order, the Prosecution will be removing from its list of evidence all references to the documents and ERNs listed in Annex 2 to the Defence filing ICC/01/04-01/10-368 and to the second interview with W-561 (ERN range DRC-OTP-2033-1267 to -1427)".

4. On 30 August 2011, the OTP submitted the *"Prosecution's filing of amended list of evidence in compliance with decision ICC-01/04-01/10-378"* ("the Prosecution Filing").⁴ In confidential annexes 1 and 2 to the Prosecution Filing, the OTP highlighted, in red font, the items on which it no longer seeks to rely at the confirmation hearing.

Submission

5. The Language Proficiency Decision was issued for the benefit of Mr. Mbarushimana and not for the benefit of Counsel for the Defence who is presumed to understand both English and French. Likewise, the decision postponing the confirmation hearing was designed to protect Mr. Mbarushimana's rights and not to put him in a more disadvantageous position than he was prior to the postponement.

6. Prior to the postponement, Counsel had fully prepared his submissions including references to the fully transcribed interviews which have now been removed from the Prosecution list of evidence and replaced by short summaries. These summaries are not, it is submitted, 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. After all, Counsel, as master of Mr. Mbarushimana's defence is the most qualified to

⁴ ICC-01/04-01/10-392.

identify the parameters of exonerating material in disclosed evidence and not the Prosecution.

7. It should be recalled that 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 order to accommodate the OTP's changes.

8. In light of the aforementioned, the Defence clarifies that its list of evidence remains unchanged in so far as it retains all materials formerly on the Prosecution List of Evidence as of the eve of the Postponement Decision – including those materials detailed in paragraph 3 hereinabove and those materials which have otherwise been removed and highlighted in red in confidential annexes 1 and 2 to the Prosecution Filing.



Nicholas Kaufman

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Monday, September 05, 2011