

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 12 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**

**URGENT**

**Decision on amended list 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. 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 the ‘Prosecution’s request for the assessment of the English proficiency of Callixte Mbarushimana’ issued on 12 May 2011 (“Language Proficiency Decision”),<sup>2</sup> wherein the Single Judge found that the language which the suspect fully understands and speaks is French<sup>3</sup> and ordered the Prosecutor to “disclose to the Defence, as soon as possible and no later than 1 June, the French translations [...] of all witness statements which have not been previously disclosed in Kinyarwanda.”<sup>4</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>5</sup> (“Postponement Decision”) issued on 16 August 2011, whereby the Chamber, having been informed that more than 60 hours of recorded interviews had been disclosed to the Defence in a language that Mr Mbarushimana fully understands and speaks in audio format only, decided to postpone the commencement of the confirmation hearing to 16 September 2011 and ordered the Prosecutor to provide, either in French or in Kinyarwanda (the languages that the suspect 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>6</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

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

<sup>2</sup> ICC-01/04-01/10-145.

<sup>3</sup> *Ibid.*, p. 6.

<sup>4</sup> *Ibid.*, p. 8.

<sup>5</sup> ICC-01/04-01/10-378.

<sup>6</sup> ICC-01/04-01/10-392.

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>7</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 on the Prosecution List of Evidence as of the eve of the Postponement Decision", including materials that have been removed from that list;

**NOTING** the "Decision on the resubmission of lists of evidence"<sup>8</sup> issued on 7 September 2011, wherein (i) the Prosecutor was ordered to file a new list of evidence having *inter alia* deleted those items upon which he would no longer be relying at the confirmation hearing and (ii) the Defence was ordered to update, if necessary, its list of evidence to include those items upon which the Defence intended to rely at the confirmation hearing that had been deleted from the Prosecutor's list of evidence ;

**NOTING** the " Resubmission of the Prosecution's list of evidence in compliance with decision ICC-01/04-01/10-401"<sup>9</sup> filed on 8 September 2011 in compliance with the Decision on the resubmission of lists of evidence;

**NOTING** the "Defence Submission of an Updated List of Evidence"<sup>10</sup> filed on 9 September 2011 in compliance with the Decision on the resubmission of lists of evidence;

**NOTING** article 67(1)(b) of the Rome Statute, rule 121(3) and 121(6) of the Rules of Procedure and Evidence;

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<sup>7</sup> ICC-01/04-01/10-398.

<sup>8</sup> ICC-01/04-01/10-401.

<sup>9</sup> ICC-01/04-01/10-403.

<sup>10</sup> ICC-01/04-01/10-405.

**CONSIDERING** that, in order to ensure the rights of the Defence in accordance with article 67(1)(b) of the Statute, the Prosecutor was ordered to exclude from his list of evidence and to prepare summaries or translations of all witness statements and transcripts of interviews that had not been disclosed to the Defence in written form and in a language which the suspect fully understands and speaks (“Witness Statements”);

**CONSIDERING** that several Witness Statements were excluded from the Prosecutor’s list of evidence and summaries and translations thereof prepared in response to the allegations of the Defence that its preparation for the confirmation hearing had been prejudiced by the format in which disclosure of these Witness Statements had been effected by the Prosecutor;

**CONSIDERING** that the Defence, nevertheless, included in its updated list of evidence substantially the same Witness Statements that it had previously sought to exclude;<sup>11</sup>

**CONSIDERING** that it would produce an illogical and entirely inconsistent result, incompatible with the principle of equality of arms, if the Defence alone were allowed to rely on items of evidence which they had succeeded in having excluded from the Prosecutor’s list of evidence on the grounds that the disclosure by the Prosecutor of these items of evidence was affected by such deficiencies that their use at the confirmation hearing would prejudice the Defence;

**CONSIDERING** that, in these circumstances, the objections of the Defence to the inclusion of the Witness Statements in the Prosecutor’s list of evidence cannot be sustained and, accordingly, the Prosecutor may also rely on such items of evidence in full;

**CONSIDERING** that the Defence has also introduced into its amended list of evidence two new items of evidence which had never been included in and therefore were not deleted from the Prosecutor’s list of evidence, and which were in the possession of the

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<sup>11</sup> The Single Judge notes that one part of the transcripts of witnesses W0528 and W0542 were omitted from the Defence’s updated list of evidence representing 28 pages and 32 pages respectively, and that a part of the transcript of the interview with witness W0526 was included although it was never included in the Prosecutor’s list of evidence but finds that for the purpose of completeness such transcripts must be included in the evidence before the Chamber.

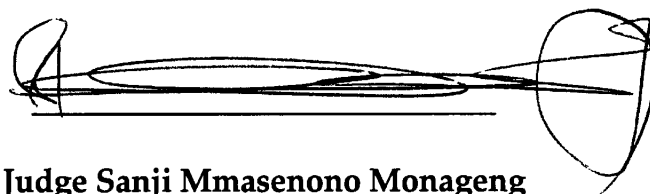
Defence at the time that it initially submitted its list of evidence but were nevertheless not included in its list of evidence;<sup>12</sup>

**FOR THESE REASONS,**

**DECIDE** that both the Witness Statements and summaries will be part of the evidence to be considered for the purposes of the confirmation of charges hearing, and

**DECIDE** that the Defence shall not be permitted to rely on DRC-REG-0003-2546 and DRC-REG-0003-2550 for the purposes of the confirmation hearing.

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

A handwritten signature in black ink, consisting of a series of loops and strokes, positioned above the printed name of the judge.

**Judge Sanji Mmasenono Monageng**

**Single Judge**

Dated this Monday, 12 September 2011

At The Hague, The Netherlands

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<sup>12</sup> ICC-01/04-01/10-405-Conf-AnxA, items number 159 and 160 (DRC-REG-0003-2546 and DRC-REG-0003-2550).