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

Date: 23/11/2011

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 Notice that it no longer relies on the statement of Prosecution Witness 692 to support the confirmation of charges"

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

Counsel for the Defence

Mr. Nicholas Kaufman

Ms. Yaël Vias-Gvirsman

Ms. Karlijn Van der Voort

Legal Representatives of the Victims

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. The Defence for Mr. Callixte Mbarushimana ("the Suspect") notes that the reason given by the Office of the Prosecutor for ceasing to rely on the summary statement of Witness 692 is the fact that *"the Prosecution has recently obtained information that may cast doubt on the reliability of this witness'(s) version"*.¹

2. The Defence does not, of course, oppose the operative effect of the Prosecution's notification and would request that the learned Pre-Trial Chamber endorse the agreement of the Parties that the summary statement of Witness 692 be ignored for the purpose of deciding whether there are grounds to confirm the charges against the Suspect.

3. The Defence is aware that no statutory provision exists regulating the procedure for withdrawing a witness's statement which has previously been presented to the Court. Notwithstanding, the Defence submits that there exists sound judicial precedent which would permit the Pre-Trial Chamber not to accord the statement in question any probative value:

"13. In essence, the parties are jointly requesting the Chamber to ignore P-159's testimony - at least for its incriminating content. While there is no formal agreement in this regard, it is clear that the parties are all of the view that P-159's testimony is unsafe. Although strictly speaking this situation does not fall under the terms of Rule 69 on agreements as to evidence, the Chamber can take note of the apparent consensus among the parties that P-159's testimony lacks probative value. Such consensus cannot bind the Chamber in its assessment of the evidence in question and there are no automatic consequences attached to it.

14. However, in the present circumstances, having regard to the fact that it is the party who called the witness who is renouncing the testimony and having considered the evidence given by the witness in light of the parties' evidential arguments, especially the fact that no one contests the reliability of the

¹ ICC-01/04-01/10-456 at paragraph 2.

contradicting statements of P-159's father and sister, the Chamber accepts the parties' concurrent submissions that there are persuasive reasons to doubt whether P-159 has spoken the entire truth.

*15. Under these conditions, and given the need to guarantee the fairness and expeditiousness of the proceedings, the Chamber informs the parties that it will not give any evidentiary weight to P-159's testimony in its deliberations on the question of guilt of the accused. The Defence can thus dispense with efforts to refute or disprove any of the incriminating assertions made by P-159. The same applies to the exhibits that were admitted during P159's testimony. Insofar as the Defence may wish to rely on P-159's testimony for exculpatory purposes, it is free to do so, although the Chamber considers that the avowed lack of credibility affects all of P-159's factual assertions."*²



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Wednesday, November 23, 2011

² ICC-01/04-01/07-2731 at paragraphs 13,14 & 15.