

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 27/01/2011

PRE-TRIAL CHAMBER I

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Confidential, ex parte, Defence Only

**Defence Clarification
of its Request pursuant to Article 57(3)(b) of the Rome Statute**

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

Counsel for the Defence

Mr. 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

Defence Support Section

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparation Other
Section**

On 28 December 2010, Counsel for Mr. Callixte Mbarushimana filed the *Defence Request under Article 57(3)(b) for State Cooperation from the Democratic Republic of the Congo* ("the Defence Request").¹

On 25 January 2011, Judge Sanji Mmasenono Monageng ordered clarification of two aspects of the Defence Request.²

A. Clarification of Paragraphs 5 and 15 of the Defence Request

Counsel for Mr. Mbarushimana does not seek any information other than the information stipulated in paragraph 5 of the Defence Request.

The use of the qualifying adjective "contemporaneous" in paragraph 15 is intended to refer to the "*documentation or official record of meetings with the OTP*" stipulated in paragraph 5.

By way of clarification therefore, Counsel for Mr. Mbarushimana seeks:

- a) such "supporting documentation"³ as supplied by the Democratic Republic of the Congo ("the DRC") together with the State Referral of 3 March 2004 ("the Referral"), and;
- b) any contemporaneous documentation or record of meetings with the OTP retained by DRC authorities which may shed light on the scope of the Referral.

¹ ICC-01/04-01/10-30-Conf-Exp.

² ICC-01/04-01/10-44-Conf-Exp.

³ Article 14(2) of the Rome Statute.

B. Justification for Filing the Defence Request Confidential, ex parte,
Defence only

Counsel for Mr. Mbarushimana wishes to stress that he does not suggest in any way whatsoever that the Prosecution will not comply with its disclosure obligations or that it will not carry them out faithfully. Counsel's expressed desire to test the "integrity" or full scope of Prosecution disclosure was intended to be non-pejorative and the word "integrity" was not used in its ethical sense.⁴ Indeed, the Defence acknowledges that the Prosecution is fully entitled to refuse disclosure pursuant to the grounds stipulated under Rule 81 of the Rules of Procedure and Evidence. The Defence, however, is legitimately entitled to test whether the resort to the grounds in Rule 81 is justified in the circumstances.

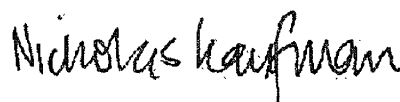
Bearing this in mind, Counsel is aware that should the Prosecution have retained notes of meetings with the DRC authorities then they could decline to disclose them on the grounds that they comprise internal work product protected under Rule 81(1) of the Rules of Procedure and Evidence. This rule cannot apply, however, to contemporaneous notes of the same meetings retained by the DRC authorities.

In summary, the Defence Request is designed to be a legitimate and alternative method of obtaining documentation which the Prosecution may justifiably deny on the grounds of its internal and general office policy. It is in this sense that Counsel for Mr. Mbarushimana understood the dicta of Judge Ušacka; namely, entitling the Defence to receive the DRC's version of what transpired during meetings with the OTP.

⁴http://www.oxforddictionaries.com/definition/integrity?view_uk

Since the purpose of the Defence Request is effectively an investigative procedure designed to obtain information which may or may not be introduced as evidence – there should be no duty on Counsel to publish his strategy to the Prosecution.

In light of the aforementioned, Counsel for Mr. Mbarushimana respectfully reiterates his request to maintain the Confidential ,ex parte, Defence only nature of the Defence Request.



Nicholas Kaufman

Counsel for Callixte Mbarushimana

Dated this 27th day of January 2011

The Hague, the Netherlands.