

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 27/02/2011

THE PRESIDENCY

Before: Judge Sang-Hyun Song, President
Judge Fatoumata Dembele Diarra, First Vice-President
Judge Hans-Peter Kaul, Second Vice-President

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Confidential, ex parte, Defence & Registry Only

**Request for Review of the Registrar's Decision on Legal Assistance
pursuant to Regulation 85(3) of the Regulations of the Court**

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**

Counsel for Mr. Mbarushimana ("Counsel") hereby requests that the Presidency review the decision of the Registrar to award Mr. Mbarushimana legal assistance from the day after his surrender to the Court (26 January 2011) and not from the date of his arrest (11 October 2010).

Relevant Factual Background

1. On 30 August 2010, Mr. Callixte Mbarushimana gave Counsel power of attorney to represent him in all matters before the International Criminal Court.¹
2. On 2 September 2010, Counsel notified both the Prosecutor and the Registrar of the International Criminal Court ("ICC") of the aforementioned power of attorney.²
3. On 28 September 2010, Pre-Trial Chamber I issued a warrant for Mr. Mbarushimana's arrest.
4. On 11 October 2010, in the early hours of the morning, Mr. Mbarushimana was arrested at his domicile in Paris, France and subsequently transferred to the Maison d'Arrêt - "La Santé". Counsel was notified of Mr. Mbarushimana's arrest in real time by a family friend.
5. On 11 October 2011, in the hours of the afternoon, Counsel wrote to the Registry notifying it that his client expected him to attend to his needs in Paris and requesting that he be reimbursed for this trip and its associated costs. This request was refused by the Registry in the following terms:

¹ Annex 1.

² *ibid.*

“Cher Maître,

Je vous écris suite à votre courriel sur le sujet visé en référence, que vous avez fait parvenir ce jour à la Section d'appui aux conseils.

Je note que vous faites mention dans ce courriel à des considérations relatives à l'aide judiciaire de la Cour. Compte tenu du caractère prématuré du point à ce stade de l'affaire – qui est actuellement traitée devant les instances judiciaires françaises –, nous n'estimons pas nécessaire de nous étendre sur ce sujet spécifique dans le cadre de la présente communication. Soyez toutefois rassuré que le Greffe examinera toute demande qui lui sera soumise en temps opportun.

Par ailleurs, vous indiquez ceci dans le courriel : “As you are aware, my client has the right to apply for interim release before the French competent authority under Article 59(3). Since this is effectively a right granted and enforceable under the Rome Statute and, furthermore, engendered by the issuance of an ICC arrest warrant – I respectfully submit that my client should be entitled to legal aid from the ICC funds for the purpose of Article 59(3) proceedings in France. (...) My client has informed me of his indigence and until a proper review of his financials is performed by your office – a presumption of indigence applies. I would, therefore, kindly request that you order the payment of legal aid and instruct the Registry Travel Unit to effect my travel arrangements in order to allow me to ensure the proper representation of Mr. Mbarushimana's interests in France.”

*Prenant en considération le fait que vous référence ici à **une procédure qui se déroule au plan national** [emphasis in the original], je vous informe que M. Callixte Mbarushimana pourra, s'il le juge approprié, demander à bénéficier de l'aide judiciaire en France pour les besoins de toute la procédure devant les juridictions françaises, y compris pour toute demande de mise en liberté provisoire.*

Bien évidemment, comme je l'ai rappelé ci-dessus, le Greffe examinera en temps opportun, toute demande d'aide judiciaire relative aux procédures devant la Cour.

En espérant avoir répondu à votre question, je vous souhaite, cher Maître, une bonne soirée.”³

6. On 25 January 2011, Mr. Mbarushimana was surrendered to the custody of the ICC in The Hague. Once again, Counsel wrote to the Registry enquiring as to whether he would be reimbursed for the costs of attending to Mr.

³ c.f.; CSS representative Abdoul Mbaye Aziz's response to Counsel's request for legal assistance dated 11 October 2011.

Mbarushimana especially bearing in mind that Pre-Trial Chamber I had set a status conference for the initial appearance on 28 January 2011.

7. On 25 January 2011, in the hours of the afternoon, Counsel received an Email informing him as follows:

"Thank you for your email.

For the record, you informed me that the French press has reported the transfer of Mr. Mbarushimana to the Court today and sought confirmation of the same. I told you that I could not confirm this in any way whatsoever or comment on Press reports, and that in case he is actually transferred and a hearing scheduled you will be duly notified.

I take note of your decision to travel to The Hague at your own costs. Once the Registry receives an application for legal aid from Mr. Mbarushimana, it will be processed and a decision issued by the Registrar as per the rules governing the legal aid system of the Court. For your information, please note that the legal aid system of the Court does not any foresee reimbursement of costs being met before a decision granting legal aid to a person.

*I suggest that you liaise with Counsel support Section for any further detail on this issue."*⁴

8. On 15 February 2011, after a preliminary investigation of his financial standing, the Registrar found Mr. Mbarushimana to be indigent and entitled to a temporary award of legal assistance ("the Impugned Decision").⁵

9. On 19 February 2011, Counsel wrote to the Counsel Support Section of the Registry enquiring from what date Mr. Mbarushimana's entitlement to legal assistance would be effective. Later the same day, Counsel received the following response:

⁴ Email from the Deputy Registrar Mr. Didier Daniel Preira to Counsel dated 25 January 2011 sent at 15:53 (GMT+01:00). This Email was viewed with a certain amount of consternation by Counsel in light of the fact that an internal Registry decision had apparently been taken not to inform Counsel of the exact date of Mr. Mbarushimana's surrender to the Court.

⁵ Annex 2.

"Thank you for your email and query.

The legal aid entitlements crystallize from the date of the Registrar's decision dated 15 February 2011 onwards.

Notwithstanding the above, in accordance with Regulation 132.3 of the Regulations of the Registry, provisional legal aid will be paid for work undertaken from 26 January 2011, representing the date of the financial information form as duly executed by your client, to the Registrar's decision of 15 February.

Hope the above is of assistance."⁶

Submission

10. Counsel's representation in ICC proceedings commenced on 12 October 2010, when he was obliged to travel to Paris - at his own expense - in order to advise Mr. Mbarushimana as to his rights and privileges under the Rome Statute prior to surrender to the ICC.⁷

11. Subsequently, Counsel engaged in extensive *inter partes* correspondence with the Prosecution on matters relating to disclosure. In addition, Counsel made several applications to the Pre-Trial Chamber⁸ in order to protect Mr. Mbarushimana's rights.

12. Counsel's representation of Mr Mbarushimana prior to his surrender was such as would be reasonably expected of a competent and responsible lawyer. Moreover, at no stage did the Pre-Trial Chamber seized of Mr. Mbarushimana's case indicate that Counsel's various pre-surrender

⁶ Email from Mr. Sam Shoamanesh to Counsel dated 19 February 2011 sent at 18:10 (GMT+01:00).

⁷ These rights and privileges include, *inter alia*, the right to challenge the validity of the arrest warrant pursuant to Rule 117 of the Rules of Procedure and Evidence and the right to file an admissibility challenge. Counsel acted *pro bono* gaining access to the detention facility in which Mr. Mbraushimana was held and representing him, with special permission of the bâtonnier of the Paris Bar, at the first arraignment before the Procureur-General of the French Republic.

⁸ ICC-01/04-01/10-14, Defence Request for an Order to Preserve the Impartiality of the Proceedings, 18 October 2010; ICC-01/04-01-10-29, Defence Request for Disclosure, 14 December 2010; ICC-01/04-01/10-32, Defence Challenge to the Validity of the Arrest Warrant, 10 January 2011; ICC-01/04-01/10-40, Supplementary Information in support of the Defence Challenge to the Validity of the Arrest Warrant, 25 January 2011.

applications were frivolous or premature. Indeed, Pre-Trial Chamber I's *Decision on the Defence Request for Disclosure*⁹ has shown that the relevant pre-surrender application was both meritorious and timely:

Turning to the third of the potential applications for the purposes of which the Defence seeks disclosure, namely a challenge to the admissibility of the case, the Chamber notes that article 19(2)(a) the Statute expressly provides that such a challenge, as well as a challenge to the jurisdiction of the Court, may be made by a person for whom a warrant of arrest has been issued under article 58.

....

The Chamber is further not persuaded by the argument of the Prosecutor that the disclosure of information and documents should only be effected if an admissibility issue is pending before the Court. As discussed above, the purpose of such disclosure is to give effect to the suspect's right to challenge the admissibility of the case. In particular, the Defence should have access to relevant documents in order to be able to make such a challenge. Making such disclosure dependent on a prior finding by the Chamber that there is a live admissibility issue pending or on a prior challenge to admissibility by the Defence would unduly restrict and delay the Defence's exercise of the right to effectively make such a challenge.¹⁰

13. The Registrar's decision not to award legal assistance from the date of arrest is, apparently, based on the conviction that there is no rôle for ICC appointed counsel in national proceedings prior to surrender.¹¹ Such a view is both misconceived and contrary to the wording of Regulation 77(1)(i) of the *Regulations of the Registry*:

Information on arrest and surrender

1. The Registrar shall invite the State requested under article 89 or 92 to inform him or her of the arrest of a person and to provide, inter alia, the following information:

....

(i) Whether the arrested person has legal assistance and/or whether he or she requires that counsel be appointed by the Court;

⁹ ICC-01/04-01/10-47.

¹⁰ *ibid* at paras. 12 & 14.

¹¹ *c.f.*; paragraph 5 hereinabove where CSS's response was communicated to Counsel several hours after Mr. Mbarushimana's arrest and before the Registrar could possibly have had an opportunity to petition the French authorities to enquire as to whether legal assistance had been provided.

14. Furthermore, the various rules and regulations of the ICC do not specifically mandate that the award of legal assistance be contingent on the surrender of a suspect to the custody of the Court. The Registry's own precedent has shown that legal assistance is awarded in several scenarios of which one is the provision of advice to potential suspects interviewed pursuant to Article 55(2)(c) of the Rome Statute.

Confidentiality

15. This document is filed confidentially since it concerns financial matters between Mr. Mbarushimana, his Counsel and the Registry. The issues at stake are not relevant to the charges presented against Mr. Mbarushimana and thus, it is submitted, are not in the public interest.

Relief Sought

16. In light of all the aforementioned, the Presidency is respectfully requested to rectify the Impugned Decision and to order that legal assistance be paid, on its current terms and conditions, from the date of Mr. Mbarushimana's arrest.



Nicholas Kaufman

Counsel for Callixte Mbarushimana

Dated this 27th day of February 2011,
Jerusalem, Israel.