Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/04-01/10**
Date: **04/04/2011**

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 Document, *ex parte*, Defence & Registry only
with Confidential Annexes

Corrigendum to Request for the Review of the Scope of Legal Assistance

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
Ms. Yael Vias-Gvirsman

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
Prof. Dr. Esteban Perlata-Losilla

Deputy Registrar
Mr. Didier Preira

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Pursuant to Regulation 83(4) of the Regulations of the Court, herein undersigned Counsel ("Counsel") requests that the learned Pre-Trial Chamber review two decisions of the Registrar with respect to the scope of legal assistance awarded to Mr. Mbarushimana:

(a) The decision to award Mr. Mbarushimana (and, by dint thereof, his Counsel) 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), and;

(b) The decision not to reimburse Ms. Yael Vias-Gvirsman ("the Legal Assistant") for reasonable travel expenses.

Relevant Factual Background

1. On 30 August 2010, Mr. Mbarushimana gave Counsel power of attorney to represent him in all matters before the International Criminal Court ("ICC").[1]

2. On 2 September 2010, Counsel provided both the Prosecutor and the Registrar of the ICC with the aforementioned power of attorney.

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.

[1] **Annex 1**.

5. On 11 October 2010, 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 motivated both by Mr. Mbarushimana's immediate wish to seek interim release before the French authorities and by his more general desire to take advice as to the various procedures which could be initiated at the ICC to challenge the admissibility and jurisdiction of the case against him and to challenge the validity of the arrest warrant. This request for legal assistance was refused by the Registry in the following terms:

> *"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.*

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. 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 from the Deputy-Registrar 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.*"[2]

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 First Impugned Decision").[3]

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:

[2] It was, of course, wholly inconceivable that the Deputy-Registrar would be unaware of the exact timing of Mr. Mbarushimana's arrival at the seat of the Court. The above-mentioned Email was, therefore, a source of considerable consternation since it seemed to imply that the Deputy-Registrar had taken a conscious decision to keep Counsel in the dark as to the whereabouts of his client. It goes without saying that in most jurisdictions, access to a detained client is considered not just a privilege to be granted when it suits the administrative authorities but an immediate statutory right.
[3] **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.*"

10. On 27 February 2011, after being expressly directed to do so by the Registrar,[4] Counsel petitioned the Presidency of the ICC seeking review of the Impugned Decision.[5]

11. On 22 March 2011, Counsel requested that the Registry reimburse the Legal Assistant,[6] for costs that she would incur travelling to and from the seat of the Court in order to observe major religious festivals, twice a year, with her family in her country of origin.

12. On 24 March 2011, Counsel received a response from the Registry rejecting the request that he made on behalf of the Legal Assistant ("the Second Impugned Decision").

13. On 31 March 2011, the Presidency ruled that it did not have jurisdiction to deal with Counsel's request for a review of the First Impugned Decision in so far as it was more appropriately characterized as a challenge to the **scope** of legal assistance and thus within the purview of the Pre-Trial Chamber.[7]

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[4] **Annex 2** at page 3.
[5] ICC-RoC85-01/11-1-Conf.
[6] The Legal Assistant commenced her duties on 1 March 2011.
[7] ICC-RoC85-01/11-2-Conf.

Submission

14. Counsel's formal representation of Mr. Mbarushimana in ICC proceedings commenced on 12 October 2010, when, out of a sense of professional responsibility, he was obliged to travel to Paris, at his own expense, in order to advise his client as to his pre-surrender rights and privileges under the Rome Statute.

15. Subsequently, Counsel engaged in extensive *inter partes* correspondence with the Office of the Prosecutor on matters relating to disclosure. In addition, Counsel made several applications to the Pre-Trial Chamber[8] in order to protect Mr. Mbarushimana's rights.

16. Counsel's representation of Mr. Mbarushimana prior to his surrender was such as would be reasonably expected of a competent and responsible lawyer. At no stage did the Pre-Trial Chamber indicate that Counsel's various pre-surrender applications[9] were frivolous or premature. Indeed, Pre-Trial Chamber I's *Decision on the Defence Request for Disclosure*[10] has, it is submitted, 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*

[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.
[9] Which were also intended to promote the efficient and prompt conduct of proceedings post-surrender.
[10] ICC-01/04-01/10-47.

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.[11]

17. 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 legal proceedings prior to surrender. 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;

18. The presumed rationale for the First Impugned Decision also contradicts Rule 117(2)[12] of the Rules of Procedure and Evidence ("Rules") which permits the Pre-Trial Chamber to appoint Counsel to assist with proceedings before the ICC "at any time after arrest". Moreover, Rule 117(3) and Articles 19(2)(a) and 95 of the Rome Statute respectively provide for a challenge the legitimacy of an arrest warrant and the admissibility of a case prior to surrender.

19. In conclusion, while there is much to suggest the possibility of pre-surrender litigation, there is no specific provision which stipulates that legal assistance shall only be awarded from the date of the surrender of an arrested person to the custody of the Court. Indeed, the Registry's own precedent has shown that legal assistance may even be awarded to suspects promised

[11] ibid at paragraphs 12 & 14.
[12] **Annex 3**; The request for nomination pursuant to Rule 117(2) was formally notified to the Registry on 25 October 2010 yet never acknowledged.

immunity from prosecution under the provisions of Article 55(2)(c) of the Rome Statute.

20. With respect to the Second Impugned Decision,[13] Counsel disputes the Registry's observation which was addressed to him in the following language: "*With your indulgence, let me clarify that, contrary to your suggestion, there is no such thing as 'Registry discretion' when assessing requests for reimbursement of expenses in the framework of the legal aid system*". Counsel further disputes the Registry's assertion that the "*requirements that religious faith imposes on believers*" do not engender costs reasonably necessary for an effective and efficient defence under Regulation 83(1) of the Regulations of the Court.

21. Firstly, the learned Pre-Trial Chamber is referred to the exact wording of Regulation 83(1) of the Regulations of the Court:

> *"Legal assistance paid by the Court shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence."*

The phrase "*as determined by the Registrar*" was omitted from the letter communicating the Second Impugned Decision to Counsel yet plainly provides for discretion to be exercised by the Registrar. Secondly, Regulation 83(1) specifically permits the remuneration of travel costs incurred by Counsel <u>and his assistants</u>. It goes without saying that the performance of an "*effective and efficient defence*" is wholly dependent on the personal welfare of those charged with executing it. Counsel thus deems that by respecting the Legal Assistant's modest travel requests, he will be promoting such a legitimate interest. Additionally, and mindful of the strict language of Regulation 83(1), there is no apparent reason why a distinction should be drawn between the reimbursement of Counsel's travel expenses to the seat of the Court which, as a

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[13] **Annex 4**.

rule, derive from the costs fund as an approved work-related mission and those of a legal assistant which are not so endorsed.

22. An examination of the costs incurred by the Mbarushimana Defence to date will reveal that the team has drawn minimally and extremely judiciously on the ICC's legal aid fund. Such cost-saving may be illustrated by the fact that, for a month, in addition to her own duties, the Legal Assistant has jointly performed the tasks of a case manager – a post which will only be permanently filled in the month of April 2011. Counsel was informed by the Registry that the unused salary allocated for the position of case-manager which has accrued since 26 January 2011 would be added to the rolling costs fund of 4000 Euros per month. In light of all the aforementioned factors, the refusal of the Registry to exercise its discretion in the Legal Assistant's favour is unreasonable and should be susceptible to judicial rectification.

Relief Sought

23. Counsel regrets that, as of the date of this filing, not only has he been refused legal assistance for all pre-surrender work but he has also not received any payment whatsoever for work performed after 26 January 2011.

24. In light of all the aforementioned, the learned Pre-Trial Chamber is respectfully requested to review and rectify the First Impugned Decision and to order that legal assistance be paid, on its current terms and conditions, from the date of Mr. Mbarushimana's arrest pursuant to the ICC arrest warrant. The learned Pre-Trial Chamber is also requested to review and rectify the Second Impugned Decision and to order that the Legal Assistant be reimbursed for the travel costs that she will incur on a twice yearly basis.

Confidentiality

25. Counsel has no objection to future publication of this application. Given, however, that the Presidency has requested that the Registrar comment on whether or not she objects to the publication of the First Impugned Decision by 21 April 2011,[14] Counsel is presently obliged to file this application confidentially.

Nicholas Kaufman

Nicholas Kaufman

Counsel for Callixte Mbarushimana

Done in Jerusalem, Israel

Monday, April 04, 2011

[14] ICC-RoC85-01/11-2-Conf at paragraph 17.