Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/04-01/10**
Date: **15 April 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

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

Observations of the Registrar on the "Corrigendum to Request for the Review of the Scope of Legal Assistance" dated 4 April 2011

Source: **The Registry**

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
Silvana Arbia
Deputy Registrar
Didier Preira

Counsel Support Section
Esteban Peralta Losilla
Sam S. Shoamanesh

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

1. Pursuant to the "Decision requesting observations on the Defence's 'Request for the Review of the Scope of Legal Assistance'",[1] rendered on 5 April 2011 by the Honourable Judge Sanji Mmasenono Monageng, Single Judge of Pre-Trial Chamber I seized of the case[2], the Registrar hereby submits her observations on the "Request for the Review of the Scope of Legal Assistance"[3], dated 4 April 2011 as finally established by the corrigendum of 5 April 2011[4] (the "Request for Review").

2. In his Request for Review, Mr. Nicholas Kaufman, counsel of record representing Mr Callixte Mbarushimana in proceedings before the Court (the "Counsel"), requests the Pre-trial Chamber I (the "Chamber") to review two decisions of the Registrar concerning the legal assistance paid to Mr. Mbarushimana. Namely the decision:
   (a) to award Mr. Mbarushimana legal assistance paid by the Court dated 15 February 2011, challenging the date of the operative effect of the said decision, and
   (b) not to reimburse Ms. Yael Vias-Gvirsman, the Legal Assistant of the team, the costs of private travel to and from her country of origin under the Court's legal aid system.

3. As indicated in paragraph 24 of the Request for Review, Counsel requests the learned Chamber to review and rectify:
   I. "the [decision of the Registrar dated 15 February 2011] 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", ("Counsel's First Request"), and
   II. "the [decision dated on 24 March 2011]" and to order that the "Legal Assistant be reimbursed for the travel costs she will incur on a twice yearly basis" ("Counsel's Second Request").

[1] ICC-01/04-01/10-92-Conf-Exp.
[2] ICC-01/04-01/10-17, "Decision on the designation of a Single Judge of Pre-Trial Chamber I", 25 October 2010.
[3] ICC-01/04-01/10-90-Conf-Exp.
[4] ICC-01/04-01/10-90-Conf-Exp-Corr.

4. The Registrar respectfully submits that, in the management and application of the Court's legal aid system in this case, as will be demonstrated below, at all material times her decisions were taken within her jurisdiction[5], with full respect for due process and propriety of established procedures, in conformity with the applicable legal texts of the Court and based on pertinent facts present, leading to reasonable and concretely founded administrative decisions in response to Counsel's First and Second Request.[6]

I. On Counsel's First Request to Have Legal Aid Entitlements Applied Retroactively to Commence from the Date of Mr. Mbarushimana's Arrest, and Before the Latter Submitted a Request for Legal Assistance Paid by the Court

5. At the Court, as with any other international criminal jurisdiction and most domestic legal systems, legal aid is not an automatic *ad infinitum* entitlement. There are established procedures, rules and regulations which govern how legal aid is claimed, assessed, and when warranted, granted within the scope and confines set by the applicable legal and policy provisions which apply to that given legal aid system.

6. The legal aid regime at the Court, as endorsed by the Assembly of States Parties and clearly established by the legal and policy texts of the Court, is no different.[7] The

[5] Similar to the jurisprudence rendered by the *ad hoc* tribunals, the Chambers and the Presidency of the Court have confirmed that it is "the Registrar in whom primary responsibility for managing the legal assistance scheme of the Court is vested, including overseeing the scheme of legal assistance by the Court [...]": The Presidency, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-937, 29 June 2007 at para. 16.

[6] Guided by established jurisprudence at the *ad hoc* tribunals, the Presidency of the Court has established a clear test to be applied in all cases where a request for review of an administrative decision of the Registrar is sought. The Presidency has articulated the test as follows: "It is recalled that the judicial review of decisions of the Registrar concerns the propriety of the procedure by which the latter reached a particular decision and the outcome of that decision. It involves a consideration of whether the Registrar has: acted without jurisdiction, committed an error of law, failed to act with procedural fairness, acted in a disproportionate manner, taken into account irrelevant factors, failed to take into account relevant factors, or reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached.": See decisions of the Presidency of the Court, dated 20 December 2005, ICC-Pres-RoC72-02-5 at para. 16, and supplemented in its decision of 27 November 2006, ICC-01/04-01/06-731-Conf, at para. 24. See also the decision of 10 July 2008, Case/filing no. ICC-Pres-RoC72-01-8-10 at para. 20.

[7] See in particular Article 67.1.d of the Rome Statute; Chapter 4, Section 4 of the Regulations of the Court and Chapter 4, Section 3 of the Regulations of the Registry. For principal documents outlining the Court's legal aid system see: "Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons" (ICC-ASP/3/16) dated 17 August 2004; "Report on the principles and criteria for the determination of indigence for the purposes of legal aid (pursuant to paragraph 116 of the Report of the Committee on Budget and Finance of 13 August 2004)" (ICC-ASP/6/INF.1) dated 31 May 2007; "Report on the operation of the Court's legal aid system and proposals for its amendment" (ICC-ASP/6/4) dated 31 May 2007; "Report to the Assembly of States Parties on options for ensuring adequate defence counsel for accused persons (ICC-ASP/3/16) Update to Annex 2: Payment details of the ICC legal aid scheme" (ICC-ASP/5/INF/1.) dated 31

same legal and policy canons governing the Court's legal aid system do not, as a rule, allow for a presumption of indigence at the Court.

7. The Court's publicly funded legal aid system covers the reasonably necessary costs of legal representation in proceedings before the ICC of indigent persons – those who lack sufficient means to pay their legal costs. In conformity with Regulation 84 of the Regulations of the Court, before legal aid can be granted the Registrar must make an informed determination on a legal aid applicant's means and decipher whether or not he or she is eligible to receive payment of legal assistance. As a rule, the Court's legal aid system does not cover the costs of legal representation of suspects or accused persons implicated in the Court's proceedings for work carried out before national courts. In the ordinary course, it is the domestic legal aid system which is applicant should be seized to cover the costs of legal representation of an indigent person implicated in proceedings before national courts. [8]

8. For suspects implicated in the Court's proceedings against whom warrants of arrest or a summons to appear have been issued, the right to receive legal assistance paid by the Court (legal aid) crystallizes only when two conditions are met: (i) in accordance with Regulation 132 of the Regulations of the Registry, the legal aid claimant must furnish to the attention of the Registrar a duly completed "standard form for legal assistance paid by the Court" (Financial Information Form) to enable the Registry to conduct a financial investigation and assessment into the means of the claimant, and (ii) there has been a decision by the Registrar declaring the person indigent.[9]

9. The legal and policy framework governing the legal aid system at the ICC does not allow for legal aid payments to be paid retroactively before the above-listed two conditions are met.

October 2006, and "Interim report on different legal aid mechanisms before international criminal jurisdictions" (ICC-ASP/7/23), dated 31 October 2008.

[8] In the case at hand, that jurisdiction was France, which benefits from a most robust and favourable legal aid system.

[9] Regulation 85 of the Regulations of the Court and Regulation 132.2 of the Regulations of the Registry.

10. The only exception to this rule as permitted by the legal texts of the Court is found in Regulation 132.3 of the Regulations of the Registry, which empowers the Registrar to provisionally grant legal aid funding from the time the legal aid claimant provides the Registry "all of the documents required" to make an informed decision on his or her indigence, and the ultimate decision of the Registrar on whether legal aid should be paid. This interim period of provisional funding shall not exceed 30 calendar days.[10]

11. In the case at hand, Mr. Mbarushimana, Counsel's client, submitted his Financial Information Form to the attention of the Counsel Support Section (CSS) of the Registry on 26 January 2011, a day after he surrendered to the custody of the Court where – in conformity with Court policy and practice – he met with CSS staff who promptly appraised him of his rights to request for legal assistance paid by the Court.

12. On 15 February 2011, in accordance with Regulation 85 of the Regulations of the Court, the Registrar found Mr. Mbarushimana indigent,[11] granting him full entitlements under the Court's legal aid system.

13. On 19 February 2011, in response to a question posed by Counsel on the operative date of the legal aid decision, CSS reiterated *viva voce* declarations previously made to Counsel, that "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 [Mr. Mbarushimana], to the Registrar's decision" on legal aid dated 15 February 2011.[12]

14. In effect, since 26 January 2011 – two days prior to the initial appearance of 28 January 2011 –, Mr. Mbarushimana, and by extension his Counsel, have and continue to benefit from legal assistance paid by the Court.[13]

[10] Regulation 132.2 of the Regulations of the Registry.
[11] This decision is appended as Annex 2 to the Request for Review.
[12] Annex 1.
[13] For details of resources made available to the team, please refer to Annex 2.

15. The details of the resources provided under the Court's legal aid system (i.e. legal fees, expenses allotment, investigation budget, *inter alia*), and made available to Mr. Mbarushimana, are provided in Annex 2. The information contained in this Annex and on how the Court's legal aid system is applied and when it is rendered effective have been explained to Counsel in person in a previous meeting and communications with the Registry, and CSS has repeatedly invited Counsel to have further meetings to discuss his client's legal aid entitlements.[14]

16. In paragraph 17 of the Request for Review, Counsel in drawing a mistaken inference puts forth the assertion that the "Registrar's decision not to award legal assistance from the date of the arrest is, apparently, based on the conviction that there is no role for ICC appointed counsel in legal proceedings prior to surrender [...]". This assertion is misconstrued. As outlined above, the Registrar is bound to strictly follow the legal and policy framework governing the publically funded legal aid system at the ICC – a legal framework, which with the exception of Regulation 132.3 of the Regulations of the Registry, does not allow for legal aid payments to be paid retroactively to the period before a request for legal aid has been submitted.

17. In view of the aforementioned, Counsel's First Request should not be seen merely through the prism of a "scope" of legal aid argument. When carefully considered in light of the applicable legal and policy framework in place, Counsel's First Request *de facto* challenges the legal aid system of the Court itself by attempting to extend legal aid entitlements – retroactively – beyond the boundaries clearly established by the legal texts of the Court, mainly the legal regime stipulated in Regulation 132.3 of the Regulations of the Registry. The Registrar reiterates that Counsel's First Request seeks, in effect, to challenge the scheme for legal assistance paid by the Court as established by the applicable legal texts and as approved by the Assembly of States Parties – a system instituted to ensure the equal treatment of persons whose costs are covered by the Court's legal assistance scheme, as well as consistency, uniformity, judiciousness and transparency in implementing that scheme. The calling into

[14] Annex 3.

question of a concrete aspect of the legal aid scheme itself, leading to an alteration of the system is not permissible.[15]

18. Based on the foregoing, the Registrar respectfully submits that to grant the Counsel's First Request would be to set a precedent that is in contradiction of the black letter of the law, as it were, as it concerns the legal regime governing the Court's legal aid system. Such a finding would equally be inconsistent with the policies and practices of the Registry concerning legal aid.

II. On Counsel's Second Request to Have Legal Aid Cover Personal Travel Costs

19. In paragraph 24 of the Request for Review, Counsel requests the learned Chamber to review and rectify "the [decision dated on 24 March 2011]" and to order that Ms. Yael Vias-Gvirsman, the Legal Assistant of the team, be reimbursed for personal travel costs that she will incur on a twice yearly basis to observe religious holidays in her country of origin.

20. In paragraphs 20 and 21 of his Request for Review, Counsel invokes Regulation 83.1 of the Regulations of the Court as a basis to advance his argument that the Registrar has discretion in the management of the legal aid system of the Court, and that such discretion would be reasonably exercised in answering favourably to his request to have the costs of the *personal* travel of his legal assistant to and fro her country of origin covered by the Court's legal aid system.

21. He further puts forth the argument that the "effective and efficient defence" criteria stipulated in Regulation 83.1 of the Regulations of the Court "is wholly dependent on the personal welfare of those charged in executing it"[16]; in so doing, Counsel in effect adopts an irregular and most liberal interpretation of an otherwise carefully worded

[15] See *Prosecutor v. Hadžihasanović et al.*, Trial Chamber II which noted that "the aim of the motion was to challenge the legal aid system itself rather than its application and that it is not for the Chamber, in the context of a particular case, to take decisions leading to an alteration of it which would affect all cases pending before the Tribunal". In this particular case, the motion was deemed to be inadmissible. See also *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, "Urgent Defence Motion for ex parte Oral Hearing on Allocation of Resources to the Defence and Consequences Thereof for the Rights of the Accused to a Fair Trial", 10 April 2003.
[16] Paragraph 21 of the Request for Review.

provision, to call for a publically funded legal aid system to cover the costs of strictly personal travels of his legal assistant to and fro her country of origin.

22. The words "effective and efficient defence" contained in Regulation 83.1 should not be read in vacuum. A reading of the provision in its entirety and the literal and contextual interpretation of Regulation 83.1 of the Regulations of the Court clearly establish that the costs that can be covered by the Court's legal aid system are only those that are "reasonably necessary as determined by the Registrar for an effective and efficient defence". Regulation 83.1 of the Regulations of the Court reads as follows :

> Legal assistance paid by the Court shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence, including the remuneration of counsel, his or her assistants as referred to in regulation 68 and staff, expenditure in relation to the gathering of evidence, administrative costs, translation and interpretation costs, travel costs and daily subsistence allowances.

23. The Registrar respectfully submits that costs at the focus of Counsel's Second Request, on the facts, are not "reasonably necessary [...] for an effective and efficient defence", and for the Registrar to find otherwise would be to act in violation of the provision and to negate her positive obligation to the Assembly of States Parties to judiciously manage the Court's legal aid system.

24. The Registrar brings the attention of the learned Chamber to the fact that the costs of Ms. Yael Vias-Gvirsman's initial travel to The Hague to commence her mandate and to report on duty on 1 March 2011, was covered by the Court's legal aid system as a "reasonably necessary" cost[17] within the meaning and *raison d'être* of Regulation 83.1 of the Regulations of the Court. The same entitlement was extended to the case-manager recently appointed to the team.[18] The favourable treatment by the Registrar on this head of costs is to be contrasted with the nature of the costs at the centre of Counsel's Second Request. While in the former, the cost is objectively reasonably necessary (e.g. team member must commence mandate and become operational in

[17] Annex 4.
[18] Annex 5.

The Hague in the team ensuring the legal representation of the person concerned and needs to travel to The Netherlands for that purpose), in the latter scenario, the nature of the cost is purely private and its nexus to the "reasonably necessary for [...] an effective and efficient defence" test of Regulation 83.1 is doubtful at best.

25. Four other relevant factors helpful in gauging the appropriateness of Counsel's Second Request are worth stressing. First, the costs of travel and daily subsistence allowance (DSA) to and from The Hague under the Court's legal aid system are reserved, as a rule, for counsel and associate counsel, who in the ordinary course have active practices in their home jurisdictions and therefore will need to regularly travel to The Hague from their country of origin to execute their mandate before the Court. In contrast, the Court's legal aid system is built on the premise that legal assistants and case-managers are stationed in The Hague on a full-time basis (as is the case with Ms. Yael Vias-Gvirsman).

26. Second, such costs are deducted from a 4,000 euro monthly allotment given to the team to cover the costs of their expenses. This monthly amount can be exhausted with relative ease if counsel and/or associate counsel alone commute frequently to The Hague. This is most pronounced during the Trial Phase, where DSA payments for long stays at the Seat of the Court can quickly reduce the amount of available funds. Requiring the Registry to deviate from the existing system by adding the additional costs of private travel of legal assistants to the monthly expenses budget will further deplete the budget available contrary to the interests of the indigent client.

27. Third, as detailed in Annex 2, under the Court's legal aid system, Legal Assistants are paid 6,113 euro per month amounting to 73,356.00 euro per year. It is the view of the Registrar that this remuneration aptly enables the Legal Assistant to assume the costs of private travel incurred "on a twice yearly basis".

28. Lastly, the Registrar respectfully submits that granting Counsel's Second Request would, in effect, open the flood gates for similar claims for reimbursement of personal costs incurred against the Court's vital legal aid scheme. This would directly place added and undue strain on a publically funded system aimed at providing

crucial funding for legal representation of indigent suspects, accused persons and victims implicated in the Court's proceedings.

III. Clarification on Delays in the Payment of Counsel's Fees

29. In paragraph 23 of the Request for Review, Counsel states: "he has [...] not received any payment whatsoever for work performed after 26 January 2011" (underlined in the original). In order to avoid a scenario where Counsel's partial presentation of the facts may not adequately inform the learned Chamber on this issue, the Registrar furnishes the following clarifications in this regard.

30. The Registrar notes at the outset that invoking the delay in payment is only remotely relevant, if at all, to Counsel's First and Second Request, and questions the motivations of Counsel for invoking the issue, in particular when the reasons for the delay were fully explained in detail to Counsel prior to his Request for Review through a *viva voce* telephone conversation he had with CSS staff. Hence, Counsel was fully versed of the practical difficulties the Registry had faced in the processing of the first payment instalment at the time he filed his Request for Review.

31. The Registrar wishes to clarify that the reason for the initial delay in payment was the exceptional circumstances surrounding the case of Mr. Mbarushimana, which for the intents and purposes of legal aid was an unforeseen new budgetary obligation born from his unexpected arrest and surrender to the Court on 25 January 2011. The costs of legal aid for Mr. Mbarushimana had to be allocated and released from the Court's Contingency Fund. The process of obligating resources from the Court's Contingency Fund is a time consuming process,[19] hence the initial delay before the fund was made available for the registry to proceed to effect legal aid payment.

32. The Registrar notes that the payment of fees for Counsel, since January 2011 to the end of March 2011 as well as the entitlements of his Legal Assistant, have been processed by CSS as soon as resources from the Contingency Fund were made available and could be utilized in early April, 2011. The Finance Section of the Court

[19] Regulation 6 *ff* of the Financial Regulations and Rules of the Court, ICC-ASP/7/5 (Part. II-D).

has been in the process of effecting payment in conformity with its internal procedures, which grants it a 15 days grace period for this purpose. Payment of legal fees has been effected by the Finance Section and should be in the bank accounts of Counsel and his Legal Assistant on Monday, 18 April 2011.

33. The Registrar emphasises that this delay is a *one-time anomaly* caused by the unique circumstances of the present case, and as Counsel had previously been informed, in the future all payments will be effected on a regular punctual basis.

34. The Registrar finds it regrettable that after having been fully informed of the practical reasons for the delay, and having communicated his understanding of the circumstances, such a declaration would be included in the Request for Review. The Registrar respectfully submits that Counsel's attempt to implicate the question of the delay in the first instalment of payments in his Request for Review – while having been fully appraised of the reasons of the delay – should not be allowed to erroneously confuse or detract attention away from the real substance of the issues invoked and the legal and policy framework guiding the Registrar's decisions rendered in response to Counsel's First and Second Request.

IV. Classification of the Present Observations

35. The present observations are classified as indicated at page 1, *supra*, in conformity with Regulation 23.2 *bis* of the Regulations of the Court.

36. Notwithstanding the above, in light of the nature and contents of the materials contained herein, the Registrar is satisfied to have the present observations and its annexes rendered public for the benefit of the public at large and in the interest of transparency. However, in the opinion of the Registrar it is advisable, as a good practice measure and to prevent any undue prejudice to ICC staff to render the contact details and related information of such staff as contained in the annexes confidential through appropriate redaction.

37. The Registrar remains at the disposal of The Honourable Single Judge should further amplifications be required.

Silvana Arbia
Registrar

Dated this 15 April 2011

At The Hague, Netherlands