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

Date: 28 April 2011

PRE-TRIAL CHAMBER I

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

**Public Document with
Confidential Annexes 1 and 2 and
Public Annexes 3-7**

**Prosecution's request for the assessment of the English proficiency of Callixte
Mbarishimana**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Luis Moreno-Ocampo

Fatou Bensouda

Counsel for the Defence

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

Deputy Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. In this filing the Prosecution seeks an order directing the Registry to conduct an assessment of whether Callixte Mbarushimana (“the Suspect”) fully understands and speaks the English language, as envisaged in the Rome Statute (“the Statute”) and the Rules of Procedure and Evidence (“the Rules”). The translation of witness statements and other materials presently written in English is not required in the current case, will delay proceedings unnecessarily and will require the commitment of substantial resources.

II. Statement of Facts

2. The Suspect was born in Rwanda and his mother tongue is Kinyarwanda.
3. At his first appearance on 28 January 2011, the Suspect confirmed that he also fully speaks and understands French.¹
4. The Suspect has submitted to several interviews conducted in English. In addition, among the materials in the Prosecution’s possession are several notes and other documents prepared by him in English.
5. Statements made to the Prosecution by crime-base witnesses were recorded in English. Accordingly, in order to expedite the disclosure process, on 14 April the Prosecution enquired of the Defence whether the Suspect would accept disclosure of certain statements in the English language, notwithstanding the provisions of Rule 76(3).² The Prosecution noted that Suspect’s interviews and written materials demonstrates his proficiency in English and that he fully understands and speaks the language to the level envisaged by the Statute and Rules.
6. On 15 April the Defence replied³, refusing this request.⁴

¹ ICC-01/04-01/10-T-1-ENG ET WT, 28 January 2011, lines 22 to 24.

² See Annex 1.

³ See Annex 2.

III. Submissions

Legal requirements

7. Under Article 67(l)(a) of the Rome Statute ("Rights of the Accused"), the Accused have a right "to be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks".
8. Under Rule 76(3), "the statements of the prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks".
9. The Appeals Chamber interpreted Article 67(l)(a) and (f) restrictively in the *Katanga and Ngudjolo* case.⁵ The Appeals Chamber found that the standard "fully understands and speaks" is met when the accused is completely fluent in the language in ordinary, non-technical conversation.

Reasons for request

10. There are two working languages in this Court, French and English. The Prosecution has presented its Application under Article 58 and its filings in English. It also intends to do so for the Document Containing the Charges ("DCC) and the List of Evidence ("LoE").
11. Furthermore, the statements of witnesses who do not speak a language of the Court were recorded in English.

⁴ The Defence made a show of cooperation by agreeing "to accept disclosure in the English language on the understanding that the Kinyarwanda transcripts be simultaneously disclosed". However, this is clearly no concession at all, since the simultaneous disclosure of the Kinyarwanda transcripts, being a language he fully understands and speaks, will in any event comply with Rule 76(3).

⁵ ICC-01/04-01/07-522.

12. In accordance with the relevant provisions quoted above, these documents would all have to be translated into French⁶ for the benefit of the Suspect. This requirement will effectively shorten the already tight deadline for the preparation of the DCC and the LoE, since they will have to be finalised considerably earlier in order to allow sufficient time for translation.
13. However, the Prosecution submits that this burden is unnecessary in the circumstances, since the Suspect's English meets the standard required by the abovementioned provisions.⁷
14. In his reply to the Prosecution's email, counsel for the Defence informed the Prosecution "[w]hile I do not deny that my client has a very good understanding of the English language, I cannot agree that he is 'completely fluent in the language'".⁸ In support of this assertion, he states that "my team and I communicate with Mr. Mbarushimana in French since we believe that it is his privilege to be professionally advised in the language in which he is most at ease. Mr. Mbarushimana certainly finds it difficult to articulate legal concepts in English" (emphasis added).⁹
15. The Prosecution submits that, when regard is had to the open source material annexed hereto,¹⁰ it is clear that the Suspect is completely fluent in the language in

⁶ Except for statements also recorded in Kinyarwanda.

⁷ The Prosecution will nevertheless supply the Suspect with French translations of those statements which it is able, as and when its resources allow. The Prosecution notes in this regard the Defence's request "For those witnesses interviewed in English and not conversant in Kinyarwanda -I would ask that you provide a French translation at your convenience" (emphasis added). Most of the witness statements currently in the Prosecution's possession (other than the transcribed interviews) have already been translated into French. However, the Prosecution cannot guarantee that it will be able to translate any further statements obtained before the disclosure deadline, or any additional deadlines imposed by the Chamber in future.

⁸ See Annex 2 (emphasis in original).

⁹ *Ibid.* (emphasis added).

¹⁰ See Annexes 3–7. Annex 3 contains an excerpt of a 2 December 2004 NBC News video recorded interview with the Suspect available at http://www.msnbc.msn.com/id/6637384/ns/nightly_news-nbc_news_investigates. Annex 4 contains an excerpt of a 21 February 2007 Dateline video recorded interview with the Suspect available at <http://www.youtube.com/watch?v=l44lQxMSvdw>. Annex 5 contains a 6 December 2008 RFI audio recorded interview with the Suspect available at http://www.rfi.fr/actuen/articles/108/article_2352.asp. Annex 6 contains a 16 February 2009 RFI audio recorded interview with the Suspect available at http://www.rfi.fr/actuen/articles/110/article_2908.asp.

ordinary, non-technical conversation. Whether the Suspect can articulate “legal concepts in English” is not the test. The statements that the Prosecution proposes to disclose in English are not filled with arcane legal terminology. The Appeals Chamber has ruled that “it is not required that he or she has an understanding as if he or she were trained as a lawyer or judicial officer”.¹¹

16. The Prosecution notes the recent decision of Pre-Trial Chamber II to deny the request of Mr Joshua Arap Sang for interpretation into Kalenjin.¹² The Prosecution submits that on the basis of the attached evidence, the Suspect’s English proficiency is at least as good as that of Mr Sang.
17. The Suspect has acted as the spokesperson for the FDLR for several years. In this capacity, he has given several interviews in English.¹³ These interviews portray an excellent command of English with a rich vocabulary, good syntax and grammar and ease of use. He clearly understands the questions perfectly and replies appropriately and without hesitation. He is also sufficiently confident to interrupt his interviewer. He enunciates clearly and speaks only with a slight accent. He is clearly well educated and eloquent.
18. The Prosecution notes further that the Suspect has raised no objection to the fact that the Prosecution’s Application under Article 58 has yet to be notified in French. Nor does there appear to have been any difficulty consulting with him regarding a number of filings that have all been in English.
19. Although the test formulated by the Appeals Chamber does not require the Suspect to be able to write English fluently, the Prosecution notes that examples of the Suspect’s ability to write in English indicate that he is competent in this regard too. His handwritten notes show good syntax, rich vocabulary and

All hyperlinks last accessed on 27 April 2001. Annex 7 contains an excerpt of a 19 November 2009 interview with the Suspect. The Suspect can be heard at minute 00:15 of the excerpt.

¹¹ ICC-01/04-01/07-522, para. 3.

¹² Decision on Joshua Arap Sang’s Request for Translation and Interpretation into Kalenjin, ICC-01/09-01/11-42, 06 April 2011.

¹³ See Annexes 3-7. See also footnote 10 above.

excellent spelling.¹⁴ His correspondence also demonstrates his command of written English.¹⁵

20. Should the Chamber require further information on the Suspect's English competency, the Prosecution submits that the matter should be referred to the Registry for a report. The Prosecution submits that such report should be based upon on pre-existing documents and audio or video recordings of the Suspect. These existing materials would provide an objective basis for the assessment that would be superior to a subjective and limited analysis based on the Suspect's performance during a language examination.

IV. Relief sought

21. In the light of the above, the Prosecution seeks an assessment of the Suspect's English Proficiency.



Luis Moreno-Ocampo
Prosecutor

Dated this 28th day of April 2011

At The Hague, The Netherlands

¹⁴ See DRC-REG-0007-3438 at pages -3466 to -3471 and at -3475 to -3480.

¹⁵ See DRC-REG-0008-2277, DRC-REG-0005-0500 and DRC-REG-0004-2007.