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Date: **02/05/2011**

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***

Public Document

**Defence response to the Prosecution's request
for the assessment of the English proficiency of Callixte Mbarushimana**

Source: Defence for Mr. Callixte Mbarushimana

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

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Other

The Defence hereby presents its observations on the *Prosecution's request for the assessment of the English proficiency of Callixte Mbarushimana*.¹

1. The test for language proficiency for the purpose of ICC proceedings was, indeed, set out by the Appeals Chamber in the *Katanga* case:

*It is a language an accused must both understand and speak and this, fully understand and speak. 'Fully' is defined in the online Oxford English Dictionary as "[i]n a full manner or degree; to the full, without deficiency; completely, entirely; thoroughly, exactly, quite". The French version of 'fully' in the Statute is 'parfaitement' '... The Appeals Chamber does not consider it necessary to enter further into any possible differences between the two words. It suffices to state that the meaning of this provision based on these definitions provides that the standard that must be required under article 67 is very high.*²

2. Mr. Mbarushimana does not speak English *"in a full manner or degree, to the full or without deficiency"*. He is thus not completely fluent in English and does not meet the standard set by the Appeals Chamber. The Prosecution conveniently neglects other *dicta* of the Appeals Chamber which are less favourable to its case – most notably the following:

*"The subject of understanding is exclusively the accused. Thus, the Chamber **must** [emphasis added – NK] give credence to the accused's claim that he or she cannot fully understand and speak the language of the Court. This is because it is the accused who can most aptly determine his or her own understanding and it should be assumed that he or she will only ask for a language he or she fully understands and speaks."*³

3. The Appeals Chamber was, of course, aware of the possibility that an accused might act in bad faith and profess that he does not understand a language offered by the Court. Notwithstanding, the Appeals Chamber did not entertain the question of whether an accused should be obliged to accept

¹ ICC-01/04-01/10-125.

² ICC-01/04-01/07-522 at paragraph 40.

³ *ibid* at paragraph 59.

disclosure in one of the working languages of the Court as opposed to the other. In this respect, therefore, the *Katanga* precedent is distinguishable from the present situation. Unlike Mr. Katanga, Mr. Mbarushimana is not expressing a preference for a language which is not a working language of the Court.

4. Mr. Mbarushimana certainly comprehends the English language. Such comprehension, however, is acquired and not instinctive. Mr. Mbarushimana will be severely handicapped when forced to assimilate a huge quantity of English incriminating materials and witness transcripts in the month prior to confirmation.

5. Furthermore, the various items of media⁴ annexed to the Prosecution request do not support the contention that Mr. Mbarushimana is completely fluent in English. Mr. Mbarushimana has, sadly, grown accustomed to having to defend himself against the baseless and slanderous accusations of so-called human rights activists and journalists. He is also passionate about political issues close to his heart. The interviews thus suggest nothing more than extremely well-rehearsed responses to questions which have been thrust at him not once - but many times - over the years. This does not mean that Mr. Mbarushimana is completely fluent in English nor that he even feels comfortable in this language.

6. As for its reliance on written media to show language proficiency, the Prosecution seems to forget that it has not yet proved – according to the rules of evidence – that it is indeed Mr. Mbarushimana who authored them.

⁴ The Defence objects to the use made of evidence whose alleged primary purpose is to prove proficiency in the English language but which, are sourced from highly prejudicial video interviews with Mr. Mbarushimana on matters totally unconnected with the charges he faces.

7. In summary, there exists no legal basis for objecting to Mr. Mbarushimana's insistence that Rule 76(3) disclosure be effected in the working language of the Court in which he is completely fluent (French).

8. The Prosecution chose to conduct its investigation in English in the full knowledge that the suspect it had targeted was a francophone living in France. The Prosecution now petitions the Court for relief because it employed investigators incapable of conducting witness interviews in French despite the fact that French is an official working language of the Court.

9. The test, therefore, is simple. Should this learned Pre-Trial Chamber indulge the generously funded and well-staffed Prosecution at the expense of Mr. Mbarushimana whose failure to understand one crucial word or one vital nuance could mean the difference between liberty and incarceration?

10. The learned Pre-Trial Chamber is asked to reject the Prosecution request.



Nicholas Kaufman
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Done in Jerusalem, Israel

Monday, May 02, 2011