



Original: **English**

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

Date: **07/08/2011**

PRE-TRIAL CHAMBER I

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

**Public Document
URGENT**

**Defence request to deny the use of certain incriminating evidence
at the confirmation hearing**

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

Mr. Luis Moreno-Ocampo, Prosecutor

Ms. Fatou Bensouda, Deputy Prosecutor

Mr. Anton Steynberg, Senior Trial Lawyer

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

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section Other**

1. On 12 May 2011, the Pre-Trial I Chamber delivered its *decision on the "Prosecution's request for the assessment of the English proficiency of Callixte Mbarushimana"*¹ ordering the Prosecution "to disclose to the Defence, as soon as possible and no later than 1 June, the French translations...of all witness statements which have not been previously disclosed in Kinyarwanda...".

2. On 1 June 2011, the Prosecution disclosed materials relating to 13 witnesses with an accompanying letter which stated as follows: *"For those transcripts of witness interviews which are available in English only, the Prosecution discloses the audio files of those interviews, which were conducted in both English and Kinyarwanda...The Prosecution will disclose the Kinyarwanda transcripts of the interviews in due course"*.

3. On 28 June 2011, in light of its failure to receive Kinyarwanda versions of English transcripts, as promised and *"in due course"*, the Defence, as a test case, petitioned the Prosecution with respect to Witness 527 ("W-527"). The Defence sought to clarify why the Prosecution had supplied it with three English transcripts from W-527's interview without either Kinyarwanda transcriptions or French translations as mandated by the Single Judge. The Prosecution provided the following response by way of Email:

"...Witness 527's interview took place in five parts....[...]

...So what you will have for 527 is:

- 2 x transcripts in Kinyarwanda and English (DRC-OTP-2033-0451 and DRC-OTP-2033-0498) - and for those, we have not disclosed the audio files (being DRC-OTP-2005-0061 and DRC-OTP-2005-0062) as it's not necessary, seeing you have the full transcripts.

- 3 x transcripts in just English (DRC-OTP-2033-0423, DRC-OTP-2033-0551 and DRC-OTP-2033-0598)-and the 3 audio files relating to them in both English and Kinyarwanda (DRC-OTP-2005-0060, DRC-OTP-2005-0063 and DRC-OTP-2005-0064).

To sum up, with respect to witness 527, you will have had 8 files disclosed (5 x transcripts and 3 x audio files), which in total will cover the 5 sessions, in all languages."

¹ ICC-01/04-01/10-145.

4. The Prosecution has apparently subscribed to the belief that so long as it has communicated the record of a witness's questioning in audio format then it is absolved from the need to supply a transcript of that same audio recording (or at the very least a translation of the completely English transcript) in a language which it has been ruled that the suspect understands best – in this case French or Kinyarwanda. Such a policy, so it would appear, has been applied to all demobilized and repatriated FDLR soldier-witnesses interviewed by the Prosecution in Rwanda – most, if not all, of whom were interviewed pursuant to Article 55(2) of the Rome Statute.

5. The Defence submits that the provision of audio files alone *in lieu* of a written record in French or Kinyarwanda contravenes both the Single Judge's decision and the Rules of Procedure and Evidence.

6. Rule 111 of the Rules of Procedure and Evidence, in particular, sets out the legislative requirement that a witness interview shall normally be recorded in a format which is capable of affirmation by way of signature unless circumstances – such as those set out in Rule 112 - dictate otherwise. When Rule 112 indeed applies, as with an interviewee subject to Article 55(2), then the interview will be audio or video recorded. The fact that an interview conducted under Rule 111 has to be transcribed (i.e. presented in written format) is implicit from the fact that should the audio/video procedure set out in Rule 112 be not feasible² – then recourse is to be made to the procedure set out in Rule 111. The default procedure set out in Rule 111, as a matter of logic, has to oblige the written transcription of interview otherwise the evidence in question would not be recorded in any format at all!

7. The learned Single Judge, so it is submitted, could not have intended that the Prosecution should deviate from the aforementioned legislative regime – namely the basic duty to provide a written record of a witness's evidence.³ The learned

² Rule 112(2).

³ Even when the provisions of Rule 112 are applied and an interview is audio/video recorded – a written transcript is still, as a matter of course, prepared, c.f.; Rule 112(1)(e).

Single Judge, so it is also argued, could not have intended that Mr. Mbarushimana should be deprived of witness "statements" or interviews transcribed into the languages in which she had ruled that he was entitled to receive them (ie. Kinyarwanda or French).

8. The Prosecution was ordered by the Single Judge to provide missing French translations by 1 June 2011 – a deadline which remained unaffected by the decision postponing the confirmation hearing.⁴ To compound matters, the Prosecution failed to abide by its very own undertaking to provide "in due course" Kinyarwanda transcripts of those Kinyarwanda/English interviews for which purely English transcripts and audio files were disclosed.

9. The Defence, it should be stressed, does not raise a mere procedural trifle. The lack of written transcripts has severely prejudiced the ability of Counsel and his client to prepare the Defence case. While Mr. Mbarushimana fully understands the Kinyarwanda elements of the audio files, he has difficulty in deciphering the language employed by the anglophone investigators and, thus, no effective means of verifying whether the questions posed have been accurately translated and presented to the witness. Furthermore, Mr. Mbarushimana has had no technical way of indicating to Counsel where the latter should be focusing his attention (by reference to a written transcript in French – shared by Counsel and client alike). Put more clearly, were Mr. Mbarushimana to have referred to a time stamp on an audio file, Counsel would not have been able to find such in the English transcript nor have understood it in its Kinyarwanda original. Counsel and client should, as a matter of principle, be able to work from unified media and failure to ensure such constitutes a breach of Article 67(1)(b) of the Rome Statute.

10. Conversely, and additionally, although supplied with transcripts of interviews conducted simultaneously in Kinyarwanda and English, the Defence has, nevertheless, been denied the associated audio files. Mr. Mbarushimana thus

⁴ ICC-01/04-01/10-207.

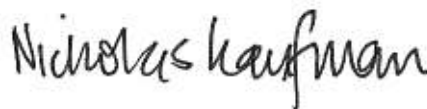
lacks, once again, the ability fully to understand the transcribed questions of the investigator (which should have been translated into French) and, subsequently, to verify the accuracy of the translation to Kinyarwanda performed by the interpreter by way of comparison with the audio file.

11. To conclude; the above detailed circumstances demonstrate that the Prosecution has adopted a fairly erratic approach to the format in which it has disclosed the interviews it conducted with the ex-FDLR soldiers. The above detailed circumstances further demonstrate that the Prosecution, in seeking to minimize the expenditure of time and effort involved in complying with the Single Judge's order, has, with respect, breached that same order and, in the process, prejudiced Mr. Mbarushimana's right to prepare adequately for the confirmation hearing.

Relief Sought

12. For the purposes of the confirmation hearing, the learned Pre-Trial Chamber is respectfully requested to order as follows:

- (i) to deny the Prosecution the use of all witness interviews, as incriminating evidence, which have not been supplied to the Defence by way of written transcript prepared in Kinyarwanda or French (i.e. have been supplied by way of audio file alone);
- (ii) to deny the Prosecution the use of all witness interviews, as incriminating evidence, for which English/Kinyarwanda transcripts have been supplied yet **without** their associated audio files.



Nicholas Kaufman

Counsel for Callixte Mbarushimana

The Hague, the Netherlands
Sunday, August 07, 2011