



Original: **English**

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

Date: **19/08/2011**

PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, 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

Third Defence request for interim release

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. Yaël Vias-Gvirsman

Legal Representatives of the Victims

Mr Hervé Diakise
 Mr Mayombo Kassongo
 Mr Ghislain Mabanga

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 16 August 2011, the Pre-Trial Chamber rendered its *Decision on "Defence request to deny the use of certain incriminating evidence at the confirmation hearing" and postponement of confirmation hearing* ("the Postponement Decision").¹

2. In the operative part of the Postponement Decision, the Pre-Trial Chamber found that the Prosecution had not complied with its earlier "*Decision on the 'Prosecution's request for the assessment of the English proficiency of Callixte Mbarushimana*" ("the Language Proficiency Decision").² Specifically, the Pre-Trial Chamber found that the Prosecution "had an obligation in this case to create Kinyarwanda or French transcripts of all [i]nterviews currently transcribed in English only". Moreover, the Pre-Trial Chamber held that "by promising to devote the Prosecution's resources to disclose Kinyarwanda transcripts "in due course", the Prosecutor's actions evinced an understanding that this information was necessary for the preparation of the Defence". Accordingly, the Pre-Trial Chamber concluded that the Prosecutor had failed "to satisfy his disclosure obligations by turning over significant portions of his evidence in a way which is unmanageable for the Defence".

3. Apportioning its criticism in an even-handed manner, the Pre-Trial Chamber did not spare the Defence censure. Notwithstanding, the Defence makes the following observations with respect to the timing of its request for relief in so far as it relates to the application to deny the use of the English only transcripts ("the Defence Request"). Firstly, the timing of the Defence Request should be seen in the context of the best interests of Mr. Mbarushimana; interests which do not, it is submitted, require the Defence to assist the Prosecution to comply with Court orders so that it is in a better position "to

¹ ICC-01/04-01/10-378

² ICC-01/04-01/10-145.

present its case as it intended" (*i.e.* to convict him and sentence him to a substantial period of imprisonment).

4. Secondly, the Defence strenuously denies that the Prosecutor's intent not to produce Kinyarwanda transcripts was "abundantly clear" to it "as early as 28 June 2011". The Defence reiterates that the Pre-Trial Chamber specifically found that the Prosecutor had given the Defence "a reasonable expectation that a "unified media" would be forthcoming before the confirmation hearing" by assuring that the "translated transcripts would be delivered to the Defence in due course". Indeed, the Defence asserts that, as of 28 June 2011, it had no reason to believe that the Prosecution would fail to abide by its undertaking to communicate the Kinyarwanda transcripts it had promised and, what is more, to do so by the last date on which the Prosecution was permitted to effect pre-confirmation disclosure; *i.e.*, 15 days before 17 August 2011 on 2 August 2011. The promise to communicate such Kinyarwanda transcripts was never explicitly withdrawn.

5. In the circumstances, the Defence believed that the 15 days prior to the confirmation hearing was more than adequate time for it to assimilate the impact³ of the outstanding materials owed to it by the Prosecution – something which has now been endorsed by the Pre-Trial Chamber in that it has, similarly, ordered that the same Kinyarwanda transcripts (or French summaries thereof) be delivered to the Defence 15 days before the rescheduled confirmation hearing. For this reason, therefore, the Defence refrained from petitioning the Pre-Trial Chamber before the expiry of the Prosecution's disclosure deadline under Rule 121(5) of the Rules of Procedure and Evidence.

³ Counsel has read all the interviews with which he has been provided and, during the confirmation hearing, will refer to each and every one of them. The only thing lacking from the Defence's preparation was Mr. Mbarushimana's comments on the quality of the interpretation. Two weeks therefore was more than sufficient time to finalise preparations for the confirmation hearing.

6. When disclosure of the Kinyarwanda transcripts failed to transpire on 2 August 2011, the Defence acted diligently by filing the Defence Request within half a week.⁴

7. It should not be neglected that the Pre-Trial Chamber decided upon a postponement that Mr. Mbarushimana neither requested nor desired even if the Defence Request were to have been rejected. In postponing the confirmation hearing, therefore, the Pre-Trial Chamber made a concession for the benefit of the Prosecution team alone which, despite its failure to comply with the Language Proficiency Decision, was granted an extension of time “solely to facilitate the proper disclosure of the interviews”⁵ thereby allowing it to remedy its fault and to present its case as it intended.

8. This is not the first time that the Prosecution’s failure to comply with an order of the Chamber has compromised the preparation of the Defence. The Defence recalls the Pre-Trial Chamber’s decision to strike out the first draft of the document containing the charges where it commented as follows:

“CONSIDERING that the Prosecutor's blatant disregard for his obligations under the Statute and the Rules, as well as the orders of the Chamber, is a source of serious concern to the Single Judge;”⁶

The amended document containing the charges was filed on 25 July 2011 – 10 days after the original deadline with an accompanying list of evidence which was substantially different from the former in that a number of documents – on which the Defence had also intended to rely – had been removed.

⁴ The request was filed on a Sunday 7 August 2011 only after Counsel had consulted Mr. Mbarushimana on the best way to proceed.

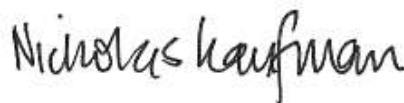
⁵ ICC-01/04-01/10-378 at para. 27.

⁶ ICC-01/04-01/10-306 at page 6.

9. The Defence realises that the Pre-Trial Chamber has already expressed its view on the timing of the Defence Request. Were the Defence, however, to have been permitted to make its submissions before the criticism which was rendered,⁷ it would have affirmed the explanations set out above in support of its decision to file the Defence Request after the expiry of the Rule 121(5) deadline.

10. In light of all the aforementioned, the Defence respectfully submits that the present delay to the start of the confirmation hearing has been caused by the Prosecution which, regardless of any criticism delivered by the Pre-Trial Chamber, still failed to comply with the Language Proficiency Decision.

11. The Defence submits that the delay caused is “inexcusable delay” as defined under Article 60(4) and, for this reason, respectfully requests that the Pre-Trial Chamber consider the release of Mr. Mbarushimana with or without conditions.



Nicholas Kaufman

Counsel for Callixte Mbarushimana

Jerusalem, Israel

Friday, August 19, 2011

⁷ The Defence notes the comments made concerning the “professionalism” of the parties. “Inexcusable delay” does not require that the Pre-Trial Chamber make a finding of non-professional behaviour. In so far as the Defence strenuously denies that it acted in an unprofessional manner (but was serving the best interests of its client with the approval of its client), it makes no similar allegation concerning the Prosecution which, while disagreeing with the Defence’s interpretation of the obligation to translate the audio files into French, nevertheless, agreed to supply Kinyarwanda transcripts thereof.