

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **11 May 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***

**Public**

**Decision on the “Defence Request for the Review of the Scope of Legal Assistance”**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

**The Office of the Prosecutor**

Mr. Luis Moreno- Ocampo

Ms. Fatou Bensouda

Mr. Anton Steynberg, Senior Trial  
Lawyer

**Legal Representatives of Victims**

**Counsel for the Defence**

Mr. Nicholas Kaufman

Ms. Yael Vias-Gvirsman

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms. Silvana Arbia

**Deputy Registrar**

Mr. Didier Preira

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Defence Support Section**  
Prof. Dr. Esteban Perlata-Losilla

I, Judge Sanji Mmasenono Monageng, the Single Judge of Pre-Trial Chamber I of the International Criminal Court (“Chamber” and “Court” respectively) responsible for carrying out the functions of the Chamber in relation to the case of *The Prosecutor v. Callixte Mbarushimana*<sup>1</sup>, hereby render the following decision on the “Corrigendum to Request for the Review of the Scope of Legal Assistance” (“Defence Request”)<sup>2</sup>.

### **Procedural History**

1. On 27 February 2011, Counsel for the Defence applied to the Presidency requesting a review of the Registrar’s Decision on Legal Assistance<sup>3</sup>, which request was found to be inadmissible as it pertained to the scope of the legal assistance to be paid by the Court, a matter within the purview of the Pre-Trial Chamber<sup>4</sup>.
  
2. On 4 April 2011, the Defence filed before the Chamber its “Request for the Review of the Scope of Legal Assistance”,<sup>5</sup> and, on 5 April 2011, the corrigendum thereof,<sup>6</sup> wherein the Defence set out the following factual background:
  - (i) When Mr. Mbarushimana was arrested at his domicile in France on 11 October 2010, Counsel for the Defence immediately notified the Registrar of his representation of Mr. Mbarushimana and requested that assistance be provided by the Court in respect of this representation, which encompassed an application for interim release before the French authorities as well as general advice relating to proceedings before the Court;<sup>7</sup>

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<sup>1</sup> Oral Decision of the Chamber, 28 January 2011, ICC-01/04-01/10-T-1-ENG, p. 11.

<sup>2</sup> ICC-01/04-01/10-90-Conf-Exp-Corr.

<sup>3</sup> Request for Review of the Registrar’s Decision on Legal Assistance pursuant to Regulation 85(3) of the Regulations of the Court, ICC-RoC85-01/11-I-Conf-Exp.

<sup>4</sup> Decision on the “Request for Review of the Registrar’s Decision on Legal Assistance pursuant to Regulation 85(3) of the Regulations of the Court”, ICC-RoC85-01/11-2-Conf.

<sup>5</sup> ICC-01/04-01/10-90-Conf-Exp.

<sup>6</sup> Defence Request.

<sup>7</sup> *Ibid.*, para. 5.

- (ii) The Registrar rejected the Defence request as follows: « *Compte tenu du caractère prématuré du point à ce stade de l'affaire – qui est actuellement traitée devant les instances judiciaires françaises, nous n'estimons pas nécessaire de nous étendre sur ce sujet spécifique dans le cadre de la présente communication. Soyez toutefois rassuré que le Greffe examinera toute demande qui lui sera soumise en temps opportun.* »<sup>8</sup>
- (iii) When Mr. Mbarushimana was surrendered to the Court on 25 January 2011, Counsel for the Defence again wrote to the Registrar enquiring about his entitlement to legal assistance and received an email that afternoon stating that “once the Registry receives an application for legal aid from Mr. Mbarushimana, it will be processed and a decision issued by the Registrar as per the rules governing the legal aid system of the Court” and noting that “the legal aid system of the Court does not any foresee [sic] reimbursement of costs being met before a decision granting legal aid to a person;”<sup>9</sup>
- (iv) On 15 February 2011, the Registrar issued a decision finding Mr. Mbarushimana to be indigent and therefore eligible to receive full legal assistance paid by the Court pending the results of an enquiry into his financial situation;<sup>10</sup>
- (v) On 19 February 2011, Counsel for the Defence was informed by the Counsel Support Section of the Registry (CSS) that provisional legal aid would be paid from 26 January 2011, the date of submission of the Financial Information Form duly executed by Mr. Mbarushimana;<sup>11</sup>

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<sup>8</sup> *Ibid.*

<sup>9</sup> Defence Request, para. 7.

<sup>10</sup> Defence Request, para. 8.

<sup>11</sup> Defence Request, para. 9.

- (vi) On 22 March 2011, Counsel for the Defence requested the Registrar to reimburse the Legal Assistant of the Defence team for the cost of bi-annual trips to celebrate religious festivities with family;<sup>12</sup> and
- (vii) By email dated 24 March 2011, this request was refused by the Registrar on the basis that the expenses in question were of a “strictly personal nature and cannot be considered as “costs reasonably necessary [...] for an effective and efficient defence” as required by regulation 83 of the Regulations of the Court”.<sup>13</sup>
3. The Defence Request called on the Chamber, pursuant to regulation 83(4) of the Regulations of the Court (“Regulations”) to:
- (i) review the decision of the Registrar of 15 February 2011 that legal assistance be payable from 26 January 2011 (“First Decision”), the date the financial information form was executed by the suspect, 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 arrest warrant of the Court (“First Request”); and
- (ii) review the decision (contained in an email dated 24 March 2011) (“Second Decision”) refusing the reimbursement of travel expenses for biannual trips in order for the Defence team legal assistant to celebrate religious festivities with family and to order that the legal assistant be reimbursed for the travel costs that she will incur on a twice yearly basis (“Second Request”).<sup>14</sup>
4. On 5 April 2011, the Single Judge filed the “Decision requesting observations on the Defence’s ‘Request for the Review of the Scope of Legal Assistance’”,<sup>15</sup> wherein the

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<sup>12</sup> Defence Request, para. 11.

<sup>13</sup> ICC-01/04-01/10-90-Conf-Exp-Anx 4.

<sup>14</sup> Defence Request, para. 24

<sup>15</sup> ICC-01/04-01/10-92-Conf-Exp

Registrar was requested to submit observations on the Defence Request no later than 15 April 2011.

5. On 15 April 2011, the Registrar filed the “Observations of the Registrar on the “Corrigendum to Request for the Review of the Scope of Legal Assistance” (“Registrar’s Observations”),<sup>16</sup> dated 4 April 2011”, wherein the Registrar submitted that the Defence Request should be rejected.
6. The Registrar did not dispute the factual allegations set out in the Defence Request and her submissions differ slightly only in relation to the issue of how the suspect was informed of his entitlement to legal assistance. The Registrar submitted that Mr. Mbarushimana filed his application for legal assistance paid by the Court on 26 January 2011, “a day after he was surrendered to the custody of the Court where – in conformity with Court policy and practice – he met with CSS staff who promptly appraised [sic] him of his rights to request legal assistance paid by the Court”.<sup>17</sup>
7. In relation to the First Request, the Registrar submitted that “the right to receive legal assistance paid by the Court (legal aid) crystallizes only when two conditions are met: (1) 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”.<sup>18</sup> The Registrar went on to state that “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”.<sup>19</sup>
8. In relation to the Second Request, the Registrar submitted that the travel costs claimed for the legal assistant were of a purely personal nature and as such not

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<sup>16</sup> ICC-01/04-01/10-102-Conf-Exp

<sup>17</sup> Registrar’s Observations, para. 11.

<sup>18</sup> Registrar’s Observations, para. 8.

<sup>19</sup> Registrar’s Observations, para. 9.

reasonably necessary for an effective and efficient defence within the meaning of regulation 83(1) of the Regulations. The Registrar pointed out that payment of travel and daily subsistence allowances is generally reserved for counsel and associate counsel, it being assumed that legal assistants are based in The Hague on a full-time basis. The Registrar submitted that the use of the €4,000 monthly expenses allowance to cover the cost of private travel expenses would deplete the available budget contrary to the interests of the indigent client and that, on a wider scale, inclusion of such costs within the scheme for legal assistance would place “added and undue strain on a publically [sic] funded system aimed at providing crucial funding for legal representation of indigent suspects, accused persons and victims implicated in the Court’s proceedings”.<sup>20</sup> Finally, the Registrar noted that the salary of the legal assistant is more than sufficient to enable her to assume the costs of her own private travel expenses.

## **Analysis and Conclusions**

### **(i) First Request**

9. The suspect has the right, pursuant to article 67(1)(d) of the Rome Statute (“Statute”), to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment where the suspect lacks sufficient means to pay for it.
10. It is clear that the statutory framework of the Court explicitly provides for the appointment of Counsel to represent a suspect before their surrender to the Court. For example, rule 117(2) of the Rules of Procedure and Evidence (“Rules”) allows for the appointment of counsel to the suspect following arrest and during detention in the custodial State in order to assist with proceedings before the Court, while rule 117(3) of the Rules allows the subject of a warrant of arrest, prior to their

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<sup>20</sup> Registrar’s Observations, para 28.

surrender to the Court, to challenge whether such warrant was properly issued in accordance with article 58(1)(a) and (b) of the Statute.

11. Although rules 20 and 21 of the Rules and regulations 83-85 of the Regulations vest responsibility for the elaboration and management of the legal assistance scheme of the Court in the Registrar, such a scheme must be in compliance with the statutory framework of the Court and, in particular, with the rights of the suspect under article 67(1)(d) of the Statute. The overview of the legal aid system of the Court, provided by the Registrar in annex 2 of the Registrar's Observations, sets out the entitlement of a suspect to legal assistance paid by the Court before his surrender to the Court, in conformity with the provisions of the Statute and the Rules.
12. This overview makes it clear that legal assistance during the first phase of proceedings, from investigation to the first appearance before the Chamber, is payable at a lower rate than that applicable during the second phase of proceedings, from the initial appearance of the suspect to the first status conference before the Trial Chamber.<sup>21</sup> The legal aid system of the Court also provides that legal assistance shall not be payable by the Court in respect of applications for interim release brought, under article 59 of the Statute, in national jurisdictions before the surrender of the suspect to the Court.<sup>22</sup>
13. The potential right of a suspect to legal assistance paid by the Court prior to their initial appearance before the Court is not disputed by the Registrar, who submitted that the inference in the Defence Request that the First Decision is "based on the conviction that there is no role for ICC appointed counsel in legal proceedings prior to surrender"<sup>23</sup> is mistaken, the true rationale for the First Decision being that the legal aid framework "does not allow for legal aid payments to be paid retroactively to the period before a request for legal aid has been submitted"<sup>24</sup>.

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<sup>21</sup> ICC-01/04-01/10-102-Conf-Exp-Anx2, page 2.

<sup>22</sup> See Report on the operation of the Court's legal aid system and proposals for its amendment, ICC-ASP/6/4.

<sup>23</sup> Registrar's Observations, para. 16.

<sup>24</sup> *Ibid.*



14. However, in circumstances where the Registrar: (i) deterred Counsel for the Defence from making an application for legal assistance paid by the Court upon his client's arrest; (ii) failed to provide Mr. Mbarushimana with the relevant application form until 25 January 2011, being the date of his surrender to the Court; and (iii) subsequently refused to make a retroactive payment to cover the time before the application for legal assistance was submitted; the suspect has effectively been deprived of his right to make an application for, and to receive if found to be indigent, legal assistance paid by the Court from the time of his arrest to the time of his surrender to the Court. This situation is incompatible with the explicit provisions of the Statute and Rules as outlined above.<sup>25</sup>
15. Moreover, the Registrar fails to identify any specific provision which would support her contention that legal aid payments may not be paid retroactively to the period before a request for legal aid has been submitted.
16. In the view of the Single Judge, there is no provision in the legal assistance scheme or in the statutory framework of the Court which would operate to preclude the retroactive payment of legal assistance to a time before an application for legal assistance was made in the circumstances hereinbefore outlined. In this regard, it should be reiterated that the right of the suspect to legal assistance paid by the Court where he lacks sufficient means to pay for it himself emanates from article 67(1)(d) and that the decision of the Registrar as to the indigence of the suspect and his entitlement to legal assistance is merely declaratory of the fact that the requisite conditions for the right to paid legal assistance are satisfied and does not *per se* give rise to or create the right in question.
17. During the period from the arrest of Mr. Mbarushimana to his surrender to the Court, the Defence Counsel made a number of interventions before the Court on behalf of his client, including a request for an order to preserve the impartiality of

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<sup>25</sup> Paras. 13-14.

the proceedings<sup>26</sup>, a request for disclosure<sup>27</sup> and a challenge to the validity of the arrest warrant.<sup>28</sup> Counsel for the Defence also submitted that he “engaged in extensive *inter partes* correspondence with the Office of the Prosecutor on matters relating to disclosure”.<sup>29</sup> Therefore, Counsel for the Defence was providing an effective and efficient defence, within the meaning of regulation 83(1) of the Regulations, in proceedings before the Court from the time of Mr. Mbarushimana’s arrest, for which legal assistance must be paid in line with the legal assistance scheme of the Court once a final determination as to the indigence or otherwise of Mr. Mbarushimana has been made by the Registrar.

### (ii) Second Request

18. The Single Judge notes regulation 83(1) of the Regulations, in accordance with which “legal assistance paid by the Court shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence”. The Second Request, as articulated by Counsel for the Defence, posits the theory that “the performance of an *“effective and efficient defence”* is wholly dependent on the personal welfare of those charged with executing it” and that “there is no reason why a distinction should be drawn between the reimbursement of Counsel’s travel expenses to the seat of the Court [...] and those of a legal assistant”.<sup>30</sup>

19. As outlined above,<sup>31</sup> the Registrar’s Observations sets out a valid basis for distinguishing between travel expenses to the seat of the Court for Counsel, on the one hand, and legal assistants, on the other.<sup>32</sup> In the view of the Single Judge, no link can be found between payment of travel expenses for trips of a personal nature for a legal assistant whose remuneration is more than sufficient to cover the cost of such trips and the provision of an effective and efficient defence, such that would

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<sup>26</sup> ICC-01/04-01/10-14.

<sup>27</sup> ICC-01/04-01/10-29.

<sup>28</sup> ICC-01/04-01/10-32.

<sup>29</sup> Defence Request, para. 15.

<sup>30</sup> Defence Request, para. 21.

<sup>31</sup> Para. 7.

<sup>32</sup> Registrar’s Observations, para. 25.

justify the payment of personal travel expenses out of a fund established for the provision of legal representation to indigent suspects, accused persons and victims.

### Classification

20. The Single Judge notes that regulation 8(c) of the Regulations of the Court requires publication on the website of the Court of all “decisions and orders of the Court and other particulars of each case brought before the Court as described in rule 15”. The reason given in the Defence Request for its classification as confidential *ex parte* was that the Presidency, when the matter was initially raised before it, had requested that the Registrar comment on whether she objected to the publication of the First Decision. This reason is no longer valid in light of the Registrar’s Observations which state that she has no objections to her observations being reclassified as public,<sup>33</sup> and the “Observations of the Registrar following the Presidency’s Order as contained in the “Decision on Request for Review of the Registrar’s Decision on Legal Assistance pursuant to Regulation 83(5) of the Regulation [sic] of the Court” dated on 31 March 2011”, filed on 21 April 2011,<sup>34</sup> wherein the Registrar states that she has no objections to the First Decision being rendered public.
21. The Registrar suggests that it would be advisable, in order to prevent any undue prejudice to ICC staff, to redact the contact details and related information of such staff as contained in the annexes. The Single Judge agrees that it is necessary for the contact details of individuals to be redacted from the annexes to both the Defence Request and the Registrar’s Observations.

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<sup>33</sup> Registrar’s Observations, para. 36.

<sup>34</sup> ICC-RoC85-01/11-3-Conf.

**FOR THESE REASONS,**

**DECIDE** to reclassify the Defence Request (ICC-01/04-01/10-90-Conf-Exp and ICC-01/04-01/10-90-Conf-Exp-Corr), as well as Annex 1 (ICC-01/04-01/10-90-Conf-Exp-Anx1), Annex 2 (ICC-01/04-01/10-90-Conf-Exp-Anx2) and Annex 3 (ICC-01/04-01/10-90-Conf-Exp-Anx3) thereto, and the Registrar's Observations (ICC-01/04-01/10-102-Conf-Exp), as well as Annex 2 (ICC-01/04-01/10-102-Conf-Exp-Anx2) thereto, as public documents;

**ORDER** the Defence Counsel to file a public redacted version of Annex 4 to the Defence Request (ICC-01/04-01/10-90-Conf-Exp-Anx4) with the contact details of Defence Counsel redacted therefrom by 13 May 2011 at the latest;

**ORDER** the Registrar to file public redacted versions of Annex 1 (ICC-01/04-01/10-102-Conf-Exp-Anx1), Annex 3 (ICC-01/04-01/10-102-Conf-Exp-Anx3), Annex 4 (ICC-01/04-01/10-102-Conf-Exp-Anx4) and Annex 5 (ICC-01/04-01/10-102-Conf-Exp-Anx5) to the Registrar's Observations with the contact details of all individuals redacted therefrom by 13 May 2011 at the latest;

**GRANT** that part of the First Request in relation to payment of legal assistance from the date of Mr. Mbarushimana's arrest pursuant to the arrest warrant issued by the Court;

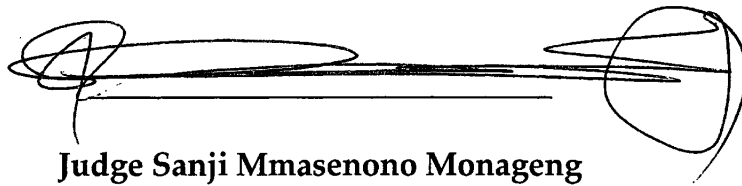
**REJECT** that part of the First Request that claims that such assistance should be payable under its current terms and conditions;

**REJECT** the Second Request in relation to the travel expenses of the Defence team legal assistant; and

**ORDER** the Registrar to make legal assistance payable to Mr. Mbarushimana, from the date of his arrest to 26 January 2011, the date when legal assistance became payable, at the rate applicable to the Pre-Trial phase of the case from investigation to the initial

appearance, upon a final determination by the Registrar that Mr. Mbarushimana was indigent at the relevant time.

Done in English and French, the English version being authoritative.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a solid horizontal line.

**Judge Sanji Mmasenono Monageng**

**Single Judge**

Dated this Wednesday, 11 May 2011

At The Hague, The Netherlands