

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 12 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 "Prosecution's request for the assessment of the English
proficiency of Callixte Mbarushimana"**

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

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

Registrar

Ms. Silvana Arbia

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section Other**

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*;¹

NOTING the “Decision on issues relating to disclosure”², issued by the Chamber on 30 March 2011 (“Disclosure Decision”), which imposed, pursuant to rule 121(3) and rule 76(1) of the Rules of Procedure and Evidence (“Rules”), the following deadlines for disclosure on the Prosecutor:

- (i) 23 May 2011, for the disclosure to the Defence of the names and statements of witnesses on which the Prosecutor intends to rely at the confirmation of charges hearing, in original and in a language which Mr. Mbarushimana fully understands and speaks, and
- (ii) 1 June 2011, for the Prosecutor to file in the record of the case, in a language which Mr. Mbarushimana fully understands and speaks, the Document Containing the Charges and the List of Evidence;

NOTING the “Prosecution’s request for the assessment of the English proficiency of Callixte Mbarushimana”³, filed on 28 April 2011 (“Prosecution Request”), whereby the Prosecutor requests the Chamber to direct the “Registry to conduct an assessment of whether Callixte Mbarushimana [...] fully understands and speaks the English language”;

NOTING that the Prosecutor submits that he recorded the statements of witnesses who do not speak a language of the Court in English and intends to present the Document Containing the Charges and the List of Evidence in English;

NOTING that the Prosecutor indicates that the suspect refused to accept disclosure of witness statements in English (when asked to do so by the Prosecutor on 14 April 2011) and requested instead that interviews with witnesses that were conducted in Kinyarwanda (Mr.

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

² ICC-01/04-01/10-87.

³ ICC-01/04-01/10-125.

Mbarushimana's mother tongue) be disclosed in English with the original Kinyarwanda transcripts and that interviews with and statements of witnesses which were completed in English be translated into and disclosed in French;

NOTING the Prosecutor's submission that Mr. Mbarushimana is completely fluent in English, an assertion which the Prosecutor supports by reference to a number of recorded interviews with the suspect⁴, and that the requirement to translate these documents into French for the benefit of the suspect would "shorten the already tight deadline for the preparation of the [Document Containing the Charges and the List of Evidence], since they will have to be finalized considerably earlier in order to allow sufficient time for translation"⁵;

NOTING the "Decision setting a time limit for the Defence's observations on the "Prosecution's request for the assessment of the English proficiency of Callixte Mbarushimana"⁶, issued on 2 May 2011;

NOTING the "Defence response to the 'Prosecution's request for the assessment of the English proficiency of Callixte Mbarushimana'"⁷, filed on 3 May 2011, wherein the Defence submits that the Prosecution Request should be rejected as Mr. Mbarushimana's comprehension of the English language is "acquired and not instinctive" and that Mr. Mbarushimana would be severely handicapped if "forced to assimilate a huge quantity of English incriminating materials and witness transcripts in the month prior to confirmation"⁸;

NOTING articles 21, 50, 61 and 67(1)(a) and (f) of the Rome Statute ("Statute"), rules 121 and 76(3) of the Rules and regulation 40 of the Regulations of the Court ("Regulations");

⁴ ICC-01/04-01/10-125-Anx(3-7).

⁵ ICC-01/04-01/10-125, at para. 12.

⁶ ICC-01/04-01/10-128.

⁷ ICC-01/04-01/10-131.

⁸ Ibid, at para. 4.

CONSIDERING that, at the first appearance of Mr. Mbarushimana before the Chamber, the suspect indicated that he fully understands and speaks French⁹, one of the working languages of the Court;

CONSIDERING the Appeals Judgment of 27 May 2008¹⁰ in the case of *The Prosecutor v. Germain Katanga* ("Appeals Judgment"), which articulated the standard to be applied in determining whether the suspect "fully understands and speaks" a given language in the following terms:

"The subject of understanding is exclusively the accused. Thus, the Chamber must 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.[...]"

Given the addition of the word fully, and the drafting history, the standard must be high. Therefore, the language requested should be granted unless it is absolutely clear on the record that the person fully understands and speaks one of the working languages of the Court and is abusing his or her right under article 67 of the Statute. An accused fully understands and speaks a language when he or she is completely fluent in the language in ordinary, nontechnical conversation; it is not required that he or she has an understanding as if he or she were trained as a lawyer or judicial officer. If there is any doubt as to whether the person fully understands and speaks the language of the Court, the language being requested by the person should be accommodated. Ultimately, the Chamber in question is responsible for ensuring the fair trial of the accused."

CONSIDERING that the situation at hand differs from that addressed in the Appeals Judgment insofar as French, the language which Mr. Mbarushimana claims to fully understand and speak, is one of the working languages of the Court set out in article 50(2) of the Statute and the Prosecutor is seeking to establish that Mr. Mbarushimana also fully understands and speaks English, the other working language of the Court and the language in which he has elected to conduct witness interviews and file the Document Containing the Charges and the List of Evidence, whereas the Appeals Judgment

⁹ ICC-01/04-01/10-T-1-Eng, p. 2, lines 22 -24.

¹⁰ Appeals Chamber, "Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled 'Decision on the Defence Request Concerning Languages'", ICC-01/04-01/07-522.

addressed the question as to whether the suspect fully understood and spoke a working language of the Court, French, rather than, as he asserted, Lingala;

CONSIDERING that the Single Judge is, nevertheless, of the view that the test set out in the Appeals Judgment should be applied, given that no distinction is drawn between the situation of the suspect who fully understands and speaks one of the working languages of the Court and the suspect who fully understands and speaks a 'third' language, in the sense that the Prosecutor may, in either eventuality, opt to conduct the case in either of the working languages of the Court under article 50(2) of the Statute, subject to the obligation to translate certain documents into a language which the suspect fully understands and speaks under article 67(1)(a) and (f) of the Statute and rule 76(3) of the Rules,;

CONSIDERING that, in accordance with the Appeals Judgment, the Single Judge must give credence to Mr. Mbarushimana's claim that French is the language that he fully understands and speaks, unless it is absolutely clear that he fully understands and speaks English, in the sense of being "completely fluent in the language in ordinary, non-technical conversation", and is abusing his right under article 67 of the Statute by requesting translation into French;

CONSIDERING that the Appeals Judgment also establishes that, in case of doubt, the language requested by the suspect must be accommodated;

CONSIDERING that neither the Prosecution Request nor the supporting material annexed to it make it absolutely clear that Mr. Mbarushimana fully understands and speaks English or raise a doubt as to the reliability of Mr. Mbarushimana's claim that his competence in English does not reach the requisite standard of complete fluency in the language in ordinary non-technical conversation such that the Single Judge would find it necessary to enter into an assessment of his proficiency in English;

CONSIDERING that the deadline for the submission of the detailed description of the charges together with a list of the evidence which the Prosecutor intends to present at the hearing of the confirmation of charges, pursuant to rule 121(3) of the Rules, has been

calculated to be 1 June 2011¹¹ and that the deadline of 23 May 2011, set in the Disclosure Decision for the disclosure of witness statements, was established pursuant to rule 76(1) of the Rules which requires that the defence be provided with the names of the prosecution witnesses and copies of their statements “sufficiently in advance to enable the adequate preparation of the defence”¹²;

CONSIDERING the difficulties which the Prosecutor asserts that he will face in producing French translations of the witness statements on which he intends to rely at the hearing of the confirmation of charges, where necessary, by 23 May 2011;

CONSIDERING that, in circumstances where disclosure of the original version of witness statements on which the Prosecutor intends to rely at the hearing of the confirmation of charges is effected by 23 May 2011, bearing in mind that the suspect’s lawyer will understand those in English and the suspect will understand those in Kinyarwanda, the adequate preparation of the Defence will not be compromised by an extension of the time limit set for the disclosure of French translations of the witness statements on which the Prosecutor intends to rely at the hearing of the confirmation of charges as long as such translations are disclosed no later than 30 days prior to the commencement of the said hearing, in compliance with rule 121(3) of the Rules;

FOR THESE REASONS,

REJECT the Prosecution Request for an assessment of whether Mr. Mbarushimana fully understands and speaks the English language;

ORDER the Prosecutor to disclose to the Defence, as soon as possible and no later than 23 May 2011, in accordance with the timetable set out in the Disclosure Decision, the names and statements of all witnesses on which the Prosecutor intends to rely at the confirmation

¹¹ ICC-01/04-01/10-87, paras.18-19.

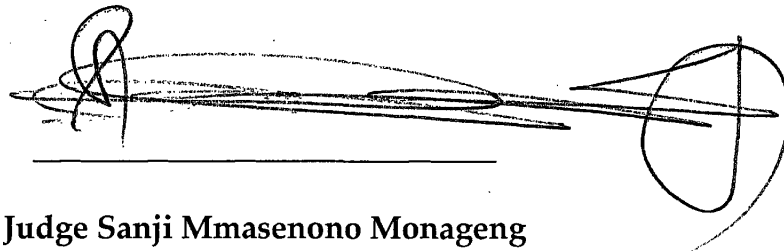
¹² ICC-01/04-01/10-87, para.20.

of charges hearing, in original, with authorised redactions pursuant to rule 81 of the Rules, if applicable;

ORDER the Prosecutor to disclose to the Defence, as soon as possible and no later than 1 June, the French translations, with authorised redactions pursuant to rule 81 of the Rules, if applicable, of all witness statements which have not been previously disclosed in Kinyarwanda; and

REMIND the Prosecutor of his obligation to file in the record of the case the Document Containing the Charges and the List of Evidence in a language that Mr. Mbarushimana fully understands and speaks no later than 1 June 2011, in accordance with the time limits provided for in rule 121(3) of the Rules and the timetable set out in the Disclosure Decision.

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

A handwritten signature in black ink, consisting of a stylized initial 'S' followed by a long horizontal line and a circular flourish at the end.

Judge Sanji Mmasenono Monageng

Single Judge

Dated this Thursday, 12 May 2011

At The Hague, The Netherlands