

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-RoC85-01/11

Date: 31 March 2011

THE PRESIDENCY

Before:

Judge Sang-Hyun Song, President

Judge Fatoumata Dembele Diarra, First Vice-President

Judge Hans-Peter Kaul, Second Vice-President

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF

THE PROSECUTOR

v. CALLIXTE MBARUSHIMANA

Confidential

**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”**

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

Counsel for the Defence
Mr Nicholas Kaufman

REGISTRY

Registrar
Ms Silvana Arbia

Deputy Registrar
Mr Didier Preira

Defence Support Section
Mr Esteban Peralta Losilla

Other
Pre-Trial Chamber I

The Presidency of the International Criminal Court (hereinafter “Court”) has before it the application of Mr Callixte Mbarushimana (hereinafter “applicant”) for judicial review of the decision of the Registrar on legal assistance paid by the Court.

The application is inadmissible.

I. PROCEDURAL HISTORY

1. On 11 October 2010, the applicant was arrested in France and subsequently taken into custody by French authorities.¹ That same day, his counsel, Mr Nicholas Kaufman (hereinafter “counsel”), was informed of this arrest and subsequently wrote to the Registry of the Court, indicating that the applicant expected counsel to provide legal advice in France and requesting that the applicant receive legal assistance from the Court and also that the Court effect counsel’s own travel arrangements to France in order to ensure the proper representation of the applicant.²
2. That same day, a staff member of the Registry rejected the aforementioned request in the following terms:

Je note que vous faites mention dans ce courriel à des considerations relatives à l’aide judiciaire de la Cour. 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 opportune. ... Prenant en considération le fait que vous référence ici à **une procédure qui se déroule au plan national** [emphasis in the original], je vous informe que M. Callixte Mbarushimana pourra, s’il le juge approprié, demander à bénéficier de l’aide judiciaire en France pour les besoins de toute la procédure devant les juridictions françaises, y compris pour toute demande de mise en liberté provisoire.³

3. On 25 January 2011, the applicant was surrendered to the custody of the Court.⁴
That same day, counsel wrote to the Registry to inquire whether he would be

¹ See Decision on issues relating to the publicity of proceedings in the case, ICC-01/04-01/10-7, 11 October 2010, paragraph 6.

² Request for Review of the Registrar’s Decision on Legal Assistance pursuant to Regulation 85(3) of the Regulations of the Court, ICC-RoC85-01/11-1-Conf-Exp, 27 February 2011, paragraph 5 (hereinafter “Application”).

³ Application, paragraph 5.

⁴ Order scheduling the first appearance of Mr Callixte Mbarushimana, ICC-01/04-01/10-43, 25 January 2011, page 3.

reimbursed for costs associated with representing the applicant, noting that Pre-Trial Chamber I had scheduled his initial appearance for 28 January 2011.⁵ That same day, counsel received a reply from the Deputy Registrar which indicated, *inter alia*, 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”.⁶

4. On 15 February 2011, the Registrar, considering that “un examen préliminaire de ces informations conformément aux dispositions de la norme 84.1 du Règlement de la Cour laisse penser, *a priori*, que le Demandeur ne dispose pas de ressources suffisantes pour prendre en charge tout ou partie des coûts de sa représentation légale devant la Cour”,⁷ determined that the applicant was provisionally entitled to legal assistance, subject to the results of further investigation of his financial situation (hereinafter “Impugned Decision”).⁸
5. On 19 February 2011, counsel requested information from the Registry as to when the Impugned Decision would take effect. That same day, counsel was informed that: “[t]he legal aid entitlements crystallize from the date of the Registrar’s decision dated 15 February 2011 onwards. Notwithstanding the above ... provisional legal aid will be paid for work undertaken from 26 January 2011, representing the date of the financial information form as duly executed by your client, to the Registrar’s decision of 15 February 2011”.⁹
6. On 27 February 2011, the applicant sought judicial review from the Presidency of the decision of the Registrar to award legal assistance commencing from the date of his surrender to the custody of the Court, rather than the date of his arrest in France (hereinafter “Application”).

II. RELIEF SOUGHT

7. The applicant requests the Presidency to rectify the Impugned Decision so that legal assistance be paid from the date of his arrest in France.¹⁰

⁵ Application, paragraph 6.

⁶ Application, paragraph 7.

⁷ ICC-RoC85-01/11-1-Conf-Exp-Anx2, page 3.

⁸ ICC-RoC85-01/11-1-Conf-Exp-Anx2, page 4.

⁹ Application, paragraph 9.

¹⁰ Application, paragraph 16.

III. SUBMISSIONS OF THE APPLICANT

8. The applicant submits that the obligations of counsel to represent him in the proceedings before the Court commenced on 12 October 2010, when counsel traveled to France in order to provide legal advice related to the proceedings before the Court.¹¹ Subsequently, counsel engaged in legal work, such as correspondence with the Office of the Prosecutor related to disclosure and several applications to the Pre-Trial Chamber.¹² The applicant submits that the representation of counsel prior to his surrender to the Court was reasonable.¹³
9. The applicant notes that the Registrar's decision not to award legal assistance commencing from the date of his arrest in France is apparently based on a conviction that there is no role for counsel in national proceedings prior to the surrender of a person before the Court.¹⁴ The applicant argues that this is inconsistent with regulation 77(1)(i) of the Regulations of the Registry, pursuant to which the Registrar shall invite an arresting state to inform her whether an arrested person has legal assistance and/or whether he or she requires that counsel be appointed by the Court.¹⁵ The applicant further argues that the legal texts of the Court do not specify that an award of legal assistance be contingent upon the surrender of a suspect to the Court and that the scenarios in which legal assistance is awarded include the provision of advice to potential suspects interviewed pursuant to article 55(2)(c) of the Rome Statute.¹⁶

IV. DETERMINATION BY THE PRESIDENCY

10. The admissibility of the Application has not been challenged by the Registrar, who expressly directed the applicant that it was possible to seek review of the Impugned Decision by the Presidency.¹⁷ Nonetheless, the Presidency must be satisfied that it has jurisdiction to decide upon the matter before it.
11. As the Presidency has previously noted in its Decision of 1 April 2010,¹⁸ legal assistance paid by the Court is governed, *inter alia*, by regulations 83, 84 and 85 of

¹¹ Application, paragraph 10.

¹² Application, paragraph 11.

¹³ Application, paragraph 12.

¹⁴ Application, paragraph 13.

¹⁵ Application, paragraph 13.

¹⁶ Application, paragraph 14.

¹⁷ Impugned Decision, page 4.

¹⁸ ICC-RoC85-01/09-7-Conf-Exp, paragraph 13.

the Regulations of the Court. Pursuant to these regulations, the Presidency and Chambers are each empowered to review distinct elements of the Registrar's administration of the legal assistance scheme.

12. Regulation 83 of the Regulations of the Court governs the general scope of legal assistance paid by the Court. Regulation 83(1) provides that "[l]egal assistance paid by the Court shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence, including the remuneration of counsel, his or her assistants as referred to in regulation 68 and staff, expenditure in relation to the gathering of evidence, administrative costs, translation and interpretation costs, travel costs and daily subsistence allowances".
13. Pursuant to regulation 83(4), decisions of the Registrar on the scope of legal assistance paid by the Court, as defined in regulation 83, may be reviewed by the relevant Chamber on application by the person receiving legal assistance.
14. Pursuant to regulations 84 and 85, the Presidency may hear challenges to the assessment of the Registrar on the payment of legal assistance, including interim, final and revised determinations on means and on provisional, final or revised determinations on the full or partial payment of legal assistance.
15. The Presidency considers that it does not have jurisdiction to decide upon the Application. The Application relates to whether it is reasonably necessary that legal costs incurred prior to surrender be covered by the legal assistance scheme, with this clearly being a question as to the reach or parameters of that scheme, to be reviewed pursuant to regulation 83(4) of the Regulations of the Court.
16. For these reasons, the Presidency considers that the Application is properly characterised as pertaining to the *scope* of legal assistance paid by the Court and therefore its review is within the purview of the relevant Chamber.

V. CONFIDENTIALITY

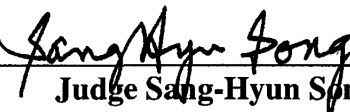
17. Although the Application relates generally to the financial situation of the applicant,¹⁹ it does not contain any specific details about his financial situation. Moreover, the issues raised in the Application and determined in this current decision may be of broader interest, both to other defence counsel before the Court and to the public. Considering, therefore, that there appears to be no *prima facie* reason to justify maintaining the confidential status of this decision and the

¹⁹ Application, paragraph 15.

confidential *ex parte* status of the Application,²⁰ the applicant is ordered to indicate and provide reasons for what information, if any, in this decision, the Application and its second annex, should remain confidential by 4pm on 21 April 2011. The Registrar is ordered to indicate and provide reasons for what information, if any, in the second annex to the Application, should remain confidential by 4pm on 21 April 2011. The Presidency may thereafter make a determination on reclassification.

The Application is inadmissible.

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



Judge Sang-Hyun Song
President

Dated this 31 March 2011

At The Hague, The Netherlands

²⁰ The Presidency is not considering any reclassification of the first annex to the Application.