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**International
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Court**

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Date: 14 December 2017

TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Chang-ho Chung

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public

Prosecution response to the Defence request for the Prosecution final trial brief to be provided in Kinyarwanda before the submission of the Defence final trial brief

Source: Office of the Prosecutor

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

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Introduction

1. The Defence request for the Prosecution final trial brief to be provided in Kinyarwanda before the submission of the Defence final trial brief (“Defence Request”) should be rejected.¹
2. First, the Accused has no right to have the Prosecution final trial brief translated into “his mother tongue” or a language that he is “able to fully read and understand”² before the Defence submits its final trial brief or at any other time. None of the provisions of the Statute³ cited in the Defence Request establish any such right.
3. Second, the Defence Request rests on the assumption that the Chamber will order the Prosecution and Legal Representatives to file their final trial briefs before the Defence. However, the Chamber is yet to make any such determination. As proposed by the Prosecution during the 5 December 2017 Status Conference, the Parties and participants’ final trial briefs should be filed simultaneously. This is in accordance with the general practice at international tribunals and with the most recent relevant trial decision of this Court. It is also in line with the judicially recognised purpose of filing such briefs which is not for the parties and participants to respond to each other’s cases but, rather, to put forward each party and participant’s own view of the charges based on the admitted evidence. Thus, no translation is required.
4. Third, any assistance that the Accused can provide in relation to the final trial brief, which is a legal submission based on the evidence adduced during the proceedings, is necessarily limited to purely factual matters. Critically, all

¹ Email from Stéphane Bourgon to the Chamber, Prosecution and participants dated 12 December 2017 at 20:35.

² See Defence Request.

³ Rome Statute.

testimonial evidence has already been interpreted into Kinyarwanda or Swahili, as have portions of any documents or videos used during testimony. The Accused may also have already been allocated resources to employ a Kinyarwanda interpreter to assist with filings and other matters. It is fair to presume that the Accused and his team have already consulted on most, if not all, the testimony in the proceedings as well as on the items that have been admitted into evidence in this case. There is nothing more that requires translation in order for the Accused to provide input on factual matters for the purposes of the final trial brief.

5. Finally, granting the Defence Request would result in an unnecessary and significant delay in the proceedings. Should the Chamber deem, however, that the Accused is entitled to be informed of critical parts of the Prosecution final trial brief in Kinyarwanda, this should be done through the assistance of a competent Registry interpreter providing sight interpretation rather than by means of a translation. To the Prosecution's knowledge, the Defence already includes staff members who are fluent in Kinyarwanda and would be able to provide such assistance.

Procedural Background

6. On 28 November 2017, the Chamber issued an order scheduling a status conference on 8 December 2017.⁴ Among the issues listed by the Chamber on the agenda for the Status Conference was the "timeline for the submission of closing briefs and the presentation of the oral closing statements, and their respective expected length".⁵

⁴ ICC-01/04-02/06-2131.

⁵ ICC-01/04-02/06-2131, para. 2(c).

7. On 5 December 2017, the Chamber decided to hold the Status Conference that afternoon rather than on 8 December 2017.⁶
8. During the Status Conference, the Presiding Judge asked “whether there is any request relating to language or translation issues.”⁷ In response to this, the Prosecution requested that the Chamber not order that the Parties or the Legal Representatives file simultaneous translations of their closing briefs but that the Registry undertake any such translation following submission of the closing briefs.⁸ The Defence stated that there is a need for all of the transcripts to be corrected⁹ but made no mention of the need for any translation of the Prosecution final trial brief.
9. On 12 December 2017, the Defence submitted the Defence Request.
10. On 13 December 2017, the Chamber ordered that any responses to the Defence Request be provided by 14 December 2017 at 16:00.¹⁰

Prosecution’s Submissions

11. At the outset, the Prosecution notes that the Chamber has previously held that requests regarding substantive matters should be made by way of a filing rather than in an email to the Chamber.¹¹ Accordingly, the Prosecution provides its response to the Defence Request in this filing rather than *via* email.

⁶ ICC-01/04-02/06-T-257-CONF-ENG ET, p. 21, lns. 9-15 (open session).

⁷ ICC-01/04-02/06-T-258-ENG ET, p. 27, lns. 3-4 (open session).

⁸ ICC-01/04-02/06-T-258-ENG ET, p. 27, lns. 5-13 (open session).

⁹ ICC-01/04-02/06-T-258-ENG ET, p. 27, lns. 17-23 (open session).

¹⁰ Email from the Chamber to the Parties and participants dated 13 December 2017 at 12:26.

¹¹ See ICC-01/04-02/06-T-13-ENG ET, p. 5, lns. 5-10 (open session); See also ICC-01/04-02/06-T-104-CONF-ENG ET, p. 3, ln. 13 – p. 4, ln. 19 (open session).

I. The Accused has no right to have the Prosecution final brief translated

12. The Accused has no right to have the Prosecution final trial brief translated into “his mother tongue” or a language that he is “able to fully read and understand”¹² before the Defence submits its final trial brief or at any other time. None of the provisions of the Statute cited in the Defence Request establish any such right.

13. The only explicit reference in the Statute to an accused being entitled to information in a language which he or she fully understands and speaks concerns information relating to the nature, cause and content of the charge against him.¹³ This requirement is satisfied by the provision of the document containing the charges (“DCC”) in such a language.¹⁴

14. The DCC has been translated into Kinyarwanda so that the Accused can understand the charges against him.¹⁵ To the Prosecution’s knowledge, the Accused has not asked the Chamber to order that a Kinyarwanda translation of the Updated DCC be provided - a testament to the reality that the Accused is fully capable of contributing to his defence absent Kinyarwanda translations. There has been no change in the nature, cause and content of the charges against the Accused subsequent to the provision of the Updated DCC.

15. The only provision of the Rules¹⁶ which expressly imposes an obligation to provide the Defence with evidentiary materials in a language which the

¹² See Defence Request.

¹³ Article 67(1)(a) of the Statute. In *Lubanga* the Single Judge of Pre-Trial Chamber I noted jurisprudence of the European Court of Human Rights establishing that there is no requirement for written translation of all items of written evidence or official documents in the procedure and that “[t]he interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events”, ICC-01/04-01/06-268, p. 5, fn. 12 citing Case of *Kamasinski v. Austria* [ECHR] Application No. 9783/82, Judgement, 19 December 1989, para. 74.

¹⁴ See ICC-01/04-01/06-268, pp. 5-6.

¹⁵ See ICC-01/04-02/06-203-AnxC.

¹⁶ Rules of Procedure and Evidence.

accused understands and speaks is rule 76(3), which relates to the statements of Prosecution witnesses.¹⁷ This rule has been adhered to by providing translations of the Prosecution witness statements identified by the Defence.

16. The Court's regulatory framework does not require that any other specific document or information be provided to the Accused in a language that he understands and speaks. Article 67(1)(f) of the Statute does not grant the Accused an unfettered right to be provided with translations of material into a language that he fully understands and speaks. Rather, this provision entitles the Accused to the assistance of a competent interpreter and such translations *as are necessary to meet the requirements of fairness*. Rejecting the Defence Request would not violate this provision.

17. In *Nizeyimana*, when the Defence alleged that the Chamber erred, *inter alia*, by failing to require the Prosecution to file its closing brief in French, an ICTR Trial Chamber held that:

there is nothing in the Statute, the Rules or the jurisprudence that confers upon the accused a fundamental right to translation of the closing briefs into a language understood by the accused, particularly where, as in this case, the counsel for the accused are both entirely bilingual and have worked with the accused throughout trial receiving and filing applications in English. Similarly, there is nothing in the Statute, the Rules or the jurisprudence that requires the Chamber to order the Prosecution to file its closing brief in the French language.¹⁸

18. The ICTR Trial Chamber found that accused persons did not have a "general right to have the Prosecution briefs translated into a language understood by him or her"¹⁹ and that its decision to refrain from ordering the Prosecution to translate its brief in the language understood by the accused "does not

¹⁷ See ICC-01/04-01/06-268, pp. 4-5.

¹⁸ *Prosecutor v Nizeyimana*, ICTR-00-55C-T, Decision on Nizeyimana Defence Motion for Certification of the 19 August 2011 Scheduling Order, 14 September 2011, para. 15 (footnote omitted) ("*Nizeyimana* Decision").

¹⁹ *Nizeyimana* Decision, para. 13.

constitute an issue which infringes upon the Accused's right to a fair trial"²⁰ and would not significantly affect the fairness and expeditiousness of the trial.²¹

II. The purpose for which final trial briefs are filed means that no translation is required

19. The Defence Request assumes that the Chamber will order the Prosecution and Legal Representatives to file their final trial briefs before the Defence. This issue was discussed at length during the 5 December 2017 Status Conference and the Chamber has not issued its decision on this matter.

20. As set out by the Single Judge of Trial Chamber VII, echoing the ICTR Appeals Chamber, "the purpose of a closing brief is not to respond to the other party's closing brief but to express their own position regarding the charges and the evidence."²² In view of this purpose, the Accused and his Defence team do not need to read the Prosecution final brief in order to submit theirs, so no translation is required. Ordering the simultaneous filing of final briefs, as proposed by the Prosecution and Legal Representatives during the 5 December 2017 Status Conference, would reflect the purpose of filing final trial briefs and ensure the expeditiousness of proceedings.

III. The Accused is already in a position to provide assistance in relation to the final trial brief

21. The final trial brief is a legal submission based on the evidence adduced during the proceedings. The Prosecution final brief will certainly contain detailed legal argumentation, including concerning the applicable law for the crimes that the

²⁰ *Nizyimana* Decision, para. 14.

²¹ *Nizyimana* Decision, para. 17.

²² ICC-01/05-01/13-1552, para. 10, fn. 12 citing *Prosecutor v. Semanza*, ICTR-97-20-A, Appeal Judgement, 20 May 2005, para. 36.

Accused has been charged with and the relevant modes of liability. The Accused has no known legal background and could not reasonably be expected to advise his team on these and a number of other issues.

22. Any assistance that the Accused can provide in relation to such a brief is limited to purely evidentiary or factual matters. The Accused is already in a position to provide his views on such matters since all the testimonial evidence in this case as well as any documentary or video evidence used during the testimony of witnesses in these proceedings have been interpreted into Kinyarwanda or Swahili. Further, the Accused may have already been granted resources for a sight interpreter to assist with translation of filings and other documents into Kinyarwanda.²³ Accordingly, no further translation is required.
23. Moreover, the Accused and his team must be presumed to have already consulted on most, if not all, the testimonial evidence in this case, for example, in preparation for examination-in-chief and cross-examination, as well as on the items that have been admitted into evidence, for example when responding to the Prosecution's bar table motion and proposing items to be admitted through the Defence bar table motion. Importantly, the Accused and his Counsel were able to prepare fully for the Accused's testimony and review all admitted evidence as well as the 840 items included on the Defence list of items to be used during the Accused's examination-in-chief.
24. It would not be reasonable to require that the final trial brief be translated into the accused person's mother tongue when he can only offer limited input in response to such submissions. The Accused has a team of lawyers who are fully conversant in English and who have been filing and responding to legal

²³ The Defence has previously requested the Registrar for additional resources, *inter alia* to enable it to hire a Kinyarwanda interpreter/translator (*see* ICC-01/04-02/06-69-Conf-tENG, para. 56; *see also* ICC-01/04-02/06-T-13-ENG ET, p. 8, lns. 2-5 (open session)). It is unclear whether such resources have been made available.

submissions in English throughout the trial. The Prosecution also notes that, to its knowledge, the Accused's Defence team includes staff members who speak Kinyarwanda and whose responsibility it is to represent his interests.

IV. Requiring translation would unnecessarily significantly delay proceedings

25. Requiring that the Prosecution final trial brief be translated into Kinyarwanda before the Defence submits its final trial brief would cause an unnecessary, significant delay to the proceedings. The Court's Interpretation and Translation Section has previously estimated that providing draft translations of 1051 pages into Kinyarwanda would require between 35 and 42 weeks depending on the number of working days per week.²⁴ This means that a 500-page final brief would take between 17 and 21 weeks to translate.

26. A 4-5 month delay to the proceedings, in particular when the Defence has been able to respond to all other filings and orders submitted in English to date, cannot be justified. The Prosecution and the victims also have an interest in ensuring that the proceedings are conducted as expeditiously as possible. Indeed, Trial Chamber V(A) stated that "the concept of a fair trial must include the principle of expeditiousness of proceedings: not only for the accused, but also for the prosecution, the victims and the public—all of whom have an interest in bringing the litigation to an end."²⁵

27. Should the Chamber deem that the Accused is entitled to be informed of the content of the Prosecution final trial brief in Kinyarwanda this entitlement could adequately be satisfied by providing him access to a competent interpreter as provided in article 67(1)(f) of the Statute, rather than delaying the proceedings by requiring a translation of the brief. Assigning an interpreter to conduct a sight interpretation *only of the most critical parts* of the Prosecution

²⁴ See ICC-01/04-02/06-114, para. 8; ICC-01/04-02/06-115, para. 10.

²⁵ ICC-01/09-01/11-1776-Red, para. 19.

brief would ensure the expeditiousness of the proceedings. Depending on the current composition of the Defence team and their linguistic abilities, no additional staffing may be required.

28. In *Lubanga*, the Single Judge of Pre-Trial Chamber I ordered the Registrar to have permanently available and free of any cost, a French interpreter to assist Thomas Lubanga Dyilo and the Defence team with documents that were only available in English for the purpose of the confirmation hearing.²⁶
29. Should the Chamber determine that a translation of the brief rather than a sight interpretation is required, only the excerpts of the brief in response to which the Accused could reasonably be expected to contribute his views should be translated.²⁷
30. Finally, while the Defence has not specified which organ of the Court it expects to provide any translation of the Prosecution final brief, should the Chamber deem any such translation necessary, the Registry, rather than the Prosecution, should be tasked with providing it pursuant to regulations 39(3) and 40(2) of the Regulations of the Court and regulation 57 of the Regulations of the Registry.²⁸ The Prosecution will not have Kinyarwanda translation resources in 2018.

²⁶ ICC-01/04-01/06-268, p. 8.

²⁷ See ICC-01/04-02/06-115, para. 12.

²⁸ See ICC-01/05-01/08-2731, para. 30.

Conclusion

31. For the foregoing reasons, the Defence Request should be rejected.



Fatou Bensouda
Prosecutor

Dated this 14th day of December 2017
At The Hague, the Netherlands