

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 7 March 2012

THE APPEALS CHAMBER

Before: Judge Erkki Kourula, Presiding Judge
Judge Anita Ušacka
Judge Akua Kuenyehia
Judge Sang-Hyun Song
Judge Daniel David Ntanda Nsereko

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. Callixte MBARUSHIMANA***

Public document

Prosecution's Response to the Defence's "Requête pour la traduction de tout document essentiel à l'appel du Procureur contre la Décision de la Chambre Préliminaire" - ICC-01/04-01/10-488

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 Prosecution opposes the Defence application that the time limit for filing its response to the Prosecution's document in support of the appeal against the decision on the charges should only begin to run after the Prosecution's request for leave to appeal,¹ the decision granting it,² the Prosecution's document in support of the appeal³ and any additions to it are translated into French ("Defence Request"⁴).
2. The Prosecution submits that granting the Defence Request is not justified on the grounds of fairness. On the contrary, fairness to the Prosecution and the principle of expeditious proceedings require that it be dismissed.

Statement of facts

3. On 16 December 2011, Pre-Trial Chamber I issued the "Decision on the confirmation of charges" ("Confirmation Decision").⁵ The Prosecution filed its application for leave to appeal that decision ("ALA")⁶ on 27 December.
4. Following an application by the Defence,⁷ the Pre-Trial Chamber decided on 28 December that Defence need not respond to the ALA until it was notified of the French translation of the Confirmation Decision.⁸ The French version of

¹ ICC-01/04-01/10-480.

² ICC-01/04-01/10-487.

³ To be filed by 12 March 2012 pursuant to Regulation 65(4) of the Regulations of the Court.

⁴ ICC-01/04-01/10-488.

⁵ ICC-01/04-01/10-465-Conf.

⁶ ICC-01/01-01/10-480.

⁷ ICC-01/04-01/10-462.

⁸ ICC-01/04-01/10-481.

the Confirmation Decision was notified on 22 February 2012⁹ and the Defence responded to the ALA on 27 February.¹⁰

5. On 1 March the Pre-Trial Chamber granted the Prosecution leave to appeal the Confirmation Decision on three grounds.¹¹
6. The Defence filed the Defence Request on 5 March. It seeks an order for the prompt translation of the documents it considers essential to the appeal.¹² It also seeks an order that the time limit for its response to the Prosecution's document in support of the appeal will only begin to run when the French translations of the documents are available. The Defence Request appears to be based principally on the Suspect's own limited ability to speak and understand English, but reference is also made to the fact that Defence counsel are francophone.
7. On 5 March, the Prosecution applied for an extension of the page limit for the parties' documents in support of the appeal.¹³
8. On 6 March the Appeals Chamber ordered the Prosecution to respond to the Defence Request by 7 March at 16:00.¹⁴

Submissions

9. The Prosecution opposes the Defence Request. The requested variation of the time limit set by Regulation 65(5) of the Regulations of the Court for responses to documents in support of the appeal is not necessary to guarantee fairness in the present circumstances. It would, on the contrary, give an unfair advantage to the Defence and delay the proceedings unnecessarily.

⁹ ICC-01/04-01/10-465-Conf-tFRA.

¹⁰ ICC-01/04-01/10-486.

¹¹ ICC-01/04-01/10-487, page 16.

¹² See para. 1 above.

¹³ ICC-01/04-01/10-489.

¹⁴ ICC-01/04-01/10-491.

10. As a starting point, the Statute provides that the working languages of the Court shall be both English and French.¹⁵ Regulation 39(1) provides that all documents and materials filed with the Registry shall be in English or French unless otherwise provided in the legal texts or authorised by the Chamber or the Presidency. There is no provision in the basic texts of the Court authorising the Prosecution or the Defence to insist on its preference among the two working languages and require that documents and materials be made available in that preferred language before the party's time limit for response begins to run. Accordingly, Chambers have denied defence requests that deadlines run from the date the French translations of filings and decisions are notified.¹⁶

11. However, the Defence Request relies¹⁷ partly on the Pre-Trial Chamber's 28 December 2011 decision, which postponed the Defence response to the Prosecution's Application for Leave to Appeal until the Confirmation Decision and the Dissenting Opinion were translated into French.¹⁸ The 28 December 2011 decision, like similar decisions by other Chambers cited by Pre-Trial Chamber I,¹⁹ was limited to the Suspect's access to the specific decision – the lengthy Confirmation Decision, which addressed a range of factual and legal issues in detail. It was not intended to change the practice in this Court or to set a different requirement with respect to this Suspect's access to all pleadings, decisions, or other materials.²⁰ Thus, in the Prosecution's

¹⁵ Article 50(2).

¹⁶ ICC-01/04-01/06-268, p. 7; ICC-01/04-01/06-1125, para. 14; ICC-01/04-01/07-304, pp. 3 - 4.

¹⁷ Defence Request, paras. 6-8 and 19(ii).

¹⁸ ICC-01/04-01/10-481.

¹⁹ See ICC-01/04-01/10-481, footnote 10.

²⁰ To the extent that the Pre-Trial Chamber's 28 December decision (ICC-01/04-01/10-481, at p. 4, lines 10 - 14) relied on an earlier ruling by the Chamber (ICC-01/04-01/10-465-Conf) allowing the Defence's time limit to present any application for leave to appeal against the confirmation of charges to run from the notification of the French translation of the Confirmation Decision, the Prosecution notes that that earlier decision by the Pre-Chamber was completely silent on the reasons that led the Chamber to grant the Defence's application for the variation of the time limit. See ICC-01/04-01/10-465-Conf, para. 34 and page 152.

submission, the Pre-Trial Chamber's 28 December decision did not override Regulation 39(1) and the practice in this Court to date, nor was it either intended or reasonably deemed to be precedent or blanket justification for similar future requests.

12. In addition, there is no requirement that these particular documents be translated first into French for the benefit of the Suspect²¹ before the Defence should be expected to respond. The legal texts explicitly require the provision of certain key documents -- "the nature, cause and content of the charge" and "the statements of prosecution witnesses" -- to the Suspect "in a language which the accused fully understands and speaks".²² Nothing in the legal texts, however, requires the translation of filings in general, or an appeal brief in particular, into a language which the person fully understands and speaks, before the Defence time for response may begin to run.

13. Nor is such a need for access to translated filings apparent as an element of fundamental fairness. To the contrary, there is a noticeable distinction between evidence and the specific charges, which must be translated so that the person can knowingly assist in his defence, and legal arguments such as those here regarding issues certified for appeal, which fall primarily within the competence of counsel.²³

14. However, even if the Appeals Chamber were to find that the requirements of fairness did require the Suspect's understanding of the Prosecution's appeal brief in order to participate in the preparation of the Defence's response the Prosecution submits that this could adequately be satisfied by providing him

²¹ The Suspect's limited ability to speak and understand English appears to be the principal basis for the Request. The Pre-Trial Chamber gave credence to the Suspect's claim that French is the language which he fully understands and speaks. See ICC-01/04-01/10-145, page 6.

²² Article 67(1)(a) and Rule 76(3)

²³ As noted further in paragraph 16 below, the Suspects limited English has never previously prevented the Defence from responding timeously to a Prosecution filing prior to the confirmation decision.

access to a competent interpreter as provided for in Article 67(1)(f), rather than delaying the proceedings for an official translation.

15. Turning to the particulars of the Defence Request, the Prosecution notes that two of the three documents that the Defence wants translated into French before it need respond (namely the Application for Leave to Appeal and the decision of the Pre-Trial Chamber to grant leave to appeal explaining why the issues meet the criteria under article 82) have no independent bearing on the legal and factual issues before the Appeals Chamber. Therefore, those documents are not relevant, much less necessary, to the Suspect's ability to participate in the appeal proceedings except insofar as they state the issues certified for appeal.²⁴

16. As for the Prosecution's appeal brief, there is no difference in principle between this document and other filings submitted by the parties. While recognising the importance of the appeal in terms of its potential impact on the parties, it may also be argued that many of the English filings submitted by both parties during the course of pre-trial proceedings have similar potential impact and are thus equally important.²⁵ Furthermore, the Prosecution notes that all but one of the Prosecution filings in this case to date have been submitted in English,²⁶ and the Defence has never suggested prior to the change in counsel that it was unable to file or respond in a timely fashion because of the Suspect's language difficulty.

17. In short, in light of the ability to date of the Suspect to participate notwithstanding the English language filings and the absence of any statutory basis for this request, the Prosecution submits that the Suspect's preference

²⁴ These are restated in half a page in the decision granting leave to appeal. ICC-01/04-01/10-487, page 16.

²⁵ For instance filings dealing directly or indirectly with jurisdiction, admissibility, stay of prosecution which may result in the termination of proceedings, or filings dealing with interim release which affect a suspect's liberty.

²⁶ With the statutory exception to the document containing the charges.

that documents be translated first into French does not support the request to delay these proceedings. .

18. The Defence also states that the Defence counsel are francophone.²⁷ However, their filing is silent on whether this indicates a preference for working in French or an actual difficulty in working in English. In this regard, however, the Prosecution notes that the present Defence counsel has previously responded within the prescribed time limits to Prosecution applications filed in English.²⁸ The Prosecution also notes that it has on numerous occasions conducted disclosure meetings and corresponded in English with one member of the Defence team without any apparent difficulty.

19. Further, as Trial Chamber I and Pre-Trial Chamber I have previously pointed out, the Court *“is entitled to assume that the accused’s representatives, in accepting instructions in this case, have put procedures in place to enable them to deal with applications and filings within the stipulated time-limits of the provisions of the Rome Statute framework, regardless of whether the decision is in English or French”*,²⁹ and *“...it is the responsibility of permanent Counsel to compose the Defence team in a manner which will allow him to (i) properly be assisted in the presentation of the case before the Chamber...”*³⁰

20. Finally, Pursuant to Rule 156(5), appeals shall be heard expeditiously. Allowing the Defence to delay its response can impact substantially on the expeditiousness of proceedings.³¹ At the same time, granting the Defence Request would also be affirmatively unfair to the Prosecution, by allowing the Defence significant additional time within which to file its brief. Fairness includes the requirement that each party should be given a “genuine

²⁷ Defence Request, para. 2.

²⁸ See ICC-01/04-01/10-477, para. 7.

²⁹ ICC-01/04-01/06-1125, para. 16.

³⁰ ICC-01/04-01/07-304, page 5.

³¹ The translation of the documents requested may potentially take several weeks. This delay must also be seen against the background of the 8 week delay already occasioned by the translation of the confirmation decision.

opportunity to present its case - under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent [...]”.³²

Relief sought

21. The Prosecution requests the Chamber to reject the Defence Request.



Luis Moreno-Ocampo

Prosecutor

Dated this 7th day of March 2012

At The Hague, The Netherlands

³² ICC-01/04-135, para 38. See also, for instance, ICC-01/05-01/08-75, para. 14 and ICC-01/05-01/05-532, paras. 18 and 19.