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TRIAL CHAMBER I

Before: Judge Geoffrey Henderson, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR

v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ

Public

Prosecution's response to the Gbagbo Defence requests of 31 July 2015 (ICC-02/11-01/15-174)

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Introduction

1. The Office of the Prosecutor (“Prosecution”) responds to the Accused Laurent Gbagbo’s *“Requête en suspension des délais de réponse au mémoire préliminaire jusqu’à transmission de la traduction française du mémoire préliminaire déposé par le Procureur le 16 juillet 2015 (ICC-02/11-01/15-148-Conf-Anx2-Corr) et demande de report de la date de début du procès qui devra être fixée au moins 6 mois après la transmission de la traduction française de ce mémoire préliminaire”* (“two requests”).¹
2. The request for a postponement of the trial date should be rejected because translation of the pre-trial brief into French is not necessary to meet the requirements of fairness under article 67(1)(a) and (f) of the Rome Statute (“Statute”). This is because a pre-trial brief does not fall in the category of statutory documents serving to inform the accused of the “nature, cause and content of the charge”. Nevertheless, given the pre-trial brief’s length and extent of sourcing, the Prosecution does not oppose a reasonable extension of time for the Gbagbo Defence to file a response, should it wish to do so.

Procedural Background

3. On 16 May 2012, the Prosecution filed in the French language its Document containing the charges.² On 17 January 2013, the Prosecution filed its first amended Document containing the charges³ and on 13 January 2014 its second amended Document containing the charges,⁴ both in the French language. On 12 June 2014, the Pre-Trial Chamber confirmed the charges.⁵

¹ ICC-02/11-01/15-174.

² ICC-02/11-01/15-124.

³ ICC-02/11-01/11-357.

⁴ ICC-02/11-01/11-592.

⁵ ICC-02/11-01/11-656-Red. The French translation of the confirmation decision was made available on 18 July 2014.

4. On 7 May 2015, Trial Chamber I set the trial commencement date for 10 November 2015 to hear opening statements, with the presentation of evidence to begin in January 2016.⁶
5. On 16 July 2015, the Prosecution filed its pre-trial brief,⁷ following a request for extension of the page limit and a request for extension of the word limit.⁸ Both requests were unopposed by the Gbagbo Defence⁹ and granted by the Trial Chamber.¹⁰
6. On 20 July 2015, the Gbagbo Defence requested an urgent translation of the pre-trial brief into French, and was subsequently informed that the estimated completion date would be in October 2015.¹¹
7. On 31 July 2015, the Gbagbo Defence filed its two requests, that:
 - a. its time to file a response to the Prosecution's pre-trial brief run from the day it is provided with a French translation of that brief ("first request"); and
 - b. the trial commencement date be postponed until at least six months from the day it is provided with such a translation ("second request").¹²
8. On 5 August 2015, the Blé Goudé Defence filed its "Request for the Translation of the Pre-Trial Brief to French under article 67(1)(a)".¹³ In making this request, the Blé Goudé Defence made no submissions on whether the current timeframe for translation of the pre-trial brief should impact upon the proceedings.¹⁴

⁶ ICC-02/11-01/15-58, para.16.

⁷ ICC-02/11-01/15-148-Conf-Anx2-Corr.

⁸ ICC-02/11-01/15-120; Email communication from Prosecution to Trial Chamber on 14 July 2015 at 17:04.

⁹ Email communication from Gbagbo Defence to Trial Chamber on 8 July 2015 at 16:47; Email communication from Gbagbo Defence to Trial Chamber on 15 July 2015 at 11:00.

¹⁰ ICC-02/11-01/15-131; ICC-02/11-01/15-138.

¹¹ See ICC-02/11-01/15-174, paras.7 and 8.

¹² ICC-02/11-01/15-174, p.19.

¹³ ICC-02/11-01/15-176.

¹⁴ ICC-02/11-01/15-176, para.18(b).

Applicable Law and Jurisprudence

9. Under regulation 35 of the Regulations of the Court (“RoC”), the Trial Chamber may extend or reduce a time limit if good cause is shown, upon a participant’s application. This regulation would appear to ground the first request.
10. Under rule 132(1) of the Rules of Procedure and Evidence (“RPE”), the Trial Chamber may postpone the date of the trial, *inter alia*, at the request of the Defence. This rule would appear to ground the second request.
11. Article 67(1) of the Statute provides the accused with the following minimum guarantees in relation to the language of documents presented in the proceedings:

“(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks”;
and

“(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks”.

12. At the outset, the Prosecution notes that on 13 January 2014, Mr Gbagbo was served with a French version of the last Document containing the charges, which is *the* charging document under the Court’s basic documents.¹⁵ Thus, the right enshrined in article 67(1)(a) has already been amply satisfied in this case. The question, therefore, is whether article 67(1)(a) extends automatically to other documents related to the charges filed in the record of the case. The answer is a negative one. The Chambers of this Court have clarified that referred to above provisions do not, and contrary to what the Defence would appear to argue,¹⁶

¹⁵ See, *inter alia*, rule 121(3) of the RPE and regulation 52 of the RoC.

¹⁶ See ICC-02/11-01/15-174, para.22: “[S]’il est un principe de droit internationalement et généralement reconnu, c’est bien celui permettant à une personne accusée d’obtenir traduction des actes de la procédure menée à son encontre et par conséquent de se voir notifier les documents de la procédure dans une langue qu’elle comprend parfaitement.”

translate into a broad right to obtain translations of all procedural documents and evidential materials used in the context of proceedings.¹⁷ The wording “as are necessary to meet the requirements of fairness” means that the right to translation only arises in relation to “those documents which are essential for [the accused’s] proper preparation to face the charges presented by the Prosecutor which form the basis of the determination by the Chamber of those charges.”¹⁸

13. The question to be asked is whether, without the translation of a particular document into a language that the accused fully understands and speaks, the accused would be able to understand the nature, cause and content of the charge and thus to adequately defend himself or herself.¹⁹ Applying this test in the present case, the Appeals Chamber has already held that the translation of a document in support of appeal of the decision adjourning the confirmation proceedings “would not serve to inform Mr Gbagbo of the ‘nature, cause and content’ of the charge against him”, nor would be “[’]necessary to meet the requirements of fairness’ within the meaning of article 67 (1) (f) of the Statute.”²⁰

14. This approach is also consistent with the European Court of Human Rights’ (“ECHR”) interpretation of its equivalent article 6(3)(e) of the European Convention on Human Rights.²¹ In *Kamasinski v Austria*, the ECHR stated that:

“[P]aragraph 3 (e) (art. 6-3-e) does not go so far as to require a written translation of all items of written evidence or official documents in the procedure. The interpretation assistance provided should be such as to enable

¹⁷ ICC-01/05-01/13-177, para.6; ICC-01/04-01/06-268, pp.5-6.

¹⁸ ICC-01/05-01/08-307, para.12; *see also* ICC-01/05-01/13-177, para.6.

¹⁹ ICC-01/05-01/13-177, para.6. The right set out in article 67(1)(a) grants the accused the right to be informed in detail of the nature, cause and content of the charges against him, as opposed to granting him a general right to receive all documents from the Prosecution in a language he fully understands and speaks. The rights of the accused will be fully guaranteed if he is provided a French version of: (1) a detailed description of the charges; and (2) list of evidence provided for in rule 121(3); ICC-01/04-01/06-268, p.6. See also ICC-01/05-01/08-307, paras.12-14 and 16 which is also quoted in decision ICC-02/04-01/15-203, para.32. Article 67(1)(f) does not grant the accused the right to have all procedural documents and evidentiary materials disclosed by the Prosecution translated into a language that the accused fully understands and speaks. This interpretation is fully consistent with the case law of ECHR (ICC-01/04-01/07-304, p.4 – see decisions cited in fn.9; ICC-01/04-01/06-268, p.6 and ICC-01/04-01/07-127, para.41).

²⁰ ICC-02/11-01/11-489, para.12.

²¹ ICC-01/04-01/06-268, pp.5-6.

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.”²²

15. In addition to article 67(1), rule 76(3) of the RPE specifically provides that “(t)he statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks.” As noted by Pre-Trial Chamber I in the *Lubanga* case, this is the “only provision which expressly imposes upon the Prosecution a statutory obligation to provide the Defence with evidentiary materials in a language which [the accused] fully understands and speaks”.²³ The Prosecution notes that the filing of a pre-trial brief is not provided for in the Court’s statutory framework.

16. Finally, the jurisprudence of the *ad hoc* Tribunals is also instructive as to two aspects. Firstly, in deciding which categories of documents should be translated into a language understood by the accused, Chambers of both the ICTY and ICTR have held that the accused is entitled to translations of evidentiary materials relating to the determination of charges against him, yet not to other motions, briefs and other pleadings.²⁴ In the *Nizeyimana* case, ICTR Trial Chamber III rejected the Defence’s request for an extension of pre-trial time pending translation of the Prosecution’s pre-trial brief and other documents in light of, *inter alia*, the amount of disclosure produced by the Prosecution, the number of witness statements in the accused’s language, and the immediate availability of the amended indictment in the accused’s language.²⁵ Secondly, Chambers of the *ad hoc* Tribunals have emphasised the role of counsel in explaining the filings to

²² ECHR, *Kamasinski v Austria*, Appl. no. 9783/82, “Judgment”, 19 December 1989, para.74. See also ECHR, *Leudicke v Germany*, Appl. no. 6210/73; 7132/75, “Judgment”, 28 November 1978, para.48.

²³ ICC-01/04-01/06-268, pp.4-5. See also ICC-01/04-01/07-127, para.39.

²⁴ *Prosecutor v. Nizeyimana*, ICTR-2001-55C-PT, Decision on Ildephonse Nizeyimana’s motion concerning translation of amended indictment, pre-trial brief and 2 August 2010 List of Witnesses, 31 August 2010, para.4 (“*Nizeyimana* Decision”). See also *Prosecutor v. Delalić et al*, IT-96-21, Decision on Defence application for forwarding the documents in the language of the Accused, 25 September 1996, paras.6 and 10 (“*Delalić* Decision”); *Prosecutor v. Rukundo*, ICTR-2001-70-I, Decision on Defence motion for translation into French of Prosecution and procedural documents in the *Rukundo* case, 5 March 2004, para.7 (“*Rukundo* Decision”).

²⁵ *Nizeyimana* Decision, para.8.

their clients pending translation, where counsel understand the language of the filing.²⁶

Submissions

First request: extension of time for response to pre-trial brief

17. The Prosecution submits that a pre-trial brief does not fall in the category of statutory documents serving to inform the accused of the “nature, cause and content of the charge”.²⁷
18. In the absence of a French version of the pre-trial brief, Mr Gbagbo is still able to understand the nature, cause and content of the charges alleged. This is so because, as advanced above (*see* paragraphs 3 and 12), he has already been informed in detail of the nature, cause and content of the charges through the provision of charging documents in a language he fully understands. Mr Gbagbo has been provided with the following documents in French: an initial Document containing the charges,²⁸ amended Documents containing the charges,²⁹ Pre-Trial Chamber confirmation decisions in both his case and the *Blé Goudé* case,³⁰ a List of Witnesses to be called at trial,³¹ and a List of Evidence to be adduced at trial.³² The Prosecution has furthermore effected disclosure under rules 76 and 77 of the RPE, including of incriminating evidence to be relied upon at trial, on a rolling basis throughout the pre-trial stage since February 2012.³³ In conformity with rule 76(3),

²⁶ *Nizeyimana* Decision, paras.5 and 8; *Prosecutor v. Zigiranyirazo*, ICTR-73-PT, Decision on the Defence extremely urgent motion for translation of essential proceedings of the Prosecutor (pre-trial brief), 30 August 2005, para.5; *Delalic* Decision, para.23; *Rukundo* Decision, para.9.

²⁷ This position is consistent with the Lubanga Appeals Judgment, ICC-01/04-01/06-3121-Red A5, para.128. Chambers can consider auxiliary documents, such as the document containing the charges or pre-trial briefs, to determine whether the accused person was informed in sufficient detail of the charges. However, these documents are not envisaged in the ICC statutory framework nor are they conceived to replace those documents which according to the Statute provide such function.

²⁸ ICC-02/11-01/11-124.

²⁹ ICC-02/11-01/11-357 and ICC-02/11-01/11-592.

³⁰ ICC-02/11-01/11-656-Conf; ICC-02/11-02/11-186.

³¹ ICC-02/11-01/15-114-Conf-AnxA-Corr.

³² ICC-02/11-01/15-114-Conf-AnxB-Corr.

³³ *See* ICC-02/11-01/11-34. A limited number of items were not disclosed prior to the 30 June 2015 disclosure deadline and were the subject of requests for extension of time under regulation 35 (*see* ICC-02/11-01/15-115 and ICC-02/11-01/15-164) but alternatives in the form of audio recordings of the interview themselves and summaries of their content were exceptionally disclosed. These items are now all available for disclosure, and

any items of evidence in languages other than French were provided with French translations. It is therefore incorrect to assert that Mr Gbagbo is not duly informed of the charges against him, in the absence of a French version of the pre-trial brief.

19. The Prosecution's pre-trial brief does not expand upon the nature, cause and content of the charges, as set out in the charging documents. The pre-trial brief provides notice of the Prosecution's case theory, in the form of an analysis of the evidence to be presented at trial. It is not a charging document, and – as stated above in paragraph 15 – it is not provided for in the Court's statutory framework. It contains no novel facts or allegations, as it may not exceed the facts and circumstances as confirmed in the Confirmation Decision, based upon the Prosecution's Document containing the charges. As Trial Chamber I of the ICTY stated in *Limaj et al*:

“A Prosecution's pre-trial brief , a document made on the basis of the material disclosed to the Defence throughout the pre-trial proceedings and which summarises the issues of facts and law of the Prosecution's case, does not in principle rely on facts which have not been disclosed to the Defence. Its purpose is to allow the Defence to indicate in a Defence's pre-trial brief those allegations with which the accused and his defence take issue and those they can agree. Therefore the task of the Defence counsel to advise his client to the best of his or her ability, by using if need be an interpreter, is not insurmountable.”³⁴

20. Furthermore, it has not been the practice of this Court to date to require the filing of a pre-trial brief in a language understood by the accused. In the *Bemba* case, the French-speaking Accused was provided with a French version of the Documents containing the charges and the Decision confirming the charges in French, yet the

the Prosecution has attempted to disclose them to the Defence teams (see ICC-02/11-01/15-175 and ICC-02/11-01/15-180).

³⁴ *Prosecutor v. Limaj et al*, IT-03-66-PT, Decision on Defence's application for extension of time to file pre-trial briefs and order for filing of expert reports and notice under rule 94bis, 7 May 2004, para.6.

pre-trial brief was filed by the Prosecution in English only.³⁵ In the *Katanga* case, the Trial Chamber did not order the filing of a pre-trial brief at all.³⁶

21. The Prosecution submits that the question for consideration is not whether a French version of the pre-trial brief, considered in isolation, would allow the Accused to understand the details of the charges levelled against him. The question, in line with the law and jurisprudence outlined above, is whether such translation is necessary for the Accused to be informed of the nature, cause and content of the charges against him, and/or to meet the requirements of a fair trial under article 67(1)(a) and (f). In circumstances where Mr Gbagbo has been provided with the materials outlined at paragraph 18 above in the French language, the translation into French of a supplementary document summarising issues of fact and law yet not surpassing the materials already provided, would not afford to Mr Gbagbo any additional understanding of the charges against him. It is the charging documents, and in particular the evidence itself, that provides him in the greatest level of detail with the nature, cause and content of these charges.
22. Finally, the Prosecution notes the availability of other options to facilitate Mr Gbagbo's understanding of the pre-trial brief, prior to the provision of a translation in final form in October 2015. Firstly, in line with the jurisprudence outlined, Mr Gbagbo may be assisted by the members of his legal team who understand English.³⁷ Secondly, to the Prosecution's knowledge, a draft translation can always be provided by the Court's Language Services Section in advance of a fully revised translation.³⁸ Thirdly, it is also open to the Trial

³⁵ See ICC-01/05-01/08-595 and ICC-01/05-01/08-669.

³⁶ In the *Katanga* case, the Prosecution instead filed a Table of Incriminating Evidence. This was provided in English only, even though this was not a language understood by the Accused (see ICC-01/04-01/07-1174 and ICC-01/04-01/07-1643).

³⁷ See ICC-02/11-01/11-489, para.13. 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. Article 67(1)(f), if utilised correctly, should enable the Defence to have immediate access to working translations of decisions that will enable them to deal properly with decisions filed in English. See ICC-01/04-01/06-1125, para.16.

³⁸ This information can be directly confirmed with the Court's Language Services Section.

Chamber to order the Registrar to make a French interpreter permanently available to Mr Gbagbo to assist him to understand the pre-trial brief.³⁹

23. However, in light of the pre-trial brief's length and degree of sourcing, the Prosecution does not oppose a reasonable extension of time for the Defence to file a response, should it wish to do so.

Second request: postponement of trial date

24. The Prosecution filed its pre-trial brief on 16 July 2015 as ordered,⁴⁰ some four months before the Parties' opening statements, and some six months before the actual presentation of the evidence. Further and as stated above in paragraph 18, the evidence to be relied upon has been disclosed on a rolling basis since February 2012. The Prosecution does not oppose the request to have the pre-trial brief translated into French. However, in light of the nature of the pre-trial brief as outlined above, the provision of a French translation is not necessary to meet the requirements of fairness under article 67(1)(a) and (f), and the Defence request for a postponement of the trial date should be rejected.

³⁹ Such an order was made in ICC-01/04-01/07-127, p.18; ICC-01/04-01/07-304, p.7; and ICC-01/04-01/06-268, p.8.

⁴⁰ ICC-02/11-01/15-58, para.26.

Conclusion

25. For the foregoing reasons, the Prosecution requests that the Trial Chamber reject the Gbagbo Defence's request for a postponement of the trial date. Yet given the pre-trial brief's length and extent of sourcing, the Prosecution does not oppose a reasonable extension of time for the Gbagbo Defence to file a response, should it wish to do so.



Fatou Bensouda, Prosecutor

Dated this 14th day of August 2015

At The Hague, The Netherlands