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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, Presiding
Lee Gacuiga Muthoga
Seon Ki Park

Registrar: Adama Dieng

Date: 6 December 2011

THE PROSECUTOR
v.
Bernard MUNYAGISHARI

Case No. ICTR-2005-89-I

JUDICIAL RECORDS/ARCHIVES
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DECISION ON THE DEFENCE REQUESTS FOR TRANSLATION AND DELAYS

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INTRODUCTION

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1. On 9 November 2011, the Prosecution filed a request, pursuant to Rule 11 *bis* of the Rules of Evidence and Procedure, to transfer the case of *The Prosecutor v. Bernard Munyagishari*, ICTR Case No. 2005-89-I to the Republic of Rwanda ("11 *bis* Motion").¹ The 11 *bis* Motion is pending as is the Defence response, which was ordered to be submitted 30 days from the filing of the French translations of the 11 *bis* Motion and accompanying annexes.²
2. On 18 and 23 November 2011, the Republic of Rwanda ("Rwanda") and Kigali Bar Association ("KBA"), respectively, filed requests to make submissions as *amicus curiae* with respect to the 11 *bis* Motion (*Amicus Curiae* Requests).³ The *Amicus Curiae* Requests are pending and the Defence has not filed responses to either. Rather, on 28 November 2011, the Defence requested that it be allowed delays to file responses until translations by the Registry into French are provided ("Defence Motion").⁴ The Prosecution filed its opposition to the Defence Motion on 30 November 2011 ("Prosecution Response").⁵
3. On 1 December, the Defence submitted a further request, asking that all documents submitted in English by the Prosecution be translated and that the timing for responses start upon the receipt of such translations ("Second Defence Motion").⁶ The Prosecution opposes the motion in a filing of 5 December 2011 ("Second Prosecution Response").⁷
4. Given the considerable overlap of the Defence Motion and the Second Defence Motion, the Chamber shall decide them both here.

DISCUSSION

5. The Defence highlights that the Accused only understands French, one of the official languages of the Tribunal pursuant to Article 31 of the Statute of the Tribunal

¹ Prosecutor's Request for the Referral of the Case of Bernard Munyagishari to Rwanda pursuant to Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence, 9 November 2011, para. 96.

² Scheduling Order for Anticipated Rule 11 *bis* Motion (TC), 26 October 2011 ("Scheduling Order"), para. 12 and p. 5.

³ Request by the Republic of Rwanda for Leave to Make Submissions as *Amicus Curiae* in the Matter of the Prosecutor's Rule 11 *bis* Request for the Referral of the Case of Bernard Munyagishari to Rwanda, dated 18 November 2011 and transmitted on 21 November 2011; Request by the Kigali Bar Association for Leave to Make Submissions as *Amicus Curiae* in the Matter of the Prosecutor's Rule 11 *bis* Request for the Referral of the Case of Bernard Munyagishari to Rwanda, dated 20 November 2011 and filed 23 November 2011.

⁴ *Requête de la défense de Bernard Munyagishari aux fins de communication des traductions en application de l'Article 20 (4)(a) and 20 (4)(b) du Statut*, 28 November 2011 ("Defence Motion").

⁵ Prosecutor's Response to "*Requête de la défense de Bernard Munyagishari aux fins de communication des traductions en application de l'Article 20 (4)(a) and 20 (4)(b) du Statut*", 30 November 2011 ("Prosecution Response").

⁶ *Requête de la défense de Bernard Munyagishari aux fins de communication des traductions en application de l'Article 20 (4)(a) and 31 du Statut*, 1 December 2011 ("Second Defence Motion").

⁷ Prosecutor's Response to "*Requête de la défense de Bernard Munyagishari aux fins de communication des traductions en application de l'Article 20 (4)(a) and 31 du Statut*", 5 December 2011 ("Second Response").



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(the "Statute").⁸ It further argues that due to the Defence team's limitations in English, translation of English filings into French is necessary to guarantee the fundamental rights of the Accused enshrined in Article 20 (4) of the Statute and Rule 3 of the Rules of Procedure and Evidence (the "Rules").⁹ In its view, the Chamber's prior Scheduling Order recognised that French was the working language of the Defence team.¹⁰ Consequently, the time to respond to the *Amicus Curiae* Requests and all Prosecution filings should run from the time of their filing in (or translation into) French.¹¹

6. The Prosecution argues that the Defence misunderstands the requirements of Article 20 (4) (a) of the Statute, which does not require that the *Amicus Curiae* Requests be translated into a language understood by the Accused.¹² Furthermore, it submits that the Chamber's Scheduling Order did not recognise French as the working language of the Defence team. Rather, it allowed, on an exceptional basis, the Defence to respond to the 11 *bis* Motion and accompanying annexes from the time the filings have been translated from English into French in light of the importance of the issues raised.¹³ Allowing delays for translation of all documents filed by the Prosecution would cause unnecessary delay.¹⁴

7. With respect to the rights of the Accused to have the *Amicus Curiae* Requests or Prosecution filings generally translated into French, Article 31 of the Statute provides that the working languages of the Tribunal are English and French. Article 20 (4) (a) of the Statute guarantees the accused the right to be informed promptly of the nature and cause of the charges against him in a language which he understands. Article 20 (4) (b) of the Statute guarantees that an accused will have adequate time and facilities for the preparation his defence and to communicate with counsel of his choosing. Rules 3 (A) and 3 (B) of the Rules mirror the provisions of Article 20 (4) (a) of the Statute.¹⁵

8. These provisions have been interpreted to mean that an accused is entitled to translation of all documents which are necessary to ensure a fair trial – namely, documents that enable him to understand the case against him, and to defend himself by putting forward his own version of the events.¹⁶ Such documents have been consistently

⁸ Defence Motion, paras. 5, 9; Second Defence Motion, paras. 1-2.

⁹ Defence Motion, paras. 4-7, 10; Second Defence Motion, paras. 1, 6-7.

¹⁰ Defence Motion, para. 3; Second Defence Motion, para. 4. The Defence also argues that Defence Counsel is only obligated to speak one of the two working languages of the Tribunal. Second Defence Motion, para. 3.

¹¹ Defence Motion, paras. 4, 8, 10-11; Second Defence Motion, paras. 9-10.

¹² Prosecution Response, para. 9; Second Prosecution Response para. 10.

¹³ Prosecution Response, paras. 6-8; Second Prosecution Response paras. 7-9.

¹⁴ Prosecution Response, para. 10; Second Prosecution Response, paras. 3, 11.

¹⁵ As observed by the Defence Motion, Rule 3 (E) of the Rules places the onus on the Registry to make the "necessary arrangements for interpretation and translation of the working languages". Defence Motion, para. 9; Second Defence Motion, para. 2.

¹⁶ See *The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-T, Scheduling Order (TC), 19 August 2011 ("*Nizeyimana* Scheduling Order"), para. 9, citing *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-T, Decision on the Defence Request for Kinyarwanda Translations of all Documents (TC), 8 November 2004 ("*Kanyarukiga* Decision"), para. 4; *Prosecutor v. Mika Muhimana*, Case No. ICTR-95-I-B-I, Decision on the Defence Motion for the Translation of Prosecution and Procedural Documents into Kinyarwanda, the Language of the Accused, and into French, the Language of his Counsel (TC), 6 November 2001 ("*Muhimana* Decision"), paras. 22-23, 26 and 29; *The Prosecutor v.*



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identified as (1) the Indictment; (2) all evidentiary material which relates to the determination of the charges against the accused, including prior witness statements disclosed by the Prosecution under Rule 66 (A) (ii) of the Rules; and (3) decisions and orders by the Chamber.¹⁷

9. However documents that fall outside this requirement include (1) disclosed documents not presented at trial; (2) motions, briefs and other pleadings; (3) transcripts of proceedings; and (4) memoranda, correspondence and similar documents.¹⁸ In this regard, the Accused has no right to translation from English into French of the *Amicus Curiae* Requests or all Prosecution filings, and, in particular, motions generally.

10. The Chamber next considers the Defence arguments that the Defence team's working language is French, warranting the translation of all Prosecution documents into French. The Defence submits that the time for the Defence team to respond to filings should run from receipt of translation. As discussed previously, the Defence submits that the Chamber's Scheduling Order recognised that French was the working language of the Defence team.

11. The Defence's interpretation of the Scheduling Order reflects a fundamental misreading of it. The Scheduling Order highlights that Defence Counsel, although requiring translation, has worked in English.¹⁹ It further notes that his two Legal Assistants are bilingual, having excellent knowledge of English and French and having worked in both.²⁰ More importantly, the Scheduling Order expressly states that "[t]he Chamber anticipates that, in the future, the Defence team shall be able to respond to motions filed in English without having to wait for translation into French".²¹

Delalić et al., Case No. IT-96-21-T, Decision on Defence Application for Forwarding the Documents in the Language of the Accused (TC), 25 September 1996, para. 14.

¹⁷ *Nizeyimana* Scheduling Order, para. 9; *Kanyarukiga* Decision, para. 4; *Muhimana* Decision, paras. 22-23, 26 and 29; *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-I, Decision on Defence Request for Protection of Witnesses (TC), 25 August 2004 ("*Simba* Trial Decision"), para 1 (p. 2). The Defence's citation to the *Uwinkindi* Pre-Appeal decision is misplaced. See Second Defence Motion, para. 8 fn. 3 citing *Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-AR11bis, Decision on Request for Translation and Extension of Time (AC), 14 July 2011, para. 6. That decision, which is consistent with the above referenced jurisprudence, does not provide a categorical right for translations of motions into a language understood by the Accused.

¹⁸ *Nizeyimana* Scheduling Order, para. 9; *Kanyarukiga* Decision, para. 4; See also *Simba* Trial Decision, para. 1 (p. 2) (noting that there is no entitlement to have all documents in the case translated).

¹⁹ Scheduling Order, para. 12 fn. 24.

²⁰ Scheduling Order, para. 12 fn. 25. In this regard, the Chamber is of the view that the situation in the present case is different from that in *Muhimana*, where the Trial Chamber ordered translations of motions, briefs and other submissions into French for counsel. *Muhimana* Decision, para. 33. In that case, lead counsel could not read or write in English. *Muhimana* Decision, para. 31. While his co-counsel informed the Tribunal that his knowledge of English was good, he clarified that French was "his usual working language." *Muhimana* Decision, para. 31. Similarly, the Appeals Chamber decision in *Akayesu* to translate appellant briefs is inapposite. See *Jean-Paul Akayesu v. The Prosecutor*, ICTR-96-4-A, Order (for Translation of Appellant's Brief) (AC), 29 March 2001 ("*Akayesu* Appeal Decision"). In that case, the Appeals Chamber granted the Defence motion for translation from French into English, after having noted that two Judges spoke no French. *Akayesu* Appeal Decision, p. 2.

²¹ Scheduling Order, para. 12 fn. 26.



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12. Thus, the Scheduling Order created an exception, allowing translation of the 11 *bis* Motion and accompanying annexes into French in light of the fundamental implications of the 11 *bis* Motion.²² It did not recognise that French was the only working language of the Defence team (which would be contrary to the submissions of Defence Counsel as well as the Legal Assistants to the Registry).²³ Nor did the Scheduling Order create a categorical right to official Registry translation from English to French of future Prosecution filings – motions in particular – submitted in this proceeding.²⁴

13. Indeed, it is expected that legal staff within the Defence team, who among them have command of both official languages of the Tribunal, will cooperate in order to avoid unnecessary delays.²⁵ The central question is not – as the Defence has argued – whether members of the Defence team have sufficiently mastered English and French so as be able to act as interpreters.²⁶ Rather, the primary consideration is whether any member of the team can grasp the “essential elements” so that they may be “effectively conveyed ... without waiting for an official translation”.²⁷

14. Furthermore, Defence Counsel’s need for translation is not determinative.²⁸ The Appeals Chamber has considered the language abilities of supporting legal staff – not lead counsel alone – when determining whether delays for translation are appropriate to ensure the fairness of proceedings.²⁹

²² Scheduling Order, para. 12. See also *The Prosecutor v. Jean-Bosco Uwinkindi*, Case No. ICTR-2001-75-I, Decision on Defence Motion for Setting a Date for the Filing [of] a Response to the Prosecution’s (Rule 11 *bis*) Request for the Referral of the Case of Jean Uwinkindi to Rwanda and Request for Translation (TC), 8 December 2010, para. 20 (the Chamber considered that while Article 20 (4)(a) of the Statute did not require translation of the Prosecution’s Rule 11 *bis* motion, the ultimate decision was of “sufficient consequence” to warrant translation).

²³ In this regard, the Defence’s reference to the *Gacumbitsi* Appeal Judgement’s consideration of the French Indictment due to the fact that the appellant and trial counsel had worked throughout the proceedings in French is not persuasive in light of the self-proclaimed English capabilities of the Defence team. See Second Defence Motion, para. 8 fn. 2 citing *Sylvestre Gacumbitsi v. The Prosecutor*, Case No. ICTR-01-64-A, Judgement, 7 July 2006, para. 169.

²⁴ The Defence also asserts that it has the right to choose to work in French. See Defence Motion, para. 9; Second Defence Motion, para. 5. The Defence may continue to communicate to the Accused and file any written or oral pleadings in French.

²⁵ See, e.g., *Simba* Trial Decision, para. 1 (p. 2); *Nizeyimana* Scheduling Order, para. 10; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Extension of Time to Respond to the Prosecutor’s Two Motions (TC), 27 September 2006, para. 4.

²⁶ Defence Motion, para. 7.

²⁷ *Aloys Simba v. The Prosecutor*. Case No. ICTR-01-76-AR72.3, Decision on Aloys Simba’s Motion for an Extension of Time (AC), 27 July 2004 (“*Simba* Appeal Decision”), p. 2.

²⁸ See Defence Motion, para. 7 (arguing that lead counsel must give instructions to his team and that it would not be fair without a translation of the documents into French).

²⁹ For example, in *Ntawukulilyayo*, the Appeals Chamber denied a defence request to file its notice of appeal after the translation of the English Trial Judgement into French even though lead counsel’s level of English was “*moyen*” and required interpretation. *Dominique Ntawukulilyayo v. The Prosecutor*, Case No. ICTR-05-82-A, Decision on Dominique Ntawukulilyayo’s Motion for Extensions of Time for Filing Appeal Submissions (AC), 24 August 2010 (“*Ntawukulilyayo* Decision”), paras. 7-8. In particular it highlighted that Co-Counsel had a “good knowledge of English ... was able to understand the Trial Judgement in its original language and discuss the contents of the Trial Judgement as well as any possible grounds of appeal with Mr. Ntawukulilyayo and his Lead Counsel”. See also *Simba* Appeal Decision, p. 2 (highlighting that while the accused and his counsel were proficient in French, at least one member of the defence team was “proficient in English”).



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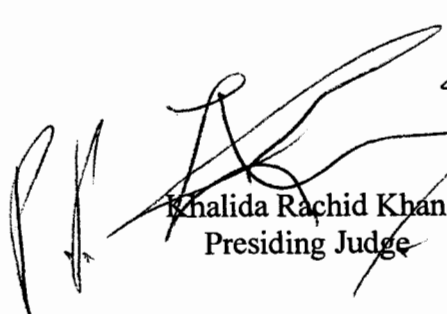
15. In light of the above, and having weighed the rights of the Accused against the considerations of judicial economy, the Chamber finds insufficient justification to grant the Defence the relief requested. While the pending *Amicus Curiae* Requests pertain to the 11 *bis* Motion, the Chamber is not convinced that the mere association of the motions justifies the exceptional relief requested. Indeed, whether or not Rwanda or the KBA will be given *amicus curiae* status is a procedural consideration that is peripheral to the merits of the 11 *bis* Motion and the substantive charges against the Accused.

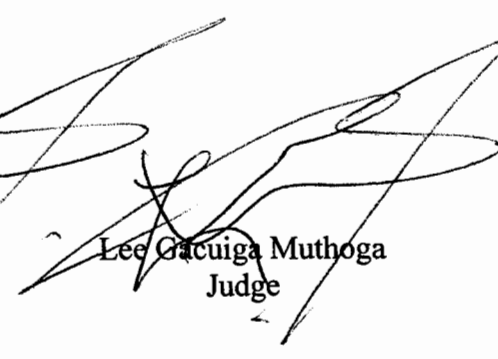
16. Furthermore, the Defence has not demonstrated that, as a general rule, all Prosecution filings in English – motions and briefs in particular – require translation into French and that the time to respond should commence upon receipt of the translation.³⁰ This would considerably delay proceedings. Indeed, in light of the Defence team's abilities in English and French, such extensions would be unnecessary and could impact the Accused's right, pursuant to Article 20 (4) (c) of the Statute, to be tried without undue delay.

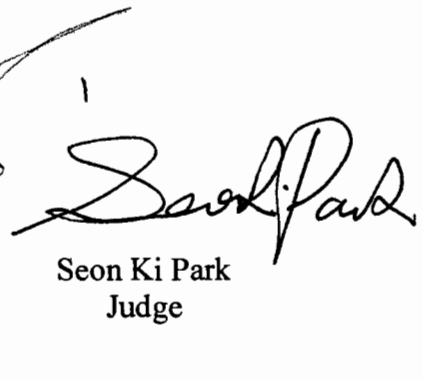
BASED ON THE FOREGOING, THE CHAMBER

DENIES the Defence Motion and the Second Defence Motion in their entirety.

Arusha, 6 December 2011, done in English


Khalida Rachid Khan
Presiding Judge


Lee Gacuiga Muthoga
Judge


Seon Ki Park
Judge

[Seal of the Tribunal]



³⁰ The Chamber is mindful of what documents the Tribunal's jurisprudence indicates should be provided in a language understood by the Accused. *See supra* para. 8. The Defence, however, has not pointed to any particular Prosecution filings that fit within these categories.