

The Pre-Trial Judge

المحكمة الخاصة بلبنان
SPECIAL TRIBUNAL FOR LEBANON
TRIBUNAL SPÉCIAL POUR LE LIBAN

Le Juge de la mise en état**THE PRE-TRIAL JUDGE**

Case No.: **STL-11-01/I/PTJ**

The Pre-Trial Judge: **Judge Daniel Franssen**

The Registrar: **Mr. Herman von Hebel**

Date: **16 September 2011**

Original language: **English**

Type of document: **Public**

DECISION ON LANGUAGES IN THE CASE OF *AYYASH ET AL.*

Office of the Prosecutor:
Mr. Daniel A. Bellemare, MSM, Q.C.

Defence Office:
Mr. François Roux



I. Introduction and Competence

1. On 28 June 2011, the Pre-Trial Judge of the Special Tribunal for Lebanon (the “Tribunal”) confirmed an indictment in the case of *Ayyash et al.*¹ (the “Indictment”).²

2. On 27 July 2011, the Pre-Trial Judge issued an Order Requesting Submissions on Working Languages (the “27 July 2011 Order”).³ The Pre-Trial Judge considered that the timely determination of the working language(s) would serve the interests of justice by providing the Prosecutor, the Defence Office, the Defence, the Registrar (notably including the Victims Participation Unit), as well as the victims participating in the proceedings and their representatives, with a desirable degree of clarity and certainty.

3. In the 27 July 2011 Order, the Pre-Trial Judge therefore requested the Prosecutor, the Defence Office, and the Registrar (including the Victims Participation Unit) to submit concise written observations by 8 August 2011, expressing their views on the modalities to be applied to working languages generally, and on several points in particular. Those several particular points were:

- (1) The determination of one or more working languages;
- (2) The determination of a language regime applicable to disclosure;
- (3) The language regime and modalities applicable to written and oral submissions by the Parties and the victims; and
- (4) The language regime applicable to the transcripts of oral hearings.

4. On 5 August 2011, the Defence Office filed its observations (the “Defence Office’s Submission”).⁴ On 8 August 2011, the Prosecutor and the Registrar both filed their own observations (the “Prosecutor’s Submission” and the “Registrar’s Submission” respectively).⁵

II. Background

5. Article 14 of the Statute of the Tribunal (the “Statute”) provides that “[t]he official languages of the Special Tribunal shall be Arabic, French and English”, and that “[i]n any

¹ Case No. STL-11-01-I/PTJ, Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi & Assad Hassan Sabra (“*Ayyash et al.*”).

² Case No. STL-11-01/I, Decision Relating to the Examination of the Indictment of 10 June 2011 Issued Against Mr Salim Jamil Ayyash, Mr Mustafa Amine Badreddine, Mr Hussein Hassan Oneissi & Mr Assad Hassan Sabra, 28 June 2011 (“Decision on Confirmation”).

³ Case No. STL-11-01-I, Order Requesting Submissions on Working Languages, 27 June 2011.

⁴ Case No. STL-11-01/I/PTJ, *Observations du Bureau de la Défense relatives aux langues de travail*, 5 August 2011.

⁵ Case No. STL-11-01/I/PTJ: The Prosecutor’s Observations on Working Language Modalities, 8 August 2011; Registry Submission on Working Languages, 8 August 2011.

given case proceedings, the Pre-Trial Judge or a Chamber may decide that one or two of the languages may be used as working languages as appropriate.”

6. Rule 10(A) of the Rules of Procedure and Evidence of the Tribunal (the “Rules”) also recognises the three official languages of the Tribunal, while Rule 10(B) of the Rules requires that as early in the proceedings as possible, the Pre-Trial Judge or a Chamber, after consulting with the Parties and the legal representatives of victims participating in the proceedings (“Victims’ Representatives”), shall decide what language(s) shall be used as working language(s) in the case.

III. Preliminary Observations

7. Before making a determination of the language modalities applicable in this case, the Pre-Trial Judge will first address two preliminary issues.

a. The Appropriate Chamber

8. The first preliminary matter concerns the identification of the appropriate Chamber to make a decision on working language(s). Pursuant to Rule 10(B) of the Rules, it is for either the Pre-Trial Judge or “a Chamber” to decide what language(s) shall be used as working language(s). In light of the imperative to decide the matter as early in the proceedings as possible, the Pre-Trial Judge considers that he is competent and mandated to pronounce on the matter of working languages at this stage of proceedings. This is without prejudice to any future order or decision which the Trial or Appeals Chambers may issue.

b. Consultation

9. The second preliminary matter concerns the obligation incumbent on the Pre-Trial Judge, pursuant to Rule 10(B) of the Rules, to consult with the Parties and the Victims’ Representatives before deciding what language(s) shall be used as working language(s). In the absence — at this stage of proceedings — of any accused appearing before the Tribunal, there exists no defence *qua* party.⁶ Neither have the Victims’ Representatives been appointed.

10. It may seem opportune to apply this Rule regarding consultation to the letter and await these appointments in order to consult them. However, as the Registrar points out, the choice of working language(s) “requires a delicate equilibrium to be struck between the rights of the accused”, the duty to ensure a fair and expeditious trial, and the need to manage the

⁶ Rule 2 of the Rules defines “Party” as “[t]he Prosecutor or the Defence”; “Defence” is defined as “[t]he accused and/or the accused’s counsel.”

Tribunal's finite resources responsibly.⁷ There are thus several countervailing interests which, in the view of the Pre-Trial Judge, warrant a more liberal approach.

11. The Prosecution submits that "a prompt decision on the working language issue" would serve the interests of justice, provide the parties with certainty and clarity, facilitate judicial economy, and allow the various organs of the Tribunal sufficient time to allocate their limited resources.⁸ Waiting for the appointment of Defence Counsel and Victims' Representatives may cause unnecessary delays.⁹

12. Subject to some reservations, the Defence Office considered that it was entitled to respond to questions of a general interest to defence teams.¹⁰ The Defence Office moreover considered that the questions raised in the 27 July 2011 Order are related to the fairness of the proceedings as well as the rights of the accused, and submitted its observations accordingly.¹¹ Regarding the requirement for consultation with the Parties, the Defence Office points out that it cannot be likened in any way to a party to the proceedings¹², before paraphrasing Rule 10(B) of the Rules in saying that the Pre-Trial Judge or Chamber must consult the Parties before determining the working languages.¹³

13. The Pre-Trial Judge notes that, as mentioned above, Rule 10(B) of the Rules requires the working language(s) to be determined "[a]s early in the proceedings as possible". Pursuant to Rule 77(E) of the Rules, the Pre-Trial Judge may *proprio motu* and in the interests of justice issue such orders as may be necessary for the preparation or conduct of the proceedings, while Rule 89(B) of the Rules requires the Pre-Trial Judge to ensure that the proceedings are not unduly delayed.

⁷ Registrar's Submission, para. 3. The same observation was made by a Trial Chamber of the International Criminal Tribunal for Rwanda ("ICTR") when considering a request for the translation of materials into Kinyarwanda, the language of the accused: "*En dégageant des principes applicables à la présente espèce, la Chambre s'est efforcée d'opérer un équilibre entre le droit général de toute personne accusée à un procès équitable ... et des considérations d'économie judiciaire liées à l'organisation du Tribunal et à celle des services de traduction.*" Case No. ICTR-95-1-B-I, *Procureur c. Mika Muhimana*, 6 November 2001, para. 12.

⁸ Prosecutor's Submission, para. 9.

⁹ Prosecutor's Submission, para. 9.

¹⁰ Defence Office's Submission, para. 3.

¹¹ Defence Office's Submission, para. 3. The Defence Office expressly submits that the Defence itself, and not the Defence Office, must nevertheless be afforded the opportunity to be heard on this matter in due course ("*Dès lors, il reviendra au Juge de la mise en état de consulter également les accusés et/ou les conseils des accusés avant de déterminer la ou les langues de travail à employer en l'espèce*"), Defence Office's Submission, paras 4, 6.

¹² "*En aucun cas, le Bureau de la Défense ne peut être assimilé à une partie à la procédure*", Defence Office's Submission, para. 4.

¹³ Cf note 11 *supra*.

14. The Pre-Trial Judge considers that, at this stage of proceedings, it is his duty to ensure that all necessary measures for the expeditious preparation of the trial are taken, including the determination of working language(s) and their modalities. Such a determination will provide, in a timely manner, the Office of the Prosecutor, the Defence Office, future Defence Counsel, future Victims' Representatives and the Registry with a degree of clarity and certainty during the pre-trial phase.

15. In the absence of such clarity, the Prosecutor would *inter alia* not be in a position to meet its language-related obligations in a timely manner, and the Registry would remain without guidance as to how best to manage the Language Services Section's resources. Furthermore, the Victims Participation Unit would not be able to implement a tailored recruitment strategy reflecting language exigencies, and the Defence Office would be unable to foresee any possible consequences of one or another language regime for the purposes of its assigning Defence Counsel.

16. Further procrastination in determining the working language(s) at this stage of proceedings may also adversely affect the efficient preparation and conduct of the trial in a manner consistent with the interests of justice. Article 16(4)(a) of the Statute recognises the accused's rights to be informed promptly and in detail in a language which he understands of the nature and cause of the charges against him, and to have adequate time and facilities for the preparation of his defence. By implication, these rights are assured when the accused is presented with the case against him in a language which he understands. They are also assured when pre-trial and trial proceedings are managed in such a way as to ensure the timely preparation of these materials in the appropriate languages.

17. In light of the foregoing, the Pre-Trial Judge decides that in order to provide clarity and certainty to the Parties and Victims' Representatives, and to ensure an expeditious and fair trial that is neither unduly delayed nor inconsistent with the rights of the accused, the determination of the working language(s) must be made at this stage of proceedings. This decision shall not, however, prevent any accused or their representatives at trial, or the Victims' Representatives once appointed, from moving the Trial Chamber to reconsider the determination of the working language(s) made in this Decision. Neither shall this Decision be read as limiting in any way the inherent discretion of the Trial and Appeals Chambers to regulate their own proceedings *proprio motu* or at the request of a Party.

IV. Applicable Law

18. Article 14 of the Statute having already been cited above, it is convenient to restate the other applicable provisions of the Statute and the Rules.

19. Article 16(4) of the Statute provides as follows:

In the determination of any charge against the accused pursuant to this Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate without hindrance with counsel of his or her own choosing;

(c) To be tried without undue delay;

(d) Subject to the provisions of article 22 [(Trials *in absentia*)], to be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require and without payment by him or her in any such case if he or she does not have sufficient means to pay for it [...];

(g) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Tribunal.

20. Rule 10 of the Rules on Official and Working Languages provides that:

(A) The official languages of the Tribunal shall be Arabic, English and French. Unless otherwise ordered by the Pre-Trial Judge or Chamber, any participant in oral proceedings before the Tribunal may use any one of the official languages.

(B) As early in the proceedings as possible, the Pre-Trial Judge or a Chamber, after consulting with the Parties and the legal representatives of victims participating in the proceedings, shall decide what language(s) shall be used as working language(s) in the case.

(C) An accused shall have the right to use his own language during proceedings before the Pre-Trial Judge or a Chamber.

(D) Other persons appearing before the Pre-Trial Judge or a Chamber, other than as counsel, who do not have sufficient knowledge of the official languages, may use their own language, subject to the authorisation of the Pre-Trial Judge or a Chamber.

(E) Decisions on any written or oral submission shall be rendered in English or French. Judgements, sentences, decisions on jurisdiction and other decisions which the Pre-Trial Judge or a Chamber decides address fundamental issues shall be translated into Arabic.

21. Rule 58 of the Rules on the Appointment, Qualifications and Duties of Counsel:

(A)(ii) a counsel shall be considered qualified to represent a suspect or accused if the counsel satisfies the Head of Defence Office that he has written and oral proficiency in English or French.

(B) In the performance of their duties, counsel shall be subject to the relevant provisions of the Statute, the Rules, Practice Directions, the Rules of Detention, the Host State Agreement, the Code of Professional Conduct for Counsel and the codes of practice and ethics governing their profession, as well as, if applicable, the Directive on the Assignment of Defence Counsel adopted by the Head of Defence Office and approved by the Plenary.

22. **Rule 59 of the Rules on Assignment of Counsel:**

(D) A suspect or accused has the right to be represented by any counsel properly admitted to the list, except insofar as such representation would not ensure the combined language abilities required for fair and expeditious proceedings.

23. **Rule 89 of the Rules on Functions after Review of the Indictment:**

(B) The Pre-Trial Judge shall ensure that the proceedings are not unduly delayed. He shall take any measures necessary to prepare the case for a fair and expeditious trial.

24. **Rule 110(A) of the Rules on Disclosure by the Prosecutor:**

[T]he Prosecutor shall make available to the Defence in a language which the accused understands:

(i) copies of the supporting material which accompanied the indictment when confirmation was sought as well as all statements obtained by the Prosecutor from the accused;

25. **Rule 110(A)(ii) of the Rules also requires the Prosecutor to provide copies of certain witness statements, depositions and transcripts, all in a language that the accused understands.**

26. **Reference must also be had to Article 18 (on General Principles) of the Directive on the Assignment of Defence Counsel¹⁴, which provides:**

(E) The Head of the Defence Office may decide to deny a suspect's or accused's request for the assignment of a counsel, where:

(iii) the assignment would not create sufficient combined language capacity to provide effective representation for the accused;

V. Discussion

27. While neither the Statute nor the Rules provide a precise definition of the term "working language", it can nevertheless be safely concluded that the working language(s) of the Tribunal are those in which it conducts its judicial proceedings in a particular case. The Pre-Trial Judge will thus examine the languages to be used in the case of *Ayyash et al.*

¹⁴ Amended on 10 November 2010.

28. The Prosecutor submits that, since each of the four individuals charged in the indictment is Arabic-speaking and it is highly likely that the language of the accused will be Arabic¹⁵, the working languages in the case of *Ayyash et al.* should not be French, but rather English¹⁶ and, implicitly, Arabic. This is because “a vast majority of the evidentiary ... material is in Arabic or English”¹⁷ and “less than 1% of its evidentiary holdings are in French”.¹⁸ The Prosecutor advises that preparation of this material in both Arabic and English is already under way.¹⁹ Translation of this significant amount of material into French would therefore cause unnecessary delays to trial preparation, and incur unnecessary expense.²⁰ Consequently, and in the absence of either an obligation or an order to the contrary, the Prosecutor has not requested translation of the material supporting the Indictment into French, a decision it describes as prudent²¹ in light of the limited resources of the Tribunal, and the translation burden under which it is already operating.²²

29. The Defence Office makes emphasises that any determination must aim to ensure respect for the rights of the accused provided for in Article 16 of the Statute in a concrete and effective manner.²³

30. The Registrar recommends that “a modular regime be adopted, with English being chosen as the working language”.²⁴ The Registrar makes mention of the particularities of Arabic in substantiating why it ought not to be chosen as the working language.²⁵

¹⁵ Prosecutor’s Submission, para. 2.

¹⁶ Prosecutor’s Submission, para. 4.

¹⁷ Prosecutor’s Submission, para. 11.

¹⁸ Prosecutor’s Submission, para. 15.

¹⁹ Prosecutor’s Submission, para. 16. The Prosecutor estimates that, as of 5 August 2011, there remained 351 documents — amounting to 5,135 pages — to be translated, “mostly from English into Arabic”. One 80-minute audio interview was awaiting transcription.

²⁰ Prosecutor’s Submission, para. 15.

²¹ Prosecutor’s Submission, para. 15.

²² Prosecutor’s Submission, paras 15, 17. The Prosecutor does, however, point out that admitted exhibits and expert reports “should ultimately exist in all three official languages” because they “represent important legacy information”, Prosecutor’s Submission, para. 18.

²³ Defence Office’s Submission, para. 6: “*Enfin, le Bureau de la Défense considère que toute décision rendue par le Juge de la mise en état sur la question de la ou des langues de travail doit viser à assurer le respect des droits de l'accusé visés à l'article 16 du Statut, et ce, d'une manière non pas théorique ou illusoire, mais concrète et effective.*”

²⁴ Registrar’s Submission, para. 11.

²⁵ Registrar’s Submission, para. 15. The Registrar avers that legal Arabic is “not stabilized” and regional language variations complicate translation. Furthermore, referenced texts and terminological resources in Arabic are limited. The use of Arabic as a working language could therefore delay proceedings and generate uncertainty (or, in the words of the Registrar, it could amount to “opening the door to difficulties”).

31. The Pre-Trial Judge considers that, as it has been held by other international criminal tribunals, excessive requirements for translation can lead to delays and thereby undermine the conduct of a trial within a reasonable period.²⁶

32. In light of the foregoing, the Pre-Trial Judge finds that while the three official languages of the Tribunal — Arabic, English and French — enjoy equal status, considerations of time and resource limitations nevertheless justify the adoption of a practical approach to the modalities of language use. These will vary as a function of the different types of contexts in which proceedings are conducted. These contexts are examined below.

a. The languages to be used during oral proceedings

33. To date, Arabic, English and French have all been used in oral proceedings, which is consistent with the requirements of Rules 10(A) and (C) of the Rules, cited above.

34. The Defence Office submits that this practice should be maintained²⁷, while the Prosecutor avers that a decision on working language(s) would not limit the ability of any party to make oral pleadings in a language of their choice in any event.²⁸

35. The Registry reaffirms its capacity to continue to provide simultaneous interpretation in all three official languages of the Tribunal.²⁹

36. The Pre-Trial Judge notes that the modalities for oral proceedings are enshrined in the Statute and Rules of the Tribunal. Consequently, any participant in oral proceedings before the Tribunal may use any of the official languages³⁰, and an accused shall have the right to use his own language.³¹

²⁶ *Prosecutor v. Duch*, Case No. 002/14-08-2006, Order on Translation Rights and Obligations of the parties, 20 June 2008, Extraordinary Chambers in the Courts of Cambodia (“ECCC”), para. A(3); *Prosecutor v. Muhimana*, case No. ICTR-95-1-B-1, *Décision relative à la requête de la défense aux fins de traductions des documents de l'accusation et des actes de procédure en Kinyarwanda, langue de l'accusé, et en français, langue de son conseil*, 6 November 2001, ICTR, para. 12; *Prosecutor v. Delalić et al*, Case no. IT-96-21-T, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, 25 September 1996, International Criminal Tribunal for the Former Yugoslavia (“ICTY”).

²⁷ Defence Office’s Submission, para. 27.

²⁸ Prosecutor’s Submission, para. 21.

²⁹ Registrar’s Submission, para. 18(a).

³⁰ Rule 10(A) of the Rules.

³¹ Rule 10(C) of the Rules. In the event that an accused is unrepresented or self-representing, he or she shall equally be entitled to file submissions in any of the Tribunal’s three official languages.

b. The languages to be used for decisions and filings

37. To date, English and French have been the languages used in all decisions, orders, written submissions and filings, with the Registry having assured the translation of these documents into the other language, as well as into Arabic. This has been the practice notwithstanding the absence of any express obligation in the Rules to that effect.³²

38. The Defence Office submits that this practice should be maintained³³, as does the Registrar, who “strongly advocates that this trend be continued” as it “increases the significance and value of the Tribunal’s archival legacy.”³⁴

39. With respect to judgements, sentences and decisions on fundamental issues in particular, the Prosecutor interprets Rule 10(E) of the Rules as requiring their translation into the three official languages and notes that the Chambers are free to order the translation of specific documents where necessary.³⁵

40. The Prosecutor submits that as a general point and in order to avoid delay, written pleadings should be limited to English, and the translation of written pleadings of the Parties should not be required.³⁶ Allowing the filing of written pleadings in Arabic would effectively delay proceedings as translations would necessarily be required. Filings in Arabic should therefore be limited.³⁷

41. Consistent with his recommendation that English be the working language, the Registrar submits that written submissions should be filed in English as a matter of course, save authorisation by the Pre-Trial Judge or Chamber to the contrary, with translations prepared only upon being ordered by the Pre-Trial Judge or Trial Chamber.³⁸ This approach would have the added benefit of encouraging oral submissions.³⁹

³² The Practice Direction on ‘Filing of Documents Before the Special Tribunal for Lebanon’ of 15 January 2010 provides that documents shall be filed in one of the working languages of the Tribunal, as determined pursuant to Rule 10 of the Rules.

³³ Defence Office’s Submission, para. 27.

³⁴ Registrar’s Submission, para. 8(d).

³⁵ Prosecutor’s Submission, para. 30.

³⁶ Prosecutor’s Submission, para. 23.

³⁷ Prosecutor’s Submission, para. 23. The Prosecutor recognises that “exceptions could be made for the translation of certain Rule 91 Documents” such as the Prosecutor’s Pre-Trial Brief pursuant to Rule 91(G)(i), and filings from *amici curiae*.

³⁸ Registrar’s Submission, paras 12, 18(b).

³⁹ Registrar’s Submission, para. 12.

i. Documents emanating from Chambers

42. The Pre-Trial Judge considers that the practice, to date, of the translation into the three official languages of the Tribunal of decisions and orders issued in English or French is commendable. This practice should be continued to the extent that the Registry retains sufficient resources. However, should the Registry become overburdened, and following written notice from the Registry to the Pre-Trial Judge or Chamber to that effect, the Pre-Trial Judge or relevant Chamber will thereafter identify those decisions that require translation.

ii. Written submissions of the Parties and Victims' Representatives

43. With regard to the Prosecutor's position that written proceedings should be limited to English, the Pre-Trial Judge considers that making such a determination would be inappropriate. The principle of equality of arms "means that the Prosecution and the Defence must be equal before the Trial Chamber" and that "equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case".⁴⁰ Furthermore, it is worth noting that the Office of the Prosecutor must be able to work equally in English and in French.⁴¹

44. The Pre-Trial Judge considers that written submissions from the Parties or Victims' Representatives must be filed in either English or French. They can furthermore be filed by an unrepresented accused in Arabic. Owing to the limited resources of the Registry and the need to ensure the expeditious preparation of the trial, the following modalities shall apply to translations of filings:

- Filings in Arabic shall automatically be translated into English, and into French subject to prior authorisation from the Pre-Trial Judge or relevant Chamber, *proprio motu* or at the request of a Party or Victims' Representative, showing good cause for the translation.

⁴⁰ ICTY Case No. IT-94-1-A, *Prosecutor v. Duško Tadić*, Appeals Judgement, 15 July 1999, paras 48, 52.

⁴¹ Case No. ICTR-96-8-A, *Prosecutor v. Elie Ndayambaje*, (before a Bench of the Appeals Chamber) Decision on motion to appeal against the provisional release decision of Trial Chamber II of 21 October 2002, 10 January 2003. See also Case No. ICTR-99-50-A, *Prosecutor v. Bizimungu*, (also before a Bench of the Appeals Chamber) Decision on the application to appeal against the provisional release decision of Trial Chamber II of 4 November 2002, 13 December 2002. This finding was made within the context of the ICTR, the Statute of which provides that English and French are the working languages of the ICTR (*cf.* ICTR Statute, Article 31). Such a clear statement of a binary language regime is the customary approach in international criminal tribunals. The working languages of the International Criminal Court, for example, are also English and French pursuant to Article 50(2) of the Rome Statute and Rule 41(2) of the Court's Rules of Procedure and Evidence. The same applies to the ICTY pursuant to Article 33 of its Statute.

- Filings in either English or French shall only be translated into the other official languages of the Tribunal subject to prior authorisation from the Pre-Trial Judge or relevant Chamber, *proprio motu*, or at the request of a Party or Victims' Representative, showing good cause for the translation.

45. Persons other than counsel may make written submissions in a language other than Arabic, English or French with leave of the Pre-Trial Judge or Trial Chamber.⁴² The Registry shall ensure translation of the applicable submissions within a reasonable time accordingly.

iii. Other materials

46. In addition to documents emanating from Chambers and written submissions from the Parties and Victims' Representatives, the Pre-Trial Judge is concerned that a further category of filings exists, whose provision in a single language may not be appropriate.

47. With respect to Rule 91(G) materials⁴³, the Prosecutor points out that, contrary to the position of the Defence Office, there is no obligation incumbent upon him to provide translations of the materials required by Rule 91(G)(iii) of the Rules in particular (lists of exhibits and the exhibits themselves).⁴⁴ As a result, the Prosecutor proposes the disclosure of lists of exhibits in English, with disclosure being made in Arabic only where original or translated versions are already available.⁴⁵

48. The Pre-Trial Judge considers that since Rule 91(G) materials constitute a significant portion of the preparation for trial. Save for materials governed by Rule 91(G)(iii)⁴⁶, Rule 91(G) materials must be available in the three official languages of the Tribunal, and they must also be filed in the original language if not in one of those three official languages. Rule 91(G)(iii) materials must be filed in Arabic and English.

49. Materials pursuant to Rule 91(H) of the Rules (lists of witnesses and lists of exhibits to be provided by participating victims) shall be filed in either Arabic or English, and the Registrar shall ensure their translation into the other of these two languages.

⁴² Pursuant to Rule 10(D) of the Rules.

⁴³ Rule 91(G): "The Pre-Trial Judge shall order the Prosecutor, within a time-limit set by him and not less than six weeks before the Pre-Trial Conference required by Rule 127, to file the following:" (i) the Prosecutor's pre-trial brief including a summary of the evidence for each count and any admissions by the Parties as well as a statement of matters that are not in dispute; (ii) the list of witnesses the Prosecutor intends to call; (iii) the list of exhibits the Prosecutor intends to offer stating, where possible, whether the Defence has any objection as to authenticity. The Prosecutor shall serve on the Defence copies of the exhibits so listed or provide to the Defence access to the exhibits.

⁴⁴ Prosecutor's Submission, para. 18.

⁴⁵ Prosecutor's Submission, para. 18.

⁴⁶ These materials are governed by the Prosecutor's disclosure obligations; *cf.* sub-section (c) below.

50. Materials pursuant to Rule 91(I) of the Rules (the defence pre-trial brief) shall be filed in either English or French, and also in the original language if not in either English or French. They can furthermore be filed by an unrepresented accused in Arabic.

c. The language(s) in which disclosure obligations may be met

51. Rule 110(A) of the Rules requires the Prosecutor to make available to the Defence “in a language which the accused understands” several categories of documents, including: copies of the supporting material which accompanied the Indictment when its confirmation was sought; all statements obtained by the Prosecutor from the accused; and the statements of Prosecution witnesses. In addition, pursuant to Rule 113(A) of the Rules, the Prosecutor must disclose to the Defence “any information in his possession or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecutor’s evidence.”

52. The Defence Office submits that it is only once the accused appear before the Tribunal that the language for disclosure may be determined.⁴⁷

53. The Prosecutor submits that the “most advisable regime” would be to disclose the material supporting the Indictment and other material subject to disclosure in English and Arabic, or the original language if not in either English or Arabic.⁴⁸ These two languages are proposed because Arabic is “the language that the accused are most likely to understand”⁴⁹, and implicitly because the Prosecutor’s Office works in English. Therefore, in light of its obligations under Rule 110(A) of the Rules and the language that the accused are most likely to understand, the Prosecution has already requested the translation of all the supporting material into Arabic, a process which it says will also facilitate efficient victim participation.⁵⁰

54. With respect to the disclosure of exculpatory material pursuant to Rule 113(A) of the Rules, the Prosecutor suggests that such material should be disclosed in its original language,

⁴⁷ Defence Office’s Submission, para. 16. The Defence Office also submits that the obligation to provide materials “in a language which the accused understands” applies equally to materials identified in Rules 110(B) (“any books, documents, photographs and tangible objects in the Prosecutor’s custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused”) and 113 (“Exculpatory Material”), (Defence Office’s Submission, para. 18).

⁴⁸ Prosecutor’s Submission, para. 12.

⁴⁹ Prosecutor’s Submission, para. 12.

⁵⁰ Prosecutor’s Submission, paras 13, 14.

together with translations if already available.⁵¹ Such an approach is consistent, the Prosecutor avers, with “international standards”.⁵²

55. With respect to the language(s) for disclosure, the Registrar declines to make submissions on factors beyond his control, but nevertheless expresses his office’s readiness to accommodate needs arising from the disclosure obligations incumbent on the Parties.⁵³

56. Notwithstanding the position of the Defence Office, the Pre-Trial Judge considers that the scale of the task which is constituted by the disclosure obligations incumbent on the Prosecutor justifies a determination of the language modalities at this stage of proceedings. To delay the provision of guidance and clarity to the Prosecutor will only generate further delays in the future, which would be contrary to the purpose of the instant decision. The Pre-Trial Judge considers that — taking into account the rights of the accused together with the resource limitations of the Tribunal — the Prosecutor must disclose all the material supporting the Indictment and other material subject to disclosure:

- in the original language; and
- in English and Arabic in any event.

57. Disclosure in French nevertheless remains to be determined. In order to anticipate the eventuality that Defence Counsel for one or more accused is Francophone (and not Anglophone), the following measures should be taken as a minimum. Materials of fundamental importance shall either be submitted for translation into French in their entirety, or summaries thereof shall be prepared and submitted for translation into French. It is for the Pre-Trial Judge or Trial Chamber, *proprio motu* or at the request of a Party or Victims’ Representative, to identify such materials of fundamental importance and order either their translation, or the translation of their summaries.

58. In order to enable the Pre-Trial Judge or Chamber to verify that this obligation is being met, the Prosecutor must provide the Pre-Trial and Trial Chamber with monthly

⁵¹ Prosecutor’s Submission, para. 19.

⁵² Prosecutor’s Submission, para. 20. The Prosecutor refers to the jurisprudence of the ECCC and the ICTR.

⁵³ Registrar’s Submission, paras 16, 17.

updates on the status of the preparation of the summaries and other translations detailed above.⁵⁴

59. With respect to the disclosure obligations incumbent on the Defence, the Pre-Trial Judge considers that the Defence shall meet these obligations in either English or French.⁵⁵

60. Lastly, the Pre-Trial Judge notes that pursuant to Rule 113(B) of the Rules, victims participating in the proceedings shall have the same disclosure obligations with respect to exculpatory material as set out in Rule 113(A) of the Rules, cited above.⁵⁶ Consequently, the modalities determined above as being applicable to the Prosecutor in this regard apply *mutatis mutandis* to victims participating in the proceedings.⁵⁷

d. The language regimes applicable to the accused and their counsel

61. The Defence Office submits that while an accused is in principle free to choose his counsel according to Article 16(4)(d) of the Statute (cited above), this freedom is nevertheless fettered *inter alia* by Rule 58 of the Rules.⁵⁸

62. The qualifications required of counsel for the Defence are detailed in Rule 58 of the Rules. Rule 58(A)(ii) of the Rules requires that Defence Counsel engaged by a suspect or accused has written and oral proficiency in English or French. Article 18(E)(iii) of the Directive on the Assignment of Defence Counsel provides that the Head of the Defence Office may decide to deny a suspect's or accused's request for the assignment of a counsel, where "the assignment would not create sufficient combined language capacity to provide effective representation for the accused."

63. Furthermore, whenever the interests of justice so demand, the Head of Defence Office must assign counsel to a suspect or an accused who lacks the means to remunerate such counsel. Accordingly, Rule 59(D) of the Rules requires the Head of the Defence Office to

⁵⁴ The Pre-Trial Judge notes that, pursuant to his request made during a confidential meeting held under the auspices of Rule 68 on 7 June 2011, the Prosecutor has already filed helpful regular reports on the status of translations of the materials supporting the Indictment.

⁵⁵ Rule 112 of the Rules on 'Disclosure by the Defence' provides for the instance in which the Defence is under a disclosure obligation. Pursuant to Rule 112(A) of the Rules, the obligation arises "[a]t the end of the Prosecutor's case, following a Defence election to present its case, within the time-limit prescribed by the Pre-Trial Judge or the Trial Chamber, but not less than one week prior to the commencement of the Defence case."

⁵⁶ Rule 112*bis* of the Rules on Disclosure by Victims Participating in the Proceedings (i.e. regarding material other than Rule 113(B) material and that is not exculpatory) provides that where the Trial Chamber grants a victim participating in the proceedings the right to call evidence, the Chamber shall decide on the corresponding disclosure obligations that shall be imposed. This would be the appropriate occasion on which to revisit the applicable language modalities.

⁵⁷ Cf. para. 56, *supra*.

⁵⁸ Defence Office's Submission, para. 13.

maintain a list of counsel who fulfil certain requirements, *inter alia* that such Defence Counsel has written and oral proficiency in English or French. Article 18(E) of the Directive on the Assignment of Defence Counsel cited above applies *mutatis mutandis* to assigned counsel: that assignment must entail sufficient combined language capacity to provide effective representation for the accused.

64. In other words, the Rules provide that an accused has the right to be represented by any counsel properly admitted to the list of Defence Counsel except insofar as such representation would not ensure the combined language abilities required for fair and expeditious proceedings.⁵⁹

65. The same limitations apply *mutatis mutandis* to the situation anticipated by Rule 105*bis* of the Rules: the absence of the accused from the proceedings before the Pre-Trial Judge.⁶⁰

66. The Prosecutor submits that the determination of the working language(s) would affect the appointment of Defence Counsel, as has been the case in other international jurisdictions.⁶¹

67. Subject to these limitations, the Defence Office submits that Defence Counsel must receive all the materials necessary for the effective preparation of the defence of the accused in a language which they understand.⁶² In the alternative, the Defence Office considers that Defence Counsel must — at a minimum — be assured receipt of ‘summaries of documents’⁶³ and translations of particular documents when specifically requested by Defence Counsel.⁶⁴

68. The Pre-Trial Judge considers that the language regimes applicable to the accused and their counsel are determined by the relevant rules and regulations. Article 16(4)(b) of the Statute recognises the right of an accused to choose his own counsel, but the limitations on

⁵⁹ The content of Rule 59 of the Rules is repeated as Article 18(E)(iii) of the Directive on the Assignment of Defence Counsel, 20 March 2009, cited above.

⁶⁰ Rule 105*bis*(B): “After the Trial Chamber ensures that the requirements of Rule 106 have been met, the Pre-Trial Judge shall request the Head of the Defence Office to assign Counsel to the accused who fails to appoint one, pursuant to Rule 57(D)viii, and shall proceed with the preliminary proceedings, pursuant to Rules 89 to 97 of the Rules.” The Head of the Defence Office will appoint Counsel for proceedings *in absentia* from a list maintained pursuant to Rule 59(B) of the Rules; accession to the list is contingent on meeting the requirements of Rule 58(A) of the Rules (*cf* Rule 59(B)(i)).

⁶¹ Prosecutor’s Submission, para. 10. The Prosecutor was referring to the appointment of Counsel in a case before the International Criminal Court (“ICC”), *Prosecutor v Katanga*, Case No. ICC-01/04-01/07, in which the appointment of counsel was made conditional on several requirements including counsel’s ability to communicate with the accused in French.

⁶² Defence Office’s Submission, para. 19.

⁶³ *Cf.* section (g) below. The Defence Office refers to “*résumés des pièces*”.

⁶⁴ Defence Office’s Submission, paras 21, 24.

this right are expressed in the Rules. Rule 59(D) of the Rules requires an accused to select from counsel “properly admitted to the list”; such counsel being admitted when various requirements — including language proficiency — are met. It is not for the Pre-Trial Judge to set further conditions than the Rules already provide. Instead, the Pre-Trial Judge defers to the Head of the Defence Office who, taking note of this Decision, is empowered to assign counsel⁶⁵ from a list of qualified Defence Counsel that he is required to draw up and maintain⁶⁶, who meet the criteria set forth in that Rule, and who will be sufficiently competent to contribute to the efficient conduct of proceedings.⁶⁷

e. The Language Regimes Applicable to Victims Participating in Proceedings

69. The Registrar makes submissions on this matter because the Victims’ Representatives are yet to be assigned, and are therefore absent at this stage of proceedings.⁶⁸

70. The Prosecutor has proceeded with requests for the translation of all the materials supporting the Indictment into Arabic in part because it will facilitate efficient victim participation.⁶⁹

71. For the purposes of this Decision, the Pre-Trial Judge considers that Legal representatives of victims participating in the proceedings are to be considered as counsel and, as such, must meet the requirements of Rules 58(A) and 59(B) and (D) of the Rules, *mutatis mutandis*. The analysis in the preceding sub-section on the language regimes applicable to the accused and their counsel therefore applies to Victims’ Representatives.

72. The Pre-Trial Judge defers to the Head of the Victims Participation Unit who, pursuant to Rule 51(C) of the Rules, is required to draw up and maintain a list of highly qualified Victims’ Representatives who meet the criteria set forth *inter alia* in Rule 59(B)(i)-(iii) of the Rules concerning the qualifications of Defence Counsel. The Head of the Victims Participation Unit is nevertheless invited to take note of this Decision when drawing up and maintaining this list, as well as when ensuring the assignment and appointment of Victims’ Representatives pursuant to Rule 51(C) of the Rules. Such representatives shall — once appointed — be entitled to move the Pre-Trial Judge or Trial Chamber to vary this determination.

⁶⁵ Pursuant to Rule 59(A) of the Rules

⁶⁶ Pursuant to Rule 59(B) of the Rules

⁶⁷ Rule 57(D)(i) of the Rules.

⁶⁸ Registrar’s Submission, para. 6.

⁶⁹ Prosecutor’s Submission, paras 13, 14.

73. One further matter arguably remains to be resolved: the language(s) which may be used by a victim participating in proceedings who is authorised to appear unrepresented.⁷⁰ The Pre-Trial Judge notes that this is a determination to be made by the Pre-Trial Judge or Chamber at such time as the question of such a victim being unrepresented arises, taking into account this Decision; it is therefore not made in this Decision.

f. The language regime applicable to “other persons” appearing before the Tribunal.

74. The Pre-Trial Judge notes that the language regime applicable to other persons appearing before the Tribunal is enshrined in its Rules.⁷¹ Consequently, the Pre-Trial Judge notes that the determination of the working language and its modalities has no impact on those provisions and their effect.

g. The language regime applicable to transcripts of oral proceedings

75. The Defence Office submits that, given the importance of transcripts, Defence Counsel should be provided with versions of transcripts in the language of his choice.⁷²

76. The Prosecutor avers that three language transcripts might be required, since real-time transcription in one language only (which for the Prosecutor would be in English) would effectively transform the French and Arabic transcripts into “transcriptions of the audio-files”, and their preparation could delay proceedings.⁷³ The Prosecutor furthermore suggests that there are no requirements in the Rules governing the preparation of transcripts in more than the working language(s).

77. The Registrar submits that the technological capabilities of the courtroom limit the preparation of real time transcripts to English or French only, and furthermore that the Registry can only produce a real time transcript in one language at a time.⁷⁴ The second

⁷⁰ While Rule 10(B) requires the Pre-Trial Judge to consult “the legal representatives of victims participating in the proceedings”, Rule 86(C) provides that “[u]nless authorized by the Pre-Trial Judge or a Chamber, as appropriate, a victim participating in the proceedings shall do so through a legal representative.” Rule 86(C) therefore anticipates circumstances in which victims —subject to being authorised— are not represented and might themselves appear.

⁷¹ Rule 10(D) of the Rules, cited above. While neither the Statute nor the Rules defines persons “other than as counsel”, the Pre-Trial Judge understands this to mean persons such as representatives of States or *amici curiae* who may appear before the Tribunal on an exceptional, *ad hoc* basis.

⁷² Defence Office’s Submission, para. 29.

⁷³ Prosecutor’s Submission, para. 28.

⁷⁴ Registrar’s Submission, para. 20.

transcript can be produced with a slight delay and is therefore not in real time.⁷⁵ In addition, and notwithstanding its “extensive and sustained” efforts, the Registry has been unable to procure software capable of real time Arabic transcripts of oral hearings.

78. Consistent with his recommendation that English be the working language, the Registrar submits that English be designated as the language for real time transcription.⁷⁶ This submission is supported by the increased degree of accuracy registered by real time transcriptions in English when compared to French, such that using English would increase the efficiency and reliability of transcripts in all three languages. Arabic and French transcripts would then be made available “within a reasonable time” thereafter.

79. In light of the above, the Pre-Trial Judge considers that it may be advisable for real time transcripts to be provided in English, with Arabic and French transcripts being made available within a reasonable time after the end of the hearing.⁷⁷ However, since resolving the language regime applicable to transcripts of oral proceedings would not contribute to the expeditious preparation of the trial at this stage of proceedings, the Pre-Trial Judge will not decide on that regime, and instead defers to the relevant Chamber to make that determination at the appropriate time.

h. Supplementary requests for translation

80. Notwithstanding the various language modalities determined above, the Parties and Victims’ Representatives remain entitled at any time to move the Pre-Trial Judge or relevant Chamber, either to order the translation of specific documents by the Registry, or to order the preparation of summaries of specific documents by the relevant party for translation. Such order shall only be granted when the moving party shows good cause.⁷⁸

⁷⁵ Registrar’s Submission, para. 20.

⁷⁶ Registrar’s Submission, para. 22.

⁷⁷ The Pre-Trial Judge notes nevertheless that should an accused not be competent in one of the three official languages of the Tribunal, his entitlement to transcripts in his own language will remain to be determined. It has previously been held, before the ICTY, that “[t]he transcripts of the proceedings are provided in one or both of the working languages on request simply as an *aide-mémoire* for courtroom participants. As with motions and other similar documents, the Defence is not entitled to have the transcripts translated into the language of the accused”, *Prosecutor v. Delalić et al.*, Case no. IT-96-21-T, Decision on Defence application for forwarding the documents in the language of the Accused, 25 September 2006, para. 14.

⁷⁸ The Pre-Trial Judge emphasises that summaries in whatever language will not have the force of formal pleadings or other materials required by the Rules, but will serve rather as an aide to francophone participants seeking to understand the case.

VI. Disposition

FOR THESE REASONS

THE PRE-TRIAL JUDGE,

PURSUANT TO RULES 10, 77(E), and 89(B);

WITHOUT PREJUDICE TO any future orders or decisions which the Pre-Trial Judge or another Chamber may issue;

WITHOUT PREJUDICE TO any future motion by a Party or Victims' Representative requesting, with good cause, the translation of specific documents by the Registry, or the preparation of summaries of specific documents by the relevant party for translation by the Registry;

MINDFUL of articles 14 and 16 of the Statute, and Rules 58, 59, 88(G), 110 and 113 of the Rules;

CONSIDERS, that participants in oral proceedings may use any of the three official languages of the Tribunal, save that an accused may use his own language;

ORDERS that written submissions by the Parties and Victims' Representatives shall be filed in either English or in French, save that an unrepresented accused may file his written submissions in Arabic;

ORDERS that all written submissions in Arabic shall be translated into English, and that these submissions shall only be translated into French subject to prior authorisation from the Pre-Trial Judge or relevant Chamber, *proprio motu*, or at the request of a Party or Victims' Representative showing good cause;

ORDERS that written submissions in either English or French shall only be translated into the other official languages of the Tribunal subject to prior authorisation from the Pre-Trial Judge or relevant Chamber, *proprio motu*, or at the request of a Party or Victims' Representative showing good cause;

ORDERS that written submissions filed by persons other than counsel may be made in a language other than an official language of the Tribunal with authorisation of the Pre-Trial Judge or Trial Chamber;

ORDERS that written submissions by persons other than counsel shall be translated into English, and that these submissions shall only be translated into Arabic and/or French subject to prior authorisation from the Pre-Trial Judge or relevant Chamber, *proprio motu*, or at the request of a Party or Victims' Representative, showing good cause;

ORDERS that materials filed by the Prosecutor pursuant to Rule 91(G) of the Rules, excluding materials governed by Rule 91(G)(iii) of the Rules, shall be filed in any of the three official languages of the Tribunal as well in their original language, and shall be translated into the other two official languages of the Tribunal;

ORDERS that materials filed by Victims' Representatives pursuant to Rule 91(H) of the Rules be filed in either English or Arabic and shall be translated into the other language as applicable;

ORDERS that materials filed by Defence pursuant to Rule 91(I) of the Rules shall be filed in either English or French, save that an unrepresented accused may file these materials in Arabic, and that in any event these materials shall also be filed in the original language if that language is not one of the official languages of the Tribunal;

ORDERS that materials subject to disclosure by the Defence shall be filed in English or French, and that in any event that these materials shall be filed in the original language if that language is neither English nor French;

ORDERS that materials subject to disclosure by the Prosecutor and the Victims' Representatives shall be filed in English and Arabic, and furthermore in the original language if that language is neither English nor Arabic;

ORDERS that materials of fundamental importance, as determined by the Pre-Trial Judge or Chamber — following an order to that effect by the Pre-Trial Judge or Chamber, *proprio motu*, or at the request of a Party or Victims' Representative — shall either be translated into French in their entirety, or they shall be summarised by the Prosecutor, and such summaries shall be translated into French; and

ORDERS the Prosecutor to provide the Pre-Trial Judge and Trial Chamber with monthly updates on the status of the preparation of the summaries and other translations.

Done in English.

Leidschendam, 16 September 2011.



Daniel Fransen

Pre-Trial Judge

