

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

No.: ICC-01/04-01/06

Date: 14 July 2006

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
vs. THOMAS LUBANGA DYILO**

Public

**Prosecution's Response to Defence's "Requête aux fins de la traduction en français
des pièces communiquées et de toute autre pièce pertinente"**

The Office of the Prosecutor
Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Ekkehard Withopf, Senior Trial Lawyer

Counsel for the Defence
Mr Jean Flamme

Background

1. During the hearing held on 23 June 2006, the Defence orally argued that Thomas LUBANGA DYILO has a right to French translations of any English documents relied upon to substantiate the charges against him.¹ Defence notified the Single Judge that it would file a written motion shortly.²
2. Accordingly, on 4 July 2006, Defence filed its “Requête aux fins de traduction en français des pièces communiquées et de toute autre pièce pertinente” (Request).³
3. On 4 July 2006, the Single Judge of the Pre-Trial Chamber (Single Judge) issued the “Decision Establishing a Deadline for the Response of the Prosecution” (Decision). The Prosecution was ordered to respond to the Request by 14 July 2006.⁴

Request of the Defence

Request

4. The Defence requests that the Pre-Trial Chamber orders the Prosecution to provide in French the following documents: (i) all exculpatory material pursuant to Article 67(2) of the Statute and (ii) all material covered by Rule 77. It further requests that measures be taken to ensure that French translations are provided pursuant to the disclosure deadline set by the Pre-Trial Chamber. The Defence

¹ See (English) Transcript of the 23 June 2006 Court hearing, at p. 35, lines 6-25 and at p. 36, lines 1-12.

² *Ibid.*, at 38, lines 5-12.

³ Requête aux fins de traduction en français des pièces communiquées et de toute autre pièce pertinente, Public, 4 July 2006.

⁴ In its Decision the Single Judge ordered a prompt response from the Prosecution considering that the issue may have an overall impact on the proceedings. See Decision, p. 2.

requests, in the alternative, that material used during the confirmation hearing be communicated to the Defence in French, if the original is in another language.⁵

Arguments of the Defence

5. While acknowledging that Rule 76 (3) is the only rule expressly imposing, on the Prosecution, an obligation to disclose material to the Defence in a language understood by the accused, the Defence argues, *inter alia*, that the Prosecution disclosure obligations are subject to the provisions of Articles 61 (3) and 67 (1) of the Statute that clarify their meaning.⁶
6. In addition, the Defence emphasises that Article 67 (1)(f) requires that to satisfy requirements of fairness Thomas LUBANGA DYILO must obtain, free of costs, translations if the language used during proceedings before the Court or in any document submitted to the Court is not a language that he speaks and understands perfectly.⁷ By imposing on the Defence the burden of translation costs, it would impact the Defence's means to effectuate legal research and investigations.⁸
7. Furthermore, the Defence submits that the Prosecution's mission is to establish truth. In so doing, it must ensure that the right to a fair trial is effective.⁹

⁵ Request, para. 27.

⁶ Request, para. 6.

⁷ Request, para. 10.

⁸ Request, para. 12.

⁹ Request, para. 13.

Providing untranslated copies of these documents will not contribute to “establish the truth in a fair manner.”¹⁰

Discussion

8. The Request is not supported by the facts and lacks legal basis.

Defence understands English

9. The Prosecution disputes the Defence’s assertion that it does not have a sufficient command of English to read documents in English and communicate their content to Thomas LUBANGA DYILO. On two occasions, Defence filed lengthy and substantive motions in English.¹¹

Defence did not timely assert its claim

10. The Defence did not timely assert its claim. The Prosecution disclosed documents in English to the Defence, as early as 20 April 2006, without objection from the Defence.¹² This demand that the Prosecution translate voluminous

¹⁰ Request, para. 14.

¹¹ See Defence Motion Regarding Ex Parte Hearing of 2 May 2006, filed on 4 May 2006 and Observations of the Defence relating to the system of disclosure in view of the Confirmation Hearing, filed on 2 May 2006. See also *The Prosecutor v. Casimir Bizimungu*, Case no. ICTR-99-50-I, Decision on Extremely Urgent Motion to Compel the Production of all the Supporting Material in English and to Suspend the Beginning of the Time within which Preliminary Motion are to be filed until all the English Translations are Produced, 11 May 2000 (where the Trial Chamber declared not been convinced that Counsel did not understand the substantive content of the supporting material which included some portions in French, which was not the working language of counsel. For that reason the Trial Chamber denied request for suspension of the deadline to file preliminary motions).

¹² Disclosure of Potentially Exculpatory Evidence (PEXO), 20 April 2006 (Package 2).

amounts of documents, in keeping with the deadlines set by the Pre-Trial Chamber, is therefore barred by the principle of laches.¹³

No legal basis for the Defence Request

11. The Defence has no legal basis to make a request of such breadth. The legislative intent as to the Prosecution's obligation to provide documents in a language understood by a person under an arrest warrant is clear: it resides in Rule 76(3), which specifically limits the documents the Prosecution must make available in a language the accused fully understands and speaks, to statements of prosecution witnesses. No other translation obligation is incumbent on the Prosecution from the Rules or Statute.
12. The interpretation of Rule 77 by the Defence is erroneous. A right to inspect does not equate to a duty to translate all material in possession or control of the Prosecutor.¹⁴ Furthermore, the Defence's right to inspect pursuant to Rule 77 does not attach to the person subject to the arrest warrant but rather relates solely to his defence counsel and is limited to physical inspection of the respective materials.
13. The interpretation made by the Defence of Article 67 of the Statute which obliges the Prosecution to translate all documents is contrary to legislative intent. ICTY

¹³ Black's Law Dictionary defines laches as:

Unreasonable delay in pursuing a right or claim-almost always an equitable one-in a way that prejudices the party against whom relief is sought. Also termed "sleeping on rights".

Black's Law dictionary, 891 (8th ed. 2004).

¹⁴ See Helen Brady, *Disclosure of Evidence*, in *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (Roy Lee ed., 2001), pp. 408-412 (which shows that the Defence's interpretation of Rule 77 was never contemplated by the legislator).

jurisprudence rejected assertions that article 21 of the ICTY Statute, which contains almost identical provisions to Article 67 of the Statute, entitled the accused to receive all documents from the Prosecution in a language he understands.¹⁵

14. The Defence refers to ICTY jurisprudence to request translations of all documents disclosed by the Prosecution. The ICTY Prosecution is obligated, pursuant to rule 66 of ICTY rules of procedure and Evidence to make available to the Defence in a language which the accused understands, copies of the supporting material which accompanied the indictment when confirmation was sought, as well as prior statements obtained from the accused.¹⁶ Such obligations are not provided by ICC texts. Therefore, ICTY jurisprudence should be considered cautiously. If ICTY texts have imposed broader obligations than the ICC legislator, ICTY Trial Chambers have, nonetheless, firmly rejected a broad approach expanding the scope of material an accused is entitled to receive from the Prosecution in a language he understands.¹⁷

15. Furthermore, to be sufficiently informed of the charges against him in order to receive a fair trial does not imply that a suspect or an accused has the right to have all disclosed material translated in a language he understands. In fact, the

¹⁵ *The Prosecutor v. Mladen Naletilić & Vinko Martinović*, Case no. IT-98-34, Decision on Defence's Motion Concerning Translation of all Documents, 18 October 2001; *The Prosecutor v. Žjenil Delalić, et al.*, Case no. IT-96-21, Decision on the Applications for Adjournment of the trial date, 3 February 1997; *The Prosecutor v. Žjenil Delalić, et al.*, Case no. IT-96-21, Decision on Defence Application for forwarding the Documents in the Language of the Accused, 25 September 1996, para. 8.

¹⁶ It should be noted that the International Criminal Tribunal for Rwanda (ICTR) Rule 66 does not have such requirement to disclose material in the language of the accused.

¹⁷ *The Prosecutor v. Mladen Naletilić & Vinko Martinović*, Case no. IT-98-34, Decision on Defence's Motion Concerning Translation of all Documents, 18 October 2001; *The Prosecutor v. Žjenil Delalić*, Case no. IT-96-21, Decision on the Applications for Adjournment of the trial date, 3 February 1997; *The Prosecutor v. Žjenil Delalić*, Case no. IT-96-21, Decision on Defence Application for forwarding the Documents in the Language of the Accused, 25 September 1996, para. 8.

European Court on Human Rights (European Court) has also set limits to the material that needed to be translated to ensure a fair trial. This approach could be qualified as a reasonableness approach. In *Luedicke*, for instance, the European Court held that Article 6(3)(e) of the European Convention means that a person “charged with a criminal offence” who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him [...] in order for him to have the benefit of a fair trial.¹⁸ In a later case, however, the Court gave a limitation to this right to free interpretation of court documents by determining that Article 6(3)(e) of the European Convention 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 a 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.¹⁹

16. In fact, some national courts have ruled that an English speaking defendant, represented by English speaking counsel, who is provided solely with the English translations of the summary of the evidence on each count (*précis*), could be sufficiently prepared to make a full defence and be tried fairly.²⁰

17. Furthermore, a counsel’s access to the case material to prepare for the defence of his client sufficiently guarantees the right to a fair trial. The European Court found that restricting the right to inspect the court file to an accused’s lawyer is

¹⁸ *Luedicke v. Germany* [ECtHR] Applications no. 6210/73; 6877/75; 7132/75 (1978), para. 48

¹⁹ *Kamasinski v. Austria* [ECHR] Application no. 9783/82 (1989), para. 74.

²⁰ See *Stadnick v. The Queen* REJB 2001-27514 (C.S. Que. Oct 24, 2001). (Judgment on the Application that Crown be ordered to provide disclosure to the applicants Walter Stadnick and Donald Stockford in English).

not incompatible with the rights of the defence.²¹ Evidently, a defendant will be denied a fair trial if his counsel is not given access to the case file ("dossier") in sufficient time so as to involve the defendant, an organization's high ranking member, charged with subordinates' criminal acts, in its examination and analysis which rendered the preparation of the case particularly difficult.²² The present case is distinguishable from those circumstances and therefore the authorities relied upon by the Defence do not apply.

18. Finally, if the Single Judge takes the view that discovery material other than Prosecution witness statements, should be communicated in the language of the accused, the responsibility to translate such material befalls on the Registry.²³ This responsibility was acknowledged by the Registry's representative during the 23 June 2006 hearing.²⁴

Practical Considerations

19. To date, the Prosecution has communicated to the Defence approximately 1,125 pages of evidentiary materials in English. It is highly probable that, in the course of disclosure, many more documents may be communicated to the Defence in English. Therefore, the Prosecution would like to draw the Single Judge's attention to the resources of the Prosecution's translation service. It is composed of two translators, one of whom is a trainee whose work needs to be supervised. According to UN guidelines, a translator can be expected to translate 1500 words

²¹ *Kamasinski v. Austria* [ECHR] Application no. 9783/82 (1989); *Kremzow v Austria* [ECHR] Application no. 12350/86 (1993), para. 52.

²² *Öcalan v. Turkey* [ECHR] Application no. 46221/99 (2003), paras 166-170 (The Court determined that, as a result of the position the applicant occupied in the armed organization concerned it placed him in one of the best positions to assess the relevance of the body of evidence adduced by the prosecution).

²³ See Regulation 40.

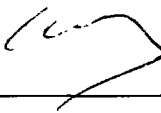
²⁴ See (English) Transcript of the 23 June 2006 Court hearing, at p. 41, lines 1-6.

per day, which constitute approximately 5 pages. Furthermore, the Prosecution's translation services do not have a French reviser, which means that none of the translations emanating from that department can be considered as official. Therefore, if the Prosecution was obligated to translate the documents it has thus far provided to the Defence, without even considering future material disclosed in English, the holding of the confirmation hearing would be substantially delayed.

20. Furthermore, institutionally, the Prosecution's language resources are viewed as restricted to the Prosecution's operational investigative activities in order to duly process, analyze and use material collected in the course of investigations.²⁵ Clearly, the Prosecution's translation services were created to guarantee confidentiality of material collected at the investigative stage by the Prosecution, not to translate thousands of pages of documents at the discovery stage of the proceedings.

Request

21. For the foregoing reasons, the Prosecution requests that the Single Judge deny the Defence's Request.



Luis Moreno-Ocampo
Prosecutor

²⁵ See Report on Rationalizing the Translation Capacity of the Court (ICC-ASP/4/CBF. 1/7) submitted to the Committee for Budget and Finances.

Dated this 14th day of July 2006
At The Hague, The Netherlands

List of authorities

1. JURISPRUDENCE

a) ICTY

The Prosecutor v. Mladen Naletilić & Vinko Martinović, Case no. IT-98-34, Decision on Defence's Motion Concerning Translation of all Documents, 18 October 2001

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The Prosecutor v. Zjenil Delalić et al., Case no. IT-96-21, Decision on the Applications for Adjournment of the trial date, 3 February 1997

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<http://www.un.org/icty/celebici/trialc2/decision-e/60925PN2.htm>

b) ICTR

The Prosecutor v. Casimir Bizimungu, Case no. ICTR-99-50-I, Decision on Extremely Urgent Motion to Compel the Production of all the Supporting Material in English and to Suspend the Beginning of the Time within which Preliminary Motion are to be filed until all the English Translations are Produced, 11 May 2000

c) ECHR

Luedicke v. Germany, ECHR Judgement, 28 November 1978, Applications no. 6210/73; 6877/75; 7132/75

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Öcalan v. Turkey, ECHR Judgement, 12 March 2003, Application no. 46221/99

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=%D6calan%20%7C%20v.%20%7C%20Turkey&sessionid=7774842&skin=hudoc-en>

(a) Domestic Courts

Canada,

R. v. Stadnick, [2001] Q.J. No. 5226 (Que. S.C.)

2. LEGISLATION

Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda

<http://69.94.11.53/ENGLISH/rules/070605/070605.pdf>

3. SECONDARY MATERIALS

Black's Law Dictionary, 8th Ed., Bryan A. Garner (Ed. In chief), 2004 West, United States

The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence, Roy S. Lee (ed.), Transnational Publishers Inc.: Ardsley, 2001

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REJB 2001-27514, J.E. 2001-2096

R. v. Stadnick

Walter Stadnick and Donald Stockford, Applicants v. Her Majesty The Queen,
Respondent

Cour supérieure du Québec

Paul J.C.S.

Heard: October 11, 2001

Judgment: October 24, 2001

Docket: C.Q. Montréal 500-01-003088-017

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Counsel: Me Alan D. Gold, for the applicants

Me Brigitte Bishop, for Crown attorney's

Subject: Criminal

Paul J.C.S.:

1 The applicants were initially indicted along with 35 other individuals, on various charges, in an unprecedented case in Canadian criminal history. They both pleaded not guilty before me on September 5th 2001.

2 On September 20th 2001, I granted a petition filed under the section 530(1) of the Criminal Code and ordered that the applicants be prosecuted in a separate trial, which will be conducted in the English language, the only official language of Canada that the applicants and their counsel Mr. Alan D. Gold are able to understand and speak.

3 On October 11th 2001, the accused filed an « Application that Crown be ordered to provide disclosure to the applicants Walter Stadnick and Donald Stockford in English ».

Analysis

4 The relevant legislative provisions in the *Criminal Code* read as follows:

Part XVII Language of Accused***Language of accused***

530.(1) On application by an accused whose language is one of the official languages of Canada, made not later than

(a) the time of the appearance of the accused at which his trial date is set, if

(i) he is accused of an offence mentioned in section 553 or punishable on summary conviction, or

(ii) the accused is to be tried on an indictment preferred under section 577,

(b) the time of the accused's election, if the accused elects under section 536 to be tried by a provincial court judge or under section 536.1 to be tried by a judge without a jury and without having a preliminary inquiry, or

(c) the time when the accused is ordered to stand trial, if the accused

(i) is charged with an offence listed in section 469,

(ii) has elected to be tried by a court composed of a judge or a judge and jury, or

(iii) is deemed to have elected to be tried by a court composed of a judge and jury,

a justice of the peace, provincial court judge or judge of the Nunavut Court of Justice shall grant an order directing that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak the official language of Canada that is the language of the accused or, if the circumstances warrant, who speak both official languages of Canada.

Idem

(2) On application by an accused whose language is not one of the official languages of Canada, made not later than whichever of the times referred to in paragraphs (1)(a) to (c) is applicable, a justice of the peace or provincial court judge may grant an order directing that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak the official language of Canada in which the accused, in the opinion of the justice or provincial court judge, can best give testimony or, if the circumstances warrant, who speak both official languages of Canada.

Accused to be advised of right

(3) The justice of the peace or provincial court judge before whom an accused first appears shall, if the accused is not represented by counsel, advise the accused of his right to apply for an order under subsection (1) or (2) and of the time before which such an application must be made.

Remand

(4) Where an accused fails to apply for an order under subsection (1) or (2) and the justice of the peace, provincial court judge or judge before whom the accused is to be tried, in this Part referred to as "the court", is satisfied that it is in the best interests of justice that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language of Canada that is the language of the accused or, if the language of the accused is not one of the official languages of Canada, the official language of Canada in which the accused, in the opinion of the court, can best give testimony, the court may, if it does not speak that language, by order remand the accused to be tried by a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak that language or, if the circumstances warrant, who speak both official languages of Canada.

Variation of order

(5) An order under this section that an accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony may, if the circumstances warrant, be varied by the court to require that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak both official languages of Canada.

R.S., 1985, c. C-46, s. 530; R.S., 1985, c. 27 (1st Supp.), ss. 94, 203; 1999, c. 3, s. 34.

Where order granted under section 530

530.1 Where an order is granted under section 530 directing that an accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language that is the language of the accused or in which the accused can best give testimony,

- (a) the accused and his counsel have the right to use either official language for all purposes during the preliminary inquiry and trial of the accused;
- (b) the accused and his counsel may use either official language in written pleadings or other documents used in any proceedings relating to the preliminary inquiry or trial of the accused;
- (c) any witness may give evidence in either official language during the preliminary inquiry or trial;
- (d) the accused has a right to have a justice presiding over the preliminary inquiry who speaks the official language that is the language of the accused;
- (e) except where the prosecutor is a private prosecutor, the accused has a right to have a prosecutor who speaks the official language that is the language of the accused;
- (f) the court shall make interpreters available to assist the accused, his counsel or any witness during the preliminary inquiry or trial;
- (g) the record of proceedings during the preliminary inquiry or trial shall include
 - (i) a transcript of everything that was said during those proceedings in the official language in which it was said,
 - (ii) a transcript of any interpretation into the other official language of what was said, and
 - (iii) any documentary evidence that was tendered during those proceedings in the official language in which it was tendered; and
- (h) any trial judgment, including any reasons given therefore, issued in writing in either official language, shall be made available by the court in the official language that is the language of the accused.

R.S., 1985, c. 31 (4th Supp.), s. 94.

I - The Crown's duty to disclose evidence

5 The Crown's duty to disclose evidence is a fundamental obligation in Canadian criminal law. Not only must the evidence be disclosed, but it also need to be *useable* by the applicants as they need to make a full answer and defence. As I see no need to make further comments on the disclosure of the evidence in the present application, I will simply refer to the analysis I previously made in the 18th October judgment on a motion filed by Maurice Boucher, who was indicted with the applicants before I ordered that a separate English trial would be held:

[18] Ainsi, nous pouvons affirmer qu'une divulgation complète qui serait « inutilisable », ou utilisable moyennant un investissement de temps et de ressources

considérables de la part de la défense, équivaut en fait à une non-divulgaration, ou à tout le moins, à une divulgation incomplète.

[19] Le critère à appliquer est donc l'utilité pour la préparation de la défense que l'on peut faire de la preuve qui a été communiquée par le Ministère public. À cet effet, le requérant invoque l'arrêt de notre Cour d'appel: *R. c. Mercier*, [1994] A.Q. no. 420:

Il s'agira toujours de déterminer si l'accusé a pu, matériellement, se servir adéquatement des renseignements ayant fait l'objet d'une communication pour repousser la preuve et les arguments du ministère public et prendre toutes les décisions qui s'imposent dans la mise en oeuvre de son droit à une défense pleine et entière. (p. 18). (je souligne) (Par. 18-19)

6 I also need to take into consideration that the applicants did not have the opportunity to « test the Crown's case against them » in a preliminary inquiry as they were directly indicted pursuant to *Section 577 of the Criminal Code*. I am also aware that the charges against Walter Stadnick are the most serious known to Canadian criminal law: 1st degree murder.

7 That being said, as noted in my October 18th 2001 judgment, the disclosure of the evidence on charges # 8-20 was admittedly satisfying according to the defence counsels. The main point was to decide if, whether or not, the evidence disclosed by the Prosecutor on charges #1-7 fulfilled his disclosure obligation.

8 I have ruled that the above question was moot, as the trials would be instructed, at least, for the beginning, on the heavier charges (# 8-20) which are all related to 1st degree murders, and that eventually, if the applicants were to be tried on charges # 1-7, the Crown would still have to comply to its duty to disclose and provide the defence with the "précis" (summary of the evidence):

[31] Éventuellement, pour les chefs 1 à 7, lorsque le Ministère public entendra procéder sur ces chefs, il faudra qu'il ait alors divulgué sa preuve de façon à rencontrer les obligations de divulgation qui lui sont imposées. Entre-temps, les procès débiteront sur les chefs 8 à 20 ou certains d'entre eux comme il est mentionné précédemment, sous réserve des recours qui sont ouverts aux accusés, et des requêtes préliminaires déposées et à venir. D'ici à ce que les procès déjà annoncés aboutissent à un verdict sur chacun des chefs, pour chacun des accusés, le Ministère public aura vraisemblablement eu le temps de préparer un exposé de la preuve, ainsi qu'un cahier de pièces relatif à chaque chef d'accusation (chefs 1 à 7).

[32] EN CONSÉQUENCE, je déclare que la requête n'a plus d'objet. Je réserve toutefois à l'accusé le droit de présenter une nouvelle requête, en temps opportun, s'il s'estime lésé par la façon dont le Ministère public se sera acquitté de sa tâche, relativement aux chefs 1 à 7, à la lumière de la jurisprudence précitée dans la présente décision. (Par. 31-32)

9 I am therefore ruling that Mr. Stockford and Stadnick be granted with the translations of the summary of the evidence relating to each count "précis", so that they can prepare their defence accordingly and be sufficiently informed, without undue delay, of the specifics with which they are charged, according to their constitutional rights.

II - The applicants'right to choose counsel

10 On a preliminary basis, it has been submitted, that the applicants should have chosen a bilingual counsel as they knew the evidence would be disclosed only in French. It has been submitted that the applicants'right to choose counsel also implies the right to choose none, and that if, for some reason, the applicants were to be conducting their own defence, the translation question would remain the same.

11 There is an underlying danger in this scheme of argumentation: it opens the door to a strategic use of the language provisions of the *Code* to gain time, and as a weapon in a plea bargain. Parliament could not have legislated in that sense when it adopted the present legislation. The Crown should not be accounted for the choice an accused makes of his lawyer. Allowing an automatic translation, which is not an obligation under the *Code*, would result in a paralysis of the judiciary system, especially in cases like this one, where the volume of the evidence disclosed is huge.

12 Besides, the right to chose counsel is not absolute, as explained in *R. v. Rodrigue*, (1994) 91 C.C.C (3d) 455:

The extent of the right to make full answer and defence, and the constitutional right to a fair hearing (under s. 11(d) of the Canadian Charter of Rights and Freedoms) has been explored most often in the context of the extent of one's right to legal aid. Does the accused have an absolute right to counsel at the expense of the state? The answer of the Court of Appeal of Ontario, in *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 at pp. 66-7, 63 C.R. (3d) 113, 35 C.R.R. 207, is that ss. 11(d) and 7 of the Charter, which guarantee a fair trial by virtue of the principles of fundamental justice, require that the state provide the accused with a lawyer at the state's expense if the accused wants a lawyer but is unable to pay for one, and if the assistance of a lawyer is essential in order to have a fair trial. The right is therefore not absolute. Does the accused have a right to counsel of his choice at the expense of the state? The courts have said that there is no such absolute right: *Panacui v. Legal Aid Society of Alberta* (1987), 40 C.C.C. (3d) 459, [1988] 1 W.W.R. 60, 54 Alta. L.R. (2d) 342 (Alta. Q.B.); *R. v. Robinson* (1989), 51 C.C.C. (3d) 452 at p. 487, 63 D.L.R. (4th) 289, 70 Alta. L.R. (2d) 31 (Alta. C.A.). (p. 478, emphasis added)

13 Here is a particularly interesting quotation from *R. v. Cameron*, [1999] Q.J. No. 6204 regarding the accused counsel's choice. These comments on Mr. Manning, at paragraph 23, could very well be applied in the present case to Mr. Alan D. Gold:

[23] I don't want to interfere with the choice of Mr. Cameron. Obviously Maître Manning is not only a competent lawyer, he is a brilliant lawyer. His reputation is well known and I had the opportunity during the hearing on these Motions to appreciate his skilfulness. Yet it can be an handicap in a case to be unilingual when most of the witnesses speak the other official language and when nearly all the documentary evidence is written in that other language.

[24] Is it the responsibility or the obligation of the Prosecution to solve this difficulty and provide a translation of disclosure as requested by Maître Manning? I don't think so. As I said, Mr. Cameron has the right to retain the services of Maître Manning and to prefer him to any other lawyer, bilingual or not. He has the right to decide that Maître Manning will not act with a bilingual lawyer, what was considered at one point. But there can be limits to the right to retain counsel of choice or consequences from this choice (Par. 23-24, emphasis added)

III - The translation of the evidence that will be used at the trial

14 The Supreme court in *R. v. Beaulac*, [1999] 1 R.C.S. 768, firmly established that Section 530 of the *Code* is not a provision to protect an accused right to a fair trial. It is a linguistic equality guarantee, to be distinguished from the fundamental rights of the applicants.

15 The rule is clear under *Code* Section 530.1(g)iii): the documentary evidence is tendered during the proceedings in the official language in which it was gathered:

The right to disclosure of the evidence established under *Stinchcombe* is the right to disclosure of the evidence as it exists at any particular time before the trial. If a written statement of a witness, or a transcript of a recording of an electronically intercepted conversation is in a language other than one of the two official languages,

the accused has a right to disclosure of this evidence in that other language. If the document has been translated into English or French, the accused has a right to obtain the translation. But if the Crown has not had the document translated, the accused does not have the right to require that it be translated.

The right is a right to the disclosure of the evidence as it exists, not the right to have the assistance of the prosecution in the sense of enhancing the ability of counsel for the defence, or of the accused himself, to assess and evaluate the significance or the weight that could be attached to a certain item of evidence. If the item of evidence is, for instance, a bullet, the right to examine this thing does not include a right to ballistic expertise to evaluate the significance of the bullet (*R. v. Rodrigue*, 91 C.C.C. 455, pp. 477-478, emphasis added)

16 There still remains the issue in determining if, whether or not, the disclosure should be translated, when one has to evaluate the applicants ability to make a full defence and answer. I cannot stress enough that there is no correlative obligation in the Criminal Code under section 530.1 for the Crown to provide a systematic translation of all the documents and evidence that is disclosed. This is clearly established in the common law (See *R. v. Breton*, 28 W.C.B. (2nd) 525, *R. v. Cameron*, [1999] QJ No. 6204, *R. v. Rodrigue*, 91 C.C.C. 455).

17 On the other hand, it is not my duty to rewrite the law, specifically, *Section 530.1 of the Criminal Code* by adding a provision which Parliament did not choose to include. I am further convinced of that conclusion by the fact that, nearly 6 years after the submissions of the Commissioner's of Official Languages (November 1995) Report on « The equitable use of English and French before the Courts in Canada », Parliament did not follow his recommendations. One of these reads as follows:

The language in which pre-trial disclosure of evidence is made is not currently covered by Section 530.1 of the *Criminal Code*. Policy in this regard is uneven. In fairness to the accused it is recommended that Section 530.1 be amended so that, to the extent that is reasonable to do so, documents which will be introduced as evidence at trial will be disclosed to the accused or his or her counsel in the accused's official language. The disclosure of other documents generated in the course of a criminal investigation should be subject to the same requirement only where it is reasonable in all the circumstances to undertake their translation. Otherwise, they should be disclosed in the language in which they were prepared. (p. 104, emphasis added)

18 Nonetheless, as it is established by *R. v. Rodrigue* (1994), 91 C.C.C. (3d) 455, there could be some circumstances in which the translation would be required. As the trial will be held in the English language and because most of the evidence to be presented will be "viva voce" by French speaking witnesses and experts and because most of the evidence consists of wiretaps transcripts in French, I see no prejudice to the applicants' right to make a full answer and defence because it is granted that they will be provided with an interpreter during the proceedings who will translate the documents as they are presented at the trial.

19 I am also concerned by the implications of this decision on the accused right to have a trial within reasonable time. Keeping the *R. v. Askov*, [1990] 2 S.C.R. 1199, factors in mind, I don't see how the trial could be held within a reasonable time frame if I were to order the Crown to translate all the material disclosed.

20 I am convinced that the applicants, being provided with the English translations of the summary of the evidence on each count (*précis*), could be sufficiently prepared to make a full defence and be tried fairly.

21 On a side note, I would like to thank both parties for the excellent written submissions they provided supporting their argumentation.

22 Consequently, for the above reasons, the Court:

23 *GRANTS* the petition in part;

24 *ORDERS* that the Crown provides, as soon as possible, translations of the summary of the evidence on each count (*précis*) and index of the documentary evidence which will be used in court during the trial.

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FOR EDUCATIONAL USE ONLY

2000 WL 33321797 (UN ICT (Trial)(Rwa))

International Criminal Tribunal for Rwanda
Trial Chamber II

THE PROSECUTOR
v.

CASIMIR BIZIMUNGU

ICTR-99-50-I

Decision of: 11 May 2000

Original: English

DECISION ON EXTREMELY URGENT MOTION TO COMPEL THE PRODUCTION OF ALL
OF THE
SUPPORTING MATERIAL IN ENGLISH AND TO SUSPEND THE BEGINNING OF THE TIME
WITHIN
WHICH PRELIMINARY MOTION ARE TO BE FILED UNTIL ALL OF THE ENGLISH
TRANSLATIONS
ARE PRODUCED

The Office of the Prosecutor: Carla Del Ponte, Kenneth Flemming

Defence Counsel for the Accused: Judith L. Bourne

Before: Judge William H. Sekule, Designated by the Trial Chamber pursuant to Rule
73 of the Rules of Procedure and Evidence
Registrar: Dr. Agwu U. Okali

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING in the person of Judge William H. Sekule, as designated by the Trial
Chamber II pursuant to Rule 73 of the Rules of Procedure and Evidence (the
""""Rules");

CONSIDERING the indictment submitted by the Prosecutor against Casimir Bizimungu
and others on 12 May 1999, confirmed by Judge Navanethem Pillay on the same day,
for the crimes of genocide, conspiracy to commit genocide, complicity in genocide,
crimes against humanity and serious violations of Article 3 common to the 1949
Geneva Conventions and the 1977 Additional Protocol II thereto;

BEING SEIZED of a Defence motion, filed on 17 April 2000, entitled "Extremely Urgent
Motion of Accused Bizimungu to Compel the Production of All of the Supporting
Material in English, and to Suspend the Beginning of the Time Within which
Preliminary Motions Are to Be Filed Until All of the English Translations Are Produced"
(the "Motion");

CONSIDERING the Prosecutor's Response to the Motion filed on 3 May 2000;

CONSIDERING the provisions of the Statute of the Tribunal (the "Statute") and the
Rules;

RECALLING the oral decision of the Tribunal that the Defence should file any
preliminary motion within 45 days from 27 March 2000. See transcript of 27 March
2000, at 28.

AFTER HAVING DELIBERATED:

WHEREAS in support of this Motion, the Defence has submitted that two copies of the supporting material, one in English and one in French were provided to Defence Counsel on 25 March 2000. However, numerous passages in the English version have been found to be in French, a language the Defence Counsel is not able to work in. The unknown portion may impact on preparing preliminary motions and effective assistance to the Accused. The Defence argues that the date by which preliminary motions must be filed is established only by the complete disclosure of the supporting material. The Defence Counsel requests providing her with English translations of those passages of the supporting material on an extremely urgent basis; and the beginning of the time within which the preliminary motions must be filed be modified to reflect the date on which the English text of the passages are provided to Defence Counsel.

WHEREAS the Prosecutor, in her written submission, opposed the Defence's request on the ground that Rule 66 only requires the precise material to be hand over. Translation is an entirely different question. The Defence Counsel has not made any request to the Registrar for the translation. Both the Accused and the Defence has had the material pursuant to Rule 66 since prior to 27 March 2000. There would have been consultations between the Accused and Counsel.

WHEREAS it is not in dispute that the two copies of supporting materials envisaged in Rule 66 were delivered to Defence before 27 March 2000. Rule 3 stipulates the working languages of the Tribunal are English and French. The Tribunal considers, for effective assistance to the Accused, the documents provided to Defence Counsel shall be in the language the Counsel understands.

WHEREAS, however, from the illustration in the Motion, the passages in French of the supporting material appear not to be significant portion, the Tribunal is not convinced that the Defence Counsel does not understand the substantive content of the supporting material entirely and the Defence Counsel is completely impeded to start preparing the preliminary motions she wishes to file. Thus, the Chamber denies granting the Defence's request for suspension of the beginning of the time within which preliminary motions are to be filed.

CONSIDERING, however, the Defence is not able to work in French.

NOTING the COURT MANAGEMENT SECTION informed the Chamber that the translations of those passages in the supporting material were ready and had been transmitted to the Defence Counsel on 10 May 2000.

WHEREAS the period of forty-five day granted the Defence to file preliminary motions on 27 March 2000 comes to the end today.

RECALLING Rule 72(F) that the Trial Chamber may grant relief upon showing good cause, the Tribunal is of the opinion that, in the light of the situation the Defence is facing and for the interest of justice, it is appropriate to grant an extension of short period of time to the Defence.

FOR THESE REASONS THE TRIBUNAL DECIDES,

TO GRANT the Defence an extension of time up to 20 May 2000 to file preliminary motions.

Arusha, 11 May 2000.

William H. Sekule, Judge

Seal of the Tribunal

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