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PRE-TRIAL CHAMBER I

Before: Judge Claude Jorda, Presiding Judge
Judge Akua Kuenyehia
Judge Sylvia Steiner

Registrar: Mr Bruno Cathala

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

Public Document

**Request to exclude video evidence which has not been disclosed on one of the
working languages**

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor
Mr. Ekkehard Withopf, Senior Trial
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Legal Representatives of Victims

Mr Luc Walley Mr Franck Mulenda
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Counsel for the Defence

Mr. Jean Flamme
Ms. Véronique Pandanzyla

1. Introduction:

1.1 Requirements for the disclosure of evidence on which the Prosecution intends to rely at the confirmation hearing

1. On 15 May 2006, the Honourable Single Judge issued the ‘Decision on the Final System of Disclosure and the Establishment of a Timetable’.
2. In this decision, the Single Judge decided that “pursuant to article 61(3) of the Statute and rule 121(2) of the Rules, the Prosecution shall communicate to the Pre-Trial Chamber the evidence on which it intends to rely at the confirmation hearing as soon as practicable after it has been subject to disclosure under rule 76 or to inspection under rule 77 of the Rules; and that such communication shall take place by filing in the record of the case against Thomas Lubanga Dyilo the original and electronic copies [...] of the relevant evidence containing the details required by the Draft Protocol on the Presentation of Evidence as it stands on 15 May 2006”.¹
3. The Single Judge found that the content and time limits of the Prosecution’s *stricto sensu* disclosure obligations under article 61(3) of the Statute are elaborated on by rule 121(3), which specifies a time limit for disclosure of no later than 30 days before the date of the confirmation hearing.
4. On 5 October 2006 the Honourable Pre-Trial Chamber issued the ‘Decision on the Date of the Confirmation Hearing’ in which it decided to postpone the confirmation hearing to 9 November and that accordingly the Defence should have access to the evidence on which the Prosecutor intends to rely during the said hearing on 9 October 2006 at the latest.²

1.2 Disclosure of video material

1. Prior to 9 October 2006³ a total of eighteen elements of video material were disclosed by the Prosecution to the Defence pursuant to its obligations under Article 61(3)(b).⁴ All eighteen elements are included in the final list of evidence on which the Prosecution intends to rely at the confirmation hearing on 9 November 2006.

¹ At pages 5-6.

² At page 4.

³ Given the large quantity of evidence disclosed to the Defence by the Prosecution and in view of the limited size and resources (the Defence did not have access to ringtail until mid-September) of the Defence, the Defence was not able to review and cross-reference material disclosed at the time. It is only now that the Defence is in a position to carry out this work.

⁴ See list of all video material disclosed in the Confidential Annexe attached.

2. Prior to the 9 October 2006 deadline, transcripts and translations relating to only two of these eighteen elements were also disclosed.⁵
3. On 1 November 2006, i.e. only eight days before the confirmation hearing, transcripts and translations relating to a further four of the eighteen video elements concerned were disclosed.⁶
4. To date eleven out of the eighteen elements of video material disclosed by the Prosecution are not accompanied by transcripts and translations into either of the working languages of the Court; six of these videos are entirely or predominantly in Swahili.

1. Submissions

1.1 Under article 61(3) the Prosecution is obliged to disclose all evidence on which it intends to rely at the confirmation hearing in one of the working languages of the Court.

1. The Defence finds it self-evident that in order to discharge its obligations under article 61(3) the Prosecution must disclose all evidence in one of the working languages of the Court. Accordingly, evidence in a language other than English or French must be disclosed with translations into one of the working languages attached thereto.
2. Recalling that under article 50(2) of the Statute, French and English are the working languages of the Court, and that documents and materials filed with the Registry under article 61(3) must be filed in English or French pursuant to Regulation 39(1), it is clear that the obligation to disclose evidence encompasses a requirement that all material disclosed must be in French or English or accompanied by a translation into one of the working languages of the Court.
3. Moreover, this obligation is not discharged if Thomas Lubunga Dyilo understands the language of the original form of the evidentiary material. The Defence refers to 'Decision on the Requests of the Defence of 3 and 4 July 2006' on 4 August 2006, in which the Single Judge made clear that the primary concern of the language requirements of the Court was to ensure that documents and materials are disclosed in one of the working languages of the Court understood by the Defence Counsel,⁷ since

⁵ A transcript and translation relating to DRC-OTP-0035-0076 was disclosed on 28 July 2006 in Pre-Confirmation Package 9 and a transcript and translation relating to DRC-OTP-0120-0293 was disclosed on 9 June 2006 in Pre-Confirmation Package 4.

⁶ In Pre-Confirmation Package 24 of 1 November 2006: transcripts and translations relating to documents DRC-OTP-0082-0016, DRC-OTP-0116-0005, DRC-OTP-0127-0058; a transcript relating to DRC-OTP-0148-0302; a translation relating to DRC-OTP0102-0003 were disclosed to the Defence.

⁷ At pages 2-3.

it is the Defence Counsel rather than the person, who is responsible for all legal aspects of the case.

4. The Defence submits that the disclosure of video material in a language which no member of the Defence team can understand, without translations attached, undermines the principle articulated in article 67(1)(b), that the defence have adequate time and facilities for the preparation of the defence, and is able to review the materials in order to formulate its strategy and conduct subsequent investigations.
5. Moreover, in view of Prosecution's duty under article 61(3)(b) to disclose all material "as soon as practicable after it has been subject to disclosure under rule 76 or inspection under rule 77,"⁸ the violation of this fundamental right of the Defence is all the more flagrant since it is very likely that the Prosecution, who must have reviewed the video material in question in order to determine whether to rely on it at the confirmation hearing, has been in possession of transcripts and translations of the material into English or French for a significant period of time.

1.2 Motion to exclude from the confirmation hearing all video material the original form of which is in whole or in part in a language other than English or French, and for which for which a translation into a working language of the Court was not disclosed to the Defence prior to the October 9 2006 deadline

1. Accordingly the Defence requests that all video material disclosed by the Prosecution, the original form of which is in whole or in part in a language other than English or French, and for which a translation into English or French was not disclosed to the Defence prior to the October 9 2006 deadline, be excluded from the evidence on which the Prosecution can rely at the confirmation hearing.⁹
2. This would consist in the exclusion of nine videos, the original versions of which are entirely or predominantly in a language other than French or English.¹⁰ Translations for three of these videos were only disclosed on 1 November 2006,¹¹ thus not meeting the 9 October 2006 deadline, whilst transcripts for the remainder have yet to be disclosed.¹²

⁸ 'Decision on the Final System of Disclosure and the Establishment of a Timetable' 15 May 2006 at pages 5-6.

⁹ A confidential annex is attached listing the dates of disclosure to the Defence of all video material and accompanying translations.

¹⁰ DRC-OTP-0082-0016, DRC-OTP-0102-0003, DRC-OTP-0116-0005, DRC-OTP-0080-0002, DRC-OTP-0102-0002, DRC-OTP-0116-001, DRC-OTP-0120-0295, DRC-OTP-0127-0060, DRC-OTP-0127-0064.

¹¹ DRC-OTP-0082-0016, DRC-OTP-0102-0003 and DRC-OTP-0116-0005.

¹² DRC-OTP-0080-0002, DRC-OTP-0102-0002, DRC-OTP-0116-001, DRC-OTP-0120-0295, DRC-OTP-0127-0060, DRC-OTP-0127-0064

2. Relief Sought

For the reasons set out above, the Defence respectfully requests the Honourable Pre-Trial Chamber to order that materials numbered DRC-OTP-0082-0016, DRC-OTP-0102-0003, DRC-OTP-0116-0005, DRC-OTP-0080-0002, DRC-OTP-0102-0002, DRC-OTP-0116-001, DRC-OTP-0120-0295, DRC-OTP-0127-0060 and DRC-OTP-0127-0064 are excluded from the evidence on which the Prosecution can rely at the confirmation of charges hearing on 9 November 2006.



Jean Flamme, Counsel for Thomas Lubanga Dyilo

Dated this 2nd day of November, 2006

At The Hague