

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/06
Date: 6 November 2006

PRE-TRIAL CHAMBER I

Before: Judge Claude Jorda, 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 Document

Response to the Defence "Request to exclude video evidence which has not been disclosed in one of the working languages"

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Background

1. Between 9 June 2006 and 23 August 2006, the Prosecution disclosed a total of eighteen (18) video excerpts to the Defence.
2. Between 9 June 2006 and 6 November 2006, the Prosecution disclosed all available registered translations and transcripts of the above-mentioned video excerpts to the Defence.
3. On 2 November 2006 - almost three and a half months after having received the first video excerpts that were submitted without a transcript or translation - the Defence filed the "Requests to exclude video evidence which has not been disclosed in one of the working languages" (the Defence Request).¹ The Prosecution notes that the Defence Request was submitted the day after the Prosecution submitted most of the transcripts and translations of the video excerpts.
4. In its submission, the Defence requests nine (9) video excerpts to be excluded from the evidence on which the Prosecution can rely at the confirmation hearing.

Defence Argumentation

5. According to the Defence, six (6) of the video excerpts are "predominantly" in Swahili.² The Defence requests, however, that nine (9) video excerpts be excluded from the Prosecution's evidence on the grounds that: *"Under Article 61(3) of the Rome*

¹ Requests to exclude video evidence which has not been disclosed in one of the working languages, Public Document, 2 November 2006, ICC-01/04-01/06-642.

² See page 3 of the Defence Request, paragraph 4.

Statute 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.”³

6. The Defence additionally refers to Regulation 39 (1) of the Regulations of the Court, and argues that the obligation of the Prosecution is not discharged even if Thomas Lubanga Dyilo understands the language of the “original form” of the evidentiary material.⁴
7. The Defence furthermore submits that the disclosure of video excerpts in a language which “no member of the Defence team can understand”, without translation attached, undermines the principle of Article 67(1)(b).
8. Finally, the Defence states that the violation of the Prosecutions duty under Article 61(3)(b) is in this case even “more flagrant” since it is very likely that the Prosecution has been in possession of translations and transcripts, of the said video excerpts, for a significant period of time.

Prosecution’s Submission

General observations

9. The Prosecution submits that the translation obligation set forth in Regulation 39(1) does not apply to its disclosure obligation as defined in Article 61 (3)(b). First, both provisions apply to different types of submissions (with different time-lines). Second, the Rome Statute and the Rules of Procedure and Evidence have explicitly

³ See page 3 of the Defence Request, Submission 1.1.

⁴ See page 3 of the Defence Request, paragraph 2 and 3 under Submission 1.1, in which the Defence refers to the ‘Decision on the Requests of the Defence of 3 and 4 July 2006’ of the Single Judge of 4 August 2006.

foreseen the instances in which the Defence is entitled to translations in order to safeguard their rights. Finally, the Prosecution submits that any other interpretation would be un-sustainable from a practical point of view.

Context of Article 61(3) versus Regulation 39(1)

10. Article 61 (3) provides that: 'Within a reasonable time before the hearing, *the person* shall: (a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and (b) Be informed of the *evidence* on which the Prosecutor intends to rely at the hearing (*emphasis added*).
11. Regulation 39 (1) provides that: "*All documents and materials* filed with the *Registry* shall be in English or French, unless otherwise provided in the Statute, Rules, these Regulations or authorised by the Chamber or the Presidency. If the original document or material is not in one of these languages, a participant shall attach a translation thereof" (*emphasis added*).
12. The Prosecution submits that both provisions apply in a different context: whereas Article 61(3)(b) applies to the submission of evidence to the accused, within a reasonable time before the hearing, the *raison d'être* of Regulation 39(1) concerns the good administration of justice whereby all parties submit their filings and supporting material in one of the two working languages of the Court, which all

parties, including the Judges, members of the Office of the Prosecutor and the Defence, are deemed to understand.⁵

13. As a result, Regulation 39 (1) does not refer to evidence, but rather to, on the one hand “documents”, a document being defined as “motion, application, request, response, reply, observation, representation and any other submission in a form capable of delivering a written record to the Court”⁶ and on the other hand (*written*) “materials”. In the French text, the terms “documents” and “pièces” have been used, and the French text specifies that it concerns cases where “la pièce ou le document original n’est pas rédigé dans une de ces langues” (*emphasis added*). From the text and context it is thus arguable that “materials” must be understood as “written” materials and that Regulation 39 (1) does not apply to the evidence the Prosecution has to submit in accordance with Article 61 (3), but rather to the filings (*sensu largu*) it submits on a regular basis with the Registry.⁷

14. In this respect, the Prosecution notes that it - in line with the E-Court Protocol - files its evidence not only with the Defence but *also* with the Registry.⁸ The Prosecution submits that the mere fact that the evidence is also filed with the Registry in order to facilitate the establishment of an E-Court cannot in itself lead to the obligation of providing full translations into French or English thereof, as such obligation in the

⁵ See Article 36(3)(c), Article 42(3), Article 43(3) and Article 50(2), and Rule 22. It should be noted that no such obligation exists vis-à-vis de representatives of the victims, which explains the content of Regulation 39(2).

⁶ Regulation 22 of the Regulations of the Court.

⁷ If the intention would have been to extend the Regulation to all evidence, the terms “evidence” or “éléments de preuves” would have been used.

⁸ Applicable only to the present case and only for the limited purpose of the confirmation hearing.

Prosecution's view can not depend on the disclosure system adhered to in the respective case.⁹

Translation obligations under the Rome Statute and the Rules of Procedure and Evidence

15. In addition, the Prosecution submits that this interpretation of the relevant provisions also concurs with the fact that the Rome Statute and the Rules of Procedure and Evidence have explicitly foreseen the instances in which translations or interpretation services have to be provided to the accused in order to safeguard his or her rights. In order to not overburden translation efforts, those instances were carefully selected and concern only the core documents and procedures, namely: the questioning of the person (Article 55 (1)(c)¹⁰ and Rule 112(1)(a)¹¹); the information on the arrest warrant and the charges (Article 67 (1) (a)¹² and Rule 117 (1)¹³ and Rule

⁹ Nothing prevents the application (in other cases or at other stages of the proceedings) of a disclosure system whereby evidence would be filed directly with the Defence (*inter partes*), without the Registry being involved.

¹⁰ Which states that a person: "Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness".

¹¹ Which states: "1. Whenever the Prosecutor questions a person to whom article 55, paragraph 2, applies, or for whom a warrant of arrest or a summons to appear has been issued under article 58, paragraph 7, the questioning shall be audio- or video-recorded, in accordance with the following procedure: (a) The person questioned shall be informed, in a language he or she fully understands and speaks, that the questioning is to be audio- or video-recorded, and that the person concerned may object if he or she so wishes. The fact that this information has been provided and the response given by the person concerned shall be noted in the record. The person may, before replying, speak in private with his or her counsel, if present. If the person questioned refuses to be audio- or video- recorded, the procedure in rule 111 shall be followed".

¹² Which states that the Accused has the right "to be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks".

¹³ Which states: "1. The Court shall take measures to ensure that it is informed of the arrest of a person in response to a request made by the Court under article 89 or 92. Once so informed, the Court shall ensure that the person receives a copy of the arrest warrant issued by the Pre-Trial Chamber under article 58 and any relevant provisions of the Statute. The documents shall be made available in a language that the person fully understands and speaks".

187¹⁴); the statements of Prosecution witnesses (Rule 76 (3))¹⁵ and the decision (Rule 144 (2)(b)).¹⁶

16. In addition, Article 67 (1)(f) provides that “The Accused has the right to have, free of any cost, the assistance of a competent interpreter and such translations *as are necessary to meet the requirements of fairness*, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks.” (*emphasis added*).

17. The Prosecution submits it would be inconsistent to impose an obligation to provide English or French translations thirty (30) days prior to the confirmation hearing in respect of all evidence under Article 61(3), if the Rome Statute and Rules of Procedure and Evidence only provide for an obligation to translate the core documents, in a language the accused fully understands and speaks. In addition, the balance provided in Article 67(1)(f) between the provision of translations and the requirements of fairness would lose any practical significance.

¹⁴ Which states: “For the purposes of article 67, paragraph 1 (a), and in accordance with rule 117, sub-rule 1, the request under article 91 shall be accompanied, as appropriate, by a translation of the warrant of arrest or of the judgement of conviction and by a translation of the text of any relevant provisions of the Statute, in a language that the person fully understands and speaks”.

¹⁵ Which states: “3. The statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks”.

¹⁶ Which states: “1. Decisions of the Trial Chamber concerning admissibility of a case, the jurisdiction of the Court, criminal responsibility of the accused, sentence and reparations shall be pronounced in public and, wherever possible, in the presence of the accused, the Prosecutor, the victims or the legal representatives of the victims participating in the proceedings pursuant to rules 89 to 91, and the representatives of the States which have participated in the proceedings. Copies of all the above-mentioned decisions shall be provided as soon as possible to: (...) (b) The accused, in a language he or she fully understands or speaks, if necessary to meet the requirements of fairness under article 67, paragraph 1 (f)”.

18. In this respect, the Prosecution believes it is important to note that contrary to what the Defence mentioned during the 3 November 2006 hearing¹⁷, of the nine (9) videos that Defence would like to see excluded: one (1) is actually partly in French (namely 01 hour, 48 min. and 10 sec.), and partly in Swahili (speeches by members of the UPC/FPLC or from his close entourage); two (2) are fully translated into English in the video; two (2) concern speeches by Thomas LUBANGA DYLO himself; and four (4) concern speeches by members of the UPC/FPLC or from his close entourage.¹⁸ As such, the Defence cannot sustain the argument that it does not understand the material.

19. The Prosecution furthermore notes that the Defence reacted only *three and a half months* after having received the first video excerpt that was submitted without a

¹⁷ Namely: "Simply, Mr President, I would like to say that we have someone in our team who speaks Swahili, but the person told us there are several kinds of Swahili. Swahili on the video is difficult to understand. So the Prosecutor is -- has delayed in regard to these transcripts. So, in my view, these videos cannot be used as evidence: it is as simple as that". Transcript hearing 3 November 2006, page 41, lines 15 to 21. The Prosecution reiterates in this context that the Defence first argued that Thomas LUBANGA DYILO does not understand Swahili.

¹⁸ More specifically:

- DRC-OTP-0080-0002: concerns a speech in Swahili by members of the UPC and FPLC;
- DRC-OTP-0082-0016: concerns a speech in Swahili by members of the UPC and FPLC;
- DRC-OTP-0102-0002: concerns speeches in French and in Swahili by members of the UPC and FPLC;
- DRC-OTP-0102-0003: concerns a speech in Swahili by Thomas LUBANGA DYILO;
- DRC-OTP-0116-0005 and DRC-OTP-0116-0011: concerns archive footage of a documentary in which all Swahili is translated in the video by the interviewer;
- DRC-OTP-0120-0295: concerns a speech in Swahili by Thomas LUBANGA DYILO;
- DRC-OTP-0127-0058: concerns a meeting conducted in Swahili between members of the UPC and FPLC and other persons;
- DRC-OTP-0127-0064: concerns a speech in Swahili by members of the UPC and FPLC;

transcript or translation.¹⁹ As by coincidence, the Defence reacted the day after the Prosecution submitted most of the translations.

Practical considerations

20. Finally, the Prosecution submits that the practical consequences of any decision obliging the Prosecution and the Defence to translate all evidence they file with the Registry (including for example video excerpts) require consideration.
21. Contrary to the implicit allegation of the Defence that the Prosecution is hiding its transcripts and translations, the Prosecution has finalised and registered only today the translation and transcription of the submitted video excerpts that contain portions in languages other than French or English. The Prosecution has -like the Defence- only two staff members at its disposal to provide for translations and transcriptions of evidence in Swahili, and thus needed a number of months to finish this significant project, which is known to be exceptionally time-consuming. The Prosecution believes that, if all evidence would need to be automatically submitted in English or French, regardless of the actual use thereof, this would deprive both the Defence and the Prosecution of using most of its Swahili evidence on a short-notice basis.
22. The Prosecution states that in the present case it has submitted the full translations of most of the video excerpts in order to facilitate the discussion thereof during the confirmation hearing without having to call upon the translation services provided in Court. The Prosecution believes there will be other instances, in which it would

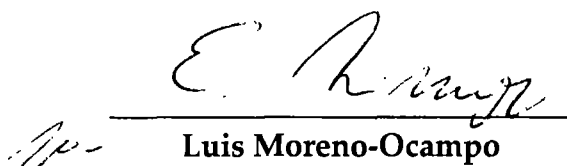
¹⁹ The Prosecution disclosed on 9 June 2006: one (1) video excerpt with translation; on 21 July 2006: five (5) video excerpts (one with translation); on 28 July 2006: five (5) video excerpts; on 10 August 2006: four (4) video excerpts; and finally on 23 August 2006: three (3) video excerpts.

only provide a translation of the relevant portion of the evidence, in order to optimise the limited resources.

Request

23. For the foregoing reasons, the Prosecution requests that the Pre-Trial Chamber denies the Defence Request.

24. In the event the Pre-Trial Chamber decides that Regulation 39(1) applies to the video excerpts, the Prosecution requests the Pre-Trial Chamber to allow the Prosecution to use at the confirmation hearing the portions of the excerpts of the videos that are originally in French or in English, as well as those that were translated into French or English in the original video. Furthermore, the Prosecution requests the Pre-Trial Chamber to use the other video excerpts without sound, given the importance of their visual components.



Luis Moreno-Ocampo
Prosecutor

Dated this 6th day of November 2006
At The Hague, The Netherlands