



Original : **French**

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

Date: **4 July 2006**

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

Registrar: Mr Bruno Cathala

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

Public Document

Motion Requesting Translation of Disclosure and Relevant Materials into French

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor
Mrs. Fatou Bensouda, Deputy Prosecutor
Mr. Ekkehard Withopf, Senior Trial
Lawyer

Counsel for the Defence

Mr. Jean Flamme
Legal Assistant
Ms. Veronique Pandanzyla

Introduction:

1. This motion is filed in relation to the statements made by the Prosecution during the Status Conference convened on 23 June 2006 to the effect that the Prosecution considers that its obligation to provide disclosure documents in the language of Mr. Thomas Lubanga Dyilo only extends to witness statements.
2. According to this position, if the original or version obtained by the Prosecution is not in French, the Prosecution may disclose exhibits, exculpatory material, and materials which are relevant to defence preparation in English. It would then be the responsibility of the Defence to ascertain whether the responsibility for providing a translation into French falls within the duties of the Registry, and if not, whether the legal aid allotment provided to the defence can and should be utilised for this purpose.
3. According to the preliminary inquiries conducted by the defence, the translation policy of the Registry and the legal aid allotment does not currently envisage or provide for such translation. As such, the stance adopted by the Prosecution would in practice mean that the Defence (and by extension Thomas Lubanga Dyilo) would not receive French versions of documents other than witness statements, unless the version received by the Prosecution was initially in French.
4. The Defence respectfully submits that the restrictive interpretation adopted by the Prosecution of its disclosure obligations is inconsistent with the object and purposes of the Rome Statute and Rules of Procedure and Evidence, and the rights of the defence set out in article 67(1) of the Statute. For that reason, the Defence requests the Honourable Pre-trial Chamber to order the Prosecution to disclose all potential Prosecution evidence, exculpatory material, and material which is relevant to the preparation of the Defence in the working language of the defence team and Mr. Thomas Lubanga Dyilo.

Submissions:

5. The Defence acknowledge that Rule 76(3) (witness statements) is the only disclosure rule which expressly requires the Prosecution to provide the defence with a copy in a language which the accused fully understands and speaks.
6. Nonetheless, the Defence is of the position that the Prosecution's disclosure obligations are ultimately subject to and qualified by the following provisions.
7. Article 61(3) provides that within a reasonable time before the hearing, the person shall be provided with a copy of the document containing the charges, and be informed of the evidence on which the prosecutor intends to rely.
8. Article 67(1) of the Rome Statute stipulates that the accused shall 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.
9. At paragraphs 50 and 53 of the annex to the Pre-Trial Judge's decision of 15 May 2006 on disclosure, the Pre-Trial Judge held that "articles 67(1)(b) and 67(2) of the Statute and rule 77 of the Rules impose on the Prosecution the obligation to disclose to the Defence before the confirmation hearing those materials that are potentially exculpatory or are otherwise material for the Defence's preparation for the confirmation hearing". If the aim of such disclosure/provision of materials is to ensure that that the defence has adequate time and facilities to prepare and that the suspect is able to freely communicate with his counsel in relation to this material as envisaged by article 67(1)(b), how is this aim achieved if the documents are provided in a language other than the working language of the counsel and suspect?
The reference to Article 67(1) in this decision implies that the Prosecution's disclosure obligations must be translated into a language which the accused fully understands and speaks (Article 67(1)(a)).
10. Article 67(1)(f) requires that the accused shall have free of any cost such translations as are necessary to meet the requirements of fairness if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks. The term 'proceedings' has been interpreted by the Honourable Pre-Trial Chamber in relatively broad manner such that it can even

include the investigative stage/proceedings.¹ It is therefore arguable that article 67(1)(f) could encompass documents disclosed or provided to the defence pursuant to *inter partes* proceedings, as well as documents submitted by the parties during or for use in court hearings.

11. Notably, the right under article 67(1)(f) is

independent of and in addition to the accused's right to legal assistance assigned and paid for by the Court if the accused lacks sufficient means, as set out in article 67(1)(d). The position taken by the Prosecutor to the effect that the defence should meet the costs of translation from its legal aid allotment would therefore impact on the funds available to the defence to conduct substantive legal and investigative preparation.

12. The Honourable Pre-trial Judge confirmed in the decision of 15 May 2006 that the panoply of rights set out in article 67(1) are applicable to the present stage of the proceedings, and moreover opined that “in the view of the single judge, protection of the right to a fair hearing, pursuant to article 67(1) of the Statute, in appropriate circumstances may require that the competent Chamber exceed the specific terms of article 67 of the Statute. This is clear from the reference to “minimum guarantees” in the *chapeau* of article 67(1) of the Statute.”² Rule 84 of the Rules of Procedure and Evidence also vests the Chamber with an obligation to make any orders which are necessary to enable the parties to prepare for the trial and to facilitate the fair and expeditious conduct of the proceedings in the context of the disclosure process.

13. Article 54(1) of the Rome Statute imposes an obligation on the Prosecution to investigate incriminating and exonerating circumstances equally. For that reason, the Prosecution's obligation to disclose exculpatory material to the defence under Rule 67(2) is a central component of its mandate to “establish the truth” in a manner which is consistent with fair trial principles. In accordance with the principle of effective interpretation, this obligation should be executed in a manner in which ensures that the rights being protected are real and not illusory. This is particularly the case with respect to obligations protecting fundamental human rights, such as the right to a fair

¹ Public redacted version of Decision on application for participation of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, and VPRS6, dated 17 January 2006, page 9

² para 97 of the annex.

trial. Thus, when interpreting the scope of States obligations under the European Convention on Human Rights, the Strasbourg Court concluded that “ it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.”³

14. It is thus arguable that the mere provision of these documents to the defence will not assist in establishing the truth in a fair manner if the defence are unable to consult with their client in relation to the contents and context of these documents, and are hence precluded from reaching an informed decision as to whether to utilise them.
15. The Prosecution is able to utilise its own language services unit, which “provides all the translation services required by the OTP during the analysis, investigation, trial and appeals stages. In addition all field interpretation and non-working language transcription services required to support the investigation phases under article 55 of the Rome Statute and rules 42 and 112 of the Rules of Procedure and Evidence are resourced and coordinated by this Unit.”⁴ It is therefore presumably open to Prosecution staff to utilise this language service to translate French documents into English in order to meet the working requirements of OTP investigators and prosecutors, and to compile a dossier of incriminating statements. The defence therefore submits that in order to comport with the dual requirement of Prosecution to ensure the truth through the equal investigation of incriminating and exculpatory documents, this language service should also be utilised to translate incriminating and exculpatory documents into the working language of the defence team and Mr. Thomas Lubanga Dyilo, and documents required for the preparation of the defence under rule 77.
16. Finally, article 21(3) of the Rome Statute provides that the application and interpretation of law by the Court (thus including the Prosecution) must be consistent with internationally recognised human rights, and be without any adverse distinction founded on grounds including, *inter alia*, language.

³ Wemhoff v Germany (2122/64) [1968] ECHR 2 (27 June 1968).

⁴ para 66, Prosecution Budget Programme Official Records of the 4th session of the Assembly of State Parties, ICC-ASP/4/32.

17. In terms of the applicable standards under international human rights, the major human rights instruments recognise the role that interpretation and translation into the language of the accused plays in securing a fair trial.⁵
18. The American Convention on Human Rights expressly refers to the right to translation of documents, in addition to interpretation. Although the European Convention on Human Rights does not expressly refer to the translation of documents in the case file, the Strasbourg Court has adopted a broad interpretation of the right under article 6(3)(e). Thus, in the judgement rendered in *Kamasinski v. Austria*,⁶ the European Court of Human Rights adopted a broad interpretation of the right to interpretation, stating that

[t]he right, stated in paragraph 3 (e) of Article 6 (art. 6-3-e), to the free assistance of an interpreter applies not only to oral statements made at the trial hearing **but also to documentary material** and the pre-trial proceedings. Paragraph 3 (e) (art. 6-3-e) signifies 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 which it is necessary for him to understand or to have rendered into the court's language in order to have the benefit of a fair trial (see the *Luedicke, Belkacem and Koç* judgment of 28 November 1978, Series A no. 29, p. 20, § 48).

19. In determining with further precision the scope of documents which should be translated in order to give effect to the right to a fair trial, it is necessary to take into consideration the right of the accused to effectively participate in the proceedings. In this regard, the European Court of Human Rights has recognised that for high-ranking accused or accused charged with command responsibility for the acts of others, the accused is in a unique position to provide instruction to his lawyers, and thus particular care should be taken to ensure the right of the accused to effectively participate in his case. For example, in the case of *Öcalan v. Turkey*, the Court stated that:

as a result of the position he occupied in the armed organisation concerned (the PKK), the applicant was one of the people best able to assess the relevance to

⁵ Article 14(3)(f) of the ICCPR (http://www.unhcr.ch/html/menu3/b/a_ccpr.htm), article 8(2)a of the American Convention on Human Rights, 'The Pact of San Jose' (<http://www.oas.org/juridico/english/Treaties/b-32.htm>) article 6(3)(e) of the ECHR, article 2 (g) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, (http://www.achpr.org/english/declarations/Guidelines_Trial_en.html)

⁶ 19 December 1989, Application 9783/82 at para. 74.

the defence of the substantial body of evidence that had been adduced by the prosecution. He was much better placed and better informed than his lawyers to determine who within the PKK bore responsibility for which acts and to what degree. It should be noted that the prosecution attributed to the applicant moral responsibility for several hundred acts of violence that were not physically carried out by him. It is reasonable to suppose that had he been permitted to study the prosecution evidence directly and for sufficient time, he would have been able to identify arguments relevant to his defence other than those his lawyers had raised themselves without the benefit of his instructions.⁷

20. The Grand Chamber of the ECHR subsequently upheld this finding, and rejected the submissions of the State that in accordance with past jurisprudence of the Court, it was sufficient if the accused was informed of the case file through his lawyers. In addition to the position of the accused, the Grand Chamber also cited the sheer volume of documents disclosed.⁸ The arrest warrant issued against Thomas Lubanga Dyilo refers to charges for command responsibility. His position is therefore analogous to Öcalan in that the prosecution is seeking to attribute responsibility to him for acts committed by others.

21. The documents for which the defence is seeking translation fall into the following categories:

- all exculpatory materials under article 67(2);
- all materials which the OTP intends to rely on during the confirmation hearing;
- all materials which are material to the preparation of the defence case, and which are provided to the defence in accordance with rule 77.

22. In light of the fact that the above materials will form either part of the prosecutor's case against the defence or will assist the defence to rebut such evidence, and taking into consideration Thomas Lubanga Dyilo's unique ability to shed light on the credibility and relevance of such materials, the defence respectfully submits that the translation of these documents into French is "necessary to meet the requirements of fairness".

⁷Case Of Öcalan V. Turkey (Application No. 46221/99) Judgement of 12 March 2003 at para. 161.

⁸Final Judgement of 12 May 2005, at paras 142 and 143.

23. In terms of the practice of the ad hoc Tribunals, the ICTY has upheld the right of the accused to receive all exhibits which the parties intend to rely on during trial, all supporting material accompanying the indictment and all exculpatory materials in a language he understands.⁹

24. The Defence acknowledges that some decisions of the ad hoc Tribunals have distinguished between the right of the defence to effectively participate in their working language, and the right of the accused to have all documents translated into the language of the accused. Nonetheless, these decisions were issued in a context in which the language of the accused was not one of the working languages of the court, and, since counsel was proficient in the language in which the documents were filed and the language of the accused, it was presumed that counsel would be in a position to inform the accused of the contents of the documents. These decisions did not address the situation in which the documents were disclosed to the defence in a language which was neither the working language of the defence nor that of the accused. In such a scenario, the ICTR has held that in addition to the imperative that written submissions and briefs be translated into both working languages, “the administration of justice and equality of arms require that evidence adduced at trial be made available in the two working languages of the Tribunal”.¹⁰

25. In this regard, the Defence would like to stress the difficulties, confusion and delay that would ensue if the defence would be compelled to base its consultations with its client on documents which neither the defence team nor the client can fully comprehend. Such a result would not only offend the right of Thomas Lubanga Dyilo to a fair trial, but would also make a mockery of article 50(2) of the Rome Statute, which provides that the working languages of the Court shall be English and French. The separate declaration of Judge Deschenes attest to this right:

⁹ See Prosecutor v. Ljubicic, ‘Decision on the Defence Counsel’s Request for Translation of All Documents’ 20 November 2002, Case No. IT-00-41-PT, Prosecutor v. Naleitic and Martinovic, ‘Decision on Defence’s Motion Concerning Translation of all Documents’ 18 October 2001, Case No. IT-98-34-T.

¹⁰ Prosecutor v. Muhimana, Decision on the Defence Motion for the Translation of Prosecution and Procedural Documents into Kinyarwanda, the Language of the Accused, and into French, the Language of Counsel, dated 6 November 2001, Case No. ICTR-95-1B-1 at para. 32. See also the ‘Decision on Defense Motion Seeking to Interview Prosecutor’s Witnesses or Alternatively to be Provided with a Bill of Particulars’ Prosecutor V. Kajelijeli, 12 March 2001 which refers to the obligation to provide Rule 66(B) materials (which replicates Rule 77 of the ICC RPE) in the official languages of the ICTR.

In light of the Statutes, Rules, Regulations and best international usages, one cannot and should not tolerate, in this Tribunal, that the French speaking jurists must, either work in a language with which they are less fluent, or risk to be scientifically overrun while awaiting an official text to which they are entitled.¹¹

26. In terms of the timing of the disclosure of translations, the defence respectfully submits that in order to give effect of the right of the defence to effectively prepare its case in advance of the confirmation hearing, all documents falling within the category listed above should be submitted for translation by the Prosecution immediately, and then to the extent possible, disclosed pursuant to the deadline set out in the disclosure timetable.

Relief Sought:

27. On the basis of the above arguments, and in order to give effect to the right of both Thomas Lubanga Dyilo and the defence team to effectively participate in the proceedings, the defence respectfully requests, as a matter of priority, the Honourable Pre-trial Chamber to order **firstly**, that the Prosecution disclose/provide provide copies to the defence of the following categories of documents in French:

- i) all exculpatory materials under Rule 67(2) of the Rome Statute; and
- ii) all material falling under Rule 77 of the Rules of Procedure and Evidence;

and **secondly**, that appropriate arrangements are undertaken to ensure that French translations are provided in accordance with the disclosure timetable.

The defence would also like to request that at the very least material which is to be used as evidence by the Prosecution at the confirmation hearing should be disclosed to the defence in French when the original has been drafted in another language, although this is of secondary importance.

¹¹ Separate Declaration to the *Tadic* Interlocutory Appeal on Jurisdiction Decision of 2 October 1995 issued by Judge Deschenes at para. 18.

Jean Flamme, Counsel for the Defence

Dated this 4 July 2006

At The Hague