

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 4 April 2008

TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge René Blattmann, Judge
Judge Elizabeth Odio Benito, Judge

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

Public Document

Prosecution's submissions on the use of audio/video material and on Rule 140(2)(d)

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. General Background

1. On 5 March 2008, the Trial Chamber issued the 'Trial Chamber's Agenda for the Status Conference on 12 March 2008 and scheduling order'¹, in which it held that during the Status Conference 'the views of the parties and participants on further subjects which may need to be determined prior to the commencement of trial' would be addressed².
2. During the hearing of 12 March 2008, the Prosecution identified several subjects that in its view require the attention of the Trial Chamber. These subjects include the use of audio/video material³ and the interpretation of Rule 140(2)(d) of the Rules of Procedure and Evidence ('Rule 140(2)(d)')⁴. Following the Trial Chamber's respective request, the Office of the Prosecutor submits its views. The Prosecution will address both subjects separately.

II. Audio/Video Material

Background

3. On 2 November 2006, the Defence filed the 'Request to exclude video evidence which has not been disclosed in one of the working languages'⁵. In the filing, the Defence requested nine (9) items of audio-video material to be excluded from the evidence on which the Prosecution can rely at the confirmation of charges hearing⁶.

¹ ICC-01/04-01/06-1209.

² ICC-01/04-01/06-1209, para.1 H.

³ ICC-01/04-01/06-T-78-CONF-ENG ET 12-03-2008, page 86 line 12 to page 87 line 9.

⁴ ICC-01/04-01/06-T-78-CONF-ENG ET 12-03-2008, page 87 line 24 to page 88 line 8. - the transcript wrongly refers to 102(d).

⁵ ICC-01/04-01/06-642. A corrigendum of this filing was submitted the same day as ICC-01/04-01/06-642-Corr.

⁶ ICC-01/04-01/06-642-Corr, page 5.

4. On 6 November 2006, the Prosecution submitted the 'Response to the Defence 'Request to exclude video evidence which has not been disclosed in one of the working languages''⁷.
5. In its submission, the Prosecution argued (i) that the translation obligation set forth in Regulation 39(1) does not apply to its disclosure obligation as defined in Article 61 (3)(b)⁸; (ii) that the Rome Statute and the Rules of Procedure and Evidence have explicitly foreseen the limited instances in which the Defence is entitled to translations in order to safeguard his or her the rights (namely in respect of the core documents), and that it would be inconsistent to read an obligation to provide English or French translations in respect of all evidence under Article 61(3)⁹; and (iii) that any other interpretation would be unsustainable from a practical point of view¹⁰.
6. It is submission, the Prosecution requested the Pre-Trial Chamber that -in the event the Pre-Trial Chamber would decide that Regulation 39(1) applies to the video excerpts- the Prosecution be allowed to use (*at the confirmation hearing*) the portions of the excerpts of the videos that are originally in French or in English, as

⁷ ICC-01/04-01/06-662.

⁸ ICC-01/04-01/06-662, paras.10-14.

⁹ ICC-01/04-01/06-662, paras.15-19.

¹⁰ ICC-01/04-01/06-662, paras.20-22.

¹¹ ICC-01/04-01/06-662, para.24.

¹² ICC-01/04-01/06-676.

¹³ ICC-01/04-01/06-676, page 4.

¹⁴ The sixty-four (64) items include two (2) items of only audio material and sixty-two (62) items of video material.

¹⁵ ICC-01/04-01/06-1120-Conf.

¹⁶ Moreover, sometimes the Prosecution has disclosed transcripts and/or translations in relation to additional portions.

¹⁷ ICC-01/04-01/06-662.

¹⁸ The Prosecution intends to show videos also to witnesses, who will be asked to comment upon the videos. The Prosecution foresees situations in which it will need to stop the video (either on the indication of the witness or on its own indication), but also to rewind and forward the video where necessary. The Prosecution submits that this may have implications on the operation of the material in Court. More specifically, the Prosecution submits that it may have an interest to operate itself the material in Court. If necessary, the Prosecution will make further submissions hereon.

¹⁹ ICC-01/04-01/06-947.

²⁰ ICC-01/04-01/06-947, para.5.

²¹ ICC-01/04-01/06-953.

²² ICC-01/04-01/06-953, para.35.

²³ ICC-01/04-01/06-953, para. 37.

well as those that were translated into French or English in the original video. Furthermore, the Prosecution requested the Pre-Trial Chamber to use the other video material without sound, given its visual importance¹¹.

7. On 7 November 2006, the Pre-Trial Chamber issued the 'Decision on the Defence 'Request to exclude video evidence which has not been disclosed in one of the working languages''¹². The Pre-Trial Chamber decided to declare inadmissible for the purpose of the confirmation hearing those *excerpts* (i) which are not translated into one of the working languages of the Court by Thursday 9 November at 9h30; and (ii) whose translations into one of the working language is not made available to the Chamber and the Defence by the said time-limit (*emphasis added*)¹³.

Current situation

8. The Prosecution disclosed sixty-four (64) items of audio/video material to the Defence¹⁴ ('videos').
9. As explained in the 'Prosecution's explanatory note vis-à-vis four videos'¹⁵, the videos disclosed comprise both publicly available materials as well as recordings stemming from private individuals. The videos include edited broadcasted documentaries, but also un-edited footage on which the documentaries are based. Some videos therefore contain numerous unrelated and / or irrelevant scenes. This is also true for videos stemming from private individuals, who often used the same tape to record several unrelated events (public events but also private festivities) on different days and at different locations.
10. In many cases the Prosecution determined only part of a video or only a specific scene to be of evidentiary value as either incriminatory or potentially exculpatory material or as material falling within the ambit of Rule 77 (the 'Relevant Portion').

The Prosecution however has disclosed the entire videos instead of the Relevant Portions only, in order to allow the Defence to assess the Relevant Portions to their fullest extent.

Disclosure of transcripts and/or translations

11. The Prosecution has disclosed transcripts and/or translations of the Relevant Portions for all incriminating and potentially exculpatory material¹⁶. It has not disclosed such transcripts and/or translations for material under Rule 77.
12. In respect of the choice to disclose transcripts or translations, the Prosecution has taken the approach to disclose transcripts in English or French where the original item was in English or in French, and translations into French, where the original item was in a language other than English or French.
13. In making reference to the arguments advanced in its submission of 6 November 2006¹⁷, the Prosecution seeks the endorsement of the Trial Chamber on the approach taken. The Prosecution draws the attention of the Trial Chamber to the fact that the majority of the portions that were not transcribed or translated, are in languages that the accused fully understands (French and Swahili).
14. Moreover, and depending on how the trial unfolds, the Prosecution foresees that it may have to use in Court portions of the disclosed videos other than the Relevant Portions, in which case it will disclose the transcripts and/or translations of such portions to the Defence at least three (3) days prior to the actual use. Consequently, the Prosecution seeks the authorisation of the Trial Chamber to proceed as such.

Subtitles, portions shown in slow-motion, and simultaneous viewing of excerpts

15. The Prosecution intends to show excerpts of videos with subtitles in Court¹⁸. The sub-titles are based on the transcripts and/or translations made by the Language Support Unit of the Office of the Prosecutor.
16. In addition, the Prosecution intends to show excerpts of videos in a slow-motion manner. At some occasions, the Prosecution foresees playing two excerpts of two different videos simultaneously.
17. The Prosecution seeks the authorisation to show excerpts of videos with internally provided subtitles; to show excerpts of videos in a slow-motion manner; and to show excerpts of different videos simultaneously.

III. Rule 140(2)(d)

Background

18. On 5 September 2007, the Trial Chamber issued the 'Order setting out schedule for submissions and hearings regarding the subjects that require early determination'¹⁹ in which it scheduled a hearing on 20 November 2007 to discuss several issues, including item 5 (c): 'the manner in which evidence shall be submitted subject to Article 64(8)(b) and Rule 140'²⁰.
19. On 12 September 2007, the Prosecution filed the 'Prosecution's submission regarding the subjects that require early determination: status of the evidence heard by the Pre-Trial Chamber; status of the decisions of the Pre-Trial Chamber; and manner in which evidence shall be submitted'²¹. It dealt with item 5(c) in paragraphs 28 to 38 of the said submission.

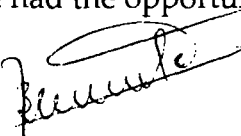
Prosecution's Submissions

20. In its submission of 12 September 2007, the Prosecution indicated that 'Rule 140(2)(d) provides that the Defence must always be the last to examine a witness, whether that is questioning pursuant to Rule 140(2)(b), re-examination, or examination after a witness is being questioned by the Trial Chamber pursuant to Rule 140(2)(d)²².
21. Moreover, the Prosecution submitted that 'the Defence's final examination under Rule 140(2)(d) should be limited to matters arising during the questioning by others, including the Trial Chamber, subsequent to the Defence's prior examination of that witness. If a witness has been proposed by the Defence, the final examination should not be leading'²³.
22. The Prosecution reiterates its position on Rule 140(2)(d) as mentioned above. However, the Prosecution clarifies that the Defence's final examination on 'matters arising during the questioning by others' should be limited to matters addressed by such others after the Defence had the opportunity to first examine the witness.
23. In other words, when the Defence examines a witness, the examination should be limited to the matters arising during the questioning by other participants or the judges before that examination ('first examination'). In respect of the last examination, the examination should be limited to the matters arising during the questioning by others after the first examination. For example, in the event of an examination-in-chief by the Prosecution, a cross-examination by the defence, a re-examination by the Prosecution and a last examination by the defence, the last examination should be limited to the matters arising during the re-examination by the Prosecution and the Defence should not be allowed to address matters related to the examination-in-chief.

IV. Requests

24. Accordingly, the Prosecution requests the Trial Chamber:

- (i) to accept the Prosecution's practice in respect of the disclosure of transcripts and/or translations;
- (ii) to authorise the Prosecution to use portions of the disclosed videos other than the Relevant Portions, provided that it has disclosed the transcripts and/or translations of such portions to the Defence at least three (3) days prior to the actual use;
- (iii) to authorise the Prosecution to show excerpts of videos with internally provided subtitles; to show excerpts of videos in a slow-motion manner; and to show excerpts of different videos simultaneously; and
- (iv) to limit the last examination under Rule 140(2)(d) to matters addressed by others after the Defence had the opportunity to first examine the witness.



Luis Moreno-Ocampo

Prosecutor

Dated this 4th day of April 2008

At The Hague, The Netherlands