

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/07

Date: 27 July 2009

TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Hans-Peter Kaul

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Public Document

**Decision on the "Prosecution's Urgent Application to Be Permitted to Present as
Incriminating Evidence Transcripts and translations of Videos and Video DRC-
OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions
(ICC-01/04-01/07-1260)"**

Decision/Order/Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda
Mr Eric MacDonald

Counsel for Germain Katanga

Mr David Hooper
Mr Andreas O'Shea

Counsel for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of the Victims

Ms Carine Bapita Buyangandu
Mr Joseph Keta
Mr Jean-Louis Gilissen
Mr Hervé Diakiese
Mr Jean Chrysostome Mulamba
Nsokoloni
Mr Fidel Nsita Luvengika
Mr Vincent Lurquin
Ms Flora Mbuyu Anjelani

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber II ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, having regard to article 21 of the Rome Statute ("Statute") regulation 23 and 35 (2) of the Regulations of the Court ("Regulations"), issues the following decision on the "Prosecutor's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions" of 9 July 2009 ("Application").¹

I. BACKGROUND

1. On 23 January 2009, the Chamber ordered that all incriminating evidence be disclosed to the Defence no later than 30 January 2009.² As part of this disclosure process, the Office of the Prosecutor ("Prosecution") disclosed 23 videos as incriminating evidence. In addition, video (DRC-OTP-1018-0145), which had initially been disclosed as falling under rule 77 of the Rules of Procedure and Evidence ("Rules"), was later reclassified, with the leave of the Chamber, as incriminating evidence.³ A 25th video (DRC-OTP-0155-0004) was initially disclosed to the Defence under rule 77 of the Rules on 20 June 2008⁴. It was later reclassified as incriminating evidence.⁵

¹ ICC-01/04-01/07-1260

² "Ordonnance fixant le calendrier de communication des éléments de preuve à charge et à décharge avant le procès et la date d'une conférence de mise en état", 23 January 2009, ICC-01/04-01/07-846

³ "Décision relative à la requête du Procureur aux fins de suppressions d'informations dans une bande vidéo (ICC-01/04-01/07-912 et ICC-01/04-01/07-1052)", 18 May 2009, ICC-01/04-01/07-1148-Conf-Exp

⁴ "Prosecution's Communication of Pre-Inspection Report for Material Provided to the Defence under Rule 77 on 20 June 2008", 23 June 2008, ICC-01/04-01/07-624

⁵ On 6 May 2009, the Prosecution 're-disclosed' DRC-OTP-0155-0004 to the Defence, this time as incriminating evidence. However, as the Prosecution had done so after the deadline for disclosing incriminating evidence had lapsed, the Chamber demanded that a formal request under regulation 35(2) be filed. This was duly done on 11 May 2009 ("Prosecution's Urgent Application to be Permitted to Present as Incriminating Evidence a Video Previously Disclosed to the Defence Pursuant to Rule 77 [Regulation 35]", 11 May 2009, ICC-01/04-01/07-1128).⁵ The Chamber received no objections from either of the Defence teams and granted the Prosecution's request ("Décision relative à la requête

2. The Prosecution did not provide transcripts or translations for any of the videos mentioned above. It is now seeking leave to submit transcripts for each video and 14 translations thereof. For six of the transcripts, the Prosecution is still not able to provide a translation and for one video no translation is said to be necessary. It expects the remaining translations to be completed by 21 August 2009, at which time it intends to seek another extension of time limit under regulation 35 (2) of the Regulations.

3. With regard to the transcript⁶ and translation⁷ of video DRC-OTP-0155-0004, the Prosecution seeks authorisation to apply a number of redactions to both the transcript and the translation for the protection of a person appearing in the video. At the time of the initial disclosure of the said video, the Prosecution, without having previously sought and obtained the Chamber's permission to do so, had applied voice and facial distortions to the video. On 13 February 2009, the Prosecution applied for "approval" to maintain the said distortions.⁸ The Chamber authorised the maintenance of the distortions and the redaction of the name of one person appearing in the video.⁹ The Prosecution now seeks authorisation to apply the same redactions to the transcript and translation of video DRC-0155-0004 "to ensure the continued effectiveness of the protective measures".¹⁰

4. Finally, the Prosecution requests to be permitted to disclose an additional video (DRC-OTP-1042-0006), which it allegedly obtained only recently, but which partially overlaps with DRC-OTP-0155-0004. No transcript or translation of this video is provided. In the event the Chamber were to allow the

urgente du Procureur aux fins d'autorisation d'utilisation d'une vidéo en tant qu'élément de preuve à charge (norme 35 du Règlement de la Cour)", 18 May 2009, ICC-01/04-01/07-1144).

⁶ Annex 24, DRC-OTP-1043-0012

⁷ Annex 25, DRC-OTP-1043-0013

⁸ "Prosecution's Application for Protective Measures pursuant to Article 54(3)(f) and Rule 81(4)", 13 February 2009, ICC-01/04-01/07-899

⁹ "Décision relative à la demande de mesures de protection présentée par le Procureur en vertu de l'article 54-3-f du Statut et de la règle 81-4 du Règlement", 25 March 2009, ICC-01/04-01/07-989

¹⁰ ICC-01/04-01/07-1260, par. 19

late submission, it is suggested that permission to provide such a transcript and translation will be requested under regulation 35 (2) when they are ready.¹¹

II. ANALYSIS AND CONCLUSION

A. Belated disclosure of transcripts and translations of 25 videos

5. In justifying its request for an extension of time limit, the Prosecution invokes the length of time required to produce the 25 transcripts and translations.¹² The Chamber notes that, although this is certainly a reasonable and understandable explanation for why the transcripts and translations could not be disclosed earlier, it must ascertain whether it is a “reason outside of his or her control”, as required by regulation 35(2) of the Regulations. The Chamber does not wish to minimise the budgetary limitations to which the Prosecution is subject and over which it indeed has very little control. The reality is that this Court, like any other judicial institution, has to operate with finite means, which, in this case, may translate into a limited capacity of the Prosecution for generating transcripts and translations. The Chamber therefore considers that, in the absence of any specific indications, the Defence’s allegation that the delay in producing the transcripts and translations is due to a lack of sufficient diligence on the part of the Prosecution¹³, is unfounded.

6. However, the Chamber notes with concern that the Prosecution seems to invoke the fact that transcribing and translating video material is a very labour-intensive process and that its resources are limited, as a justification for not complying with its obligations under the statutory framework of the Court, as well as for missing deadlines imposed by the Chamber. The Chamber stresses

¹¹ According to electronic correspondence with the Prosecution on 7 July 2009, the transcript will be ready by 27 July 2009 and the translation of the transcript will be ready by 10 August 2009.

¹² *Ibid.*, par. 7

¹³ ICC-01/04-01/07-1284, par. 15

in this regard, that a persistent lack of resources can never be an excuse for not complying with legal obligations or for not respecting deadlines, much less for ignoring the rights of the Defence to have adequate time for preparation and to be tried without undue delay. In this context, the Chamber refers to the well-established jurisprudence of the European Court of Human Rights to the effect that excessive workload or lack of necessary means is no justification for violating the right to be tried without undue delay.¹⁴

7. Regulation 35 (2) provides that “[t]he Chamber may extend [...] a time limit if good cause is shown [...]” and, in the last sentence, that : [a]fter the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.” The Chamber recalls, in this regard, that the Appeals Chamber has clearly held that the exception of regulation 35 (2) (last sentence) is only available in case the applicant can show the existence of “exceptional circumstances”, such as incapacitating illness, to demonstrate that there is a “reason outside his/her control.”¹⁵ Clearly, a persistent shortage of resources, let alone the fact that transcribing and translating video material is especially time consuming, cannot be considered as an ‘exceptional circumstance’.

8. Moreover, as the Prosecution had previous experience with transcribing and translating video footage from other cases before the Court, it is difficult to see why the Prosecution was unable to file the application for an extension of time limit before the expiration of the deadline imposed by the Chamber, as required by regulation 35(2). Although limited resources and

¹⁴ *Pugliese v. Italy*, 24 May 1991, Series A no. 206-A; *Eckle v. Germany*, 15 July 1982, Series A no. 5, (1983) 5 EHRR 1; *Milasi v. Italy*, 25 June 1987, Series A no. 119, (1988) 10 EHRR 333; *Vocutaro v. Italy*, 24 May 1991, Series A no. 206-C, (1991) 12/6-7 HRLJ 252 (some are in italics some others not)

¹⁵ Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, “Reasons for the ‘Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007’ issued on 16 February 2007”, 21 February 2007, ICC-01/04-01/06-834, par. 9-10

labour-intensiveness are clearly not 'exceptional circumstances' in the sense of regulation 35 (2) (last sentence), the Chamber considers that they may constitute a 'good cause' in the sense of regulation 35 (2) (first sentence).¹⁶ However, no mention of forthcoming transcripts or translations was made in the relevant disclosure notes.¹⁷ The disclosure notes did not even indicate clearly that such transcripts and translations were still missing and forthcoming.

9. Accordingly, the Chamber notes with concern that, although the videos were disclosed before the time limit, they were provided to the Defence *without* a transcript or translation. Under these circumstances, the Chamber wonders to what extent the Defence has been able, as the Prosecution alleges, to usefully exploit these videos. In this respect, the Chamber has itself examined a sample of the videos and found it extremely difficult to understand their precise content without the transcript and translation.

10. The Chamber recalls that according to regulation 39(1) of the Regulations, *all* documents and materials filed with the Registry *shall* be in English or French and that if the original is not in one of these languages, the participant *shall* attach a translation thereof. The Chamber further recalls that Pre-Trial Chamber I, in its decision of 7 November 2006, held that "under no circumstances may evidence not translated into one of the working languages of

¹⁶ Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, "Reasons for the 'Decision of the Appeals Chamber on the request of counsel of Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007' issued on 16 February 2007", 21 February 2007, ICC-01/04-01/06-834, par. 7: "A cause is good, if founded upon reasons associated with a person's capacity to conform to the applicable procedural rule or regulation or the directions of the Court. Incapability to do so must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations."

¹⁷ "Prosecution's Communication of Incriminatory Evidence Re-Disclosed to the Defence on 24 April 2008", 25 April 2008, ICC-01/04-01/07-442; "Prosecution's Communication of Incriminatory Evidence Disclosed to the Defence on 6 June 2008", 9 June 2008, ICC-01/04-01/07-565; "Prosecution's Communication of Incriminatory Evidence Disclosed to the Defence on 28 November 2008" , 1 December 2008, ICC-01/04-01/07-778; "Prosecution's Communication of Incriminatory Evidence Disclosed to the Defence on 17 December 2008", 17 December 2008, ICC-01/04-01/07-798; "Prosecution's Communication of Incriminatory Evidence Disclosed to the Defence on 23 January 2009", 26 January 2009, ICC-01/04-01/07-850; "Prosecution's Communication of Incriminatory Evidence Disclosed to the Defence on 29 and 30 January 2009", 2 February 2009, ICC-01/04-01/07-865;

the Court at the time of the commencement of the confirmation hearing, be admitted into evidence insofar as the Chamber must be in a position to fully understand the evidence [...] the Prosecution must be prepared to provide the evidence on which it intends to rely at the confirmation hearing in one of the working languages of the Court by the time it is required [to do so]".¹⁸ Pre-Trial Chamber I applied the same reasoning in its "Decision on the confirmation of charges" of 26 September 2008, when it declared inadmissible one of the videos¹⁹ contained in the present Application, because only a very small portion of the video had been translated.²⁰

11. The same principle must apply before the Trial Chamber. Indeed, the Chamber considers that a video is only disclosed to the Defence from the moment it can fully understand what its precise content is. This is to a large degree dependent on the nature and content of the video material. However, in most cases, it will only be possible for the Defence to fully understand the contents of a video after:

- 1) the relevant persons appearing in the recording have, to the extent possible, been identified;
- 2) the location(s) of the recording has or have been indicated as precisely as possible;
- 3) the date and time of the recording has been indicated as precisely as possible; and

¹⁸ Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the Defence 'Request to exclude video evidence which has not been disclosed in one of the working languages'", 7 November 2006, ICC-01/04-01/06-676, p. 3

¹⁹ DRC-OTP-0080-0011

²⁰ Pre-Trial Chamber I, "Decision on the confirmation of charges", 29 September 2008, ICC-01/04-01/07-717

- 4) the audible spoken words and visible written texts have, to the extent that they are relevant to the evidence, been translated into one of the working languages of the Court.

12. The Chamber accepts that there are several ways in which the Prosecution can provide this information to the parties and the Chamber. For example, the videos could have sub-titles or spoken commentary. In the present case, the Prosecution chose to rely on transcripts and the translation thereof in order to comply with its disclosure obligations.

13. For the reasons explained above, the Chamber is of the view that the transcripts and translations form an integral part of the video and must for that reason be considered as constituting one and the same piece of evidence – when one is missing, the evidence is not complete. Therefore, until the transcript and the necessary translations into one of the working languages of the Court have been provided to the Defence, the Prosecution has not complied with its disclosure obligations and its obligations under regulation 39(1) of the Regulations. Moreover, the Prosecution has also failed to comply with the Chamber's Order of 23 January 2009 according to which all incriminating evidence had to be disclosed by 30 January 2009.²¹

14. However, the Chamber observes that neither of the Defence teams raised its voice when the videos were initially disclosed without transcript or translation, and only one of the Defence teams has responded to the Application²². The Defence for Mr. Katanga requests for the Application to be denied, but does not seem to object to the continued reliance of the Prosecution on the 25 videos in question.

²¹ "Ordonnance fixant le calendrier de communication des éléments de preuve à charge et à décharge avant le procès et la date d'une conférence de mise en état (règle 132 du Règlement de procédure et de preuve)", 23 January 2009, ICC-01/04-01/07-846

²² ICC-01/04-01/07-1284

15. This leaves the Chamber in a position where it is requested to reject the submission of the transcripts and translations as being unjustifiably late, while the videos would still remain on the List of Incriminating Evidence. Given that the Chamber needs the transcripts and translations in order to understand the original videos, it considers that it has a proper interest in receiving the transcripts and translations and therefore allows their submission.

16. The same reasoning applies to the translations that are still forthcoming. The Chamber sees no purpose being served in the Prosecution submitting another application when they are ready. Instead, the Chamber urges the Prosecution to prepare the said translations within the shortest possible delay.

B. Request for redactions in transcript and translation of video DRC-OTP-0155-0004

17. The Prosecution asks to be allowed to apply the same protective measures with regard to the transcript and translation of video DRC-OTP-0155-0004 as it was authorised to apply to the video itself.²³ The Prosecution argues that such redactions are necessary in order to ensure the continued effectiveness of the protective measures applied to the video.²⁴

18. The Chamber considers that this request is a logical consequence of the protective measures it authorised with regard to video DRC-OTP-0155-0004. As the Chamber pointed out above, a video, its transcript and translation must be seen as forming integral parts of the same item of evidence. It would therefore be incoherent to impose restrictions on one, but not the other.

²³ "Décision relative à la demande de mesures de protection présentée par le Procureur en vertu de l'article 54-3-f du Statut de la règle 81-4 du Règlement", 25 March 2009, ICC-01/04-01/07-989

²⁴ ICC-01/04-01/07-1260, par. 19

C. Request for additional disclosure of new incriminating video evidence

19. The Prosecution also requests permission to add a new video (DRC-OTP-1042-0006) to its List of Incriminating Evidence. It submits that a substantial part of this video contains identical images from those contained in DRC-OTP-0155-0004²⁵, but that it is of superior video and audio quality. Moreover, the Prosecution submits that it contains limited, but relevant additional footage.²⁶

20. The Chamber has examined video DRC-OTP-1042-0006 and agrees that it is of better audio-visual quality than video DRC-OTP-0155-0004. To the extent that it can be authenticated, the Chamber sees no impediment that video DRC-OTP-1042-0006 be submitted to substitute the passages that overlap with DRC-OT0155-0004. Indeed, it will be to the benefit of all parties and the Chamber itself if the video material is of better quality.

21. However, with regard to the additional material contained in video DRC-OTP-1042-0006, the Chamber notes that the Prosecution indicated that it was awaiting the final transcription and translation of the video before it would be in a position to assess accurately all new incriminating evidence it contains and upon which it intends to rely at trial.²⁷ Nevertheless, the Prosecution provisionally identified ten new passages upon which it intends to rely at trial²⁸,

²⁵ ICC-01/04-01/07-1260, par. 13

²⁶ ICC-01/04-01/07-1260, par. 14

²⁷ Electronic communication of the Office of the Prosecutor of 3 July 2009.

²⁸ Electronic communication of the Office of the Prosecutor of 3 July 2009. The passages in question are:

[00:04:52] Images of a child with a machete;

[00:06:04-06:20] Images of a child with a machete;

[00:06:52] Images of a child with a gun;

[00:11:54] Images of a child with commander Pascal;

[00:24:48]: Images of young males in front of the offices of the Etat Major;

[00:43:27 – 00:44:37]: Images of child soldiers with guns;

[00:46:18 – 00:50:30]: Images of child soldiers with guns;

[1:21:30 – 1:22:12] Images of a child combatant with a gun;

[01:38:08]: Image of child soldiers with guns;

[01:38:25 – 1:39:28] and [01:44:00 – 01:46:44] Images of Mathieu Ngudjolo.

including footage depicting Mr. Mathieu Ngudjolo Chui, not found in previously disclosed videos.

22. The Defence for Mr. Katanga objects to the inclusion of video DRC-OTP-1042-0006 because it is submitted late and, in the view of the Defence, of limited relevance.²⁹ The Defence further points to the fact that the Prosecution did not provide a transcript and translation of the video and that the Prosecution still needs to interview the provider of the video, W-444, which will lead to further late disclosure, shortly before the start of the trial.

23. In support of its late application, the Prosecution argues that it only received video DRC-OTP-1042-0006 on 8 June 2009, after attempting to contact W-444 for several months. This, the Prosecution argues, establishes 'good cause' within the meaning of regulation 35 (2).³⁰

24. The Chamber first points out that for the purpose of regulation 35 (2), last sentence, the Prosecution is not required to show 'good cause'. Instead, in order to justify an extension after the lapse of a time limit, the party requesting late submission must establish that it was "unable to file the application within the time limit for reasons outside [its] control."³¹ As explained above, this condition presupposes 'exceptional circumstances'.³² It does not suffice that common day-to-day working methods did not allow earlier compliance with the time limit.

25. The Chamber reiterates that the applicable time limit for submitting incriminating evidence was 30 January 2009. It accepts that the Prosecution may not have obtained video DRC-OTP-1042-0006 until 8 June 2009, but at the same time the Chamber cannot fail to note that this was mainly a consequence of the Prosecution's continuing investigation. The Prosecution provides no indication

²⁹ ICC-01/04-01/07-1284, par. 16

³⁰ ICC-01/04-01/07-1260, par. 16

³¹ Regulation 35 (2) *in fine*

³² ICC-01/04-01/06-834

that it had been looking for W-444 or the video before 30 January 2009. Indeed, the Prosecution states that it only found out about the existence of W-444 after the deadline had lapsed. It is thus in the first place due to the Prosecution's continued investigation that this video was obtained after the deadline. The Chamber recalls that the Prosecution, by its own assertion, said it was ready to go to trial as of June 2009 and that it was prepared to disclose all incriminating evidence by 30 January 2009.³³ The Chamber was entitled to infer from this that, apart from the completion of some pending issues, most notably the protection of certain persons³⁴ to which the Chamber allotted ample time and attention, the Prosecution had all the evidence it needed in order to present its case.

26. The Chamber is aware of the Appeals Chamber's judgment of 13 October 2006, in which it held that the Prosecution is entitled to continue investigating after the confirmation of charges.³⁵ However, as was emphasised by the Appeals Chamber, it is the responsibility of the Chamber to safeguard that the Prosecution's right to continue investigating does not in any way undermine the right of the defence to have adequate time and facilities for the preparation of the trial, in accordance with article 64 (3)(c).³⁶

27. The Chamber notes in this regard, that the Appeals Chamber's concern when allowing continuing investigations after the confirmation of charges, was twofold: on the one hand, the Appeals Chamber was concerned about the possibility that better, more compelling, new evidence could become available after the confirmation of charges, and that it would be wrong to deprive the

³³ "Réponse de l'Accusation à l'Ordonnance enjoignant aux participants et au Greffe de répondre aux questions de la Chambre de première instance II en vue de la conférence de mise en état (article 64-3-a du Statut) du 13 Novembre 2008", 24 November 2008, ICC-01/04-01/07-764 and ICC-01/04-01/07-T-52-ENG-ET, p. 45, line 23 – p. 46, line 25 (transcript of status conference held on 27 November 2008)

³⁴ ICC-01/04-01/07-T-52-ENG-ET, p. 45, line 23 – p. 46, line 25 (transcript of status conference held on 27 November 2008)

³⁵ *Prosecutor v. Thomas Lubanga Ngudjolo*, "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence'", 13 October 2006, ICC-01/04-01/06-568

³⁶ ICC-01/04-01/06-568, par. 55

Chamber of this new information as this might interfere with the Chamber's duty of establishing the truth. On the other hand, the Appeals Chamber was concerned about the rights of the accused, in that the possibility could not be excluded that the Prosecution might discover important new and potentially exonerating evidence after the confirmation of charges, to which the defence is entitled as a matter of right.

28. Accordingly, although the Prosecution is allowed to continue its investigation after the confirmation of charges, there is no unlimited right to submit newly discovered material. The submission of the fruits of ongoing investigations is equally subject to the time limits imposed by the Chamber, particularly in light of the phase of the trial proceedings and the remaining time available to the Defence for the preparation of the trial. In other words, the Prosecution cannot rely on its right to continue investigating in order to justify late submission of newly discovered material. The fate of such new material must be determined by the Chamber on a case by case basis, and will depend to a large extent on whether the new material contains primarily incriminating or potentially exculpatory information.

29. When the evidence is potentially exculpatory in character, the right of the Defence to be informed about evidence in the Prosecution's possession, which the Prosecution believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence, trumps the time limits imposed by the Chamber. Indeed, it would be antithetical to the role of the Chamber to guarantee that the accused receive a fair trial, if it were to withhold important exonerating material from the Defence. However, late submission is subject to there being sufficient time for the Defence to have adequate time and facilities for the preparation of the trial. Therefore, if the Prosecution discloses new potentially exonerating material after the time limit has lapsed, the Defence must be given sufficient time to process the

new information. The Chamber will evaluate this in light of the nature and volume of the new evidence on a case by case basis.

30. If the Prosecution seeks to disclose newly discovered incriminating evidence after the applicable time limit, it must convince the Chamber of the significance and relevance of the newly discovered evidence and the need for the Chamber to consider it in the interest of having a better understanding of the case and the establishment of the truth.³⁷ It does not suffice, in this regard, for the Prosecution simply to argue that the evidence is new. Instead, the Prosecution must either show that the new evidence is more compelling than evidence already disclosed to the Defence, or that it brings to light previously unknown facts which have a significant bearing upon the case. If the Chamber finds that this is the case, it may allow the Prosecution to submit such newly discovered incriminating evidence after the time limit has lapsed, bearing in mind the Chamber's responsibility to safeguard the right of the accused to have adequate time to prepare. To assist the Chamber in assessing the impact of the late submission of new incriminating evidence on the Defence, the Prosecution must explain how the new evidence relates to its overall evidentiary case and the manner in which it is proposed it will be entered into evidence during the trial.³⁸

31. In applying the above conditions to the newly discovered video, the Chamber first notes that the Prosecution did not provide a transcript and translation of video DRC-OTP-1042-0006. It indicated to the Chamber that a transcript of the new passages would be ready by 27 July 2009 and that the translation thereof would be ready by 10 August 2009.

32. Under these circumstances, the Chamber is not in a position to evaluate whether the new evidence (that is, the footage which does not overlap

³⁷ "Décision sur les témoins 002, 030, 323 et 373", 14 May 2009, ICC-01/04-01/07-1135, par. 5

³⁸ Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on prosecution's request to add items to the evidence to relied on at trial filed on 21 April and 8 May 2008", 4 June 2008, ICC-01/04-01/06-1377

with DRC-OTP-0155-0004) is either more compelling than previously disclosed evidence or brings to light a significant new fact. The Chamber recalls, in this regard, that regulation 23 imposes a duty upon the participants to state all relevant legal and *factual* issues in sufficient detail and is therefore unable to accept the request.

FOR THESE REASONS,

THE CHAMBER

ALLOWS the late submission of transcripts and translations of the following videos:

DRC-OTP-0083-0002; DRC-OTP-0080-0010; DRC-OTP-0080-0006;
DRC-OTP-0124-0008; DRC-OTP-0120-0294; DRC-OTP-0081-0006;
DRC-OTP-1017-1482; DRC-OTP-0080-0011; DRC-OTP-0113-0218;
DRC-OTP-0081-0009; DRC-OTP-0087-0014; DRC-OTP-0081-0004;
DRC-OTP-0035-0076; DRC-OTP-0036-0194; DRC-OTP-0151-0665;
DRC-OTP-0127-0065; DRC-OTP-0082-0004; DRC-OTP-0116-0002;
DRC-OTP-0124-0014; DRC-OTP-0127-0061; DRC-OTP-0081-0007;
DRC-OTP-0081-0012; DRC-OTP-0081-0011; DRC-OTP-1018-0145;
DRC-OTP-0155-0004

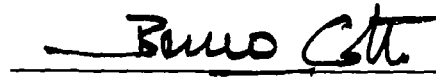
ORDERS the Prosecution to provide the outstanding translations within the shortest possible time.

AUTHORISES the Prosecution to apply the same redactions to the transcript and translation of video DRC-OTP-0155-0004 (DRC-OTP-1043-0012, DRC-OTP-1043-0013) as were authorised by the Chamber in relation to this video.³⁹

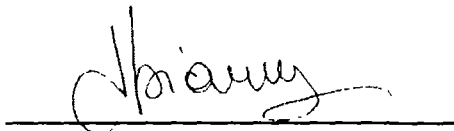
ACCEPTS the request to add video DRC-OTP-1042-0006 insofar as it contains identical material as previously disclosed video footage, but **REJECTS** the submission of any new material.

³⁹ "Décision relative à la demande de mesures de protection présentée par le Procureur en vertu de l'article 54-3-f du Statut et de la règle 81-4 du Règlement" 25 March 2009, ICC-01/04-01/07-989

Done in both English and French, the English version being authoritative.



Judge Bruno Cotte
Presiding Judge



Judge Fatoumata Dembele Diarra



Judge Hans-Peter Kaul

Dated this 27 July 2009

At The Hague, the Netherlands