

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 18 June 2009

TRIAL CHAMBER I

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

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

Confidential

**Decision on discrepancies between the English and the French Transcripts
and related issues**

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, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval

Legal Representatives of the Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Joseph Keta Orwinyo
Mr Jean Louis Gilissen
Mr Jean-Chrysostome Mulamba Nsokoloni
Mr Paul Kabongo Tshibangu
Mr Hervé Diakiese

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 I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, delivers the following decision ("Decision"):

I. INTRODUCTION

1. On a worryingly large number of occasions during this trial, the parties and the participants have complained about discrepancies between the English and the French transcripts, which the Chamber has thus far resolved by directing, wherever possible, an out-of-court resolution of these issues: the Chamber indicated that it was only to be involved, on an active basis (as opposed to being informed, as a matter of course, as to generally agreed amendments to the record), in the event of the emergence of intractable problems. This approach is discussed and reviewed in greater detail hereafter.
2. Without exhaustively rehearsing the background facts, there are *prima facie* grounds for concluding that widespread differences between the French and English transcripts exist, of which some are of real potential importance, whilst others are less so. There have been other problems, such as omissions from the record and common mistakes, which have appeared in both the French and English versions. However, it is to be stressed that until the concluding stages of this trial it will be wholly impossible to differentiate definitively between errors that are material and those of lesser relevance. It is self-evident that these discrepancies and difficulties (if they are widespread and significant) may well cause the Chamber very substantial problems at later stages in the case, should they be left unresolved: for instance, numerous competing and divergent

versions of the facts, in English and in French, have the potential to place the Chamber in a position in which it is unable to reach key factual conclusions without very substantial delays. In the view of the judges, therefore, it is a matter of high urgency that a plan is formulated to address this problem satisfactorily and immediately, in order to avoid confusion and a costly hiatus towards the end of the trial. If this problem, essentially in its entirety, is left until the closing stages of these proceedings, the potential consequences could be truly dire, particularly given the right of the accused to a fair and expeditious trial pursuant to Article 64(2) of the Rome Statute ("Statute"). It is well arguable that the right to a fair trial includes access to a reliable record of the proceedings throughout the trial. Accordingly, a plan must be formulated for the future, to avoid a recurrence of this problem.

II. THE RELEVANT HISTORY

3. The parties and participants have remarked on a frequent and wide-ranging basis as to the adequacy and accuracy of the interpretation of the live witnesses, with particular focus on the apparent differences between the French and English transcripts. Generally, these have been too numerous and wide-ranging to permit a detailed description or analysis of the circumstances of each of them. It is likely that the matters that have been brought to the attention of the Chamber will have tended to include those of greatest significance.
4. Three days after the commencement of the trial, on 28 January 2009,¹ there were complaints about inaccuracies in the interpretation from Swahili, and the Chamber directed the parties to indicate to the interpreters (assisted by

¹ Transcript of hearing on 28 January 2009, ICC-01/04-01/06-T-110-ENG, pages 45–48.

the court officer) which passages were believed to contain errors. This procedure was further developed on 11 February 2009,² when the Chamber indicated that it had had brought to its attention a number of applications for alterations to the official transcript. The direction provided by the judges was that in the event of further complaints as to interpretation or other issues relating to the content of the official transcript, in the first instance the parties and any concerned participants were to discuss the matter. If agreement was reached, the court officer should be provided with an appropriate form of words that identified how it was suggested the transcript should be amended. If it was possible to implement the proposed change (*viz.* if it was comprehensible and achievable) then this was to be effected, and the assumption would be that the Chamber had given its consent; indeed, the Chamber proposed to intervene positively only if the judges disagreed with the proposal. If the parties and any interested participant were unable to agree, or if the court officer, the interpreters or the stenographer were dubitant, then the matter was to be ventilated in open court. The Chamber stressed it particularly sought to avoid receiving emails from individual participants or either of the parties, inviting the Court to make orders which had not been the subject of prior discussion and (if possible) agreement at the bar. It is to be observed, however, that in the estimation of the Registry this procedure has "in practice proven to be quite complex and time consuming for those involved",³ and the Office of the Prosecutor ("prosecution") queried its utility.⁴

² Transcript of hearing on 11 February 2009, ICC-01/04-01/06-T-124-ENG, page 51.

³ Information to the Chamber in relation to interpretation and transcription matters related to trial proceedings, 18 March 2009, ICC-01/04-01/06-1788-Conf, paragraph 16.

⁴ Prosecution's Response to the "Information to the Chamber in relation to interpretation and transcription matters related to trial proceedings" filed by the Registry on 18 March 2009, 2 April 2009, ICC-01/04-01/06-1808-Conf, paragraph 4.

5. Regrettably, the clear indication is that the problems, although reduced in number, are enduring, and it has become apparent that in many instances they are not susceptible to resolution through *inter partes* discussion. Indeed, there is real risk that some problems will remain undetected until a much later stage in the case unless remedial steps are taken.

6. On 18 March 2009 the Registry confidentially filed its "Information to the Chamber in relation to interpretation and transcription matters related to trial proceedings".⁵ The general problem was described as follows: "Both Defence and Prosecution teams approached the Registry separately with concerns related to the transcription and interpretation services provided during trial hearings, and in particular with respect to such services as they relate to witness testimony".⁶ The prosecution had provided a transcript (as a demonstration of the difficulties), and this was reviewed and corrected, leading to the following description of the problem: "The main difficulties that have been encountered by both parties include the following: a) Difficulty in following the French real-time transcript during the court sessions due to the fact that when part of a sentence is redrafted the lines disappear during the correction exercise and when they come back they usually do so at a later stage when more sentences have been already added ('problem of disappearing lines'); b) The English and French real-time transcripts appear with a number of omissions, rendering work in both languages, for both parties, difficult, especially when the information is required for use the next day; c) Interpretation from French into English is not always accurate".⁷

⁵ ICC-01/04-01/06-1788-Conf.

⁶ *Ibid.*, paragraph 1.

⁷ *Ibid.*, paragraph 3.

7. The prosecution had particularly enquired whether it would be possible to implement a procedure whereby at the end of each day both the English and the French real-time transcripts are checked against each other in order to ensure a more accurate record, and the defence sought a better quality written record of the proceedings, especially as regards the French real-time transcript (in order to ensure the English version accurately reflects the French).⁸
8. The Registry advanced various areas of investigation, and some possible solutions, as rehearsed below.
9. Addressing the apparent problem of interpreting from French into English, a test was set up for a period of two weeks from 17 March 2009, involving modified interpretation arrangements. Four English interpreters have been made available, enabling three to be present in the booth instead of the usual two. Under this arrangement, the thirty-minute "standard" rotation period is maintained, but "the booths' configuration will be improved in order [...] to ensure that any interpretation inaccuracies that may appear on the real-time transcript are noticed during the hearing for prompt correction to the transcript on the same day".⁹ It is suggested that this test period "will allow the Registry to monitor whether progress is made or whether other solutions need to be considered".¹⁰
10. As regards the second main problem that was addressed, namely distribution of the edited version of the transcript, it was noted that the French version of the transcripts historically has generally not been

⁸ *Ibid.*, paragraph 4.

⁹ *Ibid.*, paragraph 6.

¹⁰ *Ibid.*, paragraph 7.

available until the following day. The Registry has undertaken to provide, if at all possible, the edited versions in both English and French within two hours of the conclusion of the last court session during court sitting days, and in any event on the same day. In order to implement this change in practice, the Registry has established a revised shift system since 17 March 2009: the relevant staff will be required to remain for between three to four hours after the end of the last court session to ensure that the edited version is distributed on the same day.¹¹

11. Next, the Registry considered the problem of 'disappearing lines' of the French real-time transcript. It is convenient simply to rehearse what was set out: "Since the implementation of the real-time transcript with the Transcend software, which is used for the French transcript, the Registry has been trying to identify the best solution to address the issue of the disruption caused to the user by the brief disappearance of lines or entire paragraphs. In this regard, a tool which will enhance compatibility between Case Catalyst (the software which translates steno strokes into words) and Transcend (the software that displays the transcript and allows for distribution and annotations) has been identified. This tool is yet to be tested and if successful, it could be implemented by 4 May 2009".¹²

12. As regards omissions in the transcripts, aside from an increase in staff (as described in paragraph 9 above), it was suggested that the other explanations for incomplete transcripts are a failure by those speaking in court to allow sufficient time for interpretation. A particular problem that was identified is that it is necessary to allow the interpretation of one

¹¹ *Ibid.*, paragraph 10.

¹² *Ibid.*, paragraph 11.

speaker to conclude before the next speaker commences. Apart from the general need for delivery to be appropriately paced, it was pointed out that the interpretation to and from Swahili and Lingala may last longer than French into English, and vice versa. Indeed, there can be a delay of 15 seconds. Numbers (such as EVD or MFI designations) need to be delivered particularly slowly. As regards names (of people and locations), it is proposed that one of two courses should be followed: either a list should be supplied in advance of the evidence or submission, or the name should be spelt out at the time. Speakers with "strong" accents can cause the interpreters particular difficulties. To date when the court reporters have not been sure what had been said in these circumstances, they inserted the word *inaudible* into the text. This procedure is to be discontinued and instead the interpreters will "put on the written record in real-time [...] the words for which they are not fully sure". The Registry is also considering another proposal, namely "[i]n addition, a supplementary proposal is currently being studied and further assessment is required. Namely interpretation into the same language (e.g. French to French) with regard to witnesses testifying in French who may have a very strong accent. The objective in mind would be to diminish the number of missing lines and/or paragraphs in the transcript by allowing the court reporters to rely on the interpreted version. In terms of concluding whether such type of interpretation would be required, a thorough assessment would need to be carried out during the familiarization process, to determine whether French to French interpretation might be necessary during testimony"¹³

13. Addressing the procedure for implementing corrections to the transcript, given the suggested difficulties in implementing the Chamber's direction

¹³ *Ibid.*, paragraph 12.

of 11 February 2009 (see paragraph 4 above), the Registry has advanced the following proposal:

17. In relation to the above, in maintaining the spirit of the procedure established by the Chamber, and taking into account both the information provided by the parties in relation to the difficulties they have faced when working with the transcripts, as well as the proposed solutions provided in the present submission, the Registry respectfully brings to the attention of the Chamber, for its consideration the proposed modifications to the procedure for corrections to the transcript, as follows:

a) If, during a hearing either party or concerned participant has a reason to believe that any errors, omissions or discrepancies appear in the English or French real-time transcripts, due to interpretation or transcription, the relevant person could raise it before the Chamber so that this information will appear on the record, and in order to allow the relevant Registry staff to take appropriate action.

b) Thereafter, and on the basis of the edited version of the transcript, should either party or concerned participant still face difficulties with the written record, the matter could be raised before the Chamber during the course of the next trial session.¹⁴

14. Finally, the Registry indicated its disquiet at late changes in the language used by witnesses (*e.g.* switching from Swahili to French). It is to be noted that the Registry in an email to the Chamber had ventilated this concern earlier, on 17 February 2009. In an attempt to reduce the occurrence of this event, the Registry suggests verifying the language to be spoken by the witness during his or her testimony as part of the courtroom familiarisation process, if the Chamber agrees with this approach.¹⁵

¹⁴ *Ibid.*, paragraph 17.

¹⁵ *Ibid.*, paragraph 18.

15. The prosecution responded on 2 April 2008,¹⁶ when it indicated that the Registry had accurately set out the concerns of the parties. The prosecution emphasised that it is “crucial” that adequate solutions are found for these concerns. The prosecution suggested, as regards the Chamber’s order that interpretation issues should be addressed (in the first instance) out of court, that “the parties are not in a position to agree amongst themselves on the actual words spoken by the witness.” Furthermore, it suggested that “it was burdensome on the parties and participants to review the two languages of the transcripts to identify discrepancies, and the procedure to request access to and then conduct a review of the recordings of testimony is equally onerous”.¹⁷

16. By way of positive proposals, the prosecution, first, suggested that instead of this work being undertaken by the parties and the participants, it was within the “domain” of the Registry to “consult” the audio recording of the testimony in order to ensure full accuracy of transcription and interpretation. Second, the prosecution submitted that if the parties and participants “become aware” of inconsistencies in the record, there should be a “convenient mechanism” to alert the interpretation section so that there can be examination and rectification (as necessary). Third, the prosecution argued that the “sole method” of ensuring the accuracy of the official record is to transcribe the original testimony of a witness, thereafter providing a translation into English and French. It was recognised, however, that this is “resource and time intensive”, and fails to address the need for a complete and contemporaneous record of the

¹⁶ Prosecution’s Response to the “Information to the Chamber in relation to interpretation and transcription matters related to trial proceedings” filed by the Registry on 18 March 2009, 2 April 2009, ICC-01/04-01/06-1808-Conf.

¹⁷ *Ibid.*, paragraph 4.

witness's testimony. However, it is suggested that if this approach were implemented, to complement the "live" transcript, it would provide a precise record of the evidence for the purposes of final submissions. Finally, the prosecution contended, given the inconsistencies that "currently exist", that the Registry should "undertake a comparative review of the French and English transcripts on a daily basis", and wherever the transcripts diverge, the recording of the hearing should be consulted to secure consistent records.¹⁸

17. These issues were canvassed in court on 3 April 2009.¹⁹ The defence indicated that it broadly agreed with the filing by the prosecution, and it added that it had requested the Registry – as a matter of importance – to use the Easter vacation to review the transcripts of all the witnesses who have given evidence (notwithstanding the indications from the Registry that this would be difficult to implement).²⁰

18. The prosecution explained to the Chamber that during a meeting between the prosecution, the defence and the Registry, the Office of the Prosecutor agreed to provide a "comparative analysis" of the French and English transcripts for some of the witnesses who have testified so far. In fulfilment of this, it commenced its review with Witness 41, and thereafter this has been undertaken for Witness 38, Witness 213, Witness 7, and Witness 8; it said it was finalising the review for Witness 11, and possibly one other witness. In conducting this "comparative review", the prosecution compared the French transcript of the witnesses' testimony against the English transcripts, and thereafter it prepared charts identifying where they did not correspond; the charts were provided to

¹⁸ *Ibid.*, paragraph 7.

¹⁹ Transcript of hearing on 11 February 2009, ICC-01/04-01/06-T-164-ENG.

²⁰ *Ibid.*, page 28, lines 24 – 25 and page 29, lines 1 – 11.

the Registry and the defence. The discrepancies varied between the substantial and the insignificant. It was left to the Registry to revert to the audio recording, to establish exactly what the witness said.²¹ In court, the prosecution undertook to hold further discussions with the defence, and possibly the Registry, to establish if there is additional assistance that the prosecution can provide.

19. During its submissions the prosecution indicated that it did not “anticipate” his office undertaking a complete review on behalf of the Registry in the case,²² and when asked by the judges to review this decision, counsel undertook to send an email to the Chamber later that day, indicating whether this task will be completed for all the witnesses that have been called (to this point in the trial). In the event, on 6 April 2009 the prosecution wrote confirming that it “was not in a position to review the transcription of witness testimony to date”. By way of justification for this stance, it was suggested, first, that although these charts may serve as a useful guide to the Registry, the prosecution – whilst undertaking the work neutrally – may be perceived as being *parti pris*, and that this work needs to be conducted by a neutral body. Second, the prosecution does not have the language resources to review the translations for the witnesses who testified in Swahili or Lingala. Third, the Registry has access to the audio-record, and is best placed to conduct an impartial review; indeed, by Regulation 65(1) of the Regulations of the Registry, quality monitoring is to be carried out by the Registry. Finally, the prosecution suggests that “a full review of the audio recordings against the transcripts must be undertaken” and although the audio

²¹ *Ibid.*, page 30, lines 4 – 25 and page 31, lines 1 – 12.

²² *Ibid.*, page 30, lines 17-21.

recordings can be made available to the parties and participants, "the review should be undertaken by a single, neutral organ of the court".²³

20. Returning briefly to the status conference on 3 April 2009, although the victims' representatives had been excluded from the out-of-court discussions set out above (arguably inappropriately), they indicated their agreement with the submissions of the prosecution and the defence. Of particular interest, counsel indicated that the Office of Public Counsel for Victims ("OPCV") checks the English and French transcripts daily to ensure that any apparent difficulties are noted.²⁴

21. On 3 April 2009 the defence did not seek to deflect the Chamber from making administrative enquiries of the Registry, to establish the ramifications of the various proposals before the Chamber.²⁵

22. As regards solutions to this problem, on 6 April 2009, the Registry indicated by email, on a preliminary basis, that for a retrospective revision of the transcripts, three months of trial would take a month to review, for which it would be necessary to recruit three French and three English interpreters (on a possible temporary basis), two typists (one French, one English) and two Swahili/Lingala interpreters to check the material.

23. On 7 April 2009, in an email from the Registry, the Chamber was informed that "the Registrar insists that she is opposed to the idea of en masse revision of the transcripts since it falls to the parties/participants to identify the problematic parts which will then be revised by the competent

²³ Email communication from the prosecution to the Trial Chamber through the Legal Advisor to the Trial Division on 6 April 2009.

²⁴ Transcript of hearing on 11 February 2009, ICC-01/04-01/06-T-164-ENG, page 33, lines 16 – 18.

²⁵ *Ibid.*

organs of the Registry. Such a precedent would create heightened expectations for the parties and participants and has a disproportionate financial impact".²⁶

24. The financial implications of a wholesale revision were attached in a separate email from the Head of the Translation and Interpretation Section of the Court, in which it was revealed that seven staff had been found to check the transcripts (in English and French) against the audio recording, in order to check the interpretation and to amend as necessary. However, her section was at that stage still seeking Swahili interpreters for the Swahili-speaking witnesses.²⁷

25. It was indicated that the section was seeking to define "the methodology of transcript verification and review" and that the temporary staff were to come from abroad. However, it was stressed by the author that an order from the Chamber was necessary before this work could be advanced.²⁸

26. On 5 May 2009, the transcription programme changed from Livenote to Transcend.

27. On 13 May 2009, the prosecution reported back on an exercise requested by the Chamber, namely comparing the English and French transcripts for Witness 12. In the assessment of the prosecution, "there appear to be fewer discrepancies between the two transcripts than before the Registry undertook its review of the issue yet there are still differences in the substance of the two transcripts. The prosecution noted 23 discrepancies

²⁶ Email communication from the Registry to the Trial Chamber through the Legal Advisor to the Trial Division on 7 April 2009.

²⁷ *Ibid.*

²⁸ *Ibid.*

between the English and the French transcript, of which nine relate to the names of people and places".²⁹

28. On 14 May 2009, the Director of Division of Court Services ("DCS") from the Registry sent a report via email to the Chamber in which a number of matters were raised. First, it was indicated that "Registry is continuing to review the relevant transcripts", a process which although not complete "continues at a steady pace". Second, although problems with recruitment of interpreters have been experienced, it is anticipated that the relevant vacant posts would be filled. Third, the "tools" available to the relevant staff (such as terminology tools and dictionaries) are being improved.³⁰

29. It needs to be stressed that in an attached memorandum from the Chief and Acting Head of Interpretation to the Director of the DCS, it was made clear that the transcript review does not include all the transcripts; instead it is suggested that "only one segment of the transcripts could be reviewed". This exercise involved a selection of transcripts from an early part of the trial. The objectives were said to be:

- a) (to) Provide a report on the reviewed segment with transcript corrections;
- b) (to) Gain an insight into type of errors in interpretation and transcription in order to give pointers to all parties and participants on how to use interpretation and transcription services in a way to minimise errors;
- c) (to) Gain insight into type of errors in interpretation and transcription in order to provide strategies to interpreters and court reporters on how to minimise errors in their work.³¹

²⁹ Email communication from the Prosecution to the Trial Chamber through the Legal Advisor to the Trial Division on 13 May 2009.

³⁰ Report of correction of transcripts – Pond Floor – Interpretation Part, 11 May 2009, Ref. MD/20090511/AT/016.

³¹ Internal Memorandum from the Director of the DCS to the Trial Division through Judge Fulford on 14 May 2009.

30. In the conclusions to this memorandum, it was suggested that the level of interpretation in the English booth in the early days of the trial had been "variable", and the causes were considered to be connected to the use of insufficiently experienced freelance interpreters. In contrast, it was considered that there had been a high level of accuracy in the French booth (in which a greater number of regular staff were working). As regards the interpretation from Swahili into French, it was stated that these had mostly involved "omissions". Overall, it was contended that the quality of interpretation had been improving as the case has progressed.³²

31. The main remedies that were suggested are, therefore, as follows:

- a) Counsel and witnesses must assist particularly with names, dates and numbers by ensuring that they are accurately reflected in the transcript;
- b) Inaccuracies and errors should be raised in open court, at the earliest possible stage;
- c) An increase in staff: the Court Interpretation and Translation Section ("STIC") is planning to recruit for English interpreters; and
- d) In future, there will be a "10% quality check".³³

III. RELEVANT PROVISIONS

32. The following provisions from the Statute and Rules are relevant to a consideration of these issues:

³² *Ibid.*

³³ *Ibid.*

Article 64(10) of the Statute

Functions and powers of the Trial Chamber

The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

Rule 137(1) of the Rules of Procedure and Evidence ("Rules")

Record of the trial proceedings

In accordance with article 64, paragraph 10, the Registrar shall take measures to make, and preserve, a full and accurate record of all proceedings, including transcripts, audio- and video-recordings and other means of capturing sound or image.

Regulation 27(2) of the Regulations of the Court

Transcripts

The transcripts constitute an integral part of the record of the proceedings. The electronic version of transcripts shall be authoritative.

Regulation 65 of the Regulations of the Registry

Quality control and linguistic problems at hearings

1. Quality monitoring shall be carried out by the Registry on the basis of, *inter alia*, recordings of hearings.
2. In the event of linguistic misunderstandings or errors of interpretation made at hearings, the team coordinator shall contact the court officer, who shall in turn inform the bench. Whenever an interpreter becomes aware of an error of interpretation during a hearing, he or she shall report the matter to the team coordinator, who shall in turn inform the court officer thereof.
3. Should the interpretation and translation service within the Registry discover, at a later stage, an error in a translation which was not noticed at the hearing, it shall inform the court officer who shall in turn inform the Chamber thereof. Following an order of the Chamber, a *corrigendum* may be issued by the said service.

4. Should the Chamber need to raise questions in relation to terminology or usage, the court officer shall contact the team coordinator.

IV. ANALYSIS AND CONCLUSIONS

32. There are clearly two cardinal issues which need to be separated and addressed individually. The first is the historic problem – the discrepancies and problems that have accrued to date; the second is how to proceed in the future, in order to avoid a recurrence of these difficulties.

A. The Historic Problem

33. The Registry has been provided with a considerable body of material indicating that there are differences, of varying significance, between the French and English transcripts, along with other difficulties that have been rehearsed above; this has taken the form, *inter alia*, of individual complaints, along with the prosecution's "comparative analysis" for approximately seven or eight of the witnesses. As is clear from the history, it has not been suggested at any stage by the Registrar, or anyone else, that a problem does not exist, or that its extent and seriousness has been materially exaggerated. The Chamber, when alerted to the potentially grave nature of the issue, sought at an early stage to resolve it by way of out-of-court agreement, jointly between the parties and the participants. It is clear that this has only provided, at best, a partial solution, and generally its implementation has not been satisfactory: it appears to be a labour-intensive process and it places the advocates in the difficult position of acting, in reality, as interpreters. The prosecution particularly has assisted – to a real extent – in indicating where some of the problems are to be found, but their researches ultimately have been selective, and in

any event the prosecution runs the risk of being viewed as less than neutral if it takes responsibility for discharging this function (rather than simply alerting the court to perceived problems).

34. The responsibility for ensuring there is a complete and accurate record of the trial rests with the Chamber (Article 64(10) of the Statute), whilst it is for the Registrar – and not, the Chamber stresses, for the parties – to take measures to make and preserve a full and accurate record of all the proceedings, including the transcripts (Rule 137(1) of the Rules). As a part of this latter responsibility, by Regulation 65 of the Regulations of the Registry, quality monitoring shall be carried out by the Registrar on the basis of, *inter alia*, recordings of hearings (sub-regulation (1)). In the event of linguistic misunderstandings or errors of interpretation at hearings, the “team coordinator” (from the relevant section) shall contact the court officer who will inform the bench (sub-regulation (2)). If the interpretation and translation service within the Registry discover, at some later stage, an error in translation which was not noticed at the hearing, the Chamber shall be informed via the court officer. Following an order of the Chamber, a *corrigendum* may be issued by the service (sub-regulation (3)). Most pertinently, by sub-regulation (4):

Where there are questions related to the accuracy of a translation used during a hearing, or if it becomes apparent that a translation used during a hearing contains errors, interpreters working at the hearing shall be requested to sight translate the original for the record until a revised version is prepared by the interpretation and translation service within the Registry.

35. As indicated above, the bench is unable to accept the full implication of the suggestion by the Registrar that “it falls to the parties/participants to

identify the problematic parts" of the transcripts, to the extent that this tends to suggest that the responsibility rests on the parties and participants to identify – sentence by sentence, line by line – where inconsistencies are to be found. Clearly, one avenue by which difficulties can, indeed should, be revealed is by those involved in the case alerting the Court whenever they observe an apparent problem, but ultimately under sub-regulation (5) when wide-ranging and sustainable doubts or queries are raised as to the accuracy of translations or transcripts, it is for the Registry to review and revise the questioned material. Although the parties and the participants may notice discrepancies *en passant*, they cannot be expected to act as the judges or custodians of the accuracy of the French and English transcripts, together with the interpretation of the witnesses' evidence. At best, they can only make a contribution, by identifying and reporting those apparent difficulties that they observe during, and following, hearings.

36. The evidence indicates that the Chamber is potentially faced with a markedly flawed court record, which may well provide an unsatisfactory basis for any final judgment. This must be rectified by the Registry, at the latest by the end of August 2009, as the defence is expected to start presenting its evidence at the earliest in September 2009. The Chamber has considered anxiously the projected costs of a complete review of the evidence given by the witnesses to date, but in the final analysis this work is essential, and the cost involved does not provide a sustainable reason for denying one of the essential prerequisites of a fair trial: a full and accurate record of the evidence. Although it is for the Registrar to determine how this is to be implemented, the Chamber respectfully questions whether it is necessary for the temporary staff to travel to The Hague, rather than undertaking this task via secure remote access (if this is

feasible). Accordingly, save for those parts already fully checked, the Registry is instructed to review the entirety of the evidence to date of all the witnesses, to ensure, first, the accuracy of the transcripts and, second, consistency between the French and English transcripts (each relevant transcript should be checked against the audio recording in that language, and thereafter the two transcripts should be compared against each other). The methodology to be adopted is for the Registrar to determine, but it must be comprehensive and effective.

B. How to Proceed in the Future

37. The Chamber is entirely sympathetic to the concerns of the Registrar as to the costs involved in carrying out a complete check of all the evidence in the case, and the Court must strive to implement a solution that ensures that this process of wholesale *ex post facto* review is not necessary hereafter, in this or any other trial. The bed-rock of any sustainable solution is that the Registry must discharge its critical responsibility of implementing procedures, with the assistance of the Chamber, that provide a reliable contemporaneous record, as opposed to the suggestion – rejected by the Chamber – that the main responsibility (*i.e.* alerting the Registry to any possible mistakes or areas of difficulty) rests with the parties and participants. This is not to obviate the need for all involved in the case to reveal, and assist with, possible areas of concern that are identified, but rather to emphasise that the critical responsibility lies with the Registry, as provided in the relevant provisions. On that basis, the Chamber approves the suggested investigation, testing and implementation (where appropriate) of the various remedial steps summarised below.

The number of interpreters and the "configuration of the booths"

38. The Chamber will await the results of the two-week test (that commenced on 17 March 2009), in which four English interpreters – an increase of one – are to be used during the hearings. Furthermore, the Registry indicated that the booths' configuration has been improved, to ensure that any interpretation inaccuracies that appear on the real-time transcript are identified during the hearings, enabling prompt correction on the same day. As described above, the Registry has averred that this test period will enable it "to monitor whether progress is made or whether other solutions need to be considered".³⁴

39. Once the STIC has recruited the four extra posts for the English booth and they have been working for a sufficiently long period of time, a review is to be undertaken to establish whether this has assisted in eliminating or greatly reducing the number of errors.

40. The Chamber is to be furnished with a written report forthwith on the outcome of the two-week test, and an update should be provided once the four permanent staff have been recruited and they have been in post for a sufficient period of time for their contribution to be assessed. Ultimately, however, it is for the Registrar to determine the allocation of interpreters in order to discharge her responsibility of ensuring that a high standard is maintained.

³⁴ ICC-01/04-01/06-1788-Conf, paragraph 7.

Distribution of the edited version of the transcript

41. The Registry has been operating a revised shift system since 17 March 2009, to ensure that the edited versions of the day's transcripts are distributed on the day of the hearing. This appears to have been working successfully.

'Disappearing lines'

42. A "tool" to "enhance" compatibility between Case Catalyst and Transcend has been identified and installed, and this has been running since 5 May 2009. In the event, this problem appears to have been rectified.

Speed of delivery and omissions in the transcripts

43. All those speaking in court must ensure that their delivery enables the interpreters and court reporters to work at a reasonable and reliable speed. Counsel must constantly watch the relevant transcript screen (*viz.* that which shows the language being used by the interpreters), monitoring the progress of the questioning, and creating gaps whenever necessary. Particular attention should be paid to ensuring there is a pause between speakers (critically, two people should never speak at the same time), as well as to the marked problems that can exist when a witness speaks Swahili or Lingala, or a speaker has a strong accent.

44. Names should always be spelt into the record whenever they are first used, and care must be taken over dates and numbers. If one has not already been provided, a list of "usual" names, locations and acronyms is to be provided by the prosecution, in consultation with the parties, the

participants and the court officer, within 10 days of the date of this Decision.

45. The Chamber will henceforth enforce a pace (*e.g.* the speed and manner of delivery) which is generally more measured.

The role of the parties and the participants

46. Addressing the Registrar's proposals, if during a hearing a party or participant apprehends there are problems with the transcript on issues of apparent real significance, they should note the page and line number, and at a convenient moment (*e.g.* immediately before a break in the proceedings, between witnesses or questioners, or at the end of a "topic" or line of questioning) the matter should be raised orally with the Chamber so that it will appear on the record and enable the relevant Registry staff to take appropriate action. Other, more minor, errors should be reported via email to the relevant section of the Registry immediately after the hearing, with copies to all counsel in the case and the Legal Adviser to the Trial Division.

47. Thereafter, if on the basis of the edited version of the transcript there are enduring, or other, difficulties, the matter should be raised with the bench during the next court hearing or as soon as the problem is identified, and the Chamber should be provided with page and line numbers, along with a brief explanation of the suggested difficulty.

Late changes in language

48. The Registry is to confirm during the witness familiarisation process which language the individual wishes to use during his or her testimony.

Reviews of the transcripts (in English and French)

49. The Chamber wishes to investigate whether the combined effect of these various changes and tests will produce reliable and consistent transcripts, in English and French. Using the evidence of Witness 16 to conduct a test, a sample of the court record (since the changes were implemented) should be checked for accuracy and consistency, with a full report to the Chamber, particularly highlighting any errors or difficulties that are revealed. For these purposes, each relevant transcript should be checked against the audio recording (in the same language), and thereafter the two transcripts should be compared against each other.

50. If this review reveals, in the estimation of the Chamber, a satisfactory state of affairs, thereafter the Registry is to test sufficiently extensive samples of the evidence on a regular basis, to ensure that a high level of accuracy and consistency is maintained. As a potential way of achieving best practice, the Chamber commends an approach whereby the entire transcript is checked each day, with ready access to the audio recording for the interpreters and court reporters undertaking this task.

51. The Chamber should be provided with a written report after each of these sample tests.

Unclear words instead of "inaudible"

52. The Registry is to include in its analysis, following the evidence of the next two witnesses (*viz.* those after Witness 16), whether the alteration in procedure, that of typing in the words the court reporters are uncertain of rather than simply entering *inaudible*, is a useful development.
53. The Chamber is to be kept informed as to other procedures that it is suggested should be implemented to enhance the accuracy of interpretation and transcription.
54. Finally, the Chamber wishes to express its recognition of the difficult and crucial role played by the interpreters and court reporters, and to commend them for their undoubted hard and valuable work to date. This Decision should not in any sense be understood to contain criticism of their vital contribution to this trial.

V. POSTSCRIPT

55. The confidential nature of the Registrar's filing was justified on the basis that "it contains specific information related to the workings of the judicial administration system and which, in the opinion of the Registrar could be exploited in a way that could have negative consequences for court proceedings specifically. Whereas interpretation and transcription matters are shared with all the parties and participants through the present submission, the Registrar considers that by their nature, they should not be a public domain topic at present".³⁵ If this confidential status is to remain, further particulars will need to be provided, by way of a filing, as

³⁵ ICC-01/04-01/06-1788-Conf.

to the ways in which it is considered this information “might be exploited to the disadvantage of the court”.³⁶ It is to be noted that in its submission, the prosecution adhered to the classification level of the Registry’s filing, clarifying that it has no objection to the filing being made public if deemed appropriate by the Trial Chamber.³⁷ Any additional submissions on this issue are to be filed by 16.00 on 19 June 2009. Otherwise, all the relevant documents³⁸ will be re-classified automatically as “public” documents (Regulation 23(3)*bis* of the Regulations of the Court).

VI. DISPOSITION

56. For the above reasons the Chamber makes the following orders:

- a) The Registry is instructed to review the entirety of the witnesses’ evidence to date, save for those parts already fully checked, to ensure, first, the accuracy of each relevant transcript against the audio recording (in the same language), and, second, consistency between the French and English transcripts, in order to provide a full and accurate record of the proceedings, at the latest by the end of August 2009.

- b) The Registry shall provide a written report forthwith on the outcome of the two-week test relating to the number of interpreters and the “configuration of the booths”, and shall provide an update once the four permanent staff have been recruited and have been in post for a sufficient period for their contribution to be assessed.

³⁶ *Ibid.*

³⁷ ICC-01/04-01/06-1808-Conf, paragraph 8.

³⁸ ICC-01/04-01/06-1788-Conf; ICC-01/04-01/06-1808-Conf.

- c) If one has not already been provided, a list of "usual" names, locations and acronyms is to be provided by the prosecution, in consultation with the parties, the participants and the court officer, within 10 days of the date of this Decision.
- d) If a party or participant detects problems with the transcript on issues of apparent real significance, they should note the page and line number and raise the matter orally with the Chamber so that it will appear on the record. Minor errors should be reported via email to the relevant section of the Registry immediately after the hearing, with copies to all counsel in the case and the Legal Advisor to the Trial Division. Enduring difficulties should be raised with the bench during the next court hearing or as soon as the problem is identified, providing the Chamber with page and line numbers together with a brief explanation of the suggested difficulty.
- e) The Registry is to confirm during the witness familiarisation process which language the individual wishes to use during his or her testimony.
- f) The Registry is to review a sample of the court record following the evidence of Witness 16, together with a report on the accuracy and consistency of the record following the implementation of the aforementioned changes. Any errors or difficulties revealed should be highlighted in the report.
- g) Pending the assessment by the Chamber as to whether the report reveals a satisfactory state of affairs, thereafter the Registry is to test sufficiently extensive samples of the evidence on a regular basis to

ensure that a high level of accuracy and consistency is maintained.
The Chamber should be provided with a written report after each sample test.

- h) The Registry is to report, following the evidence of the next two witnesses (*viz.* those after Witness 16), whether the alteration of procedure, that of typing in the words the court reporters are uncertain of rather than simply entering *inaudible*, is a useful development.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 18 June 2009

At The Hague, The Netherlands