

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 5 October 2007

TRIAL CHAMBER I

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

Registrar: Mr Bruno Cathala

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

Public Document

Prosecution's request on instructions to the expert on the e-Court Protocol

The Office of the Prosecutor

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

Counsel for the Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju-Duval
Ms Caroline Buteau
Mr Marc Desalliers

Background:

1. On 5 September 2007, the Trial Chamber issued the "Order setting out schedule for submissions and hearings regarding the subjects that require early determination".¹ The Trial Chamber identified, *inter alia*, as a matter that requires early determination: "*An e-court protocol. Whether the 'Technical Protocol for the Submission of Evidence, Material and Witness Information in Electronic Version for Their Presentation During the Confirmation Hearing' should be adopted, or amended, for use in the trial proceedings*"² and scheduled a hearing on this (and other) matters for 1 October 2007.³
2. On 25 September 2007, the Trial Chamber in its "The Trial Chamber's Agenda for the Hearing on Monday, 1st October 2007"⁴ further specified the issue, by making reference to the submissions and decisions on the e-Court Protocol during the phase leading up to the Confirmation Hearing: "*See 'Submission of a new version of the e-court protocol prepared jointly by the Office of the Prosecutor, the Defence and the Registry' dated 20 July 2006, ICC-01/04-01/06-201, and 'Final decision on the e-court protocol for the provision of evidence, material, and witness information in electronic version for their presentation during the confirmation hearing' dated 28 August 2006, ICC-01/04-01/06-360*".⁵

¹ Order setting out schedule for submissions and hearings regarding the subjects that require early determination, public, 5 September 2007, ICC-01/04-01/06-947 (5 September 2007 Decision).

² See 5 September 2007 Decision, at para. 2.D.

³ *Ibid.*, at para. 2.

⁴ The Trial Chamber's Agenda for the Hearing on Monday, 1st October 2007. public, 25 September 2007, ICC-01/04-01/06 (25 September 2007 Decision).

⁵ See 25 September 2007 Decision, at para. 2. D., footnote 2.

3. At the occasion of the 1 and 2 October 2007 Court hearings, and following a suggestion of the Trial Chamber,⁶ the parties and the other participants agreed that an expert be jointly⁷ instructed to address the pending questions on the implementation of the e-Court Protocol.⁸
4. Following the hearings, the parties and the other participants were instructed by the Trial Chamber to file with the Registry⁹ their representations by Friday, 5 October 2007.¹⁰

Preliminary observation:

5. The Prosecution, whilst agreeing to the instruction of the expert who was previously advising the Registry in its preparation of the e-Court Protocol,¹¹ requests the Trial Chamber to specifically instruct the expert to provide independent advice and in particular disregard any instructions she may have received previously from the Registry.

⁶ See transcript of the 1 October 2007 hearing, at pages 89 and 90.

⁷ See transcript of the 1 October 2007 hearing, at page 95.

⁸ See transcript of the 1 October 2007 hearing, at pages 90 and 96.

⁹ Instead of sending them to the expert.

¹⁰ The respective directive was provided on 2 October 2007 to all participants by way of e-mail of the Court Management Offices Services Unit.

¹¹ This statement is made in light of the information the Trial Chamber has provided at the occasion of the 1 October 2007 hearing, see transcript, at page 92.

Prosecution's requested instructions to the expert:

6. The Prosecution requests that the Trial Chamber instructs the expert to examine and consider the Prosecution's submissions to the Trial Chamber as detailed in paragraphs 7 to 11.

Prosecution's submissions:

7. The Prosecution's submissions include in particular:
 - (i) The 29 March 2007 public redacted version of the "Prosecution's Submission in Anticipation of a Status Conference",¹² at paragraphs 17 to 21;¹³
 - (ii) The 11 September 2007 "Prosecution's submission regarding the subjects that require early determination: trial date, languages to be used in the proceedings, disclosure and e-court protocol"¹⁴, at paragraphs 39 to 43; and
 - (iii) The submissions the Prosecution made orally during the 1 October 2007 hearing.¹⁵

¹² Prosecution's Submission in Anticipation of a Status Conference, 29 March 2007, public redacted version, ICC-01/04-01/06-853.

¹³ In addition to the body of the text, the expert should pay particular attention to the content of the footnotes.

¹⁴ Prosecution's submission regarding the subjects that require early determination: trial date, languages to be used in the proceedings, disclosure and e-court protocol, public, 11 September 2007, ICC-01/04-01/06-951.

¹⁵ See transcript of the hearing, at pages 90 to 94. – In the event that the expert would favor an e-Court protocol as it was to be used for the purposes of the Confirmation Hearing by the 'Final decision on the e-court protocol for the provision of evidence, material, and witness information in electronic version for

8. The Prosecution's main submissions can be summarized as follows:

- (i) Pursuant to Regulation 26, the e-Court Protocol is meant to serve the purpose of supporting the Court's daily judicial and operational management and its proceedings. Against this background, transforming the e-Court Protocol into a case-specific evidence analysis tool goes beyond the purpose of the non case-specific electronic management of the Court proceedings as foreseen in Regulation 26.
- (ii) In addition, the parties and the other participants have different requirements in respect of how they manage and analyse the evidence, resulting in them having to use independent tools. Analytical metadata provided by one of the participants may mislead all participants to the Court proceedings, including the Trial Chamber, inasmuch as such metadata is merely indicative of a participant's assessment of a given piece of evidence and does not limit the participant's ability to use the piece of evidence differently at trial.
- (iii) The Prosecution therefore favours an e-Court Protocol similar to the one that was submitted as Annex 1 to the Registry's "Submission of a New Version of the e-Court Protocol prepared

their presentation during the confirmation hearing' dated 28 August 2006, ICC-01/04-01/06-360", the Prosecution requests that the expert be instructed to also read and to consider the Prosecution's 31 August 2006 "Request [to the Pre-Trial Chamber] for Extension of Time, Clarification and Provision of Information", 31 August 2006, public, ICC-01/04-01/06.

Jointly by the Office of the Prosecutor, the Defence and the Registry".¹⁶

Prosecution's submissions on the observations of the Defence and the Legal Representatives of the Victims:

9. On the submissions the Defence and the Legal Representatives of the Victims made in their respective 24 September 2007 filings, the Prosecution submits the following additional observations:

- (i) In respect of the Defence submissions to include metadata on the chain-of-custody and the dates of lifting of restrictions,¹⁷ the Prosecution is of the view that information on the chain-of-custody should be provided on an item-by-item basis and only when required to satisfy a specific forensic purpose.¹⁸ This observation applies even more in respect of the date of lifting of restrictions.

¹⁶ Submission of a new Version of the e-Court Protocol Prepared Jointly by the Office of the Prosecutor, the Defence and the Registry, public, 20 July 2006, ICC-01/04-01/06-201.

¹⁷ See *Argumentation de la Défense sur des questions devant être tranchées à un stade précoce de la procédure: la date du procès, les langues à être utilisées au procès, la divulgation de la preuve et le e-court protocol*, 24 September 2007, public, ICC-01/04-01/06-960, at para. 41.

¹⁸ It appears that the Defence is trying to utilize the e-Court Protocol to explore issues that are *potentially* relevant to the case. In this context, the Prosecution objects to the implicit suggestion of the Defence to transform the e-Court Protocol into a supplementary disclosure tool. Furthermore, to deliver full custodial data on all evidence is very onerous on the participants, particularly on the Prosecution. In addition, information security is at risk where sources could potentially be compromised by accidental disclosure of this data.

- (ii) In respect of the submissions of the Legal Representatives for the Victims,¹⁹ the Prosecution re-emphasises that the e-Court Protocol is intended to facilitate the electronic exchange of evidence in the phase leading up to trial rather than to meet the participants' specific legal analytical needs.

E-Court Protocols in national jurisdictions and international tribunals:

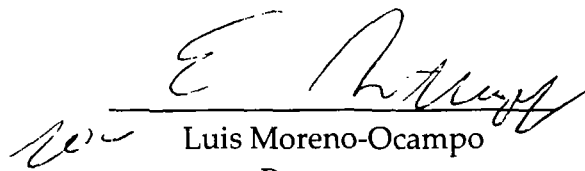
10. In addition, the Prosecution requests that the Trial Chamber instructs the expert to consider e-Court protocols that are used in national jurisdictions, and in particular the extent to which the provision of analytical metadata is required by such protocols.²⁰ Furthermore, the Prosecution requests the Trial Chamber to instruct the expert to also consider the practice at the ICTY, the ICTR and the SCSL.

¹⁹ Conclusions sur les questions préliminaires, public, 24 September 2007, ICC-01/04-01/06; and Conclusions du représentant légal de la victime a/0105/06 en réponse à l'Ordonnance fixant le calendrier pour la présentation de conclusions et la tenue d'audiences portant sur des questions devant être tranchées à un stade précoce de la procédure, public, 24 September 2007, ICC-01/04-01/06.

²⁰ The Prosecution makes reference to its oral submissions during the 1 October 2007 Court hearing; see transcript, at pages 93 and 94. The Prosecution has compiled and would be prepared to submit to the expert the following guidelines: (i) Australia - Federal Court of Australia: Guidelines for the use of information technology in litigation in civil matters - Part 1 Discovery and Annexure B – Federal Court of Australia Suggested Fields; (ii) Australia - Supreme Court of New South Wales: Practice Note SC Gen 7, Supreme Court - Use of Technology; (iii) Australia - Supreme Court of the Northern Territory of Australia: Practice Direction 2 of 2002 - Guidelines for the use of information technology in any civil matter; (iv) Australia - Supreme Court of Victoria: Practice Note No. 1 of 2007: Guidelines for the Use of Technology in Any Civil Litigation Matter; (v) Canada - Court of Queen's Bench of Alberta: Civil Practice Note No. 14: Guidelines for the Use of Technology in Any Civil Litigation Matter; (vi) Canada - Supreme Court of British Columbia: Practice Direction re: Electronic Evidence; and (vii) United Kingdom - The Litigation Support Technology Group: LiST Group Data Exchange Protocol Part 2 of 2: Disclosure Data.

Impact on resources:

11. The Prosecution furthermore requests that the Trial Chamber instructs the expert to consider that the resources of the parties and the other participants in implementing an e-Court Protocol are used in a way that is proportionate to the scale of the case of *The Prosecutor vs. Thomas LUBANGA DYILO* and to the anticipated benefit within the framework of Regulation 26.


Luis Moreno-Ocampo
Prosecutor

Dated this 5th day of October 2007
At The Hague, The Netherlands