



Original : English

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

Date: 1 November 2007

TRIAL CHAMBER I

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

Registrar: Mr Bruno Cathala

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

Public

Instructions to the expert on e-court

Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
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Legal Representatives of Victims

a/0001/06 to a/0003/06 and a/0105/06

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu

1. On 18 July 2007, Trial Chamber I issued a preliminary list of issues which require early determination in advance of the trial of Mr Thomas Lubanga Dyilo, including on the e-court protocol, namely "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".¹ Written submissions were sought in advance of a hearing thereupon.² The Office of the Prosecutor ("prosecution") filed their written submissions on that issue on 11 September 2007,³ the defence on 24 September 2007,⁴ the legal representative of victims a/0001/06 to a/0003/06⁵ and of victim a/0105/06⁶ on 24 September 2007.⁷
2. At the hearing on 2 October 2007, the Trial Chamber decided to appoint an expert witness,⁸ which instruction would take into account submissions on instructions to be filed by the parties and the participants. The defence and the prosecution filed their respective submissions on 5 October 2007.⁹ The

¹ Request for submissions on the subjects that require early determination, ICC-01/04-01/06-936, at paragraph 6D. "The Trial Chamber's Agenda for the Hearing on Monday 1st October", ICC-01/04-01/06-962, referred in footnote 2 to the "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 the "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.

² The original timetable was suspended on 16 August 2007 in the "Direction suspending the timetable on the subjects that require early determination", ICC-01/04-01/06-942. The "Order setting out schedule for submissions and hearings regarding the subjects that require early determination", ICC-01/04-01/06-947, issued on 5 September 2007 set out a new timetable.

³ Prosecution's submission regarding the subject that require early determination: trial date, languages to be used in the proceedings, disclosure and e-court protocol, ICC-01/04-01/06-951, at paragraphs 39-43.

⁴ Defence submission on the subject that require early determination: trial date, languages to be used in the proceedings, disclosure and e-court protocol, ICC-01/04-01/06-960-tENG, at paragraphs 36-41.

⁵ Submissions on preliminary issues, ICC-01/04-01/06-957-tENG, at paragraphs 28-30.

⁶ Submissions of the legal representative of victim a/0105/06 in response to the Order setting out schedule for submissions and hearings regarding the subjects that require early determination, ICC-01/04-01/06-961-tENG, at paragraphs 33-40 and pleading 5 on p.12.

⁷ The prosecution and the defence are referred to as the "parties" and the legal representatives of the victims as the "participants".

⁸ ICC-01/04-01/06-T-54-ENG page 2, line 4.

⁹ Defence observations to the expert appointed by Trial Chamber I on the question of e-court protocol, ICC-01/04-01/06-971-tENG, and Prosecution's request on instructions to the expert on the e-court protocol, ICC-01/04-01/06-972.

legal representatives of victims a/0001/06 to a/0003/06 and of victim a/0105/06 filed their respective submissions on 12 October 2007¹⁰ upon being granted an extension of time in which to do so.¹¹

3. Ms Sandra Potter of the Potter Farrelly and Associates firm was selected as an appropriate expert in the area of e-court.
4. Following receipt of the submissions from the parties and participants, the Chamber now provides the expert with its formal instructions in order to specify the issues which need to be considered. Any previous instructions received from the Registry during the course of work in the preparation of the original e-court protocol must be disregarded and the Chamber instructs the expert to conduct an objective and independent assessment of the questions asked.
5. The questions outlined below should be considered in relation to three broad categories of documents: i) positive case evidence (incriminatory material); ii) potentially exculpatory material; iii) the remainder of the material held by the prosecution.
6. Although the Chamber recognises that exculpatory materials do not fall within the scope of the e-court protocol previously adopted, the question of an alternative means of dealing with such materials is relevant to the desirable scope of application of the protocol, and as such consideration of their treatment and searchability is therefore useful. While a full consideration of the third category of material may go beyond the strict scope of the e-court protocol as a disclosure tool, the nature and purpose of the e-court protocol

¹⁰ Observations of the legal representatives of victims a/0001/06 à a/0003/06, ICC-01/04-01/06-982-tENG, and Observations du Représentant légal de la victime a/0105/06 à l'attention de l'expert désigné par la Chambre sur le protocole de Cour électronique (Corrigendum) et Annexe, ICC-01/04-01/06-983-Corr and ICC-01/04-01/06-983-Anx.

¹¹ Decision on the request of the legal representatives of victims for an extension of time to file submissions on the e-court protocol, ICC-01/04-01/06-973.

are areas which the expert is asked to consider. In addition, the Trial Chamber's duty to ensure that the proceedings are fair and expeditious and that the procedures followed allow for an efficient preparation for trial by all make it necessary to enquire into these matters.

7. While the Chamber is interested in an opinion on general principles that might be adopted by the Court as a whole going forward, the practical implications of the expert's opinions in the context of the current stage of the proceedings in the case against Mr Thomas Lubanga Dyilo should be the primary focus. In this regard, a cost-benefit analysis taking into account the resource impact of any recommendations would be helpful.
8. Further, the Chamber requests that the e-court protocols used in national jurisdictions and at the international criminal tribunals for the former Yugoslavia and Rwanda, and the Special Court for Sierra Leone be considered where relevant.
9. The Trial Chamber hereby instructs the expert to provide her opinion on the following questions :
10. The nature of the protocol
 - A) What is the rationale behind the e-court protocol? What can it achieve?
 - B) Whether the protocol could (from a technical point of view) be used as a case analysis tool for the material to which it relates.
 - C) Is there an alternative system currently in existence that could be used as a substitute by the defence in the preparation of its case (in particular to effectively search the material disclosed)?

11. The additional meta-data fields

D) What are the implications in terms of man-hours to complete the additional meta-data fields requested by the defence and the participants in their submissions? What is the commensurate added value in terms of searchability by the defence and participants? (The answer to the labour-intensity part of this question obviously depends on the volume of data held by the prosecution and the form in which that data is currently held).

E) Is there any mechanism by which the parties and participants can access the information that would be contained in these fields without the insertion of additional fields?

12. Semi- or completely- illegible materials

In respect of materials which are either difficult or impossible to read – such as materials that are handwritten (and therefore not susceptible to “Optical Character Recognition” scanning) or that are poor copies or reproductions of original materials:

F) In order to allow later electronic searching of this material (for instance, in order to review all exculpatory materials), what steps could the prosecution reasonably take when entering the individual items into the system?

G) Is there any other mechanism by which this information can be searched, without the addition of meta-data fields?

13. Currently non-e-court formatted materials (including exculpatory materials)

In respect of materials – legible or otherwise – which have not been tagged and formatted in the manner set out in the e-court protocol:

H) How practicable would it be to convert that material into a compliant form?

I) What would be the benefit of so converting, particularly in terms of searchability for the defence of potentially exculpatory materials?

J) Could such a search be undertaken in another way, either electronically or manually, by the prosecution?

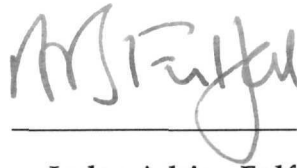
K) How practicable is the keyword-search function of the prosecution's material for the defence?

14. The foregoing encapsulates the main issues raised by the parties' and participants' submissions on the e-court. However, the Chamber refers the expert to their written and oral submissions insofar as they contain any technical information which may inform or impact her deliberations. The Registrar is hereby directed to provide a copy of the relevant filings of the parties and participants listed in paragraphs 1 and 2 above and of the transcript of the hearing on 1 and 2 October 2007 referred to in these Instructions.

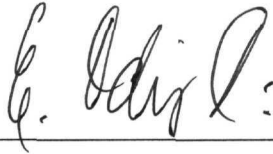
15. The expert is instructed not to limit her consideration to the context of Regulation of the Court 26, as some aspects of the e-court protocol which may be of assistance to the work of the parties may fall outside the scope of that regulation.

16. The Trial Chamber requests the expert to provide her report within ten days of the notification of these instructions.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 1 November 2007

At The Hague, The Netherlands