



Original: English

No.: ICC-02/05-02/09

Date: 17 August 2009

PRE-TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN DARFUR, THE SUDAN

IN THE CASE OF THE PROSECUTOR

V.

BAHAR IDRIS ABU GARDA

Public Document

**Prosecution's observations on the revised version of the E-court Protocol
as submitted by the Registrar**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for the Defence

Mr. Karim A.A. Khan

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**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

I. Introduction

1. On 15 July 2009, the Pre-Trial Chamber issued its “Second Decision on issues relating to Disclosure”¹ and ordered the parties “to submit any evidence with the appropriate meta-data in accordance with the e-court protocol set out in the Katanga and Ngudjolo case”.²
2. On 23 July 2009, the Registrar submitted a revised version of the E-Court protocol used by Trial Chamber I in the Lubanga and the Katanga and Ngudjolo cases in the record of the case of the *Prosecutor v. Bahar Idriss Abu Garda* (the “Submission of the Registrar”).³ In her submission the Registrar noted that technical improvements have been implemented in “the most recent E-Court protocol submitted by the Registry in the Trial phase of the Katanga and Ngudjolo case”⁴ and that “the said E-Court Protocol was discussed extensively with the Knowledge Base Unit of the Office of the Prosecutor”⁵ and that “the implementation of *those changes* is to result in a generic Protocol which would be consistent across cases and phases”.⁶ Nevertheless, the Registry also noted that “this generic Protocol will not prevent the Registry from accommodating the Chamber’s substantial requirements” in this case, *i.e.* the creation of subjective meta-data fields.⁷ Finally, the Registrar submitted that whilst “technical improvements have been inserted (...) *all the meta-data fields remain as initially ordered by Pre-Trial Chamber I*”.⁸

¹ ICC-02/05-02/09-35

² ICC-02/05-02/09-35, page 14.

³ ICC-02/05-02/09-38.

⁴ ICC-02/05-02/09-38, page 5.

⁵ ICC-02/05-02/09-38, page 5, *emphasis added*.

⁶ ICC-02/05-02/09-38, page 5.

⁷ ICC-02/05-02/09-38, page 5.

⁸ ICC-02/05-02/09-38, page 5, *emphasis added*.

3. On 30 July 2009, the Single Judge issued her “Decision Inviting the Parties to submit their observations on the E-court Protocol submitted by the Registrar”⁹ (the “Decision”) in which she invites the parties to submit their observations no later than 17 August 2009. In her Decision the Single Judge noted that in the submission of the Registrar the E-Court protocol filed in the record of the case¹⁰ includes *some technical improvements which were inserted following extensive discussion with the Knowledge Base Unit of the Office of the Prosecutor while all the meta-data fields remain as initially ordered by Pre-Trial Chamber I.*¹¹

4. The Prosecutor notes that the changes to the revised version of the E-Court protocol are two-fold. First, the changes include additional meta-data fields of a so called “subjective nature” which are not contained in the revised versions of the E-Court protocol used in the Lubanga and Katanga cases¹² and second, the revised version of the E-Court protocol submitted in the present case contains one additional change that was inserted after the revised version of the E-Court protocol was filed in the Katanga case.¹³ This additional change was not discussed with the Office of the Prosecutor’s Knowledge Base Unit. The Prosecution objects to both (i) the insertion of the subjective meta-data fields which are not contained in the E-Court protocol as used in the Lubanga and the Katanga cases and (ii) to the inclusion of a technical change not discussed with the Office of the Prosecutor’s Knowledge Base Unit.

⁹ ICC-02/05-02/09-40

¹⁰ ICC-02/05-02/09-38-Anx1

¹¹ ICC-02/05-02/09-38, page 5 and 6, emphasis added.

¹² For the most recent version of the E-Court protocol filed in the case of the *Prosecutor v. Thomas Lubanga Dyilo* see ICC-01/04-01/06-1263; For the revised version of the E-Court protocol filed in the case of the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* see ICC-01/04-01/07-1003.

¹³ ICC-02/05-02/09-38-Anx1, paragraph 23.

II. Prosecution's Observations

a. Inclusion of additional so-called "subjective" meta-data fields

5. The Prosecution objects to the insertion of subjective meta-data fields which are not contained in the E-Court protocol as used in the Lubanga and the Katanga cases.¹⁴ The use of these additional fields contradicts the concept of a generic E-Court protocol applicable to all stages of all cases. It is also contrary to the initial order of the Chamber in which Pre-Trial Chamber I ordered the parties "to submit any evidence with the appropriate meta-data in accordance with the e-court protocol set out in the Katanga and Ngudjolo case".¹⁵ Furthermore, in its "Second Decision on issues relating to Disclosure" Pre-Trial Chamber I explicitly limited the use of subjective fields to the Prosecution's list of evidence, which it defined as the list containing "the evidence to be presented at the [confirmation] hearing".¹⁶ Pre-Trial Chamber I ordered "the Prosecutor to file in the record of the Case (...) the Prosecution Charging Document and the List of Evidence (...) in a language which the person fully understands and speaks. In so doing, the Prosecution shall further ensure that this is organised in such manner that: (i) each item of evidence is linked to the factual statement it intends to prove; and (ii) each factual statement is linked to a specific element of crime, a mode of liability, or both."¹⁷ This order requires the Prosecution to submit a chart outlining the items contained in its list of evidence with additional explanations to satisfy points (i) and (ii) of the order. However, the order does not imply that this subjective analysis need also be carried out for all other disclosed materials to which the e-court protocol is applicable. The subjective fields should not be included in the e-court protocol, but instead can be dealt with in chart form for

¹⁴ See ICC-02/05-02/09-38-Anx1, pages 13 to 15 and pages 19 to 22.

¹⁵ ICC-02/05-02/09-35, page 14.

¹⁶ ICC-02/05-02/09-35, page 6.

¹⁷ ICC-02/05-02/09-35, pages 17 and 18.

the limited materials contained in the Prosecution's list of evidence as ordered by Pre-Trial Chamber I.

6. The Prosecution has consistently opposed the inclusion of subjective meta-data fields into the E-Court protocol in general in the Lubanga case.¹⁸ The position that subjective meta-data should not be included in the E-Court protocol was shared by the independent expert appointed by Trial Chamber I,¹⁹ whose opinion led to the exclusion of the subjective fields as mandatory fields for the e-court protocol at the trial stage of the Lubanga case by Trial Chamber I. Regarding the use of subjective meta-data fields in general, the independent expert strongly advised against the use of subjective meta-data and stated that the E-Court is not a case analysis tool, instead "each party [should be] responsible for creating and utilising its own case analysis tool".²⁰ Since "the data model for the case analysis tool is developed according to the party's own

¹⁸ See for instance ICC-01/04-01/06-201 "Submissions of a new version of the E-Court Protocol prepared jointly by the Office of the Prosecutor, the Defence and the Registry" of 20 July 2006 from which the subjective meta-data fields had been removed and included in annex 2 along with the points of disagreement, see also ICC-01/04-01/06-360 "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" of 28 August 2006 through which the Chamber decided to include the subjective meta-data fields in the E-Court protocol despite the Prosecution's objections, see also ICC-01/04-01/06-951 "Prosecution's submission regarding the subjects that require early determination: trial date, languages to be used in the proceedings, disclosure and e-court protocol" filed on 11 September 2007 in which the Prosecution renewed its disagreement with the inclusion of the subjective fields in the E-Court protocol, see also the reports on the e-court submitted by an independent expert Ms. Sandra Potter instructed by Trial Chamber I: ICC-01/04-01/06-1024 "Report to Trial Chamber I on the e-court" of 12 November 2007 (in particular pages 14 ss in which the expert suggests not to rely on subjective fields because of their limited use – according to the expert the parties would be better suited to analyze the evidence on their own) and ICC-01/04-01/06-1062 "Addendum to Report to Trial Chamber I on the e-court", as well as ICC-01/04-01/06-1182 "Second Addendum to Report to Trial Chamber I on the e-court, by expert witness" filed on 21 February 2008, see also ICC-01/04-01/06-1263 "Consolidated E-Court Protocol" 4 April 2008 which contains the last applicable E-Court protocol to the Lubanga case upon which the Prosecution had agreed with the Registry – the E-Court protocol no longer contains subjective meta-data fields.

¹⁹ See the report submitted by the independent expert Ms. Sandra Potter who had been consulted by Trial Chamber I: ICC-01/04-01/06-1024 "Report to Trial Chamber I on the e-court" of 12 November 2007 (in particular page 14, paragraph 53 and page 17, paragraph 60 ss) in which the expert suggests not to rely on subjective fields because of their limited use – according to the expert the parties would be better suited to analyze the evidence on their own

²⁰ ICC-01/04-01/06-1024, at page 17, paragraph 63.

requirements, to some level the information would be of no practical use or perhaps even no strategic interest to another party.”²¹

7. The Prosecution notes that the re-inclusion of these subjective fields that were subsequently rejected in the Lubanga case does not further the effort to establish a generic E-Court protocol for the Court.
8. The Prosecution notes that these “subjective fields” have also been included in another part of the E-Court protocol dealing with witnesses.²² The inclusion of the subjective meta-data fields in this part (referred to as the witness table) was equally rejected in the trial phase of the Lubanga case following the recommendation of the independent expert.²³ The witness table provides certain background information on the witnesses (such as the witness’ date of birth, name, gender, the document ID of the witness’ statement and other information such as information relevant to the modalities of the witness’ appearance before court). The Prosecution notes that the subjective meta-data fields would replicate information that can be derived by parties and participants from the statement itself, such as the relevance of a witness to a certain charge or incident and the facts that will likely be presented by the witness to prove those elements. The subjective meta-data fields in the witness table would furthermore **duplicate** the analysis presented through the Prosecution’s list of evidence. Since the list of evidence will also outline the relevance of the statements of each witness to the crimes charged using the same subjective meta-data fields.

²¹ ICC-01/04-01/06-1024, at page 17, paragraph 60.

²² See ICC-02/05-02/09-38-Anx1, pages 17 to 22.

²³ ICC-01/04-01/06-1024, at page 17, paragraph 63, see also ICC-01/04-01/06-1263.

9. The use of subjective or analytical fields in the e-court protocol is also subject to some technical limitations in view of the approach taken. The analytical fields added to the protocol lend themselves to describing factual statements, rather than whole items of evidence. The utility of attaching legal analysis classifications to whole items of evidence is low, whereas specific analytical classifications are suitable for associating with passages of factual text. Classifying factual text that may be contained in any one or more items of disclosed evidence better achieves the analytical goals of including them in the protocol.

10. In addition, the Prosecution notes that on page 22 the last meta-data field listed for the witness table refers to the “person/witness from whom the document emanated”. This seems repetitive of the source identity and author fields contained in the table regulating the meta-data applicable to documents. Its inclusion in a table containing background information on witnesses (as opposed to the document table which regulates the meta-data applicable to the documents related to these witnesses) also seems rather illogical. Further, it is noted that this field equally did not appear in recent versions of the E-Court Protocol.²⁴ It was determined unsuitable for the witness table by the independent expert. In the second addendum to her report, the expert stated that “it is my opinion that this meta-data field (...) must only appear against *physical evidence* and *material* and not as part of the *witness information* metadata fields.”²⁵ The field therefore serves no useful purpose. For all these reasons, it should be dropped. Finally, this very field (along with others)²⁶ contains an incorrect abbreviation used as an example for the code of a situation, namely

²⁴ See for instance ICC-01/04-01/06-1263-Anx1 or ICC-01/04-01/07-1003-Anx1.

²⁵ ICC-01/04-01/06-1182, at para10.

²⁶ See also ICC-02/05-02/09-38-Anx1 paragraphs 25 and 26 on page 6 and the first meta-data field on page 17.

“SUD” instead of “DAR”. If the Chamber feels that this field should be used, the abbreviation should be corrected to reflect the name of the situation.

b. Additional Paragraph 23

11. The Prosecution submits that the version of the E-Court protocol filed by the Registry is not the form agreed at the conclusion of extensive discussions with the Registry and the Prosecution’s Knowledge Base Unit. The Prosecution appreciates the Registry’s efforts towards the improvement of the protocol and hopes that discussions to further improve the protocol and issues that arise in the proceedings before the Chambers will be maintained for the future. .
12. However, as stated above, an additional paragraph 23 has been added to the E-Court protocol without prior consultations containing a new provision relating to “corrigenda”. The Prosecution disagrees with this addition which has a substantive impact. In essence the new provision foresees corrected versions of a document to be stored as separate versions of this document identifiable through the suffix –Corr01 attached to the document ID number. This separate document should then be linked to the previously registered document through the “host document number field”. Paragraph 7 of the e-court protocol, which is applicable to corrigenda simply required a participant to “re-issue the entire record that has been amended” accompanied by a letter outlining the changes. The Prosecution is not in favor of applying the concept of corrigenda to evidence, as evidence is not subject to material alterations of content (as may be the case with Books, Judgements or other Court Records). In the Prosecution’s view only one version of a piece of evidence should exist, namely the correct version. Therefore the Prosecution does not endorse the Registry’s proposal of having various versions.

c. Additional technical changes

13. Another point of disagreement regarding technical issues is the over-use of the host attachment feature as described in the E-Court protocol. The Prosecution has previously raised, and maintains its concerns with regard to this feature. Since the last discussions between the Registry and the Prosecution's Knowledge Base Unit took place, and as a consequence of recent system upgrades, alternatives have become available to support the need for maintaining relationships between redacted and unredacted documents, and original and translated documents. Consideration can be given to updating the protocol to reflect such recent advances (such as investigating the Ringtail feature "One-click search").
14. Based on experience gained in the cases of the DRC and CAR situations, and an examination of the E-Court protocol that was filed in the present case, further topics have arisen for discussion. These include the topics as follows.
 - The e-court protocol in its current version contains no provisions in relation to the communication of security classifications of disclosed documents. There appears to be inconsistency between the security classifications assigned to evidence by the Office of the Prosecutor, with the security classifications assigned by the Registry.
 - The maintenance of unique codes for participants, witnesses, and items of evidence in the E-Court system impacts the effectiveness of the Court's management of evidence and information in the long term. There are no provisions in the protocol to ensure that the participant codes that represent Defence and Victim participants are maintained by the Registry as unique. Duplication of such codes has become evident within the DRC

situation. For example, 'D01' represents the Defence team in the Lubanga case, yet D01 and D02 represents the Defence teams for Katanga and Ngudjolo respectively in that case. This overlap would additionally give rise to non-unique witness identification codes, and non-unique evidence registration numbers within situations. A generic protocol should make reference to a separate register of unique codes.

- The e-court protocol in its current version is silent on the nature of the information recorded by the Registry in the e-court system and the services provided to the participants as e-court system users. The Prosecution submits that such provisions should be added. Some statement as to the meaning of the Registry fields maintained in the E-Court system should be included. Further, some indication of distribution of hearing and exhibit related data and information in a format that allows importation of the data by participants into their separate evidence systems should also be included.

III. Relief sought

15. In light of the reasons outlined above, the Prosecution hereby respectfully requests the Single Judge to dismiss the revised version of the E-court protocol submitted by the Registry in this case.²⁷
16. The Prosecution further requests the Chamber to order the Registry to comply with its previous decision and submit to the parties the revised E-Court protocol

as filed by the Registry in the case of the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.²⁸

17. Finally the Prosecution requests the Chamber to order the improvement and standardisation of the previous protocol based on consultations and the observations recorded in this submission.



Luis Moreno-Ocampo

Prosecutor

Dated this 17th day of August 2009
At The Hague, The Netherlands