

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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TRIAL CHAMBER III

Before: Judge Adrian Fulford, Presiding Judge
Judge Elisabeth Odio-Benito
Judge Joyce Aluoch

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
V. JEAN-PIERRE BEMBA GOMBO**

**Public
Prosecution's Submission on eCourt Protocol**

Source: The Office of the Prosecutor

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

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1. During the status conference of 7 October 2009, Trial Chamber III (“the Chamber”) addressed the issue of eCourt Protocol used during the proceedings leading to and during the confirmation hearing.¹ The Chamber requested the parties and participants to address whether there is a need to adopt or amend the eCourt Protocol used during that phase of the proceedings.² The Office of the Prosecutor (“the Prosecution”) respectfully submits its observations on the matter.

Relevant factual background

2. On 31 July 2008, Pre-Trial Chamber III issued its Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties.³ Attached to this decision is an Annex which sets out the eCourt Protocol (“the *Bemba* Protocol”) proposed to be used during the proceedings leading to and during the confirmation hearing⁴. This Protocol was adopted by Pre-Trial Chamber III without consulting the parties and the participants.

3. On 6 August 2008, the Prosecution filed an application for leave to appeal Pre-Trial Chamber III’s Decision on Evidence Disclosure System and Setting a Timetable between the Parties, including its proposed eCourt Protocol.⁵

4. On 25 August 2008, Pre-Trial Chamber III rejected the Prosecution’s application for leave to appeal the evidence disclosure system.⁶

Prosecution’s submission

5. The Prosecution submits that aspects of the *Bemba* Protocol contain significant improvements to the functioning of the eCourt system. Those beneficial aspects have been incorporated into subsequent versions of the eCourt Protocol.

¹ ICC-01/05-01/08-T-ENG, p. 17, lines 16-25.

² ICC-01/05-01/08-T-ENG, p. 17, lines 16-25.

³ ICC-01/05-01/08-55

⁴ ICC-01/05-01/08-55-Anx

⁵ ICC-01/05-01/08-63

⁶ ICC-01/05-01/08-75

6. The Prosecution notifies the Chamber that the most recent Protocol applied by Pre-Trial Chamber I in the *Bahr Idriss Abu Garda* case (“the *Abu Garda* Protocol”)⁷ wholly adopts the Protocol developed by Trial Chamber II in the *Katanga and Ngudjolo* cases (“the *Katanga* Protocol”).⁸

7. Moreover, in developing the *Katanga* Protocol, Trial Chamber II largely incorporated improvements achieved in the *Bemba*⁹ and *Lubanga* Protocols¹⁰ with corrective modifications that were based on detailed discussions with participants.¹¹

8. The Prosecution submits that a consistent and common approach towards a single eCourt Protocol should be adopted by all Chambers of the Court in all cases.¹² Against this background, the Prosecution proposes that the Chamber adopt and apply the *Katanga* Protocol. The Prosecution appends as Annex A to this submission, a chart listing the different Protocols adopted in the different cases in the Court. Upon review, the chart progressively illustrates the improvements to the various Protocols since the inception of the *Lubanga* Pre-Trial Protocol.¹³ It also demonstrates the consistency evolving in the adoption of Protocols, most especially between the last two Protocols adopted in *Katanga and Ngudjolo* and *Abu Garda* cases.

Prosecution’s submissions on generic improvements to the common eCourt Protocol

9. Based on experience gained from all proceedings in the Court, additional topics have arisen for possible further improvement of the eCourt Protocol as applicable to all cases. These include the following:

⁷ ICC-02/05-02/09-61

⁸ ICC-01/04-01/07-1003-Anx1

⁹ ICC-01/05-01/08-55-Anx

¹⁰ ICC-01/04-01/06-1223 and ICC-01/04-01/06-1127

¹¹ See for instance; Order concerning the Presentation of Incriminating Evidence and the eCourt, ICC-01/04-01/07-956, p. 9-10, paras. 17-18.

¹² Trial Chamber II also expressed its support for the position of Trial Chamber I that it would be beneficial if there was one eCourt for the entire court, which would be applied universally and consistently before all Chambers. See, ICC-01/04-01/07-956, p.10, para. 19

¹³ ICC-01/04-01/06-360

- The eCourt 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 Prosecution, with the security classifications assigned by the Registry.
- The maintenance of unique codes for participants, witnesses, and items of evidence in the eCourt system has an impact on 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 represent 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 eCourt Protocol is silent on the nature of the information recorded by the Registry in the eCourt system and the services provided to the participants as eCourt system users. The Prosecution submits that such provisions should be added. Some statements as to the meaning of the Registry fields maintained in the eCourt system should be included¹⁴.
- Further, the eCourt Protocol should include 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.

¹⁴ The Prosecution observes that in the Bemba eCourt System there are 73 data fields that are visible to the prosecution for which no information has been provided to participants.

Prosecution's outline of the substantive differences between the *Katanga* and *Bemba* Protocols

10. The Prosecution appends the *Katanga* Protocol as Annex B to this submission. In assisting the Chamber in deciding whether to adopt or amend the *Bemba* Protocol, the Prosecution will first highlight the differences between the *Bemba* and the *Katanga* Protocols and will conclude by proposing the adoption of the *Katanga* Protocol.

11. The *Bemba* Protocol differs significantly from the Protocols adopted by Pre-Trial Chambers I and II as well as Trial Chambers I and II in both *Lubanga* and *Katanga and Ngudjolo* cases in the following respects. First, the *Bemba* Protocol contains a section on “specific measures for corrigenda”. The *Katanga* Protocol contains no such field. Such an addition has substantive impact. In essence, the new provision foresees corrected versions of a document to be stored as separate versions of the 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”. The Prosecution is not in favour of applying the concept of corrigenda to evidence, as evidence is not subject to material alterations of contents (as may be the case with books, judgments or other court records). The Prosecution supports the exclusion of specific provisions dealing with corrigenda.

12. Second, the *Bemba* Protocol uses the expression “Person or Witness from whom the document emanated”, while the *Katanga* Protocol maintains the expression used in the *Lubanga* Protocol, that is, “Source Identity”. The Prosecution suggests maintaining the expression “Source Identity” used in the *Katanga* Protocol.

13. Third, in the *Bemba* Protocol the three fields -- “Disclosure Phase”, “Disclosure Category and Defendant”, and “Batch” -- assist in categorizing and providing chronological order to the disclosure process. The corresponding information is captured in just one field in the *Katanga* Protocol, “Disclosures.” In the Prosecution's submission, the option proposed in the *Katanga* Protocol is a better alternative when considering data integrity issues. Where documents are disclosed

multiple times (perhaps because of reassessment of disclosure classification), users will be uncertain as to the way the information found in the three fields interconnects. This problem is evidently resolved by having one composite value as set out in the “Disclosures” field used in the *Katanga* Protocol. The Prosecution supports these changes introduced by the *Katanga* Protocol.

14. Fourth, in the *Bemba* Protocol there is no mention of victims’ information, while in the *Katanga* Protocol a Table containing Witness and Victim Information is included. This inclusion is also in the Registry proposal sent on 30 October 2009. Such information has proven to be important to be recorded during the *Lubanga* trial¹⁵.

15. Finally, with regard to the fields within the Table concerning Witness Information, three differences emerge. In the *Katanga* Protocol, the field “Expert” has been removed and subsumed within the “Status” field. Furthermore, two new fields have been added to provide more details with regards to potential victim information: “Victim code” and “Application Reference”. The Prosecution supports these changes introduced by the *Katanga* Protocol.

16. The Prosecution consulted and shared its proposals for the adoption of the *Katanga* Protocol with the Office of Public Counsel for Victims (“OPCV”), as legal representative of victims. The OPCV agrees with the Prosecution’s approach and proposals as outlined in the present submission. The Prosecution received by e-mail the Registry’s proposals for amendment of the existing Protocol.¹⁶ The Registry’s proposals accord with the Prosecution’s submissions.

Relief sought

17. In light of the foregoing, the Prosecution respectfully requests that the Chamber:

¹⁵ E-mail sent from Registry to the Prosecution, Defence and Participants copying the Legal Officer on 30 October 2009 at 16:30.

¹⁶ See *supra* footnote 15.

- (a) amend the *Bemba* Protocol by adopting the modifications introduced by the *Katanga* Protocol and instruct the Registry to file that version of the Protocol into the record of the case for this trial; and
- (b) order the Registry to coordinate periodic improvement and standardisation of the common Protocol based on consultations with representatives of the parties and participants of ICC proceedings.



Luis Moreno-Ocampo, Prosecutor

Dated this 4th day of November 2009
At The Hague, The Netherlands