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Date: **14 April 2011**

PRE-TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Sylvia Steiner
Judge Sanji Mmasenono Monageng

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. Callixte MBARUSHIMANA

Public Document

Prosecution request to amend the e-Court Protocol

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

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I. Introduction

1. On 30 March 2011 Pre-Trial Chamber I (“Chamber”) handed down its “Decision on issues relating to disclosure”¹, in which it ordered that the parties to adhere to the e-Court Protocol² (“Protocol”) annexed thereto,³ which was based on the protocol adopted in the *Banda and Jerbo* case.⁴
2. In its present form, the Protocol does not provide any guidance on how to manage electronic files, which form a significant portion of the materials potentially to be used as evidence in the present case.
3. Accordingly, the Prosecution respectfully requests that the Chamber amend the Protocol to include provisions specifically dealing with original electronic evidence relating to this case. The Prosecution also respectfully proposes that the Chamber consult the e-Court User Group, due to the specific technical challenges of dealing with electronic evidence.
4. Additionally, the Prosecution seeks certain amendments or corrections to the portions of the Protocol which address the specific measures required for translated documents.

II. Statement of facts

5. On 11 October 2010, French authorities searched the home and office of Callixte Mbarushimana (“the Suspect”) and seized various documents (“the seized documents”) and a large volume of electronic data (“the electronic data”).

¹ Decision on issues relating to disclosure, ICC-01/04-01/10-87, 30 March 2011.

² *Ibid.*, p. 14.

³ ICC-01/04-01/10-87-Anx.

⁴ ICC-01/04-01/10-87, para. 12.

6. On 7 February 2011, the Single Judge issued the Decision Scheduling a Hearing on issues relating to the Disclosure between the Parties.⁵
7. A Status Conference was subsequently held on 14 February 2011, attended by the Prosecution, Defence and the Registrar, where each participant in turn made submissions, including on the application of an e-Court Protocol to the proceedings of the case.⁶ Both the Prosecution and the Registry made specific submissions in relation to the e-Court User Group and its functions, including the assistance it may provide the Chamber.⁷ The Defence did not oppose the recommendation to consult the e-Court User Group. In light of the recommendation that this issue be referred to the e-Court User Group, the Prosecution did not make any specific submissions on the appropriate content of the e-Court Protocol.
8. On 30 March 2011, the Chamber handed down its Decision on issues relating to Disclosure ("Decision").⁸ Among other things, the Chamber ordered that when the Parties submit evidence to be relied on at the confirmation hearing, they must comply with the e-Court Protocol, which it attached as an Annex to the Decision.⁹
9. On 5 April 2011, the Prosecution filed an application for leave to appeal the Decision.¹⁰ The substance of the application for leave to appeal does not conflict with the subject-matter of this request for amendment of the Protocol.

⁵ Decision Scheduling a Hearing on Issues relating to Disclosure between the Parties, ICC-01/04-01/10-52, 7 February 2011.

⁶ ICC-01/04-01/10-T-2-ENG.

⁷ *Ibid.*, Prosecution submissions at p.12 line 24 – p. 13 line 24; Registry submissions at p. 24, lines 1-6.

⁸ ICC-01/04-01/10-87.

⁹ *Ibid.*, p. 14.

¹⁰ Prosecution's Application for leave to Appeal the "Decision on issues relating to disclosure" ICC-01/04-01/10-87, ICC-01/04-01/10-93, 5 April 2011.

III. Submissions

Provision for electronic evidence

10. The Prosecution notes that the Chamber did not request input from the e-Court User Group in relation to the changes introduced since this Chamber issued an e-Court protocol in the *Banda and Jerbo* case.¹¹ The Protocol thus does not take into account the developments generally in the Court. Nor does it take into account the significantly different circumstances of the instant case, in particular the large volume of electronic evidence. The different nature of the evidence raises issues and challenges that have not previously been addressed and accordingly are not accommodated in the Protocol.
11. In its Decision in the present case, the Chamber ordered “the parties, when submitting any evidence on which they intend to rely at the confirmation hearing, to comply with the appropriate metadata in accordance with the Protocol as annexed to the present decision.”¹² If, as it appears, the current Protocol is intended also to apply to the electronic data and other electronic items, it cannot in fact be applied efficiently to that type of evidence. This presents a significant problem, since electronic data potentially will be an important and substantial part of the Prosecution’s incriminating evidence and can reasonably be anticipated as being material to the Defence case too.
12. The treatment of electronic information in legal proceedings carries special considerations. The evidence numbering and identification, for example, may differ between electronic evidence and evidence collected in physical form. The Protocol in its present form does not provide for this. By applying special provisions for electronic data, it would be possible to efficiently process materials into the e-Court systems by retrieving the existing associated electronic meta-information to describe the items. The unified technical e-Court Protocol as annexed to the Decision offers no provisions stipulating

¹¹ *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Annex 1: Decision on issues relating to disclosure, ICC-02/05-03/09-49-Anx1.

¹² ICC-01/04-01/10-87, p. 14.

how electronic items and their associated meta-information may be utilised in the e-Court system.

13. Considering that such a sizable portion of the evidence in the present case is in electronic format, it is necessary to develop within the Protocol special measures that may be applied to this case and to all future cases where electronic information is collected or seized.¹³
14. The Prosecution submits that the items that were collected or seized electronically should be imported in their original format. The Protocol currently stipulates the standardisation of items into specific formats (eg. for documents - the "Tiff" image format). This standardisation is useful when handling items that are collected in physical form. When items are collected as electronic data, however, the application of the standard can result in a loss of information being available to the receiving party and ultimately to the Chamber. Valuable information in the electronic files will be lost by the conversion process that is assumed in the current Protocol. This, in turn, would require the manual re-entry of meta-data which could be automatically imported if the files were to be imported in their native form. The Prosecution submits that this is an unnecessary time and resource-consuming task which will hinder the expeditious conduct of proceedings.
15. Many national jurisdictions have implemented specific provisions for electronic evidence. The Prosecution submits that it is both appropriate and desirable for the Chamber to incorporate similar provisions into the Protocol.¹⁴

¹³ It is a notorious fact that information is increasingly being stored in electronic format. It may thus be anticipated that this type of evidence will be encountered all the more frequently in future cases. It is thus all the more important to develop an appropriate protocol to deal with such evidence.

¹⁴ See *The Sedona Conference International Overview of Discovery Data Privacy and Disclosure Requirements 2009*, available at: <http://www.thesedonaconference.org/dltForm?did=The Sedona Conference International Overview of Discovery Data Privacy and Disclosure Requirements>, last accessed 14 April 2011.

Provision for translated documents

16. The Prosecution respectfully requests that the Protocol also be amended to take particular account of translated documents and translations of redacted versions. The current Protocol requires translated documents to bear an ERN that is consistent with the original file on each page. This provision represents a change to the protocol that cannot be implemented for a single case alone, as it impacts on the internal processes of registering translations for all cases. Further, requirement becomes problematic where the translated document has more pages than the original – the page correlation is often not maintained due to fundamental differences in the grammar and vocabulary of the languages. The Prosecution submits that the Protocol provisions should take into account such differences.
17. Similarly, with respect to specific measures for translations of redacted versions of items, the interrelationship of paragraphs 23, 24 and 25 of the Protocol is somewhat unclear. The requirement for the “Doc ID” of a translation of a redacted item as specified in paragraph 25 makes no provision for the “translation suffix”. It appears therefore that there may have been a typographical error or omission, which requires correction.¹⁵ The Prosecution submits that the e-Court User Group would also be in a position to advise on the above-mentioned issues.

The e-Court User Group

18. The e-Court User Group was created by the Registry in September 2010, based on a recommendation from an external consultant following an audit of the Court’s e-Court infrastructure. It is an important mechanism in the standardisation of e-Court processes and development of an improved e-

¹⁵ The Prosecution notes in this regard that the example of the “Doc-ID” given in para. 25 is identical to that in para. 24. The absence of a full stop at the end of this paragraph suggests that some information may have been inadvertently omitted.

Court protocol in order to enhance efficiency. The e-Court User Group is composed of representatives of all Organs of the Court (including representatives of OPCV and OPCD). The scope of the Group's activity includes making recommendations to Chambers on complex e-Court issues. The Prosecution submits that the Group can assist in improving the e-Court Protocol issued by this Chamber, by carefully considering the technicalities of the issue(s) and recommending appropriate provisions dealing with electronic materials.

19. The Prosecution urges the Chamber to consult the e-Court User Group to assist with improving and standardising the Protocol to ensure maximum possible efficiencies to the proceedings, in a way that may be applicable to all ICC Cases.

IV. Curtailment of Period for Defence Response

20. In light of the looming deadline of 23 May 2011 for the filing of information intended to be relied upon at the confirmation hearing, the Prosecution submits that allowing the Defence the normal 21 day period to respond would defeat the purpose of this Request. It accordingly requests that the Chamber exercise its discretion to stipulate an abbreviated period for the Defence to respond, should they wish to do so.

V. Relief sought

21. The Prosecution requests the Chamber to amend the Protocol issued in annex to its Decision on issues relating to Disclosure to better suit the needs of the present case. The Prosecution requests the Chamber to direct the Registrar to convene the e-Court User Group to report on suggested modifications to address the issues described above.



Luis Moreno-Ocampo,

Prosecutor

Dated this 14th day of April 2011

At The Hague, The Netherlands