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**International
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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
Decision on the E-Court Protocol**

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Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, issues the following decision on the E-court Protocol:

I) Background

A. Procedural history at the Pre-Trial Stage

1. The Court has put in place a system of electronic management of the evidence held by, and exchanged between, the parties to its proceedings.
2. In the context of the present case, this system was initially implemented at the beginning of the pre-trial phase as a part of the “Interim System of Disclosure”,¹ which provided for all disclosure to be conducted electronically and to be effected via the Registry. This interim system was replaced by the “Final System of Disclosure” on 15 May 2006.²
3. On 28 August 2006 the Pre Trial Chamber in its final Decision on the E-Court Protocol³ put in place a protocol for implementing electronic disclosure of evidence (“Current E-Court Protocol”), which was based on an agreed draft E-Court Protocol submitted jointly by the Registry, the Office of the Prosecutor (“prosecution”) and the defence.⁴ There were a few minor points of disagreement between the parties on the fields which should be completed by them, as listed in the final page of that document.

¹ Decision Requesting Observations of the Prosecution and the Duty Counsel for the Defence on the System of Disclosure and Establishing an Interim System of Disclosure, 23 March 2006, ICC-01/04-01/06-54; Decision Requesting Further Observations from the Prosecution and the Duty Counsel for the Defence on the System of Disclosure, 27 March 2006, ICC-01/04-01/06-58.

² Decision on the final system of disclosure and the establishment of a timetable, ICC-01/04-01/06-102.

³ Final Decision on the E-Court Protocol for the Provision of Evidence, Material and Witness Information on Electronic Version for their Presentation During the Confirmation Hearing, ICC-01/04-01/06-360.

⁴ Submission of a new version of the E-court protocol prepared jointly by the Office of the Prosecutor, the Defence and the Registry, 20 July 2006, ICC-01/04-01/06-201.

4. The final system of disclosure differed from the interim system in several procedural and technical respects. However, for the purposes of this Decision it is necessary only to mention that procedurally it provided for disclosure of evidence *inter partes*. This was important because disclosure was neither necessarily conducted electronically nor via the Registry and accordingly fell outside the immediate control and supervision of the Court. Only evidence upon which the parties intended to rely at the Confirmation Hearing was required to be filed with the Registry, subsequent to disclosure.
5. The Current E-Court Protocol stipulates a list of metadata fields according to which materials are “tagged”; this list is based on the joint submission referred to at paragraph 3 above, with the addition of certain fields stipulated by the Single Judge in her Decision of 28 August 2006.
6. The applicability of the Current E-Court Protocol and its use in the trial proceedings now falls to be considered by the Trial Chamber.

B. Procedural history at the Trial Stage

7. On 5 September 2007, Trial Chamber I issued a list of preliminary issues requiring early determination in advance of the trial of Mr Thomas Lubanga Dyilo, which included the e-court protocol, in the following way “[w]hether 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”.⁵ Written submissions in advance of a Status Conference on 1

⁵ Order setting out schedule for submissions and hearings regarding the subjects that require early determination, 5 September 2007, ICC-01/04-01/06-947, paragraph 2D. See also, Request for submissions on the subjects that require early determination, 18 July 2007, ICC-01/04-01/06-936, at paragraph 6D; Direction suspending the timetable on the subjects that require early determination, 16 August 2007, ICC-01/04-01/06-942. The Trial Chamber’s Agenda for the Hearing on Monday 1st October, 25 September 2007, ICC-01/04-01/06-962, referred in footnote 2 to documents ICC-01/04-01/06-201 and ICC-01/04-01/06-360.

October 2007 were filed by the prosecution on 11 September 2007,⁶ by the defence on 24 September 2007⁷ and by the legal representatives of victims a/0001/06 to a/0003/06⁸ and victim a/0105/06⁹ on 24 September 2007.¹⁰

8. At the Status Conference on 2 October 2007, following oral submissions on 1 October 2007,¹¹ the Trial Chamber indicated its intention to appoint an expert witness,¹² who would be asked to take into account instructions to be filed by the parties and the participants, to the extent that they were approved, varied or expanded by the Chamber. The defence and the prosecution filed their respective documents on 5 October 2007.¹³ The legal representatives of victims a/0001/06 to a/0003/06 and of victim a/0105/06 filed their submissions on 12 October 2007¹⁴ having been granted an extension of time in which to do so.¹⁵
9. Taking into account the above proposals of the parties and participants, the Chamber issued instructions on 1 November 2007 to Ms Sandra Potter of Potter Farrelly and Associates in her capacity as an accepted expert in the area of e-court technology and procedure ("expert").¹⁶ Ms Potter submitted her

⁶ 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, paragraphs 39-43.

⁷ 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, paragraphs 36-41.

⁸ Submissions on preliminary issues, ICC-01/04-01/06-957-tENG, paragraphs 28-30.

⁹ 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, paragraphs 33-40 and page 12, pleading 5.

¹⁰ The prosecution and the defence are referred to as the "parties" and the legal representatives of victims as the "participants".

¹¹ Transcript of hearing on 1 October 2007, ICC-01/04-01/06-T-52-ENG, page 94, line 19 to page 103, line 2. See also transcript of hearing on 2 October 2007, ICC-01/04-01/06-T-54-ENG, page 1, line 15 to page 3, line 14.

¹² ICC-01/04-01/06-T-54-ENG, page 1, line 16 to page 2, line 6.

¹³ Defence observations to the expert appointed by Trial Chamber I on the question of e-court protocol, 5 October 2007, 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.

¹⁴ 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.

¹⁵ Decision on the request of the legal representatives of victims for an extension of time to file submissions on the e-court protocol, 5 October 2007, ICC-01/04-01/06-973.

¹⁶ Instructions to the expert on e-court, ICC-01/04-01/06-1010.

report on 12 November 2007¹⁷ and an addendum thereto on 7 December 2007,¹⁸ which are generically referred to as the “report”.

II) Relevant Provisions

10. Regulation 26 of the Regulations of the Court provides:

1. The Court shall establish a reliable, secure, efficient electronic system which supports its daily judicial and operational management and its proceedings.
2. The Registry shall be responsible for the implementation of the system described in sub-regulation 1, taking into account the specific requirements of the judicial activity of the Court, including the need to ensure authenticity, accuracy, confidentiality and preservation of judicial records and material.
3. Documents, decisions and orders shall, whenever possible, be submitted in electronic version for registration by the Registry. The electronic version of filings shall be authoritative.
4. In proceedings before the Court, evidence other than live testimony shall be presented in electronic form whenever possible. The original form of such evidence shall be authoritative.

11. Regulation 52 of the Regulations of the Registry states:

1. During a hearing, evidence shall be presented in electronic format.
2. For the purpose of the presentation, participants shall provide to the court officer, in electronic version whenever possible, the evidence they intend to use at the hearing at least three full working days before the scheduled hearing.
3. Evidence provided under sub-regulation 2 is transmitted by the court officer to the interpretation and translation service within the Registry, under strict conditions of confidentiality, for the purpose of regulation 63, sub-regulation 3.

III) Submissions

12. The prosecution submitted that the Current E-Court Protocol adopted by the Pre Trial Chamber was limited to the purposes of the confirmation hearing, and is accordingly not applicable at this stage of the proceedings.¹⁹ Moreover,

¹⁷ Report to Trial Chamber I on the e-court, ICC-01/04-01/06-1024.

¹⁸ Addendum to “Report to Trial Chamber I on the e-court”, ICC-01/04-01/06-1062.

¹⁹ ICC-01/04-01/06-852, paragraph 18.

it argued the Current Protocol is not suitable for adoption during the trial stage.²⁰

13. In particular, the prosecution submitted that the E-Court Protocol should not be a case analysis tool but rather a case-management tool as envisaged by Regulation 26 of the Regulations of the Court.²¹ It argued that the amendments made by the Pre Trial Chamber to the proposed E-Court Protocol submitted by the Registry and the parties, consisting of the addition of a range of case-specific data fields, were not in keeping with that Regulation. The addition of such data-fields, it submitted, not only created significant additional work for the parties with few or marginal benefits, but it also could mislead the parties and participants.²² Furthermore, in the prosecution's submission these additional data fields were of only limited temporal relevance and the Pre-Trial Chamber's partial reclassification of the conflict in Ituri from national to international rendered prior tagging in the "Element of alleged crime" field inaccurate.²³

14. The defence argued that the Current E-Court Protocol was not inconsistent with Regulation 26 of the Regulations of the Court and that the Protocol was an important tool as currently configured, particularly in light of the substantial volume of material held by the Prosecutor that is not electronically searchable.²⁴ Indeed, the defence submitted that its work, and the utility of the Current E-Court Protocol, would be enhanced by the addition of metadata fields describing the complete chain of custody of the evidence and the date on which any source-imposed restrictions were lifted.²⁵

²⁰ *Ibid.*, paragraphs 19-20.

²¹ ICC-01/04-01/06-951, paragraph 41.

²² *Ibid.*, paragraph 42.

²³ ICC-01/04-01/06-852, paragraph 20.

²⁴ ICC-01/04-01/06-960, paragraphs 36-37.

²⁵ *Ibid.*, paragraph 41.

15. The legal representatives of victim a/0105/06 and of victims a/0001/06 to a/0003/06 drew the Chamber's attention to the fact that victims' representatives were not consulted in the preparation and adoption of the Current E-Court Protocol and that they had had little subsequent opportunity to access E-Court compliant data.²⁶ Nevertheless, the legal representatives highlighted the lack of victim-related information in the metadata fields, and the representative of victim a/0105/06 submitted that a greater quantity of this information should be incorporated in order to make the material disclosed pursuant to the Protocol of greater immediate utility to the victims it represents.²⁷

16. At the Status Conference on 1 October 2007, it was submitted on behalf of the Registrar that the E-Court Protocol was not intended to serve as a case-analysis tool. It was highlighted that pursuant to Regulation 52 of the Regulations of the Registry, the information provided under the Protocol is only made available three days before its potential presentation at a court hearing. Thus, it is suggested this provision is not consistent with the Protocol being used for analysis of information by the parties.²⁸

IV) Analysis and Conclusions

17. The Chamber is grateful for the detailed work in this very technical area undertaken by the highly qualified appointed expert²⁹ and it is persuaded by the analysis and conclusions contained in the report.

18. In its consideration of the report, its findings and the application and adaptation of the Current E-Court Protocol, the Chamber has been mindful

²⁶ ICC-01/04-01/06 961, paragraphs 33-34 and ICC-01/04-01/06-957, paragraph 28.

²⁷ ICC-01/04-01/06-961, paragraphs 36-37 and ICC-01/04-01/06-957, paragraph 29.

²⁸ ICC-01/04-01/06-T-52-ENG, page 102, lines 16-22.

²⁹ ICC-01/04-01/06-1024, paragraphs 4-17.

not only of the advanced stage currently reached in the proceedings and the implications any significant changes would have on the timetable for trial preparation but also of the resources available to the defence and the victims' representatives. It has also considered the alternative mechanisms by which the objectives of the Current E-Court Protocol could be achieved.

19. The report supports the Chamber's view that e-court processes can greatly enhance courtroom and trial efficiency and as such should be embraced by the Court. As the expert has set out, "in an e-court, courtroom participants can have fast, well-organised access to the information that has been disclosed beforehand (documents and statements), and to the information that is created live (the spoken word and the production and creation of exhibits)".³⁰ There are other potential uses such as case management, research, presentation at hearings; exhibit management; transcript management; witness management; information to support judgments and procedural decisions; and court administration.³¹ The exponential increase in the volume of information, together with real problems that have emerged over information management, has meant that standardised protocols are necessary to govern how information can be prepared and presented.³² Important experience³³ has demonstrated that a protocol which is drawn to capture purely objective information³⁴ about documents or records related to each case is the most useful approach: this enables the exchange, search, retrieval and presentation of information in the easiest, as well as most precise and consistent way, on multiple occasions.³⁵ Critically, the experience of those courts is that these objectives cannot be met by the addition of subjective information: indeed, the

³⁰ ICC-01/04-01/06-1024, paragraph 28.

³¹ *Ibid*, paragraph 30.

³² *Ibid*, paragraphs 33 and 34.

³³ This experience derives from Australia (particularly in the Supreme Courts of Victoria and New South Wales), which is being considered and adopted by a number of national and international courts. *Ibid*, paragraph 43.

³⁴ Namely, information that is apparent from the face of the document (the date, author, recipient etc), ICC-01/04-01/06-1024, paragraph 46.

³⁵ *Ibid*, paragraphs 35 and 36.

inclusion of subjective fields works actively against them.³⁶ The expert described this issue thus: "Although subjective fields are important tools for case preparation and analysis, they [...] do not generally form part of protocols used today."³⁷ The author emphasised that subjective fields cannot be handled in the same way as objective ones. In particular:

- a) Subjective information in a record takes longer to locate and analyse, and a subjective field often contains more information than an objective field would hold.
- b) Searching material based on subjective fields or full text searches yields results that are relative, not absolute. The integrity of subjective searches depends on the quality of the subjective information captured, the ability to construct an effective search, and the sheer subjective differences between one person's work and another.
- c) The relative nature of subjective searching gives rise to the risk of misapprehension that any results are in some way a comprehensive list of records relevant to the issues searched for.³⁸

20. The expert recognised the importance of capturing and utilising subjective information as a part of case analysis generally. However, the unequivocal view expressed was that this is best undertaken separately by each party, given that the appropriate focus in capturing any subjective information will depend entirely on the role each party has to play in the case. The difference in the way the parties are likely to structure their cases will mean that the exchange of subjective information will often serve little purpose, since their individual interests will lead to disparate approaches to information.³⁹ Indeed, the expert observes that subjective fields of the kind proposed have never been included in a protocol.⁴⁰ To the extent to which the (subjective) material is protocol-compliant, it can easily be exported into a stand-alone case analysis system.⁴¹

21. In consequence, the Chamber agrees with the expert that the metadata fields should not extend beyond those identified as "objective" in paragraph 52 of

³⁶ *Ibid*, paragraph 36.

³⁷ *Ibid*, paragraph 36.

³⁸ *Ibid*, paragraph 63.

³⁹ *Ibid*, paragraph 64.

⁴⁰ *Ibid*, paragraph 82.

⁴¹ *Ibid*, paragraph 67.

the report, since adding subjective fields would not best facilitate the Court's work and would reduce the universal value of the Protocol across all cases.

22. In order to maximise the utility and the coherency of the application of the E-Court Protocol, this decision should be applied to all exchanged materials, regardless of the particular stage in the proceedings at which they were disclosed. The objective metadata fields identified by the expert⁴² should be included unless the prosecution within 7 days of this Decision files reasons for the Chamber's consideration as to why this is not reasonably achievable before trial. Moreover, the Chamber endorses the view of the expert that the Protocol should cover "all case information filed with the Registry or exchanged between parties/participants".⁴³ This, by definition, extends equally to the incriminatory and potentially exculpatory material exchanged between the parties.

23. An exception to this approach applies to the semi or completely illegible materials, given that there are 15,000 documents that are either written by hand or otherwise cannot be searched electronically.⁴⁴ The principle reason for permitting this exception is the imminence of the trial and the difficulties at this point in time for the prosecution of revisiting each of the relevant documents to apply the relevant objective coding or typing the record in full for electronic searching.⁴⁵ The Chamber stresses this exception is made purely because of the stage in the case that has been reached.

24. There is no reason to distinguish between the parties and the participants in the approach identified above. The prosecution, the defence and the victims' representatives will all be able, if they wish, to improve individually on the

⁴² *Ibid*, paragraph 52.

⁴³ ICC-01/04-01/06-1062, paragraph 9.

⁴⁴ ICC-01/04-01/06-1024, paragraph 83.

⁴⁵ *Ibid.*, paragraphs 85 and 86.

(low level) case analysis tool that the protocol will provide by using their own discrete case analysis systems.⁴⁶

25. Accordingly, the Chamber directs that the objective fields, including those “proposed victim information” fields set out at paragraph 52 of the report which are described as ‘objective,’ should be added to the Current E-Court Protocol.

26. Turning to the additional metadata fields on which the expert was unable to provide an opinion, the Chamber is of the view that the parties and participants are entitled to receive details on the “Full Chain of Custody of Material Evidence”⁴⁷ and on the “Date Source Restriction Lifted”⁴⁸ but that this information need not necessarily be provided via the E-Court metadata. If the prosecution has been routinely providing this information in a clearly identifiable alternative way, it may continue to do so. Accordingly, the Chamber directs that this information should be provided by whatever means is most convenient to the providing party. On the other hand, the Chamber does not consider that the addition of the “Person/Witness from whom the Document Originated”⁴⁹ is an onerous requirement and directs that this should form part of the E-Court Protocol, unless the prosecution within 7 days of this Decision files reasons for the Chamber’s consideration as to why this is not reasonably achievable before trial.

27. The Chamber notes the practice of grouping three victims under one victim code, highlighted at paragraph 109 of the report, and directs the parties in future to make the change suggested in that paragraph, i.e. to allocate a unique number to each victim participant.

⁴⁶ *Ibid*, paragraph 80.

⁴⁷ *Ibid*, paragraph 52 a.xi.

⁴⁸ *Ibid*, paragraph 52 a.xii.

⁴⁹ *Ibid*, paragraph 52 b.vii.

28. The Chamber also notes the question raised by the expert in paragraph 110 of the report in relation to the resources available to the defence in order to maximise its use of the Current E-Court Protocol. The Registry consequently should provide facilities and assistance for training of the defence team and legal representatives of victims participating in the proceedings in the use and application of the Current E-Court Protocol, if they feel that such assistance would be of benefit to their work.

29. While the Chamber's directions are limited to the present trial, it agrees with the reasoning behind the expert's view on the standardisation of an E-Court protocol across the proceedings of the Court as a whole. The Chamber observes that the prosecution has not viewed the Pre-Trial Chamber's version of the E-Court Protocol as binding on it subsequent to the Confirmation of Charges. This does not appear to be consistent with the principles which underpin the Protocol. A pre-determined and consistent approach to the format according to which disclosure would occur would result in savings in Court time. In addition, the Chamber anticipates that there would be significant efficiencies in terms of the overlap in documents collected in the context of a single situation and which may be suitable for disclosure in more than one trial. Since those documents would, in the main, require processing for E-court compliance on only one occasion, particularly when such compliance is limited to the objective fields which have been the focus of the present Decision, the benefits, *inter alia*, in terms of resources, may be important. Accordingly, the Chamber encourages the Office of the Prosecutor to examine the wider applicability of the E-Court Protocol and the potential for its consistent and universal implementation in all situations and cases unless and until another Chamber deems it necessary to depart from it.⁵⁰

⁵⁰ ICC-01/04-01/06-1024, paragraphs 100-103.

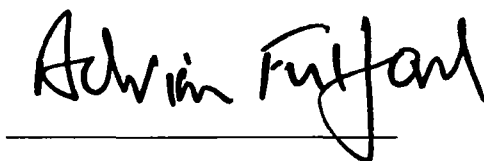
V) Orders of the Trial Chamber

30. For these reasons, the Trial Chamber hereby orders the following:

- a) All documents disclosed by the parties and participants shall be provided in a Protocol-compliant format, with the required metadata fields being completed. The objective fields including the “proposed victim information” fields identified at paragraph 52 of the report, as well as the “Person/Witness from whom the Document Originated” field, shall be included in the E-Court Protocol in relation to all materials exchanged, save for semi or completely illegible material, unless the prosecution files reasons for the Chamber’s consideration as to why this is not reasonably achievable before trial within 7 days of this Decision.
- b) Information on the “Full Chain of Custody of Material Evidence” and on the “Date Source Restriction Lifted” shall be communicated by whatever means is most convenient to the providing party.
- c) In future, a unique number (“Participant Codes” field) shall be allocated to each victim participant.
- d) The Registry should provide facilities and assistance for training of the defence team and legal representatives of victims participating in the proceedings in the use and application of the E-Court Protocol, if they feel that such assistance would be of benefit to their work.
- e) The Office of the Prosecutor is encouraged to examine the wider applicability of the E-Court Protocol and the potential for its implementation in all situations and cases.

Judge René Blattmann was consulted but is unavailable to sign the Decision as he is away from the seat of the Court on the day of signature.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 24 January 2008

At The Hague, The Netherlands