Cour Pénale Internationale

International Criminal Court

Original : English

No.: **ICC-01/04-01/06**
Date: **13 March 2008**

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
Second 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 second decision on the E-court Protocol:

I. BACKGROUND AND SUBMISSIONS

1. On 24 January 2008 the Trial Chamber issued its "Decision on the E-Court Protocol" ("Decision")[1] in which it set out a procedure for electronic management of the case materials.[2] As part of that Decision the Chamber ordered the parties and participants to ensure that disclosed documents are labelled with appropriate metadata describing the "Person/Witness from whom the document originated"[3] (the "Metadata Field").

2. On 31 January 2008 the Office of the Prosecutor ("prosecution") filed a "Submission for the Trial Chamber's consideration in respect of the 'Decision on the E-Court Protocol'"[4] in which it submitted that populating the Metadata Field would create difficulties in terms of revealing the identities of sources of material. In particular, identities would be revealed which are protected pursuant to Article 54(3)(f) of the Statute or Rules 81(2) and (4) of the Rules of Procedure and Evidence.[5]

3. The prosecution sought guidance from the Chamber on four issues. First, as regards sources whose identities the Chamber has authorised are to be withheld, the prosecution submitted the order granting non-disclosure should extend to the relevant entries in the Metadata Field. Second, it requested authority, on a temporary basis, to withhold the Metadata Field entries for sources awaiting the implementation of protective measures. Third, the

[1] ICC-01/04-01/06-1127.
[2] For further procedural history, see ICC-01/04-01/06-1127 paragraphs 1-9.
[3] ICC-01/04-01/06-1127, paragraph 30(a).
[4] ICC-01/04-01/06-1148.
[5] *Ibid.*, paragraph 8.

prosecution sought authorisation to withhold the identities of any sources who wish to preserve their anonymity.[6] Fourth, the prosecution requested that the Registry provide a consolidated version of the current E-Court Protocol.[7]

4. The Registry prepared a draft consolidated protocol which was sent to the Chamber and to the parties and participants by email on 7 February 2008. The parties and the participants were requested to provide comments on the draft protocol by 18 February 2008.

5. On 18 February 2008 the defence responded to the prosecution's submissions. The defence understood the prosecution's position as meaning that whenever the Chamber authorised the non-disclosure of an individual's identity, the identity of the individual would be made available to the defence at the same time it was disclosed generally.[8]

6. However, the defence submitted that the protection of information pursuant to Article 54(3)(f) and Rules 81(2) and (4) relates to witnesses, victims and members of their family and not to the "sources" of documents, when the sources are neither called as witnesses nor admitted as victim participants in the proceedings.[9]

7. The defence contended that an order permitting the non-disclosure of the identity of a source should not be based solely on their request or objection. Furthermore, if the prosecution is unable to disclose the identity of a source who is not a witness or a participating victim, the prosecution should not be permitted to rely on any evidence from that source.[10]

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[6] *Ibid.*, paragraph 10.
[7] *Ibid.*, paragraph 11.
[8] ICC-01/04-01/06-1174, paragraph 4.
[9] *Ibid.*, paragraphs 5-6.
[10] *Ibid.*, paragraph 7.

8. On 21 February 2008 Ms Sandra Potter, the Court-appointed expert in the area of e-court technology and procedure ("expert") submitted a "Second Addendum" to her report on the E-court Protocol.[11] As a preliminary comment she noted that the Metadata Field is meaningful only in relation to "physical evidence and material" and not to "witness information".[12]

9. She further submitted that the identity of an individual should be treated in the same way in relation to the E-Court Protocol as it is in other areas of the disclosure regime. Accordingly, if the identity of an individual is to be withheld, this would be applied to the Metadata Field.[13]

10. The expert argued that in order to uphold the confidentiality of information, redactions and other orders as to non-disclosure made by the Chamber, if an identity appears in the Metadata Field in respect of which non-disclosure has been authorised, the Metadata Field, or the metadata contained therein, should be withheld in respect of that particular document.[14]

II. ANALYSIS AND CONCLUSIONS

11. In its consideration of this matter, the Chamber has been mindful of the objectives of the E-Court Protocol, which are to enhance courtroom and trial efficiency and to facilitate the management of information. The Protocol should be viewed as a *tool* by which the parties' rights and obligations in respect of disclosure of evidence can be most efficiently facilitated and, as such, it should not create variations or exceptions to the general approach to disclosure. It follows that it is inappropriate in this Decision to address the

[11] ICC-01/04-01/06-1182.
[12] *Ibid.*, paragraph 10.
[13] *Ibid.*, paragraph 14
[14] *Ibid.*, paragraph 15.

defence submission summarised in paragraph 6 above because this is the subject of separate decisions.

12. The information included in the Metadata Field is of importance to the disclosure process. It is distinguished from the field of "Author" as it describes how a particular piece of evidence came into the possession of the prosecution. As such it is information which is potentially relevant to an assessment of the value of the evidence, and the presumption is that it shall be made available to the defence.

13. However, the E-Court Protocol must not be allowed to compromise authorised redactions or the non-disclosure of evidence by revealing identities which have been granted protection. Accordingly, where the Chamber has authorised the non-disclosure of an identity, this is to apply to the Metadata Field.

14. If, in the submission of the prosecution, the information contained in the Metadata Field requires further protection, such as the implementation of additional temporary redactions, leave is to be sought from the Chamber in each instance, as has been the practice hitherto with redactions. It follows that the Metadata Field is to be treated in accordance with the Chamber's general approach to disclosure and redactions.

15. The Chamber agrees with the view expressed by the expert that the Metadata Field is only of relevance to "physical evidence and material" and not to "witness information" and it is to be applied accordingly.

16. The Registrar is directed to submit a consolidated E-Court Protocol, after consulting with the parties and participants by 4 April 2008.

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

Judge Adrian Fulford

Judge Elizabeth Odio Benito

Judge René Blattmann

Dated this 13 March 2008

At The Hague, The Netherlands