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**TRIAL CHAMBER I**

**Before:** Judge Adrian Fulford, Presiding Judge  
Judge Elizabeth Odio Benito, Judge  
Judge René Blattmann, Judge

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO  
IN THE CASE OF  
THE PROSECUTOR  
v. THOMAS LUBANGA DYILO**

**Public**

**Prosecution's Response to the Defence "Requête aux fins de détermination des principes applicables aux questions posées aux témoins par les juges"**

**Source:** Office of the Prosecutor

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

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## Introduction

1. On 15 January 2010 the Defence for Thomas Lubanga filed an application asking the Chamber to determine the applicable principles governing the Chamber's questioning of witnesses as well as the related rights of the Defence ("the Application").<sup>1</sup> The Defence requests that (i) the Judges confine their questions to the facts and circumstances described in the confirmation decision; (ii) the Judges forbear from posing leading questions regarding the elements of the crimes charged and the accused's responsibility, and (iii) the Defence be allowed to object to questions by the Judges that contravene the first two requests.<sup>2</sup>
2. The Prosecution notes that most of the underlying questions on which this Application is founded have previously been litigated by the Defence and resolved by this Chamber.<sup>3</sup> Additionally, it submits that the Chamber has the statutory obligations to establish the truth and to determine an appropriate sentence and reparations in case of conviction. For the latter obligations, it may elicit evidence at trial that, even if not directly related to the charges or to the guilt or innocence of the accused, will assist in determining the full scale of victimization, an issue plainly relevant to sentencing and reparations. The Chamber will be able to identify and consider the evidence for the appropriate purposes, and there is no reason to assume prejudice to the accused. The Chamber may also ask leading questions that clarify or focus on matters of special interest.
3. The Prosecution agrees that a party or participant should be allowed to object to a question even if asked by the Chamber. In-court objections may have the beneficial purpose of preventing or correcting error.

## Prosecution Submission

### **A. The Chamber appropriately may ask questions addressed to matters other than the facts and circumstances described in the charges**

4. The Prosecution submits that the Judges have the authority to ask any question which the Chamber considers necessary to properly fulfil its statutory obligations. The Defence's request to limit the Judges' questions to only the facts and

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<sup>1</sup> ICC-01/04-01/06-2252 ("Application"), para. 3.

<sup>2</sup> *Ibid.*, p. 8.

<sup>3</sup> ICC-01/04-01/06-1119, 18 January 2008, paras. 121-122; ICC-01/04-01/06-1440, 29 January 2008, para. 32.

circumstances described in the confirmation decision<sup>4</sup> does not find support in the Statute, and the Defence fails to provide any valid argument or supporting authority.<sup>5</sup>

5. Rule 140(2)(c) acknowledges the Trial Chamber's right to question witnesses. This Chamber has already ruled that the Judges may exercise their right to pose questions "[w]hensoever [they] consider it appropriate", with the only limitation that the rights of the Defence under Rule 140(2)(d) are respected – *i.e.* the Defence may examine last the witness.<sup>6</sup>
6. This Trial Chamber has also previously stated that matters relevant to sentencing issues (including aggravating and mitigating circumstances) and reparation issues (including harm suffered) may be raised during the questioning of witnesses; indeed, it further held that parties shall put such questions to witnesses during trial to avoid recalling witnesses unnecessarily.<sup>7</sup> This approach is consistent with Regulation 56 of the Regulations of the Court ("RoC"), which explicitly permits the Trial Chamber to "hear the witnesses and examine the evidence for the purpose of a decision on reparations [...] at the same time as for the purposes of trial."
7. It follows that the Judges may elicit evidence relevant to sentencing issues.

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<sup>4</sup> Application, para. 13.

<sup>5</sup> The paragraphs of the two decisions that the Defence quotes are not applicable to the present scenario. First, at fn. 3, the Defence quotes a Trial Chamber II decision issued in the Katanga case, which states that the Chamber cannot, for the purpose of determining guilt or innocence, add or modify the factual allegations supporting the legal elements of the crime that were adopted by the Pre-Trial Chamber in its confirmation decision. However, as the Appeals Chamber has stated and this Chamber repeated, these factual allegations have to be distinguished from evidence and background information, which in turn must be distinguished altogether from aggravating circumstances within Rule 145. See ICC-01/04-01/06-2205, 8 December 2009 (Appeals Chamber Judgment on Regulation 55), fn. 163, and ICC-01/04-01/06-2223, paras. 30, 32. Second, at fn. 10, the Defence quotes from the ICTY *Delalic* decision out of context. That decision was not related to whether, on what subjects, or in what manner a Chamber may question a witness. Rather, it addressed whether the Defence was entitled to re-cross-examine a witness following re-direct by the Prosecution. Moreover, it is noteworthy that (i) the ICTY's interpretation of its Rule 85(B), vesting ICTY Judges with the authority to put questions to witnesses, is not binding on the ICC, which must apply its own Statute and Rules; and in any event (ii) following this decision, the ICTY Rule 85 was amended to allow for the presentation of information at trial that is relevant for sentencing purposes (Rule 85(A)(vi)).

<sup>6</sup> See oral decision on Rule 140 (Directions for the Conduct of Proceedings and Testimony), ICC-01/04-01/06-T-104 ENG WT 16-01-09, p.37, line 25 to p.38, lines 1-3.

<sup>7</sup> ICC-01/04-01/06-1140, para. 32. The Chamber held that these three issues are included, among others, within the concept of 'other relevant matters' under Rule 140(2)(b). Other international criminal courts have endorsed this practice and permit the introduction of information at trial relevant for sentencing. See Rule 85 (A)(vi) of the ICTY and ICTR Rules of Procedure and Evidence.

8. Thus, the Prosecution disagrees with the defence position that it is impermissible for the Chamber to ask questions at trial that exceed the facts and circumstances of the charges. Should the Accused be convicted, the Chamber will have to determine the sentence and reparations considering the scope and extent of the damage suffered by the victims.<sup>8</sup> It has been the Prosecution's position from the outset that the harm suffered by the children as a result of their conscription and enlistment, including the sexual violence and cruel treatment, is relevant to the determination of the sentence and to reparations.<sup>9</sup> Consequently, questions directed at those issues are appropriate.
9. Moreover, the Trial Chamber can properly assess and consider the information provided by the trial witnesses for the appropriate purpose – whether to adjudicate guilt or innocence or determine a just sentence and award reparations.<sup>10</sup> This Chamber has confirmed that it will “be able, without difficulty, to separate the evidence that relates to the charges from the evidence that solely relates to reparations, and to ignore the latter until the reparations stage (if the accused is convicted) [and] it will ensure that this course does not involve any element of

<sup>8</sup> See Rules 97 and 145(1)(c). While the decision under Article 74(2) is limited to “the facts and circumstances described in the charges”, the determination of sentence and reparations under Articles 78 and 75 is not. The ICTY and ICTR have also considered as aggravating factors for the purpose of sentencing circumstances that may not have been described in the indictment, including, for example, the particular cruel, violent, and humiliating nature of the acts and the vulnerability of the victims. See, for example, *Prosecutor v. Blaskic*, IT-95-14-T, Trial Judgement, 3 March 2000, para. 783; *Prosecutor v. Kunarac et al.*, IT-96-23-T& IT-96-23/1-T, Trial Judgement, 22 February 2001, paras. 864, 866-867; *Prosecutor v. Kunarac et al.*, IT-96-23& IT-96-23/1-A, Appeal Judgement, 12 June 2002, para. 352; *Prosecutor v. Zelenovic*, IT-96-23/2-S, Sentencing Judgement, 4 April 2007, para. 39; *Prosecutor v. Jelusic*, IT-95-10-T, Trial Judgement, 14 December 1999, para. 130; *Prosecutor v. Muhimana*, ICTR- 95-1B-T, Judgement and Sentence, 28 April 2005, paras. 612, 614). The tribunals have also considered the effect of the crimes on the victims and survivors, as in *Prosecutor v. Blaskic*, IT-95-14-T, Judgement, 3 March 2000, para. 787, and the circumstances of the offences generally, such as the conditions of the camps where the crimes were committed, e.g. *Prosecutor v. Delalic et al.*, IT-96-21-T, Trial Judgement, 16 November 1998, paras. 1242-1243.

<sup>9</sup> ICC-01/04-01/06-T-107 ENG ET, 26 January 2009; ICC-01/04-01/06-1966, 12 June 2009, para. 19; ICC-01/04-01/06-2215, 22 December 2009, paras. 18-21.

<sup>10</sup> ICC-01/04-01/06-1119, 18 January 2008, paras. 121-122. Other international tribunals have also noted that judges elected to international criminal tribunals are professional judges with the experience and ability to discern the contents of evidence and give it the appropriate weight. See *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Motion to Convert *Viva Voce* Witness to Rule 92ter Witness, 31 May 2007, p. 2; see also *Prosecutor v. Galic*, IT-98-29-A, Judgment, 30 November 2006, para. 41; *Prosecutor v. Akayesu*, ICTR-96-4, Appeal Judgement, 1 June 2001, para. 269; *Prosecutor v. Mucić et al.*, IT-96-21-A, Appeals Judgment, 20 February 2001, para. 700; *Prosecutor v. Brđanin and Talic*, IT-99-36, Decision on Application by Momir Talic for the Disqualification and Withdrawal of a Judge, 18 May 2000, para. 17. See also *Prosecutor v. Prlić et al.*, IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007, para. 57 (“professional judges are better able to weigh evidence and consider it in its proper context than members of a jury. Furthermore, as opposed to a jury's verdict, professional judges have to write a reasoned decision, which is subject to appeal”); *Prosecutor v. Milošević*, IT-98-29/1, Order on Guidelines for Drawing Up the List of Witnesses and Exhibits and Order to Translate the Witness Statements, 16 December 2005, p. 3 (“the very fact that the evidence is evaluated by professional judges and not by a jury made up of non-professionals, as is the case in the common law systems, gives support to particular treatment guaranteeing equitable evaluation of that evidence”).

prejudgment on the issue of the defendant's guilt or innocence, and [his] right to a fair trial.” The same principle would apply for sentencing matters.

10. Nor are the rights of the accused and the presumption of innocence undermined in such cases, as the Chamber explicitly stated.<sup>11</sup> In addition, if new issues arise from the Chamber’s questions, the Defence will have the opportunity to again examine the witness.<sup>12</sup>

#### **B. The Chamber may ask leading questions**

11. The Defence objects to the Chamber’s posing of questions it deems leading or suggestive on the constitutive elements of the crimes or the responsibility of the accused because the Court has an obligation of impartiality.<sup>13</sup>
12. The Prosecution disagrees that asking leading or suggestive questions necessarily violates either an obligation or an appearance of impartiality. The Prosecution reiterates that the Chamber must be presumed to not prejudge the merits before all the relevant evidence is presented.
13. Moreover, it may be desirable for Judges to ask leading questions in order to clarify areas of uncertainty or to elicit information pertinent to the appropriate sentence or consideration of reparations.

#### **C. The parties are entitled to object to the Chamber’s questions**

14. The Defence’s final request for a right to object to the Judges’ questions is advanced as a means of enforcing restrictions on the scope of the Chamber’s permitted questioning.<sup>14</sup> The Prosecution agrees that, as a matter of principle, parties or participants have the right to object to actions in court, including by the Trial Chamber. Indeed, permitting lawyers to object and to explain the basis for their objection could assist the Chamber in avoiding erroneous rulings.

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<sup>11</sup> ICC-01/04-01/06-1119, 18 January 2008, para. 120.

<sup>12</sup> ICC-01/04-01/06-T-104 ENG WT 16-01-09, p.38, lines 1-3.

<sup>13</sup> Application, para. 24.

<sup>14</sup> Application, paras. 25-28 ; p.8.

**Relief sought**

15. For the reasons set out above, the Prosecution request that the Trial Chamber rejects the Defence's Application and considers the Prosecution's submissions as set out herein.



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Luis Moreno-Ocampo  
Prosecutor

Dated this 25<sup>th</sup> day of January, 2010

At The Hague, The Netherlands