Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/04-01/06**
Date: **22 May 2008**

TRIAL CHAMBER I

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

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

Public

Decision on opening and closing statements

Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor
Ms Fatou Bensouda
Mr Ekkehard Withopf

Counsel for the Defence
Ms Catherine Mabille
Mr Jean-Marie Biju Duval

Legal Representatives of the Victims
Mr Luc Walleyn
Mr Franck Mulenda
Ms Catherine Bapita Buyangandu

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court"), in the case of the Prosecutor v. Thomas Lubanga Dyilo, delivers the following decision on the issue of opening and closing statements by the parties and participants:

I) Procedural Background

1. On 13 December 2007, the Chamber issued an "Order setting out the schedule for submissions and hearing on further subjects which require determination prior to trial". The Chamber requested that all parties make submissions on, *inter alia,* the issue of statements by the Office of the Prosecutor ("prosecution") and the defence, and in particular:

   - Whether the prosecution and the defence should be required to make individual opening statements in order to explain their respective cases;
   - If opening statements are required, whether they should be disclosed in advance and the timing of that disclosure;
   - Whether closing statements in accordance with Rule 141 of the Rules of Procedure and Evidence ("Rules") should be disclosed in advance.[1]

2. On 5 January 2008, the legal representative of Victim a/0105/06 filed her submissions,[2] followed on 7 January 2008 by the legal representatives for Victims a/0001/06 to a/0003/06[3], the prosecution[4] and the defence.[5]

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[1] ICC-01/04-01/06-1083, paragraph D.
[2] Conclusion du représentant legal de la victime a/0105/06 sur "Order setting out the schedule for submissions and hearing on further subjects which require determination prior to trial", ICC-01/04-01/06-1106.
[3] Conclusions des Représentants légaux des victimes a/0001/06 à a/0003/06 sur d'autres questions à déterminer avant le procès", ICC-01/04-01/06-1107.
[4] Prosecution's Submissions for the Status Conference on 9 January 2008, ICC-01/04-01/06-1109.
[5] Conclusions de la Défense relatives à l' "Order setting out the schedule for submissions and hearing on further subjects which require determination prior to trial", ICC-01/04-01/06-1110.

3. Further oral submissions were made by the parties and participants at the Status Conference of 10 January 2008.[6]

II) Relevant Provisions

4. The following provisions from the statutory framework of the Court are relevant to the Chamber's consideration of this matter:

Article 67 ("Rights of the accused"), paragraph (1)(h) of the Rome Statute ("Statute"):

> 1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
> [...]
> (h) To make an unsworn oral or written statement in his or her defence;
> [...]

Article 68 ("Protection of the victims and witnesses and their participation in the proceedings") of the Statute, paragraph 3:

> Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

Rule 89 ("Application for participation of victims in the proceedings"), paragraph 1, of the Rules:

> In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.

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[6] ICC-01/04-01/06-T-69-ENG, page 29, line 6 to page 33, line 1.

Rule 141 ("Closure of evidence and closing statements") of the Rules:

1. The Presiding Judge shall declare when the submission of evidence is closed.

2. The Presiding Judge shall invite the Prosecutor and the defence to make their closing statements. The defence shall always have the opportunity to speak last.

Regulation of the Court 54 ("Status conferences before the Trial Chamber"):

At a status conference, the Trial chamber may, in accordance with the Statute and the Rules, issue any order in the interests of justice for the purposes of the proceedings on [...]
(a) The length and content of legal arguments and the opening and closing statements;
[...]

III) Submissions

5. The prosecution submitted that opening statements by both parties are mandatory under the Regulations of the Court and in both its written and oral submissions of 7 and 10 January 2008[7] it addressed the utility of this approach. It argued that if the accused wishes to exercise his right to silence, the defence is obliged at the beginning of the trial to make a declaration to this effect, which would take the place of an opening statement.[8]

6. The prosecution also submitted the Chamber should encourage disclosure of opening or closing statements to the parties as a matter of "professional courtesy." It asserted that since the statements will constitute mere summaries of evidence with which the parties will already be familiar, this practice would not involve disclosure of new material.[9]

7. In its written submissions of 7 January 2008 the defence submitted that the parties are not obliged to make opening statements since the provisions of Article 67(1)(h) are permissive rather than mandatory.[10] Indeed, the defence

[7] ICC-01/04-01/06-1109, paragraph 20, and ICC-01/04-01/06-T-69-ENG, page 29, line 24 to page 32, line 3.
[8] ICC-01/04-01/06-T-69-ENG, page 31, lines 16-25.
[9] ICC-01/01-04/06-1109, paragraph 21.
[10] ICC-01/0401/06-1110, paragraphs 44-45.

submitted it can reserve its decision whether to make an opening statement until after the prosecution's statement.[11]

8. The defence further submitted that opening statements need not be disclosed to the Chamber or the other party prior to their delivery.[12]

9. On the issue of disclosure of closing statements, the defence suggested the parties should produce a memorandum or outline prior to the hearing when final arguments are presented orally. Bearing mind the right of the defence to speak last, its obligation is limited to disclosing any memorandum or outline after the prosecution's had been filed.[13]

10. In written submissions, the legal representative of Victim a/0105/06 contended it is useful for each party to make an opening statement in order for the participants to understand how the trial is likely to proceed.[14]

11. As to the issue of closing statements, the representative expressed the opinion that these should be limited to addressing the arguments and issues raised during the trial.[15]

12. The legal representatives of Victims a/0001/06 to a/0003/06 similarly suggested that opening statements were helpful for all those involved, as well as for the public, by outlining the relative positions of the parties and the participants.[16]

13. The legal representatives argued it is inappropriate to expect disclosure of opening or closing statements in advance of presentation.[17]

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[11] ICC-01/04-01/06-T-69-ENG, page 32, lines 10-15.
[12] ICC-01/04-01/06-1109, paragraph 46.
[13] ICC-01/04-01/06-1110, paragraph 47.
[14] ICC-01/04-01/06-1106, paragraph 20.
[15] *Ibid*, paragraph 21.
[16] ICC-01/04-01/06-1107, paragraph 18.
[17] *Ibid*, paragraph 19.

IV) Analysis and Conclusions

14. The Rome Statute framework in Article 67(1)(h) guarantees the accused the right to make an unsworn written or oral statement. No restriction has been imposed within the framework as to when this right may be exercised or the form the statement should take. In all other respects the provisions are permissive: with the leave of the Chamber, victims may make opening and closing statements (Rule 89(1) of the Rules); at the conclusion of the evidence the parties shall be invited to make their closing statements, with the defence speaking last (Rule 141(2) of the Rules); and the Trial Chamber may issue any order on the length and content of opening and closing statements (Regulation 54(a) of the Regulations of the Court).

15. The accused's right not to incriminate him or herself and his or her right to silence are of importance in relation to the analysis of the issues relating to opening and closing statements. He or she is presumed innocent until proven guilty (Article 66(1) of the Statute) and by Article 67(g), he or she cannot be compelled to testify or to confess his or her guilt, and he or she is entitled to remain silent during the trial without that stance having any impact on the Court's determination of his or her guilt or innocence.

16. Against that background, the Chamber is unpersuaded by the prosecution's contention that the defendant can be compelled to make an opening or closing statement. They are entitled to sit silently, leaving it to the prosecution to prove its case. It is for the accused to decide whether he or she wishes to make an unsworn written or oral statement during the trial (Article 67(1)(h) of the Statute) or a closing statement after the prosecution (Rule 141 (2) of the Rules). With the leave of the Chamber, they may also make an opening statement, either at the beginning of the case or prior to presenting his evidence.

17. The defence has conceded that the Chamber may order the defence to disclose a memorandum or outline of its closing statement (if one is to be made). In the exercise of the Chamber's case-management powers under Regulation 54(a) of the Regulations of the Court, this is likely to provide a highly useful tool for opening **and** closing statements. Accordingly, if the prosecution or the defence intend to make an opening statement, they are to furnish the Chamber, the other party and the participants with an outline 7 days in advance. If the prosecution intends to make a closing statement, it is to furnish the Chamber, the other party and the participants with an outline 7 days in advance. If the defence intends to make a closing statement, the Chamber will set a deadline for serving an outline, if any, at the appropriate stage. Furthermore, in due course the Chamber may make orders as to the length of opening and closing statements and their content.

18. The position of victims as regards opening and closing statements has been dealt with by the Chamber in its Decision on victims' participation.[18] In due course the Chamber will consider the issue of the circumstances in which such statements are to be made.

V) Orders

19. For the reasons set out above, the following orders are made:

a) If the prosecution or the defence intend to make an opening statement, they are to furnish the Chamber, the other party and the participants with an outline 7 days in advance;

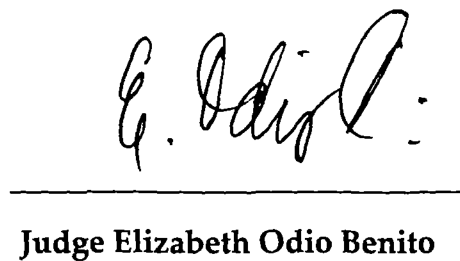
b) If the prosecution intends to make a closing statement, it is to furnish the Chamber, the other party and the participants with an outline 7 days in advance.

[18] ICC-01/04-01/06-1119, paragraph 117.

Judge René Blattmann appends a separate and dissenting opinion to this Decision.

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

Judge Adrian Fulford



Judge Elizabeth Odio Benito

Dated this 22 May 2008

At The Hague, The Netherlands

Separate and Dissenting Opinion of Judge René Blattmann

1. Following submissions from the parties and participants on the issue of statements by the prosecution and defence,[19] the Majority of Trial Chamber I issues its decision today on the matter. Specifically, the Trial Chamber asked the parties to make submissions as to: 1) whether the prosecution and the defence should be required to make individual opening statements in order to explain their respective cases; 2) if opening statements are required, whether they should be disclosed in advance and the timing of that disclosure; and 3) whether closing statements in accordance with Rule 141 of the Rules of Procedure and Evidence should be disclosed in advance.[20]

2. While agreeing with the Majority in its conclusion that the defendant cannot be compelled to make an opening or closing statement I dissent from the Majority with regard to the requirement that the parties must disclose their opening and closing statements in advance. I do not believe that the disclosure of these statements in advance is necessary in order for the Chamber to manage the case effectively and I am concerned that this requirement of disclosure takes away an important element of spontaneity which may undermine the goal of the trial to search for truth. Further, I am concerned that the requirement of disclosure once again places additional burdens on the defence and threatens the fundamental rights of the accused unnecessarily.

[19] Conclusion du représentant legal de la victime a/0105/06 sur "Order setting out the schedule for submissions and hearing on further subjects which require determination prior to trial", ICC-01/04-01/06-1106, 5 January 2008; Conclusions des Représentants légaux des victimes a/0001/06 à a/0003/06 sur d'autres questions à déterminer avant le procès", ICC-01/04-01/06-1107, 7 January 2008 ; Prosecution's Submissions for the Status Conference on 9 January 2008, ICC-01/04-01/06-1109, 7 January 2008; Conclusions de la Défense relatives à l' "Order setting out the schedule for submissions and hearing on further subjects which require determination prior to trial", ICC-01/04-01/06-1110, 7 January 2008; ICC-01/04-01/06-T-69-ENG, page 29, line 6 to page 33, line 1.

[20] Order setting out the schedule for submissions and hearing on further subjects which require determination prior to trial, ICC-01/04-01/06-1083, 13 December 2007.

Additional Burden to the Accused

3. As I have previously noted:

> " ... while it may seem harmless to make small concessions which erode the rights of the accused, there can be a cumulative effect which does, in fact, put in grave jeopardy the right of the accused to a fair trial.[21] As is stated in the Majority Opinion, "[t]he right of...the defendant to a fair trial [is] immutable[22]".[23] Therefore, I believe that it is essential, at all times, to maintain the utmost respect and care for the rights of the accused in order to ensure that the result of the trial not be tainted."[24]

4. The Trial Chamber has already requested that the parties disclose a significant amount of what will comprise the evidence which they will bring before the Chamber during the trial in its decision of 20 March 2008.[25] The present Majority position places an additional burden on the defence to disclose its statements which may have the effect of narrowing its possibility to react upon the intended case-line of the prosecution and therefore may limit the freedom of the defence to form or adjust their intended line of defence. I have found no established practice, either internationally or nationally of requiring

[21] "Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial.", *Judgement on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006*, ICC-01/04-01/06-772, 14 December 2006, pagraph 39. *See also*, Prosecutor v. Barayagwiza, *Appeals Chamber Decision*, 3 November 1999, paragraph 108 which states: "the Appeals Chamber believes that to proceed with the Appellant's trial when such violations have been committed, would cause irreparable damage to the integrity of the judicial process. Moreover, we find that it is the only effective remedy for the cumulative breaches of the accused's rights." *See also*, *Barberá, Messegué and Jabardo v Spain, European Court of Human Rights*, 10588/83 in which the original 6 December 1988 decision was set aside due to "the cumulative effect of a series of procedural shortcomings, which individually may be of minor significance, [but which] may compromise the person's right to a fair trial". (Right to a Fair Trial in Criminal Matters Under Article 6 E.C.H.R., Mahoney, Paul, 2004, page 111).

[22] The term immutable as defined in the English Oxford Dictionary as: "unalterable" and "not subject to change".

[23] The full text of the sentence states. "The right of endangered witnesses to protection and of the defendant to a fair trial are immutable, and neither can be diminished because of the need to cater for other interests." Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, ICC-01/04-01/06-1311-Anx2, 24 April 2008, paragraph 94.

[24] Separate and Dissenting Opinion of Judge Blattmann attached to Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, ICC-01/04-01/06-1131-Anx3, 24 April 2008, paragraph 10.

[25] Decision on Disclosure by the Defence, ICC-01/04-01/06-1235, 20 March 2008.

opening and closing statements to be disclosed prior to trial. Therefore, I am opposed to this requirement in the instant case as I believe that it may further burden the defence of the accused unnecessarily.

Endangering the Search for the Truth

5. Article 69(3) reminds us that it is the duty of the Trial Chamber to determine the truth.[26] Further, the Trial Chamber itself has proposed this as a principle goal of the trial.[27] As recognized by the Trial Chamber in its decision regarding witness familiarisation the spontaneous nature of the proceedings is an important element in the search for the truth.[28] Disclosure of the lines of evidence which the parties intend to advance during trial has already been required by the Trial Chamber and I consider that the spontaneity of individual testimony of witnesses and the statements of the parties and participants are of paramount importance in the Trial Chamber's ability to bring to light the full truth in the instant case. I am concerned that the additional requirement upon the parties to disclose the statements themselves may infringe upon this important spontaneous nature. The Majority Opinion states that the purpose of requiring this disclosure is to exercise case management powers.[29] This requirement may thus, imply an intention to regulate the statements of the parties in court. I am not in favour of this as a case management tool as I do not find it necessary and believe that the spontaneous nature of the statements provided by the parties is an important element to setting the tone of the trial and to providing the fact finders with an uncensored view into the evidence as a whole and should not be infringed upon.

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[26] Article 69(3) states: "The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth."
[27] Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049, 30 November 2007, paragraph 47.
[28] *Ibid*, at paragraph 52: "The spontaneous nature of testimony can be of paramount importance to the Court's ability to find the truth, and the Trial Chamber is not willing to lose such an important element in the proceedings."
[29] Majority Opinion, paragraph 17.

The Trial Chamber's Ability to Exercise Case-Management Powers

6. The Majority Opinion clarifies its notion that in order to exercise its powers under Regulation 54(a) of the Regulations of the Court, the disclosure of the parties opening and closing statements are necessary. Regulation 54(a) of the Regulations of the Court provides for orders to be made concerning the length and content of legal arguments and the opening and closing statements of the parties. I cannot foresee the necessity of the disclosure of the statements of the parties for the Trial Chamber to make orders with regard to the timing and content of such statements. Rather, as has been exercised in many previous cases before international courts,[30] restrictions limiting the specific amount of time and the content of what could be covered in such statements may be implemented without the disclosure of such statements previous to trial.

Opening and Closing Statements of Victim's Representatives

7. With regard to the Majority's assertion that the issue of opening and closing statements as pertaining to victims has been dealt with in the victim's decision of 18 January 2008, I note that the decision of 18 January simply states that Rule 89(1) provides that victims' participation may include opening and closing statements but leaves the Trial Chamber's consideration of the victims request to make statements to a later date.[31] With reference to any consideration of whether victims would be required to disclose, previous to trial, their opening and closing statements, for the same reasoning provided above, I am opposed to any disclosure requirement of either the parties or the participants opening and closing statements.

[30] See for instance the following scheduling orders by ICTY Trial Chambers: *Prosecutor v. Stanišić and Simatović* (IT-03-69), 'Scheduling Order', Trial Chamber, 7 March 2008; *Prosecutor v Milošević* (IT-02-54), 'Omnibus Order on Matters Dealt with at the Pre-Defence Conference', Trial Chamber, 17 June 2004; '*Prosecutor v Blagojević and Jokić* (IT-02-60), 'Scheduling Order', Trial Chamber, 19 March 2004; *Prosecutor v Mrđa* (IT-02-59), 'Scheduling Order', Trial Chamber, 8 July 2003; *Prosecutor v. Kvočka et al* (IT-98-30/1) 'Scheduling Order', Trial Chamber, 23 November 2000; *Prosecutor v Kovačević* (IT-97-24), 'Scheduling Order', Trial Chamber, 30 June 1998.

[31] Decision on victims' participation, ICC-01/04-01/06-1119, 18 January 2008, paragraph 117.

Conclusion

8. It is, therefore, my conclusion that it is not necessary to add burden to the parties or participants and to further impose upon the defence by the disclosure of opening and closing statements in order to effectively manage the trial. Orders pursuant to Regulation 54(a) regarding the length of statements to be made and the content which would be allowed can be made without access to such statements in advance. I respectfully dissent with the Majority Opinion ordering such disclosure for the above reasons.

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

Judge René Blattmann

Dated this 22 May 2008

At The Hague, The Netherlands