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**International
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Court**

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Date: **16 September 2009**

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 the Manner of Questioning Witnesses by the Legal
Representatives of Victims**

Decision to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

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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 Manner of Questioning Witnesses by the Legal Representatives of Victims.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 6 May 2009, an issue was raised as to the manner in which Mr Jean Mulamba, as one of the victims’ legal representatives, had questioned Witness 0012.¹ The Chamber requested Mr Mulamba to ensure his subsequent “questions were not suggestive of an answer and that they are neutrally put.”²
2. On 8 May 2009, the Chamber sought written submissions on the nature and manner of questioning by the legal representatives, with a deadline of 15 May 2009.³
3. The Office of the Prosecutor (“prosecution”) filed its submissions on 15 May 2009.⁴ It noted that there is no provision in either the Rome Statute (“Statute”) or the Rules of Procedure and Evidence (“Rules”) dealing with the manner of questioning witnesses by either the parties or the participants, and that instead the matter is left to the Trial Chamber under its overall authority to regulate the conduct of the trial, pursuant to Article 64 of the Statute and Rule 91(3) of the Rules. The prosecution

¹ Transcript of hearing on 6 May 2009, ICC-01/04-01/06-T-169-ENG, page 10, line 13 to page 15, line 2.

² *Ibid.*, page 14, lines 20-22.

³ Transcript of hearing on 8 May 2009, ICC-01/04-01/06-T-171-ENG, page 45, lines 6-22.

⁴ Prosecution’s Submission on the Manner of Questioning of Witnesses Conducted by the Legal Representatives of Victims, 15 May 2009, ICC-01/04-01/06-1876.

also noted that in a previous oral Decision of 16 January 2009,⁵ the Trial Chamber had addressed the **order** in which witnesses are questioned by the parties and participants, along with the **manner** of questioning by the parties (but not by the participants). The prosecution underlined that in the Decision of 16 January 2009, the Chamber indicated that: (i) leading questions should not be used by the party calling a witness when dealing with contentious issues; (ii) in its questioning following the examination by the other party, the party calling the witness should avoid leading questions; and (iii) if the defence had not called the witness and if it asks questions following re-examination by the party calling the witness, leading questions were to be avoided. In light of this established approach, the prosecution submitted that: (iv) at a minimum, these guidelines should also apply to questioning by the participants; and (v) as a general rule, for questions on the part of the legal representatives, they should be asked in a neutral manner, without any suggestion or influence tending to direct the witness to a particular answer, especially in relation to matters of substance.⁶

4. On 18 May 2009, following an extension to the deadline (granted by the Chamber),⁷ the victims' legal representatives filed their observations.⁸ It was submitted and observed that: (i) neither the Statute nor the Rules utilise the terms 'direct examination' and 'cross-examination', and instead, they leave the decision on the manner of questioning to the Chamber; (ii) Rule 91(3) of the Rules created the opportunity for the legal representatives of victims to request, *inter alia*, the opportunity to

⁵ Transcript of hearing on 16 January 2009, ICC-01/04-01/06-T-104-ENG, page 35, line 12 to page 38, line 3.

⁶ ICC-01/04-01/06-1876, paragraphs. 2-4.

⁷ Transcript of hearing on 14 May 2009, ICC-01/04-01/06-T-174-CONF-ENG, page 15, lines 15-22.

⁸ Observations conjointes des représentants légaux des victimes en matière d'interrogatoire des témoins, 18 May 2009, ICC-01/04-01/06-1881.

question witnesses called by the parties; (iii) Rule 91(3) established, additionally, a number of conditions under which this questioning could take place; (iv) the French version of the Rules uses the word “interroger” whilst the English version contains the expression “to question” and not the word “examine”; and (v) just as the terms of Rule 91(3) ought not to be understood as referring to “direct examination” or “examination-in-chief” – and the legal representatives should not be treated in the same way as the party calling the witness – neither is it appropriate to treat questioning on behalf of the participants as “cross-examination”.⁹

5. As regards the further issue of questioning the witnesses called by the prosecution, the legal representatives emphasised, similarly, that they are not treated in the same way as the parties. Nonetheless, they submit: (i) the legal representatives are, as a general rule, allowed to question witnesses after direct examination by the prosecution, including on relevant areas that have not been covered by the prosecution; (ii) the objective, when the legal representatives question prosecution witnesses, is to elicit information and to clarify facts relevant to the personal interests of the victims they represent (which are not necessarily linked to the guilt or innocence of the accused); (iii) their questioning of witnesses pursuant to Rule 91(3) of the Rules should not be equated with the terms “direct examination”, “examination-in-chief” or “cross-examination”, as used in common law countries; and, rather, (iv) their questions are advanced within the Court’s unique framework, which is not comparable to any other national or international system; finally, (v) any regulation as regards their questioning should be based solely on the jurisprudence of Trial

⁹ *Ibid.*, paragraphs 5-8.

Chamber I, insofar as it relates to the examination of witnesses by, and the disclosure of documents and exhibits to, the legal representatives.¹⁰

6. The legal representatives further submitted that in the case of victims with an established personal interest in the proceedings, the Trial Chamber may, pursuant to its Decision on Victim Participation,¹¹ authorise the examination of relevant witnesses, insofar as their testimony relates to those interests.¹² Specifically in this regard, it was submitted that the Chamber should not “restrict questioning by victims to reparations issues, but instead allow appropriate questions to be put by victims whenever their personal interests are engaged by the evidence under consideration”.¹³ In the submission of the legal representatives this approach would, broadly speaking, include any relevant question put to a witness, provided that it related to the personal interests of the victims.¹⁴

7. The legal representatives submitted additionally that it would be logical for the Chamber to apply to the legal representatives, *mutatis mutandis*, the approach that applies to the party not calling the witness. In support, they cited part of a previous decision of the Chamber,¹⁵ to the effect that “a party can question a witness that it has not called on questions arising out of the initial evidence given”¹⁶ and that “[t]he concept of ‘other relevant matters’ under Rule 140(2)(b) of the Rules, includes, *inter alia*, trial issues (*e.g.* matters which impact on the guilt or

¹⁰ *Ibid.*, paragraphs 9-10.

¹¹ Decision on Victim’s Participation, 15 December 2008, ICC-01/04-01/06-1119.

¹² ICC-01/04-01/06-1881, page 7, paragraphs 11-12 and *ibid.*, paragraph 103.

¹³ ICC-01/04-01/06-1881, page 7 paragraphs 13 and *ibid.*, paragraph 108.

¹⁴ ICC-01/04-01/06-1881, paragraphs 11-13.

¹⁵ Decision on various issues related to witnesses’ testimony during trial, 29 January 2008, ICC-01/04-01/06-1140.

¹⁶ *Ibid.*, paragraph 32.

innocence of the accused such as the credibility or reliability of the evidence), sentencing issues (mitigating or aggravating factors), and reparation issues (properties, assets and harm suffered)."¹⁷

8. The legal representatives noted that the general rules relating to the questioning of witnesses by the parties and participants are set out in the oral Decision of 16 January 2009, as relied on by the prosecution (see above):¹⁸

1. The party calling a witness ordinarily will ask questions first. To the extent that it is known or anticipated that part or all of the evidence of the witness is in dispute, leading questions should not be used for contentious areas.

2. To the extent that leave has been granted, the participants will next question the witness.

3. Questioning by the party not calling the witness will then follow.

4. The party calling the witness will thereafter be entitled to ask questions if they are necessary, but these are limited to the matters raised in questions by the opposing party and the participants. An application will need to be made if the party at this stage wishes to raise new issues. Leading questions are to be avoided.

9. The legal representatives submitted that insofar as point 2 above refers to their position, it does not include a prohibition against the use of leading questions, and that under this guidance, the prohibition on asking questions of this kind relates only to: (i) questions asked by the party who called the witness; (ii) contested matters and (iii) the second

¹⁷ *Ibid.*

¹⁸ ICC-01/04-01/06-T-104-ENG, page 37, lines 8-24.

occasion when a party questions a witness. In their submission, there is no rule or established practice that prevents legal representatives from asking leading questions under point 2.¹⁹

10. The legal representatives further emphasised a suggested rationale for discouraging leading questions in circumstances where the witness was initially called by the prosecution, namely that having met the witness in the course of the investigatory interviews, the prosecution may be at a particular, and unfair, advantage in the context of asking leading questions during trial, insofar as they may already know, or can better anticipate, the responses of the witness. By contrast, it is suggested that with the exception of those witnesses who are also participating victims: (i) the legal representatives have had no contact with witnesses called by the prosecution; and (ii) they do not have information about the witnesses other than those matters revealed in the statements and any disclosed documents. The legal representatives argue, therefore, that: (iii) they cannot anticipate the reaction or response of a witness to any particular question; and (iv) they cannot obtain any material advantage through the use of leading questions such as would jeopardise the rights of the accused.²⁰

11. The legal representatives cited the Chamber's directions on leading questions, which supplemented its oral Decision of 16 January 2009.²¹

12. In their penultimate submission, the legal representatives pointed out that no agreement has been reached between the parties regarding the

¹⁹ ICC-01/04-01/06-1881, paragraphs 16-17.

²⁰ *Ibid.*, paragraphs 18-19.

²¹ Transcript of hearing on 26 January 2009, ICC-01/04-01/06-T-107-ENG, page 72, line 6 to page 73, line 12.

particular areas or scenarios in which leading questions may be appropriate. It was noted that the Chamber has, in the past, determined this issue on a case-by-case basis. To this end, and finally, the legal representatives submitted that: (i) the prohibition on leading questions – as applied to the party calling the witness – was, in any event, not absolute; and (ii) if, following the oral Decision of January 2009, the legal representatives are not authorised by the Chamber to ask leading questions of the witnesses they have not called, then they request, in the alternative, that in lieu of applying a blanket ban, the Chamber instead leaves open the possibility of such questions, to be determined a case-by-case basis.²²

13. The defence filed their observations²³ on 25 May 2009, having been granted a second extension.²⁴ In the course of their initial submissions, the defence stated that, in line with the basic principles of “cross-examination”, the right to ask leading questions was reserved to the party not calling the witness. To this end it cited the definition of “cross-examination” given in Black’s Law Dictionary:²⁵

The questioning of a witness at trial or hearing by the party opposed to the party who called the witness to testify. The purpose of cross-examination is to discredit a witness before the fact-finder in any of several ways, as by bringing out contradictions and improbabilities in earlier testimony, by suggesting doubts to the witness, and by trapping the witness into admissions that weaken the testimony. The cross-examiner is typically

²² ICC-01/04-01/06-1881, paragraphs 20-23.

²³ Observations de la Défense sur les principes applicables aux interrogatoires menés par les représentants légaux des victimes, 25 May 2009 (notified on 26 May 2009), ICC-01/04-01/06-1899.

²⁴ Transcript of hearing on 14 May 2009, ICC-01/04-01/06-T-174-CONF-ENG, page 16, lines 2-13 and Transcript of hearing on 19 May 2009, ICC-01/04-01/06-T-176-ENG, page 4, lines 1-13.

²⁵ ICC-01/04-01/06-1899, paragraph 4.

allowed to ask leading questions but is traditionally limited to matters covered on direct examination and to credibility issues.²⁶

14. The defence observed that the submissions of the legal representatives did not mirror the rationale for “cross-examination” as outlined in this definition. This, it was suggested, was because the legal representatives would not, in reality, utilise questioning to discredit a witness, but rather it would constitute a means of “obtaining information, clarification on the facts concerning the personal interests of the victims that they represent”. Against this background the defence contended that the use of leading questions: (i) was only justifiable with respect to the aims of cross-examination; (ii) was therefore manifestly without utility and was unjustified insofar as it related to questions by the legal representatives of victims; and, in any event (iii) was an adversarial technique reserved as a prerogative of the party not calling the witness.²⁷

15. In the course of their further submissions the defence observed that the use of leading questions by the legal representatives of victims would be prejudicial to the rights of the accused and inimical to the principle of a fair trial. It noted: (i) that in accordance with Article 42(1) of the Statute, the Prosecutor “is responsible for conducting prosecutions before the Court”; and (ii) that the establishment of the guilt of the accused, as a necessary precondition for all reparations, was one of the objectives pursued by the victims and their legal representatives.²⁸

²⁶ B. Garner (ed.), *Black's Law Dictionary*, 8th edition (Thompson) (2004), page 601.

²⁷ ICC-01/04-01/06-1899, paragraphs 5-9.

²⁸ *Ibid.*, paragraph 10.

16. The defence submitted that there are a number of examples illustrating the objectives pursued by the legal representatives of victims. It was pointed out: (i) that the Chamber has authorised the legal representatives to present evidence tending to prove the guilt of the accused; (ii) that in their observations of 18 May 2009, one of the legal representatives unequivocally indicated that the evidence of the victims would demonstrate the scope and extent of the crimes charged by the prosecution; and (iii) that accordingly it appears that the prosecution and the legal representatives are pursuing a common aim in seeking to establish the guilt of the accused.²⁹

17. The defence submitted, therefore, that in affording the legal representatives the right to ask leading questions of a prosecution witness the Chamber would: (i) confer a right (*viz.* “cross-examination”, which, it is submitted, is a defence entitlement) on a participant who is interested in the conviction of the accused; (ii) reinforce the ways in which the prosecution is able to prejudice the rights of the accused; and (iii) bring about a situation that would be manifestly contrary to the principles contained in Rule 91(3), pursuant to which the Judges must ensure there is respect for the rights of the accused and the demands of a fair, impartial and speedy trial.³⁰

18. The defence concluded by submitting: (i) that leading questions were the exclusive preserve of the party conducting “cross-examination”; and (ii) that as regards questioning by the legal representatives of

²⁹ *Ibid.*, paragraphs 11-13.

³⁰ *Ibid.*, paragraphs 14-15.

prosecution witnesses, the Chamber should apply the same rules as apply to questions put by the prosecution.³¹

II. APPLICABLE LAW

19. In accordance with Article 21(1) of the Statute which sets out the applicable law, the Trial Chamber has considered the following provisions:

Article 68

Protection of the victims and witnesses and their participation in the Proceedings

[...]

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.

Article 69

Evidence

[...]

3. 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.

Rule 91

Participation of legal representatives in the proceedings

³¹ *Ibid.*, paragraph 15.

[...]

3

(a) When a legal representative attends and participates in accordance with this rule, and wishes to question a witness, including questioning under rules 67 and 68, an expert or the accused, the legal representative must make application to the Chamber. The Chamber may require the legal representative to provide a written note of the questions and in that case the questions shall be communicated to the Prosecutor and, if appropriate, the defence, who shall be allowed to make observations within a time limit set by the Chamber.

(b) The Chamber shall then issue a ruling on the request, taking into account the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to article 68, paragraph 3. The ruling may include directions on the manner and order of the questions and the production of documents in accordance with the powers of the Chamber under article 64. The Chamber may, if it considers it appropriate, put the question to the witness, expert or accused on behalf of the victim's legal representative.

III. ANALYSIS AND CONCLUSIONS

20. The Statute establishes the unequivocal right of victims to present their views and concerns when their interests are affected, provided this is not prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial trial (Article 68).

21. The questioning of witnesses by the victims' legal representatives pursuant to Rule 91(3) of the Rules is one example of the ways in which victims may participate in the proceedings. However, this rule only describes the procedure that the legal representatives are to follow in order to apply for leave to ask questions. In the absence of any relevant

provisions in the Rome Statute framework, the manner of questioning falls to be determined by the Chamber.

22. The terms “examination-in-chief”, “cross-examination” and “re-examination”, which are used in common law and Romano Germanic legal systems, do not appear in the Statute. However, as set out in the procedural history above, these expressions have been used as terms of convenience by the parties and the participants when addressing the issue of how witnesses are to be questioned during their evidence before the Trial Chamber.

23. The purpose of the “examination-in-chief” is “to adduce by the putting of proper questions [...] relevant and admissible evidence which supports the contentions of the party who calls the witness”.³² It follows from this purpose that the manner of such questioning is neutral and that leading questions (*i.e.* questions framed in a manner suggestive of the answers required) are not appropriate.³³ However, it needs to be stressed that there are undoubted exceptions to this approach, for instance when leading questions are not opposed. In contrast, the purpose of “cross-examination” is to raise relevant or pertinent questions on the matter at issue or to attack the credibility of the witness.³⁴ In this context, it is legitimate that the manner of questioning differs, and that counsel are permitted to ask closed, leading or challenging questions, where appropriate.³⁵

³² *Archbold Criminal Pleading, Evidence and Practice 2009* (Thomson Reuters (Legal) Ltd.) (2009), page 1304.

³³ *Ibid.*, page 1312.

³⁴ *Ibid.*, page 1322.

³⁵ *Ibid.*, pages 1323 and 1324.

24. The victims' legal representatives, however, fall into a category that is distinct and separate from the parties, and in this regard a description of the manner of questioning by the victims' legal representatives that uses the concepts of "examination in chief", "cross-examination" and "re-examination" is not necessarily helpful. This particular aspect of the proceedings at trial – the manner of questioning by the victims' legal representatives – is an example of the novel nature of the Statute, which is not the product of either the Romano Germanic or the common law legal systems.³⁶ As participants in the proceedings, rather than parties, the victims' legal representatives have a unique and separate role which calls for a bespoke approach to the manner in which they ask questions.³⁷

25. By Article 66(2) of the Statute, one of the prosecution's primary functions is to prove the guilt of the accused: "[t]he onus is on the prosecutor to prove the guilt of the accused". However, the Appeals Chamber has held that this responsibility on the part of the prosecution does not "preclude the possibility for victims to lead evidence pertaining to the guilt of the accused".³⁸ It follows that, depending on the circumstances, the alleged guilt of the accused may be a subject that substantively affects the personal interests of the victims, and the Appeals Chamber has determined that the Trial Chamber may authorise the victims' legal representatives to question witnesses on subjects that relate to this issue:

³⁶ John Jackson, "Finding the Best Epistemic Fit for International Criminal Tribunals" in 7 *Journal of International Criminal Justice* (2009) 17, pages 19, 22.

³⁷ See, for example, Article 82 of the Statute which refers to "[e]ither party".

³⁸ Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, paragraph 94.

In addition the Trial Chamber finds support for this approach in the provision under rule 91 (3) of the Rules. Under this rule the Trial Chamber may authorise, upon request, the legal representatives of victims to question witnesses or to produce documents in the restricted manner ordered. The Appeals Chamber considers that it cannot be ruled out that such questions or documents may pertain to the guilt or innocence of the accused and may go towards challenging the admissibility or relevance of evidence in so far as it may affect their interests earlier identified and subject to the confines of their right to participate.³⁹

26. It follows that the victims' legal representatives may, for instance, question witnesses on areas relevant to the interests of the victims in order to clarify the details of their evidence and to elicit additional facts, notwithstanding its relevance to the guilt or innocence of the accused.

27. Under the scheme of the Statute, questioning by the victims' legal representatives has been linked in the jurisprudence of the Trial and the Appeals Chambers to a broader purpose, that of assisting the bench in its pursuit of the truth. The framework establishing the rights of victims as regards their participation during trial has been coupled expressly with the statutory powers of the Trial Chamber, pursuant to Article 69(3) of the Statute, "to request the submission of all evidence that it considers necessary for the determination of the truth".⁴⁰ The Appeals Chamber explained that:

The framework established by the Trial Chamber [...] is premised on an interpretation of article 69 (3), second sentence, read with article 68 (3) and rule 91 (3) of the Rules, pursuant to which the Chamber, in exercising its

³⁹ *Ibid.*, paragraph 102.

⁴⁰ *Ibid.*, paragraph 95.

competent powers, leaves open the possibility for victims to move the Chamber to request the submission of all evidence that it considers necessary for the determination of the truth.⁴¹

28. In the judgment of the Trial Chamber, this link (as approved by the Appeals Chamber) between the questioning of witnesses by the victims participating in proceedings and the power of the Chamber to determine the truth tends to support a presumption in favour of a neutral approach to questioning on behalf of victims. Putting the matter generally, they are less likely than the parties to need to resort to the more combative techniques of "cross-examination". In certain circumstances, however, it may be fully consistent with the role of the victims' legal representatives to seek to press, challenge or discredit a witness, for example when the views and concerns of a victim conflicts with the evidence given by that witness, or when material evidence has not been forthcoming. Under such circumstances, it may be appropriate for the victims' legal representatives to use closed, leading or challenging questions, if approved by the Chamber.

29. In conclusion, it follows from the object and purpose of questioning by the victims' legal representatives that there is a presumption in favour of a neutral form of questioning, which may be displaced in favour of a more closed form of questioning, along with the use of leading or challenging questions, depending on the issues raised and the interests affected.

30. Otherwise, any attempt to pre-empt the circumstances in which a particular manner of questioning is to be conducted will be unhelpful,

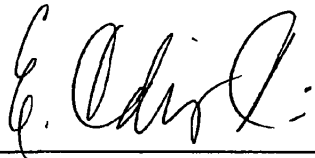
⁴¹ *Ibid.*, paragraph 98.

because the Chamber will need to respond on a case-by-case basis. The victims' legal representatives shall bear in mind, therefore, the presumption in favour of neutral questioning, unless there is a contrary indication from the bench. By way of procedure, if a representative of victims wishes to depart from a neutral style of questioning, an oral request should be made to the bench at the stage in the examination when this possibility arises.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 16 September 2009

At The Hague, The Netherlands