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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 various issues related to witnesses' testimony during trial**

**Office of the Prosecutor**

Mr Luis Moreno-Ocampo, Prosecutor  
Ms Fatou Bensouda, Deputy Prosecutor  
Mr Ekkehard Withopf, Senior Trial Lawyer

**Counsel for the Defence**

Ms Catherine Mabilie  
Mr Jean-Marie Biju-Duval

**Legal Representatives of Victims**

a/0001/06 to a/0003/06 and a/0105/06

Mr Luc Walley  
Mr Franck Mulenda  
Ms Carine Bapita Buyangandu

**TRIAL CHAMBER I** (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of Mr Thomas Lubanga Dyilo, following the Status Conference of 9 and 10 January 2008, renders the following decision on the scope of examination by a party not calling a witness, the manner in which traumatised and vulnerable witnesses shall present their evidence, and live testimony by means of audio or video-link technology:

#### **A. Background**

1. On 13 December 2007, the Trial Chamber issued its “Order setting out the schedule for submission and hearing on further subjects which require determination prior to trial”<sup>1</sup> in which it scheduled a Status Conference for 9-11 January to discuss, among other issues, the scope of examination by a party not calling a witness, the manner in which traumatised and vulnerable witnesses shall present their evidence and live testimony by means of audio or video-link technology. The Chamber requested the parties and participants to file any written submissions on these matters no later than 7 January 2008.

#### **B. Submissions of the parties and participants**

##### *Prosecution*

2. On the issue of the scope of examination by a party not calling a witness, the Office of the Prosecutor (“prosecution”) submitted that “a party not calling a witness has a *prima facie* right to question that witness on matters relevant to the case at hand, regardless of whether the subject matter arose in the testimony elicited from the witness”.<sup>2</sup> The prosecution further argued that

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<sup>1</sup> ICC-01/04-01/06-1083.

<sup>2</sup> Prosecution’s Submissions for the Status Conference on 9 January 2008, 7 January 2008, ICC-01/04-01/06-1109, paragraph 16.

the parties should not be ordered to disclose their intended line of questioning of an opposing party's witness, as this questioning is to an extent dependant upon the witness's main testimony, and in any case is a litigation strategy that should not be subject to disclosure.<sup>3</sup> The prosecution also noted that disclosure of documents to be used in questioning is governed by Rules 77 and 78 of the Rules of Procedure and Evidence ("Rules"), and the parties are thus required to make the documents intended to be used at trial available for advance inspection.

3. The prosecution recognised that the experience of testifying before the Court can be difficult for vulnerable and traumatised witnesses and, if questioning is not appropriately conducted, detrimental to the witness. The prosecution further submitted that respect for the witness and his or her experience and personal integrity should be a key factor in the determination of the manner in which the witness will testify. The prosecution identified former child soldiers in particular as falling within this category of witness. It argued that the presentation of the evidence of such witnesses should be non-adversarial, and although it is preferable that evidence from witnesses in this category should be given live in court,<sup>4</sup> the Chamber should take all necessary steps to protect them, including by strict control of the questioning and use of Rule 140(2)(c) of the Rules.<sup>5</sup> The prosecution highlighted the importance of conducting a 'debriefing' with such witnesses after the delivery of their testimony.
4. Generally, as regards the use of audio and video-links for the testimony of witnesses, the prosecution highlighted that Article 69(2) of the Rome Statute ("Statute") enables the Trial Chamber to direct that evidence is given by these means. However, the prosecution argued that the use of this

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<sup>3</sup> *Ibid*, paragraphs 17-18.

<sup>4</sup> *Ibid*, paragraphs 25-26.

<sup>5</sup> Transcript of hearing on 10 January 2008, ICC-01/04-01/06-T-69-ENG, page 19.

technology should be an exception to the general rule of live in-court testimony, its use being limited to certain types of witnesses (e.g. former child soldiers) and subject to the condition in Rule 67(1) of the Rules, i.e. that the technology must allow for examination of the witnesses by the Chamber and the parties at the time that the witness testifies. The prosecution submitted that a party or participant seeking to use such technology should make an application to the Chamber at the earliest opportunity and the Chamber should rule on a case-by-case basis, taking into account the views of the witness and the rights of the accused. The prosecution further argued that the Registry is in a position to provide the Chamber, the parties and the participants with a description of the process necessary, and the time required, to put these measures in place. This information would enable the Chamber to establish a procedure and timetable for these applications.<sup>6</sup>

### *Defence*

5. In relation to the scope of examination by a party not calling a witness, the defence contended that this may include issues related to the credibility of a witness and other relevant matters not covered by the party calling the witness, which relate to the charges against the accused, the evidence submitted or any matters which tend to support the case of the accused. The defence further submitted that the relevance of questioning should be determined on an assessment of the particular circumstances.<sup>7</sup> The defence argued that compulsory advance disclosure of lines of questioning by a party who has not called a witness could prevent effective testing of a witness's credibility. In addition, the defence opposed the imposition of an obligation to disclose the documents that it intends to use in the

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<sup>6</sup> Prosecution's Submissions for the Status Conference on 9 January 2008, 7 January 2008, ICC-01/04-01/06-1109, paragraphs 22-23; ICC-01/04-01/06-T-69-ENG, pages 5-7.

<sup>7</sup> 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", 7 January 2008, ICC-01/04-01/06-1110, paragraphs 38-39.

examination of a witness called by another party,<sup>8</sup> and it refuted the prosecution's submission in relation to Rules 77 and 78. In the submission of the defence, it is only obliged to disclose such a document three days before the hearing, in accordance with Regulation 52 of the Regulations of the Registry.<sup>9</sup>

6. On the manner in which traumatised and vulnerable witnesses will present their evidence, the defence suggested that these witnesses, who ought to be assessed as such only on a case-by-case basis, should be accompanied during their testimony by a psychologist. The defence further argued that it is the obligation of the party calling a witness to determine whether special measures are required, and, if so, the party shall make an application to the Chamber. The defence assured the Chamber that it would adopt a respectful and courteous attitude in examining witnesses, and would abstain from harassment and intimidation.<sup>10</sup>
  
7. The Defence emphasised that, in principle, evidence should be given live in court, as this is the most effective way for the parties to present, and for the Chamber to evaluate, the credibility of the witnesses. The defence submitted that any request for the use of audio or video-link technology should be justified in each instance by the party seeking to utilise it.<sup>11</sup> As such, it emphasised the need for a minimum warning period to be set for notification of a party's wish to use audio and video-link technology for one of its witnesses so that the requests can be examined individually.<sup>12</sup>

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<sup>8</sup> *Ibid*, paragraphs 40-42.

<sup>9</sup> ICC-01/04-01/06-T-69-ENG, page 28.

<sup>10</sup> ICC-01/04-01/06-1110, paragraphs 54-57; ICC-01/04-01/06-T-69-ENG, pages 20-22.

<sup>11</sup> ICC-01/04-01/06-1110, paragraphs 48-50.

<sup>12</sup> ICC-01/04-01/06-T-69-ENG, page 9, lines 13-19.

*Legal Representative of Victim a/0105/06*

8. The legal representative submitted in relation to the scope of examination by a party not calling a witness, that the term “other relevant matters” could include issues that affect the personal interests of victims, both during the trial and the reparations proceedings. With regard to the compulsory disclosure of lines of questioning, the legal representative argued that disclosure would assist in assessing in advance whether the interests of a victim are affected by the evidence. Therefore, the legal representative submitted it is necessary for the main lines of questioning to be disclosed in advance, in a non-redacted form.<sup>13</sup> Furthermore, the legal representative requested prior disclosure to the parties and participants of documents that are to be used during the evidence of a witness, since this would assist in preparation.
  
9. Regarding the manner in which traumatised and vulnerable witnesses shall present their evidence, the legal representative submitted that these witnesses should be granted the opportunity to be accompanied by a person of their choice (e.g. a relative, a psychologist, a legal representative, a NGO intermediary etc.) during their testimony, particularly in order to avoid further traumatising. However, in the case of child witnesses, it was submitted that the accompanying individual should not be a family member. The legal representative submitted that the Chamber should prevent repetitive questioning and recorded testimony should be used when appropriate. The legal representative argued that the consent of the child or his or her legal representative is necessary before they are called as a witness.<sup>14</sup>

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<sup>13</sup> Conclusion du Représentant Legal de la Victime a/0105/06 sur “Order setting out the schedule for submissions and hearing on further subject which require determination prior to trial”, 5 January 2008, ICC-01/04-01/06-1106, paragraphs 16-19; ICC-01/04-01/06-T-69-ENG, page 39.

<sup>14</sup> ICC-01/04-01/06-1106, paragraphs 27-28.

10. The legal representative further asserted that the use of audio or video-link technology is particularly appropriate in cases where the witness is a victim of sexual violence or is a child. The legal representative submitted it is necessary for the Chamber to be notified of the proposed use of such technology sufficiently far in advance to enable the parties and participants to make submissions. The legal representative contended that in making a decision on the matter, the Chamber should take into consideration any factors tending to indicate that a witness's appearance before the Court may lead to further traumatising. The legal representative also argued that the testimony of these vulnerable witnesses should be confidential and access to it should be limited to the parties and participants in the proceedings.<sup>15</sup>

*Legal representatives of victims a/0001/06 to a/0003/06*

11. The legal representatives of victims a/0001/06 to a/0003/06 argued that the manner of examination of a witness called by one of the parties on behalf of the representatives of victims would depend significantly on the modalities of their participation. As regards the compulsory disclosure of the lines of questioning, the legal representatives emphasised that this should not be a general requirement, but instead it should be encouraged for traumatised or vulnerable witnesses. However, the victims' legal representatives also referred to the possibility of the parties and participants disclosing their general lines of questioning in advance, to enable the Chamber to determine issues of relevance and admissibility. The legal representatives referred to the three day period imposed by Regulation 52 of the Regulations of the Registry for the submission to the Registry of documents to be used during

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<sup>15</sup> *Ibid*, paragraphs 22-25.

hearings, suggesting that at this juncture the Registry may make such documents available to the parties and the participants.<sup>16</sup>

12. The legal representatives submitted that the appropriateness of special measures under Rule 88 for vulnerable or traumatised witness should be decided on an individual basis. They suggested that the Victims and Witnesses Unit should inform each witness of the possibility of utilising special and protective measures in order to enable them to make a request (which should be reported to the Chamber). The legal representatives argued that in general, and particularly to avoid the risk of harassment to a witness, the Chamber should be vigilant as to the manner in which hearings are conducted.<sup>17</sup> In response to the suggestion by the defence that a psychologist should accompany witnesses during their testimony, the legal representatives argued that assistance by psychologists who speak the language of the witnesses is also important after their evidence has concluded, and this possibility should be explored.<sup>18</sup>

13. The legal representatives suggested that the use of video or audio-link technology, when evidence is to be given from a remote location, should be requested and organised in advance. However, the legal representatives argued that if a witness who is testifying at the seat of the Court indicates a preference for giving his or her testimony via audio or video-link, in accordance with Article 69(2) of the Statute, the Chamber should be able to make a determination without delay. The representatives argued that these measures may be necessary particularly with traumatised or vulnerable witnesses who are troubled by the presence of the accused or fear for their safety.<sup>19</sup> The legal representatives further argued that if a witness is

<sup>16</sup> Conclusion des Représentants légaux des victimes a/0001/06 à a/0003/06 sur d'autres questions à déterminer avant le procès, 7 January 2008, ICC-01/04-01/06-1107, paragraphs 13-17.

<sup>17</sup> *Ibid*, paragraphs 23-25.

<sup>18</sup> ICC-01/04-01/06-T-69-ENG, page 22.

<sup>19</sup> ICC-01/04-01/06-1107, paragraph 20.

participating as a victim in the trial, his or her legal representative should be permitted to advance submissions on these issues.<sup>20</sup>

### *The Registry*

14. The Victims and Witnesses Unit made submissions during the Status Conference on 10 January 2008 on the use of audio and video-link technology and the manner in which traumatised and vulnerable witnesses should present their evidence.

15. The representative of the Victims and Witnesses Unit assured the Chamber that the facilities are in place to implement this technology for court proceedings, but the quality of the link will depend greatly on the location from which the evidence is being transmitted. In order to demonstrate this varying quality to the Chamber and the parties and participants, the Victims and Witnesses Unit propose to give a presentation in the near future.<sup>21</sup> In relation to the time required by the Victims and Witnesses Unit to arrange an audio or video-link from a remote location, the representative of the Unit indicated that 35-day's advance warning is necessary.<sup>22</sup>

16. The Victims and Witnesses Unit representative emphasised that its statutory obligations extend to all witnesses, regardless of their particular characteristics, in order to enable them to testify "feeling supported and protected in (the) best possible circumstances". The representative of the Unit indicated that the early determination of a witness' vulnerability by the party calling the witness and the communication of this fact to the Chamber are paramount. The representative of the Unit also highlighted certain aspects of the Unit's role as regards vulnerable and traumatised witnesses,

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<sup>20</sup> ICC-01/04-01/06-T-69-ENG, page 10.

<sup>21</sup> *Ibid.*, page 2.

<sup>22</sup> *Ibid.*, page 3.

including witness familiarisation, witness monitoring outside the courtroom and support to the witness during his or her testimony. In order to prevent re-traumatisation, the representative of the Victims and Witnesses Unit suggested measures such as, *inter alia*, ensuring the witness has a sense of control over his or her testimony, granting breaks as and when requested, ensuring an appropriate language is used, limiting the number of people in the courtroom and guaranteeing the confidentiality of the hearing. The Victims and Witnesses Unit representative also indicated it would submit a protocol on witness familiarisation, as well as an interim list of professionals to accompany witnesses by 31 January 2008.<sup>23</sup>

### C. Relevant Provisions

17. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered the following provisions under the Rome Statute framework.

18. Article 64 of the Statute:

#### Functions and Powers of the Trial Chamber

[...]

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

[...]

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

[...]

(e) Provide for the protection of the accused, witnesses and victims; and

[...]

7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the

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<sup>23</sup> *Ibid*, pages 11-18.

purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.

#### 19. Article 68 of the Statute:

##### **Protection of the victims and witnesses and their participation in the proceedings**

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

#### 20. Article 69(3) of the Statute:

##### **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.

#### 21. Rule 67 of the Rules:

##### **Live testimony by means of audio or video-link technology**

1. In accordance with article 69, paragraph 2, a Chamber may allow a witness to give viva voce (oral) testimony before the Chamber by means of audio or video technology, provided that such technology permits the witness to be examined by the Prosecutor, the defence, and by the Chamber itself, at the time that the witness so testifies.

2. The examination of a witness under this rule shall be conducted in accordance with the relevant rules of this chapter.

3. The Chamber, with the assistance of the Registry, shall ensure that the venue chosen for the conduct of the audio or video-link testimony is conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness.

## 22. Rule 70 of the Rules:

### **Principles of evidence in cases of sexual violence**

In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:

- (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
- (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
- (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;
- (d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.

## 23. Rule 77 of the Rules:

### **Inspection of material in possession or control of the Prosecutor**

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

## 24. Rule 78 of the Rules:

### **Inspection of material in possession or control of the defence**

The defence shall permit the Prosecutor to inspect any books, documents, photographs and other tangible objects in the possession or control of the defence, which are intended for use by the defence as evidence for the purposes of the confirmation hearing or at trial.

## 25. Rule 87 of the Rules:

### **Protective measures**

1. Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.
2. A motion or request under sub-rule 1 shall be governed by rule 134, provided that:
  - (a) Such a motion or request shall not be submitted ex parte;

- (b) A request by a witness or by a victim or his or her legal representative, if any, shall be served on both the Prosecutor and the defence, each of whom shall have the opportunity to respond;
- (c) A motion or request affecting a particular witness or a particular victim shall be served on that witness or victim or his or her legal representative, if any, in addition to the other party, each of whom shall have the opportunity to respond;
- (d) When the Chamber proceeds on its own motion, notice and opportunity to respond shall be given to the Prosecutor and the defence, and to any witness or any victim or his or her legal representative, if any, who would be affected by such protective measure; and
- (e) A motion or request may be filed under seal, and, if so filed, shall remain sealed until otherwise ordered by a Chamber. Responses to motions or requests filed under seal shall also be filed under seal

3. A Chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, *inter alia*:

- (a) That the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records of the Chamber;
- (b) That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party;
- (c) That testimony be presented by electronic or other special means, including the use of technical means enabling the alteration of pictures or voice, the use of audio-visual technology, in particular videoconferencing and closed-circuit television, and the exclusive use of the sound media;
- (d) That a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness; or
- (e) That a Chamber conduct part of its proceedings in camera.

## 26. Rule 88 of the Rules:

### Special Measures

1. Upon the motion of the Prosecutor or the defence, or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may, taking into account the views of the victim or witness, order special measures such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the special measure is sought prior to ordering that measure.
2. A Chamber may hold a hearing on a motion or a request under sub-rule 1, if necessary in camera or ex parte, to determine whether to order any such special measure, including but not limited to an order that a counsel, a legal representative, a psychologist or a family member be permitted to attend during the testimony of the victim or the witness.
3. For *inter partes* motions or requests filed under this rule, the provisions of rule 87, sub-rules 2 (b) to (d), shall apply *mutatis mutandis*.

4. A motion or request filed under this rule may be filed under seal, and if so filed shall remain sealed until otherwise ordered by a Chamber. Any responses to *inter partes* motions or requests filed under seal shall also be filed under seal.

5. Taking into consideration that violations of the privacy of a witness or victim may create risk to his or her security, a Chamber shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence

## 27. Rule 140(2) of the Rules:

### **Directions for the conduct of the proceedings and testimony**

[...]

(b) The prosecution and the defence have the right to question the witness about relevant matters related to the witness's testimony and its reliability, the credibility of the witness and other relevant matters;

(c) The Trial Chamber has the right to question a witness before or after a witness is questioned by a participant referred to in sub-rules 2 (a) or (b);

## 28. Regulation 41 of the Regulations of the Court:

### **Victims and Witnesses Unit**

The Victims and Witnesses Unit may, pursuant to article 68, paragraph 4, draw any matter to the attention of a Chamber where protective or special measures under rules 87 and 88 require consideration.

## 29. Regulation 43 of the Regulations of the Court:

### **Testimony of witnesses**

Subject to the Statute and the Rules, the Presiding Judge, in consultation with the other members of the Chamber, shall determine the mode and order of questioning witnesses and presenting evidence so as to:

(a) Make the questioning of witnesses and the presentation of evidence fair and effective for the determination of the truth;

(b) Avoid delays and ensure the effective use of time.

## 30. Regulation 52(2) of the Regulations of the Registry:

### **Presentation of evidence during a hearing**

[...]

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*.

## D. Analysis and Conclusions

31. This Decision is intended to provide the parties and participants with general guidelines on the main matters related to the testimony of witnesses during trial. These guidelines do not in any way pre-determine the merits of individual applications that may be made by the parties and participants or any matters that may be raised by the Registry, particularly by the Victims and Witnesses Unit, in this regard. It follows that the Trial Chamber will apply the following guidelines on a witness-by-witness basis.

### *Scope of examination by a party not calling a witness*

32. In line with Article 69(3) of the Statute, the Trial Chamber considers that a party may question a witness it has not called about matters which go beyond the scope of the witness's initial evidence. The 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 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). The parties are under an obligation to put such part of their case as is relevant to the testimony of a witness, *inter alia*, to avoid recalling witnesses unnecessarily.

33. The Trial Chamber accepts the submissions of the parties that, in principle, the parties do not have an obligation to disclose their lines of questioning in advance, since the course a party takes will depend to a significant extent on the issues raised, and the answers given, during the evidence of the witness. However, the Trial Chamber appreciates that exceptions may be necessary, particularly in order to protect traumatised or vulnerable witnesses and in these circumstances the Trial Chamber may order the parties and

participants to disclose in advance the questions or the topics they seek to cover during their questioning.

34. The Chamber accepts the prosecution's submission that the disclosure of documents to be used in questioning a witness is governed by Rules 77 and 78 of the Rules: the parties are required to provide for inspection, in advance of trial, those documents which they intend to use for this purpose. Furthermore, by Regulation 52 of the Regulations of the Registry, the parties and participants have the obligation to provide the Registry with the electronic version, whenever possible, of any evidence they intend to use at a hearing at least three full working days in advance. However, the Chamber recognises that the questioning of a witness by a party not calling that witness is to some extent reactionary, and as such could entail on occasion the unanticipated use of documents.

*Manner in which traumatised and vulnerable witnesses shall present their evidence*

35. The Chamber will not list herein the specific protective and special measures under Rules 87 and 88 that can be used for the presentation of evidence of traumatised and vulnerable witnesses, however the Chamber indicates that in applying Article 64 of the Statute, it will ensure that appropriate steps are taken to guarantee the protection of all victims and witnesses, and particularly those who have suffered trauma or who are in a vulnerable situation. It follows that the Chamber will rule on the merits of individual applications on whether particular proposed special or protective measures are to be utilised, and including, *inter alia*, whether:

- i) the testimony of vulnerable witnesses is to be treated as confidential and access to it is to be limited to the parties and participants in the proceedings;
- ii) evidence in appropriate circumstances can be given out of the direct sight of the accused or the public;
- iii) a witness should be able to control his or her testimony, and, if so, to what extent;
- iv) breaks in the evidence should be allowed as and when requested;
- v) a witness can require that a particular language is used.

36. The Chamber notes that the obligation to identify, protect and respect the well-being and dignity of witnesses rests significantly with the party or participant calling the witness, but the other party and the participants, as well as the Court, have responsibilities in this regard. The Chamber encourages all the organs of the Court and those involved with the trial, and particularly the Victims and Witnesses Unit, to raise with the Chamber, at an early stage, any specific concerns they may have regarding the integrity and well-being of a witness, and especially with those who may be traumatised or vulnerable.

37. In a discrete submission advanced by the prosecution,<sup>24</sup> it was suggested that as a consequence of a confidential decision of the Chamber,<sup>25</sup> the parties may be unable to gather up-to-date information from their witnesses on their concerns in this regard. This submission demonstrates a failure properly to understand the ambit of the Chamber's decision in this area which addressed and prevented most aspects of the practice known as witness proofing (i.e. discussion with a witness of the topics to be dealt with

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<sup>24</sup> *Ibid*, page 7, lines 16-19.

<sup>25</sup> ICC-01/04-01/06-1040.

in court during their evidence, or concerning any exhibits which may be provided during the witness's testimony).<sup>26</sup> Ascertaining the attitude of witnesses to the process of giving evidence does not infringe the Chamber's orders in this context. Whilst reference has been made to this particular confidential decision, it has been dealt with in a way that ensures no material that requires protection has been revealed.

38. During the Status Conference on 10 January 2008 the Victims and Witnesses Unit agreed to prepare a protocol for witness familiarisation. In order to assess its appropriateness, the Chamber reiterates its oral order to the Unit to file it in the record, for consideration by the Chamber, by 31 January 2008.<sup>27</sup> This protocol should include a requirement that the Unit informs each witness of the availability of special and protective measures and that any requests are promptly brought to the attention of the Chamber.

39. As indicated by the Trial Chamber during the Status Conference on 10 January 2008, the Registry shall submit in advance of the trial a comprehensive list of professionals who are available to assist the relevant witnesses before, during and after their testimony, in addition to the support staff of the Victims and Witnesses Unit.<sup>28</sup> The list should include professionals with diverse relevant expertise, including *inter alia*, psychologists. The Registry should take all necessary steps to secure fair gender representation and the list should reflect the language and cultural background of the witnesses that it is anticipated will be called during the trial of Mr Thomas Lubanga Dyilo.<sup>29</sup>

<sup>26</sup> Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049, paragraphs 51-52.

<sup>27</sup> ICC-01/04-01/06-T-69-ENG, page 15.

<sup>28</sup> *Ibid*, page 17.

<sup>29</sup> *Ibid*, pages 16-18.

40. The Chamber requests any observations from the Victims Participation and Reparations Section in this regard to be included in its reports in those instances where the Victims Participation and Reparations Section is aware of a victim having the dual status of victim and witness.

*Live testimony by means of audio or video-link technology*

41. The Chamber accepts the submissions of the parties that the presumption is that witnesses will give evidence by way of live in-court testimony, in accordance with Article 69(2) of the Statute. However, the Chamber will authorise the use of audio or video-link whenever necessary (see particularly Article 68 of the Statute), having ensured “that the venue chosen for the conduct of the audio or video-link testimony is conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness” (Rules 67(3)). This will be dealt with on a case-by-case basis, taking into account the views and concerns of the witness, the parties and, where relevant, the participants.

42. If a party or a participant seeks to introduce evidence via audio or video-link technology from a remote location (e.g. Democratic Republic of Congo), they shall file a request with the Chamber, whilst simultaneously informing the Victims and Witnesses Unit, not less than 35 days before the relevant testimony is due to be heard. Whenever audio or video-link technology is to be used for a witness giving evidence at the seat of the Court, the parties and participants shall file a request with the Chamber, whilst simultaneously informing the Victims and Witnesses Unit, at the earliest opportunity. However, no strict time-limit is imposed, given that unforeseen circumstances may arise.

43. Finally, in relation to the presentation offered by the Victims and Witnesses Unit for the benefit of the Bench and all the legal representatives in relation to the different levels of quality of the audio and video-link, the Chamber considers this proposal is potentially of assistance and instructs the Unit to prepare a demonstration that will show the various levels of quality provided by the technology depending on where, in each of the potentially relevant areas of the Democratic Republic of Congo, the witnesses may be located.

#### **E. Orders of the Trial Chamber**

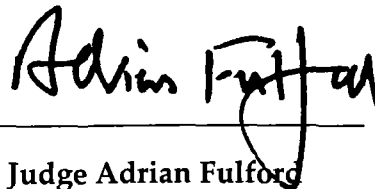
44. For these reasons, the Trial Chamber hereby orders the following:

- i) The Victims and Witnesses Unit shall file its protocol on witness familiarisation by 31 January 2008 at 16.00 hours.
- ii) The Victims and Witnesses Unit shall file by 31 January 2008 an interim report on the steps it has taken to create a list of professionals able to assist witnesses.
- iii) The Victims Participation and Reparations Section shall include in their reports any observations as regards the vulnerability or trauma of a victim, where the Victims Participation and Reparations Section is aware of a victim having the dual status of victim and witness.
- iv) The parties and participants shall inform the Chamber and the Victims and Witnesses Unit at least 35 days before the relevant testimony is due to be heard of the proposed use of audio or video-link technology from a remote location.

- v) The parties and participants shall inform the Chamber and the Victims and Witnesses Unit at the earliest opportunity of the use of audio or video-link technology when a witness is to give evidence at the seat of the Court.
- vi) The Victims and Witnesses Unit shall prepare a presentation on the different levels of quality of audio and video-link for the Chamber, parties and participants, to be given in open court session on or before 15 February 2008.

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  
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**Judge Elizabeth Odio Benito**

**Judge René Blattmann**

Dated this 29 January 2008

At The Hague, The Netherlands