

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

No.: ICC-01/04-01/06

Date: 7 January 2008

TRIAL CHAMBER I

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

Registrar: Mr Bruno Cathala

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

Public

Prosecution's Submissions for the Status Conference on 9 January 2008

The Office of the Prosecutor

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Legal Representatives of Victims

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

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Background

1. By order made on 13 December 2007, the Trial Chamber scheduled a further status conference hearing in the case of *The Prosecutor v. Thomas Lubanga Dyilo* for 9, 10 and 11 January 2008. In this order, the Trial Chamber set a list of additional issues to be considered (Issues A-G) prior to the commencement of the trial. The Trial Chamber ordered the parties and participants to file written submissions on these issues on or by 7 January 2008.

A. The role of the Office for Public Counsel for Victims (OPCV)

2. The Trial Chamber has delineated two capacities of the OPCV in which its role is to be considered: (1) as legal representative of victim-applicants and (2) as an independent body established to “provide support and assistance to the legal representatives for victims and to victims”.

(i) *The OPCV’s role as legal representative to victim-applicants*

3. In its request to access documents filed in the case record on 18 October 2007,¹ the OPCV proffered to the Chamber, as its foundation for standing to make the application, the 17 August 2007 decision of Pre-Trial Chamber I made in the situation entitled “Decision on the Requests of the Legal Representative of Applications on application process for victims’ participation and legal representation”.² In this decision, the Pre-Trial Chamber deemed it appropriate to appoint the OPCV to provide support and assistance to the unrepresented victim-applicants.³

¹ ICC-01-/04-01/06-1017

² ICC-01-/04-374

³ ICC-01-/04-374 at paras. 43-44

4. On 10 December 2007, the Pre-Trial Chamber issued a Decision on the OPCV's request to access documents in the situation record,⁴ rejecting the request in its entirety.⁵ In denying the OPCV's request, the Pre-Trial Chamber clarified the role that it had assigned to the OPCV in the situation as being "limited to providing support and assistance in the few instances in which the "Registry automatically request[s] additional information for [any] incomplete Applications.""⁶

5. Consequently, if the OPCV intends to continue to rely on the Pre-Trial Chamber's Order as authority for it to appear before this Chamber as a representative of specific victim-applicants, it must demonstrate that any application it brings falls within the parameters of providing assistance to an applicant victim "in the few instances in which the "Registry automatically request[s] additional information for [any] incomplete Applications".

(ii) *The OPCV's role under Regulation of Court 81(4)*

6. It is submitted that apart from the possibility of appearing before a Chamber as a legal representative for a victim as contemplated by Regulation of Court 80(2), the scope of the OPCV's role otherwise, before any Chamber, is strictly circumscribed by Regulation 81(4). This Regulation limits the OPCV's functions to two classes of activities: (1) assisting and supporting the Legal Representatives for victims and (2) assisting and supporting victims. This

⁴ On 18 October 2007, the OPCV filed with the Pre-Trial Chamber I a request to access documents in the situation record, which was very similar to the request filed before this Chamber in the case (ICC-01/04-407). The OPCV's proffered basis for standing before the Pre-Trial Chamber was same Decision of the Pre-Trial Chamber referred to above (ICC-01-/04-374).

⁵ "Decision on the Requests of OPCV" ICC-01/04-418. On 17 December 2007, the OPCV filed an application for leave to appeal this decision (ICC-01/04-422). The application is still outstanding before Pre-Trial Chamber I.

⁶ "Decision on the Requests of OPCV", *supra*, at para.10

assistance may take the form of legal research and advice and appearance before a Chamber in respect of specific issues.⁷

7. It is submitted that the Regulations do not grant the OPCV an autonomous right to appear before the Chamber in respect of any issue. Instead, it is submitted that any application for intervention by the OPCV must be solidly based on one of its founding obligations and must propose to offer submissions which are not adequately addressed by a party or participant.⁸

8. The Prosecution also submits that pursuant to Rule 93 the Trial Chamber may invite⁹ the views of victims not yet granted a right of participation in the proceedings. In some circumstances, where the Trial Chamber elects to seek such input under Rule 93, it may be beneficial to have such views presented through the OPCV, rather than by individual victim-applicants.

B. Disclosure by the Defence

(i) Reciprocal disclosure and timing

9. The Prosecution submits that the Rules allow for a system requiring disclosure of evidence by the Defence to the Prosecution. The Prosecution requests that the Trial Chamber implement such a system of disclosure by the Defence. The Prosecution submits that it will assist in facilitating the fair and

⁷ Regulation of the Court 81(4)(a)&(b)

⁸ The Prosecution has previously advanced its position before the Trial Chamber that the OPCV has very limited mandate and authority to intervene in the case proceedings. See ICC-01/04-01/06-1050 "Prosecution's Response to the Trial Chamber's Order of 27 November 2007 regarding participation of OPCV"

⁹ ICC-01/04-01/06-1004 "Decision on the "Demande de déposition du représentant légal des demandeurs des victimes" at para.3

expeditious conduct of the trial while still respecting rights of the accused as enshrined in Article 67.¹⁰ It will assist the parties to focus on the issues to be tried and minimize interlocutory delay.

10. Rule 79(4) necessarily implies that a Chamber possesses authority over its own proceedings to order the Defence to disclose additional evidence to the Prosecution, when that disclosure is not otherwise covered by the provisions of Rule 79. This provision is unique in that it contemplates the Chamber ordering disclosure of *evidence*, and not necessarily the requirement that the Defence also outline its intent with respect to that evidence.¹¹ The drafting history behind Rule 79 suggests that this distinction was intentional and was an attempt to balance the benefits of reciprocal disclosure and rights of the accused, such as the right to silence.¹²

11. It is submitted that a purposive reading of Rule 79, in conjunction with Rules 78 and 84, supports a balanced approach to disclosure that requires the Defence to disclose to the Prosecution all evidence that the Defence intends to rely on at trial. Such a reciprocal disclosure regimen would achieve the objective of ensuring an efficient trial proceeding by enabling the parties “to prepare for trial and to facilitate the fair and expeditious conduct of the proceedings”.¹³

12. Since the advance inspection by the Prosecution of books, documents, photographs and other tangible objects in the control of the Defence is governed

¹⁰ See, for instance, Rule of Procedure and Evidence 84

¹¹ In contrast, Rule 79(1) requires the Defence to disclose certain lines of defence and the evidence supporting the proposed defences.

¹² See R.S. Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, p.415

¹³ Rule of Procedure and Evidence 84

by Rule 78¹⁴, it is submitted that disclosure as contemplated by Rule 79(4) ought to extend to include summaries or anticipated evidence, when no statements are available. In terms of the timing of an order to disclose evidence under Rule 79(4) it is submitted that this disclosure ought to be ordered to occur in sufficient advance of the presentation of any Defence case. The Prosecution also proposes a two-tiered timeline for the purpose of Rule 78 inspections. The first tier of inspection would relate to books, documents, photographs and other tangible objects the Defence intends to rely on during the presentation of the Prosecution's case. This first tier inspection must occur sufficiently in advance of the start of the trial. The second tier of inspection under Rule 78 would relate to materials that the Defence intends to rely on during the presentation of any Defence case. This second tier of inspection may occur after the close of the Prosecution case, but in sufficient time prior to the start of the Defence case.

13. On the issue regarding the advance notification by the Defence of certain specific defences to be advanced¹⁵, namely alibi¹⁶ or a ground for exclusion of responsibility under Article 31(1), it is submitted that the Defence must adhere to the provisions of Rule 79(1) as soon as the Defence has made a determination to plead any of these defences. The notice and disclosure of these defences should

¹⁴ The Prosecution submits that Rule 78 obligations include inspection of Defence witness statements and materials and reports produced or prepared by such witnesses in the possession or control of the Defence. Reports prepared *by* a witness *for* a party, it is submitted, do not fall within the ambit of Rule 81.

¹⁵ As well as the additional requirements of notice, including particulars and evidence supporting such defences outlined in Rule 79(1).

¹⁶ The Trial Chamber in its order of December 13, 2007, listed the question of "Rule 79(1)(a) whether the Defence is required to notify the Trial Chamber of the existence of an alibi" as an item for resolution under Issue B. Disclosure by the defence. The Prosecution submits that Rule 79(1)(a) only requires that the Defence provide notice to the Prosecutor of its intent to raise the existence of alibi, and does not require this notice to be also provided to the Chamber.

occur at the earliest opportunity to permit the Prosecution to adequately prepare.¹⁷

(ii) *Procedure relating to the admissibility of evidence (Rule 64)*

14. It is submitted that, to the extent possible, objections to the admissibility of evidence that forms part of the Prosecution's case ought to be raised by the Defence at the earliest juncture, preferably before the formal process of evidence presentation has begun. The Defence, having had full disclosure of incriminating evidence prior to the commencement of the trial, will be sufficiently situated to raise any objections to certain evidence well in advance. The Prosecution urges the Chamber to institute a timeline for the Defence to raise issues relating to the relevance or admissibility of Prosecution evidence. It is submitted that such objections must be raised well enough in advance of the tendering of the evidence so that the issue of admissibility can be fully litigated by the parties and an advance ruling can be obtained from the Chamber.

15. It is submitted that a system that requires pre-trial admissibility motions by the Defence (or in the case of reciprocal disclosure, by the Prosecution) will improve the efficiency of the trial proceedings, by ensuring, to the best extent possible, that the majority of admissibility issues will be clarified in advance of the formal trial.¹⁸ With such rulings, the parties will be better prepared for trial and the trial process itself will be economized. It is further submitted that it is

¹⁷ It is submitted, additionally, that the Chamber should retain authority similar to that which exists in Rule 79(2) to grant the Prosecution an adjournment to address issues raised as a result of the Defence disclosure ordered under Rule 79(4), if the timing of that disclosure is insufficient to permit a response.

¹⁸ The Prosecution acknowledges, as outlined in Rule 64(1), that issues of relevance and admissibility are not always foreseeable by the parties, and that in certain circumstances the raising of admissibility challenges may be unavoidable during the currency of the trial.

appropriate for the Chamber to order a party seeking to challenge the admissibility of evidence prior to the commencement of trial to file a written application which outlines the evidence sought to be ruled inadmissible and the grounds supporting its position.

C. Scope of Examination by a party not calling a witness

(i) *The scope of "other relevant matters" (Rule 140(2)(b))*

16. It is submitted that a party not calling a witness has a *prima facie* right¹⁹ 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 through the questioning performed under Rule 140(2)(a) or 140(2)(c).²⁰ The limit on this right is one of relevance – the party must be able to establish, if challenged either by the opposing party or the Chamber, that the line of questioning relates to a fact at issue in the case.

17. The Prosecution also submits that, under this rubric (the scope of examination by a party not calling a witness), ordering a party to disclose the intended line of questioning of a witness would not be practical or appropriate. The questioning of an opposing party's witnesses is, to a great extent, a reactionary exercise. While a party may hypothesize a possible line or lines of

¹⁹ This right is subject, of course, to the provisions of Article 64(8)(b)&9, Article 69(4) and Rule 88(5).

²⁰ The final text of Rule 140 only emerged after the fifth session of the Preparatory Committee. Prior to its current form, the equivalent of Rule 140(2) limited a party's ability to question another party's witness on "other relevant matters" only with the prior permission of the Chamber. This requirement of prior judicial authorization for questioning on other relevant matters was eliminated from the final draft of Rule 140(2), evincing, it is submitted, the intent of the drafters of the Statute to permit as a right the questioning on relevant matters not otherwise raised in the witness's evidence. See PCNICC/1999/L.4/Rev.1 and K.N. Calvo-Goller, *The trial proceedings of the International Criminal Court*, M. Nijhoff ed. Leiden, 2006 at p.273

questioning for a witness, it is submitted that, generally speaking, these areas never crystallize in any manner that is functional until after the witness testifies. Consequently, the utility of such a procedure of disclosure, it is submitted, is uncertain.

18. Additionally, the requirement of disclosure of anticipated lines of questioning intended to be used in questioning another party's witness is akin to requiring a party to disclose a litigation strategy or materials prepared for the purposes of trial. While not specifically exempted from disclosure under Rule 81(1), it is submitted that this type of material falls within the spirit of the rule and ought not be ordered produced to the opposite party.

19. It is submitted that disclosure of documents to be used in questioning another party's witness is governed by Rules 77 and 78 for the Prosecution and Defence, respectively. These provisions require the respective party to provide for the advance inspection of documents that are intended to be used as evidence for the purpose of the trial. This would include documents intended to be used in questioning another party's witnesses.

D. Statements by the prosecution and the Defence

20. Opening statements are beneficial to all involved in the trial proceedings. These addresses frame the case as foreseen by the parties, and provide the Chamber, participants and the public with a roadmap to the proceeding and the respective party positions on key issues at trial. It is the Prosecution's position that it is appropriate that the Chamber require both parties to make opening statements at the beginning of the trial.

21. The Prosecution submits that it is appropriate for the Chamber to encourage the parties to exchange draft opening or closing statements beforehand, as a matter of professional courtesy, and provide copies to the Bench. Given that statements are functionally summaries of evidence, either anticipated or tendered, it is not necessary for the Chamber to order that the parties are obligated to 'disclose' those statements, in the strict sense of the word, in advance.²¹

E. Live testimony by means of audio or video-link

22. Article 69(2) grants the Chamber authority to permit testimony from a witness through types of technological links. The Prosecution submits that a party or participant that intends to seek the Chamber's approval to employ one of these mechanisms ought to make application to the Chamber at earliest opportunity, ideally as soon as practicable after the litigant becomes aware that such use is desirable or required. It is submitted that it is appropriate for the Chamber to rule on these applications on a witness-by-witness basis, determining in each case whether such measures would be prejudicial to or inconsistent with the fair trial rights of the accused.

23. The Prosecution submits that it would be of great assistance, in terms of developing a concrete process for applications to use alternative measures, if the Registry could provide to the Chamber, parties and participants with a description of the process and the time requirements involved in setting up such measures. The Prosecution proposes that once vested with such information, the Chamber could appropriately establish a timeline procedure by which parties

²¹ Prosecution will endeavour to provide the defence and Chamber with copies of its intended opening statement within one to two days prior to the delivery of the statement in court

must apply, absent exceptional circumstances, to the Chamber for authorization prior to the anticipated testifying date for a witness.

F. Agreements on facts and evidence

24. The parties have been holding ongoing discussions related to the possibility of reaching agreements on facts for the purposes of trial. It is submitted that the parties may submit any agreed facts to the Chamber in a statement of agreed facts prior to the start or during the trial.²² The Chamber will then be best situated to decide, on the basis of the facts submitted as agreed upon, whether a more completed presentation of evidence on one or more of the agreed upon facts is required under Article 69(3) and Rule 69.

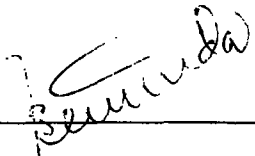
G. Manner in which traumatized and vulnerable witnesses shall present their evidence

25. The Prosecution recognizes that for some witnesses the experience of testifying before a Court about traumatic events will be difficult and in some circumstances may, if not dealt with properly, be detrimental to the witness. Respect for witnesses, for their experiences and their personal integrity, must play a key factor in any determination as to the manner in which such witnesses²³ testify.

²² The Prosecution does not wish to also foreclose the possibility that as the trial progresses and the presentation of facts and issues evolve, the parties may wish to agree upon additional facts as proven. In such a case, the Prosecution submits that agreed upon facts would be submitted by the parties to the Trial Chamber, and the Chamber may exercise authority under Article 69(3) and Rule 69 with such proposed agreements of fact as well.

²³ The Prosecution considers that the anticipated former child soldier witnesses would fall within the category of traumatized and vulnerable witnesses.

26. In general, the Prosecution supports a manner of presentation of evidence that is non-adversarial for this class of witnesses. Additionally, the Prosecution submits that additional testimonial aids, as envisioned by Rule 88(2), ought to be contemplated for this class of witnesses if warranted by the circumstances.



+ Luis Moreno-Ocampo
Prosecutor

Dated this 7th day of January 2008

At The Hague, The Netherlands