

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: **English**

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

Date: **15 May 2009**

**TRIAL CHAMBER I**

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

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

**Public document**

**Prosecution's Submission on the Manner of Questioning of Witnesses Conducted  
by the Legal Representatives of Victims**

**Source:** Office of the Prosecutor

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

**The Office of the Prosecutor**

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**Legal Representatives of Applicants**

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**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for the Victims**

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**REGISTRY**

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**Registrar**

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Ms Silvana Arbia

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Other Section**

## Background

1. On 8 May 2009, the Trial Chamber requested submissions on the manner of questioning of witnesses conducted by the Legal Representatives of victims.<sup>1</sup> By way of background, the Trial Chamber referred to an instance in which a legal representative of victims posed questions to a Prosecution witness in a leading manner reflecting techniques used in cross-examination, to which the Defence objected. The Trial Chamber ordered that submissions be filed on the issue by Friday, 15 May 2009.

## Prosecution's submission on the manner of questioning by Legal Representatives

2. The Prosecution notes that neither the Rome Statute (Statute) nor the Rules of Procedure and Evidence (Rules) expressly provides for the manner of questioning of witnesses by either the parties or the legal representatives of victims. Rather, the Trial Chamber is vested with the authority to regulate the conduct of the trial, including the manner of questioning of witnesses, pursuant to Article 64 and Rule 91(3).<sup>2</sup> The Trial Chamber must ensure, among other things, that the trial is fair and is conducted with respect for the rights of the accused.
3. In its oral decision dated 16 January 2009, the Trial Chamber ruled on the order of questioning of witnesses by the parties, the legal representatives, and the Chamber.<sup>3</sup> In the course of the ruling the Trial Chamber also determined the manner of questioning by the parties, but not by the legal representatives, stating that: (i) for a party calling a witness, leading questions should not be

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<sup>1</sup> ICC-01/04-01/06-T-171-CONF-ENG ED, page 45, lines 6-22.

<sup>2</sup> Rule 140, which provides directions for the testimony of witnesses, establishes the right to question witnesses by: (i) the party submitting evidence by way of a witness, (ii) the Prosecution, (iii) the Defence, and (iv) the Trial Chamber, but does not expressly refer to the rights of the legal representatives to question witnesses, or to the order and manner of questioning (except that the Defence has the right to be the last to examine a witness).

<sup>3</sup> ICC-01/04-01/06-T-104-ENG-ET, page 35, lines 13-25, to page 38, lines 1-3.

used for contentious areas, (ii) for questioning by the party calling a witness after the party not calling the witness has conducted its examination, leading questions are to be avoided, and (iii) if the Defence did not call the witness and decides to ask questions again following the re-examination by the party calling the witness, leading questions are to be avoided.<sup>4</sup>

4. The Chamber has recognised the right of the legal representatives to examine witnesses.<sup>5</sup> The Prosecution submits that, at a minimum, the guidelines applicable to questions by parties should also apply to the non-party questioners. But because the legal representatives are not parties, there may be less reason to afford them the same latitude that a party may enjoy when cross-examining the other party's witness. Thus, the Prosecution submits that, as a general rule, there should be a preference that questions are asked by the legal representatives in a neutral manner, without any suggestion or influence through questions that direct the witness to the answer, particularly on matters of substance.<sup>6</sup>

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<sup>4</sup> ICC-01/04-01/06-T-104-ENG-ET, page 37, lines 8-25 and page 38, lines 1-3.

<sup>5</sup> ICC-01/04-01/06-1119, 18 January 2008.

<sup>6</sup> Under a school of thought common to both common and civil law jurisdictions, on contentious matters evidence from witnesses should be led in a non-leading manner by the party calling the witness, unless the Chamber permits cross-examination by a party calling the witness because a witness has turned hostile: See United States of America: *Federal Rules of Evidence*, 28 U.S.C. app., Rule 611(c): "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions". See also Australia: *Evidence Act 1929* (S.A.), s. 27, see also, *R v. Hutchison* (1990) 53 SASR 587 at 592: "The crucial consideration is that the party calling the witness is unable, by reason of the witness's unwillingness to tell the truth or the whole truth, to elicit the true facts by non-leading questions". Civil law jurisdictions limiting the use of leading questions by a party calling a witness include Costa Rica (Article 352, which bans questions that suggest a given answer to the witness ("*preguntas sugestivas*")), and Colombia (Article 392(b), Law 906 of 2004), which requires the judge to prohibit any leading questions ("*preguntas sugestivas*").



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Luis Moreno-Ocampo  
Prosecutor

Dated this 15<sup>th</sup> day of May 2009  
At The Hague, The Netherlands