

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 18 March 2010

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 Document

Decision on judicial questioning

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

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Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, issues the following Decision on the defence “Requête aux fins de détermination des principes applicables aux questions posées aux témoins par les juges”:¹

I. Background and Submissions

The defence

1. The defence expresses its “fear” that the subject-matter and the form of a significant number of questions put by the Bench to the witnesses called by the Prosecutor, the Court and the participating victims could “seriously affect” the “appearance of impartiality” if they are repeated during the examination of witnesses called by the accused.² In those circumstances, the defence requests that pursuant to Article 64(2) and 64(3)(a) of the Rome Statute (“Statute”), the Chamber determines the applicable principles as regards questioning by the judges and that it “clarif[ies] the rights of the defence in relation to those questions”.³
2. The submissions focus on three discrete areas: the subject-matter of the questions; the form of the questions; and the rights of the defence to challenge questions put by the judges.

The subject-matter of the questions put by the judges

3. The defence argues that the jurisprudence of the Appeals Chamber⁴ has

¹ Requête aux fins de détermination des principes applicables aux questions posées aux témoins par les juges, 15 January 2010 (notified on 18 January 2010), ICC-01/04-01/06-2252.

² ICC-01/04-01/06-2252, paragraph 1.

³ ICC-01/04-01/06-2252, paragraph 3.

⁴ Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, 8 December 2009, ICC-01/04-01/06-2205.

limited the Trial Chamber to considering only those facts and circumstances that are described by the Pre-Trial Chamber in the “Decision on the confirmation of charges”.⁵ It is suggested⁶ that this approach has been reflected by Trial Chamber II in its “Decision on the Filing of a Summary of the Charges by the Prosecutor”,⁷ in the sense that the following has been decided:

19. [...] It is appropriate to prevent the Chamber from having to consider new facts, which have not expressly been accepted by the Pre-Trial Chamber as this would run contrary to the provisions of the Statute. To grant the Trial Chamber the power to not only modify the legal characterisation of the facts, as permitted by regulation 55 of the Regulations of the Court, but also to modify the facts of which it is seized or to deal with new facts, would confer upon it power not bestowed by the core legal texts.

4. Against that background, it is contended that the Chamber’s power under Article 69(3) of the Statute – its authority to request the submission of all evidence that it considers necessary for the determination of the truth – should be “exercised strictly” within the scope of the charges confirmed against the accused and of the “facts and circumstances” described by the Pre-Trial Chamber in its “Decision on the confirmation of charges”.⁸ Critically, it is argued that “[...] the questions put by the judges to witnesses must not have either the purpose or the effect of introducing into the proceedings criminal acts or charges which do not fall within the scope of the charges confirmed against the accused”,⁹ and in this context it is observed that a significant portion of the questions put by the Bench have related to the commission of acts of sexual violence, whilst no charge of this nature was confirmed against the accused and, indeed, earlier in their evidence some witnesses had not referred to this subject.¹⁰ The defence sets out an analysis to the effect that of 133 questions, 107 concerned sexual violence and the

⁵ ICC-01/04-01/06-2252, paragraph 4; Decision on the confirmation of charges, 27 January 2007, ICC-01/04-01/06-803-tEN.

⁶ ICC-01/04-01/06-2252, footnote 3.

⁷ Decision on the Filing of a Summary of the Charges by the Prosecutor, 21 October 2009, ICC-01/04-01/07-1547-tENG.

⁸ ICC-01/04-01/06-2252, paragraph 5.

⁹ ICC-01/04-01/06-2252, paragraph 6.

¹⁰ ICC-01/04-01/06-2252, paragraph 7.

presence of girls and women in the armed forces.¹¹

5. Specifically, the defence complains that by asking questions about sexual violence – and specifically rape, sexual slavery and forced impregnation – the Court has introduced “new criminal acts” into the trial which exceed the facts and circumstances contained in the charges confirmed against the accused.¹² It is said that this impermissibly exceeds the role of a judge, as defined by way of example in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), “as an impartial arbiter [who] may put questions to a witness, during examination-in-chief, cross-examination or re-examination, to clarify issues which remain unclear after an answer by the witness”.¹³ In summary, therefore, it is contended that the judges may not raise, by way of questions, criminal acts which are outside the scope of the charges.¹⁴

The form of judicial questions

6. The essence of the defence position under this heading is put thus:

In contrast to the parties, for whom “leading questions” are authorized during cross-examination, the judges are under an obligation to show the utmost impartiality and must ensure that none of their statements during proceedings can be perceived, rightly or wrongly, as indicative of a personal opinion in favour of or against either of the cases argued before them.¹⁵

7. It is suggested that the judges “[...] must not express their opinion on the acts whose materiality has been challenged by the accused [...] or their imputability to the accused”, and that suggesting a response to a witness

¹¹ ICC-01/04-01/06-2252, footnote 5.

¹² ICC-01/04-01/06-2252, paragraphs 9 – 10.

¹³ ICC-01/04-01/06-2252, paragraph 11; ICTY, *Prosecutor v. Zejnil Delalić et al*, Case No. IT-96-21-T, Trial Chamber, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landžo, 1 May 1997, paragraph 26.

¹⁴ ICC-01/04-01/06-2252, paragraph 11.

¹⁵ ICC-01/04-01/06-2252, paragraph 14.

through leading questions inevitably reveals the preconceived opinion of the judicial questioner.¹⁶ It is said that this may have extremely grave consequences for the necessary appearance of impartiality of the judiciary,¹⁷ and that a “proliferation” of questions of this kind during the course of the trial undermines the “image of justice”.¹⁸

8. It is complained that of the 133 questions, a significant proportion have been leading or suggestive in nature, thereby demonstrating the judge’s own opinion.¹⁹

The rights of the defence in relation to questions put by the judges

9. The defence maintains that, to date, it has considered that it was not entitled to challenge the questions put by the judges.²⁰ However, in the present application, the defence quotes²¹ an observation from the Presiding Judge on 14 January 2010, as follows:

[...] I am not inclined [...] to return to counsels’ benches to start examining witnesses in detail on what may be highly contentious issues in this trial. It is infinitely preferable that matters that may become significant are [...] dealt with through questioning by counsel rather than by the Judges.²²

On this basis, the defence, first, suggests that the judges’ questions are subject to rules,²³ and, second, it requests (pursuant to Article 64(2) and 64(3)(a) of the Statute) that the Chamber determines the principles applicable to questioning by the judiciary, together with the rights of the defence in relation to judicial questions.²⁴ The defence submits that it should be afforded the same

¹⁶ ICC-01/04-01/06-2252, paragraphs 15 – 17.

¹⁷ ICC-01/04-01/06-2252, paragraph 18.

¹⁸ ICC-01/04-01/06-2252, paragraph 22.

¹⁹ ICC-01/04-01/06-2252, paragraphs 19 and 21.

²⁰ ICC-01/04-01/06-2252, paragraphs 25 – 26.

²¹ ICC-01/04-01/06-2252, paragraph 2.

²² Transcript of hearing on 14 January 2010, ICC-01/04-01/06-T-227-CONF-ENG-ET, page 3, lines 12 – 18.

²³ ICC-01/04-01/06-2252, paragraph 2.

²⁴ ICC-01/04-01/06-2252, paragraph 3.

opportunity to object to questions posed by the judges as operates *inter partes*,²⁵ and particularly it requests guidance as to whether the accused is entitled to challenge questions from the Bench that might contravene any governing principles.²⁶

The prosecution

10. In the Office of the Prosecutor (“prosecution”)’s response to the defence application,²⁷ it summarised its overall position as follows:

2. The Prosecution notes that most of the underlying questions on which this Application is founded have previously been litigated by the Defence and resolved by this Chamber. Additionally, it submits that the Chamber has the statutory obligations to establish the truth and to determine an appropriate sentence and reparations in case of conviction. For the latter obligations, it may elicit evidence at trial that, even if not directly related to the charges or to the guilt or innocence of the accused, will assist in determining the full scale of victimization, an issue plainly relevant to sentencing and reparations. The Chamber will be able to identify and consider the evidence for the appropriate purposes, and there is no reason to assume prejudice to the accused. The Chamber may also ask leading questions that clarify or focus on matters of special interest.

3. The Prosecution agrees that a party or participant should be allowed to object to a question even if asked by the Chamber. In-court objections may have the beneficial purpose of preventing or correcting error.

11. The prosecution argues that the Chamber has the right to ask any question that it considers necessary in order properly to fulfil its statutory obligations.²⁸ The prosecution takes issue with the suggestion by the defence that the judges are limited in their questioning to the facts and circumstances described in the “Decision on the confirmation of charges”, and it maintains that the defence submission is without statutory basis or supporting authority,²⁹ not least because the Decisions of the Appeals Chamber and Trial Chamber II relied on

²⁵ ICC-01/04-01/06-2252, paragraph 28.

²⁶ ICC-01/04-01/06-2252, page 8.

²⁷ Prosecution’s Response to the Defence “Requête aux fins de détermination des principes applicables aux questions posées aux témoins par les juges”, 25 January 2010, ICC-01/04-01/06-2265.

²⁸ ICC-01/04-01/06-2265, paragraph 4.

²⁹ ICC-01/04-01/06-2265, paragraph 4.

by the accused do not support the propositions advanced.³⁰ The prosecution argues that, on analysis, the jurisprudence relied on by the defence does not assist its argument in this regard (set out in paragraph 3 above), because the facts and circumstances described in the “Decision on the confirmation of charges” are to be distinguished from the evidence in the case, the background information and any aggravating circumstances within Rule 145 of the Rules of Procedure and Evidence (“Rules”).³¹ The prosecution suggests that the defence have quoted from the *Delalić* Decision (see paragraph 5 above) out of context; it is contended that the Decision addressed the extent of the rights of the defence to question witnesses after the prosecution’s “re-examination”, rather than the role of the Chamber in questioning witnesses. It is said to be of note that, after the *Delalić* Decision, the Rules of Procedure and Evidence of the ICTY were amended to facilitate the introduction of evidence during the trial that is relevant to the sentencing stage of the proceedings (Rule 85(A)(vi) of the Rules of Procedure and Evidence of the ICTY, as amended 10 July 1998).³²

12. The prosecution refers to Rule 140(2)(c) of the Rules:³³

2. In all cases, subject to article 64, paragraphs 8(b) and 9, article 69, paragraph 4, and rule 88, sub-rule 5, a witness may be questioned as follows:

[...]

(c) The Trial Chamber has the right to question a witness before or after a witness is questioned by a participant [...];

The Chamber is reminded that it earlier ruled, in an Oral Decision on 16 January 2009,³⁴ that the judges will exercise their right to pose questions at

³⁰ ICC-01/04-01/06-2265, paragraph 4.

³¹ ICC-01/04-01/06-2265, footnote 5.

³² ICC-01/04-01/06-2265, footnote 5.

³³ ICC-01/04-01/06-2265, paragraph 5.

³⁴ Transcript of hearing on 16 January 2009, ICC-01/04-01/06-T-104-ENG-ET, page 1, line 11 to page 38, line 4.

their own discretion.³⁵ The Chamber put the matter shortly as follows:

The Chamber will ask questions whenever the Judges consider it appropriate, ensuring that the Defence rights under Rule 140(2)(d) are respected and that the parties generally have the opportunity to explore any new issues to the extent that is necessary.³⁶

13. The prosecution relies on the Chamber's earlier ruling that matters relevant to sentencing and reparations issues may be raised in the questioning of witnesses at trial;³⁷ the Chamber dealt with the matter as follows:³⁸

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.

14. It is observed that this approach is consistent with Regulation 56 of the Regulations of the Court ("Regulations"), which expressly empowers the Trial Chamber to "hear the witnesses and examine the evidence for the purpose of a decision on reparations [...] at the same time as for the purposes of trial", and therefore it is argued that the judges may question witnesses about evidence that is relevant to a possible later sentencing stage of the proceedings.³⁹ The prosecution distinguishes between the Decision under Article 74(2) of the Statute (*viz.* the Decision on whether or not the Prosecutor has proved the guilt of the accused in accordance with Article 66 of the Statute) and the determination of sentence and reparations under Articles 75

³⁵ ICC-01/04-01/06-2265, paragraph 5.

³⁶ ICC-01/04-01/06-T-104-ENG-ET, page 37, line 25 to page 38, line 3.

³⁷ ICC-01/04-01/06-2265, paragraph 6.

³⁸ Decision on various issues related to witnesses' testimony during trial, 29 January 2008, ICC-01/04-01/06-1140, paragraph 32. See also Rule 85(A)(vi) of the Rules of Procedure and Evidence of the International Tribunals for the Former Yugoslavia and Rwanda, permitting the introduction of information during trial that is relevant to sentencing.

³⁹ ICC-01/04-01/06-2265, paragraphs 6 – 7.

and 78 of the Statute – for the former, the Chamber is limited by “the facts and circumstances described in the charges”, whilst for the latter there is no such restriction.⁴⁰ Numerous authorities from the International Tribunals for the former Yugoslavia and Rwanda are cited, demonstrating that during trial those courts have considered evidence on aggravating factors for the purposes of sentence that had not been described in the applicable indictments, and including evidence of cruelty, violence and humiliation, along with the particular vulnerability of certain victims.⁴¹

15. The prosecution submits that its position “from the outset” has been that the harm suffered by certain children as a result of their conscription and enlistment, including the sexual violence and cruel treatment, is relevant to the determination of the sentence and to reparations. It is therefore contended that questions directed at those issues are appropriate.⁴² The case was opened by the prosecution as follows:⁴³

The evidence will prove that between 1st September 2002 and 13 August 2003, Thomas Lubanga systematically recruited children under the age of 15 as soldiers in his political military movement called Union des Patriotes Congolais, UPC, and its armed militia the Forces Patriotiques pour la Liberation du Congo, FPLC. Lubanga's armed group recruited, trained and used hundreds of young children to kill, pillage, and rape. The children still suffer the consequences of Lubanga's crimes. They cannot forget what they suffered, what they saw, what they did. They were 9, 11, 13 years old. They cannot forget the beating they suffered. They cannot forget the terror they felt and the terror they inflicted. They cannot forget the sounds of their machine-guns, that they killed. They cannot forget that they raped and that they were raped. Some of them are now using drugs to survive. Some of them became prostitutes, and some of them are orphaned and jobless.

16. It is argued that the Chamber is well able to attribute the correct significance to the evidence heard during the case, whether it is relevant to the issue of guilt or innocence, sentence or reparations.⁴⁴

⁴⁰ ICC-01/04-01/06-2265, paragraph 8 and footnote 8.

⁴¹ ICC-01/04-01/06-2265, footnote 8.

⁴² ICC-01/04-01/06-2265, paragraph 8.

⁴³ Transcript of hearing on 26 January 2009, ICC-01/04-01/06-T-107-ENG-ET, page 4, line 15 to page 5, line 4.

⁴⁴ ICC-01/04-01/06-2265, paragraph 9.

17. As to the suggested leading questions posed by the judges, the prosecution submits that, if this has occurred, it does not violate either the impartiality of the Bench or its obligation to demonstrate its impartiality, on the basis of the presumption that the Chamber will not prejudge the merits of the case. Indeed, it is argued that judicial leading questions will assist to clarify areas of uncertainty or to reveal matters relevant to sentence or reparations.⁴⁵
18. The prosecution, however, maintains that the parties are entitled to object to judicial questions because this “[...] could assist the Chamber in avoiding erroneous rulings”.⁴⁶

The legal representatives

19. The legal representatives criticise the defence for failing to raise this issue until the commencement of the evidence called on behalf of the accused and, as a result, they submit that the application should be treated as out of time.⁴⁷
20. It is said that the Chamber has a broad power to discover the truth, independently of the evidence presented by the parties; indeed the Bench can introduce evidence *proprio motu*. The judges’ right to question is reflected in Rule 140(2)(c) of the Rules (“[t]he Trial Chamber has the right to question a witness before or after a witness is questioned by a participant [...]”). Furthermore the court is reminded that, under Article 78 of the Statute:

In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

⁴⁵ ICC-01/04-01/06-2265, paragraphs 11 – 13.

⁴⁶ ICC-01/04-01/06-2265, paragraph 14.

⁴⁷ Réponse conjointe des représentants légaux des victimes à la Requête de la Défense aux fins de détermination des principes applicables aux questions posées aux témoins par les juges, 25 January 2009, ICC-01/04-01/06-2264, paragraphs 6 – 7.

21. Furthermore by Rule 145(1)(b) of the Rules, for the purposes of sentence, the Chamber is to:

Balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime;

and under Rule 145(1)(c) of the Rules, the Chamber shall:

[...] give consideration, *inter alia*, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; [and] the circumstances of manner, time and location.⁴⁸

22. Against that background, the legal representatives argue that the Rome Statute framework, which followed the work of the Preparatory Commission, does not limit the judges in the way in which they are permitted to question the witnesses, as suggested by the defence.⁴⁹

23. Furthermore, given the authority of the Chamber “[...] to request the submission of all evidence that it considers necessary for the determination of the truth” (Article 69(3) of the Statute), it is submitted the Chamber may admit and consider any evidence relevant to the issues in the case.⁵⁰

24. The representatives contend that if the Chamber is limited, as argued by the defence, to questions concerning the facts and circumstances described in the “Decision on the confirmation of charges”, this would inevitably undermine its authority to determine the truth (under Article 69(3) of the Statute) and to take into account all the factors relevant to sentencing (under Article 78 of the Statute), for which wider material may be admissible.⁵¹

⁴⁸ ICC-01/04-01/06-2264, paragraph 8.

⁴⁹ ICC-01/04-01/06-2264, paragraph 9.

⁵⁰ ICC-01/04-01/06-2264, paragraph 10.

⁵¹ ICC-01/04-01/06-2264, paragraph 11.

25. The representatives rely on examples of the approach taken by other national and international criminal courts, in particular the ICTY, for example, ICTY Trial Chamber II, in the *Hadžihasanović* case, held that “[...] it appears that the Chamber is fully entitled to put questions to witnesses in order to fulfil its duty in the truth-finding process [...]”.⁵²

26. In addition, in the same ICTY Decision, the Trial Chamber underlined, against the background of Rule 85(B) of the Rules of that Tribunal that:

[...] it is sometimes difficult for the parties to deduce the purpose sought by the Chamber when questioning witnesses; that this purpose can only be the search for the truth, as for example when the Chamber is faced with contradictions between witness statements, between a witness statement and a document in the case file, or in order to assess the content of a document;⁵³

and

[...] the probative value to be attributed to evidence can be determined only at the end of the trial, in the light of all the evidence tendered.⁵⁴

27. The legal representatives submit that, absent any contrary indications from the Rome Statute framework, it is for the Chamber to determine the form and nature of the questions it poses.⁵⁵

28. The legal representatives suggest that, even if some of the judicial questioning has been suggestive in nature, this cannot lead to doubts as to the impartiality of the Bench.⁵⁶ It is argued that the effect of the jurisprudence of the European Court of Human Rights (“ECtHR”) is that a judge is presumed impartial

⁵² ICC-01/04-01/06-2264, paragraph 18; ICTY, *The Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-T, Trial Chamber II, Decision on Defence motion seeking clarification of the Trial Chamber’s objective in its questions addressed to witnesses, 4 February 2005, page 5.

⁵³ *Ibid.*, page 6.

⁵⁴ *Ibid.*, page 7.

⁵⁵ ICC-01/04-01/06-2264, paragraph 22.

⁵⁶ ICC-01/04-01/06-2264, paragraphs 24 – 25.

unless and until the contrary is demonstrated.⁵⁷

29. Additionally, the legal representatives referred to the *Hadžihasanović* case for a summary of the approach of the ICTY to the issue of alleged judicial bias:

[...] according to the case-law of the Tribunal, a “Judge should [...] be subjectively free from bias, [and...] there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias”; that impartiality must be assessed with regard to the perception of a hypothetical fair-minded observer with sufficient knowledge of the actual circumstances to make a reasonable judgement; that this hypothetical fair-minded observer is in a position different to that of the parties.⁵⁸

30. Although the representatives submit they should be similarly placed as counsel for the parties, they argue that it would act against the independence of the judiciary to permit the defence to object to questions posed by the Bench. The Chamber is reminded of the passage from its Oral Decision of 16 January 2009,⁵⁹ (see paragraph 12 above) dealing with the order of questioning, and on this basis, it is suggested that the rights of the parties – and particularly the defence – are adequately preserved.⁶⁰

II. Relevant provisions

31. In Accordance with Article 21(1) of the Statute, the Chamber has considered the following provisions:

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

⁵⁷ ICC-01/04-01/06-2264, paragraphs 26 – 27.

⁵⁸ ICTY, *The Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-T, Trial Chamber II, Decision on Defence motion seeking clarification of the Trial Chamber’s objective in its questions addressed to witnesses, 4 February 2005, page 5.

⁵⁹ ICC-01/04-01/06-T-104-ENG-ET, page 1, line 11 to page 38, line 4.

⁶⁰ ICC-01/04-01/06-2264, paragraphs 32 – 39.

with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

[...]

Article 69 of the Statute
Evidence

[...]

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.

Article 74 of the Statute
Requirements for the decision

[...]

2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.

Article 76 of the Statute
Sentencing

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.

Rule 140 of the Rules of Procedure and Evidence
Directions for the conduct of the proceedings and testimony

[...]

2. [...]

(b) The prosecution and the defence have the right to question that 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);

Rule 145 of the Rules of Procedure and Evidence
Determination of sentence

1. In its determination of the sentence pursuant to article 78, paragraph 1, the Court shall:

(a) Bear in mind that the totality of any sentence of imprisonment and fine, as the case may be, imposed under article 77 must reflect the culpability of the convicted person;

(b) Balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime;

(c) In addition to the factors mentioned in article 78, paragraph 1, give consideration, *inter alia*, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.

2. In addition to the factors mentioned above, the Court shall take into account, as appropriate:

[...]

(b) As aggravating circumstances:

[...]

(iii) Commission of the crime where the victim is particularly defenceless;

(iv) Commission of the crime with particular cruelty or where there are multiple victims;

[...]

**Regulation 56 of the Regulations of the Court
Evidence under article 75**

The Trial Chamber may hear the witnesses and examine the evidence for the purposes of a decision on reparations in accordance with article 75, paragraph 2, at the same time as for the purposes of trial.

III. Analysis and conclusions

Introduction

32. The Chamber will address each of the contentions of the defence, in the order set out above. However, it is necessary first to highlight the central proposition underlying this application: actual bias is not alleged, but instead it is suggested by the defence that further judicial questions posed to witnesses called by the accused, directed at criminality outwith the facts and

circumstances described in the charges, could lead to an unacceptable appearance of either bias or preconceived opinions on the part of the Bench, particularly if they are framed as hitherto. Additionally, it is suggested that in any event the judges are not permitted to put questions relating to criminality that is not covered by the facts and circumstances described in the charges.

The subject-matter of the questions put by the judges

33. The defence has erroneously attempted to suggest that the limitations imposed on the Chamber as regards the Decision on the charges (*viz.* Article 74(2) of the Statute) prevents the judges from asking questions that may relate to other “criminal acts”.⁶¹

34. As to the Decision under Article 74(2) of the Statute, the position is clear:

The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.

35. The Appeals Chamber, has held that the expression “the decision shall not exceed the facts and circumstances described in the charges” has the effect that:

[...] new facts and circumstances not described in the charges may only be added under the procedure of article 61 (9) of the Statute. [...] it is the Prosecutor who, pursuant to article 54 (1) of the Statute, is tasked with the investigation of crimes under the jurisdiction of the Court and who, pursuant to article 61 (1) and (3) of the Statute, proffers charges against suspects.⁶²

36. However, these restrictions are not determinative of the present issue. In the Chamber’s 29 January 2008 Decision on the scope of the questioning by the parties, it held that:

⁶¹ ICC-01/04-01/06-1140, paragraph 32.

⁶² Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, 8 December 2009, ICC-01/04-01/06-2205, paragraph 94.

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.⁶³

37. On 25 November 2008 the Chamber ruled as follows as regards its approach to the timing of evidence relating to sentencing issues:

In our view, flexibility and fairness are the guiding principles in this regard. We will consider each and every application as to when evidence that relates to sentence should be given on its own merits if it is suggested that it should be introduced during the trial rather than during a separate sentencing hearing, and we will investigate case by case the circumstances of each particular witness. We will bear in mind the suggestion that we should try to avoid the unnecessary duplication of evidence or repeat visits to The Hague from individuals who ordinarily live in the Democratic Republic of the Congo whilst ensuring that the interests of the accused and his right to a fair trial are not undermined.

There will, in any event, be a separate sentencing hearing if the accused is convicted on one or more charges, and accordingly, this issue only arises if it is proposed that evidence that would ordinarily be advanced at that separate sentencing stage should be given instead during the trial.

Therefore, if this issue does arise at any stage during the trial process, we are to be alerted about it in advance so that we can make a separate and discrete decision on it before the evidence is reached.⁶⁴

38. Therefore, in order to ensure the proceedings are expeditious and to avoid recalling witnesses unnecessarily, the Chamber may hear evidence, during the trial, which is relevant to a possible sentencing stage. For the determination of any sentence, under Rule 145(1)(b) of the Rules, the Chamber must "[b]alance all the relevant factors, including any mitigating and aggravating factors", and the Chamber considers that testimony relating to the particular defencelessness of the victims (Rule 145(2)(b)(iii)), and any

⁶³ Decision on various issues related to witnesses' testimony during trial, 29 January 2008, ICC-01/04-01/06-1140, paragraph 32.

⁶⁴ ICC-01/04-01/06-T-99-ENG-ET, page 39, line 11 to page 40, line 4.

“particular cruelty” they experienced as a result of their enlistment, conscription and use (Rule 145(2)(b)(iv)) may be relevant for determination of a sentence in this trial, should that stage be reached. Indeed, under Rule 145(1)(c), it is the duty of the Chamber to “give consideration [...] to the extent of the damage caused, in particular the harm caused to victims and their families”.

39. The Chamber earlier set out its approach as to the legitimacy of hearing evidence on reparations at the same time as evidence for the Article 74(2) Decision, as follows:⁶⁵

120. In the judgment of the Chamber, Regulation 56 of the Regulations does not, as suggested by the defence, undermine the rights of the defence and the presumption of innocence. The objective of this provision is to enable the Chamber to consider evidence at different stages in the overall process with a view to ensuring the proceedings are expeditious and effective. This will enable the Chamber to avoid unnecessary hardship or unfairness to the witnesses by removing, where appropriate, the necessity of giving evidence twice. This will guarantee the preservation of evidence that may be unavailable to the Chamber at a later stage of the proceedings.

121. In discharging its judicial function, the Chamber will be able, without difficulty, to separate the evidence that relates to the charges from the evidence that solely relates to reparations, and to ignore the latter until the reparations stage (if the accused is convicted). Should it emerge that evidence relating to reparations introduced during the trial may be admissible and relevant to the determination of the charges, consideration will need to be given in open court as to whether it is fair for the Chamber to take this into account when deciding on the accused's innocence or guilt. The Trial Chamber has borne in mind that it has a statutory obligation to request the submission of all evidence that is necessary for determining the truth under Article 69(3) of the Statute, although this requirement must not displace the obligation of ensuring the accused receives a fair trial.

122. The Chamber does not agree with the prosecution's concept of a wholly "blended approach" because there will be some areas of evidence concerning reparations which it would be inappropriate, unfair or inefficient to consider as part of the trial process. The extent to which reparations issues are considered during the trial will follow fact-sensitive decisions involving careful scrutiny of the proposed areas of evidence and the implications of introducing this material at any particular stage. The Trial Chamber may allow such evidence to be given during the trial if it is in the interests of individual witnesses or victims, or if it will assist with the efficient disposal of issues that may arise for determination. However, the Chamber emphasises that at all times it will ensure that this course does not involve any element of prejudgment on

⁶⁵ Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119.

the issue of the defendant's guilt or innocence, and generally that it does not undermine the defendant's right to a fair trial.

40. Furthermore, in establishing the true context of, and background to, the facts and circumstances described in the charges, the Chamber will inevitably receive evidence relating to other alleged criminality (e.g. some children who were allegedly enlisted, conscripted or used as child soldiers may have witnessed, been involved in or been the victims of a wide range of criminal offences).

41. There is no foundation in the Rome Statute framework or in any relevant jurisprudence of the Court, or otherwise, for the suggestion that the Bench is unable to ask questions about facts and issues that have been ignored, or inadequately dealt with, by counsel. For the reasons set out above, the general evidence in the case is not restricted to the facts and circumstances described in the charges and any amendments to the charges,⁶⁶ and under Article 69(3) the Chamber is entitled to request the submission of all evidence that it considers necessary for the determination of the truth.

42. Finally on this issue, the Chamber ruled on 16 January 2009 that the judges "will ask questions whenever (they) consider it appropriate, ensuring that the defence rights under Rule 140(2)(d) are respected, and that the parties generally have the opportunity to explore any new issues to the extent that is necessary."⁶⁷

The form of the questions

43. It is for the judges to decide whether, when they intervene, it is appropriate to use leading questions, and addressing the defence submission that the Bench

⁶⁶ ICC-01/04-01/06-1140, paragraph 32.

⁶⁷ ICC-01/04-01/06-T-104-ENG-ET, page 37, line 25 *et seq.*

must ensure that its questions cannot be perceived as revealing a preliminary view of the court, the appropriate manner of questioning will always depend on the circumstances, which is quintessentially a matter for judicial determination.

44. Indeed, when addressing the issue of questions by the parties, the Chamber indicated that the approach will depend on the circumstances and the questioner:

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”. 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. 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. 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.⁶⁸

45. For the legal representatives of victims, the Chamber has established that there is a rebuttable presumption in favour of neutral questioning.⁶⁹

46. The Rome Statute framework, and national judicial systems generally, do not limit the role or the independence of the judges in the way suggested, and it is for the judges to decide whether, when they intervene, it is appropriate to use leading questions, depending on all the circumstances. For instance, the Bench may conclude that earlier answers given by the person testifying, or other witnesses, justify a judge dealing with an issue by way of leading rather

⁶⁸ Decision on the Manner of Questioning Witnesses by the Legal Representatives of Victims, 16 September 2009, ICC-01/04-01/06-2127, paragraph 23.

⁶⁹ ICC-01/04-01/06-2127, paragraph 28.

than neutral questioning. Generally, the Romano Germanic and the Common Law systems of law do not identify by way of a list, or a catalogue, the nature or the form of the questions that judges are entitled to ask, and such a limitation would involve a serious interference with the independence of the judiciary.

47. Finally on this issue the Bench observes in passing that the defence has materially misdescribed the nature of the judicial questions to date: generally, they have not been suggestive of any particular answer, but instead they have been framed in an open manner, leaving it to the witness to supply his or her response.

The rights of the defence to challenge questions put by the judges

48. There is no basis in the Rome Statute framework or national judicial systems generally for the suggestion that the parties (or the participants) are entitled to challenge the form or content of judicial questions. Furthermore, such an approach would put the Bench in the unrealistic position of ruling on its own questions, following objection and submissions. However, if a question is clearly put on the basis of a mistake, then counsel should appropriately bring this to the attention of the judges.

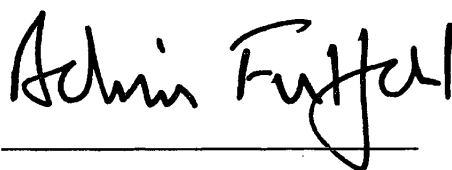
IV. Conclusion

49. In all the circumstances, the Chamber will continue to question witnesses in the manner it determines appropriate.

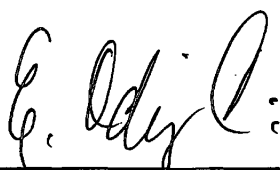
V. Post Script

50. The defence has taken out of context the statement of the Presiding Judge on 14 January 2010 that the Bench was not inclined to return to counsel's benches.⁷⁰ The judges on that occasion were referring to the proposal made by the defence that the Bench should take over the entirety of the examination of a witness on issues that the prosecution wished to explore at the end of a witness's evidence and after the usual order of questioning, as opposed simply to the judges asking such questions as seemed to them appropriate. The situation then under consideration is entirely different to the present circumstances, and it does not assist on the resolution of this issue.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 18 March 2010

At The Hague, The Netherlands

⁷⁰ ICC-01/04-01/06-T-227-CONF-ENG-ET, page 3, lines 12 – 18.