

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

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

Date: 10 December 2007

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 the procedures to be adopted for instructing expert witnesses

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") of the International Criminal Court ("Court"), in the case of Mr Thomas Lubanga Dyilo, following the Status Conference of 30 October 2007, renders the following decision on the procedures to be adopted for instructing expert witnesses:

A. Background

1. The Trial Chamber's "Order setting out schedule for submissions and hearings regarding the subjects that require early determination" included "the procedures to be adopted for instructing expert witnesses."¹ Written submissions on this issue were received from the Office of the Prosecutor ("prosecution") on 12 September 2007,² the defence on 18 October 2007,³ the legal representatives of victims a/0001/06 to a/0003/06 on 19 October 2007⁴ and the Office of Public Counsel for Victims on 9 November 2007.⁵ The Chamber also heard oral argument on the issue at the hearing on 30 October 2007.⁶

B. Submissions of the parties and participants

Prosecution

2. The prosecution's submissions advanced the view that the joint instruction of expert witnesses brought advantages to the expedition of the trial process since any objections to the qualifications of experts could be resolved at an early stage.⁷ It submitted that it would support, wherever possible, the joint instruction of experts, the separate instruction of a common expert⁸ or the instruction of an

¹ ICC-01/04-01/06-947, pages 2-3.

² Prosecution's submissions regarding the subjects that require early determination: procedures to be adopted for instructing expert witnesses, witness familiarization and witness proofing, ICC-01/04-01/06-952. See also Prosecution's submission in anticipation of a status conference, 29 March 2007, ICC-01/04-01/06-853.

³ Argumentation de la Défense sur des questions devant être tranchées à un stade précoce de la procédure: le rôle des victimes avant et pendant le procès, les procédures adoptées aux fins de donner des instructions aux témoins experts et la préparation des témoins aux audiences, ICC-01/04-01/06-991.

⁴ Conclusions des victimes a/0001/06 à a/0003/06 en vue de l'audience du 29.10.2007, ICC-01/04-01/06-992.

⁵ Observations du Bureau du conseil public suite à l'invitation de la Chambre de première instance, ICC-01/04-01/06-1020.

⁶ Transcript of hearing on 30 October 2007, ICC-01/04-01/06-T-58-ENG, pages 29-49.

⁷ ICC-01/04-01/06-853, paragraph 10.

⁸ ICC-01/04-01/06-952, paragraph 3.

expert by the Chamber directly, provided the parties are given the opportunity to submit observations on the qualification, experience, subject matter and scope of the instructions.⁹

3. When common experts are to be used by the parties, the prosecution submitted the separate instructions of the parties could be given in confidence to the expert but the prosecution acknowledged that if the expert then delivered a joint report, it would necessarily include a rehearsal of the instructions from both parties.¹⁰
4. The prosecution suggested the list of experts maintained by the Registrar is neither sufficiently extensive nor necessarily definitive and it is inevitable that the parties will instruct experts without the list.¹¹
5. The prosecution submitted that experts would be required to produce evidence, *inter alia*, as to: the context in which the conflict in Ituri took place; certain particular features of the testimony of child victim witnesses; and the alleged military role played by the defendant.¹² It informed the Court that it is actively considering suitable candidates in these areas of expertise.¹³ It stated that an expert on child witness testimony should not only provide expert analysis as to the psychological impact of the children's experiences but also be present in the courtroom during their testimony.¹⁴
6. As to the role of the legal representatives of victims, the prosecution expressed the view that the representatives should be involved in instructing expert witnesses within clearly defined limits, namely that their contribution to the

⁹ ICC-01/04-01/06-853, paragraph 11.

¹⁰ ICC-01/04-01/06-T58-ENG, page 40.

¹¹ ICC-01/04-01/06-T58-ENG, page 33, line 14; ICC-01/04-01/06-853, footnote 11.

¹² ICC-01/04-01/06-853, paragraph 9.

¹³ ICC-01/04-01/06-T58-ENG, page 36, line 2; ICC-01/04-01/06-952, paragraph 4.

¹⁴ ICC-01/04-01/06-T58-ENG, page 38.

instructions should not impact upon questions as to the guilt or innocence of the accused.¹⁵

Defence

7. The defence agreed in principle with the joint selection and instruction of expert witnesses, whilst seeking to reserve the right to appoint its own experts whenever it considered the use of joint experts to be impossible or inappropriate. The defence supports the joint instruction of experts on technical issues such as linguistic matters, transcription or matters related to the e-court. However, it is suggested that when expert testimony is required in relation to more controversial issues, the desirability of joint instruction would need to be reviewed on a case-by-case basis, since it may be of benefit to the Chamber to hear the different opinions that separate experts are able to provide.¹⁶
8. Additionally, the defence argued that it has the right to hear in court the entirety of the evidence relied on by the prosecution before divulging the accused's defence or the identities of the witnesses to be called on his behalf. Further, the defence stated that this suggested right will need to be taken into consideration when deciding on the proposed joint instruction of an expert witness. In particular, the defence submitted that until the prosecution's case is completed, it will not be in a position to indicate with certainty which expert witnesses will be needed.¹⁷

Legal Representatives of Victims

9. The legal representative of victims a/001/06 to a/003/06 submitted that in some cases it may be of considerable assistance if the victims' representatives are

¹⁵ *Ibid.*, page 47, line 6.

¹⁶ *Ibid.*, pages 42-43; ICC-01/04-01/06-991, paragraphs 73-75.

¹⁷ ICC-01/04-01/06-T58-ENG, page 44; ICC-01/04-01/06-991.

involved in the joint instruction of experts, as provided in Regulation of the Court 44.¹⁸

Representative of the Registry

10. The representative of the Registry submitted that a distinction should be drawn between experts dealing with the psychological impact that conflict may have on child soldiers and those witnesses the Chamber may permit to accompany and assist the child witnesses during the proceedings.¹⁹
11. The representative of the Registry accepted that expert witnesses who are permitted by the Chamber to give testimony and are not on the Registrar's list should be added to it for the future benefit of the Court as a whole.²⁰

C. Relevant Provisions of the Regulations of the Court

12. Regulation 44 of the Regulations of the Court provides:

1. The Registrar shall create and maintain a list of experts accessible at all times to all organs of the Court and to all participants. Experts shall be included on such a list following an appropriate indication of expertise in the relevant field. A person may seek review by the Presidency of a negative decision of the Registrar.
2. The Chamber may direct the joint instruction of an expert by the participants.
3. On receipt of the report prepared by an expert jointly instructed, a participant may apply to the Chamber for leave to instruct a further expert.
4. The Chamber may *proprio motu* instruct an expert.
5. The Chamber may issue any order as to the subject of an expert report, the number of experts to be instructed, the mode of their instruction, the manner in which their evidence is to be presented and the time limits for the preparation and notification of their report.

13. Additionally, Regulation 54 relevantly provides:

¹⁸ ICC-01/04-01/06-T58-ENG, page 44, line 22.

¹⁹ *Ibid.*, pages 45-46.

²⁰ *Ibid.*, page 46, line 5.

At a status conference, the Trial Chamber may, in accordance with the Statute and the Rules, issue any order in the interests of justice for the purposes of the proceedings on, *inter alia*, the following issues

[...]

(m) The joint or separate instruction by the participants of expert witnesses;

D. Analysis and Conclusions

Joint and Separate Experts

14. The Chamber has been mindful of the obvious savings of costs and time if maximum agreement can be achieved by the parties (and, where relevant, the participants) in their instruction of expert witnesses. In achieving that end, the Bench has concluded the work of the Court – and the interests of justice as reflected in Regulation 54(m) – would be significantly assisted if a single, impartial and suitably qualified expert is afforded the best possible opportunity to investigate areas of dispute, having been provided with the detail of the rival contentions.

15. Therefore, the Chamber is of the view that the joint instruction of experts will potentially be of great assistance to the Court because through the exercise of identifying with precision the real areas of disagreement between the parties, the expert will be placed in the best possible position to achieve a balanced and comprehensive analysis. There are two particular dimensions to this procedure that deserve mention: first, given the single expert will not be in any sense influenced, however unconsciously, by the viewpoint of only one party, he or she will be particularly able to present a balanced view of the issues, informed by the particular concerns of both sides; second, this procedure avoids any later disagreement as to the qualifications and impartiality of an expert instructed by a single party, with all the potential for delay and disruption to the trial proceedings.

16. Accordingly, the Chamber favours, where possible, the joint instruction of expert witnesses. If the parties are unable to agree upon the joint instructions to be provided to the expert, they are to provide separate instructions on all the relevant issues. This approach will maintain the benefits of having agreement as to qualifications and expertise whilst also potentially keeping some of the advantages of limiting the areas of disagreement, following the discussions between the parties. The expert will then complete one report covering all the issues that have been raised in the competing instructions. Save in exceptional circumstances, the Bench considers it impractical for the joint expert to provide separate, private reports because he or she would usually be faced with insuperable difficulties as regards confidentiality, both when discussing the issues with the parties individually and when giving evidence. The Chamber, for similar reasons and unless exceptional circumstances exist, rejects the suggestion that the parties should be able to provide confidential instructions to a joint expert. It follows that the parties when providing their letter of instruction to a joint expert must realise that it may become a public document.

17. The parties may fail to agree on the desirability of appointing a joint expert witness and, moreover, it is possible there will be areas of enquiry that are only of interest to one side. Whenever it proves impossible to agree on the instruction of a joint expert and both parties as a result seek to instruct separate expert witnesses on the same issue, the matter is to be raised as a matter of urgency before the Chamber by way of a filing by each party, setting out with full particularity the reasons why a joint expert has not been retained. The Court should be informed as to the identities of the proposed experts.

18. If a participant has been given leave to participate in the trial as regards a particular issue or area of evidence which is to be the subject of expert evidence, the parties, whenever appropriate, should notify the participant and thereby

provide him with the opportunity of contributing to the joint instructions or filing separate instructions.

19. If the parties or participants intend to appoint an expert jointly (whether instructed jointly or separately), the name of that expert is to be communicated in a public filing (unless there are good reasons for restricting the filing) in order to enable any question as to the expert's qualifications or professional standing to be raised at an early stage and before the expert has undertaken his or her work.
20. Furthermore, whenever an expert is to be appointed jointly, the instructions (whether joint or separate) are to be filed with the Chamber at an early stage to enable the Bench to provide additional instructions.
21. The Court will consider during the status conference on defence disclosure²¹ whether or not the defence is obliged to reveal the identity of, and the instructions to, any expert separately retained by the accused.
22. As envisaged in Regulation 44, the Chamber may separately instruct an expert witness if it believes there are relevant issues that are not under consideration by the parties.
23. Should the participants seek to introduce expert evidence they will need, in the first instance to make an application to the Chamber for leave. If the request is granted, the Chamber will apply the approach set out above, *mutatis mutandis*.

The List of Experts

24. The Chamber notes that the Registry has established and maintains a list of experts pursuant to Regulation 44(1). This list will potentially be of great

²¹ See *infra* paragraph 27.

assistance to the parties, participants and the Chamber in identifying relevant experts for the trial. The list should provide a wide selection of experts, all of whom will have had their qualifications verified; moreover, they will have undertaken to uphold the interests of justice when admitted to the list. However at the present time the list comprises only 28 experts and as such is of limited value. A more comprehensive list needs to be drawn up. When completed, it should at the least provide useful guidance to the parties and participants when they are selecting expert witness. The Chamber reminds the Registrar that in the establishment of the list of experts he should have regard to equitable geographical representation and a fair representation of female and male experts, as well as experts with expertise in trauma, including trauma related to crimes of sexual and gender violence, children, elderly, and persons with disabilities, among others.

25. Therefore, certainly at present, the parties and participants may seek to rely on experts not included on the list. Such experts should immediately seek admission to it, by way of application to the Registry as provided for in Regulation 44(1). The application should also be notified to the Chamber (by email to the Legal Adviser to the Trial Division), and while the Chamber will bear in mind whether or not an individual has been admitted to the list, it retains full discretion as to whether it is appropriate and fair for a proposed expert to be instructed and called in the case.

Psychological expertise and assistance to Child Soldiers Giving Evidence

26. As noted at paragraphs 5 and 10 above, the Chamber heard submissions concerning the possible presence of psychologists at court, to assist when vulnerable witnesses are giving evidence. The Chamber is persuaded of the utility of this proposal which, certainly in the first instance, should be put into effect by the Registry, and in particular by the Victims and Witnesses Unit. This does not

cover experts who may be called to give evidence on the effect of military involvement by child soldiers and their ability to provide reliable evidence and testimony, although the list of experts should be sufficiently comprehensive to provide assistance as regards witnesses in this category.

The outstanding issue

27. The Chamber has carefully considered the submission by the defence that any requirement on the accused to reveal his defence prior to the end of the prosecution evidence would infringe his fundamental rights. However, for the purposes of the present decision it is unnecessary to address that issue, although the Bench recognises that the application of the general approach to expert witnesses set out above may well necessitate an early decision on whether or not the defendant should be required give advance disclosure of his case, in full or in part. The issue will therefore form the subject matter of a status conference in the near future.

E. Orders of the Trial Chamber

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

- i) in the first instance, the parties are to instruct a joint expert on any relevant issue, if possible;
- ii) the joint expert should be jointly instructed;
- iii) if the parties cannot agree joint instructions, the joint expert is to be given separate instructions, wholly or in part;
- iv) the parties shall only instruct separate experts after that proposed course has been raised with the Chamber;
- v) to the extent that victims are participating on an issue or as regards evidence which is to be the subject of expert evidence, they are to be given

an opportunity to contribute to the expert's instructions (jointly with the parties or separately);

- vi) whenever a party or a participant intends to instruct an expert, the name of the expert is to be included in a filing;
- vii) whenever an expert is to be instructed jointly, the instructions to the expert should be filed with the Chamber at an early stage;
- viii) if a participant wishes to instruct an expert he or she should request the leave of the Chamber;
- ix) if an expert who is to be relied on is not on the list of experts, an application should be made forthwith to include his or her name on the list, and the Chamber should be notified by way of email to the Legal Adviser to the Trial Division.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 10 December 2007

At The Hague, The Netherlands