

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/06
Date: 6 February 2009

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

Instructions to the Court's expert on child soldiers and trauma

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju Duval

Legal Representatives of the Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Catherine Bapita Buyangandu
Mr Joseph Keta Orwinyo
Mr Jean Louis Gilissen
Mr Jean Chrysostome Mulamba
Nsokoloni
Mr Paul Kabongo Tshibangu
Mr Hervé Diakiese

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Ms Elisabeth Schauer

Background

1. On 10 June 2008, the Chamber informed the parties and participants that the Registry was in the process of identifying candidates to give evidence as expert witnesses on child soldiers and trauma. The Chamber stated that the parties and participants would be informed of the names of the proposed candidates in due course.¹
2. On 13 June 2008, the Trial Chamber imposed a stay in the proceedings, which was lifted on 18 November 2008.²
3. On 25 November 2008, the Chamber instructed the Registry to ascertain the availability of particular experts on child soldiers and trauma.³
4. On 17 December 2008, the Chamber issued a confidential "Order for observations on two potential expert witnesses on child soldiers and trauma and for submissions on the instructions to the expert".⁴ The Chamber informed the parties and participants of the names of two proposed experts on issues relating to child soldiers and trauma, one of which was Ms Elisabeth Schauer, an expert on the Registry's list of experts (see Regulation 44 of the Regulations of the Court). Their curricula vitae were annexed to the order. The Chamber instructed the parties to file their submissions on the suitability of these experts, and the specific areas and questions which they propose should be addressed in a report produced for the Chamber, and thereafter in oral testimony during the trial.⁵

¹ Transcript of hearing on 10 June 2008, ICC-01/04-01/06-T-89-ENG, line 24 and page 42, lines 1 and 2.

² Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401; Transcript of hearing on 18 November 2008, ICC-01/04-01/06-T-98-ENG, page 3, line 25 to page 4, line 1.

³ Transcript of hearing on 25 November 2008, ICC-01/04-01-06-T-100-EXP-ENG, page 5, lines 21-page 8, line 5.

⁴ Order for Observations on Two Potential Expert Witnesses on Child Soldiers and Trauma and for Submissions on the Instructions to the Expert, 17 December 2008, ICC-01/04-01/06-1559-Conf

⁵ *Ibid.*, paragraph 5.

5. On 6 January 2009, the Office of the Prosecutor ("prosecution") filed its observations, indicating it had no objections to the production of an expert report, or the appearance as expert witnesses, by either of the two proposed candidates.⁶ The prosecution submitted that the report should focus on the possible traumatic effects of being a child soldier, in particular on the psychological, social, developmental, and mental consequences, and should address the trauma of children who have been forcibly taken away from their family, school and community.⁷ The prosecution stated that it would be beneficial to the Court to receive the report before the testimony of the child soldiers.⁸

6. On 6 January 2009, the defence filed its observations.⁹ The defence did not make specific observations regarding the candidates' expertise. However, the defence reserved the right to file, at a latter stage in the proceedings, observations regarding the level of expertise of the experts.¹⁰

7. The defence proposed that the experts should make reference to: a) the different ways in which minors may join armed forces or groups; b) the origins and causes of this phenomenon worldwide, and in particular in the Democratic Republic of the Congo; c) the origins and causes of this phenomenon in the Democratic Republic of the Congo, in particular in Ituri; d) the methods of, and difficulties with, the demobilisation of child-soldiers; and e) the measures taken by governmental/national authorities in the face of this phenomenon, in particular in the Democratic Republic of the Congo.¹¹

⁶ Prosecution's Observations on Two Potential Expert Witnesses on Child Soldiers and Trauma and Submissions on the Instructions to the Experts, 6 January 2009, ICC-01/04-01-06-1582-Conf, paragraph 2.

⁷ *Ibid.*, paragraph 3.

⁸ *Ibid.*, paragraph 8.

⁹ Observations de la Défense relatives à l'Ordonnance de la Chambre de première instance du 17 décembre 2008, 6 January 2009, ICC-01/04-01/06-1583-Conf, paragraphs 3 and 4.

¹⁰ *Ibid.*, paragraph 3.

¹¹ *Ibid.*, paragraph 4.

8. The legal representatives of victims a/0001/06 to a/0003/06 and a/0007/08 submitted a response on 7 January 2009 on the observations of the defence and prosecution. The legal representatives supported the submissions of the prosecution and defence.¹² The legal representatives proposed a variety of questions for each expert witness, that included, *inter alia*: the reasons why children are recruited as combatants by armed groups;¹³ the socio-economic, political and other factors which make certain groups within a population more vulnerable to recruitment of their children (notably in the Democratic Republic of the Congo);¹⁴ the socio-economic, political and other factors which may encourage parents to send young children, and in particular those under the age of 15, to join armed groups;¹⁵ the socio-economic, political and other factors which may encourage children to leave their families and to enrol in armed groups;¹⁶ the social, economic and behavioural consequences, etc. of the involvement of children in armed groups, and/or their participation in the hostilities, including the use of drugs and alcohol;¹⁷ the general consequences for the families and the communities when children are recruited;¹⁸ the likely consequences on the development of a child who is recruited;¹⁹ the physiological effects on the parents of a child soldier;²⁰ the risks for the development of the child, linked to the particular factors which lead him/her to commit crimes when participating in the hostilities;²¹ the risks of developing psychological post-traumatic stress as a result of participation in hostilities;²² the risk of additional trauma as a consequence of appearing in Court as a witness or a participant and particularly when confronted with the accused;²³

¹² Réponse aux observations de la Défense et du Procureur du 6 janvier 2009, 7 January 2009, ICC-01/04-01/06-1585-Conf, paragraph 4.

¹³ *Ibid.*, paragraph 4, a).

¹⁴ *Ibid.*, paragraph 4, b).

¹⁵ *Ibid.*, paragraph 4, c).

¹⁶ *Ibid.*, paragraph 4, d).

¹⁷ *Ibid.*, paragraph 4, e).

¹⁸ *Ibid.*, paragraph 4, f), g) and h).

¹⁹ *Ibid.*, paragraph 5, a) and b).

²⁰ *Ibid.*, paragraph 5, c).

²¹ *Ibid.*, paragraph 5, d).

²² *Ibid.*, paragraph 5, e).

²³ *Ibid.*, paragraph 5, f).

and the measures which should be taken during the trial to minimize the risk of trauma to vulnerable individuals.²⁴

9. During the status conference on 12 January 2009, the Office of Public Counsel for Victims ("OPCV") was authorised to file observations on this issue within 24 hours.²⁵
10. The OPCV, as a legal representative of victims a/0047/06 to a/0052/06, a/0078/06 and a/0149/08, submitted its response on 13 January 2009.²⁶ The OPCV did not oppose the appointment of the experts,²⁷ and did not oppose the observations made by either the defence or the prosecution.²⁸ The OPCV proposed the following questions:
 - To what extent may children under 15 years of age, together with close members of their families, suffer irreparable consequences (psychological, social, behavioural *etc.*), as a result of their recruitment?²⁹ What are the criteria, if any, for evaluating the harm suffered?³⁰
 - Do measures exist which may mitigate the consequences of the recruitment of child-soldiers, for both the children and the members of their families?³¹
 - Is it possible to characterise recruitment of child soldiers under the age of 15 as voluntary? Is so, what are the criteria for evaluating whether the recruitment was voluntary rather than enforced?³²
 - Is the particular age of children under 15 years of age a factor for those undertaking the recruiting, and does age in this sense have an impact on the effectiveness of the recruitment?³³

²⁴ *Ibid*, paragraph 5, g).

²⁵ Transcript of hearing on 12 January 2009, ICC-01/04-01/06-T-101-ENG, page 49 line 18 to page 50, line 9.

²⁶ Observations du BCPV, représentant legal des victimes a/0047/06 à a/0052/06, a/0078/06 et a/0149/08, relatives aux candidatures des témoins-experts sur les questions relatives aux enfants soldats et au traumatisme ainsi qu'aux questions devant être prises en compte par les experts, 13 January 2009, ICC-01/04-01/06-1599-Conf.

²⁷ *Ibid.*, paragraph 9.

²⁸ *Ibid*, paragraph 10.

²⁹ *Ibid*, paragraph 11, a).

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid*, paragraph 11, b).

- Are children of different ages, but less than 15 years old, likely to suffer the consequences (psychological, social, behavioural, *etc.*) of enlistment and/or conscription into armed forces or groups and/or forced active participation in hostilities, with differing degrees of gravity? Is it possible to determine which age categories are the most vulnerable?³⁴
 - Whether gender constitutes a factor in recruitment and whether it is likely to influence the ease with which a child is integrated into the armed forces and groups, the effectiveness of his/her training and the manner of his/her active use in the hostilities and consequences of the recruitment.³⁵
 - Whether the role and the activities undertaken by a soldier under 15 years of age and the length of his/her recruitment is likely to: i) improve or to aggravate his/her situation within the armed forces or groups, and ii) affect the gravity of the consequences (psychological, social, behavioural *etc.*) of the recruitment.³⁶
 - Whether there is a distinction in the gravity of the consequences (psychological, social, behavioural *etc.*) suffered by child soldiers who are enrolled or conscripted into armed forces and those who are forced to participate actively in hostilities.³⁷
 - What are the consequences (psychological, social, behavioural *etc.*) suffered by former child soldiers once they have returned to their families and/or communities?³⁸
11. On 21 January 2009, the Registry informed the Trial Chamber that one of the experts was no longer willing to cooperate with the Court.³⁹ Following her withdrawal, the necessity for the confidential nature of the filings set out above has been removed, and in consequence this decision sets out matters of detail

³³ *Ibid.*, paragraph 11, c).

³⁴ *Ibid.*

³⁵ *Ibid.*, paragraph 11, d).

³⁶ *Ibid.*, paragraph 11, e).

³⁷ *Ibid.*, paragraph 11, f).

³⁸ *Ibid.*, paragraph 11, g).

³⁹ E-mail communication from the Registry to the Trial Chamber through the Legal Adviser to the Trial Division on 21 January 2009.

that no longer require protection. Therefore, the Chamber orders the Registry to re-classify as public filings ICC-01/04-01/06-1583-Conf and ICC-01/04-01/06-1599-Conf which do not refer to the expert by name. Furthermore, the prosecution and the legal representatives of victims a/0001/06 to a/0003/06 and a/0007/08 are to re-file their submissions in a public form in which the identity of this expert is removed.

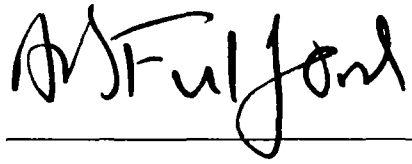
Analysis and conclusions

12. As a result of the withdrawal of one of the experts, the Chamber has been obliged to reduce the scope of the questions proposed by the parties and participants, given the specific background and area of expertise of the appointed expert, Ms Elisabeth Schauer.
13. Taking into account the submissions of the parties and participants, the Chamber hereby instructs the expert, to the extent to which her expertise permits, to address in a report, and prepare to give testimony on, the following issues, within the framework of the general subject matter and context of this trial:
 - a) The nature of relevant contemporary armed conflicts and, within that context, the vulnerability of children to recruitment, manipulation or enticement.
 - b) The relevant history, together with a description, of the phenomenon of child recruitment worldwide.
 - c) The vulnerability, in this context, of children who are orphaned, displaced, without family and community protection, *etc.*, and particularly whether children in these circumstances are at increased risk of recruitment.

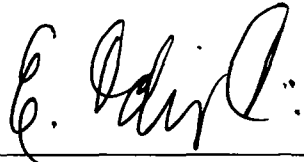
- d) The extent to which the enlistment of child soldiers can be considered “voluntary”, either on the part of the child or his or her parents; furthermore, do criteria exist to assist in distinguishing between forced and voluntary recruitment.
- e) The consequences for children who have been enlisted, conscripted or used to participate actively in armed conflict (by reference particularly to the training and discipline they are likely to be subjected to; the use of drugs, alcohol or other substances; their living conditions; sexual violence; and their role in combat) and the effect, *inter alia*, on their psychological, social, developmental, and behavioural well-being.
- f) The consequences (including any traumatic effects) for children recruited under the age of 15, along with the effects on their families and their communities (psychological, social, behavioural, developmental or otherwise); additionally, do criteria exist to assist in evaluating these consequences.
- g) The extent to which the age and gender of children under 15 years is a factor which may aggravate the consequences of recruitment (psychologically, socially, behaviourally, or otherwise); additionally, is it possible, in this sense, to differentiate different degrees of gravity or vulnerability.
- h) The modalities, including an assessment of the difficulties, of the demobilisation and reintegration of child soldiers.

- i) The consequences (psychological, social, behavioural, or otherwise) that the children may suffer once they return to their families and communities.
 - j) The procedures that are available to minimise any additional trauma being caused to former child soldiers when giving evidence in court, particularly if this happens away from their homes and in the presence of the accused.
 - k) May the trauma a child has experienced interfere with his or her ability to testify, and do criteria exist for identifying this possibility.
 - l) The protective and/or special measures that may assist in avoiding additional trauma or hardship to child witnesses appearing before the Court.
14. The expert is instructed to provide answers to the above questions, where possible, making any appropriate distinctions on the basis of gender.
15. The trial has commenced and the first witnesses have already appeared in Court. In order to give Ms Elisabeth Schauer sufficient time to prepare her report and testimony, whilst also ensuring that the evidence relating to child soldiers is presented in an appropriate overall context, the Chamber directs that the report is submitted to the Court, on a public basis, no later than 25 February 2009. The parties and participants are directed to identify by way of public filings any supplementary questions for her consideration, no later than two weeks following notification of the report.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Dated this 6 February 2009

At The Hague, The Netherlands