

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

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

Date: 18 February 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

**Decision Inviting Observations from the Special Representative of the Secretary
General of the United Nations for Children and Armed Conflict**

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

Others

Ms Radhika Coomaraswamy,
Special Representative of the Secretary-
General for Children and Armed Conflict
Mr Jaap E. Doek, Professor of Law

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 inviting observations from the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict:

A. Background and submissions

1. On 4 January 2008, the Registrar submitted to the Chamber a request by the Under Secretary General and Special Representative of the Secretary-General of the United Nations for Children and Armed Conflict, Ms Radhika Coomaraswamy (“Special Representative”), dated 7 December 2007, in which she requested leave to submit written observations in the case of Mr Thomas Lubanga Dyilo on the following matters:¹
 - a) The definition of “conscripting or enlisting” of children as soldiers and, *inter alia*, bearing in mind a child’s particular vulnerability, the distinctions between the two formulations – conscription or enlistment.
 - b) The correct interpretation of the expression “using them to participate actively in the hostilities”, considering the multiple and changing roles children play in military or other conflicts, and particularly in relation to the role of girls in armed forces.
 - c) The problems relating to the voluntary nature of children joining armed groups or forces and the defence of duress (Article 31(1)(d) of the Rome Statute (“Statute”).

¹ Submission by the Registrar of correspondence received within the context of Rule 103 of the Rules of Procedure and Evidence, ICC-01/04-01/06-1105-Conf, ICC-01/04-01/06-1105-Conf-Anx1 and ICC-01/04-01/06-1105-Conf-Anx2.

- d) The objective elements of the charges (Article 25 of the Statute) particularly given the risk that children under the age of fifteen years will be conscripted or enlisted into national armed forces or armed groups or used to participate actively in the hostilities is inevitably high due to the nature of some contemporary armed conflicts.
 - e) The mental element of the charges, and in particular the interpretation to be given to the word “knowledge” in Article 30(3) of the Statute and the approach in this regard adopted by the Pre-Trial Chamber in the present case.
 - f) The Court’s jurisdiction generally, along with issues of admissibility, particularly as regards crimes that are allegedly committed on a widespread basis and as part of a policy or plan.
2. On 23 January 2008 the Office of the Prosecutor (“prosecution”) filed its response to the request of the Special Representative, in which it recognised the “unique insight and expertise” of the Special Representative, and submitted that her written submissions “would be of assistance to the Trial Chamber”. The prosecution supported the Special Representative’s request to the extent that the areas outlined therein may arise and require consideration in the course of the trial.²
 3. The defence response of 28 January 2008 requested the Chamber to declare the submission by the Special Representative as inadmissible, to deny participation by her as *amicus curiae* and to refuse her request to participate during the trial.³ In examining whether the criteria identified by the

² Prosecution’s Response to the Submission by the Registrar of correspondence received within the context of Rule 103 of the Rules of Procedure and Evidence, ICC-01/04-01/06-1126-Conf, page 2.

³ Réponse de la Défense à la “Submission by the Registrar of correspondence received within the context of Rule 103 of the Rules of Procedure and Evidence”. ICC-01/04-01/06-1137-Conf, page 7.

prosecution in the present case for admissibility of *amicus curiae* observations are met,⁴ the defence argued that the areas included in the Special Representative's request have not arisen, at this stage of the trial, for consideration by the Chamber.⁵ It observed that rather than wishing to assist the Court with a question of law or fact relevant to the determination of the guilt or innocence of the accused, the Special Representative's aim appears to be to raise public awareness of the views and objectives of her organisation.⁶ The defence further contended that the participation of a third party which supported the prosecution would seriously impact upon the principle of equality of arms.⁷

4. Addressing the specific requests of the Special Representative, the defence submitted that pursuant to the jurisprudence of international tribunals, observations introduced by *amici curiae* must be limited to legal questions, and therefore the suggested "case-by-case inquiry taking into account [each] child's particular vulnerability"⁸ would be inappropriate.⁹ On the Special Representative's application to describe her first-hand experience, the defence submitted material of this kind could only be presented by expert witnesses.¹⁰ Regarding the request to comment on the defence of duress, the defence pointed out that this is not currently an issue in the case, and thus these submissions are irrelevant.¹¹ It was further argued that on the issues of the 'objective' and the general 'mental' elements of the charges, the Court's jurisdiction and the admissibility of the case, the Special Representative has no particular competence justifying her intervention as *amicus curiae*.¹²

⁴ *Ibid*, paragraph 11.

⁵ *Ibid*, paragraph 14.

⁶ *Ibid*, paragraph 18.

⁷ *Ibid*, paragraph 19.

⁸ ICC-01/04-01/06-1105-Conf-Anx1, paragraph 1.

⁹ ICC-01/04-01/06-1137, paragraph 20.

¹⁰ *Ibid*, paragraph 21.

¹¹ *Ibid*, paragraph 22.

¹² *Ibid*, paragraphs 23-25.

5. The legal representatives of the victims did not file any submissions on this matter.

B. Relevant Provisions

6. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered the provisions of Rule 103 of the Rules of Procedure and Evidence (“Rules”):

Rule 103

***Amicus curiae* and other forms of submission**

1. At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.
2. The Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1.
3. A written observation submitted under sub-rule 1 shall be filed with the Registrar, who shall provide copies to the Prosecutor and the defence. The Chamber shall determine what time limits shall apply to the filing of such observations.

C. Analysis and Conclusions

7. The central matter to be determined on this application is whether the Chamber will be assisted in its “proper determination” of the issues in the case by receiving the particular assistance that can be supplied by the Special Representative. Given her role on behalf of the Secretary-General of the United Nations, and particularly bearing in mind that her work focuses on the plight of children in armed conflict and that she works closely with competent international bodies to ensure the protection of children in these situations, the Chamber has determined that she will be able to supply information and assistance of direct relevance on certain issues that otherwise will not be available to the Court.

8. The Chamber has carefully considered the defence arguments that *amicus curiae* observations should be admitted only on legal questions and that factual submissions by a non-participant in the position of the applicant should only be allowed, if at all, as expert testimony. It is not necessary for the Chamber to resolve this issue because on an assessment of the merits of the various requests, the issues in respect of which the Chamber is minded to allow the Special Representative to make submissions are restricted to matters of law. In this regard, it needs to be stressed that the requirement suggested by the Special Representative of “(determining) which crime (conscripted or enlistment) has been committed on a case-by-case inquiry,” is not to propose a “case-by-case” factual inquiry during submissions but rather addresses the approach to be taken by the Chamber. Therefore, the Special Representative does not, as has been suggested by the defence, propose, as part of her submissions, to engage in a factual examination of the particular circumstances of each child.

9. Given that the six charges faced by the accused all relate to alleged criminality concerning child soldiers, certain of the legal issues raised by the Special Representative are clearly relevant to the present proceedings: they fall within the scope of the case of Mr Thomas Lubanga Dyilo and will be under consideration during the trial, as can be anticipated by the decision of Pre Trial Chamber I confirming the charges and the prosecution’s summary of presentation of evidence.¹³

10. Turning to the specific areas in respect of which leave has been requested, on the basis of the information provided, the Chamber is not persuaded that consideration of the defence of duress or the nature of contemporary armed conflicts (paragraphs 1(c) and (d) above) will at this stage benefit from submissions by the Special Representative: duress is not an issue in the case and

¹³ Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803-tEN; Submission of the Prosecution’s Summary of Presentation of Evidence, 19 December 2007, ICC-01/04-01/06-1099 and ICC-01/04-01/06-1099-Anx.

any relevant factors relating to the nature of contemporary armed conflicts are factual issues that can be addressed appropriately by the prosecution. Similarly, as there is no application from the prosecution to broaden the charges against the accused, the Chamber sees force in the defence submissions that the Special Representative's request in paragraph 1(f) above does not appear to relate to any known issue in the trial. Accordingly, the Chamber refuses leave to address these issues. As regards the mental element of the charges (paragraph 1(e) above), the Chamber considers that the Special Representative in her request has not provided sufficient justification in support of the proposed intervention on this issue.

D. Decision of the Trial Chamber

11. Pursuant to Rule 103 of the Rules, the Trial Chamber invites Ms Radhika Coomaraswamy, Under Secretary General and Special Representative of the Secretary-General for Children and Armed Conflict to submit in writing her observations, on the following issues, within 28 days of the notification of the present decision:

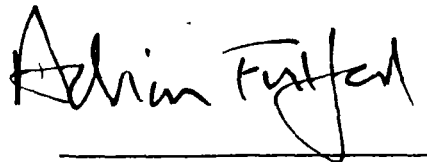
- a) The definition of "conscripting or enlisting" children, and, bearing in mind a child's potential vulnerability, the manner in which any distinction between the two formulations (i.e. conscription or enlistment) should be approached;
- b) The interpretation, focussing particularly on the role of girls in armed forces, of the term "using them to participate actively in the hostilities".

12. The Trial Chamber orders the Registrar to reclassify as "Public" the Submission by the Registrar of correspondence received within the context of Rule 103 of the Rules of Procedure and Evidence (ICC-01/04-01/06-1105-Conf and annexes)

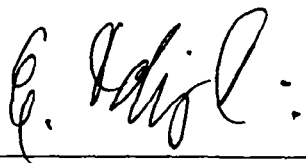
and the parties responses thereto (ICC-01/04-01/06-1126-Conf and ICC-01/04-01/06-1137-Conf).

13. The Trial Chamber further orders the Registrar to provide the Special Representative with the public versions of the Decision on the confirmation of charges and the summary of presentation of evidence in order to assist her submissions.¹⁴
14. The parties and participants are to provide any written response to the observations submitted by the Special Representative within 10 days of the notification of the said observations.

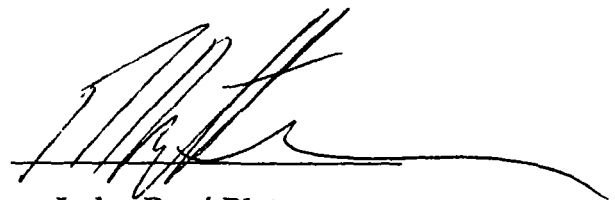
Done in both English and French, the English version being authoritative.



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 18 February 2008

At The Hague, The Netherlands

¹⁴ *Ibid.*