

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

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

Date: 14 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
**Order for submissions on whether two judges of the Trial Chamber may
hold a hearing**

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 Mabile
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

1. On 28 January 2008, the majority of the Trial Chamber issued an Order, marked "*Confidential – ex parte prosecution and Victims and Witnesses Unit only*",¹ scheduling a hearing on 29 January 2008 at 11.30 to examine an issue arising as a result of previous confidential – *ex parte* filings. In particular, following the filing on 25 January 2008 by the Registrar of a report on the status of referrals informing the Chamber that decisions on applications for protection of a number of witnesses would be delayed,² and the fact that the extended deadline for final disclosure expired on 31 January 2008,³ Judge Fulford and Judge Odio Benito scheduled an urgent hearing. At the start of the hearing the judges first attempted to establish whether, given Judge Blattmann was abroad on leave, two judges could investigate the matter at a hearing.

2. Judge Blattmann did not agree to the scheduled hearing due to the fact that he was away from the seat of the Court. It was his opinion that pursuant to Article 39(2)(b)(ii) of the Statute, which requires that the functions of the Trial Chamber are to be carried out by three judges of the Trial Division, it would not be appropriate to hold an oral hearing with only two judges present. Therefore, Judge Blattmann considered that the appropriate course of action was to ask for written submissions on the issues in order to comply with the Statute requirement that all three judges of the Trial Chamber participate in its functions.

3. At the hearing, as a preliminary issue, oral observations were invited on whether, in light of Article 39(2)(b) of the Statute, a hearing may lawfully take place before only two judges of the Chamber.⁴

¹ Scheduling Order, ICC-01/04-01/06-1133-Conf-Exp.

² Victims and Witnesses Unit report on the status of referrals, ICC-01/04-01/06-1131-Conf-Exp.

³ Transcript of hearing on 13 December 2007, ICC-01/04-01/06-T-65-ENG, pages 10-11.

⁴ Transcript of hearing on 29 January 2008, ICC-01/04-01/06-T-73-CONF-EXP-ENG, page 1, lines 15-20.

4. In the submission of the Office of the Prosecutor ("prosecution"), the drafters of the Court's texts had not provided for the possibility of two judges exercising the powers of the Trial Chamber, and particularly by way of oral hearings.⁵ Whilst highlighting its willingness to find a practical solution to the issue of the absence of one judge, the prosecution expressed concern that Judge Blattmann would not be in a position to put questions to the parties on the matters raised in their submissions.⁶ The prosecution also submitted that an alternate judge could take over on a temporary basis if a permanent member of the Bench was away from the seat of the Court but agreed that an alternate judge would only replace a judge of the Chamber who is unable to attend for the proceedings on a permanent basis.⁷ In the circumstances, it argued that the Chamber could designate a Single Judge to conduct this hearing and other hearings in the absence of Judge Blattmann,⁸ a step the prosecution considered to be within the Chamber's competence since pursuant to Article 61(11) of the Statute, the Trial Chamber may exercise the functions of the Pre-Trial Chamber.⁹

5. It was submitted on behalf of the Registry that a hearing before only two judges of the Chamber does not prevent judicial functions (in their substantive sense) from being exercised by the Chamber.¹⁰ Assuming that no decision was taken on the parties' submissions prior to consulting Judge Blattmann (who would be able to ask further questions if necessary during a subsequent hearing), and that the Chamber simply heard argument during the hearing, the Registry did not have objections.¹¹

⁵ ICC-01/04-01/06-T-73-CONF-EXP-ENG, page 2, lines 21-23.

⁶ *Ibid.*, page 3, lines 1-9.

⁷ *Ibid.*, page 3, line 10 to page 4 line 6.

⁸ *Ibid.*, page 2, lines 24-25.

⁹ *Ibid.*, page 5, lines 5-10.

¹⁰ *Ibid.*, page 5, lines 22-23.

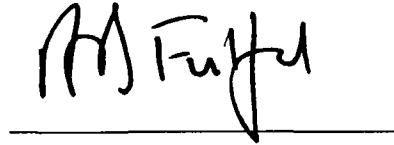
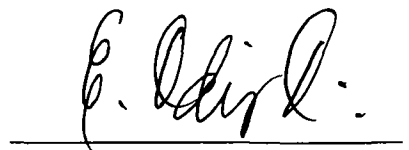
¹¹ *Ibid.*, page 6, lines 2-22.

6. Having heard arguments, the majority of the Chamber decided that the hearing should not continue, and would be postponed until Judge Blattmann returned from his leave.¹²
7. The Chamber thereafter unanimously suspended the deadline for final disclosure on 30 January 2008.¹³
8. The issue of the legality under the Statute and Rules of Procedure and Evidence of a hearing in the presence of only two of the judges of a Chamber is of undoubted importance and potential consequence, particularly since this situation may arise again in the future. In those circumstances, this question should be determined only after the parties and the participants have had an opportunity to advance submissions on the matter (in writing and orally) and following deliberations between all three of the judges of the Chamber. Accordingly, the issue will be listed for consideration at a status conference on Wednesday 12 March at 10.00. Written submissions are to be filed by 16.00 on Wednesday 27 February 2008.

¹² *Ibid*, page 7, lines 6-12.

¹³ Decision suspending deadline for final disclosure, ICC-01/04-01/06-1141.

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


Judge Adrian Fulford
Judge Elizabeth Odio Benito
Judge René Blattmann

Dated this 14 February 2008

At The Hague, The Netherlands