

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/06
Date: 27 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 vs. THOMAS LUBANGA DYILO**

Public

Prosecution's submission on whether two judges of the Trial Chamber may hold a hearing

The Office of the Prosecutor

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**Legal Representative of victims a/0001/06 to
a/0003/06 and a/0105/06**

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Background

1. On 28 January 2008, the Trial Chamber scheduled an *ex-parte* hearing for 29 January 2008 to hear observations by the Prosecution and the Victims and Witnesses Unit ("VWU") on issues related to witness protection.¹ The decision was signed by Presiding Judge Fulford and Judge Odio Benito, as Judge Blattmann was absent from the seat of the Court. The decision indicated that Judge Blattmann was consulted and that he did not agree with the scheduling of the hearing in his absence on the basis of Article 39(2)(b)(ii) of the Statute.²
2. At the 29 January 2008 hearing ("Hearing"), Presiding Judge Fulford and Judge Odio Benito represented the Trial Chamber. Upon commencement of the Hearing, the Presiding Judge invited oral submissions by the participants, on the issue of whether in light of Article 39(2)(b)(ii) of the Statute a hearing may lawfully take place before only two judges of the Chamber.³
3. The Prosecution submitted that the drafters of the Court's texts had not provided for the possibility of two judges exercising the powers of the Trial Chamber, particularly in the context of holding a hearing.⁴ The Prosecution further submitted that it would generally be in favour of coming to practical and interim solutions,⁵ and the Trial Chamber may be empowered by Article 61(11) to designate a single judge to conduct a hearing in the absence of a member of the Trial Chamber.⁶

¹ ICC-01/04-01/06-1133-Conf-Exp.

² *Ibid*, at page 3.

³ Transcript of the hearing on 29 January 2008, ICC-01/04-01/06-T-73-CONF-EXP-ENG, page 1, lines 15-20.

⁴ *Ibid*, page 2, line 21 to page 3, line 15.

⁵ *Ibid*, page 5, lines 13-18.

⁶ *Ibid*, page 2, lines 23-25 and page 5, lines 5-10.

4. The Registry submitted that two judges are not prevented from discharging Trial Chamber's judicial duties as long as the absent judge is not deprived of the opportunity to put questions to the participants of the hearing at a later date before the Trial Chamber takes decisions.⁷
5. Upon hearing the submissions, the Presiding Judge adjourned the Hearing, deciding that it should not continue before the Trial Chamber addresses with care what can be done in a situation that a judge is absent from the seat of the Court.⁸
6. On 14 February 2008, the Trial Chamber issued an Order⁹ for written submissions on the issue of legality under the Statute and the Rules of Procedure and Evidence of a hearing in the presence of only two of the judges of a Chamber.

Discussion

General framework

7. Article 39(2)(b)(ii) requires that the functions of the Trial Chamber be carried out by three judges of the Trial Division. Article 74(1) reiterates that this composition is maintained at each stage of the trial and throughout the Trial Chamber's deliberations.
8. The second sentence of Article 74(1) provides a mechanism to deal with the absence of a member of the Trial Chamber, namely the replacement of the member who is

⁷ *Ibid*, page 5, line 20 to page 6, line 22.

⁸ *Ibid*, page 7, lines 6-12.

⁹ ICC-01/04-01/06-1168.

unable to continue attending the trial with an alternate judge appointed by the Presidency. However, the language of Article 74(1) clearly suggests that the provision has been conceived to resolve permanent absence of a judge and only at the stage of trial proper. Accordingly, the Prosecution submits that Article 74(1) does not represent a suitable option in the present context.

Discussion of the legality of a hearing in the presence of only two judges

9. The Prosecution recognizes that expeditious conduct of proceedings is an important element of the accused person's fundamental right to be tried without undue delay.¹⁰ As was submitted by the Prosecution during the Hearing, the interests of justice may require that practical and interim solutions be sought to avoid unnecessary delay or interruption of the proceedings where a three-judge Trial Chamber cannot be constituted due to the temporary incapacity of one or more judges.¹¹
10. The Prosecution submits that there is no basis in the existing statutory framework for only two judges of the Trial Chamber to carry out its functions. Unlike the ICTY and ICTR Rules of Procedure and Evidence¹² which provide that two judges of the Trial Chamber may hold a hearing or conduct other judicial tasks in certain circumstances, the drafters of the Court's texts have not foreseen or endorsed that particular modality.¹³ The Court's texts envisage that the judicial functions of the Court are to be discharged either by the full Chamber or - at the pre-trial stage and in compliance

¹⁰ Article 67(1)(c).

¹¹ *Supra* note 5.

¹² ICTY Rules of Procedure and Evidence Rule 15 *bis* and ICTR Rules of Procedure and Evidence Rule 15 *bis*.

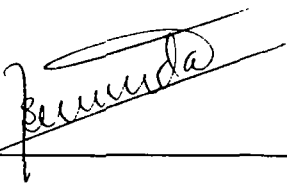
¹³ In the legislative development of Articles 39 and 74, the key draft texts contemplated three options to address a judge's inability to conduct the proceedings: (1) adjournment of the proceedings if the inability is limited to a short term; (2) replacement of the judge; (3) retrial. The focus was primarily on the replacement of a judge midway through a trial that had already commenced and assumed that the alternate judge had previously been present throughout the proceedings.

with pre-established criteria¹⁴ - by a single judge of the Pre-Trial Chamber.¹⁵ Against this background, the Prosecution submits that two judges may not, consistent with the Court's statutory basis, convene a hearing of the Trial Chamber.

11. The Prosecution submits, however, that the Trial Chamber can designate a single judge to hold a hearing, and more generally to discharge the *pre-trial* functions of the Trial Chamber.

Request

12. The Prosecution requests the Trial Chamber to refrain from holding hearings in the presence of only two judges of the Trial Chamber.



 J Luis Moreno-Ocampo
 Prosecutor

Dated this 27th day of February 2008
 At The Hague, The Netherlands

¹⁴ Rule 7 and Regulation 47.

¹⁵ Articles 39(2)(b), 57(2), 64(4) and 74(1).