

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

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

Date: 28 March 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

Prosecution's submission on the designation of an alternate judge

The 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

Background

1. On 28 January 2008, the Trial Chamber scheduled an *ex-parte* hearing for 29 January 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, but not by Judge Blattmann, who was absent from the seat of the Court.²
2. At the 29 January 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) of the Statute, a hearing may lawfully take place before only two judges of the Chamber.³ The Prosecution used the opportunity at the Hearing to mention to the Trial Chamber the possibility of designating an alternate Judge.⁴
3. On 14 February, the Trial Chamber issued an Order⁵ (14 February Order) 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 Trial Chamber. The 14 February Order stated:⁶

¹ ICC-01/04-01/06-1133-Conf-Exp.

² *Ibid*, at para 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 ICC-01/04-01/06-T-73-CONF-EXP-ENG, page 3, lines 8 to 14, and page 4, lines 3 to 6.

⁵ ICC-01/04-01/06-1168.

⁶ *Ibid*, at para.8. *Emphasis by the Prosecution.*

“The issue of the legality under the Statute and Rules of Procedure and Evidence of a hearing in the presence of only two judges of a Chamber is of undoubted importance and potential consequence, *particularly since this situation may arise again in the future.*”

4. On 5 March, the Trial Chamber issued a scheduling order,⁷ and included the issue of “whether two judges may hold a hearing” in the agenda for the status conference of 12 March.⁸ On 12 March,⁹ in the context of the discussion whether or not two judges may hold a hearing, the Prosecution mentioned again the possible designation of an alternate judge.¹⁰ The Trial Chamber invited the Prosecution to submit its further observations in writing.¹¹

Discussion

The rationale behind the designation of an alternate judge

5. The drafting history of Article 74(1), second sentence, reveals the underlying rationale for designating alternate judges – to ensure that the sudden inability of a member of the Trial Chamber to continue attending the trial does not

⁷ ICC-01/04-01/06-1209.

⁸ *Ibid*, at para. 1.

⁹ Following the submission of written observations.

¹⁰ ICC-01/04-01/06-T-78-CONF-FRA, p 5, lines 1 to 3.

¹¹ *Ibid*, page 5, lines 16 to 20.

prevent compliance with the principle of immediacy.¹² The drafting history of Rule 39 confirms this purpose.¹³

6. Furthermore, the designation of alternate judges aims to avoid appeals on the ground that a judge was not present at each stage of the trial and throughout the deliberations of the Trial Chamber as required by Article 74(1), first sentence.¹⁴

Situations and conditions that merit the designation of an alternate judge

7. The Prosecution submits that the designation of an alternate judge is merited if (i) the designation is possible given the Court's resources,¹⁵ and (ii) there is a risk of future unavailability of a judge deriving from the anticipated length of a trial or because there are signs that one of the judges may become unable to continue to be present throughout the trial.¹⁶

¹² Preparatory Committee on the Establishment of an International Criminal Court, Rules of Procedure: Working Paper, submitted by Argentina, UN Doc. [A/AC.249/L.6](#), 13 August 1996, rules 9 to 13.

¹³ Preparatory Commission for the International Criminal Court, Working Group on Rules of Procedure and Evidence, Proposal concerning Part 4, Section 2, of the Rules of Procedure and evidence: Inclusion of a new Rule 20 (F): Alternate and substitute Judges, submitted by Denmark, UN Doc. [PCNICC/1999/WGRPE\(4\)/DP.3](#), 6 August 1999.

¹⁴ O. Triffterer, "Article 74: Requirements for the decision", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden: Nomos (1999) p 958, § 12.

¹⁵ F. Terrier, "The Procedure before the Trial Chamber", in A. Cassese *et al.* (eds.), *Rome Statute of the International Criminal Court* (Cambridge, 2002), at 1313.

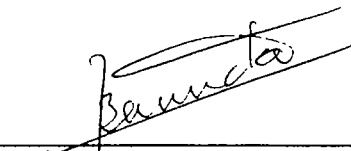
¹⁶ O. Triffterer, "Article 74: Requirements for the decision", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden: Nomos (1999) p 958, § 14.

Situation in the present case

8. In applying the criteria as developed above, the Prosecution submits that if the Trial Chamber considers that there is a risk of future unavailability of one of its judges, the Court's resources provide for the designation of an alternate judge. The upcoming trial in the LUBANGA case is currently the sole trial of the Court. Three judges of the Trial Division currently not involved in trials are available to be assigned pursuant to Article 74(1), second sentence.
9. In addition, the Prosecution submits that the fact that the upcoming trial in the LUBANGA case is the first trial of the Court should be particularly taken into account.

Request

10. The Prosecution submits to the Trial Chamber its opinion to consider the possibility to designate one alternate judge pursuant to Article 74(1), second sentence.


 f Luis Moreno-Ocampo
 Prosecutor

Dated this 28th day of March 2008
 At The Hague, The Netherlands