

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 6 December 2007

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 on the procedures to be adopted for *ex parte* proceedings

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TRIAL CHAMBER I (“Trial Chamber”) of the International Criminal Court (“Court”), in the case of Mr Thomas Lubanga Dyilo, following the Status Conference of 1 and 2 October 2007, renders the following decision on the procedures to be adopted for *ex parte* proceedings:

A. Background

1. The history to this issue is set out in the Trial Chamber’s decision of 26 September 2007 entitled “Redacted version of Decision on the prosecution’s filing entitled ‘Prosecution’s provision of information to the Trial Chamber’ filed on 3 September 2007”.¹ That decision relates to an *ex parte* filing by the Office of the Prosecutor (“prosecution”), providing the Chamber with information concerning six witnesses and their current circumstances, but which did not include a request for any order or relief.² It is unnecessary for these purposes to describe the detail of that decision. To enable the parties and participants to make submissions during the Status Conference on 1 and 2 October 2007, the Trial Chamber decided to issue a public (redacted) version of the decision (originally filed *ex parte* under seal on 18 September 2006)³ in advance of the hearing. However, having made that order on 26 September 2006, the public (redacted) version was removed from the court website by the Registry after only a few hours because the Victims and Witnesses Unit indicated for the first time that they wished to argue there should be further excisions. In the decision of 18 September 2007 the Trial Chamber indicated that it would entertain submissions as regards further redactions, although no deadline for filing written arguments was imposed. The Registry removed the decision from the website as a precautionary measure but without first

¹ ICC-01/04-01/06-963-Anx1.

² ICC-01/04-01/06-944-US-Exp.

³ ICC-01/04-01/06-955-US-Exp.

seeking the permission of the judges. Whether that action was appropriate is something the Chamber has considered below. Against that background, the parties and participants were asked to consider at the Status Conference on 1-2 October:

- the extent of the obligation to notify the other party or participants of any *ex parte* application or filing; and
- the extent of the obligation to set out the legal basis of the filing.⁴

B. Relevant provisions of the Statute, Rules of Procedure and Evidence

2. The general rule provided for in Articles 63(1) and 67(1)(d) of the Statute is that it is the right of the accused to be present at the trial. Indeed, according to Article 63(2), only if the accused “continues to disrupt the trial” does the Statute allow for him to be removed from the courtroom, but the Trial Chamber “shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom”.
3. Rule 134 of the Rules of Procedure and Evidence (“Rules”) sets out that all motions from the prosecution or the defence relating to the trial proceedings shall be in writing and shall be served on the other party, unless the request is for an *ex parte* procedure.
4. *Ex parte* proceedings are expressly provided for in five situations, in accordance with Article 72 of the Statute and Rules 74, 81, 83, and 88 of the Rules. According to Article 72(7)(a)(i), the Trial Chamber may hold hearings in the absence of the parties for reasons of national security. Under Rule 74(4),

⁴ The Trial Chamber’s Agenda for the Hearing on Monday 1st October 2007, 25 September 2007, ICC-01/04-01/06-962, page 3.

the Trial Chamber may seek the views of the prosecution *ex parte* to determine if an assurance on self incrimination should be given to a witness. Rule 81(2) provides that where material or information is in the possession or control of the prosecution which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the prosecution may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. In this situation, the matter must be heard on an *ex parte* basis by the Chamber. Rule 83 permits the prosecution to request a hearing on an *ex parte* basis for a determination of whether evidence in the possession of the accused is considered exculpatory under Article 67(2). Finally, Rule 88(2) permits the Trial Chamber, if it is necessary, to hold *ex parte* hearings to determine whether to order special measures, for instance, to facilitate the testimony of a witness.

5. Requests for protective measures under Rule 87(2)(a) of the Rules shall not be filed *ex parte*, and thus all parties to the proceedings must be fully notified of any such requests.
6. It is clear from the above that the Statute and the Rules do not attempt to define the limits of *ex parte* procedures by, for instance, the creation of a single statutory and procedural scheme, but instead they deal with *ex parte* issues solely in relation to the particular matters that have been covered in those two legal texts.

C. The jurisprudence of Pre-Trial Chamber I and the Appeals Chamber

7. *Ex parte* filings and *ex parte* hearings have taken place during the pre-trial stage prior to the confirmation of charges, and there has been some judicial consideration of the principles that are to be applied to these procedures. Most notably, in her decision of 19 May 2006 (the facts of which it is unnecessary for

the Chamber to rehearse), the Single Judge, having analysed a considerable body of authoritative material, concluded at paragraph 13 that:

insofar as *ex parte* proceedings in the absence of the Defence constitute a restriction on the rights of the Defence, *ex parte* proceedings under Rule 81 (4) of the Statute shall only be permitted subject to the Prosecution showing in its application that:

- i. it serves a sufficiently important objective;
- ii. it is necessary in the sense that no lesser measure could suffice to achieve a similar result; and
- iii. the prejudice to the Defence interest in playing a more active role in the proceedings must be proportional to the benefit derived from such a measure.⁵

8. The Single Judge highlighted the distinction that exists between two particular kinds of *ex parte* proceedings – those where the other participants are aware of them but have no opportunity to be present and those where they are entirely unaware that the proceedings are occurring.⁶ However, the Appeals Chamber in its decision of 13 October 2006, whilst not disagreeing with the judge’s assessment of the limitations to be imposed on *ex parte* proceedings, reversed her decision that whenever an application is filed *ex parte* under Rule 81 the other participant must be made aware in an *inter partes* filing of the fact that such an application was filed as well as its legal basis and, with respect to an application under Rule 81(4), of any request for *ex parte* proceedings that might be contained in such an application.⁷ In essence the Appeals Chamber concluded that the Pre-Trial Chamber’s decision did not provide for any flexibility and that informing the other participants may in some cases not be appropriate, particularly by reference to internationally recognized human rights standards.

⁵ Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence, ICC-01/04-01/06-108-Corr.

⁶ *Ibid*, paragraph 14.

⁷ Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence”, ICC-01/04-01/06-568, paragraphs 65-67.

D. Submissions of the parties and participants

9. The prosecution, supported by the defence and the participants, submitted that *ex parte* filings should be the exception, used only when necessary. The prosecution suggested that applications should be approached on a case-by-case basis, thereby avoiding inflexibility.⁸ The prosecution contended that the level of notification to the other party and participants that is necessary will depend on the issues involved in the particular *ex parte* procedure and this should usually include an explanation of the legal basis.⁹ The prosecution's submission was summarised in the following way:

A party making an *ex parte* application shall notify the other party or participants of the fact of that application and the legal basis, unless to do so would prejudice the interests being protected by the *ex parte* nature of the application. And second, if the party making an *ex parte* application proposes not to notify the other party or participants of the fact and/or the legal basis of that application, then the party should set out its reason for doing so in the application itself.¹⁰

10. The defence referred to the need for maximum transparency. It submitted that when an application is filed, the defence should be informed of the filing along with its legal basis. Thereafter, the defence should be supplied with a redacted version of the filing and if the original reason for making the redaction disappeared, then the documents in their entirety, together with a transcript of the *ex parte* hearing should be made available.¹¹
11. The representative of victims a/0001/06 to a/0003/06 was in broad agreement with the prosecution. The representative expressed reservations over transcripts of *ex parte* hearings becoming public documents, because of the need to protect the issues that had been discussed in closed session, even if,

⁸ Transcript of hearing on 2 October 2007, ICC-01/04-01/06-T-54, page 5

⁹ *Ibid.*, pages 6-7.

¹⁰ *Ibid.*, page 7.

¹¹ *Ibid.*, page 9.

for instance, subsequently the identity of a witness or a victim had been revealed.¹²

E. Analysis and conclusions

12. In the light of those matters, the Chamber considers it is appropriate to act on the following principles, which can be shortly stated. First, *ex parte* procedures are only to be used exceptionally when they are truly necessary and when no other, lesser, procedures are available, and the court must ensure that their use is proportionate given the potential prejudice to the accused. Second, even when an *ex parte* procedure is used, the other party should be notified of the procedure, and its legal basis should be explained, unless to do so is inappropriate. Accordingly, to this limited but important extent there should be a flexible approach. Complete secrecy would, for instance, be justified if providing information about the procedure would risk revealing the very thing that requires protection. Furthermore, the Chamber stresses that it should always be provided with a full explanation of the legal basis and a factual justification for the *ex parte* procedure. If the applicant has not notified the other party of the fact of the application or its legal basis, then the reason for not doing so should also be set out for the Chamber's consideration. To the extent that victims have been granted the right to participate on particular issues or as regards particular areas of evidence, consideration should be given to including them in any relevant notification procedure (in the sense outlined above), and if this is inappropriate, providing the Bench with an explanation in writing as to why they have not been informed.

13. The Chamber adds, by reference to the decision of 26 September 2007,¹³ that *ex parte* filings should, save exceptionally, include a request to the Chamber to

¹² *Ibid*, pages 9 and 10.

¹³ *Supra*, footnote 1.

make a decision on a relevant issue, rather than being used merely as a means of keeping the Bench informed of unfolding events, unless the Chamber has requested that they should be utilized for this purpose. The Chamber explained the matter as follows in its decision of 26 September 2007 at paragraph 32:

It seems to us that exceptional circumstances will need to exist in order to justify any party or participant providing information to the court on an *ex parte* basis when no relief is sought or subsequent application is made on the basis of the material, and when the Chamber has not invited that course of action. Not least, it could cause uncertainty at a later stage in the proceedings: if the bench is merely asked to "receive" private information, judicial inactivity could later be interpreted as approval by the chamber either of any action provided proposed by the party or participant, or of any past events that are revealed.

The prosecution indicated it did not disagree with that conclusion.¹⁴

14. The Chamber turns next to the submissions of the defence that once the reasons for the *ex parte* procedure no longer apply, consideration should be given to providing full disclosure, and including the details of the *ex parte* application and any *ex parte* hearing. The Chamber is unable to accept this submission. It is important that the parties and the participants should be able to make applications and submissions, when strictly necessary, on a private basis. The Chamber considers that it would undermine the proper functioning of this procedure if the expectation was that everything that had been said during the hearing or set out in the application would be made public once the reason for protection ceased to exist. That could discourage the parties and participants from revealing information of a sensitive, confidential or personal nature. The Chamber will keep the need for necessary disclosure permanently under review, to ensure that everything that properly assists the parties and the participants is disclosed, but rejects the suggestion that there is a

¹⁴ ICC-01/04-01/06-T-54, page 7.

presumption that once the need for protecting the material has gone, the content of the *ex parte* procedure should be disclosed.

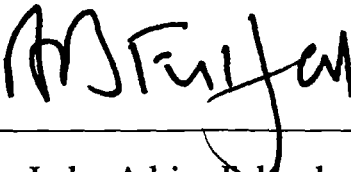
15. Turning to the removal by the Registry of the Trial Chamber's decision of 26 September 2007¹⁵ from the Court's website, once a judicial decision has been made, only a further judicial decision can reverse it, whether on reconsideration by the Chamber or on appeal. If it is feared that serious adverse consequences, not already fully ventilated before the Bench, may result from an order if it is not speedily rectified, the judges should be contacted via the Legal Adviser to the Trial Division. What should never happen is that an order of a Chamber is simply countermanded by an officer of the Court without express judicial consent.

16. The Chamber heard from the Registrar *ex parte* as regards the need for further redactions regarding the safety of the witnesses.¹⁶ It is sufficient to indicate that none of the arguments advanced in private diminished our confidence in the Chamber's original assessment that the decision of 18 September 2007 was published in an appropriate form on 26 September 2007. The Trial Chamber therefore orders the Registrar to restore the decision to the website forthwith as a public document.

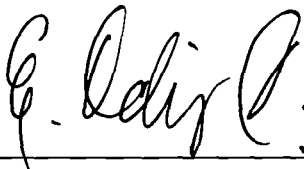
¹⁵ *Supra*, footnote 1.

¹⁶ ICC-01/04-01/06-T-53-CONF-EXP, pages 1-31.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 6 December 2007

At The Hague, The Netherlands