

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 22 May 2008

TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

SITUATION
IN THE DEMOCRATIC REPUBLIC OF THE CONGO IN THE CASE OF THE
PROSECUTOR v. THOMAS LUBANGA DYILO

Public Document

Decision on whether two judges alone may hold a hearing

- and -

**Recommendations to the Presidency on whether an alternate judge should be
assigned for the trial**

Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms Fatou Besouda

Mr Ekkehard Withopf

Counsel for the Defence

Ms Catherine Mabile

Mr Jean-Marie Biju Duval

Legal Representatives of the Victims

Mr Luc Walley

Mr Franck Mulenda

Ms Catherine Bapita Buyangandu

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

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Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

TRIAL CHAMBER I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court" or "ICC"), in the case of Mr Thomas Lubanga Dyilo, following the Status Conference on 12 and 13 March 2008, renders the following decision on whether two judges sitting alone may hold a hearing and expresses its recommendations to the Presidency as to whether an alternate judge should be assigned to the trial:

A. Procedural history

1. On 28 January 2008, the majority (Judges Fulford and Odio Benito) of the Chamber scheduled an urgent hearing for 29 January 2008, the Order having been marked "Confidential – *ex parte* prosecution and Victims and Witnesses Unit only",¹ for the purpose of considering a confidential – *ex parte* filing by the Registrar on 25 January 2008, entitled "Victims and Witnesses Unit report on the status of referrals".² The report informed the Chamber that decisions on applications for protection of a number of witnesses would not occur until mid-February 2008,³ notwithstanding the expiry of the impending extended deadline for final disclosure of the Office of the Prosecutor ("prosecution")'s evidence on 31 January 2008.⁴ In relation to these witnesses, full disclosure was dependent on the implementation of appropriate protective measures. The hearing was arranged as a simple fact-finding exercise to enable the Chamber to gain a better understanding of the difficulties that had been expressed in writing, adjourning any decision until there had been an opportunity to consult with Judge Blattmann who was abroad and who, moreover, did not agree that a hearing with only two judges present should occur.
2. At the commencement of the hearing, as a preliminary issue, the two judges invited oral submissions on the issue of whether a hearing may lawfully take

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

² ICC-01/04-01/06-1131-Conf-Exp.

³ ICC-01/04-01/06-1131-Conf-Exp, paragraph 7.

⁴ ICC-01/04-01/06-1131-Conf-Exp, page 2.

place before only two trial judges. Having heard argument, the judges decided the hearing should be adjourned and the issue postponed until Judge Blattmann's return. Thereafter, in its "Order for submissions on whether two judges of the Trial Chamber may hold a hearing"⁵ the Chamber described the matter in the following way:

8. The issue of the 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 is of undoubted importance and potential consequence, particularly since this issue 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 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.

3. Additionally, during the Status Conference on 12 March the Bench, having heard preliminary oral argument, invited written submissions on the possibility of designating an alternate judge.⁶ The prosecution filed written submissions on the matter on 28 March 2008.⁷

B. Relevant provisions

Article 39 ("Chambers") of the Rome Statute ("Statute")

[...]

2. (a) [...]

- (b) (i) [...]

(ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;

Article 74 ("Requirements for the decision")

1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.

⁵ Order for submission on whether two judges of the Trial Chamber may hold a hearing, ICC-01/04-01/06-1168

⁶ ICC-01/04-01/06-T-78-CONF-ENG, page 7, lines 5-11.

⁷ Prosecution's submission on the designation of an alternate judge, 28 March 2008, ICC-01/04-01/06-1246.

Rule 38 (“Replacements”) of the Rules of Procedure and Evidence (“Rules”)

1. A judge may be replaced for objective and justified reasons, *inter alia*:

- (a) Resignation
- (b) Accepted excuse;
- (c) Disqualification;
- (d) Removal from office;
- (e) Death.

[...]

Rule 39 (“Alternate judges”) of the Rules

Where an alternate judge has been assigned by the Presidency to a Trial Chamber pursuant to article 74, paragraph 1, he or she shall sit through all the proceedings and deliberations of the case, but may not take part therein and shall not exercise any of the functions of the members of the Trial Chamber hearing the case, unless and until he or she is required to replace a member of the Trial Chamber is that member is unable to continue attending. Alternate judges shall be designated in accordance with a procedure pre-established by the Court.

C. Submissions of the parties and participants

Submissions of the prosecution

4. In its written submissions the prosecution requested that the Chamber “refrain from holding hearings in the presence of only two judges”.⁸ In support of this request, it noted that Article 39(2)(b)(ii) of the Statute “requires that the functions of the Trial Chamber be carried out by three judges of the Trial Division”⁹ and that Article 74(1) of the Statute emphasises this requirement for each stage of the trial and during deliberations. The power given to the Presidency to designate an alternate judge under Article 74(1) “[...] to replace a member of the trial Chamber if that member is unable to continue attending”, in the prosecution’s submission, only addresses the permanent absence of a judge during the trial and thus did not apply to temporary absences.¹⁰ Whilst the prosecution recognised

⁸ Prosecution’s submission on whether two judges of the Trial Chamber may hold a hearing, 27 February 2008, ICC-01/04-01/06-1192, paragraph 12.

⁹ *Ibid*, paragraph 7.

¹⁰ *Ibid*, paragraph 8.

that it was in the interests of justice to avoid unnecessary delays¹¹ it submitted there is no power which authorises two judges to sit alone.¹² The prosecution submitted that the opportunity for a single judge to undertake judicial work is limited to the judges of the Pre-Trial Chamber.¹³

5. In its oral submissions the prosecution encouraged the Chamber to designate an alternate judge as a precaution against one of the judges becoming permanently unavailable.¹⁴
6. In its written submissions, filed on 28 March 2008,¹⁵ the prosecution reinforced its request to the Chamber “to consider the possibility to designate one alternate judge”.¹⁶ Relying on the drafting history of Article 74(1) of the Statute and Rule 39 of the Rules, which regulate the designation of an alternate judge, the prosecution submitted that the aim of these provisions was to ensure that the sudden inability of a member of the Chamber to continue attending the trial does not contravene the principle of immediacy,¹⁷ and to avoid appeals on the grounds 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).¹⁸ The prosecution formulated a test that should be applied to this issue, namely the Chamber should address two questions: first, whether the Court has the resources to provide for an alternate judge and, second, whether there is a risk of future unavailability of one of the judges on account of the anticipated length of the trial or because there are “signs” that one of the judges may be unable to continue.¹⁹ Finally, the prosecution submitted that the Chamber should also bear in mind that the instant case is the first, and sole, trial of the Court and that three judges

¹¹ *Ibid.*, paragraph 9

¹² *Ibid.*, paragraph 10. See ICTY Rules of Procedure and Evidence, Rule 15, and ICTR Rules of Procedure and Evidence, Rule 15.

¹³ *Ibid.*, paragraph 10.

¹⁴ ICC-01/04-01/06-T-78-CONF-ENG, page 6, lines 12-15.

¹⁵ Prosecution’s submission on the designation of an alternate judge, 28 March 2008, ICC-01/04-01/06-1246

¹⁶ *Ibid.*, paragraph 10.

¹⁷ *Ibid.*, paragraph 5.

¹⁸ *Ibid.*, paragraph 6.

¹⁹ *Ibid.*, paragraph 7(i) and (ii).

of the Trial Division are currently not engaged in trials and, accordingly, are available to fulfil this role.²⁰ However, the prosecution's request was confined to a proposal that the Chamber should "consider the possibility".²¹

Submissions of the Legal Representatives of Victims

7. In the joint submissions of the legal representative of victims a/0001/06 to a/0003/06 and of victim a/0105/06 it was suggested that the presence of all the judges is necessary during all parts of the process.²² Whilst they acknowledged the need to avoid delays,²³ they contended that the texts of the Court do not envisage the Chamber sitting without one of its members.²⁴ Rather, they submitted that an alternate judge would have to be appointed in accordance with Article 74(1) of the Statute and Rule 39 of the Rules if a judge became permanently unavailable.²⁵ However, in the submission of the legal representatives, Rule 39 requires that the alternate judge is consistently present and thus must be appointed prior to the commencement of the trial.²⁶

Submissions of the Office of Public Counsel for Victims

8. The Office of Public Counsel for Victims ("OPCV") in its submissions annexed to those of the legal representatives²⁷ contended that the texts do not explicitly provide for the Chamber to sit in the absence of one of its members.²⁸ In support, the OPCV provided a detailed history of the *travaux préparatoires* for the Statute²⁹

²⁰ *Ibid*, paragraphs 8 and 9.

²¹ *Ibid*, paragraph 10.

²² Observations communes des représentants des victimes sur la question de tenir une audience en présence de deux juges, 27 February 2008, ICC-01/04-01/06-1193 paragraph 9.

²³ *Ibid*, paragraph 3.

²⁴ *Ibid*, paragraph 4.

²⁵ *Ibid*, paragraph 4.

²⁶ ICC-01/04-01/06-1193 paragraph 7.

²⁷ ICC-01/04-01/06-1193-Anx.

²⁸ *Ibid*, paragraph 4.

²⁹ *Ibid*, paragraphs 5-12

and the Rules,³⁰ set in the context of the practices of other international courts and tribunals,³¹ and it asserted that there was no intention amongst the States Parties for the Chamber to sit other than *in banco*.³² The OPCV submitted that whenever a judge is unable to sit for reasons that include those enumerated in Rule 38(1) of the Rules he or she should be replaced by a judge chosen by the President applying Article 74(1) of the Statute.³³ Finally, the OPCV submitted that whenever a judge is temporarily absent, suspending the proceedings is the only available option.³⁴

Submissions of the defence

9. In the written submissions of the defence,³⁵ it was argued that all the judges of the Chamber must be present at each stage of the proceedings and during their deliberations.³⁶ The defence relied on Article 39(2)(b)(ii) of the Statute which requires that the functions of the Chamber *shall* be carried out by three judges,³⁷ and it was argued that in the absence of a provision such as Article 39(2)(b)(iii) (which permits the functions of the Pre-Trial Chamber to be carried out by a single judge of that Chamber), the State Parties clearly intended the judges of the Chamber to sit *in banco*.³⁸ The defence highlighted Article 74(1) which provides that all judges shall be present at every phase of the trial and throughout their deliberations.³⁹ The defence joined the submission of others that the correct interpretation of Article 74(1) is that it provides for the replacement of a judge only when he or she is permanently unavailable, and that, in consequence, a

³⁰ *Ibid*, paragraphs 13-18.

³¹ *Ibid*., paragraphs 20-25

³² *Ibid*, paragraphs 26-27.

³³ *Ibid*, paragraph 18.

³⁴ *Ibid*, paragraph 18.

³⁵ Conclusions de la Défense relatives à l' « Order for submissions on whether two judges of the Trial Chamber may hold a hearing », du 14 février 2008, 27 February 2008, ICC-01/04-01/06-1194.

³⁶ *Ibid*, paragraphs 3-7.

³⁷ *Ibid*, paragraph 4

³⁸ *Ibid*, paragraph 5

³⁹ *Ibid*, paragraph 7.

temporary replacement is unlawful.⁴⁰ Finally, the defence submitted that whilst Article 61(11) of the Statute allows the Chamber to assume all the functions of the Pre-Trial Chamber, it is not permitted to modify its composition for the exercise of these functions.⁴¹

D. Analysis

10. The central question which this Decision addresses is whether it is necessary at all hearings for the three judges of a Chamber to sit *in banco*. In addition to deciding on this question, recommendations for the Presidency on the issue of appointing an alternate judge are set out.

Two Judges

11. It is clear that a problem can emerge, potentially acutely, if a judge is away from the seat of the Court when an urgent issue arises that requires a hearing. Although judges who are temporarily absent can

- receive papers, electronically or otherwise;
- maintain contact with the Court (particularly with the other members of the bench, for instance by telephone and email); and
- participate in decisions which do not require a hearing,

should it become necessary to hear oral submissions, a self-evident difficulty emerges.

⁴⁰ *Ibid*, paragraph 9.

⁴¹ *Ibid*, paragraph 10.

12. For the duration of the trial, the position is clear, particularly on account of two provisions of the Statute. First, as set out above, Article 39(2)(b)(ii) provides that the functions of the Chamber shall be carried out by three judges of the Trial Division. Second, Article 74 (1) is explicit in its terms that at each stage of the trial and throughout the deliberations “all” of the judges shall be present. Accordingly, it is clear beyond doubt that during the trial the three judges shall function *in banco*. Moreover, by Article 64(8)(b), only at the trial may the presiding judge give directions for the conduct of the proceedings, thereby underlining that the presiding judge cannot adopt an analogous role to that of the single judge of the Pre-Trial Chamber during the preparatory phase before the trial commences.
13. By way of contrast, for the period following the confirmation of charges and leading up to the beginning of the trial (“the preparatory stage”), although Article 39(2)(b)(ii) has general application, the Rome Statute framework nonetheless does not contain a mirror provision to Article 74(1), stipulating that at each stage during the preparatory stage all three judges shall be present for each hearing. Likewise for this stage in the proceedings, there is no provision similar to Article 64(8)(b). Accordingly, apart from Article 39(2)(b)(ii), no specific provision exists requiring the judges to be present at each hearing during the preparatory stage and no mechanism exists to enable the Chamber to function in the event of a period of absence of a judge prior to his or her return.
14. The various options that have a statutory or regulatory basis that were canvassed during the course of argument each failed, in the view of the Trial Chamber, to provide a solution to this problem:
- a. Although by Articles 61(11) and 64(6)(a) of the Statute, the Chamber may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in the proceedings, it is impossible to read into these

provisions a power by which the Chamber may appoint one of the three judges to act as a single judge. As set out above, Article 39(2)(b)(ii) provides “[t]he functions of the Trial Chamber shall be carried out by the three judges of the Trial Division” whilst in contrast Article 39(2)(b)(iii) provides “[t]he functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence”. If the drafters of the Statute had intended both Divisions to have the same power to delegate work to a single judge, this would have been spelt out in Article 39. The difference between the provisions reflects a clear intention to restrict the opportunity to appoint a single judge to the Pre-Trial Chamber alone.

- b. Although by Article 64(4) of the Statute, the Chamber may, for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division, it may be counter-productive to attempt to delegate the kind of complicated decisions that arise during this preparatory stage to a judge or to judges of another Division who have not been involved in the complex and often interrelated issues that will have arisen following the confirmation of charges. It is likely that it would be necessary for the judge or judges to place the issue referred to them in the overall context of the Trial Chamber’s work to date, and that process would be exacting and time-consuming.
- c. The provisions of Article 74(1) of the Statute, empowering the Presidency to designate one or more alternate judge to be present at each stage of the trial, in order to replace a member of the Chamber **if that member is unable to continue attending**, restrict the involvement of the alternate judge to “presence” only, once appointed, unless and until a member of

the Chamber ceases permanently to function judicially during the trial. In our judgment, the alternate judge would not be able to participate in the work of the Chamber unless it had been decided that he or she was to act as a permanent substitute.

15. Whether or not a deliberate or accidental *lacuna* in the regulatory provisions has been identified, the effect of the Rome Statute framework, as set out above, is to provide that all three members of the Trial Chamber must be present for each hearing and status conference during the period following the confirmation of charges and leading up to the beginning of the trial (and thereafter during the trial and the Chamber's deliberations). It follows that any urgent issues that arise during the absence of a judge from the seat of the Court will be dealt with solely on the basis of written representations.

An Alternate Judge

16. As set out above, Rule 39 of the Rules stipulates the Presidency should designate alternate judges in accordance with a procedure pre-established by the Court. Particularly given that no such procedure has been established, and that the Presidency does not have the detailed knowledge and familiarity with the requirements, the length and the potential exigencies of this trial – an opinion is expressed, for consideration by the Presidency, as to the approach that should be adopted in this case.
17. The succinct formula proposed by the prosecution is wholly appropriate for resolving this issue, in that two principal considerations should be addressed, namely whether:

- i) the Court has the resources for this purpose, particularly in terms of a judge who is available to attend the entirety of the trial; and
- ii) there is an identifiable risk that for reasons such as the length of the trial, or the personal circumstances of one or more of the judges, a member of the bench may not be able to complete the trial.

18. The prosecution has correctly suggested that other factors may also arise for consideration, and it additionally asked the Chamber to bear in mind that this is the first and, at present, the only trial before the Court and that other judges of the Trial Division are currently available to fulfill this role.

19. The charges and the prosecution's evidence in this trial are not extensive in their scope: the allegations are confined to six charges concerning child soldiers and the prosecution intends to call 31 witnesses (and 2 experts). Although the Chamber is unaware of the possible length of the defence case, on the available material there are no grounds for concluding that this may turn into a lengthy trial.

20. There are no known personal circumstances relating to any of the judges which raise any concerns that one of more of them will be unable to complete this trial.

21. Although this is the first, and presently the only, trial at the ICC, and while other judges of the Trial Division are currently available, the confirmation hearing in the Court's second case is listed for 27 June 2008, and, depending on the outcome of that hearing, they may become involved in preparation for a trial should charges be confirmed in that case. In that event, if one of those judges has been appointed as an alternate judge in the instant trial, he or she would have

significant competing judicial commitments which could lead to delays in both cases. The same considerations, *mutatis mutandis*, apply if a judge of the Pre-Trial Division is appointed as an alternate judge in light not only of the current workload of that division but also the possibility of an increase in that workload as events develop.

22. Furthermore, the availability of resources within the Court to appoint an alternate judge is a consideration which is only engaged if there is a risk of a judge becoming permanently unavailable prior to the conclusion of the case. There being no known personal circumstances relating to any of the judges of the Chamber which raise any concerns that one or more of them will be unable to complete this trial, the secondary considerations of the availability of resources are irrelevant at this stage.


23. For these reasons it is recommended, for consideration by the Presidency, that an alternate judge should not be appointed in this case.

Judge René Blattmann appends a separate and concurring opinion to this decision and recommendations.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito

Dated this 22 May 2008

At The Hague, The Netherlands

Separate and Concurring Opinion of Judge Blattmann

1. On 28 January 2008, the Majority of the Trial Chamber, encompassing Judge Odio Benito and Judge Fulford issued a confidential, *ex parte* Order, scheduling a hearing on 29 January 2008.⁴² At the start of the hearing the Majority attempted to establish whether a hearing could be conducted in my absence.⁴³
2. I did not agree to the scheduled hearing due to the fact that I was away from the seat of the Court.⁴⁴ It was my 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.
3. Following oral submissions on the matter, the Majority of the Chamber decided to suspend the proceedings and reschedule upon my return to the seat of the Court.⁴⁵ The Trial Chamber requested written submissions on the issue from the parties and participants to be filed by 27 February 2008 and listed the issue for consideration at the status conference of 12 March 2008.⁴⁶ Finally, at the status conference of 12 March 2008, the prosecution was requested to submit in writing any arguments to supplement its oral request that the Trial Chamber consider appointing an alternate judge under Article 74(1).
4. While agreeing with the outcome of the Majority Opinion as to the question of whether two judges of a Trial Chamber may conduct a hearing without the presence of the full Bench, I find it necessary to attach a separate opinion in order to express my reasoning in coming to this conclusion as I am not in full agreement with the Majority Opinion's reasoning on this issue. Further, I do not think it appropriate that the Trial Chamber should advise the Presidency

⁴² Scheduling Order, ICC-01/04-01/06-1133-Conf-Exp, 28 January 2008.

⁴³ ICC-01/04-01/06-T-73-CONF-EXP-ENG, 29 January 2008, page 1, lines 15-20.

⁴⁴ ICC-01/04-01/06-1133-Conf-Exp, 28 January 2008, paragraph 3.

⁴⁵ ICC-01/04-01/06-T-73-CONF-EXP-ENG, 29 January 2008, page 7, lines 6-12.

⁴⁶ Order for submissions on whether two judges of the Trial Chamber may hold a hearing, 14 February 2008, ICC-01/04-01/06-1168.

with regard to administrative matters which the Trial Chamber has no competency over, particularly when advising them not to take action on an issue which the Presidency has not indicated that it would act upon.

Relevant Provisions

4. The following provisions from the statutory framework of the Court are relevant to the consideration of this matter:

Article 39(2)(b)(ii) of the Statute:

The functions of the Trial Chamber shall be carried out by three judges of the Trial Division

Article 74(1) of the Statute:

All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.

Submissions

5. The prosecution submitted that under the existing statutory framework there is no basis for only two judges of the Trial Chamber to carry out its functions, and therefore two judges may not convene a hearing of the Trial Chamber.⁴⁷ However, it suggested that the Trial Chamber could designate a single judge to hold a hearing, and more generally to discharge the pre-trial functions of the Trial Chamber.⁴⁸ In conclusion, the prosecution requested the Trial Chamber to refrain from holding hearings in the presence of only two judges of the Trial Chamber.⁴⁹
6. In its written submission concerning the possibility of appointing an alternate judge to the Trial Chamber, filed on 28 March 2008, the prosecution stated that if the Trial Chamber considered it a risk that during future proceedings one of

⁴⁷ Prosecution's submission on whether two judges of the Trial Chamber may hold a hearing, ICC-01/04-01/06-1192, 27 February 2008, paragraph 10.

⁴⁸ *Ibid*, at paragraph 11.

⁴⁹ *Ibid*, at paragraph 12.

its members could become unavailable, the Court's resources would provide for the designation of an alternate judge and requested from the Trial Chamber to consider the possibility to designate one alternate judge pursuant to Article 74(1).⁵⁰

7. The defence noted the obligatory nature of Article 39(2)(b)(ii) as well as calling attention to the difference in wording between paragraph (ii) and (iii) of Article 39(2)(b). It stated that should the States Parties have desired that the possibility exist for the Trial Chamber to sit with less than 3 judges it would have been expressly provided for as was done in paragraph (iii) which allows the possibility that the functions of the Pre-Trial Chamber may be performed by a Single Judge under certain circumstances. The defence also referred to Article 74(1) which provides that all judges of the Trial Chamber be present at each stage of the trial and throughout their entire deliberations. With respect to the possibility of a temporary replacement of a judge, the defence submitted that the possibility does not exist under the Statute. In its understanding of Article 74(1) the Presidency may assign an alternate judge to be present at the various stages of the proceedings, but only to permanently replace a member of the Trial Chamber who is no longer able to sit in a permanent nature. The defence notes that the possibility of applying Article 61(11) in order to allow a Single Judge of the Trial Chamber to sit for matters concerning pre trial proceedings would not be allowed under the language of the provision. Thus, the Statute provides the obligatory presence of three judges of the Trial Chamber at all times, and the role of a Single Judge cannot be applied to it. Therefore, the defence requested the Trial Chamber to declare that the Trial Chamber must be constituted of three judges for the entirety of the proceedings, with the sole exception being the replacement of a judge by the Presidency in a permanent manner.

⁵⁰ Prosecution's submission on the designation of an alternate judge, ICC-01/04-01/06-1246, 28 March 2008, paragraphs 8, 10.

8. The Victim's Representatives jointly filed submissions noting that the legislative texts of the ICC have not foreseen the possibility of a Trial Chamber holding a hearing in the absence of one of its members. However, the Victim's Representatives do suggest the possibility of appointing a replacement judge pursuant to Article 74(1) of the Statute and Rule 39 of the Rules of Procedure and Evidence. In their view, the possible procedure of appointing an alternate judge for one or more status conferences is not excluded by the respective texts and may provide a practicable solution. Finally, the Victim's Representatives do note that should an alternate judge be appointed it must be for the entirety of the status conference, rather than simply for deliberations.


Analysis and conclusions

9. Submissions from all parties and participants indicate common agreement that the Statute does not provide for the possibility of the Trial Chamber holding a hearing if any one member is absent. I agree with the arguments provided by the parties and participants and which are supported by the legal texts that pursuant to Article 39(2)(b)(ii) the three judges of Trial Chamber I must be present during any hearing in the case of Thomas Lubanga Dyilo.
10. With regard to the argument raised by the prosecution that a single judge might be appointed to carry out pre trial matters, I am not persuaded by the prosecution's suggestion. The defence position maintains that if the States Parties had envisioned that a Single Judge of the Trial Chamber could be appointed, the Statute would expressly provided for it, as was done for the Pre-Trial Division. The defence further supports its argument by noting the difference between the two chambers and the fact that they intervene at different stages of the proceedings. Moreover, it is noted that Article 74(1) provides that 'all the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations'. The defence argument is well supported by the legal texts and I agree wholly with the arguments as laid out

by the defence that the appointment of a trial chamber single judge is not permissible under the Statute.

11. Finally, addressing the request by the prosecution that the Trial Chamber consider the appointment of an Alternate Judge during the trial proceedings, I note that the Statute has not conferred upon the Trial Chamber the power to make any such appointment. Article 74(1) allows for the Presidency, rather than any specific chamber, to designate, as necessary, an Alternate Judge. Therefore, I believe that this request by the prosecution should be dismissed as the matter is not within our competency.
12. For the above reasoning, I agree with the Majority Opinion that the Trial Chamber shall be constituted of three judges for all stages and functioning of the proceedings.

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

A handwritten signature in black ink, consisting of stylized, overlapping loops and strokes, positioned above a horizontal line.

Judge René Blattmann

Dated this 22 May 2008

At The Hague, The Netherlands