

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/06
Date: 25 September 2006

PRE-TRIAL CHAMBER I

Before: Judge Claude Jorda, Presiding Judge
Judge Akua Kuenyehia
Judge Sylvia Steiner

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 Response to Request Submitted pursuant to Rule 103(1) of the Rules of
Procedure and Evidence for Leave to Participate as Amicus Curiae in the Article 61
Confirmation Proceedings**

The Office of the Prosecutor

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**Legal Representatives of Victims a/0001/06 to
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**Office of Public Counsel
for the Defence**

Ms Melinda Taylor

Other Participants

Women's Initiatives for Gender Justice
Ms Sureta Chana

Background

1. On 7 September 2006, the Women's Initiatives for Gender Justice (Applicant) filed the "Request Submitted pursuant to Rule 103(1) of the Rules of Procedure and Evidence for Leave to Participate as Amicus Curiae in the Article 61 Confirmation Proceedings"¹ (7 September 2006 Request).
2. On 19 September 2006, the Defence submitted the "Defence Response to Request on the Women's Institute² for Gender Justice to Participate as an Amicus Curiae".³

Response

3. The literal reading of Rule 103(2) provides for an opportunity to respond only once the Pre-Trial Chamber has granted leave to submit observations.
4. The Prosecution submits that Regulation 24(1) applies to the present proceedings. The 7 September 2006 Request is a "document" in terms of Regulation 22. The Applicant in its 7 September 2006 Request defines itself as a "Participant".⁴ In addition, in line with this approach, the Applicant has chosen to incorporate its observations in the 7 September 2006 Request,⁵ which it publicly filed. In their main

¹ Request Submitted pursuant to Rule 103(1) of the Rules of Procedure and Evidence for Leave to Participate as Amicus Curiae in the Article 61 Confirmation Proceedings, public, 7 September 2006.

² *Sic*.

³ Defence Response to Request on the Women's Institute for Gender Justice to Participate as an Amicus Curiae, public, 19 September 2006.

⁴ See page 1 of the 7 September 2006 Request.

⁵ See 7 September 2006 Request, at para. 7 ("If granted *amicus curiae* status, the Women's Initiatives proposes to argue as follows."). The observations span over more than ten pages, from para. 7 to para. 21.

portions, the observations detail an alleged failure of the Office of the Prosecutor (OTP) to include further charges against Thomas LUBANGA DYILO in the Document Containing the Charges. Against this background, Rule 103(2), in the Prosecution's submission, must be interpreted in a way that allows the Parties, both the Defence and the Prosecution, to respond publicly to the 7 September 2006 Request and the suggested observations.

5. In the event that the Pre-Trial Chamber does not concur with its view, the Prosecution for the reasons outlined in paragraph 4 requests the Pre-Trial Chamber to grant leave to the Prosecution to file the instant submission.

Scope of the 7 September 2006 Request

6. The Prosecution notes that the Applicant is not clear in respect of the leave it is requesting the Pre-Trial Chamber to grant:

- (i) In paragraph 1 of the Application, the Applicant, within the framework of Rule 103(1), "applies for leave to submit observations as *amicus curiae* in the article 61 proceedings".⁶

Furthermore, the Prosecution notes that the Application and the suggested observations are intermingled, thus making it difficult for the Parties to address the 7 September 2006 Request and the observations separately.

⁶ See 7 September 2006 Request, at para. 1.

- (ii) In paragraph 2 of the Application, however, the Applicant expands its request beyond the framework of Rule 103(1) and requests to be granted leave “to appear at the hearing”.⁷
 - (iii) In the title of its filing, the Applicant goes even further in requesting “leave to participate as amicus curiae in the Article 61 confirmation proceedings”.⁸ The Applicant does, however, not specify what in its view the “Article 61 confirmation proceedings” entail.
7. The Prosecution submits that at this stage Rule 103(1) provides for the submission of observations only, either in writing or orally. Rule 103(1), however, does not *per se* provide for participation in the Article 61 proceedings, at least not in the broad terms as requested by the Applicant.

Discussion

General remark

8. The Prosecution does not oppose the Applicant making its views and criticisms about the scope of the prosecution of Thomas LUBANGA DYILO known, and in fact the Applicant has done so in the media and in communications to the OTP. This, however, cannot change the scope of Article 61 as detailed below.

⁷ See 7 September 2006 Request, at para. 2 at the end. The Prosecution notes that in the present context the “hearing” can only be the Confirmation Hearing.

⁸ See 7 September 2006 Request, at page 1.

The 7 September 2006 Request is inadmissible

9. The Prosecution submits that the 7 September 2006 Request is inadmissible for the reasons detailed below.
10. Article 103(1) states that a Chamber may grant leave to an organization to submit observations provided that the Chamber deems it appropriate for the proper determination of the case. Accordingly, the issues the Applicant wishes to address must be (i) linked to the case and (ii) appropriate for its proper determination. The Prosecution submits that the 7 September 2006 Request does not meet either of these criteria.
11. The Prosecution has reviewed the jurisprudence of the ICTR, which is pertinent and specifically addresses the issues at hand.⁹ The ICTR jurisprudence establishes a number of criteria in respect of the admissibility of submissions of *amicus curiae* briefs, including, *inter alia*, that (i) the *amicus curiae* brief must deal with an issue that is relevant to the case at hand; (ii) the *amicus curiae* brief must not be used to merely advertise the views or causes of the applicant; and (iii) the relief sought by the *amicus curiae* brief must be within the authority of a Chamber, and not within the authority of the Prosecution or the Defence.
12. The Prosecution notes that the 7 September 2006 Request due to its very nature goes beyond the case at hand: The Applicant wants the Pre-Trial Chamber to request the Prosecutor to amend the charges. Furthermore, the Applicant clearly aims at

⁹ The Prosecution refers to Sarah Williams and Hannah Woolaver, *the Role of the Amicus curiae before International Criminal Tribunals*, *International Criminal Law Review* 6, 151 – 189, 2006, and the jurisprudence cited therein.

promoting its own interests without demonstrating any link to a matter capable of resolution in the proceedings. Thus, the criteria (i) and (ii) are not met.

Matters in respect of which the Applicant wants to submit observations

13. The Prosecution submits that the 7 September 2006 Request does not address a matter that falls within the authority of the Pre-Trial Chamber. Accordingly, also criteria (iii) is not met.
14. The Prosecution notes that the Applicant details¹⁰ the issues it wants to discuss as *amicus curiae* within the framework of Article 61 as follows: (i) the nature of the independence of the Prosecutor; (ii) the relationship between the Prosecutor and the Pre-Trial Chamber; (iii) the system of checks and balances in the procedures of the Court; and (iv) the role and rights of victims.
15. The Prosecution submits that these matters are specifically covered by Articles 53, 56 and 57, and - in relation to the participation of victims - by the applicable provisions governing the participation of victims. These provisions, each of them being *lex specialis* to Article 61, within their own scope and limitations, provide for regulations covering the matters the Applicant is detailing. Article 61, however, in the Prosecution's submission, has a very different, clearly defined and limited purpose, namely to regulate the procedure of the confirmation of the charges before trial. Accordingly, the issues the Applicant wants to address are not covered by Article 61 and cannot be properly discussed in the context of the confirmation proceedings, thus resulting in the 7 September 2006 Request being inadmissible.

¹⁰ See 7 September 2006 Request, at para. 5.

16. In particular, in the Prosecution's view, the Applicant misconstrues the reading of Article 61 by extending the scope and the limits of Article 61(7), and specifically of its sub-paragraphs (c)(1) and (c)(2).¹¹
17. Article 61(1) defines the scope of the Confirmation Hearing by stating that the Pre-Trial Chamber shall hold a hearing to confirm *the charges on which the Prosecutor intends to seek trial*.¹² Consequently, the scope of the Confirmation Hearing is determined by the present charges against Thomas LUBANGA DYILO as they are detailed in the 28 August 2006 Document Containing the Charges, together with the supporting evidence.
18. In mirroring the scope of Article 61(1), Article 61(7) clearly defines the role of the Pre-Trial Chamber: The Pre-Trial Chamber shall, on the basis of the Confirmation Hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes *charged*.¹³ In the Prosecution's submission, following the basic principles of legal interpretation, the *chapeau* of Article 61(7) determines the scope of subparagraphs (c)(1) and (c)(2). Consequently, any interpretation of subparagraphs (c)(1) and (c)(2) is defined and limited by that *chapeau*. Accordingly, the Prosecution submits that the interpretation by the Applicants, suggesting that these provisions entail the power of the Pre-Trial Chamber to request the Prosecutor to consider undertaking further investigations into other possible charges, lies squarely outside the scope of possible interpretations.

¹¹ In this context, the Prosecution notes that the Applicant is not able to cite any authority supporting its submission.

¹² *Emphasis* by the Prosecution

¹³ *Emphasis* by the Prosecution.

19. The Prosecution's position in interpreting Article 61(7) is supported by the language of Rule 127. Rule 127 details the procedure in the event of different decisions on multiple charges. The Pre-Trial Chamber's power to adjourn the Confirmation Hearing on "other" charges under Article 61(7)(c), whilst being ready to confirm "some" of the charges, sheds further light on the scope of Article 61(7)(c). The "some" - "other" framework in the Prosecution's view supports the interpretation that the Pre-Trial Chamber's powers in the context of the Confirmation Hearing are limited by the scope of the charges as included in the Prosecution's Document Containing the Charges.

Legislation history

20. The Prosecution has conducted a comprehensive research of preparatory works to the Rome Statute. The result of the research reveals, to the best knowledge of the Prosecution, that adding potential charges in the context of Article 61(7) as suggested by the Applicant was not even an issue of discussion. To the contrary, the discussion focused on the very different question of whether the Pre-Trial Chamber should be given the power to impose a different legal qualification to the charges presented by the Prosecution. Even in this context, however, the Legislator did not provide for such a, and significantly lesser, power than the one advocated for by the Applicant.¹⁴ In the Prosecution's view, this militates for the conclusion that the Legislator did not want the Pre-Trial Chamber in the Article 61 proceedings to exert powers that go beyond the scrutiny of the charges contained in the Document Containing the Charges.

¹⁴ The Prosecution notes that Regulation 55 specifically refers to trial proceedings and is thus not applicable to the Article 61 proceedings.

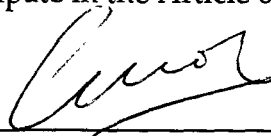
Further information

21. The Prosecution will, in the event the Pre-Trial Chamber grants leave to the Applicant to file the suggested *amicus curiae* brief, elaborate in detail on its substance, including by, *inter alia*,

- (i) addressing the factual inaccuracies in the suggested brief and its Annex 1; and
- (ii) discussing the problematic¹⁵ conclusions the Applicant is drawing in respect of legal matters related to establishing a case against Thomas LUBANGA DYILO that goes beyond the current charges.

Request

22. Accordingly, the Prosecution requests the Pre-Trial Chamber to declare the 7 September 2006 Request inadmissible and to deny leave to the Applicant to file an *amicus curiae* brief and/or to participate in the Article 61 confirmation proceedings.



Luis Moreno-Ocampo
Prosecutor

Dated this 25th day of September 2006
 At The Hague, The Netherlands

¹⁵ See in particular in para. 20 of the 7 September 2006 Application, which reveals a serious lack of understanding of the evidence which is required to establish a case.