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PRE-TRIAL CHAMBER I

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

Registrar: Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

**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
Situation in the Democratic Republic of Congo**

The Office of the Prosecutor

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Other Participants

Women's Initiatives for Gender Justice
Ms. Sureta Chana

Introduction

1. The Women's Initiative for Gender Justice (hereinafter, the "Applicant") seeks leave under Rule 103 (1) to present arguments on: (1) the role of the Pre-Trial Chamber in supervising prosecutorial discretion and (2) the criteria for determining victim status during the investigative stage.¹ The Prosecution opposes the submission of these arguments by the Applicant because they are irrelevant to any live issue before the Chamber and therefore hypothetical. Additionally, in relation to the first issue, the Prosecution submits that the Applicant is asking the Chamber to exercise powers that are more extensive than those envisaged by the Rome Statute.

Background

2. On 10 February 2006, the Pre-Trial Chamber granted the Prosecutor's application for a warrant of arrest against Thomas Lubanga Dyilo, on charges of the war crimes of enlisting, conscripting, and using children under the age of fifteen to participate actively in hostilities.²
3. On 28 June 2006, the Prosecutor informed the Pre-Trial Chamber that "he has decided to temporarily suspend the further investigation in relation to other potential charges against Thomas Lubanga Dyilo up until the close of the present proceedings pertaining to the present charges. Accordingly, the Prosecutor will not amend the charges during the present proceedings."³
4. On 7 September 2006, the Applicant filed a "Request submitted pursuant to Rule 103 (1) of the Rules of Procedure and Evidence for leave to participate as

¹ See Request submitted pursuant to rule 103(1) of the Rules of Procedure and Evidence for leave to participate as amicus curiae with confidential annex 2, ICC-01/04-313, 10 November 2006, (hereinafter "10 November 2006 Request"), para. 7.

² See Decision on the Prosecutor's Application for a warrant of Arrest, Article 58, ICC-01/04-01/06-8-US-Corr, 9 March 2006.

³ See Prosecutor's Information on Further Investigation, ICC-01/04-01/06-170, 28 June 2006 (hereinafter "28 June 2006 Information on Further Investigation"), para. 7.

Amicus Curiae in the Article 61 Confirmation Proceedings” (“7 September 2006 Request”).⁴ This filing was made in the case of *Prosecutor v. Thomas Lubanga Dyilo*.

5. On 19 September 2006, the Defence requested the Chamber to reject the 7 September 2006 Request in the “Defence Response to Request of the Women’s Institute for Gender Justice to Participate as an Amicus Curiae.”⁵
6. On 25 September 2006, the Prosecution requested 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.⁶
7. On 26 September 2006, the Pre-Trial Chamber denied leave to the Applicant to submit observations under Rule 103 and decided, *inter alia*, that the Applicant’s September 7 2006 Request had “no link with the present case”⁷ and that “the subject-matter of the Request can be dealt with only in relation to the ongoing investigation into DRC situation and not as part of the proceedings in the present case against Thomas Lubanga Dyilo”.⁸ The Chamber however invited the Applicant to re-file their request for leave to submit observations “in the record of the DRC situation.”⁹
8. On 10 November 2006, the Applicant filed a “Request submitted pursuant to Rule 103 (1) of the Rules of Procedure and Evidence for leave to participate as

⁴ See 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 (with confidential Annex 2), ICC-01/04-01/06-403, 7 September 2006 (hereinafter “7 September 2006 Request”).

⁵ See Defence Response to Request of the Women’s Institute for Gender Justice to Participate as an Amicus Curiae, ICC-01/04-01/06-442, 19 September 2006.

⁶ See 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, ICC-01/04-01/06-478, 25 September 2006.

⁷ See Decision on Request pursuant to Rule 103(1) of the Statute, ICC-01/04-01/06-480, 26 September 2006, (hereinafter “26 September 2006 Decision”), page 3.

⁸ 26 September 2006 Decision, page 3.

⁹ 26 September 2006 Decision, page 4.

amicus curiae with confidential Annex 2" ("10 November 2006 Request")¹⁰ in the DRC situation.

Discussion

9. The Prosecution submits that Regulation 24¹¹ of the Regulations of the Court entitles it to respond to the 10 November 2006 Request. The 10 November 2006 Request qualifies as a "document" under Regulation 22¹² by virtue of the reference by the Applicant to the document it filed as an "application".¹³ The Prosecution submits that by virtue of its application, the Applicant should be equated to a "participant in the case" under Regulation 24, for the confined purposes of the instant litigation.
10. This response only addresses the Applicant's request for Leave to make its submissions as *amicus curiae* under Rule 103. The merits of the Applicant's argument are only discussed herein as a means of submitting that the Rule 103 standard has not been fulfilled. In the event that the Pre-Trial Chamber grants leave to the Applicant to make its submissions, the Prosecution will at that time present full arguments on the merits of the Applicant's arguments and the contents of Annex 1 and 2 to the 10 November 2006 Request.

Rule 103 (1) of the Rules of Procedure and Evidence

11. Rule 103 (1) states that "[a]t any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or

¹⁰ 10 November 2006 Request.

¹¹ Regulation 24, paragraph 1 of the Regulations of the Court: "The Prosecutor and the defence may file a response to any document filed by any participant in the case in accordance with the Statute, Rules, these Regulations and any order of the Chamber."

¹² Regulation 22 of the Regulations of the Court: "The term 'document' shall include any motion, application, request, response, reply, observation, representation and any other submission in a form capable of delivering a written record to the Court."

¹³ For example, 10 November 2006 Request, para. 6.

grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.”¹⁴

12. The ordinary and natural meaning of Rule 103 suggests that in order to obtain leave, the Applicant must demonstrate that the Chamber’s consideration of the proposed submission would be “desirable for the proper determination of the case”.
13. The meaning of the requirement in Rule 103 has been interpreted in jurisprudence from the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for Yugoslavia (ICTY). In each of those *ad hoc* tribunals, the rule relating to *amicus* submissions, Rule 74, likewise authorizes the Chamber to permit *amicus* participation, “if it considers it desirable for the proper determination of the case.”¹⁵ The case-law from those tribunals establishes that *amicus* intervention has been permitted, only if relevant to an issue which was already in dispute in the case. By contrast, leave is denied when the proposed application was not linked to any live issue but instead raises a potential or hypothetical issue.
14. In the ICTR case of *Prosecutor v. Theoneste Bagosora*,¹⁶ for example, the Belgian government sought leave to appear as *amicus*, in part, to be heard on the issue of the power of the Tribunal to prosecute the accused pursuant to article 3 (Crimes Against Humanity) of the Statute of the Tribunal, for his alleged responsibility for killings committed by the Rwandese Armed Forces against

¹⁴ Under Rule 103(1), *amicus* briefs can be submitted either at the invitation of the Chamber or by granting of leave upon application. The Prosecution submits that the invitation extended by the Pre-Trial Chamber to the Applicant, in its decision on the Applicant’s 7 September 2006 Request, was not an invitation envisaged under Rule 103, because the Decision permitted the Applicant to “re-file their request for leave (emphasis added) to submit observations in the record of the DRC situation.”

¹⁵ Rule 74 of the RPE of the ICTR and ICTY states “[a] Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber.”

¹⁶ *Prosecutor v. Bagosora*, Case No. ICTR-96-7-T, Decision on the Amicus Curiae Application by the Government of the Kingdom of Belgium, 6 June 1998.

ten Belgian para-commandos, and by the Interhamwe militia against three members of the Belgian mission.¹⁷ The Court held that the Belgian government could present an *amicus* brief in relation to the killings of the ten para-commandos, but not in relation to the killing of the three members of the Belgian mission, because the accused was only on trial for the killing of the ten Belgian para-commandos.¹⁸ As such, the brief, insofar as it addressed the three members of the Belgian mission was deemed not relevant to the case.¹⁹

15. In *Prosecutor v. Jean Paul Akayesu*,²⁰ following the Trial Chamber's issuance of a summons to the Secretary-General of the United Nations to, *inter alia*, waive immunity of Major-General Dallaire, the Legal Counsel requested to be heard *amicus curiae* to explain the scope of lifting of the immunity of Major-General Dallaire. The Chamber considered it desirable for the proper determination of the case to invite the legal representative to make a statement in relation to that confined and tangible issue.²¹

16. The Prosecution submits, that based on the authorities cited and the jurisprudence of both the ICTR and ICTY Tribunals, the Applicant must discharge the burden of demonstrating that consideration of its proposed submission, would be desirable for the proper determination of an issue

¹⁷ See *id.*, page 2.

¹⁸ See *id.*, page 3.

¹⁹ See *id.*, page 3.

²⁰ See *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, Order granting Leave for Amicus Curiae to Appear, 12 February 1998, pages 2 and 3.

²¹ Other cases from ICTY and ICTR similarly address the issue of leave to participate *amicus*. In *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Decision on An Application by African Concern for Leave to Appear as Amicus Curiae, 17 March 1999, pages 2 and 3, the Chamber denied leave to the Applicant, an NGO, when the NGO, in part, requested leave to submit observations on penalties and restitution of property. The Chamber reasoned that the issues were not relevant to case because there were no charges of unlawful taking of property. In the ICTY case of *Prosecutor v. Milutinovic, Ojdanic and Sainovic*, Case No. IT-99-37AR73.2, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003, paras. 15 to 18, the Association of Defence Counsel of the ICTY and the International Criminal Defence of the ICTY sought permission, in part, to appear as *amicus* to make submissions to propose the review and overhaul of the Legal Aid System. The Appeals Chamber rejected the application, as the submissions "relate[d] predominantly to this larger issue," rather than the immediately present issue: whether Appellant was entitled to the allocation of additional funds for his defence during the pre-trial stage.

presented in the DRC situation, and not merely a potential issue. The Prosecution submits this burden has not been met by the Applicant in this case: being completely divorced from any identifiable issue squarely before the Pre-Trial Chamber, the Application lacks any proper basis, and should accordingly be dismissed.

No factual and legal bases for Applicant's submissions

17. The Prosecution submits that there is neither a factual nor legal basis for the granting of the Application. The proposed submission does not aid in the resolution of the issue presented in the situation, any more than it was linked to any issue in the case.²²

18. In relation to the first issue, the Applicant seeks to engage the Court in a discourse about abstract and hypothetical scenarios, for it to determine what powers it would exercise, if the Prosecutor made certain decisions, such as, the decision not to charge a particular individual²³ or not to bring certain charges against an individual charged²⁴ or not to investigate a particular crime²⁵. Such requests are tantamount to asking the Chamber to speculate and to predict how it would respond, if the Prosecutor were to decide to make certain decisions. In effect this would be asking the Chamber, to pre-decide matters, the facts of which have not yet been presented.

19. In particular, the Prosecution categorically states that it has made no decision not to investigate or not to prosecute based on the "interests of justice" within the scope of Article 53. Rather, in relation to the DRC situation, the Prosecutor has charged Thomas Lubango Dyilo for specific charges and he subsequently temporarily suspended the investigation in relation to other offences against

²² See 26 September 2006 Decision, page 4.

²³ See 10 November 2006 Request, para. 13.

²⁴ *Ibid.*

²⁵ See *id.*, para. 20.

him.²⁶ The Prosecution has not foreclosed the possibility of bringing additional charges against other persons established by evidence to be among the most responsible for crimes within the jurisdiction of the Court. Investigations involving crimes allegedly committed by other groups are ongoing.

20. It is not the function of the Chamber of this Court to participate in policy-oriented discourses or to issue advisory opinions, an exercise incompatible with basic considerations of efficiency and judicial economy. Further, the rationale for preventing a judge from deciding upon issues that are not before him or her is to prevent the judge from unfairly legislating for future litigants, who would not have had an opportunity to have their views, on a particular issue, ventilated – a right fundamental to all legal systems.

21. This position finds support in existing international case-law. The Trial Chamber in *Prosecutor v. Milosevic*²⁷, for example, declined to rule on the relationship between Rule 68 and Rule 70, when the question was raised *in abstracto* and did not relate to “a particular issue in this case.”²⁸ The Chamber ruled that it was “not the Trial Chamber’s role to issue advisory opinions on matters of general concern.”²⁹ In a separate opinion, Judge Sidwa in *Prosecutor v. Tadic*³⁰ issued a warning in this regard:

“A tribunal having international criminal jurisdiction should be careful not to convert itself into a free or general advisory body. Its enunciation of the law must be on a case by case basis and limited to the *lis* before it...The International Court of Justice, by Article 96 of the United Nations’ Charter, has an advisory capacity. Civil and criminal court basically have none, unless it is directed by the law or is directly relevant to a particular matter in a case, which it would do only in the *lis* and that too after the

²⁶ See 28 June 2006 Information on Further Investigation, para. 7.

²⁷ See *Prosecutor v. Slobodan Milosevic*, Case No. ICTY-IT-02-54-T, Order on Prosecution’s Motion For a Ruling Concerning the Relationship between Rule 68 and Rule 70, 19 April 2004.

²⁸ See *id.*, page 1.

²⁹ See *id.*, page 2.

³⁰ See *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Separate Opinion of Judge Sidwa on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 109.

parties were given a proper opportunity to produce evidence in the matter, if they propose to do so.”

22. In the light of the foregoing, the Prosecution respectfully submits, as was expressed by Judge Pikis in a dissenting judgement filed earlier this year, that it is “no part of the judicial function to enunciate the principles applicable in any given area of law (adjectival or substantive) or to determine the law applicable to pending or anticipated proceedings outside the adjudicative process for the resolution of extant issues.”³¹

23. In relation to the second issue, the Applicant proposes by means of an *amicus* filing to advocate for a broader definition of “victim” so as to enable participation of victims at various stages of proceedings.³² The Pre-Trial Chamber has established the criteria by which a victim may participate during the investigation stage and continues to apply this ruling³³ but no victim, to the best of the Prosecution’s knowledge, has requested that the Chamber revisits its prior decision. This is therefore yet another hypothetical question, raised by the Applicant as a policy matter rather than an issue in litigation. The Prosecution further notes that if and when the progress of the proceedings in the situation require the Chamber to revisit its prior determination on the concept of “victim”, the Chamber retains the authority to invite specific submissions on this point from the Applicant – this time, in the context of a tangible issue to be decided – by virtue of Rule 103 (1).

³¹ See Judgement on 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, AC, 13 October 2006, (hereinafter “13 October 2006 Dissenting Opinion”) dissenting opinion of Judge Georgios M. Pikis – para. 25.

³² 10 November Request 2006, paras. 21 to 24.

³³ See Decision on the Applications for Participation in the Proceedings of VPRS 1 to VPRS 6, ICC-01/04-101-tEN, 17 January 2006; Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Applications For Participation in the Proceedings of VPRS 1 to VPRS 6, ICC-01/04-135-tEN, 31 March 2006 and Decision on a General Framework concerning Protective Measures for Protection and Defence Witnesses, ICC-01/04-01/06-447, 19 September 2006.

24. The Applicant's "grave concern"³⁴ at the narrow charges that were brought against Thomas Lubango Dyilo, particularly the fact that they did not include gender-based crime, is not a sufficient basis, for an entitlement to have the Chamber entertain submissions on abstract legal issues. The Applicant is always at liberty to raise its concerns about prosecutorial policy with the Prosecution or even publicly, but the right to participate as an *amicus* in the forum of the Court requires a nexus to a litigated issue.

The Pre Trial Chamber lacks statutory authority to grant the requested relief.

25. The Prosecution further submits that in relation to the first issue, an additional reason that the proposed *amicus* filing does not aid in the determining any legal issue is that the Applicant is requesting the Chamber to provide relief that the Statute does not authorize. The Applicant proposes to argue that the Chamber should review decisions of the Prosecution not to prosecute or not to investigate, whether or not those decisions are based on the interests of justice. Under the Rome Statute, however the Pre-Trial Chamber does not possess a general power of review over all decisions that the Prosecutor makes. After extensive negotiations at Rome, the drafters settled upon Article 53 (3), which provides for a limited and specific power of review if a referring State or the Security Council requests the Pre-Trial Chamber to do so³⁵ or if the Prosecutor makes a decision not to initiate investigations or prosecutions on the "interest of justice" ground³⁶. Neither of these grounds apply here, and the Applicant should not be permitted to submit a filing which in effect will request the Chamber to act *ultra vires*.

³⁴ 10 November 2006 Request, Annex 1, page 1.

³⁵ Article 53 (3) (a) of the Rome Statute.

³⁶ Article 53 (3) (b) of the Rome Statute.

26. *Prosecutor v. Ntaguerura, Bagambiki and Imanishimwe*, ICTR – 99-46-T,³⁷ is relevant to this principle. In that case, the Chamber denied leave to participate as an *amicus* when the applicant, the Coalition for the Women’s Human Rights in Conflict Situations, wished to argue that the Chamber should call upon the Prosecutor to amend an indictment to include sexual violence. The Chamber denied the application for leave to participate as an *amicus* on the basis that it had no authority to grant relief sought in the application, because only the Prosecutor could amend the indictment and Article 15 of the Statute specifically ensured the independence from any other organ of the ICTR.

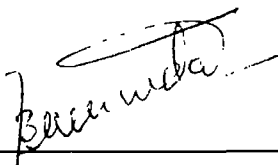
Conclusion

27. The Prosecution submits that the Application fails to meet the legal requirements governing leave to file submissions as an *amicus curiae*. The Prosecution further notes with concern that, if the Chamber were to grant the Applicant’s Request, the precedent would encourage every entity which believes it has a valid observation to make, to flood the Chamber with applications, seeking abstract pronouncements from the Chamber, unrelated to any live issue before it. This would clearly be contrary to the role envisaged for judges in the Rome Statute and would effectively convert the Chamber into an advisory body.³⁸

³⁷ See Decision on the Application to file an *Amicus Curiae* brief according to Rule 74 of the Rules of Procedure and Evidence filed on behalf of the NGO Coalition for Women’s Human Rights in Conflict Situations, 24 May 2001.

³⁸ The Prosecution stresses that, in contradistinction to the ICJ Statute, which vests that court with the authority to give advisory opinions, in addition to having the capacity to decided disputes between States, no such authority is vested upon the ICC by the Rome Statute, as well as Article 96 of the UN Charter; see also M. N. Shaw, *International Law*, Cambridge, 2003, page 1000 et seq.

28. Having regard to all its submissions, the Prosecution respectfully requests the Chamber to reject the Applicant's Request for leave to make its submissions pursuant to Rule 103 of the Rules of Evidence and Procedure.



Fatou Bensouda
Deputy Prosecutor

Dated this 05 day of December 2006

At The Hague, The Netherlands

LIST OF AUTHORITIES

A. JURISPRUDENCE

a) ICTY

Prosecutor v Milutinović et al., IT-99-37, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003
<http://www.un.org/icty/milutinovic/appeal/decision-e/031113.htm>

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<http://www.un.org/icty/milosevic/trialc/order-e/040419.htm>

Prosecutor v Tadić, IT-94-1, Separate Opinion of Judge Sidwa on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995
<http://www.un.org/icty/tadic/appeal/decision-e/510027234562.htm>

b) ICTR

The Prosecutor v Bagambiki, Ntagerura et al., ICTR-99-46-T, Decision on the Application to file an *Amicus Curiae* brief according to Rule 74 of the Rules of Procedure and Evidence filed on behalf of the NGO Coalition for Women's Human Rights in Conflict Situations", 24 May 2001
<http://trim.unicttr.org/webdrawer/rec/22137/>

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<http://69.94.11.53/ENGLISH/cases/Musema/decisions/amicus.htm>

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<http://69.94.11.53/ENGLISH/cases/Akayesu/decisions/AMICUS120998.htm>

The Prosecutor v Bagosora, ICTR-96-7, "Decision on the *Amicus Curiae* Application by the Government of the Kingdom of Belgium", 6 June 1998
<http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/AMICBAG060698.htm>

B. UN DOCUMENTS

ICTY Rules of Procedure and Evidence, 11 February 1994

<http://www.un.org/icty/legal/doc-e/basic/rpe/IT032Rev38e.pdf>

ICTR Rules of Procedure and Evidence, 29 June 1995

<http://69.94.11.53/ENGLISH/rules/index.htm>

Statute of the International Court of Justice

<http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm>

The United Nations Charter, 24 October 1945

<http://www.un.org/aboutun/charter/>

C. SECONDARY MATERIALS

Williams & Woolaver, “The Role of the Amicus curiae before International Criminal Tribunals“, *International Criminal Law Review Vol. 6*, p.151 – 189, August 2006

<http://www.springerlink.com/content/w0224150j4713004/?p=b78aaf447f95428bad894b1090ddced9&pi=0>

Shaw, *International Law (5th ed)* (Cambridge: Cambridge U. Press, 2003)