



Original : English

No.: ICC-01/04-01/06 OA 1

Date: 10 April 2008

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Philippe Kirsch
Judge Georgios M. Pikis
Judge Navi Pillay
Judge Erkki Kourula

Registrar: Mr Bruno Cathala

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

Public Document

**MOTION FOR LEAVE TO FILE Proposed AMICUS CURIAE SUBMISSION OF
THE INTERNATIONAL CRIMINAL BAR PURSUANT TO RULE 103 OF THE
RULES OF PROCEDURE AND EVIDENCE**

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Virginia C. Lindsay

Pursuant to Rule 103 of the Rules of Procedure and Evidence, the Executive Committee of the International Criminal Bar (“ICB”) respectfully asks that leave be granted to file the *Proposed “Amicus Curiae Submission Of The International Criminal Bar Pursuant To Rule 103 Of The Rules Of Procedure And Evidence”* contained in Annex A to this motion.

A. BACKGROUND

1. On 18 January 2008, Trial Chamber I issued an oral decision and public orders which included a determination that certain evidence was not material to the preparation of Thomas Lubanga’s defence case and therefore need not be made available for inspection under Rule 77.¹ This decision was made *proprio motu* and in unusual circumstances, since the Trial Chamber is not normally informed of what tangible objects are being inspected under Rule 77 unless a dispute arises which leads to the filing of a written motion seeking the Trial Chamber’s assistance.
2. Following the issuance of the oral decision, Mr. Lubanga filed a motion² which on 6 March 2008 was granted, seeking leave to appeal three issues arising from the impugned decision.³ The defence filed a document in support of the appeal on 7 March 2008⁴, and the prosecution filed their response on 28 March 2008.⁵
3. The International Criminal Bar requests leave to address aspects of the third issue in the appeal, which relates to the meaning of the phrase “material to the preparation of the defence” as used in rule 77 of the Rules of Procedure and Evidence (“Rules”). There are two points which the ICB would like to raise in relation to this issue:
 - a. The lack of legal basis for the Trial Chamber’s oral decision insofar as it seeks to define *proprio motu* what is material to the preparation of the defence; and

¹ 18 January 2008 transcript, ICC-01/04-01/06-T-71-ENG, at p. 10. The Trial Chamber issued its decision and public orders orally in open session. Despite being in open session, the transcript does not currently appear on the Court’s web site.

² Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision orale de la Chambre de première instance I rendue le 18 janvier 2008, ICC-01/04-01/06-1134.

³ Decision on the defense request for leave to appeal the Oral Decision on redactions and disclosure of 18 January 2008, ICC-01/04-01/06-1210.

⁴ Acte d’appel de la Défense relatif à la Décision relative aux expurgations et à l’obligation de communication rendue oralement le 18 janvier 2008, ICC-01/04-01/06-1227.

⁵ Prosecution’s Response to Defence Document in Support of Appeal against Oral Decision of Trial Chamber I rendered on 18 January 2008, ICC-01/04-01/06-1243.

- b. The need to prepare a sentencing case in the event the accused is convicted, which may reasonably include an investigation of the general circumstances existing at the time of the crimes.
- 4. Although these points relate to the third issue in the appeal of the oral decision and although they present important questions, neither of these points has been addressed in the pleadings presently before the Appeals Chamber.

B. THE INTERNATIONAL CRIMINAL BAR IS AN APPROPRIATE ORGANISATION TO ACT AS AN AMICUS IN THE PRESENT MATTER

- 5. Rule 103(1) of the ICC Rules of Procedure and Evidence states:

At any stage of the proceedings, 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 submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.
- 6. The International Criminal Bar (“ICB”) is an association of national and regional bar associations, professional legal associations, individual members and non-governmental organisations.⁶ It is dedicated to advancing the goals of the ICC, focusing particularly on the right to a fair trial for accused persons, the right to meaningful participation for victims, and the independence of Counsel and Legal Representatives appearing before the Court.
- 7. A substantial number of Counsel included on the Registrar’s list of counsel for the International Criminal Court are members of the International Criminal Bar, and most of the elected positions provided for in the regulations of the Court are filled by members of the International Criminal Bar.
- 8. The ICB actively participates in consultations with the Registrar on issues which include the Code of Professional Conduct for Counsel appearing before the Court and the Court’s legal aid system.

⁶ The ICB was founded in 2002. At its first general assembly in Berlin in March 2003, 400 people from more than 50 countries attended. Since November 2005, it has had official observer status at the ICC Assembly of States Parties. It has been recently recognised as an independent representative body of counsel and legal associations under article 40 of the Headquarters Agreement between the International Criminal Court and the Host State. The governing Council of the ICB is structured to ensure that all five continents and all of the world’s legal systems are represented, and includes seven seats which are specifically reserved for individual members who are authorised to appear before the Court.

9. The ICB respectfully submits that the nature of the issues *sub judice*, the ICB's relationship with those on the List of Counsel, its global representativeness of the major legal systems of the world, and its broad knowledge and history of active participation in the consultative process at the Court, all enable the ICB to offer a unique perspective which will be of assistance to the Appeals Chamber.
10. Therefore, we ask that the Appeals Chamber grant the ICB status as *amicus curiae* and order that the Annex A submission be filed in the Lubanga proceedings and that the issues contained therein be addressed in the decision on this matter.

C. THE *PROPOSED* AMICUS SUBMISSIONS WILL ASSIST THE APPEALS CHAMBER IN RESOLVING THE ISSUES *SUB JUDICE*

11. The observations and arguments proposed by the ICB are set out in Annex A to this motion and are incorporated into this motion by reference.⁷ The observations address issues which are not raised in the pleadings by the parties. They relate to basic issues which will impact upon all future cases and which are central to maintaining the independence of defence counsel and a correct balance in the relationship between the parties and the Trial Chamber, as well as achieving equality of investigative arms.
12. The issue of what legal basis authorises the Trial Chamber's decision to impose its own exercise of discretion in place of that of defence counsel in the preparation of the defence case is an important one which should be addressed, even though the parties have not challenged the Trial Chamber's legal basis for entering the public order relating to rule 77.
13. In addition, the issue of materiality to the sentencing investigation is a topic which is not easily broached by a trial counsel so early in the proceedings because of the widely perceived need to fully support the presumption of innocence. It is therefore appropriate for an *amicus* to address the issue of sentencing phase investigations and how they impact upon the concept of what is material to the preparation of the defence.

⁷ The observations are being filed as an annex with this motion so that the Appeal Chamber will be able to evaluate whether they provide assistance, and if so, be able to order the submissions filed without causing a delay in the proceedings.

14. For the foregoing reasons, the ICB respectfully requests that the Appeals Chamber grant this motion and order that the *proposed* Brief of Amicus Curiae contained in Annex A be filed in the instant case. Should the Appeals Chamber desire that additional briefing or oral arguments be submitted on these issues, amicus will be happy to play whatever role is requested.

Respectfully submitted,



Virginia C. Lindsay

Legal Counsel on behalf of the
Executive Committee of the International Criminal Bar

Dated this 10 April 2008

At Paris, France.

Virginia C. Lindsay
Legal Counsel on behalf of the
Executive Committee of the International Criminal Bar

Dated this 10th day of April, 2008,

At Paris, France