

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

No.: ICC-01/04
Date: 10 November 2006

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

**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**

The Office of the Prosecutor
Mr Luis Moreno Ocampo
Mrs Fatou Bensouda
Mr Ekkehard Withopf
Counsel for the Victims

Ad Hoc Counsel
Mr Tjarda van der Spoel
Other Participants
Women's Initiatives for Gender Justice
Ms. Sureta Chana

Introduction

1. Pursuant to rule 103 of the Rules of Procedure and Evidence (“Rules”), the Women’s Initiatives for Gender Justice (“Women’s Initiatives”) hereby applies for leave to submit observations as *amicus curiae* in the Situation in the Democratic Republic of the Congo (the “DRC situation”).
2. This application is made, bearing in mind that the Pre-Trial Chamber, in a decision of 26 September 2006 in the case of *Prosecutor v. Thomas Lubanga Dyilo* (the “Lubanga case”),¹ declined to grant leave to the Women’s Initiatives to submit observations under rule 103 in that case, but invited the Women’s Initiatives “to re-file their request for leave to submit observations in the record of the DRC situation”.²
3. If leave to submit written comments is granted, the Women’s Initiatives will file its written comments or *amicus curiae* brief within any time-limit fixed by the Pre-Trial Chamber. If leave to submit oral comments is also granted, the Women’s Initiatives, through their counsel, Ms Sureta Chana, is prepared to appear at a hearing before the Pre-Trial Chamber.

Importance of the issues and justification for rule 103 submissions

4. The questions that the Women’s Initiatives seeks to address are of importance as they have wider implications for more fundamental issues such as the nature of the independence of the Prosecutor, the relationship between the Prosecutor and the Pre-Trial Chamber, the system of checks and balances in the procedures of the Court, judicial supervision of prosecutorial discretion, and the role and rights of victims.
5. The Court is presently at the very early and formative stages of its existence. The approach and decisions taken by the Pre-Trial Chamber in its first proceedings will set a significant precedent for the future and be “determinant in shaping the Court’s

¹ No. ICC-01/04-01/06-480, *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on Request pursuant to Rule 103(1) of the Statute”, Pre-Trial Chamber I, 26 September 2006.

² The present application incorporates much of the material that was contained in the earlier application, but is broader in its scope, in view of the fact that it is filed in the situation and not merely in one case ensuing from that situation.

credibility”.³ At this stage, the Court has no case law of its own examining in detail the questions proposed to be addressed by the Women’s Initiatives. Furthermore, in relation to these questions, the Pre-Trial Chamber cannot rely on the case law of other international criminal courts, since the procedures under this Court’s Statute for the initiation and conduct of investigations, and for the confirmation of charges, are very different to the procedures of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”), or the Special Court for Sierra Leone (“SCSL”).

6. Given that the Pre-Trial Chamber will be dealing for the first time with questions of such importance, without any precedent to guide it, it is respectfully submitted that the participation of *amicus curiae* in the proceedings is justified, to ensure that all possible arguments are put before the Pre-Trial Chamber for its consideration. The earlier application under rule 103 made by the Women’s Initiatives in the *Lubanga* case was opposed by both the Prosecution⁴ and the Defence⁵. This underscores the fact that the arguments proposed to be presented by the Women’s Initiatives would otherwise be unlikely to be put before the Pre-Trial Chamber, as the interests of both the Defence and the Prosecution differ from the legitimate interests of the victims.

Issues on which the Women’s Initiatives seeks to make submissions

7. The issues on which the Women’s Initiatives seeks to submit observations, and an outline of the arguments it seeks to present, are (1) role of the Pre-Trial Chamber in supervising prosecutorial discretion and (2) the criteria for determining victim status.

(1) Role of the Pre-Trial Chamber in supervising prosecutorial discretion

8. The question of which persons will be charged, and the crimes with which they will be charged, is one that falls to be determined by the Prosecution, in the exercise of his or her discretionary powers. The provisions of the Statute conferring such discretionary powers include in particular article 58(1) (Prosecutor’s power to decide to apply to the Pre-Trial Chamber for an arrest warrant specifying the crimes within the jurisdiction

³ Claude Jorda, *The Major Hurdles and Accomplishments of the ICTY: What the ICC can learn from them*, in: *Journal of International Criminal Justice*; vol. 2, 2, pp. 572-584, 2004.

⁴ No. ICC-01/04-01/06-478, “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”, 25 September 2006.

⁵ No. ICC-01/04-01/06-442, “Defence Response to of the Women’s Institute [*sic*] for Gender Justice to Participate as an Amicus Curiae”, 19 September 2006.

of the Court for which the person's arrest is sought), and article 61(1) and (3) (Prosecutor's power to decide the charges on which the Prosecutor intends to bring a person to trial).⁶

9. The exercise of these discretionary powers by the Prosecutor will have far-reaching consequences, not only for suspects and accused, but also for victims and their families and communities, and for the international community as a whole. It is self evident that such significant discretionary powers cannot be complete and unfettered. Indeed, this has been expressly acknowledged by the present Prosecutor of the Court, who said in an address to the Assembly of States Parties, just after being nominated as the Prosecutor:

An attentive reading of the Rome Statute and its supplementary instruments reveal that the architects of the International Criminal Court were wise in accompanying the powers of the prosecutor with an adequate system of checks and balances apt to prevent abuse of power or arbitrary decisions.⁷

10. In cases where these discretionary powers are exercised by the Prosecutor in a manner adverse to a suspect or an accused, the checks and balances are spelled out in the Statute. In such cases, the discretionary power is subject to the approval of the Pre-Trial Chamber. Thus, for instance, under article 58(1) the Pre-Trial Chamber can refuse to issue an arrest warrant against a particular person, or can refuse to include certain crimes in an arrest warrant, if it considers that the Prosecutor has acted unreasonably or arbitrarily in seeking an arrest warrant against that person, or has acted unreasonably or arbitrarily in including certain crimes in the arrest warrant. Similarly, under article 61(7) the Pre-Trial Chamber can for instance refuse to confirm a particular charge against a person in the confirmation proceedings if it considers that the Prosecutor has acted unreasonably or arbitrarily in seeking to bring that charge.
11. Similar checks and balances are equally essential in the converse case, where the Prosecutor decides, in the exercise of his or her discretion, *not* to bring any proceedings against a particular person, or *not* to include certain crimes in the charges brought against a particular person. The exercise of the discretion in such cases will obviously not be contrary to the interests of the accused or suspect. However, it may

⁶ See also, for instance, article 61(4) (Prosecutor's power to amend or withdraw the charges against a person prior to the rule 61 confirmation hearing), article 61(8) (Prosecutor's power to request the Pre-Trial Chamber to confirm a charge that the Pre-Trial Chamber has previously declined to confirm), article 61(9) (Prosecutor's power to apply to the Pre-Trial Chamber to amend the charges after they have been confirmed but before trial has begun), and article 61(9) (Prosecutor's power to apply to the Pre-Trial Chamber to withdraw charges after trial has begun).

⁷ Press Release ICC-OTP-20030502-10-En, 2 May 2003, "OTP – Election of the Prosecutor, Statement by Mr. Moreno Ocampo", < <http://www.icc-cpi.int/press/pressreleases/5.html> >.

be contrary to the interests of victims and their families and communities, of the international community as whole, and of the interests of justice in general. It is clearly implicit in the Statute that the Prosecutor must take the interests of victims properly into account when exercising these discretionary powers: see, in particular, articles 53(1)(c), 53(2)(c), and 54(1)(b). It is also implicit in the Statute that the Prosecutor must take the interests of the local and international community into account when exercising these discretionary powers: for instance preambular paragraph 4 of the Statute states “that the most serious crimes *of concern to the international community as a whole* must not go unpunished” (emphasis added). The purpose underlying the Court’s creation and existence is “to put an end to impunity for the perpetrators of these crimes [within the jurisdiction of the Court] and thus to contribute to the prevention of such crimes”.⁸ This overarching purpose must be properly taken into account by the Prosecutor when exercising his or her discretionary powers.

12. It is acknowledged that, in reality, prosecutions by the Court will necessarily be selective, since it will not have the resources to try every person over whom it would be capable of exercising jurisdiction for every crime of which there may be evidence. Prosecuting selectively requires choices to be made, and those choices need to be made carefully. If proceedings before the Court are to be fair and just, from the point of view of the accused, of the victims, of local communities and the international community in general, it is necessary that the choices be made in a transparent and principled way and not in a way that is *ad hoc*, arbitrary. Furthermore, such choices need to be made carefully if the Court is to be effective in achieving its aim of deterring the commission of such crimes in the future. For instance, failure to give sufficient importance to the prosecution of certain types of crimes may obviously weaken or undermine the Court’s effectiveness in deterring those particular types of crimes⁹ especially those known to have been committed. Indeed, the Court might in such circumstances send the signal that such crimes can continue to be committed with impunity.¹⁰ Thus, while these choices fall to be made through the exercise of the Prosecutor’s discretion, they are choices that ultimately affect the entire international community. As the Prosecutor himself has acknowledged:

⁸ Statute, preambular paragraph 5.

⁹ The Court is furthermore enjoined under article 21(3) to interpret laws pursuant to this article without any adverse distinction founded *on inter alia* gender.

¹⁰ This is especially true with regard to gender based crimes given the historical impunity of prosecuting crimes of sexual violence.

Determining the correct model is a legal, financial and strategic question that will require dialogue between many actors. It has a legal dimension, namely the interpretation of Article 53, and therefore involves OTP and ultimately the judges. It has a budgetary dimension and therefore involves the States Parties. It also has a strategic dimension - what is the desired scope and role of the Court? - and therefore involves all stakeholders.¹¹

The importance of such decisions by the Prosecutor, and the need for transparency in their making, requires that they be ultimately subject to judicial supervision, hence the creation of the Pre-Trial Chamber and the participation of victims are two significant innovations of the Rome Statute giving the Court a supervisory role over the activities of the Prosecutor.

13. The Statute does not expressly set out the checks and balances to deal with the situation where the Prosecutor decides *not* to bring any proceedings against a particular person, or *not* to include certain crimes in the charges brought against a particular person. However, this cannot mean that the exercise of the Prosecutor's discretion in such circumstances is absolute, unfettered and unreviewable, no matter how unreasonable or arbitrary it may be. Therefore the Women's Initiatives proposes to argue that the Pre-Trial Chamber has an inherent general duty to satisfy itself that the Prosecutor is exercising his or her discretion correctly, even when deciding *not* to prosecute a particular person, or *not* to prosecute a person for particular crimes. The Pre-Trial Chamber cannot usurp the Prosecutor's discretion, but it has a duty to intervene if the Prosecutor, in exercising his or her discretion, has for instance failed to take into account relevant matters, or has taken into account irrelevant matters, or has reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached.¹²
14. The Women's Initiatives proposes to argue that there are a number of procedural mechanisms which do ensure that the Pre-Trial Chamber operates as a check and balance against exercises of the Prosecutor's discretion in such cases. These include the following.
15. **First**, under article 58, it falls to the Pre-Trial Chamber to determine, on the application of the Prosecutor, whether to issue an arrest warrant. Under this provision,

¹¹ Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Informal meeting of Legal Advisors of Ministries of Foreign Affairs, New York, 24 October 2005 < http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051024_English.pdf >.

¹² Compare, for instance, *Prosecutor v. Kvočka et al.*, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, Case No. IT-98-30/1-A, Appeals Chamber, 7 February 2003, para. 13, referring to "standards for judicial review of administrative decisions" based on "general principles of law derived from the principal legal systems".

it is for the Prosecutor to specify the particular crimes in respect of which the warrant of arrest is to be issued (article 58(2)(b)). The Pre-Trial Chamber will issue the arrest warrant “if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that ... There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court” (article 58(1)). The effect of this provision is that the Pre-Trial Chamber can issue an arrest warrant if there are reasonable grounds to believe that the person has committed “*a* crime [that is, any crime] within the jurisdiction of the Court” (emphasis added), whether or not this crime is alleged by the Prosecutor in his or her application for an arrest warrant under article 58(2)(b).¹³ It would follow that a Pre-Trial Chamber has the power, under article 58, to specify in an arrest warrant crimes other than those that were specified by the Prosecutor under article 58(2)(b).

16. If the Pre-Trial Chamber has this power, it must also have the inherent power in proceedings under article 58 to ask the Prosecutor whether he has other evidence of crimes committed by the person named in the arrest warrant, and to invite the Prosecutor to undertake further investigations and to submit further evidence to the Pre-Trial Chamber before a decision on the arrest warrant is taken. As part of this process, the Pre-Trial Chamber could call on the Prosecutor to explain the nature of any material that has been submitted to the Office of the Prosecutor (“OTP”) from external sources, the nature of the investigations undertaken by the OTP, the nature of the evidence obtained from such investigations, and the reasons for the decisions taken by the Prosecution with respect to which crimes to specify in the application for the arrest warrant.
17. **Secondly**, under article 61, it falls to the Pre-Trial Chamber to confirm the charges against a person. Article 61 indicates that it is initially for the Prosecutor to determine which charges he or she intends to bring against a person, and it is the responsibility of the Prosecutor to produce sufficient evidence of each of those charges. The role of the Pre-Trial Chamber is then dealt with in paragraph 7 of that article.
18. It is proposed to argue that article 61(7) of the Statute gives the Pre-Trial Chamber a general supervisory jurisdiction over the exercise of the Prosecutor’s discretion. The role of the Pre-Trial Chamber is not limited merely to confirming or declining to confirm a particular charge that the Prosecutor has decided to bring. Under article 61(7)(c)(i), the Pre-Trial Chamber has the power to request the Prosecutor to consider

¹³ In this respect, article 58(1) can be contrasted with article 58(7), which provides that the Pre-Trial Chamber may issue a summons to appear (instead of an arrest warrant) if it is satisfied “that there are reasonable grounds to believe that the person committed *the crime alleged [by the Prosecutor]*” (emphasis added).

conducting further investigation with respect to a particular charge, and under article 61(7)(c)(ii), the Pre-Trial Chamber has the power to request the Prosecutor to consider amending a charge.¹⁴ The words “a particular charge” in article 61(7)(c)(i) should not be read narrowly as referring only to those charges that were specified by the Prosecutor under article 61(3)(a) prior to the first article 61 hearing. Similarly, the words “the evidence submitted” in article 61(7)(c)(ii) should not be read narrowly as referring only to the evidence that was submitted by the Prosecutor at the first article 61 hearing. The two provisions must be read together, as conferring a general power on the Pre-Trial Chamber to request the Prosecutor to consider undertaking further investigations into other possible charges, and, on the basis of evidence obtained through such investigations, to consider amending the charges to include additional charges. If the Prosecutor does then decide to seek to amend by including such additional charges, the article 61 procedure will apply again to those additional charges (article 61(9)). In performing this function, the Pre-Trial Chamber can undertake enquiries of the kind referred to in paragraph 16 above at the article 61 hearing.

19. **Thirdly**, at the investigations stage, the Pre-Trial Chamber has the authority to be proactive in convening hearings to deal with matters of protection of victims and witnesses and preservation of evidence,¹⁵ and may order specific proceedings to enable victims to present their views and concerns.¹⁶ There would be little point in enabling victims to present their views and concerns if the Prosecutor was free to ignore them and the Pre-Trial Chamber was powerless to intervene. Furthermore, there is no reason why the Pre-Trial Chamber should be required to wait until the Prosecutor makes an application for an arrest warrant before undertaking the enquiries of the kind referred to in paragraph 16 above. It would obviously be more efficient for these enquiries to be made by the Pre-Trial Chamber at an early stage, during the course of the investigation into a situation. In this respect it must be emphasised that this Court’s Statute provides for a different model of relationship between the

¹⁴ It is noted that the Single Judge in the *Lubanga* case has ordered that “except for exceptional circumstances which might justify subsequent isolated acts of investigation, the investigation must be completed by the time the confirmation hearing starts”: No. ICC-01/04-01/06-102, “Decision on the final system of disclosure and the establishment of a timetable”, 15 May 2006, para. 131; see also No. ICC-01/04-01/06-108, “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Statute”, 19 May 2006, para. 39. However, this must be subject to the express power of the Pre-Trial Chamber, under article 61(7)(c)(i) of the Statute, to request the Prosecutor to consider conducting further investigation with respect to a particular charge.

¹⁵ No. ICC-01/04-9, “Decision to Convene a Status Conference”, 17 February 2005.

¹⁶ No. ICC-01/04-101, “Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6”, 17 January 2006 (the “Victim Participation in Investigations Decision”), para. 75.

Prosecution and Judges to that found in the Statutes of the ICTY, ICTR or SCSL. In this Court, unlike in the other international criminal courts, a situation is assigned from the beginning to a Pre-Trial Chamber,¹⁷ which remains seised of the situation throughout the entire investigation. There is no reason why the Pre-Trial Chamber should not be proactive in dealing with a situation, in continuously remaining apprised of the manner in which prosecutorial discretions are being exercised, and in continuously being aware of any unreasonable or arbitrary use of such discretions. It can do this, for instance, by regularly undertaking the enquiries of the kind referred to in paragraph 16 above at status conferences during the investigation.

20. The need for judicial checks and balances in respect of a decision of the Prosecutor **not** to investigate a particular crime, or **not** to prosecute a particular crime, is one that is recognised in certain municipal law systems. For instance, in England and Wales, and other jurisdictions with similar legal systems, it is possible for an affected person (such as a victim) to bring administrative law proceedings in respect of such a decision in certain circumstances.¹⁸ Additionally, it is possible in such jurisdictions for individuals to bring a private prosecution in circumstances where the public prosecutor is unwilling to do so.¹⁹ Judicial checks and balances of prosecutorial discretion also exist in many civil law systems.²⁰ This Court has an equal need for mechanisms serving the same function given that these mechanisms are not available to victims in the international fora. Judges must be able to exercise their discretion to counter that of the prosecution. The international criminal justice system must have a way to correct unfairness and /or abuse of prosecutorial discretion.

¹⁷ Regulations of the Court, regulation 46(2); and see, for instance, No. ICC-01/04-1, "Decision assigning the situation in the Democratic Republic of the Congo to Pre-Trial Chamber I", 5 July 2004.

¹⁸ See, for instance, *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (United Kingdom, House of Lords), as quoted with approval in *Brooks v Commissioner of Police for the Metropolis* [2005] UKHL 24 (United Kingdom, House of Lords), at para. 19 (: "By common law police officers owe to the general public a duty to enforce the criminal law That duty may be enforced by mandamus, at the instance of one having title to sue. But as that case shows, a chief officer of police has a wide discretion as to the manner in which the duty is discharged. It is for him to decide how available resources should be deployed, whether particular lines of inquiry should or should not be followed and even whether or not certain crimes should be prosecuted. It is only if his decision upon such matters is such as no reasonable chief officer of police would arrive at that someone with an interest to do so may be in a position to have recourse to judicial review." < <http://www.bailii.org/uk/cases/UKHL/2005/24.html> >.

¹⁹ See, for instance, *R (on the application of Charlson) v Guildford Magistrates Court* [2006] EWHC 2318 (Admin) (High Court of England and Wales), dealing with "the question of how magistrates should approach and resolve applications to issue summonses for private prosecutions after the Crown Prosecution Service had discontinued a prosecution in respect of the same conduct". < <http://www.bailii.org/ew/cases/EWHC/Admin/2006/2318.html> >.

²⁰ Article 12-121 of the Dutch Code of Criminal Procedure and under Belgian laws, a decision of the Prosecutor not to investigate a certain complaint can be subjected to judicial review; Cour d'Arbitrage, Judgment No. 62, 23 March 2005, at www.arbitrage.be. In Spain and France, an investigative judge may pursue a case brought by private petitioners despite opposition by the public prosecutor.

(2) The criteria for determining victim status

21. The Women's Initiatives proposes to argue that the Pre-Trial Chamber should give further consideration to the criteria for determining which victims have a right to participate at different stages of the proceedings. This Pre-Trial Chamber has held that during the stage of investigation of a situation, the status of victim will be accorded to applicants who seem to meet the definition of victims in relation to the *situation* in question, while at the case stage the status of victim will be accorded only to applicants who seem to meet the definition of victims in relation to the relevant *case*.²¹ To meet the definition in relation to a particular *situation*, there must be a causal link between the harm suffered by a victim and a crime falling within the jurisdiction of the Court that was committed in the relevant situation.²² To meet the definition in relation to a particular case, it has been held that there must be a sufficient causal link between the harm suffered by a victim and the crimes for which the Chamber has issued in an *arrest warrant*.²³
22. The potential impact of this ruling on victims can be illustrated by a simple example. Suppose that the Prosecution commences an investigation into the situation in country X, and that two victims are permitted to participate in the investigation stage of the proceeding. Victim A suffered torture, rape, mutilation, and witnessed all of her close family members murdered. Victim B had his house burned down. In the course of the investigation, the Prosecution obtains evidence that suggests that Person Z was individually criminally responsible for all of the crimes against both victims. However, in the exercise of his discretion, the Prosecutor decides to prosecute Person Z only on charges relating to destruction of property, and obtains an arrest warrant limited to these crimes.
23. In this example, Victim A may feel legitimately concerned by the decision not to include charges of sexual violence, murder and torture. Yet despite having been permitted to participate as a victim in the *situation* proceedings, she will not be permitted to participate in the article 61 proceedings in the ensuing *case*, or in any subsequent proceedings in that case, as the crimes of which she is alleging to be a victim have not been specified in the arrest warrant.²⁴

²¹ Victim Participation in Investigations Decision, para. 66.

²² *Ibid.*, paras. 81-94.

²³ No. ICC-01/04-01/06-172, "Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo", 29 June 2006, p. 6.

²⁴ See paragraph 33 below for a practical example of this problem.

24. The Women's Initiatives proposes to submit that one of the main purposes of allowing victims to participate in proceedings should be to enable this type of concern to be raised by victims.²⁵ One way in which this could be done would be to ensure that victims at the situation stage are able to make submissions in the article 58 proceedings, when the Pre-Trial Chamber determines what crimes to include in an arrest warrant. An additional way in which this could be done would be for the Pre-Trial Chamber to reconsider the definition of a victim for the purposes of article 61 proceedings. In relation to article 61 proceedings, victim status should require only a causal link between the harm suffered by a victim and a crime alleged to have been committed by a person named in an arrest warrant, whether or not that particular crime has been included in the arrest warrant.

Relevance of the issues in the present situation

25. It is submitted that the issues that the Women's Initiatives intends to address are not hypothetical or abstract issues in the present situation. On the contrary, they are very real issues, given the circumstances of this situation, and given the charges which have been preferred by the Prosecutor in the *Lubanga* case, the only case that has so far ensued from this situation.
26. The situation in the Democratic Republic of the Congo ("DRC") was referred to the Prosecutor by the DRC pursuant to articles 13(a) and 14 of the Statute. The referral covered *any* crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute, on 1 July 2002.²⁶ The DRC when it referred the situation to the Prosecutor had a reasonable expectation that the full range of the most prolific crimes would be investigated and prosecuted. The Prosecutor subsequently announced his intention to commence an investigation of the situation in the DRC, acknowledging that reports by States, international organizations and non-governmental organizations "allege a pattern of rape, torture, forced displacement and the illegal use of child soldiers".²⁷
27. In a number of subsequent statements made by or attributable to the Prosecutor, it was affirmed that the Prosecutor had information available to him that the situation in the

²⁵ Article 68(3) states that 'where the personal interests of the victims are affected, the Court *shall* (*emphasis ours*) permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court'.

²⁶ Press Release ICC-OTP-20040419-50-En, 19 April 2004 < http://www.icc-cpi.int/pressrelease_details?id=19&l=en.html >.

²⁷ Press Release ICC-OTP-20040623-59-En, 23 June 2004 < http://www.icc-cpi.int/pressrelease_details?id=26&l=en.html >.

DRC involved allegations of a variety of large-scale crimes under the Statute of the Court, including conscription of child soldiers, summary executions, mass murder, torture, rape and other forms of sexual violence and forced displacement.^{28,29,30}

28. In subsequent statements, the Prosecutor gave assurances that he would investigate all crimes,³¹ including crimes of gender violence.³²

29. On 17 March 2006, the Prosecutor issued a statement in which he said:

At the outset of the investigation [into the situation in the DRC], Ituri was singled out as being one of the most violent regions in the DRC. The investigation made it possible to identify several groups responsible for the violence. The Forces patriotiques pour la libération du Congo (FPLC) emerged as one of the militias which had committed the worst atrocities. The FPLC is the military wing of the Union des patriotes congolais (UPC).³³

30. On 17 January 2006, the Pre-Trial Chamber permitted six victims to participate in the investigation stage of these proceedings.³⁴ The crimes reported by these victims which formed the basis of their recognition as victims included murder,³⁵ looting and

²⁸ Address by Prosecutor Luis Moreno Ocampo, Third Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, The Hague, 6 September 2004 www.icc-cpi.int/library/asp/LMO_20040906_En.pdf (stating that “available information suggests that rape and other crimes of sexual violence, torture, child conscription, and forced displacement continue to take place” in the DRC).

²⁹ United Nations General Assembly, Report of the International Criminal Court, UN Doc. A/60/177, 1 August 2005 < http://www.icc-cpi.int/library/organs/presidency/ICC_Report_to_UN.pdf >, at para. 37 (“The Office of the Prosecutor is investigating the situation in the Democratic Republic of the Congo, which involves allegations of thousands of deaths by mass murder and summary execution since 2002, as well as large-scale patterns of rape, torture and use of child soldiers”). (This report was submitted in accordance with the provisions of article 6 of the Relationship Agreement between the United Nations and the International Criminal Court. It must be assumed that the portions of it dealing with the Office of the Prosecutor were approved by the Prosecutor).

³⁰ Assembly of States Parties, Fourth session, 28 November to 3 December 2005, Report on the activities of the Court, ICC-ASP/4/16, 16 September 2005 < http://www.icc-cpi.int/library/asp/ICC-ASP-4-16_English.pdf >, at para. 53 (“The Office of the Prosecutor is investigating the situation in the Democratic Republic of the Congo, which involves allegations of thousands of deaths by mass murder and summary execution since 2002, as well as large-scale patterns of rape, torture and use of child soldiers”). (It must be assumed that the portions of this report dealing with the Office of the Prosecutor were approved by the Prosecutor).

³¹ “I will investigate *all* crimes related to the situation in an impartial way. I will continue to receive information from any source on crimes within the jurisdiction of the Court”: Statement of the Prosecutor Luis Moreno Ocampo to Diplomatic Corps, 12 February 2004, < www.icc-cpi.int/library/organs/otp/LOM_20040212_En.pdf >.

³² “Our cases will expose the commission of specific crimes which have a devastating impact, such as rape, sexual enslavement and forced enlistment of children”: Assembly of States Parties, Fourth session, 28 November to 3 December 2005, Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, 28 November 2005 < http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051128_English.pdf >, at p. 5.

³³ Press Release ICC-OTP-20060302-126-En, 17 March 2006 < <http://www.icc-cpi.int/press/pressreleases/133.html> >.

³⁴ Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6.

³⁵ *Ibid.*, paras. 123, 134, 166, 185.

destruction of property,³⁶ abduction and enslavement,³⁷ torture,³⁸ and unlawful detention.³⁹

31. On 10 February 2006, Pre-Trial Chamber I issued a warrant of arrest against Mr. Thomas Lubanga Dyilo (the "Arrest Warrant").⁴⁰ The only crimes specified in the Arrest Warrant were crimes relating to the enlistment and conscription and use of child soldiers under the age of fifteen, and the use of such child soldiers in active hostilities (Statute, articles 8(2)(b)(xxvi) or 8(2)(e)(vii)).
32. The Arrest Warrant contained a finding by the Pre-Trial Chamber that there are reasonable grounds for believing that Mr Lubanga has been the President of the UPC since its foundation on 15 September 2000, that he was the founder and Commander-in-Chief of the FPLC from September 2002 until the end of 2003 at least, that he exercised *de facto* authority which corresponded to his positions as President of the UPC and Commander-in-Chief of the FPLC and had ultimate control over the adoption and implementation of the policies/practices of the UPC/FPLC.
33. It is not clear from the public records of the Court whether the six victims participating in the investigation stage at that time were able to participate in the proceedings relating to the issuing of the Arrest Warrant. However, the Arrest Warrant itself makes no reference to the victims being heard in relation to the Prosecutor's application for the Arrest Warrant, and the fact that the Arrest Warrant was originally issued under seal would have made victim participation unlikely. It is therefore presumed that the participating victims did not have an opportunity at that time to express any concerns they may have had that the crimes specified in the Arrest Warrant were narrowly limited to crimes relating to the recruitment and use of child soldiers. All of those six victims will now also be deprived of any opportunity to raise such concerns at the article 61 hearing in the *Lubanga* case, or in any subsequent proceedings in that case, since the Pre-Trial Chamber has determined that no sufficient causal link has been established between the harm that any of them has suffered and the crimes specified in the warrant of Arrest Warrant.⁴¹

³⁶ *Ibid.*, paras. 123, 134, 166, 175, 185.

³⁷ *Ibid.*, para. 151.

³⁸ *Ibid.*, paras. 175, 185.

³⁹ *Ibid.*, para. 175.

⁴⁰ No. ICC-01/04-01/06-2, "Warrant of Arrest", 10 February 2006.

⁴¹ No. ICC-01/04-01/06-172, "Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo", 29 June 2006.

34. The Prosecutor's document containing the charges under rule 121(3) was filed on 28 August 2006 with three counts relating to child soldiers.⁴² A document filed by the Prosecution on 28 June 2006⁴³ indicates that at the time that the arrest warrant in this case was issued, further investigations in the case were in progress, and the addition of further charges was considered a possibility. However, according to this document, investigations into other possible charges have now been suspended, and the current charges will not be amended "during the present proceedings". This document indicates that the further investigations that were previously being undertaken by OTP in this case related to allegations of attacks against the civilian population, murder, pillage, and ordering the displacement of the civilian population. There is no reference in the document to any investigation being undertaken in this case into gender-based crimes.
35. If the arguments proposed to be made by the Women's Initiatives are accepted, the Pre-Trial Chamber has the power, and the duty, to satisfy itself that the Prosecutor's decision on the charges is an appropriate exercise of the Prosecutor's discretion in all of the circumstances. In the DRC situation and the *Lubanga* case, the relevant circumstances include the following:
- (1) the fact that the Prosecutor has publicly stated that large-scale crimes committed in the DRC included many atrocities in addition to the recruitment and use of child soldiers, summary executions, mass murder, torture, rape and other forms of sexual violence and forced displacement;
 - (2) the fact that the Prosecutor has publicly stated that the UPC/FPLC emerged as "one of the militias which had committed the worst atrocities";⁴⁴
 - (3) the fact that the Pre-Trial Chamber has already found that there are reasonable grounds for believing that the Detainee has been the President of the UPC since September 2000 and was Commander-in-Chief of the FPLC from September 2002 until the end of 2003 at least, and that he had effective authority and ultimate control over the policies/practices of these organisations;⁴⁵
 - (4) the fact that there is information publicly available to the effect that other serious crimes such as sexual slavery, rape, cannibalism, murder, abduction

⁴² No. ICC-01/04-01/06-356, "Submission of the Document Containing the Charges pursuant to Article 61(3)(a) and of the List of Evidence pursuant to Rule 121(3)", 28 August 2006, Annexe 2.

⁴³ No. ICC-01/04-01/06-170, "Prosecutor's Information on Further Investigation", 28 June 2006.

⁴⁴ Press Release ICC-OTP-20060302-126-En, 17 March 2006 < <http://www.icc-cpi.int/press/pressreleases/133.html> >.

⁴⁵ Arrest Warrant, pp. 3-4.

and torture have been committed by a range of militia groups including the UPC/FPLC, FNI, FAPC, and by Ugandan and Rwandan armed forces active in the conflict. Sources of this information include a letter from the Secretary-General of the United Nations to the President of the Security Council dated 16 July 2004,⁴⁶ United States Department of State country reports for the DRC for the years 2003⁴⁷ and 2004,⁴⁸ reports by Amnesty International,⁴⁹ Human Rights Watch⁵⁰ and the Women's Initiatives for Gender Justice.⁵¹

⁴⁶ United Nations Security Council, Letter dated 16 July 2004 from the Secretary-General addressed to the President of the Security Council, covering a "Special report on the events in Ituri, January 2002-December 2003", UN Doc. S/2004/573, 16 July 2004 < <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/430/63/img/N0443063.pdf?OpenElement> >:

The team received reports of 18 cases of rape, some of the victims being as young as 11, committed by UPC soldiers, after the ceasefire was signed [on 17 May 2003]. Most of the victims were abducted while they were out to look for food or water, and were taken to military places or private houses for sexual abuse. (at para. 80) .

UPC soldiers also committed large-scale rape in the 15 different areas of the town, sometimes abusing girls as young as 12. (At para. 37) .

After Mambasa, similar abuses were also systematically carried out in the villages south of the town and between Komanda and Eringeti, with the involvement of UPC. The number of rape cases - mainly young girls or women between 12 and 25 years old - also rose to an alarming level. (At para. 108).

⁴⁷ United States of America, Department of State, Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices, 2003, Democratic Republic of the Congo, dated 25 February 2004 < <http://www.state.gov/g/drl/rls/hrrpt/2003/27721.htm> >:

... between January and March [2003], during military operations, the Hema UPC killed at least 250 persons and abducted 30 women from the Lendu village of Lipr, near Bunia. The victims were either shot during the attacks or executed with machetes over a period of days following the attacks. In addition, the UPC burnt several villages and over the course of several attacks on the town of Bambu, looted the offices of Kilo Moto, the largest gold-mining company in the region, the hospital, schools, an orphanage, and religious structures. ...

Fierce fighting occurred between May 6 [2003], when the UPDF left Bunia, and May 17 [2003] ... This fighting resulted in numerous civilian deaths ... MONUC confirmed 438 cases of arbitrary killing, 150 by the UPC, 291 by Lendu and Ngiti combatants, and the remaining by unidentified perpetrators. ...

On May 16 [2003], Hema UPC soldiers in Bunia killed 12 civilians, mostly women and children, at the Lembabo Health Center. ...

Between June 8 and 15 [2003], the Hema UPC committed numerous human rights violations in and around Bunia. Reports indicated that approximately 40 persons were kidnapped. An undetermined number were subsequently killed at a former Ugandan military camp at Simbiliabo and at the former UPC Governor's residence. In addition, on June 11, Hema UPC killed 14 IDPs from Medu at the former governor's residence and their bodies were disposed of in a latrine. ...

⁴⁸ United States of America, Department of State, Bureau of Democracy, Human Rights, and Labour, Country Reports on Human Rights Practices, 2004, Democratic Republic of the Congo, dated 28 February 2005 < <http://www.state.gov/g/drl/rls/hrrpt/2004/41597.htm> >:

In areas under marginal government control, there were credible reports that between July 2003 and March [2004], the local head of the national police and the local UPC commander in Boga, Ituri District killed nine persons, some by summary execution and some by torture. ...

In many cases, armed groups did not make a distinction between military and civilian targets. For example, the MONUC Ituri report found that UPC forces shelled "Lendu villages without making any distinction between armed combatants and civilians." ...

⁴⁹ Amnesty International, "Democratic Republic of Congo-Mass Rape-Time for Remedies", AI Index: AFR 62/018/2004, 26 October 2004 < <http://web.amnesty.org/library/Index/ENGAFR620182004> > ("most allegations of sexual violence centre on the host of less well-controlled and disciplined armed groups in DRC. These include

- (5) the fact that the Prosecutor has publicly acknowledged the importance of prosecuting gender crimes, stating that:

I fully agree that this is one of the gravest crimes, raping women was a tool to destroy communities. Rape as it was perpetrated in Congo does not constitute only sexual abuse but it is used as a weapon of war. Because women form the basis of any community, women bring people together, and raping them is like raping the whole community. We totally agree with you on the **gravity** (emphasis added) of this crime.⁵²

36. The fact that these issues arise in the DRC situation and the *Lubanga* case, the very first case to come before this Court, demonstrates the likelihood that they will arise in future cases before the Court. It also demonstrates the real need for supervisory powers to be exercised by the Pre-Trial Chamber, both at the investigation stage and at the case stage, to assure the international community, the local community and the public that prosecutorial discretion is being exercised correctly and transparently, and not arbitrarily or unreasonably, which in turn will enhance the credibility of the Court and ultimately determine its effectiveness and success.

Details of the Women's Initiatives for Gender Justice

37. The contact details of the Women's Initiatives are as follows:

Women's Initiatives for Gender Justice
 Anna Paulownastraat 103
 2518 BC The Hague
 The Netherlands
 Telephone: +(31) (70) 365 2042
 Fax: +(31) (70) 392 5270
 E-mail: brigid@iccwomen.org
 Internet: www.iccwomen.org

notably, but not exclusively, the Congolese *mayi-mayi*, RCD-Goma, MLC, RCD-ML, UPC, FNI and FAPC armed groups, and the Rwandan FDLR and Burundian FDD or FNL armed groups"). Also Amnesty International, "Democratic Republic of Congo: Ituri - How many more have to die?", AI Index: AFR 62/030/2003. <[http://web.amnesty.org/library/pdf/AFR620302003ENGLISH/\\$File/AFR6203003.pdf](http://web.amnesty.org/library/pdf/AFR620302003ENGLISH/$File/AFR6203003.pdf)>, at p. 3 (describing the brutal rape of a mother and daughter side-by-side by UPC militiamen in the Saio district of Bunia).

⁵⁰ Human Rights Watch, "Seeking Justice: The Prosecution of Sexual Violence in the Congo War", March 2005 <<http://hrw.org/reports/2005/drc0305/drc0305text.pdf>>, at pp. 19-20 (documenting examples of rapes by UPC combatants).

⁵¹ Confidential Annex 2 attached to this filing.

⁵² Interactive Radio for Justice, "Special Thomas Lubanga Program, Transcript, 5 April 2006 <http://www.irfj.org/Programs/Program11/IRFJ_prg11_english.doc>.

38. The Women's Initiatives is a "Stichting" established under the law of the Netherlands in January 2004,⁵³ and became operational in February of that year. The Executive Director of the Women's Initiatives is Ms Brigid Inder.
39. For the purposes of this application, and in its capacity as *amicus curiae* if the application is granted, the Women's Initiatives is represented by Ms Sureta Chana as counsel, whose address for service is:

Ms Sureta Chana
 c/o Women's Initiatives for Gender Justice
 Anna Paulownastraat 103
 2518 BC The Hague
 The Netherlands
 Telephone: +(44) 7737 887 489
 +(31) (70) 365 2042
 E-mail: suretachana@btinternet.com

Statement of Interest

40. The Women's Initiatives is an international women's human rights organization. Its mandate is to work globally to ensure justice for women and an independent and effective International Criminal Court. It is committed to:

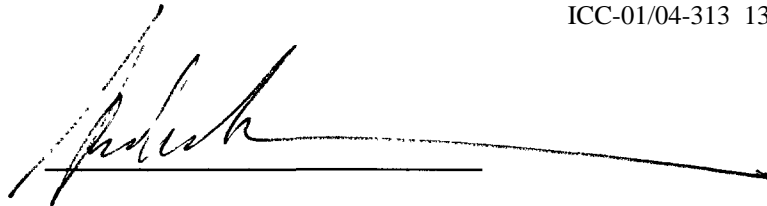
- advocating for gender justice through the International Criminal Court (ICC);
- monitoring the ICC to ensure implementation of the Rome Statute, including the gender-inclusive provisions;
- ensuring sexualized violence and gender based crimes are a priority in the investigations and prosecutions of the ICC;
- advocating for women victims/survivors to benefit from the reparations mechanisms and processes of the Court;
- enhancing the capacity among women, particularly women's NGOs in countries where the ICC is conducting investigations, in the use of international law specifically the Rome Statute;
- consulting with women, women's groups and NGOs most affected by conflict in situations brought before the ICC, to ensure their concerns and issues are incorporated into the investigations and prosecutions, and the Court's work with victims and witnesses;

⁵³ The Corporate name is Stichting Women's Initiatives for Gender Justice, file reference number; 27264260.

- strengthening advocacy in women's human rights and gender equality;
 - promoting the international gender standards of the Rome Statute and supporting national law reform to advance women's human rights through use of the Statute and implementing legislation;
 - influencing and strengthening the gender competence of the ICC through training and the recruitment and appointment of women, including experts on gender and sexual violence amongst the personnel of the Court;
 - facilitating and maintaining a pool of experts on sexual and gender violence, victims and witnesses and institutional aspects of gender mainstreaming to shape the mechanisms developed by the ICC.
 - to do all that is connected to the above or can be useful to achieve the above which includes interventions in proceedings including filing *amicus briefs*.
41. The Women's Initiatives has had two meetings with senior officials of the OTP in which it raised concerns that gender-based crimes were not being effectively investigated in the DRC.⁵⁴ On 15 August 2006, the Women's Initiatives sent a letter to the Prosecutor (PARTIALLY REDACTED PUBLIC ANNEX 1) under cover of which it submitted a report to the Prosecutor detailing gender-based crimes committed in eastern DRC by the UPC (CONFIDENTIAL ANNEX 2). This report which is redacted is filed confidentially to protect the identities of the victims. It includes over fifty-five (55) individual interviews with women victims/survivors of rape and other forms of sexualized violence since 1 July 2002. Of these, thirty-one (31) interviewees are victims/survivors specifically of acts of rape and sexual slavery committed by the UPC. This report is the result of two field missions conducted in May and July 2006 by the Women's Initiatives in collaboration with local activists in eastern DRC.
42. The Women's Initiatives previously filed an application for leave to submit observations under rule 103 in the *Lubanga* case (see paragraph 2 above).

Respectfully submitted

⁵⁴ On 29 March 2006 and 12 April 2006.

A handwritten signature in black ink, appearing to read 'Sureta Chana', is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Ms. Sureta Chana
Counsel for the Women's Initiatives for Gender Justice

Dated this *10 November 2006*

At The Hague

The Netherlands