Cour
Pénale
Internationale

International
Criminal
Court

Original : **English**

No.: **ICC-01/04-01/06**
Date: **19 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 CONGO
IN THE CASE OF
THE PROSECUTOR
v. THOMAS LUBANGA DYILO

Public Document

Defence Response to Request of the Women's Institute for Gender Justice to Participate as an Amicus Curiae

The Office of the Prosecutor
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1. Introduction:

1. On 7 September 2006, the Women's Initiative for Gender Justice (WIGJ) filed a request pursuant to Rule 103 of the Rules of Procedure and Evidence for leave to submit written and oral observations as *amicus curiae* at the confirmation hearing for the charges against Thomas Lubanga Dyilo.
2. If granted leave, the WIGJ indicated that it wished to address the following topics:[1]
   - the interpretation of article 61 of the Rome Statute; and
   - the implications of the above for the:
     i. independence of the Prosecutor;
     ii. the relationship between the Prosecutor and the Pre-Trial Chamber, and in particular, "what role and duties the Pre-Trial Chamber has in the determination of the appropriate charges to be brought against an accused";[2]
     iii. the system of checks and balances of the Court; and
     iv. the role and rights of victims.

3. The Defence strongly opposes the request of the WIGJ to participate as *amicus curiae*, and therefore requests that the Honourable Pre-Trial Chamber rejects the application of the WIGJ.

2. Legal foundation of this response:

4. Rule 103 of the Rules of Procedure and Evidence provides that "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."[3] If the Chamber grants leave, the written observations shall be filed with the Registrar,[4] and the Prosecutor and the Defence shall have the right to respond to the observations of the *amicus*.[5]
5. Although Rule 103 thus speaks of the right of the Prosecution and the Defence to respond to the substance of the observations once leave has been granted, the defence

[1] At para. 5.
[2] At para. 6.
[3] Rule 103(1).
[4] Rule 103(3)
[5] Rule 103(2)

respectfully submits that the fact that the request itself has been publicly filed in the case file triggers a right for the Prosecution and the Defence to respond to the question as to whether it is appropriate and in the interests of justice to invite *amicus curaie* submissions on the topics delineated in the request, at this stage of the proceedings.

6. Such a right can be extrapolated from Regulation 24(1) of the Regulations of the Court, which provides that the Prosecutor and the Defence may file a response to any participant in the case in accordance with the Statute, Rules, these Regulations and any order of the Chamber. Since the WIGJ request was filed in the case file, the Defence can only assume that it was filed in accordance with either the Statute, the Rules, the Regulations or an order of the Court. Moreover, although the WIGJ have yet to be recognised as an *amicus curiae,* they are in effect participating in the proceedings (albeit in a limited manner) to the extent that their request impacts on the expeditiousness of the proceedings and the right of the Defence to adequate time and facilities for their preparation in advance of the confirmation hearing.
7. In the alternative, the Defence hereby requests the leave of the Chamber to respond to the preliminary question as to whether the WIGJ should be granted leave to file submissions as *amicus curiae.* This would be consistent with the principle of *audi alteram partem*, and the duty of the Chamber to take such measures as are necessary to ensure the rights of the defence under article 67(1) of the Statute.

3. Submissions:

8. Although the Defence does not intend to discuss the substance of the proposed *amicus curiae* application, it notes that the topics delineated in the request are either predicated on specific allegations concerning Thomas Lubanga Dyilo which have arisen from investigations conducted by the WIGJ, or general concerns concerning the strategy and policy of the Prosecution.
9. In terms of the former, if the WIGJ were permitted to address the court on these factual allegations, it would also be necessary for the Court to order the WIGJ to disclose to the participants the factual foundation for its conclusions i.e. any witness statements and exhibits it collected during its missions in the DRC. This would not only create a parallel case against Thomas Lubanga Dyilo, but would deplete the scarce resources of the defence team. It would also have the potential to introduce a parallel course of litigation concerning protective measures and disclosure obligations/deadlines for the WIGJ.

10. Regarding the second cadre of *amicus* observations, the Defence acknowledge that the ICC has an important historical and political mandate. This should not, however, distort the fact that the present proceedings concretely concern and affect the rights of Thomas Lubunga Dyilo. As such, it is imperative that his rights to due process and to expeditious proceedings do not get overridden by attempts to use this case as a sounding board for policy debates.
11. The Defence fully supports the concept of an accountable and transparent Prosecutor, but does not believe that the present proceedings against Thomas Lubanga Dyilo are the appropriate forum for entering into a general policy debate. The Defence is aware of the fact that NGOs have vocally and repeatedly expressed concerns in relation to the policies of the Prosecutor. NGOs (including the WIGJ) have utilised[6] and may continue to utilise both the media and Rule 104 as avenues for doing so. There is thus no reason why they should also be permitted to utilise the present case to reiterate these concerns.
12. The WIGJ justify their participation on the grounds that "[g]iven 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 submitted that the participation of *amicus curiae* in the proceedings is justified, to ensure that all possible arguments are put before the Court for its consideration."[7]
13. This may have been the case if the aim of the WIGJ was to present neutral submissions which address the possible rights and concerns of all participants. That, unfortunately, is not the case as the WIGJ is raising several legal and factual issues which are detrimental to the interests and rights of Thomas Lubanga Dyilo. The Defence would therefore be forced to respond to the substance of these allegations in order to protect the rights of Thomas Lubanga Dyilo and to contest these publicly made allegations.
14. The Defence therefore respectfully disagrees with the ultimate conclusion of the WIGJ that its participation will ensure that all possible arguments are put before the Court for its consideration. Given the volume of materials disclosed to the Defence and the consequences for Thomas Lubanga Dyilo if the charges are confirmed, what is imperative is that the Defence be accorded adequate time and resources to ensure that all possible relevant arguments are put before the Court. To the extent that the

[6] See for example, letter from NGOs to ICC Prosecutor concerning charges against Thomas Lubanga Dyilo dated 31 July 2006, < http://www.iccnow.org/documents/DRC_joint_letter_eng.PDF >
[7] At para 5.

recognition of the WIGJ as *amicus curiae* would divert the time and the resources of the defence, their participation would be counterproductive to their purported aim.

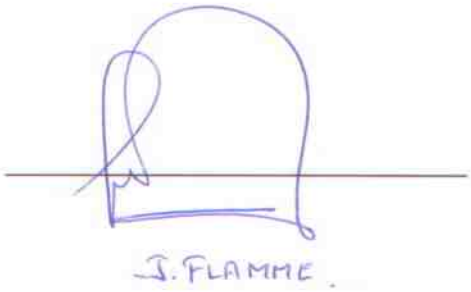
15. The Defence also observes that several issues, such as the criteria for victims' participation, have already been considered by the Pre-Trial Chamber. In addition, the Prosecution has clearly indicated in its latest filing that it has no intention to amend the charges prior to the confirmation hearing. Any submissions in relation to alleged crimes pertaining to gender violence *et cetera* are clearly redundant for the purposes of *this* confirmation hearing.
16. As a final observation, the Defence is strongly concerned by the fact that the WIGJ automatically equates the mandate of the Court to eliminate impunity with a need to enlarge the charges brought by the Prosecutor against Thomas Lubanga Dyilo. It is inevitable that the ICC will not be able to prosecute all persons who committed violations of the Rome Statute. However, the converse of this should not be that the ICC charges the one person they have in their custody with all the crimes which allegedly occurred in the DRC.
17. One of the seminal objectives of individual criminal responsibility was to eliminate the desire for collective punishment. However it is equally important not to err by moving towards the other extreme of using individuals as scapegoats for all offences, irrespective of whether that person bears the greatest legal responsibility for those offences. Such a practice would create an equally damaging form of impunity by sending the signal that someone has been punished for these crimes, whereas the persons who actually bear the greatest responsibility for those particular offences walk free.
18. Thus, if the ICC is to function effectively and expeditiously, it should have targeted, non-discriminatory prosecutions, which are well founded on evidence and law, and which will serve as an example and catalyst for national prosecutions for all other related perpetrators. The Defence also respectfully submits that this also implies that the Court should convene targeted, focused proceedings (and confirmation hearings) which do not digress into the realm of policy debate proposed by the WIGJ.

4. Relief Sought

19. For the reasons outlined above, the Defence respectfully requests the Honourable Pre-Trial Chamber to:

    i. accept this filing; and

ii. reject the request of the WIGJ for leave to file observations as *amicus curiae* in the case against Thomas Lubanga Dyilo.



Dated this 19th day of September, 2006

At The Hague