

WOMEN'S INITIATIVES FOR GENDER JUSTICE

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Confidential

Mr. Luis Moreno Ocampo
Chief Prosecutor
International Criminal Court
Maanweg 174
2516 AB, The Hague
The Netherlands

Dear Mr Ocampo,

The Women's Initiatives for Gender Justice (Women's Initiatives) wishes to express its grave concern at the narrow charges being brought by the Office of the Prosecutor (OTP) in the case against Thomas Lubanga Dyilo, specifically the absence of charges for gender based crimes for which we believe there is substantial and available evidence as shown by a report, prepared by the Women's Initiatives, which we attach to this letter and discuss below.

The Women's Initiatives for Gender Justice is an international women's human rights organization advocating for gender justice, in particular through the International Criminal Court (ICC). Amongst other activities, the organization works globally to ensure justice for women and an independent and effective ICC, and seeks to ensure that sexualized violence and gender-based crimes are effectively investigated and prosecuted by the Court.

We note that in September 2003, when you announced your intention to commence an investigation of the situation in the Democratic Republic of the Congo (DRC) you stated 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".¹ In a number of subsequent statements made by or attributable to you over the past 12 months, it was affirmed that the situation in the DRC involved allegations of a variety of large-scale crimes under the Statute of the

¹ Press Release ICC-OTP-20040623-59-En, 23 June 2004 < http://www.icc-cpi.int/pressrelease_details?id=26&l=en.html >.

Court in addition to the conscription of child soldiers, including summary executions, mass murder, torture, rape and other forms of sexual violence, and forced displacement.^{2,3,4}

In view of these statements, the Women's Initiatives is concerned that the only crimes included in the warrant of arrest issued on 10 February 2006 against Thomas Lubanga Dyilo were crimes relating to the conscription and use of child soldiers (Statute, articles 8(2)(b)(xxvi) and 8(2)(e)(vii)).

The Women's Initiatives appreciates that prosecutions by the ICC may need to be selective, since it will not necessarily 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. The Women's Initiatives also appreciates that under the Statute of the ICC, it is in principle a matter within the discretion of the Prosecutor to determine which persons to charge with which crimes. However, if proceedings before the ICC are to be fair and just, from the point of view not only of the accused, but also from the point of view of victims and the local and international communities, it is necessary that this prosecutorial discretion be exercised in a transparent and principled way. We believe that the need for transparency and principled decisions entitles the public to call upon the Prosecutor to give an explanation of his reasons for selecting the persons against whom charges are brought, and of the reasons for the selection of the charges against those persons.

One of the principal functions of the ICC is to deter the commission of the crimes within its Statute by prosecuting those who commit them. It is evident that if the Prosecutor, in the exercise of his or her discretion, chose never to prosecute certain types of crimes, the ICC would not have the effect of deterring those types of crimes. Indeed, the ICC might in such circumstances send the signal that such crimes can continue to be committed with impunity. Thus, the selection of the particular charges against those who are accused is even more important than the overall number of accused.

We believe that rape and other forms of sexual violence are a defining characteristic of the conflict

² Address by Prosecutor Luiz Moreno Ocampo, Third Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, The Hague, 6 September 2004 < http://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).

³ 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").

⁴ 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.")

in eastern DRC which fact has been amply documented by international organizations, NGOs and the media. Deterring such crimes requires that they be appropriately charged in cases before the ICC, whenever there is evidence of their commission.

In the case of Thomas Lubanga Dyilo, the Pre-Trial Chamber on 10 February 2006 has already made the finding in the warrant of arrest that there are reasonable grounds for believing that he 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, that he had defacto authority and ultimate control over the policies/practices of these organisations, and that the UPC/FPLC was a hierarchically organised armed group.⁵ In March this year you stated that the FPLC, the military wing of the UPC, was “one of the militias which had committed the worst atrocities”.⁶

There is readily-available public material documenting crimes of sexual violence that were committed specifically by the UPC/FPLC. For instance, in a letter from the Secretary-General of the United Nations to the President of the Security Council, dated July 16, 2004, the Secretary-General states:

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.⁷

UPC soldiers also committed large-scale rape in the 15 different areas of the town, sometimes abusing girls as young as 12.⁸

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.⁹

Other instances of gender-based crimes committed by the UPC can be found, for instance, in reports of Amnesty International¹⁰ and Human Rights Watch.¹¹ We recognize there is a difference between

⁵ No. ICC-01/04-01/06-2, “Warrant of Arrest”, 10 February 2006, pp. 3-4.

⁶ Press Release ICC-OTP-20060302-126-En, 17 March 2006 < <http://www.icc-cpi.int/press/pressreleases/133.html> >.

⁷ 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> >, at para. 80.

⁸ *Ibid.* para. 37.

⁹ *Ibid.* para. 108.

¹⁰ 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 notably,

general allegations included in United Nations and NGO reports and the specific evidence required at trial. However the information available indicates gender based crimes have been committed, that such commission has been widespread and that victims/survivors and witnesses of these crimes are willing to come forward.

Given the publicly available information, we are deeply disturbed by a document filed by the OTP in this case on 28 June 2006.¹² This document 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, further investigations into other possible charges have now been suspended, and the current charges will not be amended “during the present proceedings”. It is not clear to us from the document whether the words “the present proceedings” mean until the end of the trial on the current charges, or until the end of the Article 61 confirmation proceedings. Most disturbingly, 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.¹³ There is no reference in the document to any investigation ever being undertaken in this case into gender-based crimes.

In the circumstances, the Women’s Initiatives is gravely concerned that gender-based crimes have not been adequately investigated in this case, and indeed, there is no indication in the document filed on 28 June 2006 that they have ever been a serious subject of investigation at all.

We are similarly concerned that no investigations appear to have been undertaken in this case into allegations of child soldiers being raped given especially that the only crimes included in the arrest warrant relate to child soldiers. We are aware of information regarding the rape of girls abducted by the UPC for the purposes of induction into the militia group. Several reports exist on gender based crimes committed against girls abducted by militia groups in the DRC.¹⁴

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).

¹¹ 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).

¹² No. ICC-01/04-01/06-170, “Prosecutor’s Information on Further Investigation”, 28 June 2006.

¹³ *Ibid.* para. 3.

¹⁴ See, for example, Amnesty International, *Democratic Republic of Congo – Children at War*, 9 September 2003, AI Index: AFR 62/034/2003 < [http://web.amnesty.org/library/pdf/AFR620342003ENGLISH/\\$File/AFR6203403.pdf](http://web.amnesty.org/library/pdf/AFR620342003ENGLISH/$File/AFR6203403.pdf) >, pp. 8-9; Save the Children Fund, *Forgotten Casualties of War – Girls in armed conflict*, 2005 < http://www.savethechildren.org.uk/temp/scuk/cache/cmsattach/2698_GAAF%20report.pdf >, pp. 11-16; Coalition to

As you are aware the Women's Initiatives has had various meetings with senior officials of the OTP where we raised concerns that gender-based crimes were not being effectively investigated in the DRC. In a meeting held on 29 March 2006, we were informed that the OTP did not intend to include gender based crimes against Thomas Lubanga Dyilo as there was insufficient time to do so. The position of the OTP at this meeting was that evidence of gender based crimes was insufficient because either the evidence did not exist or that crimes of rape and other forms of sexual violence committed by the UPC were opportunistic and were not conducted on a large scale. The Women's Initiatives finds this position untenable as we have information that not only does the evidence of gender based crimes exist but they were conducted on a large scale basis. Furthermore the crimes were committed by the militia under the command of Thomas Lubanga Dyilo or in territory controlled by the UPC. We cannot help coming to the conclusion that the OTP has failed to collect this evidence.

[REDACTED]

At these meetings the OTP further gave indications that investigations of gender based crimes may form part of the investigations in future cases ensuing from the situation in the DRC, but not in the Thomas Lubanga Dyilo case. We are particularly concerned by a number of further consequences that this position will have.

First, given that there are reasonable grounds for believing that Thomas Lubanga Dyilo had effective authority and ultimate control over the policies/practices of the UPC/FPLC, it seems to us to be inherently unlikely that any subordinate member of the UPC/FPLC will be charged with gender-based crimes if Thomas Lubanga Dyilo is not so charged. Any future DRC cases in which gender-based crimes are charged would therefore be against alleged members of groups other than the UPC/FPLC. Our concern is that if gender-based crimes are charged in cases for example brought against the FNI/FRPI in which the victims are Hema women, this will be perceived by Lendu victims as a double persecution. Such a result would not be conducive to the restoration of peace and reconciliation in the region, and could be a cause of future tensions.

Secondly, if gender-based crimes are not included in the charges in the Thomas Lubanga Dyilo case, this will mean that victims of gender-based crimes for which he may be responsible will be denied the opportunity to participate in the proceedings. The Pre-Trial Chamber has held that at the case

Stop the Use of Child Soldiers, *Child Soldiers Global Report 2004*, 2004 < http://www.child-soldiers.org/document_get.php?id=966 >, p. 52.

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.¹⁵ To meet the definition in relation to a particular case, there must be a sufficient causal link between the harm suffered by a victim and the crimes for which the Chamber has issued an arrest warrant.¹⁶ The inclusion of such limited charges in the arrest warrant in this case will thus have a severely limiting impact on victim participation in the case, and also in any related proceedings concerning reparations. In this respect, we recall your own statement that:

... in establishing and implementing its policies the Office has been and remains cognizant of the important role that *victims* play in the proceedings. At every stage of the judicial process, the Office will consult with the relevant victims and take their interests into account.¹⁷

Indeed, it is well known that the inclusion of provisions on victim participation was a key innovation in the Rome Statute of the ICC. To exclude from the proceedings in this case all victims other than former child soldiers is not in our view consistent with this aim.

I attach with this letter a report from the Women's Initiatives for Gender Justice on gender-based crimes committed in eastern DRC by the UPC. This report includes fifty-five (55) individual interviews with women victims/survivors of rape and other forms of sexualized violence. 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 by the Women's Initiatives [REDACTED]. The field missions were conducted in May and July 2006, over 22 days, and were conducted by 3 people for under € 30,000. Given the far greater resources of the OTP, and given that the OTP has had much longer to investigate the situation in the DRC, we hope this report will persuade you that investigations into gender-based crimes in this conflict are urgently needed and feasible. We remind you that you have a positive obligation under the Rome Statute to effectively investigate and prosecute gender based crimes.

In conclusion therefore we are of the view that the absence of charges for gender based crimes against Thomas Lubanga Dyilo at this stage is undeniably due to ineffective investigations conducted by your office which were limited in scope, poorly directed and displayed a lack of commitment to gather the relevant information and evidence to enable gender based crimes to be brought against the first indictee at the ICC. We are fully aware that there are real difficulties and

¹⁵ 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", 26 January 2006, para. 66.

¹⁶ 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.

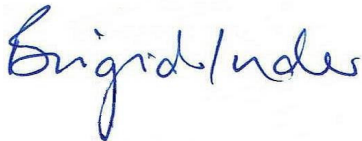
¹⁷ Seventh Diplomatic Briefing of the International Criminal Court, Compilation of Statements, 29 June 2006 < <http://www.icc-cpi.int/library/asp/DB7-Compilation-Statements.pdf> >, at p. 8.

challenges in conducting investigations in an environment where there is an ongoing conflict as in eastern DRC, but nevertheless such investigations are viable. In the circumstances, we also believe that the public is entitled to a cogent explanation as to why the OTP has not undertaken committed investigations and now has declared its intention not to conduct further investigations into allegations of gender-based crimes in this case.

The Women's Initiatives asserts that it is not too late for the OTP to correct its current investigatory oversight of these crimes and urges you to immediately open investigations into gender based crimes and pursue the leads and incidents outlined for you in the enclosed report. We are willing to engage in further dialogue with the OTP regarding the information included in this report and will offer assistance as needed by the OTP at its request.

We are of the view that the Pre-Trial Chamber has the power, under Article 61(7) of the Rome Statute, to consider whether a case has been adequately and appropriately investigated, and can invite the Prosecutor to undertake further investigations if it is not satisfied that this has occurred. The Women's Initiatives may subsequently seek leave to make submissions on this issue as *amicus curiae* before the Pre-Trial Chamber.

Yours sincerely,

A handwritten signature in blue ink that reads "Brigid Inder". The signature is written in a cursive, flowing style.

Brigid Inder
Executive Director