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PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

**SITUATION OF CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
*v. JEAN-PIERRE BEMBA GOMBO***

Public Document

**Request for leave to submit Amicus Curiae observations
pursuant to Rule 103 of the Rules of Procedure and Evidence**

Source: Women's Initiatives for Gender Justice

Document to be notified in accordance with regulation 31 of the *Regulations of the****Court to:*****The Office of the Prosecutor**

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I. Introduction

1. The Women's Initiatives for Gender Justice (the "Women's Initiatives") respectfully seeks leave to submit observations as *amicus curiae* on issues of cumulative charging raised in Pre-Trial Chamber II's "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo".¹ (the "Confirmation Decision")
2. The present application is made pursuant to Rule 103 of the Rules of Procedure and Evidence (the "Rules").

II. Application for Leave

3. The Women's Initiatives, an international women's human rights organization, was established as a "Stichting" under the law of the Netherlands in January 2004. Further details of the Women's Initiatives and its interest in these proceedings are set out below in section V.
4. Rule 103(1) of the Rules allows:

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.

5. For the reasons set out below, the Women's Initiatives requests leave to submit an *amicus curiae* brief in the case of the *Prosecutor v. Jean-Pierre Bemba*

¹ Pre-Trial Chamber II, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, 15 June 2009 ("Confirmation Decision").

Gombo. (the “Case”). In accordance to Rule 103(1), the Women’s Initiatives applies for leave to submit observations both in writing and orally.

III. Relevant Procedural Background

6. On 23 May 2008, Pre-Trial Chamber III issued a warrant of arrest² against Jean-Pierre Bemba Gombo (the “Accused”). The Prosecutor charged the accused with the Crimes Against Humanity of murder, rape and torture, pursuant to Article 7 of the Rome Statute, (the “Statute”) and the War Crimes of murder, torture, rape, outrages upon personal dignity and pillaging, pursuant to Article 8 of the Statute.
7. On 10 June 2008, Pre-Trial Chamber III issued a new arrest warrant that replaced the arrest warrant of 23 May 2008.³
8. On 17 October 2008⁴ and on 19 November 2008,⁵ the Prosecutor filed amended Documents Containing Charges (the “DCC”) against the accused. The amended DCCs did not alter the number of counts or the characterization of the charges.
9. From 12 January until 15 January 2009, Pre-Trial Chamber III conducted the confirmation of charges hearing (the “Hearing”) and, on the same day, invited the parties to file supplementary written submissions.

² Pre-Trial Chamber III, *Warrant of Arrest for Jean Pierre Bemba Gombo*, ICC-01/05-01/08-1-tENG-Corr, 23 May 2008.

³ Pre-Trial Chamber III, *Warrant of Arrest for Jean-Pierre Bemba Gombo replacing the Warrant of Arrest issued on 23 May 2008*, ICC-01/05-01/08-15-tENG, 10 June 2008.

⁴ See Office of the Prosecutor, *Prosecution’s Application for Leave to Appeal the Decision Pursuant to Article 61(7)(a) and (b) on the Charges against Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-427, 22 June 2009 (“Application”), para.3.

⁵ Office of the Prosecutor, *Prosecution’s Communication of Amended Document Containing the Charges and Amended List of Evidence pursuant to the Third Decision on the Prosecutor’s Requests for Redactions and Related Request for the Regulation of Contacts of Jean-Pierre Bemba Gombo With Confidential Prosecution and Defence Only Annexes A, B, C, D*, ICC-01/05-01/08-264, 19 November 2008.

10. On 30 March 2009, the Prosecutor filed a subsequent amended DCC against the accused, together with the Prosecutor's Amended List of Evidence and an In Depth Analytical Chart of Incriminatory Evidence.⁶ The Amended DCC of 30 March 2009 retained the three charges of Crimes Against Humanity, respectively murder, torture and rape, and the five charges of War Crimes, namely murder, torture, rape, outrages upon personal dignity and pillaging.

11. On 15 June 2009, Pre-Trial Chamber II (the "Chamber") issued its Confirmation Decision on the charges against the accused. The Chamber stated in the Confirmation Decision that:

...The prosecutorial practice of cumulative charging is detrimental to the rights of the Defence since it places an undue burden on the Defence. The Chamber considers that, as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges. This is only possible if each statutory provision allegedly breached in relation to one and the same conduct requires at least one additional material element not contained in the other.⁷

12. Accordingly, the Chamber declined to confirm Count 3 of the Amended DCC, torture,⁸ as a Crime Against Humanity under Article 7(1)(f), and held that the acts of torture were fully subsumed by the count of rape.⁹ The Chamber, invoking the same reasoning, declined to confirm Count 5 of the Amended DCC, outrages upon personal dignity, a War Crime under Article 8

⁶ Office of the Prosecutor, *Prosecution's Submission of Amended Document Containing the Charges, Amended List of Evidence and Amended In-Depth Analysis Chart of Incriminatory Evidence with Under Seal, Ex Parte Prosecution Only Annexes 1A, 1B, 1C, 1D, 1E and Confidential, Prosecution and Defence Only Annexes 2A, 2B, 2C, 2D, 2E and Public Annexes 3, 4, and 5*, ICC-01/05-01/08-395, 30 March 2009 ("Amended DCC").

⁷ Confirmation Decision, para. 202.

⁸ Confirmation Decision, para. 190.

⁹ Confirmation Decision, para. 205.

(2)(c)(ii),¹⁰ and held that outrages upon personal dignity was fully subsumed by the count of rape.¹¹ The Chamber confirmed Counts 1 and 2 of the Amended DCC, rape as a Crime Against Humanity and as a War Crime.¹²

13. Apparently, as a further rationale to support the confirmation of the charge of rape under Counts 1 and 2, the Chamber recalled that Regulation 55 permitted a Trial Chamber to “re-characterise a crime to give it the most appropriate legal characterisation”,¹³ and thus disallowed the prosecutor’s approach to cumulative charging, stating that pleaded otherwise, the Defence might have to confront “all possible legal characterisations”.¹⁴

14. Moreover, in the Confirmation Decision the Chamber cited to an insufficiency of evidence or imprecise pleading in the Amended DCC and, hence, declined to confirm acts within Count 3, torture as a Crime Against Humanity,¹⁵ and within Counts 4 and 5, torture¹⁶ and outrages upon personal dignity¹⁷ as War Crimes that resided upon conduct other than direct rapes, such as acts to constrain family members to witness sexual violence inflicted upon each other.¹⁸

15. On 22 June 2009, the Prosecutor filed its Application for leave to Appeal the Decision Pursuant to Article 61(7)(a) and (b) on the Charges against Jean-Pierre Bemba Gombo, (the “Application”). The Prosecution moved to appeal the Chamber’s denial of confirmation of the charges of torture and outrages upon personal dignity due to the Chamber’s holding on cumulative charging

¹⁰ Confirmation Decision, para. 302.

¹¹ Confirmation Decision, para. 312.

¹² Confirmation Decision, p. 185.

¹³ Confirmation Decision, para. 203.

¹⁴ Confirmation Decision, para. 203.

¹⁵ Confirmation Decision, para. 209.

¹⁶ Confirmation Decision, para. 291, 297-300.

¹⁷ Confirmation Decision, para. 311.

¹⁸ Confirmation Decision, para. 308.

and the Chamber's finding that there was insufficient pre-trial notice to the Defence of the charges and of the supporting facts that resulted in the dismissal of Counts 3, 4, and 5.¹⁹

16. On 26 June 2009, the Office of the Public Counsel for Victims filed their Response²⁰ to the Confirmation Decision and underscored their support of the Prosecutor's Application. The Principal Counsel argued that the manner in which crimes are charged statutorily lies within the discretion of the Prosecutor.²¹ The Response averred that the Chamber acted beyond their competence and effectively usurped the Prosecutor's discretion when it failed to confirm the charges in the Amended DCC that it deemed cumulative.²² The Response also challenged the Chamber's restricted recognition of victims of sexual violence as solely victims when they are directly raped, and not when they are otherwise tortured, or subjected to outrages upon their personal dignity.²³

17. On 9 July 2009, the Defence respectfully informed the Chamber that they would file their response to the Prosecutor's Application after the French translation of the Confirmation Decision and the Prosecutor's Application had been completed.²⁴

¹⁹ Application, para. 8.

²⁰ Office of the Public Counsel for Victims, *Réponse du Représentant légal des victimes a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08 et a/0467/08 à la demande d'autorisation d'interjeter appel déposée par le Bureau du Procureur à l'égard de la Décision sur la confirmation des charges*, ICC-01/05-01/08-428, 26 June 2009 ("Response").

²¹ Response, para. 14.

²² Response para. 14.

²³ Response, paras. 17-19.

²⁴ Counsel for the Defence, *Observations de la Défense à la demande du Procureur concernant l'autorisation de former appel contre la décision de confirmation des charges*, ICC-01/05-01/08-443, 9 July 2009.

18. The Women's Initiatives files the present request to seek leave to submit observations, *amicus curiae*, in a proposed brief on the matter of cumulative charging, now before the Chamber.

IV. The Proposed *Amicus Curiae* Will Assist the Chamber in Resolving the Issues

Sub Judice

19. The Women's Initiatives' proposed brief will be "desirable for the proper determination of the case"²⁵ because it will (1) address cumulative charging in light of the due process rights of the accused as well as the elements of crimes, issues of first impression before the International Criminal Court (the "Court") and the Chamber; and (2) address cumulative charging in light of Article 21 of the Rome Statute. The observations that will be raised by the *amicus curiae* are not addressed in the Prosecutor's Application or in the Office of the Public Counsel for Victims' Response. Furthermore, the observations relate to issues that will impact future cases at the Court, in particular cases that will examine evidence of gender-based violence, inclusive of sexual violence.

20. The proposed *amicus curiae* intends to offer observations about cumulative charging and any potential detriment to the rights of the accused to a fair trial in view of Article 21 of the Rome Statute. The observations will examine whether the accused is fully protected from unfair and unlawful prosecution by the safeguards provided for within the Statute, international treaties, general principles of law and the human rights guarantees as embodied in Article 21.

21. Any necessity to disallow cumulative charging under the aegis of Regulation 55, in order to preserve the due process rights of the accused, will be

²⁵ Rule 103(1).

addressed in light of the statutory construction attributed under Article 21. These observations are *de novo* and will impact on future cases before the Chambers and the Court.

22. The proposed *amicus curiae* intends to offer observations to assist the Chamber by distinguishing between cumulative and non-cumulative charges, *inter alia*, in instances of the crimes rape and torture, including in cases of children, under the Rome Statute, as guided by international law. These observations are *de novo* and will impact on future case before the Court.
23. The proposed *amicus curiae* intends to offer observations to the Chamber on the statutory obligations integrated into Article 21 of the Rome Statute that require the Chamber to take into consideration evidence of gender-based violence, as incorporated into the Rome Statute, and as derived from international treaties and their interpretation, such as the Convention on the Elimination of all forms of Discrimination Against Women, and the Convention the Rights of the Child, as well as regional human rights treaties. These observations are *de novo* and will impact on future case before the Court.
24. The proposed *amicus curiae* will address how the requirement within Article 21(3), specifically that the application of the law that governs the Court be administered in a manner that is consistent with human rights guarantees and without adverse distinction on such grounds as gender and age, applies to the issues *sub judice*. These observations are *de novo* and will impact on future cases before the Court

V. The Women's Initiatives for Gender Justice Is an Appropriate Organization to Act as an *Amicus Curiae* in the Present Case

25. Since 2004, the Women's Initiatives for Gender Justice, an independent non-governmental organization, has been the leading international women's human rights organization monitoring the International Criminal Court. The Women's Initiatives works with women in each situation currently before the Court, with a particular focus on women victims/survivors of gender based crimes. The Women's Initiatives advocates for the rights of women and girls, victims/survivors, and communities to access justice and legal remedies and to participate in the establishment of peace and reconciliation processes to end armed conflict.

26. The Women's Initiatives' International Advisory Council and Legal Counsel are renown legal experts who are competent in legal theory, and include persons who have practiced before international judicial bodies that adjudicate gender based crimes under international criminal law and international humanitarian or human rights law.

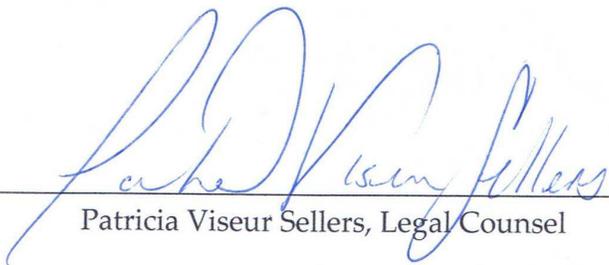
27. The Women's Initiatives has particular expertise on the Rome Statute. Several members were actively involved in the drafting process of the Statute, specifically in relation to the gender provisions. The predecessor to the Women's Initiatives, the Women's Caucus for Gender Justice, was one of the early members of the Coalition of NGOs for the International Criminal Court. The Women's Initiatives has served on the Coalition's Steering Committee from its inception to the present day.

28. The Women's Initiatives is actively engaged in working with women most affected by the conflicts under investigation by the ICC. The organization has extensive programmes for victim participation in proceedings before the

Court, peace negotiation, capacity building, and documentation of gender based crimes in Uganda, the Central African Republic, Darfur and the Democratic Republic of the Congo. The Women's Initiatives is uniquely placed to assist the Chambers with observations in the present matter.

VI. Conclusion

29. For the foregoing reasons, the Women's Initiatives respectfully requests that the Chamber grant leave to submit observations, *amicus curiae*, and order that a proposed brief be timely filed in the present matter pursuant to Rule 103.



Patricia Viseur Sellers, Legal Counsel

Women's Initiatives for Gender Justice

Dated this 13 July 2009

At Oxford, England