



Legal Filings



submitted by the
Women's Initiatives for Gender Justice
to the International Criminal Court

The Prosecutor v. Jean-Pierre Bemba Gombo
The Prosecutor v. Thomas Lubanga Dyilo

The Women's Initiatives for Gender Justice is an international human rights organisation which advocates for gender justice through the International Criminal Court (ICC) and works with women most affected by the conflict situations under investigation by the ICC.

Currently the Women's Initiatives for Gender Justice has country-based programmes in the four ICC situation countries: Uganda, the Democratic Republic of the Congo, Sudan and the Central African Republic.

The strategic programme areas for the Women's Initiatives include:

- Political and legal advocacy for the prosecution of gender-based crimes
- Capacity and movement building initiatives with women in armed conflicts
- Conflict resolution and integration of gender issues within the negotiations and implementation of Peace Agreements (Uganda, DRC, Darfur)
- Documentation of gender-based crimes in armed conflicts
- Victims' participation before the ICC
- Training of activists, lawyers and judges on the Rome Statute and international jurisprudence regarding gender-based crimes
- Advocacy for reparations for women victims/survivors of armed conflicts

In 2006 the Women's Initiatives for Gender Justice was the first NGO to file before the International Criminal Court and to date is the only women's rights organisation to have been granted *amicus curiae* status.

Women's Initiatives for Gender Justice



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The Prosecutor v. Jean-Pierre Bemba Gombo
Pre-Trial Chamber II

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

13 July 2009



Original: **English**

No.: **ICC-01/05-01/08**

Date: **13 July 2009**

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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Section****Other**

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.

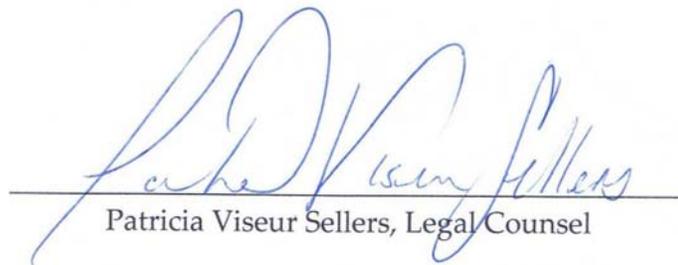
27. The Women's Initiatives has particular expertise on the Rome Statute. Several members were actively involved in the drafting process of the Statute, specifically in relation to the gender provisions. The predecessor to the Women's Initiatives, the Women's Caucus for Gender Justice, was one of the 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

The Prosecutor v. Jean-Pierre Bemba Gombo
Pre-Trial Chamber II

Amicus curiae observations of the Women's Initiatives for
Gender Justice pursuant to Rule 103 of the Rules of Procedure
and Evidence

31 July 2009



Original: **English**

No.: ICC-
Date: **31 July 2009**

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova

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

Public Document

**Amicus Curiae Observations of the Women's Initiatives for Gender Justice
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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Legal Representatives of Victims

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Unrepresented Victims

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Section**

Other

***Amicus Curiae* Submission of the Women’s Initiatives for Gender Justice Pursuant to Rule 103 of the Rules of Procedure and Evidence**

I. Introduction

1. Having sought and been granted leave pursuant to Rule 103 of the ICC Rules of Evidence and Procedure (“Rules”), the Women’s Initiatives for Gender Justice hereby submits its observations on issues related to cumulative charging raised in the “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 that are before Pre-Trial Chamber II (the Chamber) in light of the Prosecutor’s application to seek leave to appeal the Decision Confirming the Charges.²
2. The Chamber must determine whether the Application satisfies the standard set forth in Article 82(1)(d) of the Rome Statute (“Statute”), namely that the Decision Confirming the Charges involves “an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which ... an immediate resolution by the Appeals Chamber may materially advance the proceedings”.³
3. The *Amicus* respectfully offers the Chamber observations in order to assist in “the proper determination of the case” pursuant to Rule 103(1).

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 (“Decision Confirming the Charges”).

² 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*, and its annex, ICC-01/05-01/08-427, 22 June 2009 (“Prosecutor’s Application”).

³ Article 82(1)(d) states: “Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: ... (d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”

II. Procedural Background of Issues on Appeal

1. On 23 May 2008, Pre-Trial Chamber III issued a warrant of arrest⁴ against Jean-Pierre Bemba Gombo (the “Accused”).⁵ The Prosecutor charged the Accused with the Crimes Against Humanity of murder, rape and torture, pursuant to Article 7 of the Statute and the War Crimes of murder, torture, rape, outrages upon personal dignity and pillaging, pursuant to Article 8 of the Statute.⁶
2. From 12 until 15 January 2009, Pre-Trial Chamber III conducted the confirmation of charges hearing (the “Hearing”).
3. On 30 March 2009, the Prosecutor filed a subsequent amended Documents Containing the Charges (“DCC”) against the Accused, together with the Prosecutor’s Amended List of Evidence and an In Depth Analytical Chart of Incriminatory Evidence.⁷
4. On 15 June 2009, the Chamber issued its Decision Confirming the Charges. The Chamber dismissed Count 3 of the Amended DCC, torture, a Crime Against Humanity under Article 7(1)(f).⁸ The Chamber also dismissed Count 5 of the Amended DCC, outrages upon personal dignity, a War Crime under Article

⁴ Pre-Trial Chamber III, *Warrant of Arrest for Jean Pierre Bemba Gombo*, ICC-01/05-01/08-1-tENG-Corr, 23 May 2008.

⁵ On 10 June 2008, Pre-Trial Chamber III issued a new arrest warrant that replaced the arrest warrant of 23 May 2008. 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.

⁶ The Prosecutor amended the Documents Containing the Charges against the Accused on two subsequent occasions. See Office of the Prosecutor, *Prosecution’s Submission of the Document Containing the Charges and List of Evidence*, ICC-01/05-01/08, 1 October 2008; 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.

⁷ See 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”). 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.

⁸ Decision Confirming the Charges, para. 190.

- 8(2)(c)(ii).⁹ The Chamber confirmed Counts 1 and 2 of the Amended DCC, rape as a Crime Against Humanity and rape as a War Crime.¹⁰
5. The Chamber opined that the dismissed charges ran afoul of cumulative charging principles.¹¹
 6. The Chamber held that the acts of torture under Count 3 did not possess a distinct element from rape and, thus, were fully subsumed by Count 1.¹² Similarly, the Chamber held that outrages upon personal dignity was fully subsumed by Count 2, rape as a War Crime.¹³
 7. To further support its findings, the Chamber ruled that Regulation 55 permitted a Trial Chamber to “re-characterise a crime to give it the most appropriate legal characterisation”.¹⁴ It found that under the Prosecutor’s approach to cumulative charging, the Defence might have to confront “all possible characterisations”.¹⁵
 8. Moreover, the Chamber cited an insufficiency of evidence or imprecise pleading in the Amended DCC as another rationale for the dismissals of Count 3, torture as a Crime Against Humanity,¹⁶ and Counts 4 and 5, torture¹⁷ and outrages upon personal dignity¹⁸ as War Crimes.
 9. On 22 June 2009, the Prosecutor filed its Application for leave to appeal the Chamber’s dismissal of the charges of torture and outrages upon personal dignity.

⁹ Decision Confirming the Charges, para. 302.

¹⁰ Decision Confirming the Charges, p. 185.

¹¹ Decision Confirming the Charges, paras. 202, 310.

¹² Decision Confirming the Charges, paras. 204-205.

¹³ Decision Confirming the Charges, paras. 310, 312.

¹⁴ Decision Confirming the Charges, para. 203.

¹⁵ Decision Confirming the Charges, para. 203.

¹⁶ Decision Confirming the Charges, para. 209.

¹⁷ Decision Confirming the Charges, paras. 291, 297-300.

¹⁸ Decision Confirming the Charges, paras. 311-312.

10. On 26 June 2009, the Office of the Public Counsel for Victims filed their Response to the Decision Confirming the Charges in support of the Prosecutor's Application.¹⁹
11. On 9 July 2009, the Defence respectfully informed the Chamber that they would respond after the issuance of the French translation of the Decision Confirming the Charges.²⁰
12. On 13 July 2009, the Women's Initiatives for Gender Justice (Women's Initiatives) filed a Request for Leave to File *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence.²¹
13. On 14 July 2009, the Defence filed a request to submit observations on the submission of the *Amicus Curiae* Observations of the Women's Initiatives.²²
14. On 22 July 2009, the Chamber released its Decision on the Request for Leave to File *Amicus Curiae* Observations to Rule 103 of the Rules of Procedure and Evidence,²³ and granted the Women's Initiatives leave to submit the present observations.

III. Applicable Law

15. The *Amicus* relies upon the following law from the Statute:

¹⁹ 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.

²⁰ 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.

²¹ Women's Initiatives for Gender Justice, *Request for leave to submit Amicus Curiae observations pursuant to Rule 103 of the rules of procedure and evidence*, ICC-01/05-01/08-447, 13 July 2009 ("Request for Leave").

²² Counsel for the Defence, *Observations de la Défense à la demande du l'ONG « Women's initiatives for Gender Justice » concernant l'autorisation de participer comme Amicus Curiae*, ICC-01/05-01/08-449-Corr, 14 July 2009.

²³ Pre-Trial Chamber II, *Decision on Request for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence*, ICC-01/05-01/08-451, 17 July 2009.

Article 21

Applicable law

1. The Court shall apply:
 - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
 - (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
 - (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Article 51

Rules of Procedure and Evidence

...

4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.

...

Article 52

Regulations of the Court

1. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.

....

Article 61

Confirmation of the charges before trial

....

7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person

committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

- (a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;
- (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;

...

Article 67

Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
- (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
- (c) To be tried without undue delay;

...

Article 74

Requirements for the decision

...

2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.

...

Article 82

Appeal against other decisions

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

- (d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

...

16. The *Amicus* relies upon the following law from the Rules and Regulations:

Rules of Evidence and Procedure*

* **Explanatory note:** The Rules of Procedure and Evidence are an instrument for the application of the Rome Statute of the International Criminal Court, to which they are subordinate in all cases. ... In all cases, the Rules of Procedure and Evidence should be read in conjunction with and subject to the provisions of the Statute.

Rule 103

***Amicus curiae* and other forms of submission**

1. 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.

2. The Prosecutor and the Defence shall have the opportunity to respond to the observations submitted under sub-rule 1.

...

Regulation 1

Adoption of these Regulations

1. These Regulations have been adopted pursuant to article 52 and shall be read subject to the Statute and the Rules.

...

Regulation 55

Authority of the Chamber to modify the legal characterisation of facts

1. In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.

...

IV. Observations of the *Amicus*

17. The *Amicus* offers the following observations to clarify important issues in regard to cumulative charges so as to assist the Chamber in the proper determination of the case.

18. The *Amicus* agrees with the Chamber that cumulative charging is permissible and that the Chamber applied the appropriate test to determine cumulativeness as

intoned by the ICTY Appeals Chamber in the *Prosecutor v. Delalic*.²⁴ The *Amicus* notes that the Chamber acknowledges not only international courts but also national criminal systems permit cumulative charges, notably the common law practice of multiple offenses, or the civil law practice exemplified in *concurrs d'infraction*.

19. In the Decision Confirming the Charges, the Chamber dismissed counts of torture and outrages upon personal dignity and held that cumulative charging²⁵ might be detrimental to the rights of the accused. It averred 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.²⁶

20. The Chamber envisions that upon confirmation of the Document Containing the Charges, the Prosecutor should not allege crimes that are *improperly* cumulative, meaning charges that run afoul of the *Delalić* test. If the Document Containing the Charges were to allege crimes, arising from the same facts and circumstances, that did not have a distinct element, the Chamber would consider such charges to place an unfair burden upon the Defence.

21. The *Amicus* recognizes that at all times, and in particular during the course of the proceedings, the Chamber must assure the fairness and the expeditiousness of the trial, and, thus, ensure the due process rights of the accused are protected under the Statute and the Rules. Moreover, the *Amicus* agrees that the rights of the accused are

²⁴ Decision Confirming the Charges, para. 202, n. 277, citing *Prosecutor v Delalić et al.*, IT-96-21-A, Appeals Chamber Judgment, para. 412, 20 February 2001.

²⁵ The *Amicus* assumes that the Chamber means improper cumulativeness, which contravenes the *Delalić* test that the Chamber applied in the present case.

²⁶ Decision Confirming the Charges, para. 202.

not violated when crimes alleged are properly deemed cumulative, meaning within the prescriptions of the *Delalić* test.²⁷

22. Accordingly, in national courts and international courts, as long as a charge has a sufficient evidentiary basis, the determination of whether charges are cumulative can occur at the end of trial, after the judge's deliberation results in a conviction.²⁸ In such proceedings, it is not inimical to the due process rights of the accused; they remain safeguarded throughout the trial.²⁹ Upon a finding of guilt, cumulative convictions are impermissible, but at the charging stage, whether charges are cumulative or not, their inclusion in the indictment does not violate fair trial practices.

23. The *Amicus* submits that Article 21 of the Statute and the Rules are pertinent to the Chamber's concern regarding its duty to protect the due process rights of the accused. Article 21 states that the Statute is the first guide for the decisions of the Court. The relevant provisions of the Statute include Article 61(7), which requires that all confirmed counts in the DCC have a sufficiency of evidence, and Article 67, which details important rights of the accused in relation to the proceedings. According to Articles 61(7) and 67, an unfair or unlawful prosecution would occur whenever an accused is prosecuted based upon insufficient evidence. The Statute requires that insufficient evidence should incur the dismissal of a count from the Document Containing the Charges and that proceeding on such a charge would contravene Article 61(7) and impinge upon the rights of an accused under Article 67.

²⁷ The *Amicus* recognizes that the rights of the accused still could be upheld and fully protected in proceedings that allege cumulative charges that do not meet the *Delalić* test as long as the confirmation of a criminal charge is done on a count-by-count basis in relation to the sufficiency of the evidence.

²⁸ A. Bogdan, *Cumulative Charges, Convictions and Sentencing at the Ad Hoc International Tribunals for the Former Yugoslavia and Rwanda*, 3 MELB. J. INT'L LAW 1 (2002). See generally JEAN PRADEL, DROIT PÉNAL (1995); JEAN PRADEL, DROIT PÉNAL COMPARÉ (1995); and GASTON STEFANI ET AL., DROIT PÉNAL GÉNÉRAL (15th ed., 1995).

²⁹ See Prosecutor v. Karadžić, *Decision on two motions alleging defects in the form of the indictment*, IT-95-5/18-I, 12 May 2009, para. 21; Prosecutor v. Galić, *Appeals Chamber Judgment*, IT-98-29, para. 161, 30 November 2006; Prosecutor v. Todović & Rašević, *Decision on Todović Defence Motion on the Form of the Joint Amended Indictment*, IT-97-25/1, 21 March 2006, para. 25; Prosecutor v. Rasevic, *Decision regarding Defence preliminary motion on the form of the indictment*, IT-97-25/1-PT, 28 April 2004, paras. 29-30; Prosecutor v. Stankovic, *Decision on the Defence's Preliminary Motion on the Form of the Second Amended Indictment*, IT-96-23/2, 2 April 2003, paras. 15-16; Prosecutor v. Nahimana et al., *Trial Chamber Judgment and Sentence*, ICTR-99-52-T, 3 December 2003, para. 1089; Prosecutor v. Ntakirutimana, *Trial Chamber Judgment and Sentence*, ICTR-96-10 & ICTR-96-17-T, 21 February 2003, para. 863.

24. The *Amicus* observes that national courts' review of cumulative charges at the conviction stage is coherent with such an interpretation of Articles 61 and 67. Clearly, it is recognized that cumulative charges are not the equivalent of charges lacking in evidence. The cumulative charges, in the present case, could not have been submitted to the parameters of the *Delalić* test if the evidence did not sufficiently support their elements. Article 21 would require the application of Article 61(7), which would have nullified the ability to apply the *Delalić* test.
25. Although the *Amicus* agrees that the Chamber applied the correct standard to determine the cumulative nature of the charges, it is advanced that the test was applied incorrectly in at least three categories of witnesses: the child of ten years, the brother of a rape victim who was beaten while his sister was raped, and the persons who watched the sexual assault of their relatives.
26. The Chamber ruled that the elements of torture were not as particularized as the elements of rape. The torture element of infliction of severe physical or mental pain or suffering was subsumed by the rape element of sexual penetration, while the torture element of control and custody was contained under the force or coercion element of rape. Rape was held to have a distinct material element.³⁰ In the factual situation of the ten-year-old girl,³¹ the Chamber did not anticipate that an element of rape, namely, the inability to give genuine consent—completely differentiated from force or coercion—would apply. In that instance, even under the Chamber's rationale, the rape and torture of the ten-year-old girl should not have been viewed as cumulative acts.
27. The Chamber also did *not* find that the brother who was lashed while his sister raped suffered any sexual penetration himself.³² The crime inflicted upon him was torture. The *Delalić* test was inapplicable.

³⁰ Decision Confirming the Charges, para. 204.

³¹ Decision Confirming the Charges, para. 174.

³² Decision Confirming the Charges, para. 179.

28. The Chamber ruled that the persons, themselves victims of rape or soon to be victims of rape, were not tortured when they were forced to view the torture of their relatives. The Chamber might have referred to the jurisprudence of *Prosecutor v. Furundžija*,³³ wherein Witness D, who was forced to watch the repeated rapes of Witness A, was deemed to have been tortured. The *Amicus* observes that the Chamber's application of the cumulative charging test was too narrow.
29. The *Amicus* observes that the Chamber's application of the *Delalić* test examining the cumulativeness of rape and outrages upon personal dignity is also too narrow.³⁴ The Rome Statute separated rape and outrages from the same provision. Infliction of humiliating and degrading conduct is a stand-alone crime. The elements of rape do not require humiliation, degradation, or otherwise violation of dignity as part of the act. The *Amicus* recognizes that the intra-family nature of the public rapes were humiliating, degrading and an infliction upon dignity; however, the description of the outrages upon personal dignity element should not be conflated to satisfy the element of force or coercion of the crime of rape.
30. Again, the *Amicus* advances, in the very least, that the family members forced to witness repeated rapes of their relatives, before or after they themselves have been sexually penetrated, have been more broadly victimized than the act of their rape. The coercion or force elements that support their rape can be differentiated from the humiliation, degradation and violation of dignity inflicted upon them as they watch their family being raped.
31. The Chamber found that the rape counts subsumed the count of torture as a crime against humanity and outrages upon personal dignity, then applied Regulation 55 to re-characterise the evidence of torture, outrages upon personal dignity, and rape as rape. The *Amicus* offers the observation that Article 21 does not refer to Regulations of the Court as an applicable source of law. Even though the regulations enjoy an

³³ *Prosecutor v. Furundžija*, Trial Chamber Judgment, IT-95-17/1, 10 December 1998, para. 267.

³⁴ See General Introduction, Elements of Crimes, para. 9 ("A particular conduct may constitute one or more crimes").

administrative function, they take a subordinate role to statutory provision of Article 21 and the Rules of Procedure and Evidence.³⁵

32. The re-characterisation of evidence of outrages upon personal dignity and torture as rape occurred after these charges were subsumed through failure to meet the cumulative charging test. Nonetheless, their dismissal is also based on insufficiency of evidence. It is unclear which evidence is part of the rape counts and which evidence has been dismissed. Article 74 of the Statute states that “a decision shall be based on the evidence of the entire proceeding and not exceed the facts and circumstance described in the charges.” What facts and circumstances can the sexual assault witnesses base their testimony upon, now, other than rape?

33. The *Amicus* advances that the multiple factors concerning the Chamber’s ruling on sexual assault evidence, application of the *Delalić* test, application of Article 21 and the fair trial rights of the accused, and incertitude of the facts and circumstances or evidence to be established before trial, are issues that would significantly affect the fair and expeditious conduct of the proceedings. The *Amicus* argues that these issues concern the Chamber’s and the Court’s future ability to deliver a justice that is cognizant of gender-based violence, especially the sexual assaults.

34. Article 21(3) requires that:

The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds *such as gender* as defined in article 7, paragraph 3, *age*, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

35. The Convention for the Elimination of Discrimination Against Women (CEDAW),³⁶ a source of law within the meaning of Article 21(3), has been interpreted in the CEDAW Committee’s General Recommendation No. 19 of 1992 to recognize that gender-based violence, which impairs or nullifies the enjoyment by women of

³⁵ Trial Chamber I, *Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted*, ICC-01/04-01/06-1084, para. 47, 13 December 2007.

³⁶ Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981.

human rights and fundamental freedoms under general international law or under human rights conventions, constitutes discrimination within the meaning of article 1 of the Convention and also includes “the *right to equal protection* according to humanitarian norms in times of international or internal armed conflict”.³⁷

36. Similarly, the United Nations Convention on the Rights of the Child,³⁸ the most widely ratified human rights treaty, requires in Article 38 that states ensure respect for the rules of humanitarian law applicable to them in armed conflict which are relevant to the child. The *Amicus* submits that both the CEDAW Committee and the Committee on the Rights of the Child intend that crimes that occur against women and children during armed conflict are assiduously and fairly pursued.

37. The application of rules or norms of international humanitarian law to women and children³⁹ has been interpreted by the Committee of the Convention on the Rights of the child to mean “effective justice”.⁴⁰

38. The *Amicus* advances that Article 21(3)’s application of the Statute and other sources of international law to the Court is concomitant with a spirit and purpose of due regard for the non-discriminatory approach to all crimes, proceedings, and use of the Rules or other administration mechanisms of the Court, such as Regulation 55.

39. The *Amicus* submits that gender-based crimes, especially sexual assaults, perpetrated on women, children or men, are to be examined in all proceedings in a manner that is non-discriminatory. The Chamber’s too narrow restriction of rape and torture under crimes against humanity and rape and outrages upon personal dignity, through cumulative charging and re-characterization, diminish the effective access

³⁷ Committee on the Elimination of Discrimination against Women, *General Recommendation 19, Violence against women* (Eleventh session, 1992), U.N. Doc. A/47/38 at 1 (1993), para. 7(c) (emphasis added).

³⁸ Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2 1990.

³⁹ For a modern example of State intent to redress sexual assault crimes, see Security Council Resolution 1820 (2008).

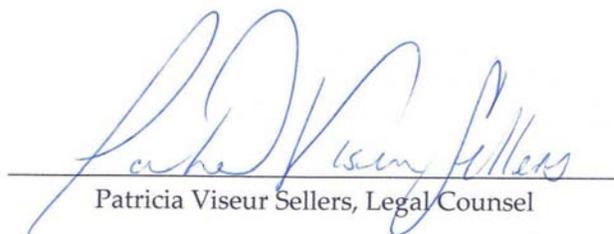
⁴⁰ Committee on the Rights of the Child, *Concluding Observations: India*, CRC/C/15/Add.228 (2004), para 69; *Concluding Observations: Indonesia*, CRC/C/15/Add.223 (2004), para 71(f); *Concluding Observations: India*, CRC/C/15/Add.115 (2000) para. 64; *Concluding Observations: Democratic Republic of the Congo*, para. 64, CRC/C/15/Add.153 (2001).

of victims to justice even in the absence of infringement on the due process rights of the accused.

40. The *Amicus* observes that the further consideration application of Article 21(3) to the holdings in the Decision Confirming the Charges is paramount to avoid unintentional adverse effects on gender. The *Amicus* does not suggest that unsubstantiated charge, or counts with insufficient evidence, should be charged. This is a clear violation of the rights of the Accused. However, the unclear analysis and re-characterisation of the sexual assault evidence could inadvertently contravene Article 21(3).

V. Conclusions

The *Amicus* respectfully offers the above observations to assist the Chamber in the proper determination of the case and expresses its appreciation for the opportunity to be heard.



Patricia Viseur Sellers, Legal Counsel
Women's Initiatives for Gender Justice

Dated this 31 July 2009

At [place, country]

**Women's Initiatives for Gender Justice
International Advisory Council Members**

Professor Hilary Charlesworth
Director of the Centre for International Governance and Justice
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Australia

Professor Rhonda Copelon
International Women's Human Rights Law Clinic
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Department of International and Public Affairs, Columbia University
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¹ Professor Paula Escarameia is also a member of the International Law Commission of the United Nations.

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The Prosecutor v. Jean-Pierre Bemba Gombo
Pre-Trial Chamber II

Decision on request for leave to submit *amicus curiae*
observations pursuant to Rule 103 of the Rules of Procedure
and Evidence

17 July 2009

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08

Date: 17 July 2009

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

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

Public Document

**Decision on Request for Leave to Submit *Amicus Curiae* Observations Pursuant to
Rule 103 of the Rules of Procedure and Evidence**

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Fatou Bensouda, Deputy Prosecutor
Petra Kneuer, Senior Trial Lawyer

Counsel for the Defence

Nkwebe Liriss
Karim A.A.Khan
Aimé Kilolo Musamba
Pierre Legros

Legal Representatives of the Victims

Marie Edith Douzima-Lawson
Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

**Amicus Curiae
Women's Initiatives for Gender Justice**

REGISTRY

Registrar
Silvana Arbia

Defence Support Section

Deputy Registrar
Didier D. Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the "Chamber") of the International Criminal Court (the "Court") with respect to the situation in the CAR and the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* ("Mr Jean-Pierre Bemba"), except for all victims' issues, until decided otherwise,¹ is seized of a request for leave to submit *amicus curiae* observations under rule 103 of the Rules of Procedure and Evidence (the "Rules").²
2. On 23 May 2008 Pre-Trial Chamber III issued a warrant of arrest against Mr Jean-Pierre Bemba,³ and on 24 May 2008 he was arrested in the Kingdom of Belgium.
3. On 10 June 2008 Pre-Trial Chamber III issued the "Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo".⁴ On the same date, Pre-Trial Chamber III issued a new warrant of arrest, which entirely replaced the one of 23 May 2008.⁵
4. On 3 July 2008 Mr Jean-Pierre Bemba was surrendered to the seat of the Court where his first appearance took place before Pre-Trial Chamber III on 4 July 2008.⁶
5. On 15 June 2009 the Chamber issued the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo" ("Decision Confirming the Charges"), in which it was decided, *inter alia*, that there is sufficient evidence to establish substantial grounds to believe that the accused is criminally responsible under article 28(a) of the Statute for two counts of crimes against humanity and three counts of war crimes and to commit him to a Trial Chamber.⁷

¹ Pre-Trial Chamber II, ICC-01/05-24; ICC-01/05-01/08-393.

² ICC-01/05-01/08-447.

³ ICC-01/05-01/08-1.

⁴ ICC-01/05-01/08-14-tENG.

⁵ ICC-01/05-01/08-15.

⁶ ICC-01/05-01/08-T-3-ENG ET.

⁷ Pre-Trial Chamber II, ICC-01/05-01/08-424.

6. On 22 June 2009 the Prosecutor submitted his "Application for Leave to Appeal the Decision Pursuant to Article 61(7)(a) and (b) on the Charges against Jean-Pierre Bemba Gombo" (the "Prosecutor's Application").⁸

7. On 13 July 2009 the Women's Initiative for Gender Justice filed the "Request for Leave to Submit Amicus Curiae observations pursuant to Rule 103 of the Rules of Procedure and Evidence" (the "Request"), in which it mainly requested to provide observations on cumulative charging and its impact on the rights of the accused to a fair trial in light of article 21 of the Statute, as aspects that are neither allegedly addressed in the Prosecutor's Request nor in the OPCV's Response.⁹

8. On 14 July 2009 the Chamber received the "Observations de la Défense à la demande du l'ONG 'Women's initiatives for Gender Justice' concernant l'autorisation de participer comme Amicus Curiae",¹⁰ followed in the same day by a corrigendum thereto, in which the Defence stated that it is not in a position to respond to any possible observations related to the subject-matter of the Request before receiving the French translation of the Decision Confirming the Charges and the Prosecutor's Application.¹¹

9. The Single Judge notes rule 103 of the Rules, and regulation 37(1) of the Regulations of the Court (the "Regulations").

10. The Single Judge notes in particular, rule 103(1) of the Rules, according to which the Chamber may, at any stage of the proceedings, "if it considers it desirable for the proper determination of the case, [...] grant leave to a State, organization or person to submit any observation on any issue that the Chamber deems appropriate".

⁸ ICC-01/05-01/08-427 and its annex.

⁹ ICC-01/05-01/08-447.

¹⁰ ICC-01/05-01/08-449.

¹¹ ICC-01/05-01/08-449-Corr.

11. The Single Judge also recalls that in the “Decision on ‘Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence’”, the Appeals Chamber underlined that, when acting within the sphere of rule 103 of the Rules, the respective Chamber should take into consideration whether the proposed submission of observations may assist it “in the proper determination of the case”.¹²

12. Having considered the Request submitted by the Women’s Initiatives for Gender Justice, the Single Judge is of the view that the proposed *amicus curiae* brief tends to provide legal information that the Chamber may find useful in the context of the present case. The Single Judge considers, therefore, that granting the Request is both desirable and appropriate for the proper determination of the case.

13. The Single Judge notes that, in accordance with rule 103(2) of the Rules, the Prosecutor and the Defence shall have the opportunity to respond to the observations submitted under rule 103 of the Rules.

14. The Single Judge also notes rule 103(3) of the Rules and regulation 37(1) of the Regulations, according to which the Chamber is entitled to set a time and page limit for the filing of *amicus curiae* observations and the parties’ responses for the purpose of these proceedings.

15. The Single Judge considers, however, that both the time and page limit to be granted to the applicant and the parties have to be determined in light of the duty of the Chamber to ensure the expeditiousness of the proceedings as one of the fundamental tenets of their fairness.

¹² Appeals Chamber, ICC-01/04-01/06-1289, para. 8.

16. The Single Judge considers, accordingly, that the Women's Initiatives for Gender Justice shall be granted leave to submit written observations which do not exceed 20 pages, no later than 31 July 2009, and that the Prosecutor shall have the opportunity to respond by 10 August 2009, while the Defence is expected to do so within ten days after receipt of the French translation of the Decision Confirming the Charges.

FOR THESE REASONS, THE SINGLE JUDGE

a) grants the Request of the Women's Initiatives for Gender Justice to submit written observations which do not exceed 20 pages, no later than 31 July 2009;

b) orders the Registrar to provide copies of the written observations submitted by the Women's Initiatives for Gender Justice to the Prosecutor and the Defence;

c) grants the Prosecutor and the Defence the opportunity to respond to the observations submitted under rule 103(1) of the Rules within the time limits specified in paragraph 16 of this decision.

Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova
Single Judge

Dated this Friday 17 July 2009

At The Hague, The Netherlands

The Prosecutor v. Jean-Pierre Bemba Gombo
Pre-Trial Chamber II

Corrigendum observations de la Défense à la demande de
l'ONG « Women's Initiatives for Gender Justice » concernant
l'autorisation de participer comme *amicus curiae*

(English translation not yet available)

14 July 2009



Original : français

N° : ICC-01/05-01/08

Date : 14 Juillet 2009

LA CHAMBRE PRÉLIMINAIRE II

Composée comme suit : Mme la juge Ekaterina Trendafilova, juge unique

SITUATION EN REPUBLIQUE CENTRAFRICAINE

AFFAIRE

LE PROCUREUR

c. Jean-Pierre Bemba Gombo

Public

Corrigendum Observations de la Défense à la demande de l'ONG « Women's initiatives for Gender Justice » concernant l'autorisation de participer comme Amicus Curiae

Origine : Equipe de la Défense de Mr Jean-Pierre Bemba Gombo

Document à notifier conformément à la norme 31 du Règlement de la Cour aux destinataires suivants :

Le Bureau du Procureur

Fatou Bensouda
Petra Kneuer

Le conseil de la Défense

Nkwebe Liriss
Karim A.A.Khan
Aimé Kilolo Musamba
Pierre Legros

Les représentants légaux des victimes

Marie Edith Douzima-Lawson
Paolina Massidda

Les représentants légaux des demandeurs

Les victimes non représentées

**Les demandeurs non représentés
(participation/réparation)**

Le Bureau du conseil public pour les victimes

Le Bureau du conseil public pour la Défense

Les représentants des États

L'amicus curiae

GREFFE

Le Greffier et greffier adjoint
Silvana Arbia et Didier Preira

La Section d'appui à la Défense

L'Unité d'aide aux victimes et aux témoins

La Section de la détention

La Section de la participation des victimes et des réparations

Autres

1. En date du 15 Juni 2009 le Référé Avant Procès II a rendu une décision de confirmation des charges à l'encontre de Mr Jean Pierre Bemba.¹
2. Aux termes de cette décision, les délais en vue de déclencher une procédure d'appel (l'Autorisation), ne prennent effet, pour la Défense, qu'à partir de la Notifications qui lui est faite de sa Version Française.
3. En date du 22 Juin 2009 le Procureur a sollicité auprès de ce Référé Avant Procès , l'autorisation de relever appel de ladite Décision de confirmation des charges.²
4. Cette demande a été notifiée à la Défense en version anglaise.³
5. En date du 26 Juin 2009, les représentants des victimes ont fait notifier leurs observations.⁴
6. En date du 13 Juillet 2009, l'ONG « Women's initiatives for Gender Justice » a introduit une demande afin d'être autorisée à formuler des observations en tant qu'Amicus curiae par rapport à la demande d'autorisation de faire appel du Procureur.⁵
7. Par ces présentes, la Défense fait respectueusement observer à la Chambre, qu'elle ne peut donc encourir une quelconque déchéance des délais aux fins de présenter ses observations sur la Demande de l'ONG « Women's initiatives for Gender Justice » , sans avoir reçu notification des versions françaises de la Décision sur la confirmation des charges ainsi que de la Demande du Procureur de faire appel, et ce, aux vœux de la décision du 4 Décembre 2008⁶ , de celle entreprise, des articles 50/2, 55/c, 67/1-2 du Statut, et de la règle 121/1 du Règlement de Procédure et de Preuve étant donné que lesdites observations auront pour base cette Décision de confirmation des charges.

¹ ICC-01/05-01/08-424

² ICC-01/05-01/08-427

³ Idem

⁴ ICC-01/05-01/08-428

⁵ ICC-01/05-01/08-447

⁶ ICC-01/05-01/08-307

PAR CES MOTIFS,

La Défense soumet très respectueusement les observations ci-dessus.



Nkwebe Liriss
Conseil Principal

Fait le 14 Juillet 2009

À La Haye, Pays-Bas

The Prosecutor v. Jean-Pierre Bemba Gombo
Pre-Trial Chamber II

Requête du Représentant légal des victimes eu égard au dépôt
d'un *amicus curiae* par Women's Initiatives for Gender Justice
(English translation not yet available)

21 July 2009



Original : français

N° : ICC-01/05-01/08

Date : 21 juillet 2009

LA CHAMBRE PRÉLIMINAIRE II

Composée comme suit : Mme la juge Ekaterina Trendafilova, juge unique

**SITUATION EN RÉPUBLIQUE CENTRAFRICAINE
AFFAIRE
LE PROCUREUR
c. JEAN-PIERRE BEMBA GOMBO**

Public

Requête 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 eu égard au dépôt d'un *Amicus Curiae* par Women's Initiatives for Gender Justice

Origine : Bureau du conseil public pour les victimes

Document à notifier conformément à la norme 31 du Règlement de la Cour aux destinataires suivants :

Le Bureau du Procureur

Mme Fatou Bensouda, Procureur adjoint
Mme Petra Kneuer, Premier Substitut du Procureur

Le conseil de la Défense

Me Liriss Nkwebe
Me Karim A.A. Khan
Me Aimé Kilolo-Musamba
Me Pierre Legros

Les représentants légaux des victimes

Me Marie Edith Douzima-Lawson
Me Paolina Massidda

Les représentants légaux des demandeurs

Les victimes non représentées

Les demandeurs non représentés (participation/réparation)

Le Bureau du conseil public pour les victimes

Me Paolina Massidda

Le Bureau du conseil public pour la Défense

Les représentants des États

L'amicus curiae

Women's Initiatives for Gender Justice

GREFFE

Le Greffier et Greffier adjoint

Mme Silvana Arbia et M. Didier Preira

La Section d'appui à la Défense

L'Unité d'aide aux victimes et aux témoins

La Section de la détention

La Section de la participation des victimes et des réparations

Autres

I. Historique procédural

1. Le 15 juin 2009, la Chambre préliminaire II a rendu la « Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo » (la « Décision sur la confirmation des charges »)¹, confirmant cinq des huit charges retenues à l'encontre de M. Jean-Pierre Bemba Gombo et renvoyant ce dernier en procès.

2. Le 22 juin 2009, le Bureau du Procureur a déposé une « 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 »², demandant l'autorisation de la Chambre préliminaire II d'interjeter appel de la Décision sur la confirmation des charges.

3. Le 26 juin 2009, le Bureau du conseil public pour les victimes (le « BCPV » ou le « Bureau »), agissant en sa qualité de représentant légal des victimes 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, a déposé sa « 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

¹ Voir la « Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo » (Chambre préliminaire I), n° ICC-01/05-01/08-424, 15 juin 2009 (la « Décision sur la confirmation des charges »).

² Voir la « 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 », n° ICC-01/05-01/08-427, 22 juin 2009 (la « Requête du Bureau du Procureur »).

d'interjeter appel déposée par le Bureau du Procureur à l'égard de la Décision sur la confirmation des charges »³.

4. Le 13 juillet 2009, Women's Initiatives for Gender Justice a soumis une « Request for leave to submit Amicus Curiae observations pursuant to Rule 103 of the Rules of Procedure and Evidence »⁴ par laquelle cette dernière demandait l'autorisation de déposer des observations sur la question des charges cumulatives.

5. Le 17 juillet 2009, la juge unique de la Chambre préliminaire II a rendu sa « Decision on Request for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence »⁵, par laquelle celle-ci a fait droit à la requête de Women's Initiatives for Gender Justice et a ordonné au Greffier de notifier une copie des observations écrites que cette dernière déposera au plus tard le 31 juillet 2009, au Bureau du Procureur ainsi qu'à la Défense. En outre, la juge unique a également autorisé le Bureau du Procureur à répondre aux dites observations avant le 10 août 2009 et la Défense au plus tard 10 jours après réception de la traduction française de la Décision sur la confirmation des charges.

6. En conséquence, le Conseil principal du Bureau soumet respectueusement à la juge unique la requête suivante.

³ Voir la « 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 » n° ICC-01/05-01/08-428, 26 juin 2009 (la « Réponse du BCPV »).

⁴ Voir la « Request for leave to submit Amicus Curiae observations pursuant to Rule 103 of the Rules of Procedure and Evidence », n° ICC-01/05-01/08-447, 13 juillet 2009.

⁵ Voir la « Decision on Request for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence », n° ICC-01/05-01/08-451, 17 juillet 2009.

II. Concernant le dépôt d'observations par les Représentants légaux sur l'*Amicus Curiae*

7. Le Conseil principal note que la juge unique a autorisé le dépôt de l'*Amicus Curiae* considérant que de telles observations visent à donner une information juridique qui pourrait être utile à l'évaluation de la Chambre et dont la soumission apparaît en conséquence souhaitable et appropriée.

8. Le Conseil principal note que la question qui sera examinée par l'*Amicus Curiae* concerne un aspect essentiel de la confirmation des charges. À cet égard, le Conseil principal soumet à la juge unique qu'une telle question concerne incontestablement les intérêts personnels des victimes qu'elle représente tels que mentionnés à l'article 68-3 du Statut de Rome⁶.

9. En effet, le Conseil principal rappelle la jurisprudence de la Chambre préliminaire III selon laquelle d'une part, la procédure en confirmation des charges concerne bien les intérêts personnels des victimes, et d'autre part, les intérêts personnels des victimes correspondent notamment au droit à la justice et à la vérité⁷, droit qui englobe la correcte qualification factuelle et juridique des événements vécus par les victimes et qui peuvent être qualifiés en tant que crimes qui relèvent de la compétence de la Cour.

10. De plus, le Conseil principal rappelle la décision du juge unique de la Chambre préliminaire III concernant les modalités de participation des victimes à l'audience de confirmation des charges selon laquelle « [l]es représentants légaux des

⁶ Voir la « Décision relative à l'ensemble des droits procéduraux associés à la qualité de victime dans le cadre de la procédure préliminaire en l'espèce » (Chambre préliminaire I, juge unique), n° ICC-01/04-01/07-474-tFRA, 13 mai 2008, par. 31 à 44.

⁷ Voir la « Quatrième décision relative à la participation des victimes » (Chambre préliminaire III, juge unique), n° ICC-01/05-01/08-320-tFRA, 12 décembre 2008, paras. 90-91.

victimes devraient avoir le droit de présenter de brèves conclusions écrites sur des questions de droit et de fait spécifiques » si leurs intérêts sont concernés par la question et si la Chambre l'estime approprié⁸.

11. Le Conseil principal note également que si la règle 103 du Règlement de procédure et de preuve ne prévoit pas explicitement la possibilité pour les représentants légaux des victimes de répondre à de telles observations, celle-ci ne l'exclue pas et que, en tout état de cause, ladite règle doit être lue à la lumière de l'article 68-3 du Statut de Rome. À cet égard, le Conseil principal prend acte de la récente jurisprudence du juge unique de la Chambre préliminaire III en la matière⁹, et note que ce dernier « considère que [...] le droit des victimes de répondre aux observations faites par un amicus curiae s'accorde à l'aune de l'article 68-3 du Statut et selon les deux conditions [y énoncées]¹⁰. »

12. Le Conseil principal note que tel que spécifié ci-dessus les deux conditions sont remplies en l'espèce.

13. Par ailleurs, le Conseil principal soumet à l'attention de la juge unique la décision de la Chambre de première instance I du 18 février 2008 par laquelle cette dernière a invité Mme Radhika Coomaraswamy, Sous-Secrétaire générale de l'Organisation des Nations Unies et Représentante spéciale du Secrétaire général pour les enfants et les conflits armés à présenter des observations en vertu de la règle 103 du Règlement de procédure et de preuve, suite à une requête introduite par cette dernière. Le Conseil principal souligne en particulier l'invitation faite par la

⁸ *Idem.* note 7, par. 110.

⁹ Voir la « Décision relative à la requête du représentant légal des victimes a/0278/08, a/0279/08, a/0291/08 à a/0293/08, a/0296/08 à a/0298/08, a/0455/08 et a/0457/08 à a/0467/08 déposée le 20 avril 2009 » (Chambre préliminaire III, juge unique), n° ICC-01/05-01/08-408, 22 avril 2009.

¹⁰ *Idem.*, paras. 6-7. Les deux conditions y énoncées sont les suivantes : « i) que les victimes prouvent d'abord que leurs intérêts sont concernés et ii) que la Chambre, ou le juge unique en l'espèce, l'estime approprié. »

Chambre « [aux] *parties et [aux] participants [de] répondre par écrit aux observations présentées par la Représentante spéciale dans les dix jours qui suivent la notification desdites observations* »¹¹.

14. Le Conseil principal soumet à la juge unique le caractère similaire de la procédure conduite en l'espèce eu égard à la requête de Women's Initiatives for Gender Justice, et en conséquence l'applicabilité de ladite jurisprudence à la présente affaire. En effet, la juge unique a elle-même précisé que « *étant au fait de la jurisprudence des autres chambres de la Cour, le juge unique appliquera, conformément à l'article 21-2 du Statut de Rome, les principes et règles de droit tels que la Cour les a interprétés dans ses décisions, dans la mesure où ceux-ci sont applicables à l'espèce* »¹².

15. À la lumière de la jurisprudence établie en la matière et des faits de la présente espèce, le Conseil principal soumet que les intérêts personnels des victimes qu'elle représente sont concernés par l'*Amicus Curiae* et justifient la possibilité pour ces dernières de formuler des observations pour la défense effective de leurs intérêts.

16. Enfin, le Conseil principal souligne, à l'instar de la Chambre préliminaire III, que « [s]elon les dispositions du Statut, les victimes ne se voient pas attribuer le rôle de *simples observateurs* »¹³. Le fait d'autoriser les représentants légaux des victimes à déposer des observations sur l'*Amicus Curiae* est conforme à leurs droits tels qu'envisagés par le Statut et n'est pas de nature à porter préjudice aux droits de l'accusé, notamment puisqu'il revient à la Chambre de fixer la forme et les délais dans lesquels ces observations pourraient être soumises.

¹¹ Voir la « Décision invitant la Représentante spéciale du Secrétaire général de l'ONU pour les enfants et les conflits armés à présenter des observations » (Chambre de première instance I), n° ICC-01/04-01/06-1175-tFRA, 18 février 2008, p. 9.

¹² Voir la « Quatrième décision relative à la participation des victimes » (Chambre préliminaire III, juge unique), *supra* note 7, par. 15.

¹³ *Idem.* note 7, par. 85.

III. Concernant la notification aux Représentants légaux de l'*Amicus Curiae*

17. Par ailleurs, le Conseil principal note que la juge unique a ordonné au Greffier de notifier une copie des dites observations uniquement au Bureau du Procureur et à la Défense et non aux Représentants légaux, alors même que ce document est considéré par la Chambre elle-même comme utile aux procédures et sera de plus, *a priori*, déposé au dossier de l'affaire de manière publique.

18. Or, bien que la règle 103 du Règlement de procédure et de preuve prévoit qu'une copie des observations de l'*Amicus Curiae* est fournie au Procureur et à la Défense, le Conseil principal rappelle - comme d'ailleurs indiqué par le juge unique de la Chambre préliminaire III dans sa décision relative à la participation des victimes - qu'aux termes de la règle 121-10 du Règlement de procédure et de preuve, les représentants légaux des victimes ont un droit d'accès au dossier de la procédure¹⁴, et que le document qui sera déposé par Women's Initiative for Gender Justice concerne indéniablement les intérêts personnels des victimes représentées pour les raisons précédemment évoquées. De plus, en ce qui concerne la notification dudit document, le juge unique de la Chambre préliminaire III dans sa décision relative à la participation des victimes a établi qu'en vertu de la règle 92-6 du Règlement de procédure et de preuve, les représentants légaux « [d]oivent se voir notifier toutes les décisions et écritures publiques déposées à compter de la date à laquelle les victimes se sont vues reconnaître le droit de participer à la présente procédure »¹⁵.

19. Enfin, si lesdites observations devaient être déposées de manière confidentielle par Women's Initiatives for Gender Justice, le Conseil principal soumet respectueusement à la Chambre que le document devrait en tout état de cause être

¹⁴ *Ibid.*, par. 103.

¹⁵ *Ibid.*, par. 106.

notifié aux Représentants légaux afin de leur permettre de suivre efficacement la procédure et de pouvoir continuer à défendre de manière effective les intérêts des victimes qu'ils représentent. En effet, la possibilité pour les représentants légaux de se voir notifier des documents confidentiels n'a pas été exclue par le juge unique de la Chambre préliminaire III dans sa décision relative à la participation des victimes¹⁶.

EN CONSÉQUENCE, le Conseil principal, en tant que 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, demande respectueusement à la Chambre de bien vouloir l'autoriser à formuler, si elle l'estimera opportun pour la défense des intérêts des ses clients, des observations sur le document qui sera déposé par Women's Initiatives for Gender Justice, dans les formes et délais que la juge unique voudra bien établir. Le Conseil principal demande également que la juge unique ordonne la notification dudit document aux Représentants légaux des victimes.



Me Paolina Massidda

Conseil Principal
Bureau du conseil public pour les victimes

Fait le 21 juillet 2009

À La Haye, Pays-Bas

¹⁶ *Ibid.*

The Prosecutor v. Jean-Pierre Bemba Gombo
Pre-Trial Chamber II

Decision on the OPCV Request for leave to submit a response
to *amicus curiae* observations

24 July 2009

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08

Date: 24 July 2009

PRE-TRIAL CHAMBER II

Before: Judge Hans-Peter Kaul, Single Judge

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

Public Document

**Decision on the OPCV Request for Leave to Submit a Reponse to *Amicus Curiae*
Observations**

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Fatou Bensouda, Deputy Prosecutor
Petra Kneuer, Senior Trial Lawyer

Counsel for the Defence

Nkwebe Liriss
Karim A.A.Khan
Aimé Kilolo Musamba
Pierre Legros

Legal Representatives of the Victims

Marie Edith Douzima-Lawson
Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae
Women's Initiatives for Gender Justice

REGISTRY

Registrar

Silvana Arbia

Defence Support Section

Deputy Registrar

Didier D. Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Hans-Peter Kaul, acting as Single Judge on behalf of Pre-Trial Chamber II (the "Chamber") of the International Criminal Court (the "Court") with respect to all victims' issues in relation to the proceedings of the situation in the CAR and the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* ("Mr Jean-Pierre Bemba"),¹ is seized of a request by the Office of Public Counsel for Victims (the "OPCV") to be granted leave to submit a response to the *amicus curiae* observations of the Women's Initiatives for Gender Justice, which will be submitted on 31 July 2009.²

1. On 15 June 2009 the Chamber II confirmed some of the charges against Mr Jean-Pierre Bemba and committed him to a Trial Chamber whilst it declined to confirm others as it rejected the cumulative charging approach of the Prosecutor.³

2. On 22 June 2009 the Prosecutor lodged a leave to appeal the Chamber's decision of 15 June 2009 (the "Request for leave to appeal") pertaining, *inter alia*, to the issue of cumulative charging pursuant to article 82(1)(d) of the Rome Statute (the "Statute"). The OPCV responded to the Prosecutor's Request for leave to appeal on 26 June 2009.⁴ The decision on whether to grant leave to appeal is still pending.

3. On 13 July 2009 the Women's Initiatives for Gender Justice (the "Women's Initiatives"), a non-governmental organization, sought leave to submit *amicus curiae* observations on, *inter alia*, the issue of cumulative and non-cumulative charging, pursuant to rule 103 of the Rules of Procedure and Evidence (the "Rules"). Such leave was granted by decision on 17 July 2009⁵ and the Prosecutor and the Defence were granted the opportunity to respond to the *amicus curiae* observations.

¹ Pre-Trial Chamber II, Decision Designating Single Judges, ICC-01/05-01/08-393.

² ICC-01/05-01/08-455.

³ 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.

⁴ ICC-01/05-01/08-428.

⁵ Pre-Trial Chamber II, Decision on Request for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, ICC-01/05-01/08-451.

4. On 21 July 2009 OPCV requested leave to be given the opportunity to respond to the *amicus curiae* observations of the Women's Initiatives and requested the Chamber to order the notification of these submissions to the victims' representatives.

5. The Single Judge notes article 68(3) of the Statute and rule 103 of the Rules. It is recalled that pursuant to rule 103(2) of the Rules, the Prosecutor and the Defence shall have the opportunity to respond to the observations submitted under rule 103(1) of the Rules. However, the Single Judge observes that rule 103 of the Rules must be interpreted in light of article 68(3) of the Statute.

6. The Single Judge recalls the "Third Decision on the Question of Victims' Participation Requesting Observations from the Parties" in which he clarified that article 68(3) of the Statute

"gives the Single Judge *the authority to determine* whether the presentation and consideration of views and concerns of victims during the stage of confirmation of charges pursuant to article 61 of the Statute *is appropriate* and not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Furthermore, this provision gives the Single Judge *the authority to determine where it is appropriate* that such views and concerns may be presented by the legal representatives of victims during the stage of confirmation of charges pursuant to article 61 of the Statute (emphasis added)."⁶

7. Bearing in mind the rudimentary and discretionary language of article 68(3) of the Statute, the Single Judge further recalls his findings in the "Fourth Decision on Victims' Participation" dated 12 December 2008 in which the modalities of limited victims' participation have been further defined. To this end, he wishes to refer in particular to paragraphs 103, 106 and 110 of said decision. Whereas the rights of access to the case record and notification of public documents are sufficiently defined in the decision and the Court's legal texts, the Single Judge wishes to highlight once again that the right of victims to provide written submissions is dependent on the Single Judge's determination that two requirements have been met: (i) victims must prove first *by way of application* that their interests *are* affected

⁶ Pre-Trial Chamber III, ICC-01/05-01/08-253, para. 7.

by the issue under examination and (ii) it is *deemed appropriate* by the Chamber (emphasis added).

8. The Single Judge notes that the OPCV, representing some of the victims who have been granted participatory rights in the present proceedings, simply contends that the abovementioned criteria have been met and has not presented any facts which would allow the Single Judge to conclude that and why the "personal interests of the victims" it represents "*are affected*" (emphasis added).

9. The Single Judge clarifies that victims, having been granted the right to participate in the present proceedings, are not to be perceived as parties to the proceedings, which are the Prosecutor and the Defence. They are granted the right to participate if certain conditions, which the Statute and the Chamber's rulings demand, are met.

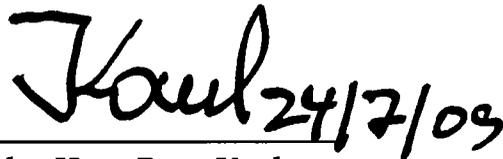
10. In addition, the Single Judge observes that the OPCV has already provided its observations to the Prosecutor's Request for leave to appeal on 26 June 2009. He therefore believes that the OPCV has provided sufficient information to allow the Chamber to take an informed decision on the Prosecutor's Request for leave to appeal within the parameters of article 82(1)(d) of the Statute.

11. Concerning the notification of the *amicus curiae* observations by the Women's Initiatives to both victims' representatives, the Single Judge observes that rule 121(10) and 92(6) of the Rules and his finding in the Fourth Decision on Victims' Participation of 12 December 2008 provide sufficient answer to the second request raised by the OPCV. A further ruling by the Single Judge is therefore not necessary.

FOR THESE REASONS, THE SINGLE JUDGE

a) **does not grant** OPCV the opportunity to respond to the *amicus curiae* observations of the Women's Initiatives for Gender Justice.

Done in both English and French, the English version being authoritative.



Judge Hans-Peter Kaul
Single Judge

Dated this Friday 24 July 2009

At The Hague, The Netherlands

The Prosecutor v. Jean-Pierre Bemba Gombo
Pre-Trial Chamber II

Prosecution's response to *amicus curiae* observations of the
Women's Initiatives for Gender Justice pursuant to Rule 103
of the Rules of Procedure and Evidence

6 August 2009

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08

Date: 6 August 2009

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

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

Public

Prosecution's Response to *Amicus Curiae* Observations of the Women's Initiatives for Gender Justice pursuant to Rule 103 of the Rules of Procedure and Evidence

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for the Defence of Jean-Pierre Bemba

Mr Nkwebe Liriss

Mr Karim A. Khan

Mr Aimé Kilolo-Musamba

Mr Pierre Legros

Legal Representatives of Victims

Ms Marie Edith Douzima-Lawson

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Procedural Background

1. On 15 June 2009, the Pre-Trial Chamber II (hereinafter referred to as the “Chamber”) issued the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo” (hereinafter referred to as the “Confirmation Decision”).¹
2. On 22 June 2009, the Office of the Prosecutor (hereinafter referred to as the “Prosecution”) submitted its “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” (hereinafter referred to as the “Application for Leave to Appeal”).²
3. On 13 July 2009 the Women’s Initiative for Gender Justice filed the “Request for leave to submit *Amicus Curiae* observations pursuant to Rule 103 of the Rules of Procedure and Evidence” (hereinafter referred to as the “Request”).³
4. On 17 July 2009, the Single Judge issued the “Decision on Request for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence” granting the Request and in addition allowing the Prosecution and the Defence the opportunity to respond by 10 August 2009.⁴

¹ ICC-01/05-01/08-424.

² ICC-01/05-01/08-427.

³ ICC-01/05-01/08-447.

⁴ ICC-01/05-01/08-451.

5. On 31 July 2009, the Women's Initiatives for Gender Justice filed its *Amicus Curiae* Observations pursuant to Rule 103 of the Rules of Procedure and Evidence (hereinafter referred to as the "*Amicus Curiae* Observations").⁵

Prosecution's Response

6. The Prosecution welcomes the *Amicus Curiae* Observations in agreement with its position that considerations required for gender-based crimes "avoid unintentional adverse effects on gender"⁶ and ensure that "crimes that occur against women and children during armed conflict are assiduously and fairly pursued."⁷ The Prosecution further concurs with the position taken by the *Amicus Curiae* that "the Chamber's too narrow restriction of rape and torture" charges, through its interpretation of doctrines of cumulative charging and re-characterization in the Confirmation Decision in this case, "diminish the effective access of victims to justice"⁸ As the Prosecution has submitted in its Application for Leave to Appeal, the restrictions imposed by the Confirmation Decision in this regard impact, *inter alia*, "on the fairness of the proceedings *vis-à-vis* victims who suffered from heinous crimes and will be denied the chance to have the full range of their suffering and victimization reflected in the charges".⁹
7. Therefore, the Prosecution considers that the arguments in the *Amicus Curiae* Observations that reflect the impact of the Chamber's rejection of cumulative charging on the fair and expeditious conduct of the proceedings,¹⁰ and in particular on the

⁵ ICC-01/05-01/08-466.

⁶ *Ibid*, para 40.

⁷ *Ibid*, para 36.

⁸ *Ibid*, para 39.

⁹ ICC-01/05-01/08-427, para 23.

¹⁰ See for instance, *Amicus Curiae* Observations, para 21 and 33.

interests of victims and their effective access to justice,¹¹ are relevant to the determination of the instant issue, and serve to further support the Prosecution's position that the Confirmation Decision entails appellable issues warranting intervention by the Appeals Chamber.

8. The Prosecution will not engage the substance of the *Amicus Curiae* Observations on the merits of the Confirmation Decision that is the object of the Prosecution's Application for Leave to Appeal. These matters are not for discussion at this stage of the proceedings. The Prosecution reserves its right to discuss the substance of the *Amicus Curiae* Observations at the appropriate time, if and when the Chamber grants the Application for Leave to Appeal.¹²



Luis Moreno-Ocampo, Prosecutor

Dated this 6th day of August 2009

At The Hague, The Netherlands

¹¹ See for instance, *Amicus Curiae* Observations, paras 34 – 40.

¹² The Prosecution does not necessarily agree with all the substantive arguments advanced by the *Amicus Curiae*.

1.8

Special Issue of the Women's Initiatives for Gender Justice
e-letter *Legal Eye on the ICC*

August 2009

Women's Initiatives for Gender Justice



Legal Eye on the ICC

Regard Juridique sur la CPI

Mirada Legal Sobre la CPI

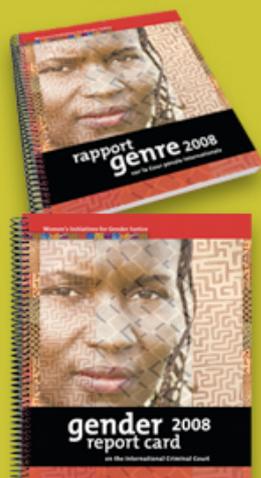
In this issue

Central African Republic
Amicus curiae filing by the
Women's Initiatives for Gender
Justice in the case against
Jean-Pierre Bemba Gombo

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Dear Friends,

Welcome to a **Special Issue of *Legal Eye on the ICC***, a regular e-letter from the Women's Initiatives for Gender Justice. In the *Legal Eye* you will find summaries and gender analysis of judicial decisions and other legal developments at the International Criminal Court (ICC), and discussion of legal issues arising from victims' participation before the Court, particularly as these issues relate to the prosecution of gender-based crimes in each of the Situations under investigation by the ICC. The Court currently has cases relating to the conflicts in Uganda, the Democratic Republic of the Congo (DRC), Darfur, Sudan and the Central African Republic (CAR).

In addition to the *Legal Eye on the ICC* we also produce *Women's Voices*, a monthly e-letter providing updates and analysis on political developments, strategies for the pursuit of justice, the status of peace talks, and reconciliation efforts from the perspective of women's rights activists from the four conflict situations.

With both online e-letters we will also update you about the programmes, legal and political advocacy, campaigns, events, and publications of the Women's Initiatives.

More information about the work of Women's Initiatives for Gender Justice and previous issues of *Women's Voices* and the *Legal Eye* can be found on our website at www.iccwomen.org.

Purpose of this Special Issue

In this **Special Issue**, we report on the Women's Initiatives' 31 July filing of *amicus curiae* observations to the Court in the case of *Prosecutor v. Bemba*, in which we argued that the Pre-Trial Chamber's decision to dismiss two charges resulted in excluding the ability to prosecute acts of sexual violence that are not encompassed by the narrower charge of rape. This is the Women's Initiatives' fourth filing before the ICC under Rule 103 and our first *amicus* brief. The Women's Initiatives is one of only five organisations or bodies to be granted *amicus curiae* status before the Court and the only international women's rights organisation to be granted such status.

The Women's Initiatives' *amicus curiae* filing can be found on our website ([click here to download file](#)) or the [ICC website](#).

CAR :: *Amicus Curiae* filing by the Women's Initiatives for Gender Justice in the case against Jean-Pierre Bemba Gombo

Background

In the March 2009 issue of the *Legal Eye on the ICC*, we reported on the Confirmation Hearing of Jean-Pierre Bemba Gombo (Bemba), alleged President and Commander-in-chief of the *Mouvement de Libération du Congo*. In the May 2009 issue we reported on the adjournment by the Pre-Trial Chamber of those confirmation proceedings, in order to allow the Prosecutor time to submit an amended document containing the charges (Amended DCC), addressing what the Chamber found was a defect in the mode of liability alleged. In the July issue we analysed the 15 June 2009 decision by Pre-Trial Chamber II

to confirm the charges against Bemba, including its decision not to confirm two charges based on acts of rape — torture as a crime against humanity and outrages upon personal dignity as a war crime — because, it reasoned, these counts were cumulative to the charges of rape and therefore prejudicial to the rights of the accused. A brief summary of the Confirmation Decision and subsequent procedural history are provided below, followed by a summary of the *amicus curiae* observations filed by the Women's Initiatives.

Pre-Trial Chamber II's Confirmation Decision

As reported in the July issue of the *Legal Eye*, the Pre-Trial Chamber II (the 'Chamber') delivered its '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') on 15 June 2009. The Prosecutor had presented charges against Bemba for crimes against humanity of murder, rape and torture, pursuant to Article 7 of the Statute and the war crimes of murder, torture, rape, outrages upon personal dignity and pillaging, pursuant to Article 8 of the Statute.²

The Chamber confirmed Counts 1 and 2 of the Amended DCC, rape as a Crime Against Humanity and rape as a War Crime, but it declined to confirm some charges on the reasoning that the Prosecutor had improperly engaged in the practice of cumulative charging, which could be prejudicial to the rights of the Defence. The charges *not* confirmed were:

- Torture as a Crime Against Humanity under Article 7(1)(f) [Count 3], reasoning that the acts of torture were fully subsumed by the count of rape as a crime against humanity, as the charge of torture was based on acts of rape.
- Torture as a War Crime under Article 8(2)(c)(i) [Count 4], on the basis that there was insufficient evidence in the Amended DCC regarding the necessary specific intent of the perpetrators which would characterise the alleged acts as torture rather than rape.
- Outrages upon personal dignity as a War Crime under Article 8 (2)(c)(ii) [Count 5], holding that this charge was fully subsumed by the count of rape as a war crime, as the charge arose out of acts surrounding rape.

According to the Chamber, because the charges of torture and outrages upon personal dignity arose from the same facts and circumstances as the charges of rape, these two crimes must possess a distinct legal element to the crime of rape in order to pass the cumulative charging test. After examining the elements of rape and torture, the Chamber averred that

the specific material elements of the act of torture, namely severe pain and suffering and control by the perpetrator over the person, are also the inherent specific material elements of the act of rape. However, the act of rape requires the additional specific material element of penetration, which makes it the most appropriate legal characterisation in this case.³

Similarly, it found that the charge of rape as a war crime was more appropriate than the charge of outrages upon personal dignity because the facts underlying this charge 'reflect in essence the constitutive elements of force or coercion in the crime of rape, characterising this conduct, in the first place, as an act of rape'.⁴

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', and thus disallowed the Prosecutor's approach to cumulative charging, stating that pleaded otherwise, the Defence might have to confront 'all possible legal characterisations'.⁵ Finally, the Chamber cited to an insufficiency of evidence or imprecise pleading in the Prosecution's Amended DCC to support charges of torture and outrages upon personal dignity that resided upon conduct other than direct rape.

Read more about the Confirmation Decision in the [July 2009 issue of *Legal Eye*](#).

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Prosecutor's request for leave to appeal the Confirmation Decision

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'.⁶ 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 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.

On 26 June 2009, the Office of the Public Counsel for Victims (OPCV) filed their Response to the Confirmation Decision⁷ and underscored its support for the Prosecutor's Application. The Principal Counsel argued that the manner in which crimes are charged statutorily lies within the discretion of the Prosecutor. The Response stated that the Chamber acted beyond its competence and effectively usurped the Prosecutor's discretion when it failed to confirm the charges in the Amended DCC that it deemed cumulative. 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.

On 9 July 2009, the Defence respectfully informed the Chamber that it would file a response to the Prosecutor's Application after the French translation of the Confirmation Decision and the Prosecutor's Application had been completed.⁸

Read the Prosecutor's Application for Leave to Appeal the Confirmation Decision:
<http://www.icc-cpi.int/NR/exeres/6B7AC1C9-2B3E-4F7D-8EA9-406FDC887C6F.htm>

Read the OPCV's Response to the Confirmation Decision: <http://www.icc-cpi.int/NR/exeres/1D221DDE-7525-468A-A758-88BAB6040E86.htm>

Read the Defence's Response to the Prosecution's Application for Leave to Appeal:
<http://www.icc-cpi.int/NR/exeres/A17E4FAE-44FE-4507-8629-D180D9CCE25D.htm>

Women's Initiatives' request for leave to file *amicus curiae* observations

On 13 July 2009, the Women's Initiatives for Gender Justice filed a 'Request for leave to submit *Amicus Curiae* observations pursuant to Rule 103 of the Rules of Procedure and Evidence'.⁹ The Women's Initiatives proposed to brief the Court on cumulative charging in light of the due process rights of the accused and cumulative charging in light of Article 21 of the Rome Statute, both issues of first impression before the ICC and the Chamber.

The Women's Initiatives request for leave can be found here: <http://www.icc-cpi.int/NR/exeres/2EBBC510-BEC4-478B-BB8C-4872EBB43CB8.htm>

Pre-Trial Chamber II grants Women's Initiatives' request for leave to file

On 17 July 2009, Judge Ekaterina Trendafilova, Single Judge of Pre-Trial Chamber II, granted leave to the Women's Initiatives for Gender Justice to file observations as *amicus curiae* under Rule 103.¹⁰ The Single Judge noted that 'the proposed *amicus curiae* brief tends to provide legal information that the Chamber may find useful in the context of the present case' and that granting the request is 'both desirable and appropriate for the proper determination of the case', therefore meeting the requirements for Rule 103.¹¹ The Single Judge invited the Prosecution and Defence to file responses within 10 days of the submission of the *amicus* observations.

On 14 July 2009, the Defence filed a request to submit a response to the *amicus curiae* brief of the Women's Initiatives after it had received a French translation of the Confirmation Decision and the Prosecution's Appeal of the Decision.¹²

On July 21, the Office for the Public Council of Victims (OPCV) sought leave of the Pre-Trial Chamber to respond to the *amicus curiae* submission of the Women's Initiatives.¹³ On 24 July, Single Judge Hans-Peter Kaul denied the OPCV's request.¹⁴ According to the Single Judge, victims have the right to provide written submissions only where the Court is satisfied that they have proven in their application that their interests are affected by the issue under examination and the Chamber finds the submissions appropriate. In the present case, the OPCV did not provide sufficient facts to prove to the Single Judge that the personal interests of the victims are affected. Moreover, the OPCV has had an opportunity to provide its observations on the Prosecutor's request for leave to appeal the Confirmation Decision. The Single Judge found that this prior submission provided 'sufficient information' for the Pre-Trial Chamber to make its decision on whether to grant the Prosecution's request.¹⁵

Read the decision granting leave to the Women's Initiatives to file: <http://www.icc-cpi.int/NR/exeres/E39CD218-77C7-4017-A62C-0C2194ECE879.htm>

Read the Response of the Defence: <http://www.icc-cpi.int/NR/exeres/9747B0D8-CA11-4947-9ED2-8133BAB6C7C9.htm>

Read the OPCV request for leave to respond: <http://www.icc-cpi.int/NR/exeres/82175A8F-E337-4686-B7D5-0397DDAC789B.htm>

Read Judge Kaul's decision on the OPCV request: <http://www.icc-cpi.int/NR/exeres/579C8B80-BD63-44A8-BD15-7091A8A540BD.htm>

Women's Initiatives files *amicus curiae* observations

The Women's Initiatives for Gender Justice filed its *amicus* brief on 31 July.¹⁶ The brief addresses the issue of cumulative charging as an issue of general interest to the Court and in reference to this specific case. As many of the issues raised are *de novo* and will impact future cases before the Court, including but not limited to issues surrounding gender-based crimes, the brief argues that they are of significant importance to the Appeals Chamber to warrant review pursuant to Article 82(1)(d) of the Rome Statute. According to this provision, a request for leave to appeal may be granted if the decision in question 'involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings'.

First, the brief argues that the Pre-Trial Chamber improperly dismissed crimes of torture and outrages upon personal dignity on the grounds that cumulative charging was detrimental to the rights of the accused. While the Chamber used the appropriate test for cumulative charging as set forth by the International Criminal Tribunal for the former Yugoslavia Appeals Chamber in *Prosecutor v. Delalic*, it did not properly apply the test to the facts in this case. In national courts and international tribunals, cumulative charging has never been posited as violating the rights of the accused. Cumulative charging is distinct from charges lacking in evidence and as such 'is not inimical to the due process rights of the accused; they remain safeguarded throughout the trial. Upon a finding of guilt, cumulative convictions are impermissible, but at the charging stage, whether charges are cumulative or not, their inclusion in the indictment does not violate fair trial practices.'¹⁷

Second, the brief argues that the Chamber's application of the cumulative charging test was too narrow, at least with respect to three categories of victims. For example, the Chamber held that the victims who were raped *and* who witnessed their family members being raped were not also tortured. This holding is at odds with precedent established by the International Criminal Tribunal for Yugoslavia in the case of *Prosecutor v. Furundzija*, which recognised the torture, and therefore the broader victimisation, of those who watched their relatives being raped.

Third, the Pre-Trial Chamber's reliance on the possibility under Regulation 55 to later re-characterise the evidence of torture and outrages upon personal dignity as rape contravenes the hierarchy of law set forth in Article 21 of the Rome Statute, which establishes the Statute and Rules — not Regulations — as applicable sources of law. When the Chamber stated *after* this re-characterisation of the evidence that the Prosecution had not presented sufficient evidence to support the charges of outrages upon personal dignity and torture, the Chamber did not make clear which evidence is part of the rape counts and which evidence has been dismissed. The brief argues that the Chamber's lack of clarity raises the important question, 'What facts and circumstances can the sexual assault witnesses base their testimony upon, now, other than rape?'¹⁸

Fourth, the brief argued that under Article 21, the Chamber is required to take into consideration evidence of gender-based violence, as incorporated into the Rome Statute, and as derived from international and regional treaties and their interpretation. Article 21(3) requires that:

The application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights, and be without any adverse distinction founded on grounds *such as gender* as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status. *[emphasis added]*

International human rights treaties, particularly the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, 'intend that crimes that occur against women and children during armed conflict are assiduously and fairly pursued'.¹⁹ Under Article 21, the Court is obligated to pursue justice in a non-discriminatory manner. The Chamber's narrow application of the cumulative charging test and re-characterisation of the evidence could 'diminish the effective access of victims to justice even in the absence of infringement on the due process rights of the accused',²⁰ and thereby contravene Article 21.

The brief was prepared by Patricia Viseur Sellers acting as Legal Counsel for the Women's Initiatives on this case. Annex II of the filing includes the names of the [International Advisory Council](#) for the Women's Initiatives.

The Women's Initiatives' *amicus curiae* filing can be downloaded from our website ([click here to download](#)) or the [ICC website](#).

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Prosecution's response to Women's Initiatives' *amicus curiae* observations

On 6 August 2009, the Prosecution issued a response to the Women's Initiatives' *amicus curiae* observations.²¹ The Prosecution welcomed the arguments regarding the Court's obligation to pursue a justice that does not discriminate on the basis of gender. It further concurred that "the Chamber's too narrow restriction of rape and torture" charges, through its interpretation of doctrines of cumulative charging and re-characterisation in the Confirmation Decision in this case, "diminish the effective access of victims to justice".²²

In summary, it agreed with the *amicus* that the Chamber's rejection of the Prosecution's cumulative charging approach, and the potential impact on victims' access to justice, are significant issues warranting review by the Appeals Chamber. The Prosecution reserved the right to discuss the *amicus* views on the merits of the Confirmation Decision once the Chamber grants the Prosecutor's Application for Leave to Appeal.

Read the Prosecution's response to the Women's Initiatives' filing: <http://www.icc-cpi.int/NR/exeres/4F820E81-DF2F-47C1-9362-F51E49ACDB98.htm>

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Footnotes

1. ICC-01/05-01/08, 15 June 2009 ('Confirmation Decision').
2. Pre-Trial Chamber III, *Warrant of Arrest for Jean Pierre Bemba Gombo*, ICC-01/05-01/08-1-ENG-Corr, 23 May 2008. The Prosecutor amended the Documents Containing the Charges against the Accused on two subsequent occasions. See *Prosecution's Submission of the Document Containing the Charges and List of Evidence*, ICC-01/05-01/08, 1 October 2008; *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*, ICC-01/05-01/08-264, 20 November 2008.
3. Confirmation Decision, para 204.
4. *Id.*, para 310.
5. *Id.*, para 203.
6. *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.
7. *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.
8. 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.
9. *Request for leave to submit Amicus Curiae observations pursuant to Rule 103 of the Rules of Procedure and Evidence*, ICC-01/05-01/08-447, 13 July 2009.
10. *Decision on Request for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence*, ICC-01/05-01/08-451, 17 July 2009.
11. *Id.*, para 12.
12. *Observations de la Défense à la demande du l'ONG « Women's initiatives for Gender Justice » concernant l'autorisation de participer comme Amicus Curiae*, ICC-01/05-01/08, 14 July 2009.
13. *Requête 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 eu égard au dépôt d'un Amicus Curiae par Women's Initiatives for Gender Justice*, ICC-01/05-01/08-455, 21 July 2009.
14. *Decision on the OPCV Request for Leave to Submit a Response to Amicus Curiae Observations*, ICC-01/05-01/08-462, 27 July 2009.
15. *Id.*, para 10.
16. *Amicus Curiae Observations of the Women's Initiatives for Gender Justice pursuant to Rule 103 of the Rules of Procedure and Evidence*, ICC-01/05-01/08-466, 31 July 2009; see also *Corrigendum of 3 August 2009*.
17. *Id.*, para 22.
18. *Id.*, para 32.
19. *Id.*, para 36.
20. *Id.*, para 39.
21. *Prosecution's Response to Amicus Curiae Observations of the Women's Initiatives for Gender Justice pursuant to Rule 103 of the Rules of Procedure and Evidence*, ICC-01/05-01/08, 6 August 2009.
22. *Id.*, para 6.

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The Prosecutor v. Thomas Lubanga Dyilo
Pre-Trial Chamber I

Request for leave to participate as *amicus curiae* in the
Article 61 Confirmation of Charges proceedings

7 September 2006

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

No.: ICC-01/04-01/06
Date: 07 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 THE CONGO
IN THE CASE OF
THE PROSECUTOR
v. THOMAS LUBANGA DYILO**

Public Document

**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
(WITH CONFIDENTIAL ANNEX 2)**

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda
Mr Ekkehard Withopf

Counsel for the Defence

Mr Jean Flamme
Other Participants
Women's Initiatives for Gender Justice
Ms. Sureta Chana

Introduction

1. Pursuant to rule 103 of the Rules of Procedure and Evidence, the Women's Initiatives for Gender Justice ("Women's Initiatives") hereby applies for leave to submit observations as *amicus curiae* in the article 61 confirmation proceedings in this case. The article 61 confirmation hearing is presently scheduled to be held on 28 September 2006.¹
2. In accordance with rule 103, the Women's Initiatives applies for leave to submit comments both in writing and orally. 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. The Women's Initiatives also remains prepared to submit any further written comments at the request or with the leave of 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 the hearing.
3. The details of the Women's Initiatives and their interest in these proceedings are set out in paragraphs 22-26 below.

Issues on which the Women's Initiatives seeks to make comments as *amicus curiae*

4. The Women's Initiatives seeks leave to make submissions as *amicus curiae* on the powers and duties of the Pre-Trial Chamber in article 61 confirmation hearings. This is an important question, given that article 61 hearings are a standard procedure in all cases before the Court. The article 61 hearing in this case will be the first such hearing ever held before this Court, and the approach that the Pre-Trial Chamber takes in these article 61 proceedings will set a significant precedent for the future. There is currently no case law of the Court on the powers of the Pre-Trial Chamber in article 61 proceedings. Furthermore, the Pre-Trial Chamber will not have the benefit of any relevant case law from other international criminal courts, since this Court's article 61 confirmation procedure is very different to the procedure for the confirmation of an

¹ No. ICC-01/04-01/06-126, "Decision on the Postponement of the Confirmation Hearing and the Adjustment of the Timetable Set in the Decision on the Final System of Disclosure", 24 May 2006, Order 9.

indictment under the Rules 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”).

5. Furthermore, for the reasons given below, that the interpretation of article 61 has wider implications for more fundamental questions 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, and the role and rights of victims. 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 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.

6. The particular question that the Women’s Initiatives seeks to address is what role and duties the Pre-Trial Chamber has in the determination of the appropriate charges to be brought against an accused. 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, which states:
 - (7) The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:
 - (a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;
 - (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;
 - (c) Adjourn the hearing and request the Prosecutor to consider:
 - (i) Providing further evidence or conducting further investigation with respect to a particular charge; or
 - (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

7. If granted *amicus curiae* status, the Women's Initiatives proposes to argue as follows.

- (1) Under the Statute, it is for the Prosecutor to determine, in the exercise of his or her discretion, which charges to bring against a person. However, under article 61(7), the Pre-Trial Chamber has a general supervisory jurisdiction over the Prosecutor's exercise of that discretion. The role of the 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 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.² 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)).
- (2) The question of which charges are to be brought against a person is a matter within the discretion of the Prosecutor. However, this is not an untrammelled discretion that is beyond any form of judicial supervision or review. An important part of the role of the Pre-Trial Chamber in article 61 proceedings is

² It is noted that the Single Judge in this 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.

to satisfy itself that the Prosecutor has exercised his or her discretion correctly. The Pre-Trial Chamber does have the power under article 61, and indeed the 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.³

- (3) Where the Pre-Trial Chamber is not satisfied that the Prosecutor has exercised his or her discretion correctly, the Chamber *shall* under article 61(7) request the Prosecutor to *consider* providing further evidence or conducting further investigations or amending the charges. Concomitantly, this is an important power, since there is no limit to the number of times that the Pre-Trial Chamber can adjourn the hearing under article 61(7)(c). If necessary, it could adjourn the article 61 proceedings a number of times until it is satisfied that the Prosecutor's discretion has been correctly exercised.

8. The Women's Initiatives further proposes to submit that a number of considerations support this interpretation, including the following.

- (1) One of the principal functions of the Court is to deter the commission of the crimes within its Statute, by prosecuting those who commit them.⁴ However, 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, and the international community in general, it is necessary that the choices be made in a transparent and principled way, not in a way that is *ad hoc* or 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,

³ 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".

⁴ See the fifth preambular paragraph of the Statute of the Court: "Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".

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 crimes especially those known to have been committed. Indeed, the ICC might in such circumstances send the signal that such crimes can continue to be committed with impunity. The Court is enjoined by article 21(3) to ensure that the law be applied without any adverse distinction founded on *inter alia* gender. 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:

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.⁵

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.

- (2) The ICC Statute provides for a different model of relationship between the Prosecution and Judges to that found in the Statutes of the ICTY, ICTR or SCSL. In those other international criminal courts, confirmation of an indictment is an *ex parte* proceeding, which normally takes place without any involvement by the Defence, and indeed, before the accused is arrested or transferred to the tribunal. In contrast, under the Statute of this Court, article 61 confirmation proceedings are *inter partes*, involving not only the Prosecution and Defence, but also possibly victims. In this Court, even at the investigations stage, the Chambers exercise a degree of supervision of activities of the Prosecutor that is unknown at the ICTY, ICTR or SCSL. For

⁵ 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>.

instance, 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,⁶ or may order specific proceedings to enable victims to present their views and concerns.⁷ There is no reason why the degree of judicial supervision should diminish once a case ensues from an investigation. There is thus no reason why article 61(7) should be read restrictively.

- (3) Decisions under article 61 have a direct impact on victims. 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*.⁸ 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.⁹ 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*.¹⁰

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

⁶ No. ICC-01/04-9, "Decision to Convene a Status Conference", 17 February 2005.

⁷ 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.

⁸ *Ibid.*, para. 66.

⁹ *Ibid.*, paras. 81-94.

¹⁰ 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.

relating to destruction of property, and obtains an arrest warrant limited to these crimes.

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 investigation stage, she will not be permitted to participate in the article 61 proceedings, as the crimes of which she is alleging to be a victim have not been specified in the arrest warrant.

The Women's Initiatives proposes to submit that one of the main purposes of allowing victims to participate in article 61 proceedings should be to enable this type of concern to be raised by victims. The Women's Initiatives proposes further to submit that to enable this to occur, the Pre-Trial Chamber should 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 proceedings

9. It is submitted that the issues that the Women's Initiatives intends to address are not hypothetical or abstract issues in the present proceedings. On the contrary, they are very real issues, given the circumstances of this case.
10. The present case ensued from a situation that was referred to the Prosecutor by the Democratic Republic of the Congo ("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 2002.¹¹ The DRC when it referred the situation to the OTP 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

¹¹ Press Release ICC-OTP-20040419-50-En, 19 April 2004 < http://www.icc-cpi.int/pressrelease_details&id=19&l=en.html >.

States, international organizations and non-governmental organizations that “allege a pattern of rape, torture, forced displacement and the illegal use of child soldiers”.¹²

11. In a number of subsequent statements made by or attributable to the Prosecutor, it was affirmed that the situation in the 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.^{13,14,15}
12. On 12 February 2004, the Prosecutor stated that “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”.¹⁶
13. On 28 November 2005, the Prosecutor said to the Assembly of States Parties that “Our cases will expose the commission of specific crimes which have a devastating impact, such as rape, sexual enslavement and forced enlistment of children”.¹⁷ In relation to the situation in the DRC he added that “We are working in sequence, selecting cases on the basis of gravity”.¹⁸
14. On 17 March 2006, the Prosecutor issued a statement in which he said:

¹² Press Release ICC-OTP-20040623-59-En, 23 June 2004 < http://www.icc-cpi.int/pressrelease_details?id=26&l=en.html >.

¹³ 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).

¹⁴ 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.)

¹⁵ 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.)

¹⁶ Statement of the Prosecutor Luis Moreno Ocampo to Diplomatic Corps, www.icc-cpi.int/library/organs/otp/LOM_20040212_En.pdf.

¹⁷ 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

¹⁸ *Ibid.*, at p. 2.

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).¹⁹

15. On 17 January 2006, the Pre-Trial Chamber permitted six victims to participate in the investigation stage of the proceedings.²⁰ The crimes reported by these victims which formed the basis of their recognition as victims included murder,²¹ looting and destruction of property,²² abduction and enslavement,²³ torture,²⁴ and unlawful detention.²⁵
16. On 10 February 2006, Pre-Trial Chamber I issued the warrant of arrest against Mr. Thomas Lubanga Dyilo in this case (the "Arrest Warrant").²⁶ 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)).
17. 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.

¹⁹ Press Release ICC-OTP-20060302-126-En, 17 March 2006 < <http://www.icc-cpi.int/press/pressreleases/133.html> >.

²⁰ Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6.

²¹ *Ibid.*, paras. 123, 134, 166, 185.

²² *Ibid.*, paras. 123, 134, 166, 175, 185.

²³ *Ibid.*, para. 151.

²⁴ *Ibid.*, paras. 175, 185.

²⁵ *Ibid.*, para. 175.

²⁶ No. ICC-01/04-01/06-2, "Warrant of Arrest", 10 February 2006.

18. It is not clear from the public records of the Court whether the six victims participating in the investigation stage 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 victims will now also be deprived of any opportunity to raise such concerns at the article 61 hearing, 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.²⁷
- 19 The Prosecutor's document containing the charges under rule 121(3) was filed on 28 August 2006 with three counts relating to child soldiers contrary to article 8 8(2)(e)(vii) and article 25(3)(a)²⁸ of the Rome Statute and charges consistent with the Arrest Warrant. A document filed by the Prosecution on 28 June 2006²⁹ 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.
- 20 If the Women's Initiatives is given leave to make *amicus curiae* submissions, it will submit that whether or not the Prosecutor seeks to present additional charges, 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

²⁷ 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.

²⁸ 28.08.2006 - Submission of the Document Containing the Charges pursuant to Article 61(3)(a) and of the List of Evidence pursuant to Rule 121(3) ICC-01/04-01/06-356 Annexe 2

²⁹ No. ICC-01/04-01/06-170, "Prosecutor's Information on Further Investigation", 28 June 2006.

of the circumstances. 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”;³⁰
- (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;³¹
- (4) the fact that there is information publicly available to the effect that other crimes such as murder and sexual violence were committed specifically by the UPC/FPLC; such information includes a letter from the Secretary-General of the United Nations to the President of the Security Council dated 16 July 2004,³² United States Department of State country reports for the DRC for the years 2003³³ and 2004;³⁴ and reports by Amnesty International,³⁵ Human Rights Watch³⁶ and the Women’s Initiatives for Gender Justice.³⁷

³⁰ Press Release ICC-OTP-20060302-126-En, 17 March 2006 < <http://www.icc-cpi.int/press/pressreleases/133.html> >.

³¹ Arrest Warrant, pp. 3-4.

³² 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.)

³³ ... 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. ...

- (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 of this crime.³⁸

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. ...

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> >.

³⁴ 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." ...

United States of America, Department of State, Bureau of Democracy, Human Rights, and Labor, 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> >.

³⁵ 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, 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).

³⁶ 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).

³⁷ Confidential Annex 2 attached to this filing

³⁸ Interactive Radio for Justice, "Special Thomas Lubanga Program, Transcript, 5 April 2006 < http://www.irfj.org/Programs/Program11/IRFJ_prg11_english.doc >.

21. The exercise of the Pre-Trial Chamber's supervisory jurisdiction under article 61 could take the form of calling on the Prosecutor to explain the nature of any material that has been submitted to the Office of the Prosecutor from external sources, the nature of the investigations undertaken by the Office of the Prosecutor, the nature of the evidence obtained from such investigations, and the reasons for the decisions taken by the Prosecution with respect to the charges to the brought. The Pre-Trial Chamber further has the power to request the Prosecutor to consider conducting further investigations with respect to a particular charge.

Details of the Women's Initiatives for Gender Justice

22. 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

23. The Women's Initiatives is a "Stichting" established under the law of the Netherlands in January 2004.³⁹ The Executive Director of the Women's Initiatives is Ms Brigid Inder.
24. 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

³⁹ The Corporate name is Stichting Women's Initiatives for Gender Justice, file reference number; 27264260.

2518 BC The Hague
The Netherlands

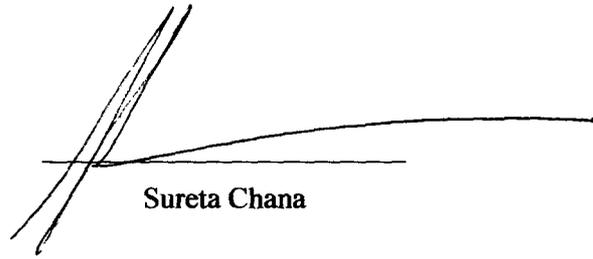
Telephone: +442074834196
+31(70) 365 2042
E-mail: suretachana@btinternet.com

Statement of Interest

25. The Women's Initiatives was established in January 2004 in The Hague, and became operational in February of that year. The organisation's mandate is to work globally to ensure justice for women and an independent and effective International Criminal Court.
26. The Women's Initiatives is an international women's human rights organization 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;
 - 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*.
27. The Women's Initiatives has had two meetings with senior officials of the Office of the Prosecutor ("OTP") in which it raised concerns that gender-based crimes were not being effectively investigated in the DRC.⁴⁰ On 15 August 2006, the Women's Initiatives sent a letter to the Prosecutor (ANNEX 1) under cover of which it submitted a report to the Prosecutor detailing gender-based crimes committed in eastern DRC. (CONFIDENTIAL ANNEX 2). This report which is additionally redacted is filed confidentially to protect the identities of victims and witnesses, 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.

⁴⁰ On 29 March 2006 and 12 April 2006.



Sureta Chana

Dated this 7th day of September 2006

At The Hague, the Netherlands

Women's Initiatives' letter to the Prosecutor stating concern about the failure to investigate and charge gender-based crimes in the Lubanga case

2006

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.

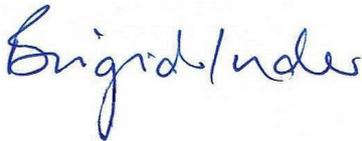
¹⁷ Seventh Diplomatic Briefing of the International Criminal Court, Compilation of Statements, 29 June 2006 < <http://www.icc-cpi.int/library/asp/DB7-Compilation-Statements.pdf> >, at p. 8.

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

The Prosecutor v. Thomas Lubanga Dyilo
Pre-Trial Chamber I

Decision on request to participate as *amicus curiae*

26 September 2006

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

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

Date: 26 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 THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. Thomas Lubanga Dyilo***

Public Document

Decision on Request pursuant to Rule 103 (1) of the Statute

The Office of the Prosecutor

Mr Luis Moreno Ocampo

Ms Fatou Bensouda

Mr Ekkehard Withopf

Legal Representatives for Victims

a/0001/06 to a/0003/06

Mr Luc Walley

Mr Franch Mulenda

Counsel for the Defence

Mr Jean Flamme

Ms Véronique Pandanzyla

**Office of Public Counsel for the
Defence**

Ms Melinda Taylor

PRE-TRIAL CHAMBER I (“the Chamber”) of the International Criminal Court (“the Court”);

NOTING the “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 (with Confidential Annex 2)” (“the Request”),¹ filed by the Women’s Initiatives for Gender Justice (“the Women’s Initiatives”) on 8 September 2006, in which they apply for leave to submit observations as *amicus curiae* in the confirmation proceedings pursuant to article 61 of the Rome Statute (“the Statute”) in the case against Thomas Lubanga Dyilo;

NOTING the “Defence Response to Request of the Women’s Institute for Gender Justice to Participate as an Amicus Curiae”, filed by the Defence on 19 September 2006, in which the Defence requests that the Chamber reject the Request;²

NOTING the “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” (“the Prosecution Response”),³ filed by the Prosecution on 25 September 2006, in which “the Prosecution requests the Pre-Trial Chamber to declare the 7 September 2006 Request inadmissible and to deny leave to the Applicant to file an *amicus curiae* brief and/or to participate in the Article 61 confirmation proceedings;”⁴

NOTING articles 57 and 61 of the Statute and rule 103 of the Rules of Procedure and Evidence (“the Rules”);

¹ ICC-01/04-01/06-403.

² ICC-01/04-01/06-442.

³ ICC-01/04-01/06-478.

⁴ The Prosecution Response, p. 9.

CONSIDERING that the subject-matter of the Request is the alleged gender based crimes committed in the territory of Democratic Republic of the Congo ("the DRC") after 1 July 2002;⁵

CONSIDERING that the letter from the Women's Initiatives to the Prosecution contained in Annex I to the Request states that (i) "the absence of charges for gender 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";⁶ and (ii) in view of the Women's Initiative, "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;"⁷

CONSIDERING that the present case against Thomas Lubanga Dyilo is confined to the alleged enlistment, conscription and active use in military operations of children under the age of fifteen; and that, therefore, the Request has no link with the present case;

CONSIDERING that, in the view of the Chamber, the subject-matter of the Request can be dealt with only in relation to the ongoing investigation into the DRC situation and not as part of the proceedings in the present case against Thomas Lubanga Dyilo;

⁵ See in particular ICC-01/04-01/06-403-Conf-Anx2, "Rape and Sexual Violence in Ituri, in the Oriental Province of the Democratic Republic of the Congo."

⁶ ICC-01/04-01/06-403-Anx1-Corr, pp. 6 and 7.

⁷ ICC-01/04-01/06-403-Anx1-Corr, p. 7.

FOR THESE REASONS

DECIDES not to grant leave to the Women's Initiative for Gender Justice to submit observations under rule 103 of the Rules in the proceedings in the present case against Thomas Lubanga Dyilo;

INVITES the Women's Initiatives to re-file their request for leave to submit observations in the record of the DRC situation.

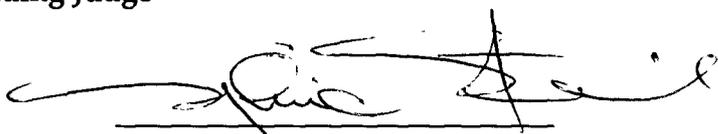
Done in English and French, the English version being authoritative.



Judge Claude Jorda
Presiding Judge



Judge Akua Kuenyehia



Judge Sylvia Steiner

Dated this Tuesday 26 September 2006

At The Hague

The Netherlands

The Prosecutor v. Thomas Lubanga Dyilo

Pre-Trial Chamber I

Request for leave to participate as *amicus curiae* in the
situation in the Democratic Republic of the Congo

10 November 2006

**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 seized 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;

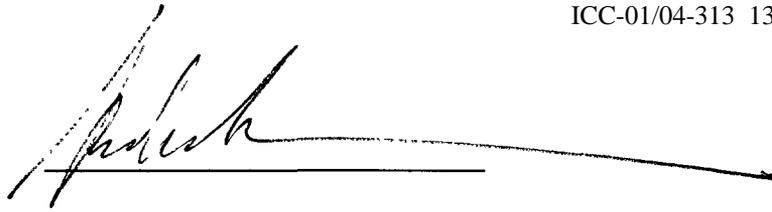
⁵³ The Corporate name is Stichting Women's Initiatives for Gender Justice, file reference number; 27264260.

- 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 solid horizontal line. The signature is fluid and cursive, extending to the right beyond the end of the line.

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

Dated this *10 November 2006*

At The Hague

The Netherlands

The Prosecutor v. Thomas Lubanga Dyilo
Pre-Trial Chamber I

Decision on the request to participate as *amicus curiae* in the
situation in the Democratic Republic of the Congo

17 August 2007



Original : English

No.: ICC-01/04
Date: 17 August 2007

PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Anita Ušacka
Judge Sylvia Steiner

Registrar: Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

**Decision on the Request submitted pursuant to rule 103(1) of the Rules of
Procedure and Evidence**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo

Ms Fatou Bensouda

Mr Ekkehard Withopf

Legal Representatives for Victims

Mr Emmanuel Daoud

Other participants

Women's Initiatives for gender Justice

Ms. Sureta Chana

PRE-TRIAL CHAMBER I of the International Criminal Court (“the Chamber” and “the Court”, respectively)

NOTING the warrant of arrest against Thomas Lubanga Dyilo issued by the Chamber on 10 February 2006;¹

NOTING the “Prosecutor’s Information on Further Investigation”² filed by the Prosecution on 28 June 2006 informing the Chamber that it temporarily suspended the investigation in relation to other potential charges against Thomas Lubanga Dyilo until the end of the present case against him;

NOTING the “Decision on Request pursuant to Rule 103(1) of the Statute”³ issued by the Chamber on 26 September 2006, whereby the Chamber denied the Women’s Initiatives for Gender Justice (“the Women’s Initiatives”) the leave to submit observations under rule 103(1) of the Rules of Procedure and Evidence (“the Rules”) in the proceedings of the confirmation of charges in the case against Thomas Lubanga Dyilo⁴, finding that the request had no link with the case and invited the Women’s Initiatives “to re-file their request for leave to submit observations in the record of the DRC situation”;

NOTING the “Request submitted pursuant to rule 103(1) of the Rules for leave to participate as *amicus curiae* with confidential annex 2”⁵ submitted by the Counsel for Women’s Initiatives on 10 November 2006, whereby Women’s Initiatives applied for leave to submit observations as *amicus curiae* in the Situation in the Democratic Republic of the Congo (“the DRC”), namely on: (i) the role of the Pre-Trial Chamber

¹ ICC-01/04-01/06-8-US-Corr

² ICC-01/04-01/06-170.

³ ICC-01/04-01/06-480.

⁴ ICC-01/04-01/06-403.

⁵ ICC-01/04-313.

in supervising prosecutorial discretion; and (ii) the criteria for determining victims' status;

NOTING the "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 Situation in the Democratic Republic of Congo"⁶ filed by the Prosecution on 5 December 2006, requesting the Chamber to reject the request for leave to participate as *amicus curiae* pursuant to rule 103 of the Rules submitted by Women's Initiatives.

HEREBY RENDERS THIS DECISION:

1. Rule 103 of the Rules of Procedure and Evidence ("the Rules") states 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".
2. Pursuant to rule 103 of the Rules, spontaneous applications can be submitted either by States, organizations or individuals willing to participate in the proceedings before the Court. The Chamber notes that the request from Women's Initiatives represents the first spontaneous application for leave to participate as *amicus curiae* before the Court.
3. In deciding whether to grant the leave to an applicant to submit observations as *amicus curiae*, according to rule 103 of the Rules the Chamber shall evaluate whether this is "desirable for the proper determination of the case" and whether

⁶ ICC-01/04-316.

the observations relate to an issue that the Chamber deems appropriate. This determination shall necessarily be made by the Chamber on a case by case basis.

4. Furthermore, it is the view of the Chamber that the rationale for admitting *amicus curiae* in the proceedings is to have the opportunity to get experts' information on relevant issues of legal interest for the proceedings in order to provide the Chamber with a contribution to the proper determination of the case.
5. The submission of Women's Initiatives presents two points for which the Chamber is requested to grant leave. The first point of Women's Initiatives concerns the role of the Pre-Trial Chamber in supervising prosecutorial discretion when the Prosecutor decides "not to prosecute a particular person or not to prosecute a person for particular crimes"⁷. In the situation at hand, however, investigations in the Situation in the DRC are ongoing and the Prosecutor has not taken any decision not to investigate or prosecute.⁸ The Chamber therefore deems this issue as not appropriate at the present stage of the proceedings.
6. The second point raised by Women's Initiatives relates to the criteria for determining victim status⁹. The Chamber observes that the position of Women's Initiatives in the present request is not acting as a legal representative of victims admitted to participate in the proceedings at the investigation stage of the Situation in the DRC but rather acting as an *amicus curiae*. The Chamber therefore deems this issue as not appropriate at the present stage of the proceedings.

⁷ ICC-01/04-313, par. 13.

⁸ ICC-01/04-316, par. 19.

⁹ ICC-01/04-313, par. 24.

7. As the Chamber does not consider the submission of further observations as *amicus curiae* from Women's Initiatives to be of assistance to it in this instance, it finds that it would not be desirable for the proper determination of the case that leave be granted in respect of these issues pursuant to rule 103 of the Rules.

FOR THESE REASONS

REJECTS the request of Women's Initiatives for leave to submit observations as *amicus curiae*.

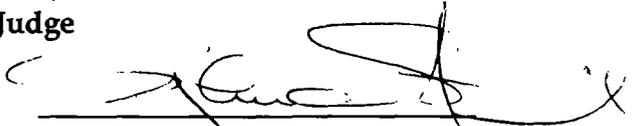
Done in both English and French, the English version being authoritative.



Judge Akua Kuenyehia
Presiding Judge



Judge Anita Ušacka



Judge Sylvia Steiner

Dated this Friday 17 August 2007

At The Hague, The Netherlands