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PRE-TRIAL CHAMBER II

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

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

Public Document

**APPLICATION FOR LEAVE TO SUBMIT AMICUS CURIAE OBSERVATIONS
PURSUANT TO RULE 103 OF THE RULES OF PROCEDURE AND EVIDENCE**

Source: International Women's Human Rights Law Clinic

on behalf of proposed amici consisting of UN torture and women's human rights experts and human rights advocates

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

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I. Introduction

1. In accordance with Rule 103 of the Rules of Procedure and Evidence (“the Rules”) of the International Criminal Court (“the Court”), the undersigned individuals and organizations request leave to submit written observations as *Amici Curiae* in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (“the Case”) on the negotiating history and applicability of key provisions of the Rome Statute and Elements of Crimes as well as developments in international law which compel the cumulative charging of rape and torture.

II. Application for Leave

2. Rule 103 provides for submissions by *amicus curiae* as follows:

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.

The proposed brief by *amici curiae* would surface sources of law and international legal developments highly relevant to the instant matter that have not been fully briefed by either the parties or in the *amicus curiae* brief previously filed with regard to the issue of cumulative charging of rape and torture.¹ The brief proposed herein would not, therefore, be duplicative and would assist the Court in the proper determination of the issue of cumulative charging for which the Prosecutor has sought leave to appeal.

III. Proposed *Amici*

3. Proposed *amici* joining in this request include the following individuals: **Felice Gaer**, current member and former vice chair of the United Nations Committee Against Torture; **Claudio Grossman**, chair of the UN Committee Against

¹ Women’s Initiatives for Gender Justice, *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. (“Women’s Initiatives’ Observations”). Proposed *Amici* endorse the observations made therein concerning the propriety of cumulative charging.

Torture; current and former United Nations Special Rapporteurs on torture, and other cruel, inhuman and degrading treatment including, **Manfred Nowak***, **Sir Nigel Rodley**, and **Theo van Boven**; United Nations Special Rapporteur on violence against women, **Rashida Manjoo**; and Special Rapporteur on women's rights for the African Commission on Human and People's Rights, **Soyata Maiga**. Also joining in her individual capacity is **Vahida Nainar**, former Executive Director of the Women's Caucus for Gender Justice, an organization that actively participated in the ICC negotiations toward the Rome Statute and supplemental. Organizations joining as *amici* include: the **Center for Constitutional Rights**, the **Coalition for Women's Human Rights in Conflict Situations**, the **Feinstein International Center**, the **Greater Boston Legal Services Immigration Unit**, the **International Women's Human Rights Law Clinic**, the **Jacob Blaustein Institute for the Advancement of Human Rights**, **medica mondiale**, **REDRESS**, **Rights & Democracy** and **Women's Rights International**.

4. As can be seen more fully in the statements of interest of *amici* annexed hereto as Appendix I, proposed *amici* are comprised of individual experts, women's human rights advocates and human rights organizations that have made important contributions with respect to the international legal framework of accountability for torture and sexual and gender-based violence. *Amici* have joined together to emphasize the significance of the issue of cumulative charging with regard to crimes of rape and sexual and gender violence as torture.

IV. Procedural Background

5. In the present matter, the accused, Jean-Pierre Bemba, was originally charged with the offenses of murder, rape, and torture as crimes against humanity under Article 7 of the Rome Statute and with murder, torture, rape, outrages

* In respect of those amici enjoying functional privileges and immunities under the General Convention of the Privileges and Immunities of the United Nations (1946), this application is made without prejudice to those privileges and immunities.

upon personal dignity and pillaging as war crimes under Article 8 of the Rome Statute.² The charge of torture as a crime against humanity (Count 3) was based on evidence of acts of rape and other sexual violence as was Count 5, the war crime of outrages upon personal dignity.³ The Document Containing the Charges (“DCC”) was amended twice although the charges and legal characterizations of the evidence supporting them did not change through the amendment process.⁴

6. The hearing on the confirmation of charges was conducted from 12-15 January 2009. On 15 June 2009, Pre-Trial Chamber II issued 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,” (“the Decision”) wherein the Chamber rejected the cumulative charging approach utilized by the Prosecutor⁵ and declined to confirm the charges of torture as a crime against humanity and the war crime of outrages upon personal dignity on that basis.⁶ In so holding, this Chamber concluded that “the evidence presented reflects the same conduct which underlies the count of rape”, and further that the acts of torture and outrages upon personal dignity were “fully subsumed by the count of rape.”^{7,8}

² Pre-Trial Chamber III, *Warrant of Arrest for Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1-tENG-Corr, 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 ; 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, 9 November 2008; 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.

³ *Id.*

⁴ *Id.*

⁵ Pre-Trial Chamber II, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Decision Confirming the Charges*, ICC-01/05-01/08-424, 15 June 2009, para. 190. (“Decision Confirming the Charges”)

⁶ Decision Confirming the Charges, paras. 205, 312. The proposed brief will also succinctly address issues relating to the history of the offense of outrages upon personal dignity and the legislative history with respect to the Rome Statute manifesting an intention to distance conceptually rape and other crimes of sexual and gender violence from the category of outrages upon personal dignity.

⁷ Decision Confirming the Charges, para. 205, 312.

⁸ While the possibility of retaining the charge of torture as a crime against humanity with regard to acts other than rape, i.e. of other sexual violence particularly with regard to family members and others forced to witness the sexual assaults, was also raised by the Prosecutor in the DCC and at the confirmation hearing, it was rejected on the basis of insufficient notice to the accused of the conduct underlying the charge. See Decision Confirming

7. On 22 June 2009, the Office of the Prosecutor sought leave to appeal the Chamber's decision.⁹
8. Following the Prosecutor's request, the Office of Public Counsel for Victims filed a Response to the Decision Confirming the Charges in support of the Prosecutor's Application on 26 June 2009.¹⁰
9. On 13 July 2009, the Women's Initiatives for Gender Justice ("Women's Initiatives") sought leave to submit observations as *Amicus Curiae* which was granted on 17 July 2009. On 31 July 2009, the Women's Initiatives submitted its observations as *Amicus Curiae*.¹¹
10. On 29 June 2009, a hearing was held to consider issues relating to the pre-trial detention of the accused, in accordance with Art. 60(3) of the Rome Statute, which allows the Pre-Trial Chamber to modify its ruling concerning detention if satisfied that "changed circumstances" so require. At the hearing, the defense argued, *inter alia*, that the Pre-Trial Chamber's decision concerning the confirmation of charges effected a change in circumstance in that it resulted in a "significant reduction in the charges" against the accused.¹² Subsequent to the hearing, the defense submitted *additional observations* in which it suggested that the Pre-Trial Chamber's decision resulted in a "marked change with respect to (1) the gravity of the crimes and severity of the possible sentence incurred... ." ¹³

the Charges, paras. 206-209. The charge of torture as a war crime was also rejected on the basis that the offense was not properly alleged, specifically with respect to the additional element of purpose. Decision Confirming the Charges, paras. 289-300. However, the brief proposed herein would address only those charges for which the Chamber found there was sufficient evidence and notice inasmuch as it confirmed the charges of rape as a crime against humanity, as well as a war crime, but rejected the associated charge of torture as a crime against humanity as improperly cumulative.

⁹ Office of the Prosecutor, *Prosecutor'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. ("Prosecutor's Application for Leave to Appeal")

¹⁰ 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.

¹¹ Women's Initiatives' Observations, ICC-01/05-01/08-466, 31 July 2009.

¹² Pre-Trial Chamber II, ICC-01/05-01/08-T-13-ENG WT, p. 13, line 7.

¹³ Counsel for the Defense, *Written Submissions Supplementing the Oral Submissions Made by the Defense at the Hearing of 29 June 2009*, ICC-01/05-01/08-432-Corr., pp. 4-5, paras. 18-20.

V. The Proposed *Amici Curiae* Brief Will Address the Negotiating History and Applicability of Key Provisions of the Rome Statute and Elements of Crimes as well as Developments in International Law Which Compel the Cumulative Charging of Rape and Torture.

11. Proposed *amici* will echo, though not duplicate or repeat in detail, the observations made previously by the Women's Initiatives as *amicus curiae* and the position expressed in the Prosecution's motion for leave to appeal the Decision, as well as in the Chamber's Decision itself, that cumulative charging, in general, is a widely accepted and established practice in international and national courts which does not run counter to the rights of the accused and a fair trial.¹⁴ Moreover, *amici* concur with the position of the Prosecution and observations of the Women's Initiatives that, in light of their clear elemental distinctions, the charging of both torture and rape are correct under cumulative charging rules, which were misapplied in this case.¹⁵
12. The brief proposed herein will be additionally helpful for the proper determination of the instant matter, in accordance with Rule 103(1), as it will provide additional bases for reviewing the Chamber's Decision which have not yet been fully brought forth and which are essential to a thorough-going consideration of the issue and appreciation of the implications and consequences of the Decision. Specifically, the brief will: (1) highlight the negotiating history and applicability of several key provisions of the Rome Statute and Elements of Crimes which warrant cumulative charging, particularly of crimes of sexual violence; (2) address developments that have entrenched the concept and treatment of rape as torture in international criminal, human rights and humanitarian law and, ultimately, customary international law, overcoming in the process the historic and discriminatory

¹⁴ Women's Initiatives' Observations, ICC-01/05-01/08-466, 31 July 2009, at paras.18- 25; Prosecutor's Application for Leave to Appeal, ICC-01/05-01/08-427, 22 June 2009, para. 16 ; Decision Confirming the Charges, para. 200.

¹⁵ Prosecutor's Application for Leave to Appeal, ICC-01/05-01/08-427, 22 June 2009, paras. 17-18; Women's Initiatives' Observations, ICC-01/05-01/08-466, 31 July 2009, at paras. 25-40.

trivialization of rape and other sexual violence; and (3) illustrate that cumulative charging of rape and torture is “consistent with internationally recognized human rights,” and is further necessary to avoid gender-based discrimination, in accordance with Article 21(3).

13. With regard to relevant provisions of the Rome Statute and Elements of Crimes, *Amici* would draw attention to the fact that not only is the cumulative charging of rape and torture not to be discouraged, it is explicitly envisioned and promoted in several respects, as evidenced by the following provisions:

- a) War Crimes (Article 8(2)(b)(xxii) and Article 8(2)(e)(vi)). In this respect *amici* will explain that the language “also constituting a grave breach of the Geneva Conventions” and “also constituting a serious violation of article 3 common to the four Geneva Conventions” was intended, in part, to recognize the importance of charging the sexual violence crimes as also torture, mutilation and other cruel treatment. In particular, the language of the appended phrase was revised from the proposed “also amounting to”, calling for an assessment of severity, to “also constituting” to make clear that the sexual violence crimes are now understood as part of these original Geneva Convention crimes and can be charged as such.¹⁶ This language was also constructed in light of the developments in the International Criminal Tribunal for Rwanda (“ICTR”) and International Criminal Tribunal for the Former Yugoslavia (“ICTY”) recognizing the appropriateness of charging rape and other sexual violence as torture.¹⁷
- b) Introduction to the Elements Annex (para. 9). Paragraph 9 provides “A particular conduct may constitute one or more crimes.” While this

¹⁶ See, Steains, Cate, “Gender Issues” in *The International Criminal Court: The Making of the Rome Statute*, ed. Roy S. Lee, Kluwer Law International, The Hague (1999), p. 364.

¹⁷ *Id.* at pp. 361-364 ; See also, e.g., ICTY, *Prosecutor v. Furundzija*, IT-95-17/1-T, Trial Judgement, 10 December 1998, paras 162-163; *Prosecutor v. Delalic, et al*, IT-96-21-T, Trial Judgement, 16 November, 1998, paras 466, 475-477, 925, 941 and 965; *Prosecutor v. Kunarac, et al*, IT-96-23/1 Appeals Judgement, 12 June 2002, para 557 ; *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgement, 2 September, 1998, paras 597, 687. See also, *Prosecutor v. Brđanin*, IT-99-36-A, ICTY Appeals Chamber, 3 April 2007, paras.253-258.

language appears as a general authorization to charge conduct as different crimes, it originated in a proposal specific to crimes of sexual violence but was later made more general to avoid the possible implication that the specificity would preclude cumulative charging of crimes other than those of sexual violence.¹⁸

- c) Elements Annex, Article 6(b): Genocide By Causing Serious Bodily or Mental Harm. Footnote 3 to this Element provides “This conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.” The central purpose of this footnote was to incorporate the judgement in *Prosecutor v. Akayesu* where rape had been deemed an act of genocide and in which the Trial Chamber also discussed rape as a form of torture.¹⁹

14. *Amici* also wish to expand upon the *amicus curiae* brief submitted by the Women’s Initiatives on the issue of consistency with Article 21(3) which provides as follows:

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. (emphasis supplied).

In providing that the interpretation *and* application of the statute and law pursuant to this article *must* be consistent with internationally recognized human rights, it is necessary to call the Court’s attention to the universal acceptance and treatment of rape as torture, and the reasoning therefore, in the

¹⁸ *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, ed. Roy S. Lee, et al, Transnational Pub. (2001), pp. 50-51.

¹⁹ *Id.* See also, *Prosecutor v. Akayesu*, ICTR-96-4-T, ICTR, Trial Judgement, 2 September, 1998, paras 597, 687.

human rights system. In this regard, *amici* will provide the Chamber with specific authorities, including:

- a) The United Nations Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) has repeatedly treated rape and other forms of sexual violence as torture. These developments have been accepted by a consensus of States Parties as reflected in the lack of contest to this provision of General Comment 2;²⁰
- b) The Human Rights Committee has likewise recognized rape (and other forms of sexual violence) as torture;²¹
- c) General Recommendation 19 of the Committee to End Discrimination Against Women recognizes that violence against women is based on a number of long-standing human rights violations, including torture;²²
- d) The Special Rapporteurs on Torture and Other Cruel, Inhuman or Degrading Treatment from 1988 to the present have recognized that rape, and more recently, other forms of sexual violence constitute torture;²³
- e) The European Court of Human Rights has recognized rape as torture;²⁴
- f) The Inter-American Court of Human Rights has recognized rape as torture;²⁵
- g) The Inter-American Commission on Human Rights has recognized rape as torture.²⁶

²⁰ United Nations Committee Against Torture (CAT), General Comment 2, UN Doc : CAT/C/GC/2, para 22; *C.T. and K.M. v. Sweden*, (CAT) Communication No. 279/2005, 17 November, 2006; *V.L v. Switzerland*, CAT Communication No. CAT/C/37/D/262/2005, 20 November, 2006.

²¹ Human Rights Committee Concluding Observations on Russian Federation, UN Doc : CCPR/CO/79/RUS, 6 November 2003, para 13.

²² United Nations Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation 19, Violence Against Women (Eleventh Session, 1992), UN Doc. A/47/38, para 7.

²³ See 1986 *Report of Special Rapporteur on Torture and Cruel, Inhuman and Degrading Treatment*, Pieter Kooijmans, UN Doc : E/CN.4/1986/15, pp. 29-30; 1992 *Report of Special Rapporteur on Torture and Cruel, Inhuman and Degrading Treatment*, Pieter Kooijmans, UN Doc : E/CN.4/1992/SR.21, 21 February, 1992, para 35 : “Since it was clear that rape or other forms of sexual assault against women held in detention were a particularly ignominious violation of the inherent dignity and right to physical integrity of the human being, they accordingly constituted an act of torture ;” 1995 *Report of Special Rapporteur on Torture and Cruel, Inhuman and Degrading Treatment*, Nigel S Rodley, UN Doc : E/CN.4/1995/34, pp. 8-10; 2008 *Report of Special Rapporteur on Torture and Cruel, Inhuman and Degrading Treatment*, Manfred Nowak, UN Doc : A/HRC/7/3, para 26.

²⁴ *Aydın v. Turkey*, Case 57/1996/676/866, European Court of Human Rights, 25 September, 1997, paras 64, 186 and 189.

²⁵ *Miguel Castro-Castro Prison v. Peru*, Inter-Am Ct. H.R. (ser. C) No. 160, 25 November 2006.

²⁶ *Raquel Martín de Mejía v. Perú*, Case 10.970, Inter-American Commission on Human Rights, 1996.


15. Given the unanimity in the international human rights system that rape and other forms of sexual violence constitute and should be addressed as torture, *Amici* would submit that it is inconsistent with internationally recognized human rights and therefore inconsistent with the dictates of Article 21(3) to exclude prosecution of rape as torture.
16. Finally, as Article 21(3) provides specifically that “the interpretation of law pursuant to this article must be...without any adverse distinction founded on grounds such as gender as defined in article 7 paragraph 3,” *Amici* would illustrate that to disallow the charging of rape and other forms of sexual violence as torture constitutes such an adverse distinction. The developments in human rights law were triggered by the obligation of the human rights system to re-examine the exclusion of crimes committed predominately against women, particularly crimes of sexual and gender violence, from the purview of traditional grave violations of humanitarian and human rights law and to ensure the elimination of these discriminatory exclusions with the mainstreaming of gender.
17. *Amici* will submit that such discrimination has real impact. Rape is to be treated as torture as part of a recognition of the discrimination that results from an interpretation and application of the crime of torture that excludes gender and sexual violence. Until recently, rape was a frequent and ignored or trivialized offense when committed against women. *Amici* will show that the importance of treating rape as torture is thus essential if the full gravity of rape is to be properly understood and preserved in international law. To require a prosecutor to proceed without the torture charges undermines this now firmly settled principle of international law and threatens to diminish the seriousness of rape in the process.

18. *Amici* would submit that the diminishing effect of not allowing acts of rape to be charged also as torture can be immediately seen in the aforementioned submissions of the defense following the hearing on the confirmation of charges. The defense urged the accused's release pending trial in part on the basis that the rejected charges resulted in "marked change with respect to (1) the gravity of the crimes and severity of the possible sentence incurred... " despite the fact that the allegations of rape underlying the charges were not rejected; just the additional offenses charged with respect to those acts. In light of the historic trivialization of rape and other crimes of sexual and gender violence, *Amici* are concerned that the level of gravity associated with the acts charged in this matter will ultimately be lessened, in the instant case and beyond, by the failure to recognize the acts alleged as torture.

VI. Conclusion

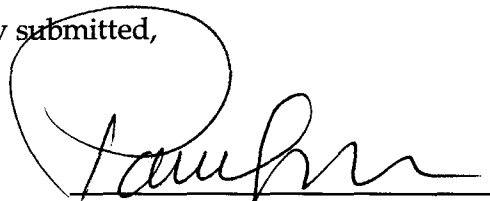
19. Based on the foregoing, the undersigned respectfully request leave to submit the proposed *amicus curiae* brief on the issues set forth above, in accordance with Rule 103 of the Rules within the timeframe to be set by the Court.

Respectfully submitted,



Rhonda Copelon
Professor of Law & Director
International Women's
Human Rights Law Clinic
As Counsel for Amici

Dated this 27th day of August, 2009
At Philadelphia, Pennsylvania, USA



Pamela C. Spees
International Women's
Human Rights Law Clinic
As Counsel for Amici

Dated this 28th day of August, 2009
At Lake Charles, Louisiana, USA