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**PRE-TRIAL CHAMBER II**

**Before:** Judge Ekaterina Trendafilova  
Choose ICC Judge  
Choose ICC Judge  
Choose ICC Judge  
Choose ICC Judge

**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:

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## ***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”<sup>1</sup> 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.<sup>2</sup>
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”.<sup>3</sup>
3. The *Amicus* respectfully offers the Chamber observations in order to assist in “the proper determination of the case” pursuant to Rule 103(1).

### **II. Procedural Background of Issues on Appeal**

1. On 23 May 2008, Pre-Trial Chamber III issued a warrant of arrest<sup>4</sup> against Jean-Pierre Bemba Gombo (the “Accused”).<sup>5</sup> The Prosecutor charged the Accused with the Crimes Against Humanity of murder,

<sup>1</sup> 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”).

<sup>2</sup> 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, and its annex (“Prosecutor’s Application”).

<sup>3</sup> 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.”

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

<sup>5</sup> 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.

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.<sup>6</sup>

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.<sup>7</sup>
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).<sup>8</sup> The Chamber also dismissed Count 5 of the Amended DCC, outrages upon personal dignity, a War Crime under Article 8(2)(c)(ii).<sup>9</sup> The Chamber confirmed Counts 1 and 2 of the Amended DCC, rape as a Crime Against Humanity and rape as a War Crime.<sup>10</sup>
5. The Chamber opined that the dismissed charges ran afoul of cumulative charging principles.<sup>11</sup>
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.<sup>12</sup> Similarly, the Chamber held that outrages upon personal dignity was fully subsumed by Count 2, rape as a War Crime.<sup>13</sup>
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".<sup>14</sup> It found that under the

<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> Decision Confirming the Charges, para. 190.

<sup>9</sup> Decision Confirming the Charges, para. 302.

<sup>10</sup> Decision Confirming the Charges, p. 185.

<sup>11</sup> Decision Confirming the Charges, para. 202.

<sup>12</sup> Decision Confirming the Charges, paras. 204-205.

<sup>13</sup> Decision Confirming the Charges, para. 312.

<sup>14</sup> Decision Confirming the Charges, para. 203.

Prosecutor's approach to cumulative charging, the Defence might have to confront "all possible legal characterisations".<sup>15</sup>

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,<sup>16</sup> and Counts 4 and 5, torture<sup>17</sup> and outrages upon personal dignity<sup>18</sup> 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.
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.<sup>19</sup>
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.<sup>20</sup>
12. On 13 July 2009, the Women's Initiatives for Gender Justice filed a Request for Leave to File *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence.<sup>21</sup>
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 for Gender Justice.<sup>22</sup>
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,<sup>23</sup> and granted the Women's Initiatives leave to submit the present observations.

<sup>15</sup> Decision Confirming the Charges, para. 203.

<sup>16</sup> Decision Confirming the Charges, para. 209.

<sup>17</sup> Decision Confirming the Charges, paras. 291, 297-300.

<sup>18</sup> Decision Confirming the Charges, paras. 311-312.

<sup>19</sup> 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").

<sup>20</sup> 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.

<sup>21</sup> 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").

<sup>22</sup> 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.

<sup>23</sup> 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

### III. Applicable Law

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

#### **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.

...

## **Chapter 1**

### **General provisions**

#### **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**

#### **Regulations of the Court ICC-BD/01-01-04 32**

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*.<sup>24</sup> 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 charging<sup>25</sup> 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.<sup>26</sup>

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 *Delalic* 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

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

<sup>25</sup> The *Amicus* assumes that the Chamber means improper cumulativeness, which contravenes the *Delalic* test that the Chamber applied in the present case.

<sup>26</sup> Decision Confirming the Charges, para. 202.



the rights of the accused are not violated when crimes alleged are properly deemed cumulative, meaning within the prescriptions of the *Delalic* test.<sup>27</sup>

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.<sup>28</sup> In such proceedings, it is not inimical to the due process rights of the accused; they remain safeguarded throughout the trial.<sup>29</sup> 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.
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 *Delalic* 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 *Delalic* 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

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<sup>27</sup> 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 *Delalic* 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.

<sup>28</sup> A. Bogdan, *Cumulative Charges, Convictions and Sentencing at the Ad Hoc International Tribunals for the Former Yugoslavia and Rwanda*, 3 MELBJIL 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).

<sup>29</sup> See Prosecutor v. Blagojević & Jokić, Decision on Motion of Accused Blagojević to Dismiss Count 1, IT-02-60, 31 July 2002, page 3; Prosecutor v Radovan Stankovic, *Decision on the Defence's Preliminary Motion on the Form of the Second Amended Indictment*, IT-96-23/2, 2 April 2003, paras. 14-15; Prosecutor v. Miltar 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. Radovan 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. 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. Galić, Trial Chamber Judgment, IT-98-29, 30 November 2006, para. 160; Prosecutor v. Galić, Appeals Chamber Judgment, IT-98-29, para. 156, n. 268, 30 November 2006; Prosecutor v. Elizaphan and Gerard Ntakirutimana, Trial Chamber Judgment and Sentence, ICTR-96-10 & ICTR-96-17-T, 21 February 2003, para. 863-864; Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze, Trial Chamber Judgment and Sentence, ICTR-96-11, 3 December 2003, para. 1089.

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.<sup>30</sup> In the factual situation of the ten-year-old girl,<sup>31</sup> 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.<sup>32</sup> The crime inflicted upon him was torture. The *Delalic* test was inapplicable.
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*,<sup>33</sup> 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 *Delalic* test examining the cumulateness of rape and outrages upon personal dignity is also too narrow.<sup>34</sup> 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.

<sup>30</sup> Decision Confirming the Charges, para. 204

<sup>31</sup> Decision Confirming the Charges, para. 174.

<sup>32</sup> Decision Confirming the Charges, para. 179.

<sup>33</sup> *Prosecutor v. Furundžija*, Trial Chamber Judgment, IT-95-17/1, 10 December 1998, paras. 73, 75.

<sup>34</sup> See General Introduction, Elements of Crimes, para. 9 (stating, « a particular conduct may constitute one or more crimes. »)

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 administrative function, they take a subordinate role to statutory provision of Article 21 and the Rules of Procedure and Evidence.<sup>35</sup>
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 *Delalic* 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),<sup>36</sup> 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 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”.<sup>37</sup>

<sup>35</sup> 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-OI/04-01/06-1084, para. 47, 13 December 2007.

<sup>36</sup> 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.

<sup>37</sup> 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), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 243 (2003), para. 7(c) (emphasis added).

36. Similarly, the United Nations Convention for the Rights of the Child,<sup>38</sup> a widely ratified 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 CEDAW 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 children<sup>39</sup> has been interpreted by the treaty-body Committee of the Convention on the Rights of the child to mean “effective justice”.<sup>40</sup>
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 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).

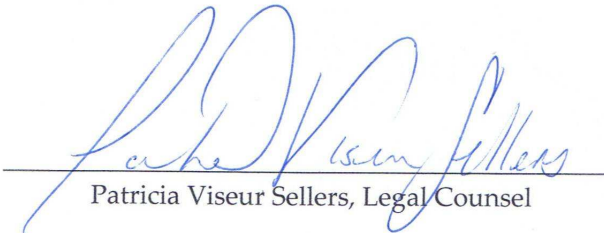
## V. Conclusions

41. 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.

<sup>38</sup> 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.

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

<sup>40</sup> 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).



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

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Dated this 31 July 2009

At [place, country]