



Original: **English**

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

Date: **22 June 2009**

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

**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**

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. A. Khan

Mr Aimé Kilolo-Musamba

Legal Representatives of Victims

Marie-Edith Douzima-Lawson

Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

Paolina Massidda

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

States Representatives

Amicus Curiae

Amnesty International

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

Introduction

1. The Prosecution applies for leave to appeal to address the issues presented, which are novel and would benefit from dispositive consideration by the Appeals Chamber. First, these issues affect the charges that can be prosecuted; absent appeal, the Prosecution cannot go forward on three counts. Second, it is important that there be some uniform understanding of the ability of the Pre-Trial Chamber to deny confirmation of proven charges because it considers they are unnecessary, cumulative, or burdensome to the Defence. The Court can establish a consistent jurisprudence on how charging documents will be interpreted. This will allow the Prosecution to refine its policies, in particular for the purpose of guaranteeing full notice to the Defence.
2. An Application for Leave to Appeal does not require the Chamber to be persuaded that its Decision is erroneous. It only requires that the issues meet the threshold standards of importance, and that the Court and the parties will benefit from their resolution now rather than later. Thus, the *sole* question for this Chamber is whether the issues on which leave to appeal is sought meet the criteria set out in Article 82(1)(d).¹ If they do, the Chamber should authorize appeal notwithstanding its view on the merits.

Procedural Background

3. On 1 October 2008 the Prosecution filed the Document Containing the Charges (“DCC”). It filed Amended DCCs on 17 October and 19 November 2008. All versions of the DCC charged Jean-Pierre Bemba (“the Accused”) with three separate Crimes Against Humanity: murder (Article 7(1)(a)); rape (Article 7(1)(g)); and torture (Article 7(1)(f)). It also charged the Accused with five separate War Crimes: murder and torture (Article 8(2)(c)(1)); rape (Article 8(2)(e)(vi)); outrages upon personal dignity (Article 8(2)(c)(ii)); and pillaging (Article 8(2)(e)(v)).

¹ *Situation in Uganda*, ICC-02/04-01/05-20-US-Exp, 19 August 2005, para. 22.

4. In conjunction with the DCC, the Prosecution also filed a List of Evidence and Amended Lists of Evidence that identified and explained the evidence on which it would rely to substantiate the allegations in the DCC.² In addition, following an order by the Pre-Trial Chamber, on 24 November 2008 - 49 days before the start of the confirmation hearing - the Prosecution submitted an In-Depth Analytical Chart of Incriminatory Evidence.³
5. The confirmation hearing was held from 12 to 15 January 2009. Thereafter the parties submitted written observations. On 30 March 2009, responding to a request of the Chamber, the Prosecution filed an Amended DCC, along with an Amended List of Evidence and In-Depth Analytical Chart of Incriminatory Evidence. The documents presented an alternative mode of liability under Article 28.
6. On 15 June 2009, the Chamber 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 Confirmation Decision”).
7. In the Confirmation Decision, the Chamber decided that “the five-day period to present an application for leave to appeal set out in Rule 155(1) shall start running for the Defence as of the date of notification of the French translation of this decision”.⁴ The Prosecution respectfully requests that the Chamber jointly decide on all applications for leave to appeal against the Decision.

The issues for which leave to appeal is sought fulfil the criteria in Article 82(1)(d)

8. The Prosecution seeks leave to appeal two issues arising from the decision:
 - Whether the Pre-Trial Chamber has the authority to decline to confirm two charges (torture as a crime against humanity, and outrages against personal dignity as a war crime) on the ground that they are cumulative of rape charges; and whether torture and outrages against dignity are, either objectively as a matter of law or in particular based on the facts alleged, wholly subsumed within rape charges.

² ICC-01/05-01/08-264, 19 December 2008: List of Evidence on 1 October 2008, and Amended List of Evidence on 17 October 2008, 7 November 2008, 19 November 2008, and 19 December 2008.

³ ICC-01/05-01/08-278, 24 November 2008.

⁴ Decision, p. 185(g).

- Whether the Pre-Trial Chamber has the authority to decline to confirm charges on the ground that the Accused lacked sufficient pre-confirmation notice of their basis; and whether the DCC and the In-Depth Analytical Chart gave the Accused sufficient notice of the charges and the supporting facts.

The First Issue is Appealable under Article 82(1)(d)

9. This issue addresses the Pre-Trial Chamber's authority to deny confirmation on a basis that is not expressly authorized by the Statute, the Rules of Procedure, or the Court's Regulations. It also addresses substantively whether one offence is subsumed in another because some facts overlap, even though the elements of the crimes are different and the provisions are directed at protecting separate interests.
10. This issue thus presents a matter of substantial importance for the proper functioning of this Court. For the reasons set out below, it also meets the requirements for interlocutory review.

(a) The Issue Arises from the Decision

11. The Chamber declined to confirm the charges on torture through acts of rape as a crime against humanity and outrages against personal dignity as a war crime on the ground that these charges were "cumulative" of the rape charges.⁵ It held that to the extent that the Prosecution had alleged that acts of rape also constituted torture (as a crime against humanity) and outrages on personal dignity, then based on the evidence presented those charges are fully subsumed by the charges of rape.⁶
12. This ruling did not discount the sufficiency of the Prosecution's evidence. To the contrary, the Chamber found the charges to be essentially indistinguishable from the rape charges that, it expressly found, *were* sufficiently proven.

⁵ Note that the Chamber also declined to confirm Count five regarding outrages upon personal dignity on the basis of the second issue as described below. See Confirmation Decision, paras. 307, 311.

⁶ "The Chamber therefore considers that the act of torture is fully subsumed by the count of rape" (Decision, para. 205); "in this particular case the count of outrage upon personal dignity is fully subsumed by the count of rape, which is the most appropriate legal characterisation of the conduct presented" (Decision, para. 312).

13. Thus, in rejecting the Prosecution's right to bring the additional torture and outrage charges, the Decision plainly rests on the Pre-Trial Chamber's assumption of authority to deny confirmation of a charge that it finds was adequately proved, on a ground not spelled out in the Statute or addressed in the Rules of Procedure and Evidence.
14. Article 61(7) empowers the Pre-Trial Chamber to "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... (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence..." The only basis on which the Pre-Trial Chamber is therefore authorised to refuse to confirm a charge is insufficiency of the evidence. Indeed, the Pre-Trial Chamber stressed the statutory mandate enshrined in Article 61(7) in the pre-trial proceedings of the present case.⁷
15. Nothing in the Statute authorises the Chamber to decline to confirm because it considers the charge is unnecessary or unduly burdensome to the Defence.⁸
16. Moreover, the Chamber erred in assuming that the charges of torture and outrages were not "distinct crimes" separate from the crime of rape.⁹ In this regard, the Prosecution notes that the Decision purports to prohibit or limit cumulative charging.¹⁰ However, the authority relied upon by the Chamber does not prohibit cumulative charging, but rather governs the circumstances under which cumulative convictions are (and are not) permissible.¹¹ These principles are not applicable at this stage of the proceedings.¹²
17. Furthermore, the Prosecution will argue before the Appeals Chamber, if leave is granted, that the Pre-Trial Chamber has misapplied the relevant principles:

⁷ ICC-01/05-01/08-55, para. 13.

⁸ Decision, paras. 202, 204, 205, 312.

⁹ Decision, paras. 205, 312.

¹⁰ Decision, para. 202.

¹¹ Decision, footnote 277; see also ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeals Judgement, 20 February 2001, para. 412 (on cumulative convictions) in contrast to para. 400 (on cumulative charging).

¹² Indeed, the Pre-Trial Chamber recognises the cumulative charging is followed in national courts and international tribunals (Decision, para. 200), and fails to provide any authority to prohibit or limit this practice at the charging (as opposed to conviction) stage.

instead of analysing whether the offences *per se* each require a material legal element not contained in the other; the Chamber based its determination on whether “the evidence ... presented [in this particular instance] reflects the same conduct which underlies the count of rape”.¹³ The elements of rape as a crime against humanity¹⁴ are clearly different from those of torture as a crime against humanity.¹⁵ For instance, the Prosecution need not prove to secure a conviction for rape a certain quantum of pain or suffering endured by the victim, and a torture victim need not have endured “*a physical invasion of a sexual nature*”¹⁶ a distinctive element of rape. Not all rape that is validly so charged will meet the legal standards for torture, but that which does should be able to be charged as such, notwithstanding that it is torture committed through rape. Moreover, the man forced to watch his wife being raped repeatedly and viciously is not himself a victim of rape, but he can be properly viewed as a torture victim. Further, the logic against “cumulative” charges of the Confirmation Decision could also extend to preclude the Prosecution from charging both war crimes and crimes against humanity, or crimes against humanity and genocide for that matter, for the same underlying facts of rape, notwithstanding that the legal elements and concerns of each head of liability are distinct.

18. Thus, the appropriate test that this Court should apply to cumulative crimes – whether crimes are cumulative if the victim is the same in both offences and the facts overlap, or whether it should be based on the traditional examination of the provisions, to determine if the crimes contain different and separate elements and protect distinct and separate interests -- is an issue arising from the Confirmation Decision, warranting review by the Appeals Chamber.

(b) The First Issue affects the fair conduct of the proceedings

19. The Prosecution submits that fairness requires that the procedural and substantive rights and obligations of all participants – including the Prosecution – be respected.¹⁷ The concept of fairness is also linked to the ability of a party to

¹³ Decision, para. 205.

¹⁴ Elements of Crimes, Article 7(1)(g)-1.

¹⁵ Elements of Crimes, Article 7(1)(f).

¹⁶ *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment, 2 September 1998, paras. 598 and 688.

¹⁷ See further *Situation in the DRC*, ICC-01/04-141, 25 April 2006, para. 48; *Prosecutor v. Kony et al*, ICC-02/04-01/05-212, 26 February 2007, paras. 10-11. This has been held to include respect for the

present its case.¹⁸ In particular, that “means that the Prosecutor must be able to exercise the powers and fulfil the duties listed in Article 54”.¹⁹

20. The Confirmation Decision does not respect the procedural and substantive rights and obligations of the Prosecution. The Pre-Trial Chamber is not entitled to choose the counts that it believes best reflect the harm suffered by victims and the criminality engaged in by the Accused, and to reject others as cumulative. When the charges are supported by the evidence, as here, the choice of counts to prosecute at trial is a right granted to the Prosecutor, not to the Pre-Trial Chamber.²⁰
21. In this instance, an immediate consequence of the Decision is that serious charges, for which the Prosecution has presented sufficient evidence to establish “substantial grounds to believe that the person committed each of the crimes charged”, will not go to trial. The Trial Chamber will therefore not be able to pronounce itself on, and the judgment will not reflect, the full range of crimes committed by the Accused and the nature and degree of victimization suffered.
22. The denial of confirmation bars the Prosecution’s right and ability, under Article 42 and 54, to present its case. When that ability is improperly restricted, the proceedings are unfair to the Prosecution.
23. This issue will also impact 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 victimisation reflected in the charges.²¹ Further, some victims may be excluded altogether, as their participation must be linked to the charges confirmed against the Accused. Victims who suffered from being forced to watch their family members raped in front of them – as has been pleaded in the

norms of a fair trial (Situation in the DRC, ICC-01/04-168, 13 July 2006, para. 11), equality and the principle of adversarial proceedings (*Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, para. 38), and fairness to the Prosecution (*Situation in the DRC*, ICC-01/04-135-tEN, 31 March 2006, paras. 38-39; *Prosecutor v Kony et al*, ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), 11 July 2006, para. 24).

¹⁸ *Prosecutor v Kony et al*, ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), 11 July 2006, para. 24.

¹⁹ Situation in the DRC, ICC-01/04-135-tEN, 31 March 2006, para. 39.

²⁰ Article 42(1).

²¹ See para. 21 above.

DCC and substantiated in the evidence presented²² – may thus be denied the opportunity to be heard, to present the facts and to eventually seek reparations.²³

(c) The First Issue affects the expeditious conduct of the proceedings

24. Once a party has demonstrated that an issue affects the fair conduct of the proceedings, any further showing that the issue also affects their expeditious conduct is superfluous for the purposes of obtaining leave to appeal under Article 82(1)(d).²⁴ Nonetheless, the Prosecution submits that the issue in this Decision separately affects the expeditious conduct of the proceedings. Since the concept of “proceedings” for the purposes of Article 82(1)(d) extends to any subsequent proceedings in this or any other case,²⁵ it should be beyond dispute that the potentially detrimental impact of the Decision on the expeditious conduct of the trial justifies the granting of leave to appeal.

²² DCC, paras. 39, 51. See ICC-01/05-01/08-278-Conf-Exp-Anx A, 24 November 2008: W-81 stated that her brother was lashed by the Banyamulenge when he tried to stop them from raping his sister. CAR-OTP-0028-0268, ICC-01/05-01/08-278-Conf-Exp-AnxA, p. 42; CAR-OTP-WWWW-0023 stated that after raping him, Banyamulenge soldiers raped his wives and his four daughters, and he was forced to watch, CAR-OTP-0008-0050, ICC-01/05-01/08-278-Conf-Exp-AnxA, p. 98; CAR-OTP-WWWW-0042 stated that Jean-Pierre Bemba’s troops forced him, his wife and son to lie on the ground. In the meantime, a soldier took his ten year old daughter behind the house and raped her. CAR-OTP-0027-0809, ICC-01/05-01/08-278-Conf-Exp-AnxA, p. 43.

²³ The Appeals Chamber has found that “[f]or the purpose of participation in trial proceedings, the harm alleged by a victim and the concept of personal interests under article 68(3) of the Statute must be linked with the charges confirmed against the accused.” (*Prosecutor v Lubanga*, ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, para. 2). In some cases such victims may be able to apply as indirect victims, as long as they have suffered personal harm (*Prosecutor v Lubanga*, ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, para. 39). However, this does not recognise that victims have directly suffered from the crimes in question. Moreover, a showing that indirect victims are entitled to participate in proceedings may be complex and its outcome will be uncertain (see for instance *Situation in Uganda*, ICC-02/04 OA, 23 February 2009, paras. 1-2).

²⁴ Similarly, if a party had demonstrated that the issue affects the expeditious conduct of the proceedings, then any showing that it also affected the fair conduct of the proceedings would likewise be superfluous. See in particular *Situation in the DRC*, ICC-01/04-141, paras. 49-52; see further *Situation in the DRC*, ICC-01/04-103, footnote 5; *Prosecutor v Lubanga*, ICC-01/04-01/06-125, footnote 30. The Prosecution considers that this requirement mirrors the obligation to ensure that proceedings are fair and expeditious (see e.g. Article 64(2)). In the same manner that once proceedings are no longer fair, or no longer expeditious, they are no longer “fair and expeditious”; so once an issue affects the fair conduct of the proceedings, or affects the expeditious conduct of the proceedings, it affects the “fair and expeditious conduct of the proceedings”. The jurisprudence of the ICTY and ICTR, adjudicating on the same text as is found in Article 82(1)(d), supports this proposition. In both tribunals, Chambers have often granted leave to appeal solely on the basis that the issue affects the fair conduct of the proceedings - see authorities set out in *Situation in the DRC*, ICC-01/04-141, paras. 49-52; see subsequently *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecutor’s Motion for Certification to Appeal the Trial Chamber’s Decisions on Protection of Defence Witnesses, 28 September 2005.

²⁵ *Situation in the Democratic Republic of the Congo*, ICC-01/04-168 OA3, 13 July 2006, paras.12 and 17.

25. Nonetheless, the Prosecution continues to view these charges as important to convey the full range of injury to the victims and criminality on the part of the Accused. If these charges are not reinstated, the Prosecution is left with no recourse but to ask the Trial Chamber to invoke Regulation 55 – the procedural avenue identified by the Pre-Trial Chamber in the Decision. The reach of that provision is unsettled, and its mechanics untested.²⁶ If the Trial Chamber agreed that it could appropriately consider the dismissed charges under its Regulation 55 authority, that preliminary determination would trigger the right of all parties and participants to additional time within which to make submissions and possibly to recall witnesses. Those possibilities will inevitably result in delay of the trial proceedings.

(d) The First Issue affects the outcome of the trial

26. Under the terms of Article 82(1)(d), an issue only needs to impact on the fair and expeditious conduct of the proceedings or on the outcome of the trial.²⁷

27. An immediate and irrefutable consequence of the Decision is that two charges²⁸ for which the Prosecution has presented sufficient evidence to establish “substantial grounds to believe that the person committed each of the crimes charged” will not go to trial. This will affect the outcome of the trial. The Trial Chamber will not be able to pronounce itself on, and the judgment will not reflect, the full range of facts pleaded and charges brought by the Prosecution in its DCC.

28. Further, in respect of the purportedly cumulative charges for which the Chamber considered that the underlying facts had been pleaded, the Prosecution stresses that these were not presented as alternative characterisations for the purposes of unfairly securing conviction on multiple counts. The purpose was to capture the full extent of the criminal conduct and victimization. In this sense, the Prosecution stresses that Regulation 55 is not a right of the Prosecution but rather

²⁶ See below, para. 28.

²⁷ *Prosecutor v Bemba*, ICC-01/05-01/08-75, 25 August 2008, para. 8.

²⁸ Counts One and Five: torture through rape, as Crime against Humanity, and outrages upon personal dignity constituting War Crime.

a prerogative of the Trial Chamber, which may adopt an interpretation very different to that of the Pre-Trial Chamber.²⁹

The Second Issue is Appealable under Article 82(1)(d)

29. The Pre-Trial Chamber also declined to confirm torture as a crime against humanity (through the commission of acts other than rape), torture as a war crime, and outrages against personal dignity, on the ground that the Accused lacked sufficient notice of “the facts underpinning the charges”,³⁰ “the specific intent of MLC soldiers which would have clearly characterised the alleged acts as acts of torture as a war crime;”³¹ or “the alleged acts of outrage upon personal dignity, different from the act of rape itself, such as the powerlessness of the family members and the impact on the family members and the CAR population”.³² Because of the purported inadequacy of notice to the Defence, the Chamber declined to confirm these charges without evaluating the evidence supporting them.

30. As noted previously,³³ the refusal to confirm charges brought by the Prosecution, for reasons outside the parameters of the Chamber’s authority under Article 61(7), means that certain charges will not be presented at trial. This impacts clearly and directly on the outcome of the trial and alone merits granting leave to appeal. And limiting the Prosecution’s right to bring a case that is factually and legally sound, without allowing consideration of such a fundamental issue until after the trial (if at all), affects the fair and expeditious conduct of the proceedings. Finally, since the issue impacts on the scope of the trial and presents an alleged error that, the

²⁹ In particular, the Prosecution notes that it is not settled whether Regulation 55 can authorise the *addition* of a new legal characterisation (rather than merely the replacement of the old one). While the Prosecution considers that there are arguments that Regulation 55 does include the possibility of adding a new legal characterisation (*Prosecutor v Lubanga*, ICC-01/04-01/06-1966, 12 June 2009, paras. 16-18) it cannot be denied that the issue remains controversial (*Prosecutor v Lubanga*, ICC-01/04-01/06-1975, 19 June 2009, paras. 10-25). Given the unsettled nature of the law on this point, the Prosecution submits that the Chamber cannot deny leave to appeal on the basis that Regulation 55 precludes any impact of the Decision on the outcome of the trial.

³⁰ Decision, paras. 209, 307 and 309 respectively.

³¹ Decision, para. 299.

³² Decision, para. 311; see also para. 307.

³³ See para. 21 above.

Prosecution believes, if appealed at the end of the trial would likely result in a reversal, its immediate resolution will materially advance the proceedings.

(a) *The Second Issue arises from the Decision*

31. Like the First Issue, the Second Issue addresses the Pre-Trial Chamber's authority to deny confirmation for a reason not provided in the Statute, the Rules, or the Court's Regulations. It arises from the Decision since the purported inadequacy of notice is the basis for the Chamber's ruling.
32. The Second Issue also addresses the content and structure of the Prosecution's charging documents and the purpose of the supplementary information that the Pre-Trial Chamber ordered the Prosecution to produce. Thus, it raises "a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination"³⁴ – in the instant case, the adequacy of charges submitted for confirmation.
33. In anticipation of an objection that whether adequate notice was given is simply a "conflict of opinion", the Chamber's decision is not a merely factual conclusion that the charges were inadequately pleaded. It presents a fundamental legal issue as to how charges must be pleaded, how the charging documents (including supplementary materials ordered – and not questioned – by the Chamber) will be assessed and what constitutes notice.
34. Thus, the issue does not quarrel with the Chamber's findings *per se*. The disagreement centers on, first, whether the Chamber has the power to deny confirmation on the ground of inadequate notice to the Accused; and second, the range of documents a Chamber must consider in evaluating the sufficiency of notice to the Accused. In this instance, the Chamber does not appear to have viewed the general factual information in the DCC or the particular links in the In-Depth Analysis Chart as bearing in any way on notice to the Accused of the pending charges against him.³⁵ Had it done so, it would have seen that the

³⁴ *Situation in the DRC*, ICC-01/04-168, 13 July 2006, para. 9.

³⁵ Despite the Chamber explicitly stated that, in order to make its determination under article 61(7) of the Statute "[...] the Chamber's consideration of evidence will take account of all Disclosed Evidence between the parties, including the evidence presented at the Hearing and referred to in the Supporting Documents". Decision, para. 36. What constitutes the supporting documents is set out in paras. 34-35 of the Decision: Amended DCC, the In-Depth Analysis, the Amended List of Evidence and the

elements of torture and outrages against dignity were described. The DCC stated that “Men, women and children were raped by multiple MLC perpetrators in their homes, raped in front of family members, forced to watch rapes of family members, and raped in public locations”, and that “Lootings, rapes and murders occurred as MLC troops sought to punish perceived rebel sympathizers”.³⁶ With respect to the crime against humanity of torture, the chart explains that CAR-OTP-WWWW-0023 was forced to watch soldiers rape his wives and his four daughters.³⁷ Explaining the war crime of torture, the Chart states: “Rapes perpetrated by Mouvement pour la Liberation du Congo combatants were partly intended to punish the women for alleged assistance to the BOZIZE-led combatants”³⁸ and that a witness “who was raped by Banyamulenge, states that she heard that the Banyamulenge were sent to Boy Rabe because it was a rebel base and Patasse told [t]hem that if they find men there, those men would be rebels.”³⁹ For the war crime of outrages on personal dignity, “CAR-OTP-WWWW-0029 stated that the way that the perpetrators had intercourse with her was aimed at soiling her. She felt humiliated.”⁴⁰ And, according to CAR-OTP-WWWW-0047, about 20 MLC repeatedly raped eight CAR women in full public view, and “[w]hile one MLC was raping a woman, the others forced her to take their penis in her mouth.”⁴¹

35. It is the Prosecution’s view that the charging document must be read as a whole and in a commonsense manner. The Prosecution also believes that the entirety of the information provided to the Defence must be considered in determining whether the Defence received adequate actual notice. The Chamber’s unwillingness to consider those documents in their entirety in determining whether the Accused had notice of the factual basis for the torture and outrages against dignity charges arises from the Confirmation Decision itself..

Amended In-Depth Analysis, the written submissions and observations filed by the parties and participants as well as the arguments presented by the participants at the hearing.

³⁶ DCC, paras. 39 and 41. It was also alleged that “Women were raped on the pretext that they were rebel sympathizers. Men were also raped as a deliberate tactic to humiliate civilians men” (para. 41), that “These crimes were used as a tool” (para. 42), and in relation to one witness that he was “sodomized by multiple MLC soldiers on the ground outside, in front of his family” (para. 51).

³⁷ CAR-OTP-0008-0050 and CAR-OTP-0008-0088, ICC-01/05-01/08-278-Conf-Exp-AnxA, p. 43.

³⁸ CAR-OTP-0011-0503, ICC-01/05-01/08-278-Conf-Exp-AnxA, p. 92.

³⁹ CAR-OTP-W-0087, CAR-OTP-0030-0171, ICC-01/05-01/08-278-Conf-Exp-AnxA, p. 92.

⁴⁰ CAR-OTP-0010-0022, ICC-01/05-01/08-278-Conf-Exp-AnxA, p. 96

⁴¹ CAR-OTP-0030-0137, ICC-01/05-01/08-278-Conf-Exp-AnxA, p. 98

(b) *The Second Issue affects the fair conduct of the proceedings*

36. As previously noted, the trial is not fair to the Prosecution or the victims if the Prosecution is wrongly limited in its ability to prove the extent and nature of the Accused's criminality and the harm suffered by his victims.
37. It is manifestly unfair to bar the Prosecution from proceeding to prove torture and outrages upon dignity that were, in fact, amply proven at the hearing and based on factual allegations about which the Defence received notice prior to confirmation. The Chamber's failure to consider the facts that were pleaded and the evidence that was presented in support will deny the Prosecution an opportunity to have its case properly considered on the merits.⁴²
38. The denial of that opportunity affects the fair conduct of the proceedings. Additionally, as noted previously,⁴³ victims who have suffered from crimes will be denied the chance to have the full range of their suffering and victimisation reflected in this case.
39. Further, the Confirmation Decision required the Prosecution to specify within the particular charging language of the DCC all the links between the specific facts or individual concerned and each of the charges. This requirement is nowhere to be found in Regulation 52 or in the other governing texts. The imposition of an extra-statutory requirement, especially on a retroactive basis, resulting in the dismissal of three serious supported charges, is unfair to the Prosecution.
40. Thus, the Second Issue affects the fairness of the proceedings by affecting the standard required of the Prosecutor for pleading facts in the DCC, the relationship between the DCC and other supplementary documents (such as the List of Evidence or any other supporting documents which the Chamber may require of the Prosecution), and the standard by which fair notice is determined. Each of these is fundamental to the fairness of the proceedings for both the Prosecution and the Defence, hence appealable.

⁴² See *Prosecutor v Kony et al*, ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), 11 July 2006, para. 24.

⁴³ See para. 20-21, 23 above.

41. The unfairness to the Prosecution has been compounded in this case by the Chamber's requirement that the Prosecution prepare an In-Depth Analysis Chart of its incriminating evidence. The Chamber demanded this chart, *inter alia*, because "the Defence has to have all necessary tools to understand the reasons why the Prosecutor relies on any particular piece of evidence" and that to accomplish this and to respect the Defence's rights under Article 67(1)(a) and (b) the Prosecution must provide its legal analysis in a chart "relating the alleged facts with the constituent elements corresponding the each crime charged."⁴⁴
42. The Prosecution reasonably intended that this Chart give detailed notice to both the Chamber and the Defence regarding the facts and evidence on which it relied for the charges and the specific elements thereof. Indeed the Chamber claims to have taken the Chart into account in its Confirmation Decision.⁴⁵ Yet the Chamber appears not to have considered the Chart in relation to giving adequate notice to the Defence, and at critical junctures the Chamber appears not to have considered this chart at all.⁴⁶ If the Chart was not regarded as a means of providing notice, the Chamber should have clarified this in advance of the hearing. Not to do so in light of the indications referred to above, and to induce the Prosecution into expending the effort to comply with the Chamber's notice requirement only to then ignore the Chart altogether, compounds the unfairness and further supports the necessity of appeal.

(c) The Second Issue affects the expeditious conduct of the proceedings

43. The arguments previously presented with respect to the First Issue apply here. If the issue affects the fair conduct of the proceedings, it is not necessary to establish additionally that it also affects the expeditious conduct. Moreover, if there is a fundamental error that limits the Prosecution's right to bring charges, and that

⁴⁴ ICC-01/05-01/08-55, 31 July 2008, para. 66

⁴⁵ Decision, para. 34.

⁴⁶ Para. 41 of the DCC includes the fact that "Lootings, rapes and killings occurred as MLC troops sought to punish perceived rebel sympathizers." The first item of evidence listed for this fact in the Prosecution List of Evidence is the Statement of Witness CAR-OTP-WWWW-0087, document CAR-OTP-0030-0171 at 0181. The In-Depth Analytical Chart lists this same item of evidence under the Element of the War Crime of Torture "The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion..." (emphasis added). Yet despite this explicit linkage, the Chamber still held that "the Prosecutor failed to provide the factual basis in the Amended DCC underpinning the charge of torture as a war crime. [...] he did not elaborate on the specific intent of alleged MLC soldiers which would have clearly characterised the alleged acts as acts of torture as a war crime" (Decision, para. 299).

error may be raised at the end of the trial and could result in prolonged proceedings thereafter, the issue plainly affects the expeditious conduct of the proceedings.

(d) The Second Issue affects the outcome of the trial

44. The arguments previously presented with respect to the First Issue apply here: three charges for which the Prosecution has presented sufficient evidence to establish “substantial grounds to believe that the person committed each of the crimes charged” will not go to trial. The Trial Chamber will therefore not be able to pronounce itself on, and the judgement will not reflect, the full range of facts pleaded and charges brought by the Prosecution in its DCC.

45. Additionally, the Prosecution reiterates that the reference by the Chamber to Regulation 55⁴⁷ lacks merit, and does not obviate the impact of this issue on the trial. The Chamber found that various facts or elements of charges had not been pleaded or the Accused had not been given sufficient notice. Should the Trial Chamber thus conclude that such elements are no longer within the “facts and circumstances described in the charges”, Regulation 55 could not apply: i.e. the Trial Chamber would not be able to add or change the legal characterisation of the charges – even if it wished to do so – due to the fact that some of the relevant and pleaded facts have not been confirmed by the current Decision.

Immediate resolution of both Issues will materially advance the proceedings

46. The immediate resolution of this issue will materially advance the proceedings as it will ensure that the Trial Chamber considers, from the moment of its constitution, the proper charges.

47. As stated by the Appeals Chamber, interlocutory appeals aim to “ensur[e] that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings, [which] extends to the proceedings prior and subsequent thereto.”⁴⁸ It is imperative that the preparation for and conduct of trial

⁴⁷ Decision, para. 203.

⁴⁸ *Situation in the DRC*, ICC-01/04-168, 13 July 2006, paras. 12, 14-15, 17, 18.

takes place, from the outset, on the correct basis in order to prevent any error from having such an ongoing impact on the proceedings.

48. The Prosecution further notes that the impact of the precise scope of the charges affects not only the ultimate trial and judgment, but all preparatory steps including disclosure and victim participation. All of these will be advanced by resolving with certainty the scope of the charges.
49. The proper scope of the charges is a matter that must be resolved now. It cannot be left to be addressed as part of a final appeal.⁴⁹ If the Appeals Chamber is prevented from remedying any error at this stage, but finds after the conclusion of the trial that additional charges should have been considered, then it may have to order a new trial on those charges – to the detriment of all participants and the efficient administration of justice.
50. In addition to the direct impact on the present proceedings, the prompt resolution of these issues will also assist to advance all other proceedings before this Court.⁵⁰ It will provide certainty for all cases on the principles governing the requirements for charging, the contents of the DCC, the manner in which the DCC is to be read in conjunction with other documents prepared by the Prosecution (such as the List of Evidence and any analytical charts required by the Chamber), and the role of such documents in providing notice to the Accused. Especially in light of the apparent inconsistency between the Decision and the approach of Pre-Trial Chamber I, such certainty is urgently required.⁵¹ The Court cannot have

⁴⁹ The Prosecution further recalls that the purpose of Article 82(1)(d) is to regulate whether an issue should be appealed at this stage of proceedings, or whether it should be left to be raised (if necessary) as part of a final appeal against judgment – see e.g. *Prosecutor v Strugar*, IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 6; see further submissions in *Situation in the DRC*, ICC-01/04-103, 23 January 2006, paras. 37-38 and authorities cited therein.

⁵⁰ While the impact of immediate resolution of the issue on other proceedings may not itself be sufficient to sustain a grant of leave under Article 82(1)(d), it is a factor to be weighed in deciding whether to grant leave. Pre-Trial Chamber II has previously recognised that in certain circumstances, the potential impact on other proceedings may be “invoked as an additional argument in support of the alleged significant impact on the current proceedings” (*Prosecutor v Kony et al*, ICC-01/05-20-US-Exp - reclassified pursuant to ICC-02/04-01/05-52 -, 19 August 2005, para. 54). See further *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005, para. 5; *Prosecutor v Bagosora et al*, ICTR-98-41-T, Certification of Appeal Concerning Access to Protected Defence Witness Information, 29 July 2005, para. 4; *Prosecutor v Mrksic*, IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003.

⁵¹ The fact that different first instance Chambers have taken different approaches to a matter has been considered as a factor supporting a conclusion that immediate resolution would materially advance the proceedings. See e.g. *Prosecutor v Milosevic*, IT-02-54-T, Decision on Prosecution's Application for Certification under Rule 73(B) concerning the Evidence of an Investigator, 20 June 2002; *Prosecutor v*

fundamental issues such as the role of the Pre-Trial Chamber, the nature of the charges and of notice to the Accused, which go to the heart of the case and the nature and fairness of the proceedings, being subject to different standards and procedures depending on the Chamber. The Appeals Chamber must be permitted to establish consistent standards and principles.

51. Certainty regarding the principles governing cumulative charges, and the permissibility of striking out purportedly cumulative charges at the stage of the confirmation hearing, will also advance proceedings in this case and in others. It will allow the Prosecutor to adopt a consistent charging practice on a certain basis, and will allow this issue to be resolved for the purposes of this (and all other) trials.

Conclusion

52. For the above referred reasons, the Prosecution requests that the Chamber grant leave to appeal the Confirmation Decision regarding the issues identified, pursuant to Article 82(1)(d).



**Luis Moreno-Ocampo,
Prosecutor**

Dated this 22nd day of June 2009
At The Hague, The Netherlands

Milosevic, IT-02-54-T, Decision on Prosecution's Application for Certification under Rule 73(B) concerning Rule 70, 29 August 2002.