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**International  
Criminal  
Court**

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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**

**Decision on the Prosecutor's Application for Leave to Appeal the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo"**

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

**The Office of the Prosecutor**

Fatou Bensouda, Deputy Prosecutor  
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**Counsel for the Defence**

Nkwebe Liriss  
Aimé Kilolo-Musamba

**Legal Representatives of the Victims**

Marie-Edith Douzima-Lawson  
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**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

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

**States Representatives**

**Amicus Curiae**

The Women's Initiatives for Gender  
Justice

**REGISTRY**

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**Registrar**

Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**PRE-TRIAL CHAMBER II** (the “Chamber”) of the International Criminal Court (the “Court” or the “ICC”) renders its decision on the “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” (the “Application”)<sup>1</sup> submitted on 22 June 2009.

## **I. PROCEDURAL HISTORY**

1. On the basis of the Prosecutor’s document containing the charges,<sup>2</sup> Pre-Trial Chamber III held a hearing between 12 and 15 January 2009 on the confirmation of the charges in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (the “Hearing”). The Hearing was adjourned by decision of 3 March 2009<sup>3</sup> based on which the Prosecutor submitted an amended document containing the charges<sup>4</sup>.

2. On 19 March 2009 the Presidency decided to dissolve Pre-Trial Chamber III and to assign the situation in the Central African Republic to Pre-Trial Chamber II.<sup>5</sup>

3. On 15 June 2009 the Chamber rendered 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” (the “15 June 2009 Decision”)<sup>6</sup> confirming in part the charges against Jean-Pierre Bemba Gombo (“Mr Jean-Pierre Bemba”). In that decision the Chamber confirmed that there is sufficient evidence to establish substantial grounds to believe that Mr Jean-Pierre Bemba is criminally responsible under article 28(a) of the Rome Statute (the “Statute”) for the charges of

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<sup>1</sup> ICC-01/05-01/08-427.

<sup>2</sup> ICC-01/05-01/08-264-Conf-AnxB.

<sup>3</sup> Pre-Trial Chamber III, “Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute”, ICC-01/05-01/08-388.

<sup>4</sup> ICC-01/05-01/08-395.

<sup>5</sup> Presidency, “Decision on the constitution of Pre-Trial Chambers and on the assignment of the Central African Republic situation”, ICC-01/05-01/08-390.

<sup>6</sup> Pre-Trial Chamber II, ICC-01/05-01/08-424.

- (i) murder constituting a crime against humanity (count 7) within the meaning of article 7(1)(a) of the Statute;
- (ii) rape constituting a crime against humanity (count 1) within the meaning of article 7(1) (g) of the Statute;
- (iii) murder constituting a war crime (count 6) within the meaning of article 8(2)(c)(i) of the Statute;
- (iv) rape constituting a war crime (count 2) within the meaning of article 8(2)(e)(vi) of the Statute; and
- (v) pillaging constituting a war crime (count 8) within the meaning of article 8(2)(e)(v) of the Statute.

4. However, the Chamber declined to confirm, *inter alia*, that Mr Jean-Pierre Bemba is criminally responsible within the meaning of article 28(a) of the Statute for the charges of

- (i) torture constituting a crime against humanity (count 3) within the meaning of article 7(1) (f) of the Statute;
- (ii) torture constituting a war crime (count 4) within the meaning of article 8(2)(c)(i) of the Statute;
- (iii) outrages upon personal dignity constituting a war crime (count 5) within the meaning of article 8(2)(c)(ii) of the Statute.

The Chamber based its finding declining some of the charges on two lines of argumentation: (i) cumulative charging and (ii) failure of the Prosecutor to properly notify the Defence of all material facts pertaining to the charges in the amended document containing the charges.

5. With his Application the Prosecutor seeks leave to appeal two issues in the 15 June 2009 Decision in accordance with article 82(1)(d) of the Statute, namely:

- (1) "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 [personal] dignity are, either objectively as a matter of law or in particular based on the facts alleged, wholly subsumed within rape charges" ("First Issue");
- (2) "whether the Pre-Trial Chamber has the authority to decline to confirm charges on the grounds that the [a]ccused lacked sufficient pre-confirmation notice of their basis; and whether the DCC and the In-Depth Analytical Chart

gave the [a]ccused sufficient notice of the charges and the supporting facts” (“Second Issue”).

6. On 26 June 2009, the Office of Public Counsel for Victims (the “OPCV”), representing some of the victims in the case, provided observations on the Prosecutor’s Application.<sup>7</sup>

7. On 9 July 2009 the Defence informed the Chamber that it could not provide a response to the Prosecutor’s Application unless it received a French translation thereof.

8. With the leave of the Chamber,<sup>8</sup> the Women’s Initiatives for Gender Justice, a non-governmental organisation, provided on 31 July<sup>9</sup> and 3 August 2009<sup>10</sup> *amicus curiae* observations pursuant to rule 103 of the Rules of Procedure and Evidence (the “Rules”), to which the Prosecutor responded on 6 August 2009<sup>11</sup>. The Defence had been granted the right to submit its response within ten days after receipt of the French translation of the 15 June 2009 Decision.<sup>12</sup>

9. On 28 August 2009 the French translation of the 15 June 2009 Decision was notified to the Chamber and all parties and participants.<sup>13</sup>

10. On 7 September 2009 the Defence submitted, within the time-limit granted, a note informing the Chamber that for reasons of expeditiousness of the proceedings it

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<sup>7</sup> ICC-01/05-01/08-428.

<sup>8</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.

<sup>9</sup> ICC-01/05-01/08-466.

<sup>10</sup> ICC-01/05-01/08-466-Corr.

<sup>11</sup> ICC-01/05-01/08-469.

<sup>12</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, para. 16.

<sup>13</sup> ICC-01/05-01/08-443.

did not lodge a request for leave to appeal.<sup>14</sup> On 11 September 2009 the Defence filed a response to the Prosecutor's Application (the "Defence's Response").<sup>15</sup> At that time, the French translation of the Prosecutor's Application was not yet available.

11. On 14 September 2009 the Defence filed its response to the *amicus curiae* observations by the Women's Initiative for Gender Justice.<sup>16</sup>

## **II. THE LAW**

12. The Chamber concurs with Pre-Trial Chamber I in that the drafters of the Statute intentionally excluded decisions confirming (or not) the charges against a suspect from categories of decisions which may be directly appealed without leave of the Chamber.<sup>17</sup> A decision confirming (or not) the charges may therefore only be appealed if the specific requirements under article 82(1)(d) of the Statute are met. As has been stated by other chambers of this court, the remedy of article 82(1)(d) of the Statute reflects a restrictive approach, favouring "as a principle the deferral of appellate proceedings until final judgment, and limit interlocutory appeals to a few, strictly defined, exceptions".<sup>18</sup> Considerations that an interlocutory appeal would address fundamental questions or would be to the benefit of the entire Court do not *per se* warrant to depart from this principle.

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<sup>14</sup> ICC-01/05-01/08-506.

<sup>15</sup> ICC-01/05-01/08-516.

<sup>16</sup> ICC-01/05-01/08-518.

<sup>17</sup> Pre-Trial Chamber I, "Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges", ICC-01/04-01/06-915, para. 19. The Chamber recalls that the ground in relation to the confirmation or denial of an indictment was deleted at one stage from Draft Article 81 as it was considered to lead to delays in the proceedings, see Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2/Add.1, 14 April 1998, pp. 126-127; see also H. Brady/M. Jennings, Appeal and Revision, in: R.S. Lee (ed.), *The Making of the Rome Statute* (Kluwer Law International, 1999), p. 300.

<sup>18</sup> Pre-Trial Chamber II, "Decision on Prosecutor's Application for Leave to Appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrant of Arrest under Article 58", ICC-02/04-01/05-20, paras 19; this approach was followed equally by Pre-Trial Chamber I, "Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges", ICC-01/04-01/06-915, para. 20; see also Trial Chamber II, "Decision on the Prosecutor's Application for Leave to Appeal the Decision on Redactions Rendered on 10 February 2009", ICC-01/04-01/07-946-tENG, para. 11.

13. Article 82(1)(d) of the Statute provides that either party may appeal

[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 (...) Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

14. Taking note of the relevant jurisprudence of this Chamber<sup>19</sup> as well as that of other chambers of the Court,<sup>20</sup> and being mindful of the restrictive character of this remedy, the Chamber recalls that for leave to appeal to be granted the following specific requirements need to be met:

(a) the decision involves an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings (ii) or the outcome of the trial; and

(b) in the opinion of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

15. The Chamber notes that the two requirements as set out in (a) and (b) above are cumulative. Failure in demonstrating that one of the requirements is fulfilled is fatal to an application for leave to appeal.

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<sup>19</sup> Pre-Trial Chamber III, "Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure", ICC-01/05-01/08-75.

<sup>20</sup> Pre-Trial Chamber I, "Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges", ICC-01/04-01/06-915; Pre-Trial Chamber II, "Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58", ICC-02/04-01/05-20; Pre-Trial Chamber II, "Decision on Prosecutor's Applications for Leave to Appeal Dated the 15th day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal Dated the 11th day of May 2006", ICC-02/04-01/05-90; Trial Chamber I, "Decision on the prosecution and the defence applications for leave to appeal the 'Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'", ICC-01/04-01/06-2107; Trial Chamber II, "Decision on the Prosecutor's Application for Leave to appeal the Decision on Redactions Rendered on 10 February 2009", ICC-01/04-01/07-946-tENG; Trial Chamber II, "Decision on the 'Prosecution's Application for Leave to Appeal the 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol'" and the 'Prosecution's Second Application for Extension of Time Limit Pursuant to Regulation 35 to Submit a Table of Incriminating Evidence and related material in compliance with Trial Chamber II 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol'", ICC-01/04-01/07-1088; Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal", ICC-01/04-168.

16. The Chamber further wishes to clarify that, according to the explicit wording of article 82(l)(d) of the Statute, the first alternative as set out in (a) is twofold, consisting of two cumulative conditions: the issue on which the appeal is sought must significantly affect the proceedings both in terms of fairness *and* in terms of expeditiousness. Repeated submissions of the Prosecutor alleging that only one element need to be proven cannot alter the established interpretation of this Court.

*The interpretation of appealable issue*

17. An “issue” is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.<sup>21</sup> In addition, as has this Chamber held, an appealable issue must emanate from the ruling of the decision concerned and does not merely represent an abstract question or a hypothetical concern.<sup>22</sup>

*The interpretation of fairness*

18. As this Chamber has previously found, the principle of fairness of proceedings is a fundamental element to all judicial proceedings, including criminal pre-trial proceedings, and is enshrined in various international legal instruments.<sup>23</sup> One of the fundamental aspects of the right to a fair trial in criminal proceedings is that the proceedings should be adversarial in nature and that there should be equality of arms, in the sense of a fair balance between the parties.<sup>24</sup> Based on this finding, the

<sup>21</sup> See Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, ICC-01/04-168, para. 9.

<sup>22</sup> Pre-Trial Chamber III, “Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure”, ICC-01/05-01/08-75, para. 11.

<sup>23</sup> Article 10 of the Universal Declaration of Human Rights, article 14(1) of the International Covenant on Civil and Political Rights, article 6(1) of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, article 8(1) of the American Convention on Human Rights and article 7(1) of the African Charter on Human Rights.

<sup>24</sup> See for instance, European Court of Human Rights (“ECtHR”), *Dombo Beheer B.V. v. The Netherlands*, Judgment of 27 October 1993, vol. 274, Series A, Application no 14448/88, para. 33; *Rowe and Davis v. United Kingdom*, Judgment of 16 February 2000, Application no 28901/95, para. 60; *Brandstetter v. Austria*, Judgment of 28 August 1991, vol. 211, Series A, Application nos 11170/04, 12876/87 and 13468/87, paras 66-67; *Jasper v. the United Kingdom*, Judgment of 16 February 2000, Application no 27052/95, para. 51; *Coëme and Others v. Belgium*, Judgment of 22 June 2000, Application nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, para. 102; Human Rights Committee, Communication no



Chamber further clarifies that fairness is preserved when a party is provided with the genuine opportunity to present its case - under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent - and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision.

19. The Chamber also recalls that, in a more general sense, the principle of fairness should be preserved to the benefit of all participants, including the Prosecutor. As Pre-Trial Chamber I has clarified in an earlier finding the respect for fairness of the proceedings with regard to the Prosecutor entails that the Prosecutor must be able to exercise his powers and fulfill his duties under article 54 of the Statute.<sup>25</sup>

#### *The interpretation of expeditiousness*

20. The expeditiousness of proceedings is closely linked to the concept of judicial proceedings "within a reasonable time"<sup>26</sup> and complements the guarantees afforded to the suspect, such as the right to fair and public proceedings. The Chamber recalls its earlier finding that the issue concerned must be of such nature as to significantly affect the expeditiousness of the proceedings, namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned.

#### *The interpretation of "outcome of the trial"*

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307/1988, *John Campbell v. Jamaica*, para. 6.4; Communication no 779/1997, *Åarela and Näkkäläjärvi v. Finland*, para. 7.4; M. Nowak (ed.), U.N. Covenant on Civil and Political Rights, CCPR Commentary, (Engel Publisher, 2nd rev. ed., 2005), p. 321, para. 29.

<sup>25</sup> Pre-Trial Chamber I, "Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", ICC-01/04-135-tEN, para. 39; similarly also Pre-Trial Chamber II, "Decision on Prosecutor's Applications for Leave to Appeal Dated the 15th day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal Dated the 11th day of May 2006", ICC-02/04-01/05-90, para. 24.

<sup>26</sup> See e.g. ECtHR, *Pélissier and Sassi v. France*, Reports of Judgments and Decisions, 1999-11, Application no 25444/94, paras 67; Inter-American Court of Human Rights ("IACtHR"), *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Judgment of 21 June 2002, Series C, No 94 (2002), para. 143; M. Nowak (ed.), U.N. Covenant on Civil and Political Rights, CCPR Commentary, (Engel Publisher, 2nd rev. ed., 2005), p. 333 *et seq.*, with further references to case law.

21. The Appeals Chamber has held that the Pre-Trial Chamber “must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence”.<sup>27</sup>

*The interpretation of “immediate resolution by the Appeals Chamber”*

22. As the Appeals Chamber has previously determined, the issue must be such “that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.” “Advancing” the proceedings has been identified by the Appeals Chamber as “removing doubts about the correctness of a decision or mapping a course of action along the right lines” and the term “immediate” has been defined as “underlin[ing] the importance of avoiding errors through the mechanism provided by subparagraph (d) by the prompt reference of the issue to the court of appeal”.<sup>28</sup>

23. Lastly, an application for leave to appeal does not represent an opportunity for the Chamber to further reason its 15 June 2009 Decision. However, it shall provide clarifications if it is clear that a misrepresentation of said decision so warrants. Thus, the Chamber recalls that arguments on the merits of the putative issues will be examined only to the extent that they have a bearing on the criteria set out in article 82(1)(d) of the Statute.

24. As they do not form part of the present decision, substantive arguments shall not be addressed.

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<sup>27</sup> Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, ICC-01/04-168, para. 13.

<sup>28</sup> Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, ICC-01/04-168, paras 14-19.

### III. PRELIMINARY ISSUES

25. According to regulation 65(3) of the Regulations of the Court (the “Regulations”), a participant to the proceedings may file a response within three days of notification of the application [pursuant to article 82(1)(d) of the Statute]. The Defence, while initially arguing it would await the French translation of the Prosecutor’s Application, nevertheless submitted its response on 11 September 2009, 81 calendar days after the notification of the Prosecutor’s Application. The Chamber recalls that an extension of time had neither been requested by the Defence nor granted by the Chamber. The Defence’s Response to the Prosecutor’s Application is therefore past any time-limit established by the Court’s legal instruments. However, the Chamber is aware that the Defence was granted the right to lodge a leave to appeal the 15 June 2009 Decision after notification of its French translation.<sup>29</sup> Hence, while the Chamber has not *expressis verbis* granted any belated submission to the Prosecutor’s Application, the Chamber could accept that the time-limit would commence as of the day of notification of the 15 June 2009 Decision, which forms the basis of the Prosecutor’s Application. However, the 15 June 2009 Decision was notified on 28 August 2009; the time-limit for the Defence’s Response, therefore, expired three days thereafter, namely on 3 September 2009. Whether the Chamber considers the Prosecutor’s Application or the notification of the French translation of the 15 June 2009 Decision as the decisive factor, in any event the deadline was missed by the Defence. For these reasons, the Defence’s Response is not taken into account for the purposes of the present decision.

26. Likewise, the Defence had been granted the right to submit its response to the *amicus curiae* observations by the Women’s Initiative of Gender Justice within ten days after the receipt of the French translation of the 15 June 2009 Decision, which was notified on 28 August 2009. The time-limit, therefore, ran until 10 September

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<sup>29</sup> Pre-Trial Chamber III, ICC-01/05-01/08-T-12-ENG ET, p. 142, lines 4-9 ; Pre-Trial Chamber II, 15 June 2009 Decision, letter g) of the operative part, ICC-01/05-01/08-424.

2009. As a request for extension of time was not presented by the Defence, the Chamber cannot take this filing into consideration as it is submitted past any time-limit granted.

#### **IV. THE FIRST ISSUE**

##### ***A. The Impugned Decision***

27. For those instances, where the evidence reflected acts of rape, the Chamber declined to confirm the charges of torture and outrages upon personal dignity based on the consideration of cumulative charging. While the Chamber acknowledged that this approach is followed in other national courts or tribunals under certain conditions, it rejected this approach by the Prosecutor. The main findings of the Chamber are summarized below.

##### ***Torture constituting a crime against humanity***

28. Whilst the Prosecutor averred that the same criminal conduct can be prosecuted under two different crimes and based the charge of torture, constituting a crime against humanity within the meaning of article 7(1)(f) of the Statute, on facts reflecting acts of rape, the Chamber held that, as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach. This means that each statutory provision breached in relation to one and the same conduct requires at least one additional material element not contained in the other. In this particular case, the Chamber determined that the specific material elements of the act of torture were also inherent specific material elements of the act of rape but that the act of rape required an additional element of penetration which made it the most appropriate legal characterisation.<sup>30</sup>

29. After an analysis of the factual circumstances submitted by the Prosecutor, the Chamber concluded that the evidence he presented in part reflected the same

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<sup>30</sup> Pre-Trial Chamber II, 15 June 2009 Decision, ICC-01/05-01/08-424, paras 199-204.

conduct which underlied the count of rape. Therefore, the Chamber concluded that the alleged acts of torture were fully subsumed by the count of rape.<sup>31</sup>

30. By this decision, the Chamber made it clear that the prosecutorial practice of cumulative charging for one and the same criminal conduct is detrimental to the rights of the Defence since it places undue burden on the Defence.<sup>32</sup> Reference was made to regulation 55 of the Regulations which, according to the Chamber, did not require the Prosecutor to adopt a cumulative charging approach before the ICC.<sup>33</sup>

#### *Outrages upon personal dignity constituting a war crime*

31. With regard to the charge of outrages upon personal dignity constituting a war crime within the meaning of article 8(2)(c)(ii) of the Statute, the Chamber found that only at the Hearing the Prosecutor identified the factual basis in seven categories.<sup>34</sup>

32. The Chamber held that most of the facts presented by the Prosecutor during the Hearing were in essence constitutive elements of force or coercion in the crime of rape, characterising this crime, in the first place, as an act of rape. The Chamber therefore concluded that the count of outrage upon personal dignity is fully subsumed by the count of rape, thus rejecting the cumulative charging approach of the Prosecutor.<sup>35</sup>

### ***B. Submissions of the Prosecutor and Participants***

#### *The submission of the Prosecutor*

33. The Prosecutor submits that the First Issue pertaining to the Chamber's authority to decline charges based on the ground of cumulative charging and the

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<sup>31</sup> Pre-Trial Chamber II, 15 June 2009 Decision, ICC-01/05-01/08-424, para. 205.

<sup>32</sup> Pre-Trial Chamber III, "Decision on the Prosecutor's Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-14-tENG, para. 25.

<sup>33</sup> Pre-Trial Chamber II, 15 June 2009 Decision, ICC-01/05-01/08-424, paras 202-203.

<sup>34</sup> Pre-Trial Chamber II, 15 June 2009 Decision, ICC-01/05-01/08-424, paras 307-308.

<sup>35</sup> Pre-Trial Chamber II, 15 June 2009 Decision, ICC-01/05-01/08-424, para. 310.

question whether the Chamber applied the appropriate test is an appealable issue arising from the 15 June 2009 Decision.<sup>36</sup> The Chamber notes that the First Issue consists of two sub-issues.

34. Addressing the first sub-issue of the First Issue, the Prosecutor submits that the Chamber's authority to deny charges on considerations of cumulative charging is not expressly authorised by any of the Court's legal texts.<sup>37</sup> In his view, and, he believes, also in the view of the Chamber, those charges were sufficiently proven.<sup>38</sup> According to the Prosecutor, the Pre-Trial Chamber may only confirm or decline to confirm charges based on the (in)sufficiency of evidence.<sup>39</sup> Nothing in the Statute would authorise the Chamber to decline to confirm because it considers the charge unnecessary or unduly burdensome to the Defence.<sup>40</sup>

35. Addressing the second sub-issue of the First Issue, the Prosecutor further purports that the Chamber erred in assuming that the crimes of torture and outrages upon personal dignity were not 'distinct crimes' separate from the crime of rape.<sup>41</sup> In his opinion, the elements of rape are different from those of torture. In cases in which an act of rape met the legal standard for torture, it should be charged as such.<sup>42</sup> He further alleges that the authority the Chamber relied upon governed the circumstances under which cumulative convictions are (and are not) permissible. These principles would not be applicable at this stage of the proceedings.<sup>43</sup>

36. The Prosecutor contends that the First Issue affects the fair conduct of the proceedings as it does not respect the substantive rights and obligations of the

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<sup>36</sup> ICC-01/05-01/08-427, para. 18.

<sup>37</sup> ICC-01/05-01/08-427, para. 9.

<sup>38</sup> ICC-01/05-01/08-427, para. 12.

<sup>39</sup> ICC-01/05-01/08-427, para. 14.

<sup>40</sup> ICC-01/05-01/08-427, para. 15.

<sup>41</sup> ICC-01/05-01/08-427, para. 16.

<sup>42</sup> ICC-01/05-01/08-427, para. 17.

<sup>43</sup> ICC-01/05-01/08-427, para. 16.

Prosecutor emanating from articles 42 and 54 of the Statute.<sup>44</sup> The Pre-Trial Chamber, according to the Prosecutor, “is not entitled to choose the counts that it believes best reflect the harm suffered by victims and the criminality engaged in by the [a]ccused, and to reject others as cumulative”. He continues by alleging that when the charges are supported by evidence, the choice of counts to prosecute at trial is a right granted to the Prosecutor, not to the Pre-Trial Chamber.<sup>45</sup> The Prosecutor thus maintains that the denial of confirmation would bar his right and ability, under articles 42 and 54 of the Statute, to present his case.<sup>46</sup>

37. The Prosecutor also maintains that this issue would have an impact on the fairness of the proceedings vis-à-vis the victims who would be denied the chance to have the full range of their suffering and the victimisation reflected in the charges. Excluding some of the victims may diminish their right to reparations.<sup>47</sup>

38. The Prosecutor further contends that this issue affects the expeditious conduct of the proceedings. If the charges concerned are not reinstated, the Prosecutor would have to request the Trial Chamber to invoke regulation 55 of the Regulations which would result in delay of the trial proceedings.<sup>48</sup>

39. The Prosecutor alleges that declining to confirm the charges affects also the outcome of the trial as those charges would not go to trial. Consequently, the Prosecutor maintains, the Trial Chamber would not be able to pronounce itself on, and the judgment will not reflect, the full range of the facts pleaded and charges brought by the Prosecutor.<sup>49</sup> He recalls that regulation 55 of the Regulations is a

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<sup>44</sup> ICC-01/05-01/08-427, paras 19-20.

<sup>45</sup> ICC-01/05-01/08-427, para. 20.

<sup>46</sup> ICC-01/05-01/08-427, para. 22.

<sup>47</sup> ICC-01/05-01/08-427, para. 23.

<sup>48</sup> ICC-01/05-01/08-427, para. 25.

<sup>49</sup> ICC-01/05-01/08-427, para. 27.

prerogative of the Trial Chamber which may adopt an interpretation very different to that of the Pre-Trial Chamber.<sup>50</sup>

40. Lastly, the Prosecutor alleges that the resolution of this issue will materially advance the proceedings as it affects all preparatory steps of the proceedings and will ensure that the Trial Chamber considers, from the moment of its constitution, the proper charges.<sup>51</sup>

*The submission of the OPCV*

41. The OPCV submitted observations in response to the Prosecutor's Application. The Chamber notes that it can only take those observations into consideration that are related to the two *sub judice* issues raised by the Prosecutor, which shall meet the standard test under article 82(1)(d) of the Statute. Arguments by the OPCV introducing new issues, such as the evidentiary threshold purportedly misapplied by this Chamber in its 15 June 2009 Decision, cannot be addressed in this decision.

42. With regard to the First Issue, the OPCV joins the Prosecutor's argument by stating that it would be within the discretionary competence of the Prosecutor, and not the Pre-Trial Chamber, to choose the charges and for the Trial Chamber to pronounce on them.<sup>52</sup> The OPCV further alleges that the Trial Chamber can only re-characterise those facts brought before it but would be deprived of those which the Pre-Trial Chamber does not retain.<sup>53</sup> Effectively, the Trial Chamber would not be in a position to consider the crimes of torture and outrages upon personal dignity.<sup>54</sup>

43. Further, the OPCV alleges that, considering that the victim status is linked to the charges of the case, many victims would risk being denied participatory rights and,

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<sup>50</sup> ICC-01/05-01/08-427, para. 28.

<sup>51</sup> ICC-01/05-01/08-427, paras 46-51.

<sup>52</sup> ICC-01/05-01/08-428, para. 13.

<sup>53</sup> ICC-01/05-01/08-428, para. 14.

<sup>54</sup> ICC-01/05-01/08-428, para. 17.



thus, would be deprived of presenting their views and concerns.<sup>55</sup> The OPCV suggests that the facts underlying those charges declined could correspond to different constitutive elements of crimes, other than related to rape.<sup>56</sup> In conclusion, the OPCV requests leave to appeal to be granted in order to safeguard the victims' participation rights in the trial proceedings and their preparation.<sup>57</sup>

*The submission of the amicus curiae*

44. The Womens' Initiatives for Gender Justice in their *amicus curiae* observations provided arguments in support of the Prosecutor's Application pertaining to the First Issue. However, as explained above, the Chamber only takes those observations into consideration that are related to the issue *sub judice*, namely whether the First Issue meets the test of article 82(1)(d) of the Statute. The Chamber shall not revisit its findings on cumulative charging in the 15 June 2009 Decision or re-evaluate the disclosed evidence.

45. The *amicus* alleges that cumulative charging "does not violate fair trial practices".<sup>58</sup> Although the Chamber had applied the correct standard to determine the cumulative nature of the charges,<sup>59</sup> it had incorrectly applied the test in the context of torture in at least "three categories of witnesses". By reference to those "three categories of witnesses" the *amicus* observes that the Chamber had applied in a too narrow fashion the cumulative charging test with regard to torture and rape.<sup>60</sup> With reference to rape and outrages upon personal dignity, the *amicus* likewise argues that the cumulative charging test is applied in a too narrow fashion as both crimes are characterised by distinct elements.<sup>61</sup>

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<sup>55</sup> ICC-01/05-01/08-428, para. 18.

<sup>56</sup> ICC-01/05-01/08-428, para. 19.

<sup>57</sup> ICC-01/05-01/08-428, para. 20.

<sup>58</sup> ICC-01/05-01/08-466, para. 22.

<sup>59</sup> ICC-01/05-01/08-466, paras 18 and 25.

<sup>60</sup> ICC-01/05-01/08-466, paras 25-28.

<sup>61</sup> ICC-01/05-01/08-466, paras 29 and 30.

46. The *amicus* further purports that the Chamber erroneously referred in its 15 June 2009 Decision to regulation 55 of the Regulations, a provision which, according to the *amicus*, is part of the Court's administrative regulations and thus not applicable law according to article 21 of the Statute.<sup>62</sup> In the opinion of the *amicus* it is unclear which evidence is part of the rape and which evidence had been dismissed by the Chamber.<sup>63</sup> Lastly, the *amicus* offered observations on article 21(3) of the Statute and human rights instruments.<sup>64</sup>

47. As regards the test under article 82(1)(d) of the Statute, the Chamber notes that the *amicus* contends in a general fashion that the issue of cumulative charging significantly affects the fair and expeditious conduct of the proceedings, without providing any further substantiation to the issue *sub judice*.

48. In his response to the *amicus curiae* observations, the Prosecutor concurred with the *amicus'* position regarding the Chamber's rejection of cumulative charging and highlighted again the interests of victims and their effective access to justice.<sup>65</sup>

### *C. Findings of the Chamber*

49. While the First Issue emanates from the 15 June 2009 Decision, the Chamber does not find that it significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial.

50. At the outset, the Chamber clarifies that it does not entertain the arguments of the Prosecutor, the OPCV and the *amicus* pertaining to proper interpretation of the constitutive elements of the crimes concerned and the assessment of the evidence of the case as both issues fall outside the scope of a decision granting (or not) leave to appeal under article 82(1)(d) of the Statute.

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<sup>62</sup> ICC-01/05-01/08-466, paras 31 and 38.

<sup>63</sup> ICC-01/05-01/08-466, para. 32.

<sup>64</sup> ICC-01/05-01/08-466, paras 34-40.

<sup>65</sup> ICC-01/05-01/08-469, paras 6-8.

51. The Chamber does not find merit in the Prosecutor's argument pertaining to a lack of authority of the Pre-Trial Chamber to decline charges based on considerations of cumulative charges. In particular the Prosecutor's understanding that the Chamber erred in assuming that the crimes of torture and outrages upon personal dignity were not 'distinct' crimes separate from the crime of rape, seems to rest on a misrepresentation of the Chamber's findings in the 15 June 2009 Decision.

52. At first the Chamber emphasises that the powers enlisted in article 61(7) of the Statute reflect the objective of the pre-trial phase, providing for the threshold to be applied and the general scope of the pre-trial proceedings to define the parameters of the trial.<sup>66</sup> It follows therefrom that the Pre-Trial Chamber must carefully filter the cases to be sent to trial<sup>67</sup> and detect deficiencies which would otherwise flaw the entire proceedings. Hence, the Chamber's role cannot be that of merely accepting whatever charge is presented to it. To restrict the competences of the Pre-Trial Chamber to a literal understanding of article 61(7) of the Statute, to merely confirm or decline to confirm the charges, does not correspond to the inherent powers of any judicial body vested with the task to conduct fair and expeditious proceedings while at the same time paying due regard to the rights of the Defence. In this regard, it is the view of the Chamber that article 61(7) of the Statute does not bar the Chamber from rulings which it considers necessary to ensure the protection of the rights of the Defence pursuant to article 67 of the Statute.

53. Thus, the Chamber is not convinced by the Prosecutor's argument that the Statute would not authorise the Chamber to decline a charge because it considers the

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<sup>66</sup> See also Pre-Trial Chamber III, "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties", ICC-01/05-01/08-55, para. 14.

<sup>67</sup> Pre-Trial Chamber III, "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties", ICC-01/05-01/08-55, paras 15 and 18; concurring, Pre-Trial Chamber I, ICC-01/04-01/07-428-Corr, "Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules", para. 6.

charge unduly burdensome to the Defence. To the contrary, the Chamber is duty-bound to safeguard the rights of the Defence at any time of the proceedings. This entails that, when circumstances so warrant, the Chamber may not confirm all charges as such, in case the essence of the violation of the law underlying these charges is fully subsumed by one charge.

54. At this point, the Chamber recalls that it has set out the said position on an earlier occasion by stating that it is for the Chamber to characterise the facts put forward by the Prosecutor.<sup>68</sup> Based on this understanding, the Chamber ruled in the 15 June 2009 Decision that where the Prosecutor relied on the *same evidence* pertaining to acts of rape to substantiate two or more legal characterisations, the specific elements of the crime of torture and outrages upon personal dignity were congruent with those of the crime of rape and, therefore, fully subsumed by the count of rape. However, the Chamber did not preclude the possibility that charges of rape and torture could be cumulative in the event the Prosecutor presented evidence that pertained to different specific elements not contained in the other.

55. Consequently, the Chamber does not find that the First Issue significantly affects the fair conduct of the proceedings vis-à-vis the Prosecutor. The rights and duties of the Prosecutor emanating from article 54 of the Statute remain fully with the Prosecutor: the 15 June 2009 Decision's ruling on cumulative charging allows the Prosecutor, in order to establish the truth, to independently identify a case, investigate incriminating and exonerating circumstances equally, and present the facts and legal arguments before the Pre-Trial Chamber. However, the Prosecutor's and OPCV's conclusion cannot be sustained that it is within the Prosecutor's exclusive competence to choose the counts which ultimately will be entertained by the Trial Chamber. According to article 61(3) of the Statute, the Prosecutor is under an obligation to present the charges, but it is incumbent upon the Pre-Trial Chamber

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<sup>68</sup> Pre-Trial Chamber III, "Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-14-tENG, para. 25.

to delineate the scope of the trial proceedings by way of its decision pursuant to article 61(7) of the Statute, in which it evaluates the evidence and applies the law. To limit such a decision to a mere formality, barring the Chamber from one of its core functions, would run counter to the Pre-Trial Chamber's understanding of its statutory role and mandate. The duty of the Prosecutor is to present the facts that he has investigated and to provide his view on their legal characterisation in the document containing the charges. But it is for the judges of the Pre-Trial Chamber to apply the law to those facts as presented by the Prosecutor and give the legal characterisation to those facts.

56. More importantly, the Chamber is not persuaded by the Prosecutor's and OPCV's arguments that the declined charges would not go to trial, and that thus the Trial Chamber would be deprived from pronouncing itself on them. By declining to confirm some of the charges based on cumulative charging, the Chamber did not reduce the factual scope of the case but decided to not qualify the facts as presented by the Prosecutor. All facts pertaining to acts of rape, which the Prosecutor presented under more than one legal characterisation, have been retained in the 15 June 2009 Decision. The Trial Chamber will thus be able to decide on the facts and circumstances described in the 15 June 2009 Decision, as foreseen in article 74(2), second sentence, of the Statute. In addition, as was clarified in the 15 June 2009 Decision, the Chamber recalls that under the ICC legal framework, which differs from that of other international jurisdictions, the Trial Chamber may invoke regulation 55 of the Regulations and re-characterise a crime to give it the most appropriate characterisation.<sup>69</sup> The Prosecutor seemed to accept this understanding of the law on an earlier occasion.<sup>70</sup>

57. For the sake of clarification, the Chamber does not share the *amicus'* understanding of the nature of regulation 55 of the Regulations. As was clarified by

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<sup>69</sup> Pre-Trial Chamber II, 15 June 2009 Decision, ICC-01/05-01/08-424, para. 203.

<sup>70</sup> ICC-01/05-01/08-431, para. 8.

Trial Chamber I, “this regulation was recommended by the judges in plenary and thereafter adopted by the Assembly of States Parties, which underlines its legitimacy”.<sup>71</sup> In the opinion of this Chamber, this regulation reflects a further important development in international criminal law which pertains to the general powers of a Trial Chamber to effectively discharge its statutory functions in the interests of justice.

58. The Chamber notes that this issue of fairness vis-à-vis the victims was raised by the Prosecutor and the OPCV as legal representative of some victims in this case. In light of the Chamber’s finding above that the victims, represented by the OPCV, may not introduce new issues, the Chamber, nevertheless, holds that this issue, which first and foremost they can present, relates to the personal interests of the victims which they are authorised to advance within the parameters of the Prosecutor’s Application.

59. Nevertheless, the Chamber cannot sustain the arguments raised by the Prosecutor and the OPCV. As explained above, the facts of the case have not been reduced by the Chamber’s finding on cumulative charging. Therefore, victims, who have suffered from acts of rape, have neither been excluded from the case nor have they been denied participatory rights in the present case. After all, it is clear that victims do not have the right that particular charges are retained, when the Chamber considers their inclusion to affect the expeditiousness of proceedings and to be detrimental to the rights of the Defence.

60. Even though the “expeditiousness tenet” of the first alternative of article 82(1)(d) of the Statute does not need to be further examined, the Chamber wishes to make the following parenthesis: the Chamber recalls that it also declined the charges on considerations of cumulative charging in an effort directly aimed at strengthening

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<sup>71</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-01/04-01/06-1084, para. 47.

the expeditiousness of the proceedings.<sup>72</sup> Bearing this in mind, it is questionable that a finding of the Chamber, aiming at the expeditiousness of proceedings, can in itself reasonably be viewed as significantly affecting the expeditious conduct of proceedings.

61. Likewise, the Chamber is not of the view that the First Issue would significantly affect the outcome of the trial, considering that the Chamber has not reduced the factual scope of the case and the Trial Chamber may address the issue of re-characterisation of the facts anew.

62. Considering that the First Issue does not significantly affect both the fair and expeditious conduct of the proceedings or the outcome of the trial, the Chamber will not entertain the second requirement pursuant to article 82(1)(d) of the Statute, namely whether, in the opinion of the Chamber, the immediate resolution of the Appeals Chamber would materially advance the proceedings (see paragraph 15 above).

## **V. SECOND ISSUE**

### ***A. The Impugned Decision***

63. For those instances, where the evidence reflected facts other than acts of rape, the Chamber declined to confirm the charges of torture and outrages upon personal dignity based on the consideration that the Prosecutor failed to properly notify the Defence of the material facts underlying these charges in the amended document containing the charges. The main findings of the Chamber are summarized below.

#### ***Torture constituting a crime against humanity***

64. While the Chamber noted that the Prosecutor presented other evidence pertaining to other acts of torture, other than acts of rape, the Chamber found that

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<sup>72</sup> Pre-Trial Chamber II, 15 June 2009 Decision, ICC-01/05-01/08-424, para. 202.

the Prosecutor's amended document containing the charges failed to specify such other acts of alleged torture, on which the Prosecutor relied upon, as well as the method of their commission. Without any information on the link between the facts underpinning the alleged act of torture and the individual concerned, the Chamber had to resort to the disclosed evidence in order to properly interpret the amended document containing the charges. Only at the Hearing did the Prosecutor present some material facts parenthetically.<sup>73</sup>

65. However, the Chamber opined that this approach did not cure the deficiencies and imprecision of the amended document containing the charges as required under article 61(3) of the Statute and regulation 52(b) of the Regulations. The Chamber held that it is the duty of the Prosecutor to furnish all facts underpinning the charges and that any deficiencies cannot be compensated by the Chamber. Failing this, the accused was not in a position to properly identify the material facts underpinning the act of torture and adequately prepare his defence.<sup>74</sup>

*Torture constituting a war crime*

66. With regard to the charge of torture constituting a war crime within the meaning of article 8(2)(c)(i) of the Statute, the Chamber determined that the Prosecutor had failed to provide the factual basis in the amended document containing the charges underpinning the charge of alleged torture as a war crime, in particular the element of specific intent. In the view of the Chamber, even at the Hearing, the Prosecutor only recalled a selection of factual circumstances pertaining to acts of rape and did not elaborate on the specific intent which would have characterised the alleged acts as acts of torture constituting war crimes. The Chamber thus held that the Prosecutor did not discharge properly his duty under article 61(3) of the Statute and regulation 52(b) of the Regulations which could not be compensated by the Chamber.<sup>75</sup>

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<sup>73</sup> Pre-Trial Chamber II, 15 June 2009 Decision, ICC-01/05-01/08-424, paras 206-207.

<sup>74</sup> Pre-Trial Chamber II, 15 June 2009 Decision, ICC-01/05-01/08-424, paras 208-209.

<sup>75</sup> Pre-Trial Chamber II, 15 June 2009 Decision, ICC-01/05-01/08-424, paras 299-300.



*Outrages upon personal dignity constituting a war crime*

67. The Chamber also found that other alleged acts underlying the charge of outrages upon personal dignity, within the meaning of article 8(2)(c)(ii) of the Statute, different from the acts of rape itself, were not clearly set out in the amended document containing the charges thus infringing upon the rights of the Defence. In the amended document containing the charges, general reference was made to one of the legal requirements of the crime without providing information on the link existing between the specific facts underpinning the charge and the individual victim or witness concerned. Only at the Hearing, the Prosecutor developed seven categories of facts which allowed for an identification of the factual basis.<sup>76</sup>

***B. Submissions of the Prosecutor and Participants***

*The submission of the Prosecutor*

68. The Prosecutor submits that the Second Issue pertaining to the Chamber's authority to decline charges based on the ground that the accused lacked sufficient pre-confirmation notice of their basis and to the question whether the accused was given sufficient notice by the in-Depth Analysis Chart, is an appealable issue arising from the 15 June 2009 Decision. The Chamber notes that the Second Issue consists of two sub-issues.

69. Addressing the first sub-issue of the Second Issue, the Prosecutor contends that, lacking any basis in the Court's legal texts, the Chamber had no authority to decline to confirm charges on the abovementioned ground.<sup>77</sup>

70. Addressing the second sub-issue of the Second Issue, the Prosecutor maintains that the amended document containing the charges must be read as a whole and in a common sense manner. The entirety of information provided to the Defence must be

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<sup>76</sup> Pre-Trial Chamber II, 15 June 2009 Decision, ICC-01/05-01/08-424, paras 308, 310-312.

<sup>77</sup> ICC-01/05-01/08-427, paras 30-31.

considered in determining whether the Defence received sufficient pre-trial notice. The Chamber's unwillingness to consider the entirety of documents is an issue emanating from the 15 June 2009 Decision.<sup>78</sup>

71. The Prosecutor purports that the Second Issue affects the fair conduct of the proceedings vis-à-vis the Prosecutor and the victims as the 15 June 2009 Decision wrongly limits his ability to prove the extent and nature of the accused's criminality and the harm suffered by the victims.<sup>79</sup> The impugned decision is manifestly unfair, according to the Prosecutor, as it denies the Prosecutor the opportunity to have the pleaded facts and presented evidence properly considered by the Trial Chamber on the merits.<sup>80</sup>

72. The Prosecutor alleges that the 15 June 2009 Decision required the Prosecutor to specify within the particular charging language of the document containing the charges all the links between the specific facts or individual concerned and each of the charges, a requirement not contained in regulation 52 of the Regulations. Hence, the Prosecutor contends that the imposition of such an extra-statutory requirement on a retroactive basis, resulting in the dismissal of three charges, is unfair to the Prosecutor.<sup>81</sup> Moreover, the Prosecutor had provided upon the Chamber's request with an In-Depth Analysis Chart which, he claims, the Chamber at critical junctures appears to not have considered at all. Inducing the Prosecutor into expending efforts to comply with the Chamber's notice requirement only to ignore it altogether compounds the unfairness vis-à-vis the Prosecutor.<sup>82</sup>

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<sup>78</sup> ICC-01/05-01/08-427, para. 35.

<sup>79</sup> ICC-01/05-01/08-427, para. 36.

<sup>80</sup> ICC-01/05-01/08-427, para. 37.

<sup>81</sup> ICC-01/05-01/08-427, para. 39.

<sup>82</sup> ICC-01/05-01/08-427, paras 41 and 42.

73. The Prosecutor further contends that this issue affects the expeditious conduct of the proceedings. He alleges that to raise this error, limiting the Prosecutor to bring charges, at the end of the trial could result in prolonged proceedings thereafter.<sup>83</sup>

74. The Prosecutor, in addition, contends that this issue would affect the outcome of the trial. Without those charges confirmed, he maintains that the Trial Chamber could not pronounce itself on them and the judgment would not reflect the full range of facts pleaded and charges brought by the Prosecutor.<sup>84</sup> He claims that the Chamber erroneously made reference to regulation 55 of the Regulations which is not applicable in this case.<sup>85</sup>

75. Lastly, the Prosecutor alleges that the resolution of this issue will materially advance the proceedings as it affects all preparatory steps of the proceedings and will ensure that the Trial Chamber considers, from the moment of its constitution, the proper charges.<sup>86</sup>

#### *The submission of the OPCV*

76. The OPCV alleges that the Defence's rights under article 67(a) and (b) of the Statute had been respected and that the charges of torture and outrages upon personal dignity had been included in the amended document containing the charges. It also maintains that the Defence had been notified of the charges of torture and outrages upon personal dignity as early as in the warrant of arrest.

77. The OPCV, while acknowledging that the Chamber has used the In-Depth Analysis Chart for those charges confirmed, joins the Prosecutor in purporting that the amended document containing the charges must be read together with all other documents presented to the Chamber, in particular the list of evidence.

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<sup>83</sup> ICC-01/05-01/08-427, para. 43.

<sup>84</sup> ICC-01/05-01/08-427, para. 44.

<sup>85</sup> ICC-01/05-01/08-427, para. 45.

<sup>86</sup> ICC-01/05-01/08-427, paras 46-51.

### *C. Findings of the Chamber*

78. While the Second Issue emanates from the 15 June 2009 Decision, the Chamber does not find that it significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial.

79. Responding to the Prosecutor's argument that the Chamber lacked the authority to decline a charge based on the consideration of insufficient pre-trial notice of the material facts to the Defence, the Chamber recalls its previous finding concerning the Chamber's understanding of its statutory role and mandate (see paragraphs 52 above). This implies that the competences of the Pre-Trial Chamber cannot be reduced to a literal understanding of article 61(7) of the Statute.

80. To the contrary, following rule 121(1) of the Rules and article 67 of the Statute, it is incumbent upon the Chamber to ensure that the rights of the Defence are not infringed. In principle, where the breaches of the rights of the Defence are such as to make it impossible for it (i) to identify the material facts which underly the charges and consequently (ii) to effectively prepare and conduct its defence, the Chamber is called upon to take this element into consideration when deciding within the parameters of article 61(7) of the Statute.

81. The Chamber does not find that the Second Issue significantly affects the fair conduct of the proceedings vis-à-vis the Prosecutor. Again, the rights and duties of the Prosecutor emanating from article 54 of the Statute (see paragraph 55 above) remain fully with the Prosecutor. Declining the charges based on considerations that the Defence's rights were not properly respected does not entail that the decision is "manifestly unfair" vis-à-vis the Prosecutor. Equally, to imply that the Chamber should have used the In-Depth Analysis Chart "at crucial junctures" rests on a flawed understanding of the roles of the Chamber and that of the Prosecutor (see paragraph 55 above). Any other conclusion would imply that the Chamber favours

the Prosecutor and does not fulfil its function of judicial control. To the contrary, the Chamber's 15 June 2009 Decision is directed at restoring fairness and to place both parties on an equal footing.

82. To this end, and as rightly observed by the OPCV, the Chamber has taken all documents before it into consideration, including the amended document containing the charges, the In-Depth Analysis Chart and the list of evidence.<sup>87</sup> Thus, the Prosecutor's argument, that the Chamber had "ignored" the In-Depth Analysis Chart altogether, cannot be sustained.

83. The In-Depth Analysis Chart had been provided by the Prosecutor<sup>88</sup> following two decisions of this Chamber.<sup>89</sup> However, this ancillary document represents an effort to guarantee the fairness and proper organisation of pre-trial proceedings and does not release the Prosecutor from his statutory obligation under article 61(3) of the Statute to provide all detailed information in the amended document containing the charges. This requirement, which was highlighted by this Chamber in those two decisions mentioned above, is not a retroactive element introduced by this Chamber but an unequivocal dictate of the Statute to which the Chamber had alluded before the amended document containing the charges had been submitted by the Prosecutor. In the opinion of this Chamber, deficiencies in the amended document containing the charges, the *only* document delineating the scope of the pre-trial proceedings, cannot be overcome by interpreting all documents in their entirety and common sense. This would give unprecedented leeway to arbitrariness, alien to this Statute.

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<sup>87</sup> Pre-Trial Chamber II, 15 June 2009 Decision, ICC-01/05-01/08-424, para. 34.

<sup>88</sup> ICC-01/05-01/08-278.

<sup>89</sup> Pre-Trial Chamber III, "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties", ICC-01/05-01/08-55, paras 64-73; *ibid.*, "Decision on the Submission of an Updated, Consolidated Version of the In-Depth Analysis Chart of Incriminating Evidence", ICC-01/05-01/08-232, paras 7-8.

84. For the sake of clarification, it is recalled that in the 15 June 2009 Decision regulation 55 of the Regulations was referred to only in the context of cumulative charging.<sup>90</sup>

85. Even though the “expeditiousness tenet” of the first alternative of article 82(1)(d) of the Statute does not need to be further examined, the Chamber holds that the Prosecutor cannot use article 82(1)(d) of the Statute to have charges reinstated, which have been declined by the Pre-Trial Chamber. Moreover, the Chamber is not persuaded by the Prosecutor’s general argumentation that this would affect significantly the expeditious conduct of proceedings.

86. Likewise, the Chamber is not of the view that the Second Issue would significantly affect the outcome of the trial. The Chamber acknowledges that even though the Second issue *in arguendo* may affect the outcome of the trial as three charges have not been confirmed by the Chamber, it, however, does not do so in a significant manner. The Chamber recalls that the Prosecutor in his closing statement at the Hearing highlighted that “[t]he main physical acts underpinning the charges of rape, torture and outrages upon personal dignity is rape in this case”.<sup>91</sup> In light of this assessment of the Prosecutor, the Chamber concurs that with the charges confirmed in the present case the Chamber has captured all main facts presented by the Prosecutor.<sup>92</sup>

87. Considering that the Second Issue does not significantly affect both the fair and expeditious conduct of the proceedings or the outcome of the trial, the Chamber will not entertain the second requirement pursuant to article 82(1)(d) of the Statute, namely whether, in the opinion of the Chamber, the immediate resolution of the

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<sup>90</sup> Pre-Trial Chamber II, 15 June 2009 Decision, ICC-01/05-01/08-424, para. 203, following the heading “aa) Alleged acts of torture through acts of rape or other forms of sexual violence”.

<sup>91</sup> Pre-Trial Chamber III, ICC-01/05-01/08-T-12-ENG ET, p. 63, lines 14-15.

<sup>92</sup> This understanding seems to have been shared by the Prosecutor on earlier occasion, see ICC-01/05-01/08-431, para. 10.

Appeals Chamber would materially advance the proceedings (see paragraph 15 above).


## **VI. FINAL REMARKS**

88. With the filing of the present decision, the Chamber has fulfilled its functions in relation to the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*.

### **FOR THESE REASONS, THE CHAMBER**

- a) rejects the Prosecutor's Application;**
- b) orders the Registrar to transmit the 15 June 2009 Decision and transmit the record of the proceedings of the case of *The Prosecutor v Jean-Pierre Bemba Gombo* to the Presidency, as provided for in rule 129, second sentence, of the Rules of Procedure and Evidence, in order for the Presidency to constitute a Trial Chamber.**

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

  
Judge Ekaterina Trendafilova  
Presiding Judge  
Judge Hans-Peter Kaul  
Judge Cuno Tarfusser  
Judge

Dated this Friday, 18 September 2009

At The Hague, The Netherlands