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TRIAL CHAMBER III

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio-Benito
Judge Joyce Aluoch

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

Public Document

Prosecution's Response to the Defence's "Requête aux fins d'obtenir une Décision ordonnant la correction et le dépôt du Second Document Amendé Contenant les Charges» of 12 February 2010"

Source: The Office of the Prosecutor

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

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Introduction

1. On 12 February 2010, the Defence filed its “Requête aux fins d’obtenir une Décision ordonnant la correction et le dépôt du Second Document Amendé Contenant les Charges”(“Request”) in which it requested Trial Chamber III (“Chamber”) *inter alia* to order the Office of the Prosecutor (“Prosecution”) to submit a new Amended Document Containing the Charges (“DCC”) reflecting the changes it proposed in the Annex attached to its Request.¹

2. Pursuant to Regulation 24(1) of the Regulations of the Court (“Regulations”), the Prosecution hereby files its response opposing the Defence’s Request. In summary, the Prosecution disagrees with the essence of the Defence position. The Defence proposes that the Prosecution no longer has the authority to define the charges. Rather, the Pre-Trial Chamber (“PTC”) would have assumed that statutory function when it delivered its Confirmation Decision. According to the Defence, the Confirmation Decision is not merely confirmation of charges; it in fact becomes the source of the charges. The Defence further argues that facts and factual allegations originally set out in the DCC and not rejected by the PTC nonetheless must be excluded from the case if they were not expressly set out in the Confirmation Decision.

3. The arguments advanced by the Defence are predicated on a flawed understanding of the Rome Statute (“Statute”), the Rules of Procedure and Evidence (“Rules”) and the Regulations, as well as relevant case law. They ignore, *inter alia*, a significant decision of the Appeals Chamber that expressly distinguishes the factual allegations which support each of the legal elements of the crimes charged from the evidence adduced at the confirmation hearing and from background or other information contained in the DCC.

¹ ICC-01/05-01/08-694+Conf-Exp-AnxA.

Procedural background

4. On 15 June 2009, PTC II issued its “Decision Pursuant to Article 61(7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”² confirming most of the charges against the Accused. It declined to confirm three charges on the ground that they are either cumulative of other charges or that the Accused lacked sufficient pre-confirmation notice of their basis.³ The case was then transferred to the Chamber.

5. On 7 October 2009, the Chamber ordered the Prosecution to submit a revised DCC which complies with the Confirmation Decision, no later than 4 November 2009.⁴ In compliance with that order, on 4 November 2009 the Prosecution filed its Second Amended DCC to reflect the charges as confirmed by PTC II.⁵

6. On 1 February 2010, the Defence filed an application requesting that the Chamber order the Prosecution to file a new DCC and sought an extension of page limit to properly address all the alleged defects in the Second Amended DCC.⁶

7. On 11 February 2010, the Chamber granted the Defence’s request for extension of page limit.⁷ On 12 February 2010, the Defence filed the instant submission.⁸

Prosecution’s submissions

Overview of the Defence’s Request and the Prosecution’s response

² ICC-01/05-01/08-424.

³ Ibid, para. 307, 311 and 312.

⁴ ICC-01/05-01/08-T-14-ENG, p. 13.

⁵ ICC-01/05-01/08-593-Conf-Exp-Anx.

⁶ ICC-01/05-01/08-684, p. 4, para. 8.

⁷ ICC-01/05-01/08-693.

⁸ ICC-01/05-01/08-694 +Conf-Exp-AnxA.

8. The Defence divides its submissions into two main parts. First, it provides its position on the legal regime regulating the contents of a charging document after charges are confirmed by the PTC⁹ and requests the following: (i) that the Prosecution's Second Amended DCC must be limited to the factual allegations upheld by PTC II in its Confirmation Decision;¹⁰ (ii) that the Prosecution should be precluded from asserting facts not explicitly referred to or retained by PTC II in its Confirmation Decision;¹¹ (iii) that the Prosecution should not be permitted to reformulate the conclusions reached by PTC II in its Confirmation Decision;¹² (iv) that the factual allegations not considered or adopted by PTC II in the Confirmation Decision cannot be adduced at trial and any consideration of such allegations as part of the charges by the Chamber would violate the Statute;¹³ (v) that the Chamber is bound by the contents of the charges as confirmed by PTC II and does not have the power either to modify them or to authorize the Prosecution to do so;¹⁴ (vi) that it is up to the PTC to determine which factual allegations as presented in the DCC meet the threshold for confirming charges pursuant to Article 61(7) of the Statute;¹⁵ and (vii) that it has not received sufficient notice of the charges against the Accused because the Prosecution's Second Amended DCC does not comport with the Confirmation Decision.¹⁶

9. Second, the Defence specifically addresses areas it considers to be defective in the Prosecution's Second Amended DCC.¹⁷ The Defence repeats its submission that the Prosecution extended and amended the charges by including new allegations, which were not confirmed or retained by PTC II.¹⁸ It attaches the Second Amended

⁹ ICC-01/05-01/08-694, paras 17-26.

¹⁰ ICC-01/05-01/08-694, paras 17-18.

¹¹ *Ibid.*

¹² ICC-01/05-01/08-694, paras 23-25.

¹³ ICC-01/05-01/08-694, paras 21-22.

¹⁴ ICC-01/05-01/08-694, para. 20.

¹⁵ *Ibid.*

¹⁶ ICC-01/05-01/08-694, paras 23 and 136.

¹⁷ ICC-01/05-01/08-694, paras 27-134.

¹⁸ ICC-01/05-01/08-694, paras 29-33.

DCC with track-changes reflecting the alleged defective areas as an Annex to its submission. Finally, it requests that the Chamber order the Prosecution to file a new Amended DCC reflecting the track-changes it proposed in the Annex attached to its submission.¹⁹

10. The Prosecution likewise divides its response into two parts. First, the Prosecution will respond to the general submissions canvassed by the Defence in relation to the legal regime governing the contents of charging documents after charges are confirmed by the PTC; and second, it will address the specific defects pointed out by the Defence in its Second Amended DCC. For the reasons set out below, the Prosecution requests that the Chamber reject the Defence's arguments and find that the Prosecution's Second Amended DCC comports with the criteria for DCC set out in Regulation 52 of the Regulations and accordingly provides sufficient notice of the charges against the Accused.

Prosecution's submission in response to first part of Defence's Request

The Defence has misrepresented the role of the PTC in the confirmation proceedings

11. Extensively relying on Trial Chamber ("TC") II's decision of 21 October 2009 in the *Katanga* and *Ngudjolo* case,²⁰ the Defence argues that only the factual allegations retained by the PTC in its confirmation of the charges under Article 61(7) of the Statute shall be part of the charges. It concludes that if the PTC does not confirm a factual allegation which was put forward by the Prosecution, such an allegation could not be part of the charges and should therefore be dismissed.²¹

¹⁹ ICC-01/05-01/08-694, para. 135.

²⁰ ICC-01/04-01/07-717.

²¹ ICC-01/05-01/08-694, paras. 17-21.

12. The Prosecution submits that such a requirement is not supported by the Statute or the Rules, and is based on a flawed interpretation of the PTC's role in the confirmation process. As emphasized by PTC III, the PTC does not confirm the factual allegations, as the Defence contends, but rather evaluates the evidence presented by the Prosecution and its sufficiency to establish substantial grounds to believe the person committed the charged crimes, the standard set out in Article 61(7) of the Statute.²²

13. While the Prosecution recognizes that it has the obligation to plead *all the factual allegations underlying the charges*, as highlighted by TC II,²³ that does not confer an obligation on the PTC to confirm each factual allegation by requiring that each fact be proved, in order to find substantial grounds at the confirmation stage. Rather, the Prosecution must provide sufficient evidence to establish substantial grounds to believe that the suspect is responsible for each of the crimes charged.²⁴ Consequently, during the confirmation process, the Prosecution has to provide sufficient evidence supporting, broadly, the charges against the suspect. It is not further obligated, however, to prove every single alleged in its DCC. This approach, taken by PTC I in the *Lubanga* case,²⁵ was also adopted by PTC II,²⁶ which assented to the standard established in the *Lubanga* case: that in order for the Prosecution to meet its evidentiary burden under Article 61(7) of the Statute, it must present concrete and tangible evidence, demonstrating a clear line of reasoning underpinning its specific allegations.²⁷

14. The threshold for the confirmation of charges, although higher than the requirement of "*reasonable grounds to believe*" for the issuance of an arrest warrant (see

²² ICC-01/05-01/08-388, para. 16.

²³ ICC-01/04-01/07-1547, para. 23; Rule 121-3 of the Rules of Procedure and Evidence.

²⁴ Articles 61(5) and (7) of the Rome Statute.

²⁵ ICC-01/04-01/06-803.

²⁶ ICC-01/04-01/07-428-Corr, paras. 77-83.

²⁷ ICC-01/04-01/07-717, paras 62-66.

Article 58(1) of the Statute), is significantly lower than the “*beyond reasonable doubt*” standard that must be met at trial.²⁸ Clearly, if the Prosecution, to meet the reasonable grounds test, omitted certain evidence in its application for an arrest warrant, it would not be foreclosed from including them in the charges on the ground that the person was not properly arrested on those facts. By the same token, if the Prosecution, to meet the “substantial grounds” test, omitted certain evidence from the confirmation hearing, it should not be foreclosed from including them in the trial. This is consistent with the seminal ruling of the Appeals Chamber in the *Lubanga* case, where the Appeals Chamber described the “facts described in the charges” as “the factual allegations which support each of the legal elements of the crime(s) charged”. The Appeals Chamber further clarified that “these factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61(5) of the Statute), as well as from the background or other information that, although contained in the Document Containing the Charges or the Confirmation Decision, does not support the legal element of the crime(s) charged”²⁹.

15. It follows that, the Prosecution needs to provide *sufficient evidence*, but not *all* its evidence; it needs to produce only enough evidence to allow the PTC to determine whether there are substantial grounds to believe that the suspect committed each of the crimes charged.³⁰ It is therefore not for the Prosecution to prove each and every single factual allegation described in the DCC, nor is it obliged to provide all the evidence supporting all or certain of these factual allegations. Rather, the Prosecution has to prove the essential elements and parameters of the charges. Article 61(5) of the Statute supports this approach by offering to the Prosecution the possibility to have the charges confirmed on the basis of summary evidence, without any in-depth scrutiny of the evidence and the facts it underpins.

²⁸ ICC-01/04-01/07-717, para. 69.

²⁹ ICC-01/04-01/06-2205, footnote 163.

³⁰ ICC-01/05-01/08-424, para.66.

Scope, object and purpose of confirmation hearing

16. According to Regulation 52 of the Regulations, the DCC must contain “a statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial” and “a legal characterization of the facts to accord” with the elements of the crimes and the modes of participation. It does not require that every factual allegation that may be pertinent to the charges must be alleged in order that they may be considered part of the charges.

17. Further, the Confirmation Decision, according to the statutory language, “confirm[s] those charges in relation to which it has determined that there is sufficient evidence, and commit[s] the person [...] for trial on the charges as confirmed”. Article 61(7) of the Statute. Nothing in that language suggests that it is required to confirm all the alleged facts, nor that the Confirmation Decision then be considered to substitute the charges brought by the Prosecution.

18. The Defence’s argument that only those facts which the PTC expressly considered in the Confirmation Decision should be part of the charges also is not supported by the Court’s jurisprudence. Chambers of this Court have consistently held that the PTC plays the role of a filter to protect the suspect against wrongful prosecution and ensure judicial economy by distinguishing between cases that should go to trial from those that should not.³¹ The PTC’s powers listed 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. In applying the evidentiary threshold set out in Article 61(7) of the Statute, the PTC must ensure that no case proceeds to trial without

³¹ ICC-01/05-01/08-532, paras. 52 -55; ICC-01/05-01/08-55, paras. 14- 18; ICC-01/05-01/08-424, para.28.; ICC-01/04-01/07-717, paras. 62-66.

sufficient evidence to establish substantial grounds to believe that the person committed the crime or crimes with which the person has been charged. The process by which the PTC assesses evidence to achieve its purpose under Article 61(7) of the Statute is different from that of the trial phase. As such, the PTC is not bound to consider all facts and circumstances in reaching its decision under Article 61(7) of the Statute. To require otherwise would amount to equating the confirmation phase with the trial phase.

19. The Defence's interpretation of the PTC's role in the confirmation process is also flawed because it conflicts with the distribution of powers respectively assigned to the PTC and the TC by the Statute. As emphasized by PTC II, it is the duty of the Prosecution to present the facts that it has investigated and to provide its view on their legal characterization in the DCC.³² Article 61(7) of the Statute makes it clear that the Prosecution formulates the charges on which it intends to try the suspect, and the PTC decides whether to confirm or not those charges or to request the Prosecution to provide further evidence or amend a charge.

20. After trial begins, the Prosecution with the permission of the PTC and after notice to the Accused may, as appropriate, amend, add, substitute, or withdraw charges as provided for in Article 61(9) of the Statute. Save the authority of the TC under Regulation 55 of the Regulations to change the legal characterization of facts, it lies within the Prosecution's mandate at the first instance to make the decision to alter the charges.

21. Nothing in the Statute, the Rules or the Regulations supports the position that once the charges brought by the Prosecution have been confirmed, the DCC no longer constitutes the charging instrument defining the parameters of the trial, and that this critical function is assigned to a judicial decision. To do so would not only

³² ICC-01/05-01/08-532, para. 55.

undermine the role of the Prosecution as the sole accusatorial organ of the Court; it would also transform the role of the PTC from that of a neutral judicial body into a charging panel.

The PTC is not required to consider and specifically address all the facts pleaded in the DCC

22. Contrary to the Defence's assertions, the PTC need not enter a finding on every single fact pleaded in the DCC, but only those facts which, viewed together, lead to the conclusion that there are substantial grounds to believe that the suspect is criminally responsible for a crime charged. As a result, the PTC in its Confirmation Decision may choose to address some (but not all) of the facts which underpin the evidence which establishes substantial grounds to believe threshold under Article 61(7) of the Statute.

23. Further, the practice of the Court demonstrates that PTCs do not prepare the decisions entered under Article 61 of the Statute with a view to replace the charges brought by the Prosecution; those decisions do not contain factual allegations and are not structured around charges against the Accused. Rather, the decisions enter legal and factual findings pertaining to the charges brought by the Prosecution. To seek to ascribe the functions of a charging instrument to a judicial decision that has been delivered for completely different purposes defeats legal certainty.

24. On a practical level, the PTC may not have addressed all facts pleaded in its Confirmation Decision for several plausible reasons, including the following:

- During the confirmation hearing, the Prosecution provides core evidence underpinning certain facts, but not *all* the facts pleaded in the DCC. There may be situations where the Prosecution is unable to bring evidence at the

confirmation hearing of particular, but important facts, because, for instance, the evidence would necessarily disclose the identity of an endangered witness or contains sensitive information that cannot be disclosed at that stage. Given the limited scope of the confirmation hearing and its object and purpose within the criminal procedure embraced by the Statute and the Rules, the Prosecution, although in possession of such information, may limit its evidence to the very core evidence supporting the charges against the suspect.³³ It would therefore be illogical and unfair to preclude the Prosecution from relying on such evidence at trial, and on the facts it underpins, merely because the Prosecution did not use it at the confirmation hearing for the reasons stated above.

- Additionally, presentation of evidence at confirmation to prove every factual allegation would be a massive undertaking that would not only unduly extend what is intended to be a preliminary screening proceeding, but also severely burden the PTC's ability to issue a decision within 60 days, as required by Regulation 53 of the Regulations. This is particularly a problem if the Confirmation Decision is more than mere confirmation that there exists substantial grounds for the charges, but itself becomes the operative charging document.
- Moreover, even if the Prosecution were to provide evidence to prove all the pleaded facts, the PTC may already be satisfied that Article 61(7)'s threshold has been met after assessing only part of the Prosecution's evidence. In such a case the PTC might only address a limited portion of the pleaded facts. Under the Defence theory, the PTC's failure to address all facts, for reasons other than a rejection of the Prosecution's evidence, would nonetheless bar the Prosecution from proving its full case at trial. As an illustration, the Defence argues that "the Prosecution states that Bemba 'knew' or 'should have known'

³³ ICC-01/04-01/07-428-Corr, para. 77-78.

while PTC II limited its conclusions to ‘knew’”.³⁴ As such, the Defence submits that the Prosecution should have limited its DCC to what PTC II expressly upheld. The Prosecution submits that PTC II found no need to address the facts proving the lower standard (“*should have known*”), as it concluded that it was satisfied on the evidence that the higher *mens rea* (the Accused knew) was met. This conclusion by PTC II does not in anyway preclude the Prosecution from pleading this lower *mens rea* standard, nor does it foreclose the Chamber from considering this pursuant to Regulation 55 of the Regulations.

25. It follows that if the Confirmation Decision does not address certain facts pleaded by the Prosecution in its DCC, those facts have to be retained for the purpose of the trial, provided that they have not been expressly rejected. Should the scope of the trial be confined to those factual allegations expressly confirmed in the Confirmation Decision, the Prosecution’s duty to submit newly discovered evidence after the Confirmation Decision, “if it brings to light previously unknown facts which have a significant bearing upon the case”³⁵, would be meaningless, despite the legal basis for doing so.³⁶ In light of the foregoing, the Defence’s argument that the PTC would have to individually confirm every single factual allegation that the Prosecution puts forward or that they must be expressly mentioned/retained by the Confirmation Decision is unfounded and should be dismissed.³⁷

The decision of TC II is not binding on the Chamber

26. The Defence has extensively relied on TC II’s Decision of 21 October 2009³⁸ in support of its position. TC II, while stressing that the DCC no longer serves as a reference for the purposes of trial, concludes that “under the Statute, the decision on

³⁴ ICC-01/05-01/08-694, para. 35.

³⁵ ICC-01/04-01/07-1336, para. 30.

³⁶ ICC-01/04-01/06-568.

³⁷ See, for instance, ICC-01/04-01/07-717, para. 69.

³⁸ ICC-01/04-01/07-1547.

the confirmation of the charges is the only document which can serve as a reference during Trial Chamber proceedings”.³⁹

27. For the reasons elaborated below, the Prosecution disagrees with the reasoning in TC II’s decision, which in any event is not binding on this Chamber. As already advanced, the PTC need not enter a finding in its Confirmation Decision on all the factual allegations pleaded by the Prosecution. Moreover, it would be manifestly unfair to apply that decision retroactively to the present situation, since it assumes after the fact that the PTC had a role and responsibility – not simply to screen charges, but also to rewrite and define them – about which the PTC itself was unaware at the time it issued the Confirmation Decision.

28. The Confirmation Decision, based on the PTC’s understanding of the purpose of confirmation (before TC II expressed its completely different reasoning), therefore does not necessarily encompass all the pleaded facts upon which the Prosecution can properly rely at trial to support the charges confirmed against the Accused. The purpose of the Second Amended DCC is to fill this vacuum by including not only the factual allegations confirmed by PTC II, but also those facts which were not expressly rejected by the PTC in the confirmation process. As such, the Second Amended DCC is a complete and comprehensive document which accords with both Regulation 52 of the Regulations and Article 67(1) of the Statute and provides the Accused with sufficient notice of the charges confirmed by PTC II, including the factual allegations underpinning those charges.

29. The Prosecution should be able to use at trial all the factual allegations included in its Second Amended DCC. This position is consistent with PTC II’s Decision of 18 September 2009, which expressly stated that “by declining to confirm some of the charges based on cumulative charging, the PTC *in the Confirmation*

³⁹ ICC-01/04-01/07-1547, paras.10-16.

Decision did not reduce the factual scope of the case but decided to not qualify the facts as presented by the Prosecutor [emphasis added]”⁴⁰. It adds that “all facts pertaining to acts of rape, which the Prosecutor presented under more than one legal characterization, have been retained in the 15 June 2009 Decision. The 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”.⁴¹ As observed by PTC II, the Chamber, while considering those facts, may, under Regulation 55 of the Regulations, re-characterize a crime to give it the most appropriate legal characterization.⁴² This clearly implies that, if a charge is confirmed, all the facts pleaded in connection with that charge not included in the Confirmation Decision can be used by the Prosecution at trial, unless expressly determined otherwise.

The Prosecution has provided sufficient notice of the nature, content and scope of the charges to the Accused

30. The Defence’s allegation that it did not receive adequate notice of the nature, scope and content of the charges against the Accused is without merit. So too is the claim that the Second Amended DCC contains new allegations in the form of facts about which the Confirmation Decision is silent. What the Defence erroneously labels as “new allegations” are facts that were previously pleaded and not expressly rejected by PTC II.

31. The Prosecution’s position is supported by the jurisprudence of the Court. As PTC I noted in *Katanga and Ngudjolo* cases, even if it makes reference to items of evidence which could provide substantial grounds to believe that specific charges

⁴⁰ ICC-01/05-01/08-532, para. 56.

⁴¹ Ibid.

⁴² ICC-01/05-01/08-424, para. 203.

could or could not be confirmed, the citations in its conclusions would not include references to all the evidence presented in respect of a specific charge.⁴³

32. The Prosecution's approach is also supported by the jurisprudence of the Appeals Chamber. In the *Lubanga* case, the Appeals Chamber describes facts as those factual allegations which support each of the legal elements of the crime(s) charged. It states further that "these factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61(5) of the Statute), as well as from the background or other information that, although contained in the Document Containing the Charges or the Confirmation Decision, does not support the legal element of the crime(s) charged"⁴⁴. It follows that the Defence's allegation that it does not consider having received notification of the charges because of the inclusion of facts not expressly rejected by PTC II in its Confirmation Decision is without merit and should be rejected. The Prosecution submits that all the facts included in its Second Amended DCC are either confirmed or not expressly rejected by PTC II in its Confirmation Decision.

Prosecution's response to second part of the Defence's Request

33. The Prosecution notes that the Defence's submission in the second part is repetitive of most of the issues in the first part of its submissions. Having addressed these issues in the first part of this submission, the Prosecution will respond in this part only to the specific defects in the Second Amended DCC identified by the Defence.

34. The Defence complains that the Prosecution uses the terms effective "command and control" and effective "authority and control" in its Amended DCC,

⁴³ ICC-01/04-01/07-717, para. 69.

⁴⁴ ICC-01/04-01/06-2205, footnote 163.

while PTC II limited its findings to only “authority and control.”⁴⁵ It requests that the Second Amended DCC be changed to accurately reflect PTC II’s findings, i.e. to remove the term “command and control”. The Prosecution submits that the Defence’s request should be dismissed because its submission is based on an incomplete reading of the Confirmation Decision. PTC II, whilst noting that the terms “effective command and control” or “effective authority and control” referred to in Article 28(a) of the Statute are alternatively applicable in situations of military commanders *strictu sensu* and military-like commanders, considered that “command” and “authority” in the two phrases have no substantial effect on the required level or standard of “control”.⁴⁶ This is also clear from the express language of the two terms using the words “effective” and “control” as a common denominator under both alternatives.⁴⁷ Moreover, PTC II noted that the degree of “control” required in both formulations is the same. The term “effective authority” may refer to the modality, manner or nature by which a military or military-like commander exercise “control” over his forces or subordinates.⁴⁸ Accordingly, PTC II’s conclusion that the Accused was effectively acting as a military commander and had effective authority and control over the *Mouvement de Libération du Congo* (“MLC”) troops who committed the crimes, does not suggest in any way that it rejected the Prosecution’s allegations on the Accused’s effective command over the perpetrators.

35. The Defence contends further that the Prosecution in the Second Amended DCC claims that the Accused failed to prevent, repress, or submit the matter to the competent authorities, while PTC II limited its findings to his failure to prevent and repress the commission of crimes.⁴⁹ The Prosecution refers the Defence to the paragraph 461 of the Confirmation Decision. In addition to the Accused’s power to prevent and to repress the commission of crimes, PTC II expressly acknowledged the

⁴⁵ ICC-01/05-01/08-694, paras 29-33.

⁴⁶ ICC-01/05-01/08-424, para. 412.

⁴⁷ *Ibid.*

⁴⁸ ICC-01/05-01/08-424, para. 413.

⁴⁹ ICC-01/05-01/08-694, para. 34.

existence, within the MLC structure, of a military judicial system to which the Accused was able to submit matters for investigation and prosecution. Thus, contrary to the Defence's contention, PTC II sufficiently found that the Accused had the required material ability to submit the matter to the competent judicial body but he failed to do so.⁵⁰

36. The Defence argues further that the Prosecution's wrongful use of "open expressions" such as "*on or about*", "*include but (...) not limited to*" have the effect of adding to or expanding PTC II's conclusions on the scope of the charges confirmed.⁵¹ It is submitted that these expressions do not expand the scope of the charges and are indeed comprehensible when read in the context of the paragraphs in question and more importantly when the Amended DCC is read as a whole. The Prosecution further notes that the List of Evidence and the In-depth Analysis Chart identify specific evidence in relation to which the expressions in question are used, which further places these expressions in context and facilitate their comprehension. The facts pleaded in the paragraphs where these expressions are employed, when read together and in conjunction with the supporting evidentiary basis and material which are specifically linked to each allegation, provide the Defence with sufficiently detailed notice of the charges against the Accused and amply meet the requirements prescribed in Regulation 52 of the Regulations.

37. Finally, the Defence alleges that the Prosecution referred many times to the Protocol Additional to the Geneva Conventions of 12 August 1949 ("Additional Protocol I"), which is applicable to international armed conflicts, whereas PTC II made a finding of a non-international conflict.⁵² In response, the Prosecution notes that PTC II also referred to Additional Protocol I on many occasions.⁵³ More

⁵⁰ ICC-01/05-01/08-424, paras. 461; 493-495.

⁵¹ ICC-01/05-01/08-694, para. 36, 48.

⁵² ICC-01/05-01/08-694, para. 39.

⁵³ ICC-01/05-01/08-424, e.g: footnotes 520, 582, 588, and 720.

importantly, however, the Prosecution's reference to Additional Protocol I is not to resurrect an issue regarding the international or non-international nature of the conflict. The point of the reference is to illustrate the Accused's failure to ensure adequate training of his troops in international humanitarian law, as was required under Article 87 of the Additional Protocol I.⁵⁴ The Defence's argument is therefore without merit and should be rejected.

Conclusion

38. For all the above-explained reasons, the Prosecution respectfully requests that the Chamber dismiss the Defence's Request.



Luis Moreno-Ocampo, Prosecutor

Dated this 22nd Day of March 2010

At The Hague, The Netherlands

⁵⁴ ICC-01/05-01/08-593-Conf-Exp-Anx, para. 77. The Prosecution further notes that it is settled law that the doctrine of command responsibility, stemming from Articles 86 and 87 of Additional Protocol I and incorporated in Article 28 of the Rome Statute applies to both international and non-international armed conflicts. See *Prosecutor v. Hazihasanovic, Alagic & Kubura*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ICTY Appeals Chamber, 16 July 2003.