

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 20 July 2010

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

**Decision on the defence application for corrections to the Document Containing
the Charges and for the prosecution to file a Second Amended Document
Containing the Charges**

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

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor
Ms Petra Kneuer, Senior Trial Lawyer

Counsel for the Defence

Mr Nkwebe Liriss
Mr Aimé Kilolo-Musamba

Legal Representatives of the Victims

Ms Marie-Edith Douzima-Lawson

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber III (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (“Bemba case”) hereby delivers the following Decision on the defence’s “*Requête aux fins d’obtenir une Décision ordonnant la correction et le dépôt du Second Document Amendé Contenant les Charges*”.¹

Although some of the documents referred to in this Decision are not part of the public record of the case, the Chamber is satisfied that the Decision can be issued publicly as the content of the relevant material was referred to publicly in the Decision Confirming the Charges. In any event, there is no relevant information that requires protection.

I. Background and Submissions

1. The first Document Containing the Charges (“DCC”) was filed on 1 October 2008.² Following the confirmation hearing, Pre-Trial Chamber II issued its “Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute”³ in which the Chamber requested the Office of the Prosecutor (“prosecution”) to consider amending the charges because the evidence tends to support a crime not charged, as regards the mode of liability under Article 28 of the Rome Statute (“Statute”), in the context of Article 61(7)(c)(ii) of the Statute.⁴

¹ *Requête aux fins d’obtenir une Décision ordonnant la correction et le dépôt du Second Document Amendé Contenant les Charges*, 12 February 2010, ICC-01/05-01/08-694 and Conf-Exp-AnxA. The Chamber was provided with a draft translation of the main filing; all subsequent references to this document include a reference to this draft translation.

² Prosecution’s Submission of Public Redacted Version of the Document Containing the Charges against Jean-Pierre Bemba Gombo, 1 October 2008, ICC-01/05-01/08-136 and AnxA.

³ Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, 3 March 2009, ICC-01/05-01/08-388.

⁴ ICC-01/05-01/08-388, paragraph 49.

2. On 15 June 2009, following the filing of the prosecution's amended DCC,⁵ the Pre-Trial Chamber issued its "Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo" ("Confirmation Decision").⁶
3. The defence did not seek leave to appeal the Confirmation Decision.⁷
4. During the 7 October 2009 status conference, the Trial Chamber indicated that it would be of assistance if the prosecution submitted a fresh document containing the charges "which reflected the final way in which the Pre-Trial Chamber had described them".⁸ The prosecution duly filed the "Second Amended Document Containing the Charges" ("Second Amended DCC") on 4 November 2009.⁹
5. On 12 February 2010, the defence filed an application relating to the Second Amended DCC requesting that the Chamber:¹⁰
 - (i) Orders the prosecution to submit a further DCC which complies with the Statute, the Confirmation Decision and the Order of 7 November 2009, using the exact language and terminology of the Pre-Trial Chamber in the Confirmation Decision, as regards each element of the charges, and including precise reference throughout to the relevant paragraphs of the Confirmation Decision;

⁵ Prosecution's Submission of Amended Document Containing the Charges, Amended List of Evidence and Amended In-Depth Analysis Chart of Incriminatory Evidence, 30 March 2009, ICC-01/05-01/08-395.

⁶ Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424.

⁷ See Note d'information de la défense à la Chambre Préliminaire II, 7 September 2009, ICC-01/05-01/08-506.

⁸ Transcript of hearing on 7 October 2009, ICC-01/05-01/08-T-14-ENG ET WT, page 13, lines 5 – 10.

⁹ Prosecution's Submission of the Document Containing the Charges as Confirmed by the Pre-Trial Chamber filed in accordance with the Chamber's Order of 7 October 2009, 4 November 2009, ICC-01/05-01/08-593, Conf-Anx and Anx-Red.

¹⁰ ICC-01/05-01/08-694, paragraph 135.

- (ii) Orders the prosecution to reflect in the DCC, the submissions and observations of the defence on the nature and scope of the charges, including those advanced in the Confidential Annex A to the Application;
 - (iii) Orders the prosecution to provide a precise reference to the relevant paragraphs of the Confirmation Decision for each factual allegation in the document;
 - (iv) Finds that the prosecution has disobeyed an order of the Chamber, thereby causing a delay to the proceedings.
6. The defence submissions are divided into two parts: the first describes the provisions that regulate the contents of the DCC post-confirmation, and the second addresses the suggested defects in the prosecution's Second Amended DCC.
7. On the first issue, the defence contends that only the allegations upheld by the Pre-Trial Chamber can be included in the DCC, because these alone meet the evidential threshold under Article 61(7) of the Statute and they define and limit the case against the accused. The defence submits not only that the prosecution has no right unilaterally to alter the nature or scope of the charges,¹¹ but also that the Trial Chamber is similarly constrained, and has no authority to modify, or to grant leave to the prosecution to modify, the charges.¹² The Decision of Trial Chamber II of 21 October 2009 in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ("Katanga case") is cited in support of these submissions by the defence.¹³

¹¹ ICC-01/05-01/08-694, paragraphs 18 and 19.

¹² ICC-01/05-01/08-694, paragraph 20.

¹³ Decision on the Filing of a Summary of the Charges by the Prosecutor, 21 October 2009, ICC-01/04-01/07-1547-tENG.

8. The defence therefore submits that the Court is bound by the scope of the charges as confirmed by the Pre-Trial Chamber, and any amendment would constitute a violation of the Statute.¹⁴ It is argued that the Pre-Trial Chamber controls the ambit of the charges, and the prosecution's DCC must be based on the Confirmation Decision, in which either the exact language of the latter is used, or at least terminology which is faithful to the content or the spirit of the Pre-Trial Chamber's conclusions.¹⁵
9. On this basis, the defence contends that the prosecution has extended and amended the charges by including allegations not confirmed by the Pre-Trial Chamber.¹⁶ The defence sets out the areas it complains of in a copy of the DCC, marked up in track changes, as an annex to the Application.¹⁷
10. The defence submits that any modification at this stage in the proceedings to the DCC not only constitutes a violation of the Statute and the binding decisions of the Court, but it would also amount to a serious breach of the accused's rights to sufficient and prompt notification of the charges, adequate time to prepare for trial, and a fair hearing.¹⁸
11. It is argued that in the DCC, the prosecution has, *inter alia*, (i) added new and unconfirmed allegations; (ii) reformulated the Pre-Trial Chamber's findings by deviating from the letter and spirit of the Confirmation Decision; (iii) added words and expressions such as "on or about" and "including but not limited to" which are not included in the formulation of the charges.¹⁹

¹⁴ ICC-01/05-01/08-694, paragraphs 22 and 23.

¹⁵ ICC-01/05-01/08-694, paragraph 24.

¹⁶ ICC-01/05-01/08-694, paragraphs 29 – 33.

¹⁷ ICC-01/05-01/08-694-Conf-Exp-AnxA.

¹⁸ ICC-01/05-01/08-694, paragraph 30.

¹⁹ ICC-01/05-01/08-694, paragraph 36.

12. The defence submits that the prosecution has attempted to add allegations to its case under Article 28 of the Statute that were not confirmed by the Pre-Trial Chamber (e.g. as set out in paragraphs 22 – 28 of the Second Amended DCC).²⁰
13. Finally, the defence contends that it has not received appropriate notification of the nature and scope of the charges within the meaning of Article 67 (1)(a) of the Statute in the Second Amended DCC, as it is presently framed.²¹

Legal representative of victims

14. On 8 March 2010, the legal representative of victims filed their response to the Application.²² The legal representative submits that applying the jurisprudence of Trial Chamber I in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (“Lubanga case”), if the DCC does not reflect the charges confirmed by Pre-Trial Chamber, it should be amended “to ensure that there is a complete understanding of the statement of facts underlying the charges confirmed by the Pre-Trial Chamber” and “to enable a fair and effective presentation of the evidence (as part of a fair and expeditious trial in accordance with Article 64 of the Statute)”.²³ The legal representative submits the Second Amended DCC provides a clear and accurate summary of the nature, cause and content of the charges confirmed against the accused.²⁴
15. The legal representative submits that the defence has misinterpreted or misunderstood the nature and content of the Second Amended DCC.²⁵ It is argued the new DCC reflects the charges as defined by the Pre-Trial

²⁰ ICC-01/05-01/08-694, paragraph 37.

²¹ ICC-01/05-01/08-694, paragraph 136.

²² Réponse du Représentant légal des victimes a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08 et a/0467/08 à la Requête de la Défense concernant le Document amendé contenant les charges, 8 March 2010, ICC-01/05-01/08-719.

²³ ICC-01/05-01/08-719, paragraph 14; Order for the prosecution to file an amended document containing the charges, 9 December 2008, ICC-01/04-01/06-1548, paragraph 13.

²⁴ ICC-01/05-01/08-719, paragraph 17.

²⁵ ICC-01/05-01/08-719, paragraph 23.

Chamber,²⁶ which complies with the Rome Statute framework, as interpreted by the Court.²⁷ Accordingly the legal representative submits the Application should be dismissed.²⁸

Prosecution

16. The Chamber granted the prosecution's application (unopposed by the defence)²⁹ for an extension of time until 22 March 2010 to file its response³⁰ due to the suggested importance and complexity of the issues.³¹
17. The prosecution's submissions³² were in two parts: first they addressed the general submissions of the defence in relation to the rules governing this issue, once the charges are confirmed by the Pre-Trial Chamber; second, they focused on the particular alleged defects in the DCC highlighted by the defence.
18. As to the role of the Pre-Trial Chamber, it is suggested that it does not confirm the factual allegations but rather it assesses the sufficiency of the evidence presented by the prosecution and whether it provides substantial grounds to believe the relevant individual committed the crimes with which he or she is charged, pursuant to Article 61(7) of the Statute.³³ The prosecution accepts it has a duty to plead all the factual allegations underlying the charges

²⁶ ICC-01/05-01/08-719, paragraph 25.

²⁷ ICC-01/05-01/08-719, paragraph 26.

²⁸ ICC-01/05-01/08-719, page 12.

²⁹ Réponse de la Défense à la requête du bureau du Procureur sollicitant l'extension de délai pour répondre à la « *Requête aux Fins d'Obtenir une Décision ordonnant la correction et le dépôt du Second Document Amendé Contentant les Charges* », 3 March 2010, ICC-01/05-01/08-712.

³⁰ Prosecution's Application for Extension of Time Limit Pursuant to Regulation 35 of the Regulations of the Court to Respond to the Defence's "Requête aux Fins d'Obtenir une Décision Ordonnant la Correction et le Dépôt du Second Document Amendé Contentant les Charges", 1 March 2010, ICC-01/05-01/08-708.

³¹ Order granting the prosecution's application for an extension of time limit pursuant to Regulation 35 of the Regulations of the Court, 5 March 2010, ICC-01/05-01/08-715.

³² Prosecution's Response to the Defence's « *Requête aux Fins d'obtenir une Décision ordonnant la correction et le dépôt du Second Document Amendé Contentant les Charges* » of 12 February 2010, 22 March 2010, ICC-01/05-01/08-731.

³³ ICC-01/05-01/08-731, paragraphs 11 – 12.

(as noted by Trial Chamber II in the *Katanga* case),³⁴ although it submits this does not result in an obligation on the Pre-Trial Chamber to confirm each relevant factual allegation, in the sense that they have to be proved at the confirmation stage in order for the Chamber to find substantial grounds.³⁵ Instead, the prosecution submits that it must provide sufficient evidence to establish substantial grounds to believe that the suspect is responsible for each of the crimes charged (rather than labouring under the obligation to set out each and every fact alleged in the DCC).³⁶ The prosecution argues that this approach has been followed by the Pre-Trial Chambers in the *Lubanga* and *Katanga* cases.³⁷

19. The prosecution relies on the Decision of the Appeals Chamber in the *Lubanga* case when it described the “facts described in the charges” as “factual allegations which support each of the legal elements of the crime(s) charged”. The Appeals Chamber set out 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”.³⁸

20. Further, the prosecution contends that Article 61(5) of the Statute supports this approach, in that it enables the prosecution to seek confirmation of the

³⁴ ICC-01/04-01/07-1547-tENG, paragraph 23.

³⁵ ICC-01/05-01/08-731, paragraph 13.

³⁶ ICC-01/05-01/08-731, paragraph 13.

³⁷ ICC-01/05-01/08-731, paragraph 13, referring to Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803-tEN and 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, 25 April 2008, ICC-01/04-01/07-428-Corr, paragraphs 77 – 83.

³⁸ ICC-01/05-01/08-731, paragraphs 14-15; Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, 8 December 2009, ICC-01/04-01/06-2205, paragraph 90 and footnote 163.

charges on the basis of a summary of the evidence, without subjecting it to any in-depth scrutiny or analysis of the facts underpinning it.³⁹

21. Addressing the defence argument that only those facts that the Pre-Trial Chamber expressly considered in the Confirmation Decision can form part of the charges, the prosecution submits that Regulation 52 of the Regulations of the Court does not require that every relevant fact must have been alleged and confirmed in order for them to support the charges.⁴⁰ The prosecution further submits that the language of Article 61(7) of the Statute does not suggest that the Pre-Trial Chamber is required to confirm every fact that is alleged, or that the Confirmation Decision replaces the charges brought by the prosecution.⁴¹

22. It is suggested that the defence interpretation of the Pre-Trial Chamber's role at the confirmation stage is flawed because it does not reflect the division of power and responsibility between the Pre-Trial Chamber and Trial Chamber under the Statute.⁴² Further, the prosecution submits that the Rome Statute framework does not support an argument that once the charges, as brought by the prosecution, have been confirmed, the DCC ceases to comprise the relevant charging instrument, defining the parameters of the trial. It is suggested that the prosecution is the sole accusatorial organ of the Court, and the Pre-Trial Chamber should not be transformed from a judicial body into a charging panel.⁴³

23. The prosecution contends that if the Confirmation Decision does not refer to particular facts relied on by the prosecution in the DCC, they ought to be retained for the purpose of the trial, provided they have not been expressly

³⁹ ICC-01/05-01/08-731, paragraph 15.

⁴⁰ ICC-01/05-01/08-731, paragraph 16.

⁴¹ ICC-01/05-01/08-731, paragraph 17.

⁴² ICC-01/05-01/08-731, paragraph 19.

⁴³ ICC-01/05-01/08-731, paragraph 21.

rejected, and it is suggested that the defence argument that the Pre-Trial Chamber has to confirm, mention or “retain” each factual allegation to enable their use at trial is unfounded and should be rejected.⁴⁴

24. The prosecution submits that Trial Chamber III should not adopt the relevant decision of Trial Chamber II in the *Katanga* case relied on by the defence, highlighting that it is not in any event binding on the Chamber.⁴⁵ The prosecution particularly takes issue with Trial Chamber II’s conclusions that “under the Statute, the decision on confirmation of the charges is the only document which can serve as a reference during Trial Chamber proceedings”, and that the DCC no longer serves as a reference document for the purposes of trial.⁴⁶ The principal arguments supporting these submissions have been set out above.⁴⁷

25. The prosecution submits it has provided the accused with adequate notice of the nature, content and scope of the charges and it resists the suggestion that the Second Amended DCC contains new factual allegations that were unaddressed in the Confirmation Decision. The prosecution argues that the suggested “new allegations” are facts previously relied on by the Prosecutor, which were not expressly rejected by Pre-Trial Chamber II.⁴⁸

26. As to the alleged defects in the Second Amended DCC,⁴⁹ the prosecution suggests the defence has misunderstood the Confirmation Decision, and that the matters allegedly absent are set out therein.⁵⁰ On the defence submission that the prosecution has wrongly used “open expressions” such as “on or about” and “include but (...) not limited to” which are said to have added or

⁴⁴ ICC-01/05-01/08-731, paragraph 25.

⁴⁵ ICC-01/05-01/08-731, paragraph 27.

⁴⁶ ICC-01/05-01/08-731, paragraph 26; ICC-01/04-01/07-1547-tENG, paragraphs 10 – 16.

⁴⁷ ICC-01/05-01/08-731, paragraphs 27 – 29.

⁴⁸ ICC-01/05-01/08-731, paragraph 30.

⁴⁹ ICC-01/05-01/08-731, paragraph 33.

⁵⁰ ICC-01/05-01/08-731, paragraphs 34, 35 and 37.

expanded the Pre-Trial Chamber's conclusions on the scope of the charges, the prosecution submits they do not have this effect, and that they are comprehensible when read in the context of the relevant paragraphs of the Second Amended DCC and, critically, when it is read as a whole.⁵¹

27. For all of the above reasons, the prosecution submits that the Application should be dismissed.⁵²

II. Relevant Provisions

28. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered the following provisions:

Article 61 of the Statute
Confirmation of the charges before trial
 [...]

3. Within a reasonable time before the hearing, the person shall:

- (a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and
- (b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

[...]

5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the persons committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

[...]

7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

- (a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;

[...]

⁵¹ ICC-01/05-01/08-731, paragraph 36.

⁵² ICC-01/05-01/08-731, paragraph 38.

Article 64 of the Statute
Functions and powers of the Trial Chamber

[...]

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

[...]

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

[...]

(f) Rule on any other relevant matters.

Article 67 of the Statute
Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

Article 74 of the Statute
Requirements for the decision

[...]

2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.

[...]

Regulation 52 of the Regulations of the Court
Document containing the charges

The document containing the charges referred to in article 61 shall include:

(a) The full name of the person and any other relevant identifying information;

(b) 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, including relevant facts for the exercise of jurisdiction by the Court;

(c) A legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.

III. Analysis and Conclusions

29. The first question to be answered is the true purpose of the DCC, as provided by the Rome Statute framework. Trial Chamber I addressed this issue, as follows:⁵³

A Document containing the Charges

12. Pursuant to Article 64(8)(a) of the Statute, "[a]t the commencement of the trial the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber", "shall satisfy itself that the accused understands the nature of the charges", and "afford him an opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty." Regulation 52 of the Regulations of the Court, headed "Document containing the charges" provides that the prosecution, pursuant to Article 61, shall provide a document that shall include:

- a) The full name of the person and any other relevant identifying information;
- b) 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, including relevant facts for the exercise of jurisdiction by the court;
- c) A legal characterisation of the facts to accord with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.

13. Although Article 61 and Regulation 52 relate to proceedings before the Pre-Trial Chamber [...] the Trial Chamber considers that filing an amended "Document containing the charges" is necessary to ensure that there is a complete understanding of the "statement of facts" underlying the charges confirmed by the Pre-Trial Chamber, and to enable a fair and effective presentation of the evidence (as part of a fair and expeditious trial in accordance with Article 64 of the Statute).

30. Trial Chamber III is similarly persuaded that it is critical that a DCC is provided for the purposes of this trial, because the Confirmation Decision does not provide a readily accessible statement of the facts that underlie each charge.⁵⁴ The Chamber respectfully suggests that in future an annex to the Confirmation Decision, framed in this way, would be of very considerable assistance to the Trial Chambers.⁵⁵ Furthermore, it would in future be of

⁵³ ICC-01/04-01/06-1548, paragraphs 12 and 13.

⁵⁴ See ICC-01/04-01/07-1547-tENG, paragraph 13.

⁵⁵ See ICC-01/04-01/07-1547-tENG, paragraph 31.

assistance to the Trial Chambers if the DCC includes footnotes providing appropriate references to paragraphs of the Confirmation Decision.⁵⁶

31. Trial Chamber II has stressed the importance of distinguishing between the charges and the evidence, suggesting that the charges are defined and set by the Pre-Trial Chamber, and the Prosecutor advances the evidence.⁵⁷ In an earlier written Decision, Trial Chamber II indicated that the facts and circumstances are an integral part of the charges, which the Trial Chamber in its final judgment must not exceed, and that a charge is not a mere statement of the legal characterisation – it is instead a mixture of the statement of the facts and their legal characterisation.⁵⁸ On a linked subject, the Chamber indicated that it was necessary for the prosecution to prepare a concise document reflecting the charges (“Summary of the Charges”) because this would promote a greater understanding of the charges, and is generally indispensable. It was stressed that the language of the Pre-Trial Chamber should be used.⁵⁹ As an exceptional step, Trial Chamber II ordered the prosecution to prepare a Summary of the Charges, reiterating the language of the Pre-Trial Chamber in its Confirmation Decision, numbering each charge. The prosecution was ordered not only to restate the findings of the Pre-Trial Chamber but also it was to extract the factual findings relied on.⁶⁰

32. Trial Chamber II concluded that the Decision on the Confirmation of Charges is the only document that can serve as a reference during the trial proceedings. The Statute made the Pre-Trial Chamber the arbiter of the facts that are the subject of the prosecution – as reflected in the DCC – as well as the evidence produced by the prosecution in support thereof. The Pre-Trial

⁵⁶ See ICC-01/04-01/07-1547-tENG, paragraphs 23 and 30; Annex 1 to Document Summarising the Charges Confirmed by the Pre-Trial Chamber, 3 November 2009 ICC-01/04-01/07-1588-Anx1.

⁵⁷ Transcript of hearing on 23 November 2009, ICC-01/04-01/07-T-78-ENG ET WT, page 4, line 22 - page 5, line 1.

⁵⁸ ICC-01/04-01/07-1547-tENG, paragraph 10.

⁵⁹ ICC-01/04-01/07-1547-tENG, paragraphs 12 and 17.

⁶⁰ ICC-01/04-01/07-1547-tENG, paragraph 29.

Chamber is entitled to reject or accept the facts relied on, and therefore, it is not “merely a Chamber for the registration or rejection of the Document Containing the Charges”.⁶¹

33. Addressing Regulation 55 of the Regulations of the Court, the Appeals Chamber determined that:

91. The drafting history of article 74 (2) of the Statute [...] confirms that Regulation 55 must be limited to the facts and circumstances described in the charges or any amendment thereto. As the Prosecutor notes, what would become the second sentence of article 74 (2) of the Statute was first contained in an Argentinean proposal of 13 August 1996 for the Rules of Procedure and Evidence. The commentary to the proposal explained that “the court may not hand down a judgement on acts which have not been included in the indictment or an amendment thereto”. Thus, the purpose of the provision was to bind the Chamber to the factual allegations in the charges.⁶²

34. The Appeals Chamber went on to observe:

97. Regulation 52 of the Regulations of the Court [...] stipulates that the document containing the charges shall contain three distinct elements: information identifying the accused person, a statement of the facts, and the legal characterisation of these facts. The distinction between facts and their legal characterisation should be respected for the interpretation of Regulation 55 as well. The text of Regulation 55 only refers to a change in the legal characterisation of the facts, but not to a change in the statement of the facts. This indicates that only the legal characterisation (regulation 52 (c) of the Regulations of the Court) could be subject to change, but not the statement of the facts (regulation 52 (b) of the Regulations of the Court) [...].⁶³

35. This Chamber is persuaded by the weight of this authority from the Appeals Chamber and the other two Trial Chambers, which reflects the terms and the substance of the relevant provisions of the Rome Statute framework. It follows that the Second Amended DCC filed following the Confirmation Decision must describe the charges by reference to the “statement of facts” underlying the charges confirmed by the Pre-Trial Chamber – its precise factual findings.

⁶¹ ICC-01/04-01/07-1547-tENG, paragraph 16.

⁶² ICC-01/04-01/06-2205, paragraph 91.

⁶³ ICC-01/04-01/06-2205, paragraph 97.

36. The defence develops a general objection to the prosecution's reliance on the "Second Amended DCC", contending that as it contains references to crimes not confirmed by the Pre-Trial Chamber, any mention of the charges should identify the relevant portion of the Confirmation Decision rather than the Second Amended DCC.⁶⁴

37. As decided by Trial Chamber II the Confirmation Decision is the authoritative document for all trial proceedings. Thus, whenever the prosecution refers to the charges against the accused, this should be by way of the exact language of the Confirmation Decision, and with specific reference to the relevant paragraph.

38. The second – and final – question is whether the Second Amended DCC complies with these requirements. The Pre-Trial Chamber confirmed the following charges:⁶⁵

- (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;

39. In providing the Trial Chamber with the Second Amended DCC, the prosecution expressly accepted the restrictions set out above as to the contents of this document:⁶⁶

⁶⁴ See, e.g., ICC-01/05-01/08-694, paragraph 80.

⁶⁵ ICC-01/05-01/08-424, final order, pages 184 – 185.

⁶⁶ ICC-01/05-01/08-593, paragraphs 3 and 4.

3. In order for the Prosecution to provide the Chamber with a charging document consistent with PTC II's Decision Confirming the Charges, some portions of the text were removed. Other portions of the text were moved to different sections of the Second Amended DCC in order to retain factual continuity. No additional or new facts that were not contained in the Amended DCC were added to the Second Amended DCC.

4. The Second Amended DCC submitted reflects: (i) the confirmed charges against the Accused; and (ii) the facts and circumstances upon which each charge is based, with reference to the specific findings in the confirmation decision.

40. It follows that if the prosecution succeeded in discharging that undertaking, it will have complied with the approach that is to be taken as regards any amendment to the DCC following the Confirmation Decision. The Chamber's analysis of the suggested breaches by the prosecution of this obligation is set out hereafter.

A. The person charged (paragraphs 1 – 8 of the Second Amended DCC)

Alleged Breach: Exceeding the scope of the facts

41. The defence alleges that with the exception of the proposed facts contained in paragraphs 1 – 3, paragraph 4, third sentence, and paragraph 8,⁶⁷ the allegations in paragraphs 1 – 8 of the Second Amended DCC exceed the scope of the facts confirmed by the Pre-Trial Chamber.⁶⁸

42. The first sentence of paragraph 4 of the Second Amended DCC, which states that “[d]uring the second half of 1998, Bemba established his own movement, the *Mouvement de Libération du Congo* (hereinafter referred to as ‘MLC’) in Kisangani, [Democratic Republic of the Congo (“DRC”)]”⁶⁹ differs from the reference in the Confirmation Decision to “the creation of the politico-military movement (MLC/ALC) in 1999”.⁷⁰ In the Chamber's view, the information contained in this passage is essentially background detail rather than factual

⁶⁷ ICC-01/05-01/08-694, paragraph 55.

⁶⁸ ICC-01/05-01/08-694, paragraphs 51 – 56.

⁶⁹ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 4.

⁷⁰ ICC-01/05-01/08-424, paragraph 457.

allegations supporting the charges, and therefore it does not constitute a modification of the charges.

43. The defence objects to the first sentence of paragraph 5 of the Second Amended DCC, which suggests that during the relevant period Mr Bemba was the MLC President and Commander-in-Chief.⁷¹ The Pre-Trial Chamber in the Confirmation Decision relied on evidence that under Article 12 of the MLC Statute, Mr Bemba was the President of the MLC and Commander-in-Chief of its military wing, the *Armée de Libération du Congo* (“ALC”).⁷² Accordingly, the first sentence of paragraph 5 should state, more precisely, “MLC president and Commander-in-Chief of the ALC” and the prosecution is instructed to make the necessary revision. The defence also objects to the second sentence of paragraph 5 of the Second Amended DCC, which asserts that as of 13 July 2002 Mr Bemba obtained the rank of a General. The Chamber finds that this information simply provides evidential detail rather than additional facts to support the charges, and therefore does not constitute a modification to, or exceed the scope of, the charges.

44. It is set out in paragraph 6 of the Second Amended DCC that “[i]n June 2003, Bemba became one of four DRC vice-presidents in the DRC Transitional Government” and paragraph 7 refers to events that allegedly took place in 2006 and 2007.⁷³ Whilst this assertion exceeds the time-span of the charges confirmed against the accused, which are limited to crimes allegedly committed from on or around 26 October 2002 to 15 March 2003,⁷⁴ the information contained in these paragraphs is essentially background detail rather than factual allegations supporting the charges, and therefore it does not constitute a modification of the charges.

⁷¹ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 5.

⁷² ICC-01/05-01/08-424, paragraphs 453 – 457.

⁷³ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraphs 6 and 7.

⁷⁴ ICC-01/05-01/08-424, paragraph 478.

B. Statement of facts (A. Background and B. 2002-2003 CAR intervention – paragraphs 9 – 21)

Alleged Breach: Exceeding the scope of the Confirmation Decision⁷⁵

45. Although the defence submits that none of the allegations in this section of the Second Amended DCC have been confirmed by the Pre-trial Chamber, it nonetheless does not take issue with paragraphs 9, 10, 11 (first and second sentences), 13, 17 (first and second sentence, save for the first six words of the second sentence, “On or about 26 October 2002”) and 21 (first sentence).

46. Paragraphs 11 – 12 of the Second Amended DCC comprise, *inter alia*, background statements that describe events that allegedly occurred before the period relevant to the charges, as set out in the Confirmation Decision.⁷⁶ The information in these paragraphs is essentially background detail rather than factual allegations supporting the charges, and therefore it does not constitute a modification of the charges.

47. The statements in paragraph 14 the Second Amended DCC describe the circumstances of the entry of MLC troops commanded by Mr Bemba into the Central African Republic (“CAR”) at the request of Mr Patassé on or about 26 October 2002, extending through until 15 March 2003.⁷⁷ The Pre-Trial Chamber considered this point in paragraphs 67 and 68 of the Confirmation Decision.⁷⁸ The Pre-Trial Chamber explicitly found that MLC soldiers arrived on the CAR territory “on or about” 26 October 2002.⁷⁹ The Chamber therefore concludes the defence objection in relation to this part of paragraph 14 is unfounded. As to the remainder of paragraph 14, whilst the allegation that Mr Bemba benefited by securing the CAR as the MLC’s strategic rear base in

⁷⁵ ICC-01/05-01/08-694, paragraphs 57 – 60.

⁷⁶ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraphs 11 – 12.

⁷⁷ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 14.

⁷⁸ ICC-01/05-01/08-424.

⁷⁹ ICC-01/05-01/08-424, paragraph 254.

exchange for his provision of MLC troops is not described in exactly this way in the Confirmation Decision, the Chamber considers that this and the other statements in this paragraph come within the scope of the factual findings in the Confirmation Decision.⁸⁰ Therefore, the prosecution has not exceeded the scope of the Confirmation Decision.

48. Paragraph 15 of the Second Amended DCC alleges, *inter alia*, that “[a]t least from the time that the MLC troops were sent into the CAR, Bemba intended for the CAR civilian population [...] to be targeted by his forces. The MLC soldiers were given *carte blanche* to kill, pillage and rape with a sense of impunity.”⁸¹ In the Confirmation Decision, the Pre-Trial Chamber noted that:

At the Hearing, the Prosecutor argued that “despite [Mr Jean-Pierre Bemba's] full knowledge of the commission of crimes in 2001, he sent the MLC troops to the CAR in 2002 and placed them in a permissive environment with ‘carte blanche’, allowing them to rape, kill, torture and pillage with impunity”. On reviewing the evidence presented, the Chamber realises that the Prosecutor's assertion was based on a sole witness statement - namely witness 15. Although it is true that witness 15 mentioned the term “carte blanche”, the context in which the expression was used does not support the Prosecutor's inference that Mr Jean-Pierre Bemba had the requisite intent.⁸²

49. The Pre-Trial Chamber was not satisfied that by committing his troops, Mr Bemba had been aware that it was virtually certain that murder, rape, and pillaging would occur in the ordinary course of events.⁸³ The Pre-Trial Chamber concluded that there was insufficient evidence to establish substantial grounds to believe that Mr Bemba had the requisite intent under Article 30 of the Statute for the crimes alleged.⁸⁴ It follows that the repetition of these factual assertions—already rejected by the Pre-Trial Chamber—in paragraph 15 of the Second Amended DCC exceeds the scope of the charges as confirmed. However, the assertion in that paragraph that “[t]he MLC

⁸⁰ ICC-01/05-01/08-424, paragraphs 126 and 392.

⁸¹ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 15.

⁸² ICC-01/05-01/08-424, paragraph 387.

⁸³ ICC-01/05-01/08-424, paragraph 389.

⁸⁴ ICC-01/05-01/08-424, paragraph 401.

troops instilled a general climate of fear in the CAR population with the intention of destabilizing the opposing army” is relied on in the Confirmation Decision.⁸⁵ The Chamber thereby instructs the prosecution to revise the Second Amended DCC accordingly, deleting those factual assertions that were rejected by the Pre-Trial Chamber, whilst maintaining the second-to-last sentence of the paragraph in question. The last sentence of paragraph 15, which alleges that MLC troops were authorised to pillage, should be removed.

50. The defence indicates that it does not take issue with the substance of the first sentence of paragraph 16 but rather it objects to its context within the document.⁸⁶ Further, it objects to the substance of the second and third sentences of paragraph 16, concerning the appointment of the Commander of Operations.⁸⁷ In the judgment of the Chamber, the entirety of paragraph 16, which elaborates on the military functions allegedly performed by the accused in his role as President of the MLC and Commander-in-Chief of the ALC (as well as duties of his subordinates), falls within the scope of the charges confirmed against the accused and is appropriately pleaded in the document.

51. The defence objects to the words “on or about 26 October 2002” in the first sentence of paragraph 17 of the Second Amended DCC.⁸⁸ However, in the Confirmation Decision, the Pre-Trial Chamber explicitly found that MLC soldiers arrived on the CAR territory “on or about” 26 October 2002.⁸⁹ The Chamber therefore concludes the defence objection in relation to this part of paragraph 17 is unfounded.

⁸⁵ ICC-01/05-01/08-424, paragraphs 109 – 110 and 150.

⁸⁶ ICC-01/05-01/08-694, paragraph 60 and ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 16.

⁸⁷ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 16.

⁸⁸ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 17.

⁸⁹ ICC-01/05-01/08-424, paragraph 254.

52. The defence raises a complaint as to the third sentence of paragraph 17 of the Second Amended DCC, in which the prosecution repeats an allegation that it made at the confirmation hearing, as well as in the Amended DCC, namely that on crossing the Oubangui river to enter the CAR, MLC commanders told MLC troops to “kill and destroy everyone that you find on your way”.⁹⁰ The Pre-Trial Chamber in the Confirmation Decision stated that:

In both the Hearing and the Amended DCC, the Prosecutor stated that Mr Jean-Pierre Bemba intended that crimes would occur as a result of the implementation of the alleged common plan, because, *inter alia*, MLC commanders gave clear instructions to MLC troops to kill CAR civilians. In support of his argument, the Prosecutor quoted part of the summary statement of witness 47, which refers to MLC commanders' instructions while crossing the Oubangui river to enter the CAR in 2002. The summary statement reads: “[i]n Bangui, in the Central African Republic, you have no parents, no wives, and no children. You go to war. You kill, and you destroy everything [...] Jean-Pierre Bemba sent you to kill and not to have fun”.⁹¹

53. The Pre-Trial Chamber decided that the information contained in the summary statement had low probative value; it was uncorroborated by any other evidence; and it was contradicted by the statements from a number of other prosecution witnesses. Moreover, it concluded that the statement was not attributed to Mr Bemba nor was it established that it was said in his presence or following his instructions.⁹² The Pre-Trial Chamber concluded that in light of the above, it “could not infer that Mr Bemba intended that his troops “destroy everything” in the CAR and kill the civilians.”⁹³ Given that determination by the Pre-Trial Chamber, the Chamber considers that the prosecution cannot now rely on the same statement to prove essentially the same thing, *i.e.* that MLC commanders (instructed by Mr Bemba) ordered their troops to “kill and destroy everyone that you find on your way”. Accordingly the Chamber instructs the prosecution to remove this sentence from the Second Amended DCC. Whether the prosecution is entitled to rely

⁹⁰ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 17.

⁹¹ ICC-01/05-01/08-424, paragraph 390.

⁹² ICC-01/05-01/08-424, paragraphs 390 – 391.

⁹³ ICC-01/05-01/08-424, paragraph 392.

on evidence in this regard, to support the factual allegations confirmed by the Pre-Trial Chamber may be considered by the Trial Chamber in due course.

54. The defence objects to paragraphs 18 and 19 of the Second Amended DCC, which set out allegations concerning the movements of MLC troops in and around Bangui, *Point Kilomètre* (hereinafter referred to as “PK”) 12, Damara, Sibut, Bossembélé, Bossangoa and Bozoum, and crimes alleged to have been committed by the troops as they advanced.⁹⁴

55. The Pre-Trial Chamber was satisfied that several witnesses directly endured MLC attacks at various locations, including Bangui, PK 12 and Mongoumba,⁹⁵ and it found that there was evidence demonstrating that the towns of Damara, Bossembélé, Sibut, and Bozoum were all attacked.⁹⁶ In all the circumstances, the additional details provided in paragraph 18 of the Second Amended DCC are merely extracted from the facts relied on in the Confirmation Decision, and in the result they do not exceed the scope of the charges.

56. As to the defence objection to paragraph 20 of the Second Amended DCC, which alleges that Mr Bemba maintained contact with MLC subordinates throughout the 2002 intervention and that the troops of Mr Bemba and Mr Patassé coordinated their efforts during these events,⁹⁷ the Pre-Trial Chamber determined that there was sufficient evidence to establish substantial grounds to believe that Mr Bemba retained his effective authority and control over MLC troops throughout the 2002 – 2003 intervention in the CAR, and that Mr Patassé helped to coordinate this intervention.⁹⁸ The Chamber therefore

⁹⁴ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraphs 18 and 19.

⁹⁵ ICC-01/05-01/08-424, paragraph 117.

⁹⁶ ICC-01/05-01/08-424, paragraph 117.

⁹⁷ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 20.

⁹⁸ ICC-01/05-01/08-424, paragraphs 465 – 477.

considers that the allegations in paragraph 20 fall within the scope of the charges as confirmed.

57. The defence objects to the inclusion of the second to fourth sentences of paragraph 21 of the Second Amended DCC, which allege facts concerning the withdrawal of MLC soldiers from the CAR by March 2003, and which set out that MLC troops perpetrated crimes including pillaging, rape, and murder against the civilian population.⁹⁹ The Pre-Trial Chamber found that there was sufficient evidence to establish that these crimes were committed during the retreat by MLC soldiers,¹⁰⁰ and thus paragraph 21 is within the scope of the charges.

C. Formation and Rise of the MLC- 1. MLC Structure 2. Mr Bemba's Role within the MLC and 3. Composition and organization of MLC troops (paragraphs 22 – 31)

Alleged breach: Inconsistency with the charges confirmed against the accused and the facts are not contained in the Confirmation Decision.¹⁰¹

58. The defence does not take issue with paragraph 22, second, third and fourth sentences; paragraph 24, first and second sentences; paragraph 25, third and fourth sentences; paragraph 29, second sentence; paragraph 30; and paragraph 31, third, fourth and fifth sentences.¹⁰²

59. The defence objects to the first sentence of paragraph 22,¹⁰³ which states that “Bemba’s ALC military movement created in 1998 evolved into a hierarchically organised politico-military movement by adoption of the 1999

⁹⁹ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 21.

¹⁰⁰ ICC-01/05-01/08-424, paragraphs 99 – 108.

¹⁰¹ ICC-01/05-01/08-694, paragraphs 61 – 67.

¹⁰² ICC-01/05-01/08-694, paragraph 66.

¹⁰³ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 22.

Statute”.¹⁰⁴ However, as discussed in paragraph 42 above, this information is essentially background detail rather than facts supporting the charges, and therefore it does not constitute a modification of the charges.

60. Paragraph 23 of the Second Amended DCC alleges that “[a]t all times relevant to the charges, Bemba, as the President and Commander in Chief of the MLC, had *de facto* and *de jure* control over the MLC”.¹⁰⁵ The defence suggests that this assertion misrepresents the scope of the Confirmation Decision.¹⁰⁶ The Pre-Trial Chamber concluded that at all times relevant to the present case Mr Bemba served as the *de jure* Commander-in-Chief of the ALC and had *de facto* ultimate control of the MLC as its President.¹⁰⁷ The Pre-Trial Chamber further noted that according to Article 12 of the MLC Statute, the President of the MLC is also the Commander-in-Chief of the ALC.¹⁰⁸ The Chamber considers that in these circumstances, paragraph 23 needs to be altered consistently with the Chamber’s instruction in paragraph 43 above so that it reads “President of the MLC and Commander-in-Chief of the ALC”. The paragraph does not otherwise misrepresent the scope of the charges confirmed against the accused.

61. The defence objects to the final three sentences in paragraph 24, which concern Mr Bemba’s role as head of the ALC and MLC.¹⁰⁹ The Chamber finds that this objection is ill founded since the first sentence describes facts explicitly confirmed by the Pre-Trial Chamber, namely the responsibilities given to the President by the MLC Statute.¹¹⁰ The next sentence asserts that the Politico-Military Council was limited to making recommendations that only Mr Bemba could authorise, and the last sentence states that the MLC

¹⁰⁴ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 22.

¹⁰⁵ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 23.

¹⁰⁶ ICC-01/05-01/08-694, paragraph 65.

¹⁰⁷ ICC-01/05-01/08-424, paragraphs 455 and 457.

¹⁰⁸ ICC-01/05-01/08-424, paragraph 453.

¹⁰⁹ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 24.

¹¹⁰ ICC-01/05-01/08-424, paragraphs 453 – 454 and 459 – 460.

Statute did not provide for his removal or the election of a new President or Commander in Chief. The Chamber considers that these are all within the scope of the charges as they merely elaborate on the previously-enumerated powers of the MLC President and ALC Commander-in-Chief.

62. As regards to the defence objections to the first two sentences of paragraph 25, which concern Mr Bemba's authority to discipline MLC members and the existence of a code of conduct, as well as a related military tribunal in Gbadolite,¹¹¹ the Chamber considers that these assertions were confirmed by the Pre-Trial Chamber.¹¹²

63. The defence contests virtually the entirety of paragraphs 26 – 28, which address Mr Bemba's *de facto* control of the MLC.¹¹³ The defence objects in particular to the description in paragraph 26 of the MLC as Mr Bemba's "own enterprise" as well as the statement in the same paragraph that Mr Bemba "exercised complete command and control over the military personnel either through the chain of command or, bypassing the hierarchy, and given instructions directly to commanders in the field"; the defence also takes issue with the characterisation of Mr Bemba in paragraph 27 as the "sole decision making authority and control for all military matters".¹¹⁴

64. Given the Pre-Trial Chamber's findings i) that Mr Bemba had *de facto* control over MLC commanders;¹¹⁵ ii) that according to the evidence the MLC Chief of Staff, who coordinated the activities of the General Staff and the troops, "execute[d] the decisions of the Commander-in-Chief of the ALC";¹¹⁶ iii) that MLC troops remained under the control of MLC headquarters;¹¹⁷ and iv) that

¹¹¹ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 25.

¹¹² ICC-01/05-01/08-424, paragraphs 460 – 462, 470 and 472.

¹¹³ ICC-01/05-01/08-694, paragraphs 33 and 41 and ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraphs 26 – 28.

¹¹⁴ ICC-01/05-01/08-694, paragraph 41.

¹¹⁵ ICC-01/05-01/08-424, paragraph 457.

¹¹⁶ ICC-01/05-01/08-424, paragraph 454.

¹¹⁷ ICC-01/05-01/08-424, paragraph 476.

Mr Bemba “not only had the power to appoint, promote, demote and dismiss MLC commanders but also the ability to unilaterally arrest as well as to detain and release those who were arrested”,¹¹⁸ the Chamber finds that the description of Mr Bemba’s authority in paragraphs 26 and 27 does not exceed the charges as set out in the Confirmation Decision.

65. Sub-sections (i) to (vi) of paragraph 27, also objected to by the defence, provide a number of examples of tasks allegedly carried out by Mr Bemba in the exercise of his decision-making authority over the MLC. These activities are said to include i) Mr Bemba’s deployment of MLC troops to the CAR under his command and control; ii) his appointment of an MLC commander to lead the CAR military operation; iii) the provision of weaponry including AK 47s, Kalashnikovs and mortars to the MLC troops; iv) the provision of “logistics”, transport and supplies including Antonovs, helicopters and boats; v) visits to the MLC troops; vi) establishing sole decision-making authority regarding the provision of “logistics”, and sole control over the airplanes used to transport various items, including weapons; vii) repeated travel to the CAR to visit and address the troops, specifically in PK 12 in early November 2002; and viii) personal control over the MLC finances, including donations from foreign countries.¹¹⁹

66. The Trial Chamber considers that all of the factors set out in these subparagraphs fall within – they are subsumed by – the ambit of the more general matters already confirmed by the Pre-Trial Chamber, namely that Mr Bemba as President of the MLC and Commander-in-Chief of the ALC had effective authority and control over his forces. The Pre-Trial Chamber also found that although Mr Bemba was mainly stationed in the DRC during the relevant time, he travelled to the CAR “at least once” during this period.¹²⁰

¹¹⁸ ICC-01/05-01/08-424, paragraph 460.

¹¹⁹ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 27 (i) – (vi).

¹²⁰ ICC-01/05-01/08-424, paragraph 485.

The Chamber therefore finds that the sub-paragraphs are within the parameters of the Confirmation Decision.

67. The defence objects to the entirety of paragraph 28.¹²¹ The first sentence suggests that throughout the relevant time period, “Bemba accepted his role as the MLC’s Commander in Chief, nationally and internationally, by attending meetings with foreign representatives and ambassadors to discuss the MLC’s activities.” The second sentence of paragraph 28 states that Mr Bemba made public statements to the effect that he controlled the MLC. In the Confirmation Decision, the Pre-Trial Chamber relied on the fact that Article 12 of the MLC Statute gives the President the authority, *inter alia*, to approve and sign defence agreements with external partners.¹²² The Chamber considers that because, as MLC President, Mr Bemba had the authority to sign defence agreements with foreign powers, the factual assertion in the first sentence of paragraph 28 of the Second Amended DCC is essentially a matter of background evidential detail rather than providing additional facts to support the charges, and therefore it does not constitute a modification to, or exceed the scope of, the charges. The Chamber finds that the allegation that Mr Bemba stated publicly that he controlled the MLC is within the scope of the charges, given the finding that he was its President during the relevant time period.

68. The defence objects to paragraph 29, which alleges that “[t]he composition and organization of the MLC enabled Bemba to ensure that his orders would be complied with by his subordinates” and asserts that the MLC was male dominated, composed of different ethnic groups, and included a small number of women and children.¹²³ The Chamber finds that this information simply provides evidential detail rather than additional facts to support the

¹²¹ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 28.

¹²² ICC-01/05-01/08-424, paragraph 453.

¹²³ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 29.

charges, and therefore does not constitute a modification to, or exceed the scope of, the charges

69. The defence objects to the first two sentences of paragraph 31, which allege that “[c]onsistent with Article 16 of the MLC Statute, the *Etat Major* reported all military affairs directly to Bemba. The MLC had brigades headed by brigade commanders who were nominated by Bemba.”¹²⁴

70. The Pre-Trial Chamber noted that the evidence showed that the brigade and battalion commanders were all appointed by Mr Bemba.¹²⁵ It also concluded that at all relevant times, Mr Bemba served as the *de jure* Commander-in-Chief of the ALC and had *de facto* ultimate control over MLC commanders.¹²⁶ The Trial Chamber therefore concludes that the assertions contained in these sentences were relied on by the Pre-Trial Chamber and are consequently within the scope of the charges.

D. MLC behaviour in conflicts prior to 2002 – 2003 (paragraphs 32 – 35)

Alleged breach: Inconsistency with the charges confirmed against the accused and/or facts are not contained in the Confirmation Decision.

71. The defence objects to paragraphs 32 – 35 of the Second Amended DCC, arguing that the allegations in this section all relate to the prosecution’s case in relation to Article 25 of the Statute, which the Pre-Trial Chamber declined to confirm.¹²⁷

72. Paragraph 32 of the Second Amended DCC sets out that in 2001, at Mr Patassé’s request, Mr Bemba sent MLC troops to the CAR. Paragraph 33

¹²⁴ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 31.

¹²⁵ ICC-01/05-01/08-424, paragraph 456.

¹²⁶ ICC-01/05-01/08-424, paragraph 457.

¹²⁷ ICC-01/05-01/08-694, paragraph 68.

alleges that during this 2001 intervention in the CAR, MLC troops committed crimes against the civilian population including pillaging, rape, and murder.¹²⁸ Paragraphs 33 and 34 allege facts concerning attacks by the MLC in Mambasa between 11 and 29 October 2002.

73. In the Confirmation Decision, the Pre-Trial Chamber considered the prosecution's evidence relating to prior behaviour of MLC troops in the CAR in 2001 and in the DRC (Mambasa) in 2002 in the context of charges brought against the accused under Article 25(3)(a) of the Statute, concluding that intent under Article 30 could not be generally inferred to Mr Bemba from the alleged past behaviour of MLC troops.¹²⁹ The Pre-Trial Chamber thereafter declined to confirm the charges against the accused under Article 25(3)(a).¹³⁰ The Chamber therefore concludes that the allegations in paragraphs 32 – 35 of the Second Amended DCC exceed the scope of the charges. The Chamber instructs the prosecution to remove this section from the Second Amended DCC.

E. Territorial, temporal, and material jurisdiction (paragraphs 36 – 39)

Alleged breach: Inconsistency with the charges confirmed against the accused or facts are not contained in the Confirmation Decision.¹³¹

74. Paragraph 36 of the Second Amended DCC rehearses that all of the crimes alleged “occurred between approximately 26 October 2002 and 15 March 2003”.¹³² The defence indicates that it does not take issue with the proposed facts in this paragraph but objects to the word “approximately”, which it suggests should be removed.¹³³

¹²⁸ ICC-01/05-01/08-593-Anx-Red, paragraphs 32 – 33.

¹²⁹ ICC-01/05-01/08-424, paragraphs 372 – 377.

¹³⁰ ICC-01/05-01/08-424, paragraph 401.

¹³¹ ICC-01/05-01/08-694, paragraphs 70 – 75.

¹³² ICC-01/05-01/08-593-Anx-Red, paragraph 36.

¹³³ ICC-01/05-01/08-694, paragraph 71 and ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 36.

75. However, throughout the Confirmation Decision, the time period relevant to the charges is referred to as “on or about 26 October 2002 to 15 March 2003”. The Chamber is of the view that the word “approximately” in paragraph 36 qualifies the relevant timeframe only to the same extent as the words “on or about”, and thus it does not alter the scope of the charges. Nonetheless, in the interests of consistency and to avoid confusion, the Chamber instructs the prosecution to change the wording to “on or about 26 October 2002 to 15 March 2003”.

76. The defence observes, on the issue of the first sentence of paragraph 37, the Pre-Trial Chamber found that the relevant armed conflict was “not of an international character”.¹³⁴ The defence also raises the addition of several words in paragraph 37. The Chamber is of the view that these latter additions do not have any material impact as the meaning of the paragraph is sufficiently clear. As currently drafted, the paragraph does not suggest that the armed conflict was of an international character and no alteration is necessary.

77. The defence objects to paragraph 38 of the Second Amended DCC, which states that at all relevant times, Mr Bemba was aware of the existence of an armed conflict in the CAR.¹³⁵ It is submitted that although the Pre-Trial Chamber found that MLC members had the requisite level of awareness, it did not extend this conclusion to Mr Bemba.¹³⁶

78. In the Confirmation Decision, the Pre-Trial Chamber noted that it was undisputed by either party that 1,000 to 1,500 MLC soldiers were sent to the CAR by Mr Bemba at the request of Mr Patassé in order to assist the CAR

¹³⁴ ICC-01/05-01/08-694, paragraph 73.

¹³⁵ ICC-01/05-01/08-694, paragraph 70, referring to ICC-01/05-01/08-593-Anx-Red, paragraph 38.

¹³⁶ ICC-01/05-01/08-694, paragraph 70.

government troops in repelling the troops of Mr Bozizé.¹³⁷ The Pre-Trial Chamber further concluded that the facts established by the evidence clearly indicated that Mr Bemba had personal knowledge of the acts of rape, pillage, and murder by MLC troops in the CAR during the five-month period relevant to the charges.¹³⁸ It is, therefore, clear that the Pre-Trial Chamber proceeded on the basis that at all relevant times Mr Bemba was aware of the existence of an armed conflict. Thus, the Chamber finds that paragraph 38 of the Second Amended DCC does not exceed the scope of the charges and should remain unchanged.

79. The defence advances a general objection to the prosecution's allegations throughout the Second Amended DCC that the attack against the civilian population was "widespread" and/or "systematic", submitting that the charges were only confirmed on the basis of a widespread attack.¹³⁹

80. In the Confirmation Decision, the Pre-Trial Chamber noted that the terms "widespread" and "systematic" in the *chapeau* elements to Article 7 of the Statute are drafted in the alternative, and accordingly the Chamber determined that it need not examine both elements, since it found that the MLC attack against the civilian population was widespread.¹⁴⁰ Given that the Pre-Trial Chamber only confirmed the charges on the basis of a widespread attack, the introduction at this stage of the "systematic" element in the Second Amended DCC exceeds the scope of the charges. The Second Amended DCC needs to be amended accordingly.

81. Paragraph 39 of the Second Amended DCC alleges that conduct charged as a crime against humanity was part of a widespread or systematic attack

¹³⁷ ICC-01/05-01/08-424, paragraphs 240 – 242.

¹³⁸ ICC-01/05-01/08-424, paragraph 489.

¹³⁹ ICC-01/05-01/08-694, paragraph 78.

¹⁴⁰ ICC-01/05-01/08-424, paragraphs 82 and 160.

directed against the CAR population, and that with regard to conduct charged as a crime against humanity, Mr Bemba acted while knowing that the civilian population was being attacked and that his acts comprised part of those attacks.¹⁴¹ The defence suggests this paragraph should be amended to specify that a sufficient nexus between the crimes alleged and the suggested attack against the civilian population had been established only in relation to certain witnesses.¹⁴² The defence further submits that the last sentence of the paragraph, containing the allegation that Mr Bemba acted with knowledge of the attacks on the civilian population, should be deleted.¹⁴³

82. The Pre-Trial Chamber found that there was sufficient evidence to establish substantial grounds to believe that Mr Bemba knew that MLC troops were committing or were about to commit the crimes against humanity of murder and rape and the war crimes of murder, rape and pillaging in the CAR from on or about 26 October 2002 to 15 March 2003 and he was aware of the commission of these crimes throughout the entire period of the intervention.¹⁴⁴ The Chamber therefore finds that the allegations in paragraph 39 fall within the scope of the charges confirmed against the accused. However, the reference to a “systematic” attack is to be deleted, for the reasons set out above.

F. Facts relevant to Article 7 Chapeau Elements (paragraphs 40 – 45)

Alleged breach: Inconsistency with the charges confirmed against the accused and/or facts are not contained in the Confirmation Decision.¹⁴⁵

83. The defence suggests a number of amendments to paragraph 40 of the Second Amended DCC.¹⁴⁶ With the exception of the reference to “Counts 1 and 4 of

¹⁴¹ ICC-01/05-01/08-593-Anx-Red, paragraph 39.

¹⁴² ICC-01/05-01/08-694, paragraph 74.

¹⁴³ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 39.

¹⁴⁴ ICC-01/05-01/08-424, paragraphs 478 and 489.

¹⁴⁵ ICC-01/05-01/08-694, paragraphs 76 – 84.

this Second Amended DCC”, which should be amended in conformity with the instructions in paragraph 37 above as they refer to the charges against the accused, the Chamber finds that the allegations in paragraph 40 do not deviate materially from the Decision of the Pre-Trial Chamber and are therefore within the scope of the charges.

84. The defence also suggests that the last sentence of paragraph 40 should be amended to remove the words “these locations include but are not limited to” because it is submitted that the Pre-Trial Chamber’s finding in paragraph 101 of the Confirmation Decision is narrower than this formulation.

85. At paragraph 117 of the Confirmation Decision, the Pre-Trial Chamber states:

Having reviewed the Disclosed Evidence as a whole, the Chamber concurs with the Prosecutor’s submission and finds that there is sufficient evidence to establish that the attack directed against the CAR civilian population was widespread. The Chamber is satisfied that several direct witnesses suffered from MLC attacks in various locations such as Bangui (districts of Boy-Rabé and Fouh), PK 12 and Mongoumba. The direct evidence establishing the attack on those locations is corroborated by indirect evidence relevant to a period of approximately five months. CAR towns like Bossangoa, Damara, Bossembélé, Sibut, Bozoum, Bossemptélé, PK 22, and Bangui were the numerous locations attacked. In addition, the Chamber notes that the victims of rapes and sexual violence represented by one of the legal representatives are mainly from Bangui, Damara, Sibut, Bozoum, and Mongoumba which strengthens the argument that the attack was widespread since it occurred within a large geographical area.¹⁴⁷

86. In light of the Pre-Trial Chamber’s reference to “various locations such as [...]” the Chamber finds that the words “these locations include but are not limited to” in paragraph 40 of the Second Amended DCC reflect the scope of the facts rehearsed in the Confirmation Decision, and do not require alteration.

¹⁴⁶ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 40.

¹⁴⁷ ICC-01/05-01/08-424, paragraph 117.

87. The defence further submits that the last sentence of paragraph 40 of the Second Amended DCC should be amended to remove the references to Damara, Bossembélé, Sibut, Bozoum and Bossemtélé, as it is argued that the current formulation “creates great uncertainty as to the scale of the relevant crimes in each of those locations”.¹⁴⁸ However, as discussed above, the Confirmation Decision explicitly finds that each of these locations was targeted by MLC troops allegedly committing crimes, and accordingly the Chamber is of the view that the last sentence of paragraph 40 of the Second Amended DCC does not exceed the scope of the charges.

88. The defence objects to the first sentence of paragraph 41 of the Second Amended DCC, which reads “in the locations identified in paragraph 40, MLC troops pillaged, raped, and killed CAR civilians”,¹⁴⁹ as it is submitted that the Pre-Trial Chamber did not find that these crimes took place at every location.¹⁵⁰

89. In the Confirmation Decision, the Pre-Trial Chamber found that there was evidence establishing that “various locations such as Bangui (districts of Boy-Rabé and Fouh), PK 12 and Mongoumba as well as Bossangoa, Damara, Bossembélé, Sibut, Bozoum, Bossemtélé and PK 22” were attacked by MLC troops over an approximately five month period.¹⁵¹ The Chamber is therefore of the view that the first sentence of paragraph 41 does not exceed the scope of the charges. As to the allegation in the second sentence of the paragraph that “civilians were forced to cook and clean for the MLC troops against their will and with no payment”, the Pre-Trial Chamber did not rely on this factual assertion in the Confirmation Decision. Accordingly the Chamber finds that

¹⁴⁸ ICC-01/05-01/08-694, paragraph 81.

¹⁴⁹ ICC-01/05-01/08-593-Anx-Red, paragraph 41.

¹⁵⁰ ICC-01/05-01/08-694, paragraph 82.

¹⁵¹ ICC-01/05-01/08-424, paragraphs 117 and 486.

this allegation exceeds the scope of the charges, and instructs the prosecution to remove it from paragraph 41.

90. The defence suggests a number of additional amendments to paragraph 41 of the Second Amended DCC, notably removing details provided concerning the circumstances of the offences of rape allegedly committed by MLC troops. The Chamber is of the view that these details merely rehearse facts already confirmed by the Pre-Trial Chamber¹⁵² and thus do not exceed the scope of the charges.

91. In paragraph 42 of the Second Amended DCC, the defence alleges that there is no finding by the Pre-Trial Chamber that the crimes ascribed to the MLC troops “target[ed] a large number of civilian victims”.¹⁵³ The defence further objects to the substance of paragraph 42 and to the reference to the “crimes alleged in Counts 1 and 4”.¹⁵⁴

92. The Chamber instructs the prosecution to amend the first sentence of paragraph 42 in conformity with the instructions in paragraph 37 above in order to reference the Confirmation Decision. As regards the remainder of the paragraph, the Pre-Trial Chamber found that the MLC attack directed against the CAR population was widespread and a number of locations were targeted.¹⁵⁵ The Chamber therefore considers that the assertion in paragraph 42 that MLC troops targeted a large number of civilian victims is within the scope of the charges confirmed against the accused. The Chamber dismisses the remainder of the deletions and additions suggested by the defence, with respect to paragraph 42, since the allegations therein do not exceed the scope of the charges.

¹⁵² ICC-01/05-01/08-424, paragraphs 94, 165, 168, and 171 – 188.

¹⁵³ ICC-01/05-01/08-694, paragraph 83, referring to ICC-01/05-01/08-593-Anx-Red, paragraph 42.

¹⁵⁴ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 42.

¹⁵⁵ ICC-01/05-01/08-424, paragraph 117.

93. Paragraph 43 concerns crimes against humanity allegedly committed by MLC troops. The defence objects to the first sentence of paragraph 43 of the Second Amended DCC, which sets out that “MLC troops also systematically targeted the civilian population in each of the locations specified in an organized manner as they advanced in and retreated from the CAR.”¹⁵⁶ It is submitted that the wording of this paragraph “provides an unsatisfactory interpretation of the Chamber’s determination” as to the attack against the civilian population. The defence also objects to the allegation in the same paragraph that “[w]omen were raped on the pretext that they were rebel sympathisers. Men were also raped as a deliberate tactic to humiliate them and demonstrate their powerlessness to protect their families.” The Pre-Trial Chamber rehearsed this allegation in the Confirmation Decision and concluded that the evidence as a whole supported the finding that the attack by MLC troops against the CAR civilian population was conducted pursuant to an organised policy.¹⁵⁷

94. Focusing on the allegations (in paragraph 43), objected to by the defence, that MLC troops “systematically targeted” the civilian population, the Pre-Trial Chamber found that MLC soldiers, when taking control of former rebel-held CAR territories, carried out attacks following the same pattern.¹⁵⁸ In the view of the Chamber, use of the word “systematically” in this particular context refers to the organised policy and does not exceed the scope of the charges. However, the Chamber instructs the prosecution to remove the references to “pillaging” in the third and fourth sentences, as this paragraph deals with facts relevant to Article 7, whereas pillage is a war crime.

¹⁵⁶ ICC-01/05-01/08-593-Anx-Red, paragraph 43.

¹⁵⁷ ICC-01/05-01/08-424, paragraphs 109 – 110.

¹⁵⁸ ICC-01/05-01/08-424, paragraph 115.

95. As regards the other alterations to paragraph 43 suggested by the defence, the prosecution's allegations in this paragraph relate to the pattern of crimes committed by MLC troops and thus are within the scope of the charges confirmed against the accused and do not require amendment.
96. The defence objects to the entirety of paragraph 44 of the Second Amended DCC.¹⁵⁹ This paragraph relates to the MLC troops instilling a general climate of fear in the CAR population, with the hope of effectively destabilizing the opposing army by subjecting the CAR civilian population to cruel, inhuman and humiliating attacks. However, the Chamber finds that these allegations have already been confirmed by the Pre-Trial Chamber and thus they do not exceed the scope of the charges.¹⁶⁰
97. The defence similarly objects to the entirety of paragraph 45 of the Second Amended DCC, which sets out that “[a]t all times relevant to this Second Amended DCC, Bemba knew that his conduct was part of, or intended for his conduct to be part of a widespread or systematic attack on the CAR civilian population”.¹⁶¹
98. The Pre-Trial Chamber found sufficient evidence establishing substantial grounds to believe that Mr Bemba, as the President and Commander-in-Chief, knew that MLC troops were committing or about to commit a widespread attack against the civilian population during the relevant time period.¹⁶² The Chamber finds, therefore, that the allegation in paragraph 45 of the Second Amended DCC that Mr Bemba knew that his conduct was part of the widespread attack is within the scope of the charges confirmed against the accused. However, for the reasons given above, references to “systematic” in

¹⁵⁹ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 44.

¹⁶⁰ ICC-01/05-01/08-424, paragraphs 109 – 110 and 115.

¹⁶¹ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 45.

¹⁶² ICC-01/05-01/08-424, paragraphs 478, 486 and 489.

this context should be removed. Additionally, it is to be borne in mind that the Pre-Trial Chamber found that intent on Mr Bemba's part to commit the crimes as specified in the Amended DCC in relation to liability under Article 25(3)(a) was not established,¹⁶³ and in confirming the charges under Article 28(a), the Pre-Trial Chamber did not make a finding regarding the intention on the part of the accused "for his conduct to be part of a widespread or systematic attack". Accordingly, the Chamber instructs the prosecution to amend paragraph 45 to remove the reference to intent.

G. Facts relevant to Article 8 chapeau elements (paragraphs 46 – 49)

Alleged breach: Exceeding the scope of the facts contained in the Confirmation Decision¹⁶⁴

99. The defence acknowledges that the Pre-Trial Chamber made findings supporting a number of sentences in paragraphs 46 – 49 of the Second Amended DCC, but it alleges that in certain respects it should be amended.
100. The defence objects to the majority of the elements of paragraph 46 of the Second Amended DCC, and advances a revised version.¹⁶⁵ The Chamber concludes that in keeping with paragraph 37 above, the reference in paragraph 46 to the "crimes alleged in [...] this Second Amended DCC" should be replaced with a reference instead to the Confirmation Decision. As to the remainder of the paragraph, the Chamber finds that all of the matters of evidence therein are within the scope of the charges as confirmed.¹⁶⁶
101. The defence objects to the entirety of paragraph 47 of the Second Amended DCC that addresses the number of troops commanded by Mr Bozizé and their

¹⁶³ ICC-01/05-01/08-424, paragraphs 372 – 374.

¹⁶⁴ ICC-01/05-01/08-694, paragraphs 85 – 86.

¹⁶⁵ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 46.

¹⁶⁶ ICC-01/05-01/08-424, paragraphs 212 and 240 – 246.

alleged conflict with Mr Patassé's loyalist troops.¹⁶⁷ The Chamber finds that all of the factual assertions in this paragraph were relied on in the Confirmation Decision and thus they do not exceed the scope of the charges.¹⁶⁸

102. The defence objects to the entirety of paragraph 48 of the Second Amended DCC, which alleges that although "the most intense fighting and the greatest number of atrocities, at least in Bangui, occurred during the first two to three weeks, the fighting continued throughout the five month period in different locations including, but not limited to Bangui, PK 12, Fou, Mongoumba, Bossangoa, Damara, Bossembélé, Sibut, Bozoum and Bossemtélé" where it is alleged that the MLC pillaged, raped, and murdered on a large scale.¹⁶⁹
103. The Pre-Trial Chamber relied on all of the factual allegations in paragraph 48 of the Second Amended DCC,¹⁷⁰ and thus the Chamber finds that this paragraph is within the scope of the charges confirmed against the accused.
104. The defence objects to paragraph 49 of the Second Amended DCC, which states "[d]uring all times relevant to this Second Amended DCC, Bemba was at all times aware of the existence of an armed conflict."¹⁷¹
105. As discussed above, the Pre-Trial Chamber in the Confirmation Decision relied on the fact that throughout the relevant time-period, Mr Bemba was aware of the existence of an armed conflict.¹⁷² Accordingly, the Chamber finds that the matters set out in paragraph 49 are within the scope of the charges.

¹⁶⁷ ICC-01/05-01/08-593-Anx-Red, paragraph 47.

¹⁶⁸ ICC-01/05-01/08-424, paragraphs 257 – 262.

¹⁶⁹ ICC-01/05-01/08-593-Anx-Red, paragraph 48.

¹⁷⁰ ICC-01/05-01/08-424, paragraphs 235, 251 and 486.

¹⁷¹ ICC-01/05-01/08-593-Anx-Red, paragraph 49.

¹⁷² ICC-01/05-01/08-424, paragraphs 240 – 242 and 489.

H. Facts Relevant to Individual Crimes Charged (paragraphs 50 – 58)

Alleged Breach: Inconsistency with the charges confirmed against the accused and/or facts are not contained in the Confirmation Decision¹⁷³

106. Paragraphs 50 – 54 of the Second Amended DCC include allegations from prosecution witness statements. The defence suggests a number of amendments to paragraphs 50 – 53 and objects to the entirety of paragraphs 54 – 58, contending that the Pre-Trial Chamber did not confirm the matters in these paragraphs.¹⁷⁴
107. The allegations in paragraphs 50 – 58 are based on the testimony of prosecution witnesses 22, 23, 29, 42, 68, 80, 81 and 87. The Chamber notes that with the one exception, discussed in paragraph 109 below, the Pre-Trial Chamber explicitly relied in the Confirmation Decision on the statements of these witnesses,¹⁷⁵ and thus the allegations in paragraphs 50 – 53 merely describe the facts and circumstances upon which the charges have been confirmed.
108. The defence objects to the third to the fifth sentences of paragraph 51 of the Second Amended DCC, which allege details of crimes committed by MLC soldiers at the home of Witness 22, including the allegation that as a result of the rape the witness contracted HIV and the alleged killing of a dog.¹⁷⁶ The Chamber notes that this information was set out in the statement of witness 22 which was relied on in the Confirmation Decision.¹⁷⁷ Therefore it does not constitute a modification to, or exceed the scope of, the charges.

¹⁷³ ICC-01/05-01/08-694, paragraphs 87 – 88.

¹⁷⁴ ICC-01/05-01/08-694, paragraphs 87 – 88.

¹⁷⁵ See, for example, ICC-01/05-01/08-424, paragraphs 140, 165, and 324 – 333.

¹⁷⁶ ICC-01/05-01/08-593-Anx-Red, paragraph 51.

¹⁷⁷ ICC-01/05-01/08-424, paragraphs 182 and 324

109. As to the allegation in the last sentence of paragraph 51 of the Second Amended DCC, the Chamber notes that the Pre-Trial Chamber found that the witness referred to her cousin rather than her nephew, and instructs the prosecution to amend this sentence to reflect the Pre-Trial Chamber's finding.¹⁷⁸ In paragraph 53 of the Second Amended DCC, the prosecution refers to the alleged rape of "three daughters" of witness 23,¹⁷⁹ which the defence seek to amend to "two daughters".¹⁸⁰ The Pre-Trial Chamber in the Confirmation Decision, relied upon information that "at least two of his daughters" had been raped,¹⁸¹ and accordingly the Chamber does not consider that the allegation that three of his daughters were raped materially exceeds the scope of the Confirmation Decision.

110. Paragraphs 55 – 57 of the Second Amended DCC set out allegations relating to the alleged rape of unidentified victims 1 – 35. The Chamber notes that in the Confirmation Decision the Pre-Trial Chamber did not rule against including these allegations in the charges. It merely stated that it had attached low probative value to the uncorroborated statement of Witness 47 in relation to unidentified victims 1 to 35. In consequence, the Pre-Trial Chamber did not rely on that particular statement in confirming the charge of rape as a crime against humanity and so it did not entertain the defence challenge.¹⁸² At this stage, the Chamber finds that the inclusion in the Second Amended DCC of allegations relating to the rapes of unidentified victims 1 – 35 do not exceed the scope of the charges, although it may review the issue in due course.

111. As regards the death of unidentified victim 36, the Pre-Trial Chamber stated that it was not convinced by the evidence and did not rely on this evidence as

¹⁷⁸ ICC-01/05-01/08-424, paragraph 146, footnote 188.

¹⁷⁹ ICC-01/05-01/08-593-Anx-Red, paragraph 53.

¹⁸⁰ ICC-01/05-01/08-694-Conf-Exp-Anx, paragraph 53.

¹⁸¹ ICC-01/05-01/08-424, paragraph 172.

¹⁸² ICC-01/05-01/08-424, paragraph 169.

set out in witness 47's statement for its determination regarding the count of murder.¹⁸³ The Pre-Trial Chamber specifically stated:¹⁸⁴

The Chamber, in principle, concurs with the Prosecutor that although the victim is unidentified, this incident may be taken into consideration as evidence of murder. The Chamber further specifies that such evidence may be accepted to substantiate its finding if corroborated by other pieces of evidence. The Chamber, however, recalls that witness 47 is anonymous and his statement is not corroborated. For these reasons, the Chamber considers that there is not sufficient evidence to establish substantial grounds to believe that MLC soldiers killed Unidentified Victim 36 by gunshot between October 2002 and 31 December 2002 near Bangui. Accordingly, the Chamber does not deem necessary to address the challenge raised by the Defence on the lack of specificity of the dates of the alleged murder of Unidentified Victim 36.

112. In light of the above findings of the Pre-Trial Chamber in relation to unidentified victim 36, the prosecution is to remove this reference from paragraph 57.

113. Paragraph 58 of the Second Amended DCC alleges that “[o]n or about 5 March 2003, at or near Mongoumba, MLC soldiers stopped [Witness 29] as she fled. After searching her home, she was raped by multiple MLC soldiers. As a result of the rape, she is HIV positive”. It is further alleged that the home of the witness's parents was pillaged.¹⁸⁵ The Pre-Trial Chamber relied in the Confirmation Decision on the statement of Witness 29 regarding her alleged rape by three MLC soldiers.¹⁸⁶ The Trial Chamber notes that the allegation regarding Witness 29 having contracted HIV as a result of her rape is contained in her witness statement. Thus, although this information is not specifically referred to in the Confirmation Decision, the Chamber finds that it is an evidential detail that supports the factual allegation underlying the charge of rape, and therefore it does not constitute a modification to, or exceed the scope of, the charges.

¹⁸³ ICC-01/05-01/08-424, paragraph 155.

¹⁸⁴ ICC-01/05-01/08-424, paragraph 158.

¹⁸⁵ ICC-01/05-01/08-593-Anx-Red, paragraph 58.

¹⁸⁶ ICC-01/05-01/08-424, paragraph 173.

114. As to the allegation in paragraph 58 that the home of witness 29's parents was pillaged, the Pre-Trial Chamber found that the witness's statement did not establish that MLC soldiers appropriated her parents' property, and consequently it declined to rely on this allegation in the Confirmation Decision.¹⁸⁷ Thus, the Chamber finds that the statement in paragraph 58 regarding the pillage of the home of the witness's parents exceeds the scope of the charges and instructs the prosecution to remove it from the Second Amended DCC.

I. Mr Bemba's Responsibility: Article 28(a) of the Rome Statute (a) MLC troops committed crimes (paragraphs 59 – 61)

Alleged breach: Inconsistency with the charges confirmed against the accused and/or facts are not contained in the Confirmation Decision¹⁸⁸

115. The defence objects to sections of paragraph 59 of the Second Amended DCC and suggests various amendments.¹⁸⁹ However, the Chamber finds that paragraph 59 of the Second Amended DCC merely reiterates that the accused is charged with criminal responsibility under Article 28(a) and therefore it does not exceed the scope of the charges. However, in keeping with the finding in paragraph 37 above, the prosecution is instructed to amend the last sentence of paragraph 59 to refer to the Confirmation Decision rather than to "Counts 1 to 5" of the Second Amended DCC.

116. The defence advances a general objection to any reference in the Second Amended DCC to Mr Bemba's "effective command and control" and submits that the Pre-Trial Chamber limited its findings to an allegation of "effective power and authority".¹⁹⁰

¹⁸⁷ ICC-01/05-01/08-424, paragraph 337.

¹⁸⁸ ICC-01/05-01/08-694, paragraphs 89 – 90.

¹⁸⁹ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 59.

¹⁹⁰ ICC-01/05-01/08-694, paragraph 89.

117. In the Confirmation Decision, the Pre-Trial Chamber observed that the terms “effective command” and “effective authority” in Article 28(a) are closely related, but considered that the use of the disjunctive “or” between the terms in the Statute required the Chamber to interpret these terms as having close, but distinct meanings.¹⁹¹ The Pre-Trial Chamber then confirmed the charges against the accused based solely on his “effective authority and control” over the MLC troops who committed the crimes.¹⁹² As a result, the Chamber finds that any reference in the Second Amended DCC to the “effective command and control” of the accused exceeds the scope of the charges, and instructs the prosecution to revise the Second Amended DCC to reflect the language used by the Pre-Trial Chamber in the Confirmation Decision.
118. The defence has several objections concerning paragraph 60 of the Second Amended DCC.¹⁹³ First, it objects to the use of the term “effective command and control.” In keeping with the finding in paragraph 117 above, the Chamber instructs the prosecution to amend the expression “effective command and control” in paragraph 60 of the Second Amended DCC.
119. Second, the defence submits that the inclusion in paragraph 60 of the words “prior to, and” before the phrase “during the 2002 – 2003 intervention into the CAR” improperly broadens the scope of the allegation.¹⁹⁴ The Chamber notes that the Pre-Trial Chamber did not rely on any evidence that Mr Bemba’s criminal responsibility under Article 28(a) resulted from his failure to exercise control over MLC forces prior to the 2002-2003 intervention into the CAR.¹⁹⁵ Rather, prior events were only relied on in the context of demonstrating that Mr Bemba took measures to repress prior crimes, but that such measures

¹⁹¹ ICC-01/05-01/08-424, paragraph 413.

¹⁹² ICC-01/05-01/08-424, paragraph 446.

¹⁹³ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 60.

¹⁹⁴ ICC-01/05-01/08-694, paragraph 89.

¹⁹⁵ ICC-01/05-01/08-424, paragraphs 478 – 501.

were insufficient.¹⁹⁶ Thus, the inclusion of the words “prior to, and” in this paragraph impermissibly expand the allegation, taking it outside the scope of the charges. The Chamber therefore instructs the prosecution to remove the words “prior to, and” from paragraph 60 of the Second Amended DCC.

120. The defence further objects to the use in paragraph 60 of the phrase “should have known” in the sentence beginning “Bemba knew or, owing to the circumstances at the time, should have known that the MLC soldiers were committing or about to commit such crimes”, and it is argued that this phrase impermissibly broadens the prosecution’s case to include a form of *mens rea* under Article 28(a) for which the Pre-Trial Chamber made no finding.¹⁹⁷
121. The Pre-Trial Chamber clearly deliberately chose only to rely on one part of Article 28(a)(i), in the sense that it only found *mens rea* on the basis of “knew” rather than “should have known”. The Pre-Trial Chamber discussed these two elements at length in the Confirmation Decision,¹⁹⁸ and only relied on the knowledge of the accused when confirming his responsibility with respect to this allegation pursuant to Article 28(a)(i). It did not proceed on the basis of the second element, “should have known”. The Chamber finds that the allegation in paragraph 60 that Bemba “should have known” of the crimes committed by MLC soldiers therefore exceeds the scope of the charges, and is to be deleted.
122. The defence also objects to the final part of paragraph 60,¹⁹⁹ which alleges that Mr Bemba failed to submit the crimes to the competent authorities for investigation and prosecution.²⁰⁰ The Pre-Trial Chamber rehearsed the defence contention that Mr Bemba called upon the United Nations Secretary

¹⁹⁶ ICC-01/05-01/08-424, paragraph 464.

¹⁹⁷ ICC-01/05-01/08-694, paragraph 89.

¹⁹⁸ ICC-01/05-01/08-424, paragraphs 427 – 434.

¹⁹⁹ ICC-01/05-01/08-694, paragraph 89.

²⁰⁰ ICC-01/05-01/08-593-Anx-Red, paragraph 60.

General Special Representative to open an international investigation into crimes committed in the CAR during the 2002 -2003 intervention. The Pre-Trial Chamber addressed the adequacy of this measure, concluding that it was neither necessary nor reasonable.²⁰¹ In light of this finding by the Pre-Trial Chamber, the Trial Chamber considers that the reference in paragraph 60 to Mr Bemba's failure to submit the crimes to the competent authorities is within the scope of the charges.

123. The defence objects to the majority of paragraph 61, including the prosecution's inclusion of an authority that was not cited by the Pre-Trial Chamber in its decision.²⁰² The Chamber considers that the document containing the charges should not contain references to authorities in this way, but should instead focus on the specific facts and circumstances supporting each of the charges. The Chamber therefore instructs the prosecution to remove all legal references, including the reference in paragraph 61, from the Second Amended DCC.

124. The defence further objects to the allegation in paragraph 61 that "MLC soldiers are directly responsible for physically committing, through direct means, crimes against humanity and war crimes".²⁰³ According to the defence, "the [Pre-Trial] Chamber's findings confirming the identity of the alleged perpetrators are limited to the crimes it found had been committed – that is to say, physically perpetrated – by alleged members of the MLC".²⁰⁴ The defence also objects to the last section of paragraph 61, which it claims appears to be a comment or opinion on the evidence and does not form any part of the charges as confirmed by the Chamber.²⁰⁵

²⁰¹ ICC-01/05-01/08-424, paragraphs 497 – 498.

²⁰² ICC-01/05-01/08-694, paragraphs 89 – 90.

²⁰³ ICC-01/05-01/08-593-Anx-Red, paragraph 61.

²⁰⁴ ICC-01/05-01/08-694, paragraph 89.

²⁰⁵ ICC-01/05-01/08-694, paragraph 89.

125. In the Confirmation Decision, the Pre-Trial Chamber considered a nearly identical allegation to the one in paragraph 61 (save for an additional reference to Article 8 which appears in the Second Amended DCC), and far from rejecting it, the Chamber apparently relied on the allegation in confirming the charges.²⁰⁶ The Chamber does not consider that the additional reference to Article 8 substantively alters the allegation and therefore finds that the entirety of paragraph 61 comes within the scope of the charges.

J. Mr Bemba was a military commander or person effectively acting as a military commander, and (c) Mr Bemba exercised effective command and control over forces committing crimes within the jurisdiction of the Court (paragraphs 62 – 73)

Alleged Breach: Inconsistency with the charges confirmed against the accused and/or facts are not contained in the Confirmation Decision²⁰⁷

126. The defence sets out a number of general objections to paragraphs 62 – 73, including the suggestion that the prosecution has misrepresented the scope of the Pre-Trial Chamber’s findings in relation to Mr Bemba’s alleged authority over the judicial system and that the prosecution has “systematically modified the wording of the Chamber’s determination” in order to broaden the scope of the case. The defence also suggests a number of deletions and amendments to these paragraphs.²⁰⁸

127. The defence objects to all but the first sentence of paragraph 62.²⁰⁹ The remainder of the paragraph alleges that Mr Bemba acted “both internally and externally, as the ultimate MLC authority in both political and military matters”, and that as “supreme commander” Mr Bemba exercised *de jure* and *de facto* control over military matters and operations, ensuring that he retained

²⁰⁶ ICC-01/05-01/08-424, paragraph 126.

²⁰⁷ ICC-01/05-01/08-694, paragraphs 91 – 102.

²⁰⁸ ICC-01/05-01/08-694, paragraphs 91 – 102 and ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraphs 62 – 73.

²⁰⁹ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 62.

command over all units of MLC forces.²¹⁰ Paragraph 62 also refers to and incorporates paragraphs 23 – 31 of the Second Amended DCC.

128. The Pre-Trial Chamber found that as Commander-in-Chief and President, Mr Bemba had *de facto* and *de jure* control over the MLC,²¹¹ including the authority to represent the MLC in dealing with external partners.²¹² Accordingly, the Chamber finds that the allegations in paragraph 62 are within the scope of the facts and circumstances relied on by the Pre-Trial Chamber when confirming the charges.
129. The defence objects to the majority of paragraph 63,²¹³ which sets out allegations relating to Mr Bemba's position as Commander-in-Chief of the MLC and asserts that as the highest military commander, Mr Bemba had an obligation to comply with an internal military disciplinary system as well as with international humanitarian law. The prosecution includes a reference to Article 87 of the Additional Protocol I to the Geneva Conventions and to the ICRC Commentary on the Additional Protocols.²¹⁴
130. The Chamber instructs the prosecution, consistent with its finding in paragraph 123 above, to remove the footnote in the last sentence of paragraph 63. Otherwise, the contents of paragraph 63 are within the scope of the Confirmation Decision.
131. The defence objects to several portions of paragraph 64 and the heading above that paragraph, including references to Mr Bemba's "effective command" over MLC troops; the allegation that Mr Bemba had the ability to "effectively control the crimes committed" by his troops; and the allegation

²¹⁰ ICC-01/05-01/08-593-Anx-Red, paragraph 62.

²¹¹ ICC-01/05-01/08-424, paragraphs 457 and 466.

²¹² ICC-01/05-01/08-424, paragraph 453.

²¹³ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 63.

²¹⁴ ICC-01/05-01/08-593-Anx-Red, paragraph 63.

that Mr Bemba had *de jure* and *de facto* powers to prevent, repress, or submit for investigation and prosecution the crimes committed by MLC troops, and suggests several amendments.²¹⁵

132. In accordance with its instruction in paragraph 117 above, the Chamber instructs the prosecution to remove the references to “effective command” in paragraph 64 and in the heading directly above it. With respect to the allegation that “Bemba had the material ability to effectively control the crimes committed by his MLC troops in the CAR”, the Pre-Trial Chamber found sufficient evidence to establish substantial grounds to believe that Mr Bemba had “effective authority and control over the MLC troops who committed the crimes”.²¹⁶ Thus, the prosecution’s allegation in paragraph 64 misstates the charge, and the Chamber instructs the prosecution to amend this allegation to conform to the charge as confirmed against the accused. The Chamber finds that the matters in the remainder of paragraph 64 are within the scope of the charges.

133. Paragraph 65 of the Second Amended DCC sets out allegations relating to the MLC code of conduct and Mr Bemba’s control over its Disciplinary Board, as well as his extension of the territorial jurisdiction of the *Tribunal de Grande Instance de Lisala*.²¹⁷ The defence objects to a number of these assertions, including the claim in the first sentence that Mr Bemba promulgated the MLC code of conduct and the claim in the third sentence that Mr Bemba used his “wide discretionary powers” to issue military decrees, including a decree ensuring the implementation of sanctions issued by the Disciplinary Board and a decree extending the territorial jurisdiction of the *Tribunal de Grande Instance de Lisala*. The defence further suggests that the sentence concerning the power of the MLC Disciplinary Board to issue punishments for breaches

²¹⁵ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 64.

²¹⁶ ICC-01/05-01/08-424, paragraph 446.

²¹⁷ ICC-01/05-01/08-593-Anx-Red, paragraph 65.

of the code should be qualified by the addition of the words “with the exception of *inter alia* murder, theft and rape” at the end of the sentence.²¹⁸

134. Although it is not specifically alleged in the Confirmation Decision that Mr Bemba promulgated the MLC Code of Conduct, in light of the Pre-Trial Chamber’s findings regarding Mr Bemba’s disciplinary powers, the Chamber finds that this allegation is within the scope of the charges.²¹⁹ Regarding the third sentence in paragraph 65, the Pre-Trial Chamber relied on evidence that Mr Bemba had the ability to issue military decrees relating to the organization of the military judicial system, including a decree establishing military jurisdiction within the MLC.²²⁰ Therefore, the Chamber finds that the allegation in paragraph 65 of the Second Amended DCC that Mr Bemba had “wide discretionary powers” which he used to issue, *inter alia*, military decrees ensuring the implementation of sanctions issued by the Disciplinary Board falls within the scope of the charges. However, the Chamber considers that the allegation in paragraph 65 that Mr Bemba issued a decree extending the territorial jurisdiction of the *Tribunal de Grande Instance de Lisala* constitutes a new fact not relied on in the Confirmation Decision, and therefore should not have been included in the Second Amended DCC. The Chamber instructs the prosecution to remove this allegation from paragraph 65.

135. As to the defence final objection to paragraph 65, the Confirmation Decision states that the Disciplinary Board had jurisdiction to judge all offences “except for, *inter alia*, murder, theft and rape.”²²¹ In order to ensure consistency with the scope of the Pre-Trial Chamber’s findings, the Chamber instructs the prosecution to add this qualification to its allegation that the Disciplinary Board “issued punishments for breaches of this code”. The Chamber nevertheless bears in mind that the Pre-Trial Chamber relied on evidence

²¹⁸ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 65.

²¹⁹ ICC-01/05-01/08-424, paragraphs 461 – 464.

²²⁰ ICC-01/05-01/08-424, paragraphs 463 and 493.

²²¹ ICC-01/05-01/08-424, paragraph 462.

showing that the crimes of murder, theft and rape were crimes within in the jurisdiction of the Martial Court.²²²

136. The defence objects to the majority of paragraph 66, suggesting a number of deletions and amendments.²²³ This paragraph deals with Mr Bemba's authority in relation to the MLC military judicial system. The first and second sentences in the paragraph allege that "[f]rom as early as mid-2001 the MLC had a military judicial system to which Bemba could have submitted matters for investigation and prosecution" and assert that Mr Bemba issued further military decrees.²²⁴ The Pre-Trial Chamber, in considering responsibility under Article 28(a), relied on evidence that Mr Bemba imposed disciplinary and other measures in relation to the alleged crimes committed by MLC troops during the 2001 intervention in the CAR and the 2002 Mambasa attack.²²⁵ The Confirmation Decision also refers to Mr Bemba's authority to issue military decrees.²²⁶ In light of this evidence, the Chamber finds that the first two sentences of paragraph 66 fall within the scope of the charges confirmed against the accused.²²⁷

137. The third sentence of paragraph 66 alleges that Mr Bemba controlled the military judicial system and appointed the military judges. The Pre-Trial Chamber relied on evidence that, according to the MLC Code of Conduct, the members of the Martial Court are appointed by the High Command.²²⁸ In light of this finding, the Chamber considers that the allegation in the third sentence of paragraph 66 is within the scope of the facts and circumstances relied on by the Pre-Trial Chamber.

²²² ICC-01/05-01/08-424, paragraph 462.

²²³ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 66.

²²⁴ ICC-01/05-01/08-593-Anx-Red, paragraph 66.

²²⁵ ICC-01/05-01/08-424, paragraph 464.

²²⁶ ICC-01/05-01/08-424, paragraph 493.

²²⁷ ICC-01/05-01/08-424, paragraphs 461 – 463.

²²⁸ ICC-01/05-01/08-424, paragraph 462.

138. The prosecution also alleges, in the fourth and fifth sentences of paragraph 66, that Mr Bemba had “unfettered ability to unilaterally arrest, detain or release subordinates at will. Bemba exercised this power, particularly in situations where subordinates attempted to object to his military decisions”.²²⁹ In the Confirmation Decision, the Pre-Trial Chamber made a finding that Mr Bemba had “the power to unilaterally arrest, detain, and release soldiers”.²³⁰ As an initial observation, the prosecution’s substitution of the word “soldiers” with “subordinates” or the inclusion of the term “at will” at the end of the sentence does not substantively alter the content of the allegation as it appears in the Confirmation Decision. The prosecution’s use of the word “unfettered” is indistinguishable from the expression “unilateral”, and does not therefore exceed the scope of the charges. As regards the last sentence, concerning Mr Bemba’s exercise of his power “particularly in situations where subordinates attempted to object to his military decisions,” the Chamber considers that in light of the Pre-Trial Chamber’s findings concerning Mr Bemba’s unilateral authority to arrest, this allegation is within the scope of the facts and circumstances contained in the Confirmation Decision.

139. The defence objects to the majority of paragraph 67.²³¹ It is specifically alleged that the characterisation of Mr Bemba as having the “sole authority to appoint, promote, demote, remove or dismiss MLC commanders” is inaccurate, and that the addition of the verb “remove” to this list is an example of the prosecution’s attempt impermissibly to broaden the scope of its case.²³² The defence also objects to the first and last sentences of the paragraph.

²²⁹ ICC-01/05-01/08-593-Anx-Red, paragraph 66.

²³⁰ ICC-01/05-01/08-424, paragraph 493.

²³¹ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 67.

²³² ICC-01/05-01/08-694, paragraph 99.

140. The Pre-Trial Chamber relied on evidence that, according to Article 16 of the MLC Statute, each member of the General Staff of the ALC is appointed and dismissed by the Commander-in-Chief “after a positive opinion of the Political and Military Council”.²³³ Thus, Mr Bemba would not have had “sole authority” to appoint and dismiss MLC commanders, and the Chamber instructs the prosecution to remove the word “sole” from the second sentence of paragraph 67.

141. As to the defence allegation that the prosecution has impermissibly added the verb “remove” to the list of Mr Bemba’s powers, the Chamber considers that the finding that Mr Bemba had authority to “appoint, promote, demote, and dismiss” MLC commanders means that the use of the verb “remove” in paragraph 67 is clearly within the scope of the charges.²³⁴ Further, in light of the Confirmation Decision’s reliance on evidence demonstrating the powers of the accused to arrest, detain, and release MLC commanders, the Chamber finds that the last sentence of paragraph 67, which alleges that Mr Bemba had the power to recall troops who did not comply with military rules, is also within the scope of the charges.

142. The defence objects to the entirety of paragraph 68,²³⁵ which alleges facts concerning Mr Bemba’s power to order the competent authorities to initiate investigations into crimes and other disciplinary breaches committed by MLC troops, and refers to an order by Mr Bemba to investigate crimes allegedly perpetrated by MLC troops in Mambasa in 2002 and during the 2002 – 2003 CAR conflict.²³⁶

143. The Pre-Trial Chamber relied on evidence that Mr Bemba “imposed disciplinary measures and took some other measures in relation to the alleged

²³³ ICC-01/05-01/08-424, paragraph 454.

²³⁴ ICC-01/05-01/08-424, paragraphs 460, 471 and 472.

²³⁵ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 68.

²³⁶ ICC-01/05-01/08-593-Anx-Red, paragraph 68.

crimes committed by MLC troops during the 2001 intervention in the CAR and the 2002 attack".²³⁷ It rehearsed evidence concerning Mr Bemba's creation of a commission of enquiry into alleged crimes committed by his troops, and his establishment of a court martial.²³⁸ Although the Confirmation Decision does not specifically address the visit of the Special Representative of the Secretary General of MONUC or the alleged subsequent order of Mr Bemba, the Chamber concludes that in light of the relevant findings of the Pre-Trial Chamber this paragraph does not exceed the scope of the charges.

144. The defence objects to the entirety of paragraph 69.²³⁹ The first sentence of this paragraph alleges that Mr Bemba had the authority to implement investigations and prosecutions for the crimes committed by the troops.²⁴⁰ However, this allegation was expressly relied on in the Confirmation Decision,²⁴¹ and is thus within the scope of the charges.

145. With regard to the second sentence of this paragraph, which alleges that "Bemba had the ability to interfere with, and influence, hearings by obliging the competent authorities to follow his instructions", the Chamber finds that although this fact was not explicitly relied on in the Confirmation Decision, it is subsumed within facts and circumstances relied on in the Decision, namely that Mr Bemba had "the ability to unilaterally arrest as well as to detain and release those who were arrested".²⁴² This finding equally applies to the third sentence of paragraph 69 referring to Mr Bemba's power to grant amnesty, and as a result, the Chamber finds that the second and third sentences are within the scope of the facts and circumstances relied on in confirming the charges. The Chamber concludes that the final sentence of paragraph 69,

²³⁷ ICC-01/05-01/08-424, paragraph 464.

²³⁸ ICC-01/05-01/08-424, paragraphs 463 and 469.

²³⁹ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 69.

²⁴⁰ ICC-01/05-01/08-593-Anx-Red, paragraph 69.

²⁴¹ ICC-01/05-01/08-424, paragraph 469.

²⁴² ICC-01/05-01/08-424, paragraph 460.

which deals with Mr Bemba's role as Commander-in-Chief, is also within the scope of the charges.

146. The defence suggests a number of amendments to the first sentence of paragraph 70, and objects to the remainder of this paragraph, which sets out allegations relating to Mr Bemba's decision to order MLC troops into the CAR and his appointment of a Commander of Operations, who reported to him.²⁴³ The Chamber considers that these assertions are simply relevant particulars of certain factual allegations that have been confirmed, most particularly that Mr Bemba had effective control over the military as Commander-in-Chief, that he had the power to appoint MLC commanders and that he directly contacted and issued orders to commanders in the field.²⁴⁴ These are matters of evidential detail rather than providing additional facts to support the charges, and therefore they do not constitute a modification to, or exceed the scope of, the charges.

147. The defence makes a number of objections to paragraph 71 and suggests amendments.²⁴⁵ Paragraph 71 alleges, *inter alia*, that Mr Bemba retained control of MLC forces through his direct involvement in strategic planning and field operations, that he provided operational support to two individuals during a meeting in Gbadolite, and that following this meeting, Mr Bemba sent the MLC's 5th battalion to the CAR.²⁴⁶

148. The Chamber considers that the allegation in the first sentence in paragraph 71, regarding Mr Bemba's direct involvement in strategic planning and operations, is within the scope of the facts and circumstances relied on in confirming the charges, namely that Mr Bemba had effective control over the military as Commander-in-Chief. With regard to the second sentence, the

²⁴³ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 70.

²⁴⁴ ICC-01/05-01/08-424, paragraphs 446, 459, 460, 474 and 488.

²⁴⁵ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 71.

²⁴⁶ ICC-01/05-01/08-593-Anx-Red, paragraph 71.

Chamber notes that although Mr Bemba's alleged meeting in Gbadolite is not specifically referred to in the Confirmation Decision, this assertion is subsumed within facts and circumstances relied on in the Decision, namely that Mr Bemba had effective authority and control over MLC troops and in this position of authority he planned military operations with the *Forces Armées Centrafricaines* ("FACA").²⁴⁷ The Chamber further observes that the Pre-Trial Chamber relied on evidence that Mr Bemba ordered the 5th battalion to the CAR.²⁴⁸ Thus the Chamber finds that the first three sentences in paragraph 71 do not exceed the scope of the charges.

149. The defence also alleges that in paragraph 71 the prosecution mischaracterises the Pre-Trial Chamber's findings relating to Mr Bemba's visit to Bangui.²⁴⁹ The relevant sentences allege that:

During the operations, Bemba, while in military uniform ("*tenue de combat*"), visited PK 12 in Bangui where his commanders and troops assembled to meet their Commander-in-Chief. Bemba was accompanied by other high ranking members of the MLC military. Bemba talked to his troops about discipline and informed them that he would personally respond to disciplinary infractions.²⁵⁰

The Pre-Trial Chamber relied on the following evidence in the Confirmation Decision regarding Mr Bemba's trip to Bangui:

The Chamber also recalls that several witness statements, coupled with two summary statements, revealed that Mr Jean-Pierre Bemba, along with senior MLC commanders, travelled to Bangui in November 2002 to address his troops. In particular, witness 31 stated that Mr Jean-Pierre Bemba learned about the crimes committed by the MLC soldiers, and accordingly suspended two commanders who were suspected of pillaging. Furthermore, according to witness 40, during his visit, Mr Jean-Pierre Bemba cautioned members of his army against any misconduct and stated that "the one who [...] make mistakes, [...] will respond [...] to his mistakes".²⁵¹

²⁴⁷ ICC-01/05-01/08-424, paragraph 465.

²⁴⁸ ICC-01/05-01/08-424, paragraph 242.

²⁴⁹ ICC-01/05-01/08-694, paragraph 100.

²⁵⁰ ICC-01/05-01/08-593-Anx-Red, paragraph 71.

²⁵¹ ICC-01/05-01/08-424, paragraph 471.

150. The Chamber considers that following a comparison of the allegation in the Second Amended DCC with the evidence relied on in the Confirmation Decision, the description of Mr Bemba's trip to Bangui is within the scope of the facts and circumstances relied on by the Pre-Trial Chamber.

151. The defence suggests that the interpretation of paragraph 477 of the Confirmation Decision in paragraph 72 of the Second Amended DCC is "extremely misleading, if not malicious", and objects to the entirety of that paragraph.²⁵² The paragraph alleges that "[p]rior to the MLC withdrawal, Bemba signed a communiqué announcing that MLC troops would leave the CAR by 15 March 2003. [The Commander of Operations] executed this withdrawal according to Bemba's instructions."²⁵³

152. In the Confirmation Decision, the Pre-Trial Chamber stated as follows:

The Chamber also notes that, by the 13 January 2003, Mr Jean-Pierre Bemba was advised by the MLC Secretary General to withdraw his troops from the CAR. Mr Jean-Pierre Bemba then signed a joint communiqué with Mr Ange-Félix Patassé, on mid-January 2003, announcing the gradual withdrawal of the MLC troops from the CAR starting in mid-February 2003. Consequently, Mr Jean-Pierre Bemba issued an order to this effect to his Commander of Operations in the CAR in mid-February 2003. The order was complied with immediately and the troops took approximately one month to complete the withdrawal on 15 March 2003.²⁵⁴

In light of the evidence relied on by the Pre-Trial Chamber, the Chamber finds that the allegations contained in paragraph 72 are within the scope of the charges, save that the date of 15 March 2003 should be replaced by "gradually starting in mid-February 2003" properly to reflect the Decision confirming the charges.

153. The defence objects to the majority of paragraph 73.²⁵⁵

²⁵² ICC-01/05-01/08-694, paragraph 101.

²⁵³ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 72.

²⁵⁴ ICC-01/05-01/08-424, paragraph 499.

²⁵⁵ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 73.

154. The Pre-Trial Chamber noted that the prosecution and the defence disagree as to whether Mr Bemba was in direct contact with the MLC Commander of Operations in the CAR.²⁵⁶ The Chamber found that “in compliance with the hierarchical structure of the MLC, the MLC Commander of Operations in the CAR contacted the Chief of Staff of the MLC, who in turn reported to Mr Bemba, the Commander-in-Chief of the MLC.²⁵⁷ The Chamber also noted that “the MLC Commander of Operations in the CAR referred to his hierarchy in Gbadolite for disciplinary matters, logistical purposes, and for manpower reinforcements”.²⁵⁸ The Pre-Trial Chamber found that “the MLC Commander of Operations was contacted at least once” by Mr Bemba,²⁵⁹ and that throughout the 2002 – 2003 intervention, Mr Bemba had the ability to contact his Commander of Operations in the CAR.²⁶⁰ In light of these findings by the Pre-Trial Chamber, the Chamber is of the view that the allegation in the first sentence of paragraph 73 is within the scope of the facts and circumstances relied on by the Pre-Trial Chamber in confirming the charges.

155. The second sentence in paragraph 73 states that the authority of Mr Patassé and the CAR government “neither excluded nor diminished Bemba’s effective command and control over his troops” which “was maintained throughout the period relevant to the charges – Bemba gave orders, his subordinates obeyed.” As discussed above, the Pre-Trial Chamber determined that Mr Bemba had effective authority and control over MLC troops throughout the time-period relevant to the charges.²⁶¹ Thus, in keeping with the finding in paragraph 117 above, the Chamber instructs the prosecution to delete the reference to “effective command” from paragraph 73, but otherwise the remainder of this sentence is within the scope of the charges.

²⁵⁶ ICC-01/05-01/08-424, paragraph 473.

²⁵⁷ ICC-01/05-01/08-424, paragraph 475.

²⁵⁸ ICC-01/05-01/08-424, paragraph 476.

²⁵⁹ ICC-01/05-01/08-424, paragraph 474.

²⁶⁰ ICC-01/05-01/08-424, paragraph 488.

²⁶¹ ICC-01/05-01/08-424, paragraph 446.

K. Crimes were committed as a result of Mr Bemba's failure to exercise control properly over MLC troops (paragraphs 74 – 78)

Alleged Breach: Inconsistency with the charges confirmed against the accused and/or facts are not contained in the Confirmation Decision²⁶²

156. The defence objects to the entirety of paragraph 74.²⁶³ However, the Chamber considers that this paragraph does not contain any allegations but instead it explains that the evidence discussed in paragraphs 101 to 110 is incorporated in this section of the Second Amended DCC.

157. The defence objects to the majority of paragraph 75, but does not dispute the contention that MLC troops continued to commit crimes after Mr Bemba visited them and spoke about discipline.²⁶⁴ In the same sentence, however, the defence contends that the word “looting” should be replaced with “pillage”, a suggestion the Chamber dismisses, as the Confirmation Decision refers to “looting” and “pillage”.²⁶⁵

158. The first sentence in paragraph 75 alleges that Mr Bemba “failed to issue clear and effective orders to ensure that the crimes were not committed by the MLC troops prior to, as well as during, the 2002-2003 operation in CAR.” As discussed above, the Confirmation Decision does not rely on evidence concerning the behaviour of MLC troops prior to the period relevant to the charges; therefore, the reference to crimes committed by MLC troops prior to the 2002 – 2003 operation in CAR exceeds the scope of the charges. The Chamber instructs the prosecution to remove this reference from paragraph 75, but the remainder of the sentence is within the scope of the charges.

²⁶² ICC-01/05-01/08-694, paragraphs 103 – 109.

²⁶³ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 74.

²⁶⁴ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 75.

²⁶⁵ ICC-01/05-01/08-424, paragraph 115.

159. The final two sentences of paragraph 75 allege that “[...] MLC troops further committed serious acts of violence in Damara, Bossembélé, Bozoum, Bossangoa and Mongoumba” and that MLC troops continued committing crimes until the moment of their withdrawal. The Pre-Trial Chamber relied on evidence of murder and rape committed in Damara, Bossembélé, Bozoum, Bossangoa and Mongoumba after Mr Bemba’s visit to address his troops in November 2002.²⁶⁶ The Pre-Trial Chamber also relied on evidence that war crimes and crimes against humanity were committed by MLC troops from on or about 26 October 2002 until the withdrawal of the troops on 15 March 2003.²⁶⁷ Thus, the prosecution’s allegations in the last two sentences of paragraph 75 are within the scope of the charges.
160. The defence objects to the entirety of paragraph 76, contending that it takes into account allegations that had formed part of the prosecution’s case under Article 25, which the Chamber declined to confirm.²⁶⁸
161. The second sentence of paragraph 76 alleges facts concerning the behaviour of MLC troops during military operations prior to the 2002 – 2003 intervention in the CAR. In keeping with the finding in paragraph 73 above, the Chamber finds that this sentence exceeds the scope of charges, and instructs the prosecution to remove it. As to the first, third and fourth sentences of paragraph 76, the Chamber considers that these assertions are matters of evidential detail rather than providing additional facts to support the charges, and therefore they do not constitute a modification to, or exceed the scope of, the charges.

²⁶⁶ ICC-01/05-01/08-424, paragraphs 486, 489, 495 and 496.

²⁶⁷ ICC-01/05-01/08-424, paragraphs 101 and 282.

²⁶⁸ ICC-01/05-01/08-694, paragraph 106.

162. The fifth sentence of paragraph 76 alleges that Mr Bemba “encouraged this sense of impunity by his failure to discipline MLC troops appropriately”. The Chamber observes that this sentence alleges that it was Mr Bemba’s failure to act, rather than an affirmative act on his part, that contributed to the environment of impunity, as alleged. Accordingly, the Chamber finds that this assertion is within the scope of the facts and circumstances relied on in support of the charges confirmed by the Pre-Trial Chamber.
163. The final two sentences of paragraph 76 allege that “[t]he absence of a salary for MLC troops was a factor that further fuelled the commission of crimes against civilians. A benefit of their mandate was their ability to loot”.²⁶⁹ In rejecting the mode of responsibility under Article 25(3)(a), the Pre-Trial Chamber concluded that “the argument of deploying ‘unpaid’ troops under same or similar circumstances [was] neither sound nor supported by the case file”, and held that it did not accept the link between the use of unpaid troops and the commission of the war crimes and crimes against humanity of murder and rape. The Chamber concluded that “[a]lthough a connection may be drawn between sending ‘unpaid’ troops and the commission of the war crime of pillaging, the evidence before the Chamber does not support such a finding in the present case.”²⁷⁰ Although the Pre-Trial Chamber concluded that the *past* use of unpaid soldiers could not support charges under Article 25(3)(a), the allegation in paragraph 76 is narrower, namely that the absence of a salary for MLC troops was a factor contributing to the commission of crimes. In these circumstances, the Chamber considers that the allegation contained in the sixth sentence of paragraph 76 does not exceed the scope of the charges. However, as to the last sentence, which suggests that MLC troops were authorised to loot, the Chamber finds that this allegation exceeds the scope of the charges and instructs the prosecution to remove it.

²⁶⁹ ICC-01/05-01/08-593-Anx-Red.

²⁷⁰ ICC-01/05-01/08-424, paragraph 378.

164. The defence objects to the entirety of paragraph 77, save for the allegation that the MLC code of conduct was written in French and had to be translated orally to the MLC soldiers in Lingala.²⁷¹ The defence alleges that the allegations in paragraph 77 improperly attempt to reformulate the case against Mr Bemba.²⁷² It further objects to the reference to the Geneva Conventions and the International Committee of the Red Cross commentary in this paragraph.²⁷³

165. Paragraph 77 makes a number of allegations concerning Mr Bemba's failure to ensure adequate training of the MLC troops in the rules of international humanitarian law concerning the protection of civilians. In considering responsibility under Article 28, the Pre-Trial Chamber in the Confirmation Decision found that "the MLC soldiers had been informed about the importance of respect for international humanitarian law and the code of conduct, which regulated the military discipline [...]".²⁷⁴ The Pre-Trial Chamber also observed that according to one witness, "the code of conduct was not distributed to all soldiers. Instead, political commissioners were there to popularize the code amongst soldiers".²⁷⁵

166. In light of the foregoing, the Chamber finds the prosecution's characterisation of the facts in paragraph 77 is misleading. The facts and circumstances relied on in the Confirmation Decision regarding training of MLC soldiers with respect to international humanitarian law and the code of conduct, as recounted above, do not support the allegations made by the prosecution. Thus, the prosecution is instructed to remove the entirety of paragraph 77

²⁷¹ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 77.

²⁷² ICC-01/05-01/08-694, paragraph 107.

²⁷³ ICC-01/05-01/08-694, paragraph 107.

²⁷⁴ ICC-01/05-01/08-424, paragraph 491

²⁷⁵ ICC-01/05-01/08-424, paragraph 492.

from the Second Amended DCC, or to reformulate it consistently with the facts contained in the Confirmation Decision.

167. In paragraph 78 it is alleged that “[a]s a result of the aforementioned Bemba failed to exercise control properly over the MLC troops which resulted in the commission of the crimes.” The defence objects to the entirety of paragraph 78, arguing that it is inconsistent with the Pre-Trial Chamber’s factual finding in paragraph 501, and suggests an alternative version.²⁷⁶

168. In the Confirmation Decision, the Pre-Trial Chamber held that no direct causal link needed to be established between the superior’s omission and the crime committed by his subordinates, and that it was sufficient for criminal responsibility under Article 28(a) that the commander’s omission increased the risk of the commission of the crimes charged.²⁷⁷ In paragraph 501, the Pre-Trial Chamber held that Mr Bemba’s “failure to fulfil his duties to prevent crimes increased the risk of their commission by the MLC troops in the CAR [...]”.²⁷⁸ The Chamber instructs the prosecution to amend paragraph 78 to reflect the precise finding of the Pre-Trial Chamber.

L. Mr Bemba knew or, owing to the circumstances at the time, should have known that MLC troops were committing or about to commit crimes (paragraphs 79 – 80)

*Alleged breach: Exceeding the scope of the confirmation decision*²⁷⁹

169. The defence objects to the inclusion of the “should have known” standard in the heading, arguing that this was not confirmed by the Pre-Trial Chamber as part of the charges against the accused.²⁸⁰ The Chamber has already analysed

²⁷⁶ ICC-01/05-01/08-694, paragraph 108 and ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 78.

²⁷⁷ ICC-01/05-01/08-424, paragraph 425.

²⁷⁸ ICC-01/05-01/08-424, paragraph 501.

²⁷⁹ ICC-01/05-01/08-694, paragraphs 110 – 114.

²⁸⁰ ICC-01/05-01/08-694, paragraphs 110 – 111 and ICC-01/05-01/08-694-Conf-Exp-AnxA, page 27.

this suggested standard (“should have known”) in paragraph 121 above, and concludes that it exceeds the scope of the charges. The paragraph is to be amended accordingly.

170. Paragraph 79 alleges that at all relevant times, Mr Bemba maintained *de jure* and *de facto* authority over the MLC forces, accepted his role as the *de jure* and *de facto* Commander-in-Chief, and made public statements acknowledging his control over MLC troops.²⁸¹ The defence objects to the entirety of the paragraph, arguing that the allegations bear no relation to the element of *mens rea* under Article 28 and it is contended that the Pre-Trial Chamber did not rely on these allegations when confirming the charges.²⁸²

171. The Chamber notes that the Pre-Trial Chamber relied on evidence that Mr Bemba made public statements acknowledging his control over MLC troops, such as when he visited troops in Bangui to caution them against misconduct and to warn that there would be consequences for mistakes.²⁸³ Further, as discussed above, the Pre-Trial Chamber found that Mr Bemba maintained *de jure* and *de facto* authority over MLC forces at all relevant times.²⁸⁴ Thus, the Chamber finds that the allegations in paragraph 79 are within the scope of the charges confirmed against the accused.

172. The defence objects to the entirety of paragraph 80, arguing that the inclusion of allegations based on the “should have known” standard exceed the scope of the charges as confirmed by the Pre-Trial Chamber.²⁸⁵ In keeping with the analysis in paragraph 121 above the Chamber finds that the reference to this standard exceeds the scope of the charges, and the paragraph is to be amended accordingly. Further, in the view of the Chamber, the addition of

²⁸¹ ICC-01/05-01/08-593-Anx-Red.

²⁸² ICC-01/05-01/08-694, paragraph 112.

²⁸³ ICC-01/05-01/08-424, paragraph 471.

²⁸⁴ ICC-01/05-01/08-424, paragraph 466.

²⁸⁵ ICC-01/05-01/08-694, paragraph 113.

the word “including” before the crimes “rape, looting and murder” in paragraph 80 expands the allegation beyond the scope of the charges. Accordingly, the Chamber instructs the prosecution to remove the word “including” from paragraph 80.

M. Mr Bemba received regular reports of MLC activities in the CAR (paragraphs 81 – 88)

***Alleged Breach: Exceeding the scope of the confirmation decision.*²⁸⁶**

173. The defence objects to the heading of this section and argues that this portion of the Second Amended DCC misconstrues the finding made by the Pre-Trial Chamber in paragraph 397 of the Confirmation Decision.²⁸⁷ In paragraph 397, the Pre-Trial Chamber held that, based on the evidence, it could not infer that Mr Bemba received information through Mr Patassé about the commission of crimes by MLC troops.²⁸⁸ The defence further alleges that there is no finding in the Confirmation Decision to suggest that Mr Bemba received regular reports of MLC activities in the CAR, and cites paragraph 488 of the Confirmation Decision as support for its position.²⁸⁹

174. As an initial matter, the Chamber observes that the heading merely refers to Mr Bemba’s receipt of “regular reports” and does not specify their source, nor the nature of the “MLC activities”. The Pre-Trial Chamber in the Confirmation Decision relied on evidence that Mr Bemba discussed on a daily basis the events that occurred in the CAR as they were broadcast, and in this context the Pre-Trial Chamber also noted the availability of an established reporting system within the MLC.²⁹⁰ Thus, the Chamber finds that the heading of this section conforms with the charges.

²⁸⁶ ICC-01/05-01/08-694, paragraphs 115 – 122.

²⁸⁷ ICC-01/05-01/08-694, paragraph 115.

²⁸⁸ ICC-01/05-01/08-424, paragraph 397.

²⁸⁹ ICC-01/05-01/08-694, paragraph 116.

²⁹⁰ ICC-01/05-01/08-424, paragraphs 487 – 488.

175. The defence objects to all but the first sentence of paragraph 81, and suggests replacing the phrase “the 2002 – 2003 CAR conflict” in that sentence with the words “the five-month period intervention in CAR.”²⁹¹ The Chamber declines to implement the defence suggestion as the word “conflict” was used in the Confirmation Decision to refer to the five-month period of hostilities.²⁹²
176. The remainder of paragraph 81 alleges that Mr Bemba’s knowledge of the crimes in the CAR “is reflected both in the content of his public statements and private meetings during the relevant timeframe” and that Mr Bemba “announced on RFI that he knew that serious crimes were perpetrated by his MLC troops against the CAR civilian population and that he was prepared to punish them”.²⁹³ The defence claims that the latter allegation wrongly introduces evidence that the prosecution wishes to use at trial and mischaracterises the Pre-Trial Chamber’s finding in paragraph 470 of the Confirmation Decision.²⁹⁴
177. The Chamber finds that the allegation in paragraph 81 concerning the content of Mr Bemba’s public statements and private meetings is within the scope of the facts and circumstances confirmed by the Pre-Trial Chamber.²⁹⁵ With respect to the assertion concerning Mr Bemba’s announcement on *Radio France Internationale* (RFI), the Chamber notes that the Pre-Trial Chamber relied on the following evidence in paragraph 470 of the Confirmation Decision:

Moreover, RFI reported that during a telephone conversation they had had with Mr Jean-Pierre Bemba, he told them that if his men had committed "atrocities, they

²⁹¹ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 81.

²⁹² ICC-01/05-01/08-424, paragraph 255.

²⁹³ ICC-01/05-01/08-593-Anx-Red, paragraph 81.

²⁹⁴ ICC-01/05-01/08-694, paragraph 117.

²⁹⁵ ICC-01/05-01/08-424, paragraphs 486 – 489.

would [have been] arrested and undergo[ne] trial under their Movement's military laws".²⁹⁶

The prosecution's characterisation of this report misrepresents the finding of the Pre-Trial Chamber, insofar as it alleges that Mr Bemba personally made an announcement on RFI, indicating that he knew that serious crimes had been committed by his troops against the CAR civilian population. Consequently, the Chamber instructs the prosecution to amend this section of paragraph 81 of the Seconded Amended DCC to reflect accurately the precise factual findings contained in the Confirmation Decision.

178. The defence objects to a number of statements in paragraph 82, which alleges facts concerning Mr Bemba's knowledge of the crimes committed by MLC troops in the CAR.²⁹⁷ In the first and second sentences, the defence objects to the phrases "were committing" and "while they were happening" which imply that Mr Bemba was informed of the crimes as they occurred.²⁹⁸ The defence alleges that there is no finding in the Confirmation Decision to the effect that Mr Bemba learned of the crimes as they were being committed.

179. However, in the Confirmation Decision the Pre-Trial Chamber relied on evidence, *inter alia*, that Mr Bemba received and discussed daily media reports concerning the events in the CAR, that there existed effective means of communications and an established reporting system within the MLC, that throughout the 2002-2003 intervention Mr Bemba had the means directly to contact commanders in the field, and that he contacted these commanders.²⁹⁹ The Pre-Trial Chamber concluded that the evidence clearly indicated that "Mr Bemba was aware of the occurrence of these crimes as of the beginning of the operations and throughout the entire period of intervention".³⁰⁰ Thus, the

²⁹⁶ ICC-01/05-01/08-424, paragraph 470.

²⁹⁷ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 82.

²⁹⁸ ICC-01/05-01/08-694, paragraph 119.

²⁹⁹ ICC-01/05-01/08-424, paragraphs 486 – 488.

³⁰⁰ ICC-01/05-01/08-424, paragraph 489.

Chamber finds that the first and second sentences of paragraph 82 of the Second Amended DCC accurately reflect the Pre-Trial Chamber's findings and do not require amendment.

180. The defence objects to the third and fourth sentences of paragraph 82, which allege that commanders, MLC political advisors, and MLC intelligence and security advisors all informed Mr Bemba about the crimes committed by MLC troops.³⁰¹ The Chamber observes that the Pre-Trial Chamber relied on evidence that MLC commanders, political advisors, and intelligence advisors all reported the crimes to Mr Bemba,³⁰² and accordingly the Chamber finds that the allegations in this passage are consistent with the facts relied upon by the Pre-Trial Chamber. The Chamber notes that the allegation in the fifth sentence of paragraph 82 that MLC members told the Chief of Staff about cases of theft, rape, pillaging and murder is not specifically referred to in the Confirmation Decision. However, in light of the Chief of Staff's responsibility for coordinating the activities of the troops,³⁰³ and given the Pre-Trial Chamber's finding that Mr Bemba had actual knowledge of the crimes committed by MLC troops, the Chamber finds that the allegation that the Chief of Staff was informed about the crimes is within the scope of the charges.

181. The defence further objects to the last sentence of paragraph 82, which states that "Bemba was also in contact with journalists who brought to his attention the abuses committed by troops in the CAR".³⁰⁴ The Confirmation Decision referred to a conversation between a journalist and Mr Bemba regarding crimes committed by MLC troops in the CAR,³⁰⁵ and thus the Chamber finds that this allegation in paragraph 82 does not exceed the scope of the charges.

³⁰¹ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 82.

³⁰² ICC-01/05-01/08-424, paragraphs 487 – 489.

³⁰³ ICC-01/05-01/08-424, paragraph 454.

³⁰⁴ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 82.

³⁰⁵ ICC-01/05-01/08-424, paragraph 470 and footnote 650.

182. The defence objects to paragraph 83, alleging that it contains a number of inaccurate reformulations of the Pre-Trial Chamber's findings and that the prosecution has inappropriately presented evidence that it intends to rely on at trial to establish the facts confirmed by the Chamber.³⁰⁶
183. The first sentence of paragraph 83 alleges that the crimes committed were "so widespread throughout the CAR during the relevant timeframe" that they were covered extensively by the international media. The defence suggests a reformulation of this sentence, which the Chamber finds is unnecessary, given the allegation in its original form is within the scope of the evidence relied on by the Pre-Trial Chamber.³⁰⁷ The defence does not object to the second sentence of paragraph 83, but suggests the substitution of the word "read" for the word "monitored" in the third sentence of paragraph 83.³⁰⁸ The Chamber finds that this substitution is also unnecessary. The fourth sentence of paragraph 83, which the defence objects to in full, sets out that "[j]ournalists told Mr Bemba about the abuses perpetrated by MLC troops in the CAR, and the proceeds of the looting were carried away by MLC soldiers in front of MLC and CAR commanders".
184. The Chamber has already determined, in paragraph 181 above, that there is a reference in the Confirmation Decision to journalists personally telling Mr Bemba about crimes committed by MLC troops. With respect to the allegations concerning pillaging within the sight of MLC and CAR commanders, the Pre-Trial Chamber relied on evidence of large-scale pillaging by MLC troops, who allegedly carried the goods away in full view of a number of witnesses.³⁰⁹ In light of the evidence relied on by the Pre-Trial

³⁰⁶ ICC-01/05-01/08-694, paragraph 118.

³⁰⁷ ICC-01/05-01/08-424, paragraph 486.

³⁰⁸ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 83.

³⁰⁹ ICC-01/05-01/08-424, paragraphs 322 – 335 and 494.

Chamber, the Chamber finds that this allegation is within the scope of the facts and circumstances relied on by the Pre-Trial Chamber in support of the charges relating to pillaging. The final sentence of paragraph 83 alleges that “Bemba possessed an item looted in the 2002 intervention”.³¹⁰ However, the Pre-Trial Chamber declined to rely on this allegation in the Confirmation Decision,³¹¹ and thus the Chamber instructs the prosecution to remove it from paragraph 83 of the Seconded Amended DCC.

185. Paragraph 84 alleges that Mr Bemba and other MLC commanders were specifically informed of the crimes committed against the civilian population in PK 12 and that Mr Bemba acknowledged to the local population that he was informed of pillaging and stated that abuses were unavoidable.³¹² The defence objects to the entirety of this paragraph and suggests that it has been unable to identify any finding in the Confirmation Decision to support the assertions made in this paragraph.³¹³

186. As to the first sentence of paragraph 84, although there is no specific reference in the Confirmation Decision to direct notification to Mr Bemba concerning the crimes committed in PK 12, the Chamber finds that this allegation is within the scope of the facts and circumstances relied upon to confirm the charges against the accused, namely the finding that MLC troops committed crimes in PK 12 and that Mr Bemba received ongoing reports of the crimes committed by MLC troops.³¹⁴ With regard to notification to MLC commanders, this evidence was contained *inter alia* in the statement of Witness 38, relied on by the Pre-Trial Chamber in its finding that Mr Bemba knew that MLC troops were committing or were about to commit crimes.³¹⁵

³¹⁰ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 83.

³¹¹ ICC-01/05-01/08-424, paragraphs 383 – 386.

³¹² ICC-01/05-01/08-593, paragraph 84.

³¹³ ICC-01/05-01/08-694, paragraph 120.

³¹⁴ ICC-01/05-01/08-424, paragraphs 98, 101, 108, 117, 333 and 485 – 489.

³¹⁵ ICC-01/05-01/08-424, paragraph 485.

187. As to the second sentence concerning Mr Bemba's alleged statement to the population of PK 12 that abuses were unavoidable, the Confirmation Decision does not contain this allegation but instead it is set out that the MLC Commander of Operations in the CAR gave a speech to the local population after Mr Bemba's visit in PK 12 excusing the troops' misconduct.³¹⁶ Accordingly, the Chamber instructs the prosecution to amend this allegation to reflect the precise factual finding of the Pre-Trial Chamber.

188. It is stated in the last sentence of paragraph 84 that there were radio broadcasts concerning the PK 12 lootings. Although these broadcasts are not specifically referred to in the Confirmation Decision, the Pre-Trial Chamber relied on evidence of pillaging in PK 12³¹⁷ and also found that throughout the approximately five-month period of the MLC intervention in the CAR, acts of murder, rape, and pillaging were regularly reported by international media, including radio broadcasts.³¹⁸ Therefore, the Chamber finds that the allegation in the last sentence of paragraph 84 falls within the scope of the facts and circumstances confirmed by the Pre-Trial Chamber.

189. Paragraph 85 sets out various allegations concerning Mr Bemba's contact with his field commanders and the functioning of the MLC reporting system.³¹⁹ The defence objects to the entirety of this paragraph, claiming that it misrepresents the nature and scope of the Pre-Trial Chamber's findings in paragraph 488 of the Confirmation Decision, and appears to describe a finding that the Chamber did not reach.³²⁰

190. The Pre-Trial Chamber relied on evidence of the MLC reporting system, which allegedly allowed Mr Bemba to receive daily information in the form of

³¹⁶ ICC-01/05-01/08-424, paragraph 485.

³¹⁷ ICC-01/05-01/08-424, paragraphs 324 – 325, 327 – 328 and 333.

³¹⁸ ICC-01/05-01/08-424, paragraph 486.

³¹⁹ ICC-01/05-01/08-593-Anx-Red, paragraph 85.

³²⁰ ICC-01/05-01/08-694, paragraph 121.

oral or written reports, to monitor military operations conducted by the MLC, to transmit orders, and to contact his field commanders directly.³²¹ The Confirmation Decision further states that the Chief of Staff reported to Mr Bemba.³²² Thus, the Chamber finds that with one exception, discussed directly below, the allegations in paragraph 85 of the Second Amended DCC are within the scope of the Pre-Trial Chamber's findings in the Confirmation Decision.

191. With regard to the allegation in paragraph 85 that the Commander of Operations reported directly to Mr Bemba, the Pre-Trial conducted a careful review of the evidence as a whole and determined that, whilst Mr Bemba had the ability to contact his Commander of Operations in the CAR and indeed did so at least once in February 2003, the Commander of Operations was still in contact with the hierarchy in Gbadolite during the 2002 – 2003 intervention.³²³ The Pre-Trial Chamber further relied on evidence that the Commander of Operations reported to the Chief of Staff, who in turn reported to the Commander-in-Chief.³²⁴ However, the Pre-Trial Chamber also found that “although article 16 of the MLC Statute stated that the Chief of Staff is entrusted with the implementation of the Commander-in-Chief's orders, witnesses 33, 36, 44, 45, and 65 state that Mr Jean-Pierre Bemba bypassed him and directly contacted commanders in the field and issued orders.”³²⁵ In addition, the Pre-Trial Chamber relied on the statement of another witness that the Commander of Operations was in direct contact with Mr Bemba.³²⁶ Accordingly, the Chamber finds that the allegations in paragraph 85 are within the scope of the charges as confirmed.

³²¹ ICC-01/05-01/08-424, paragraphs 459 and 488.

³²² ICC-01/05-01/08-424, paragraph 454.

³²³ ICC-01/05-01/08-424, paragraphs 472, 474, 476 and 488.

³²⁴ ICC-01/05-01/08-424, paragraph 475.

³²⁵ ICC-01/05-01/08-424, paragraph 459.

³²⁶ ICC-01/05-01/08-424, paragraph 474, footnote 663.

192. The defence objects to virtually all of paragraph 86, which sets out allegations relating to the MLC's transmission centre and communications equipment.³²⁷ In the submission of the defence, this paragraph makes allegations not confirmed by the Pre-Trial Chamber.³²⁸
193. In considering the authority of the accused to issue orders, the Pre-Trial Chamber relied on specific evidence relating to the types of equipment used by Mr Bemba and the MLC Commanders.³²⁹ Thus, the Chamber finds that the allegations contained in paragraph 86 refer to the facts and circumstances underlying the charges confirmed by the Pre-Trial Chamber.
194. The first sentence of paragraph 87 alleges that Mr Bemba made several trips to the CAR during the conflict period to meet with MLC commanders and troops.³³⁰ The defence objects to this characterisation, suggesting that it should be amended to state that Mr Bemba went to Bangui in November 2002 and met with MLC troops.³³¹ The defence further objects to the prosecution's allegations in the same paragraph that during this visit, Mr Bemba addressed his troops with respect to the crimes they had committed and that at Begoa school, the local population complained to him about abuses committed by his troops.³³²
195. The Pre-Trial Chamber found that Mr Bemba travelled to the CAR "at least once" during the relevant period, when he made a trip to Bangui in November 2002 to address MLC troops.³³³ The Chamber concludes that the formulation "at least once" should be used in the Second Amended DCC rather than the present wording, and this is to be amended. The Pre-Trial

³²⁷ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 86.

³²⁸ ICC-01/05-01/08-694, paragraph 121.

³²⁹ ICC-01/05-01/08-424, paragraphs 458 – 459.

³³⁰ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 87.

³³¹ ICC-01/05-01/08-694, paragraph 121 and ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 87.

³³² ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 87.

³³³ ICC-01/05-01/08-424, paragraph 485.

Chamber relied on evidence that during his November trip, Mr Bemba made a speech cautioning his troops against misconduct and suspended two commanders suspected of pillaging.³³⁴ In light of this finding, the Chamber considers that the second sentence of paragraph 87 is within the scope of the charges.

196. The last sentence of paragraph 87 alleges that during a particular visit the local population complained to Mr Bemba about abuses committed by his troops. Although the Pre-Trial Chamber relied on the statements of witnesses that Mr Bemba visited Begoa school in PK 12, and it observed that complaints were made by the local population,³³⁵ there is no finding in the Confirmation Decision that Mr Bemba was personally approached at the school or that he received these complaints. Therefore, the Chamber finds that the last sentence of paragraph 87 exceeds the facts and circumstances relied on by the Pre-Trial Chamber in confirming the charges and instructs the prosecution to remove it from the Second Amended DCC or to amend it to conform with the Confirmation Decision.

197. Paragraph 88 contains assertions concerning Mr Bemba's knowledge of the crimes, given his alleged "constant communication" with Mr Patassé; including the suggestion that Mr Patassé routinely ordered field missions, that he was informed by his subordinates of crimes committed by MLC troops, and that one of Mr Patassé's Cabinet members informed him that he was a victim of looting.³³⁶ The defence submits that this paragraph forms a part of the prosecution's case under Article 25 which the Pre-Trial Chamber declined to confirm, and contends that the prosecution may not now attempt to rely on these allegations.³³⁷

³³⁴ ICC-01/05-01/08-424, paragraph 485.

³³⁵ ICC-01/05-01/08-424, paragraphs 180 and 485.

³³⁶ ICC-01/05-01/08-593-Anx-Red, paragraph 88.

³³⁷ ICC-01/05-01/08-694, paragraph 122.

198. The Pre-Trial Chamber considered the prosecution's allegation that Mr Bemba received information about the crimes as a result of his direct and regular contacts with Mr Patassé, and concluded that the evidence did not support such a finding and that the prosecutor's argument was thus "groundless".³³⁸ Therefore, the Chamber finds that paragraph 88 of the Second Amended DCC exceeds the scope of the charges confirmed by the Pre-Trial Chamber, and instructs the prosecution to remove this paragraph.

N. Mr Bemba had knowledge of the criminal conduct of his MLC troops from prior military operations (paragraphs 89 – 94)

Alleged breach: Exceeding the scope of the confirmation decision.³³⁹

199. The defence objects to the entirety of this section of the Second Amended DCC, which it argues attempts to revive allegations which were part of the prosecution's case under Article 25 and which the Pre-Trial Chamber declined to confirm.³⁴⁰

200. The heading of this section refers to the behaviour of MLC troops during prior military operations. The Chamber finds that this heading exceeds the scope of the charges as confirmed, since as rehearsed in paragraph 73 above the Pre-Trial Chamber declined to rely on the prosecution's allegations relating to Mr Bemba's knowledge of the past behaviour of MLC troops as proof of his *mens rea*. Accordingly this heading should be removed.

201. Paragraphs 89 – 91 and paragraph 94 allege that Mr Bemba's intention and knowledge regarding the crimes committed during the 2002-2003 intervention

³³⁸ ICC-01/05-01/08-424, paragraph 397.

³³⁹ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 123.

³⁴⁰ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 123.

in the CAR can be inferred from his knowledge of the behaviour of MLC troops during the 2001 CAR intervention and in Mambasa in 2002.

202. In the Confirmation Decision, the Pre-Trial Chamber considered the prosecution's evidence relating to the prior behaviour of MLC troops in the CAR in 2001 and in the DRC (Mambasa) in 2002 in the context of the charges brought against the accused under Article 25(3)(a) of the Statute, concluding that Mr Bemba's intent under Article 30 could not be generally inferred from the alleged past behaviour of MLC troops.³⁴¹ The Pre-Trial Chamber went on to decline to confirm the charges against the accused relating to Article 25(3)(a).³⁴² The Chamber therefore concludes that the assertions in paragraphs 89 – 91 and 94 of the Second Amended DCC, which allege that Mr Bemba had knowledge of MLC criminal conduct as a result of the prior behaviour of MLC troops, exceed the scope of the charges. This section is to be removed or appropriately amended.
203. Paragraphs 92 and 93 contain allegations relating to Mr Bemba's creation of a military tribunal in Gbadolite to address MLC crimes arising from Mambasa and the 2002 – 2003 intervention in the CAR. It is alleged that with respect to the punishment for the Mambasa crimes, "the sentences delivered were disproportionately low in relation to the crimes, and with respect to the crimes from the 2002 – 2003 intervention, only several low rank soldiers were tried for thefts, and these soldiers received light sentences and were later granted amnesty".
204. The Pre-Trial Chamber focussed on evidence concerning the military tribunal at Gbadolite, and further found that the punishments handed down for the crimes tried at Gbadolite were insufficient.³⁴³ The Chamber also considered

³⁴¹ ICC-01/05-01/08-424, paragraphs 372 – 396.

³⁴² ICC-01/05-01/08-424, paragraph 401.

³⁴³ ICC-01/05-01/08-424, paragraphs 495 - 496.

the prosecution's evidence in relation to the Mambasa crimes, namely that the soldiers received light sentences and were later pardoned,³⁴⁴ and although the Chamber declined to rely on this allegation as evidence of the past behaviour of MLC troops³⁴⁵, it explicitly relied on evidence that Mr Bemba "imposed disciplinary measures and took some other measures in relation to the alleged crimes committed by MLC troops during the 2001 intervention in the CAR and the 2002 attack".³⁴⁶ In light of these findings of the Pre-Trial Chamber, the Chamber finds that the allegations in paragraphs 92 and 93 are within the scope of the charges, insofar as they are being used to show Mr Bemba's power to prevent and repress the commission of crimes. However, in light of the finding in paragraph 200 above that the heading of the section exceeds the scope of the charges, the Chamber instructs the prosecution either to delete paragraphs 92 and 93 or to move them to an appropriate section of the Second Amended DCC.

O. Mr Bemba's mens rea inferred by his control over the military operations (paragraphs 95-96)

Alleged breach: Exceeding the scope of the charges.

205. The defence objects to the heading of the section for paragraphs 95 and 96, contending that these allegations do not form part of the case as confirmed by the Pre-Trial Chamber.³⁴⁷ Paragraph 95 asserts that Mr Bemba's *mens rea* can be inferred from statements allegedly made by MLC soldiers to the civilian population.

206. The heading states that Mr Bemba's *mens rea* can be inferred from his control over the military operation. The Chamber finds that there is no reference to

³⁴⁴ ICC-01/05-01/08-424, paragraph 376.

³⁴⁵ ICC-01/05-01/08-424, paragraph 377.

³⁴⁶ ICC-01/05-01/08-424, paragraph 464.

³⁴⁷ ICC-01/05-01/08-694, paragraphs 95 – 96.

this suggested inference in the Confirmation Decision, and accordingly the prosecution is to remove the heading.

207. The two statements referred to in paragraph 95 are excerpts taken from the summary statement of Witness 47, which were considered by the Pre-Trial Chamber in the Confirmation Decision.³⁴⁸ The Pre-Trial Chamber found that if the summary statement of Witness 47 was not corroborated by any other piece of evidence, it was not sufficient to be relied upon.³⁴⁹ The Pre-Trial Chamber further noted that, with regard to the first statement, there was no evidence that these statements were from Mr Bemba, were made in his presence or followed his instructions.³⁵⁰ With regard to the second statement, the Pre-Trial Chamber held that it

does not consider that the statement made by MLC soldiers meant *per se* that they were either explicitly or implicitly authorized by Mr Jean-Pierre Bemba to rape the civilian population during the 2002 – 2003 intervention in the CAR. Accordingly, the Chamber cannot infer that, in sending his troops to the CAR in 2002, Mr Jean-Pierre Bemba was aware that, in the ordinary course of events, the commission of rape would be the virtually certain consequence of his actions.³⁵¹

The prosecution now seeks to rely on the same evidence to support its allegations that these statements were made “in furtherance of the military concept of operation authorized by Bemba”.³⁵² The Chamber concludes that these assertions are not supported by the findings in the Confirmation Decision, and accordingly it instructs the prosecution to remove paragraph 95 from the Second Amended DCC.

208. Paragraph 96 alleges that “Bemba’s knowledge that the MLC troops were committing crimes is evident from his establishment of a military tribunal at Gbadolite to address both the MLC crimes in 2002 in Mambasa and the crimes

³⁴⁸ ICC-01/05-01/08-424, paragraphs 390, 391, 395, 396.

³⁴⁹ ICC-01/05-01/08-424, paragraph 396.

³⁵⁰ ICC-01/05-01/08-424, paragraphs 390 – 393.

³⁵¹ ICC-01/05-01/08-424, paragraph 396.

³⁵² ICC-01/05-01/08-593-Anx-Red, paragraph 95.

arising from the 2002-2003 operation. However, the trials conducted at Gbadolite were a sham, as outlined in paragraph 92.” The relevant part of paragraph 92 alleges that “[w]ith respect to the CAR 2002-2003 operation, only several low rank soldiers were tried for thefts. These soldiers received light sentences and were later granted amnesty”.

209. The Pre-Trial Chamber relied on evidence that Mr Bemba “imposed disciplinary measures and took some other measures in relation to the alleged crimes committed by MLC troops during the 2001 intervention in the CAR and the 2002 attack”.³⁵³ Although the Pre-Trial Chamber specifically declined to rely on evidence of the behaviour of MLC troops prior to the period relevant to the charges in order to prove intent of the accused as required under Article 25(3)(a), in the view of the Chamber, the reference to the military tribunal in the context of establishing knowledge for purposes of Article 28(a) does not exceed the scope of the charges. Consequently, the Chamber finds that the allegations in paragraph 96 are within the scope of the charges.

P. Conclusion: Mr Bemba had the requisite Mens Rea (paragraphs 97 – 100)
Alleged Breach: Exceeding the scope of the confirmation decision.

210. The defence objects to the entirety of paragraphs 97 – 99, with the exception of a portion of the first sentence of paragraph 97. It is argued that these paragraphs contain assertions with no basis in the Confirmation Decision and instead merely reflect the prosecution’s view of its evidence.³⁵⁴

211. The first sentence in paragraph 97 alleges that “MLC troops were allowed to commit crimes and operated with a sense of impunity in the CAR in an

³⁵³ ICC-01/05-01/08-424, paragraph 464.

³⁵⁴ ICC-01/05-01/08-694, paragraph 125.

environment of lawlessness created and perpetuated by Bemba". As regards the first sentence of paragraph 97, the Chamber finds that the allegation that MLC troops "were allowed" to commit crimes should be amended to reflect the precise findings of the Confirmation Decision, namely that Mr Bemba failed to prevent or repress crimes.

212. The second sentence of paragraph 97 contends that a contributing factor to this sense of impunity was Mr Bemba's use of unpaid troops, which provided a further incentive for the commission of crimes, including looting. Although the Pre-Trial Chamber concluded that the *past* use of unpaid soldiers could not support charges under Article 25(3)(a), the allegation in paragraph 97 is narrower, namely that the absence of a salary for MLC troops was a factor contributing to the sense of impunity. The Pre-Trial Chamber found sufficient evidence to establish substantial grounds to believe that Mr Bemba's failure to fulfil his duties to prevent crimes increased the risk of their commission by the MLC troops in the CAR. Therefore, the Chamber finds that the second sentence of paragraph 97 does not exceed the scope of the charges.

213. The first sentence of paragraph 98 alleges that Mr Bemba's failure to prosecute or punish crimes encouraged the sense of impunity with which the troops operated during the 2002 – 2003 conflict. The Chamber observes that this sentence alleges that it was Mr Bemba's failure to act, rather than an affirmative act on his part, that contributed to the environment of impunity, as alleged. Accordingly, the Chamber finds that this assertion is within the scope of the facts and circumstances relied on in support of the charges confirmed by the Pre-Trial Chamber, namely that Mr Bemba did not take reasonable or necessary preventive measures either to punish those responsible for crimes committed during the relevant time or to avoid their repetition.³⁵⁵

³⁵⁵ ICC-01/05-01/08-424, paragraph 496.

214. The second sentence of paragraph 98 alleges that “the proceeds of CAR looting were carried away by MLC troops in plain view of MLC and CAR commanders”. The Pre-Trial Chamber relied on evidence of large-scale pillaging by MLC troops, who allegedly carried the goods away in full view of a number of witnesses.³⁵⁶ In light of the evidence relied on by the Pre-Trial Chamber, the Chamber finds that this allegation is within the scope of the facts and circumstances relied on by the Pre-Trial Chamber in support of the charges relating to pillaging.

215. The third sentence of paragraph 98 alleges that “[v]ehicles that had been looted in the CAR were distributed by Bemba to the top MLC officials”.³⁵⁷ However, the Pre-Trial Chamber found that the prosecution’s evidence with respect to this allegation was insufficient, concluding that “the Prosecutor cannot reasonably base his demonstration of Mr Bemba’s intent to commit the crimes [...] on inconclusive statements which do not sufficiently support his allegation”.³⁵⁸ Thus, the Chamber finds that the third sentence of paragraph 98 is not supported by the factual allegations confirmed by the Pre-Trial Chamber, and it instructs the prosecution to remove this sentence from the Second Amended DCC. Whether it is permissible for the prosecution to introduce additional evidence to support the existing factual allegations will be resolved on a case-by-case basis, as necessary.

216. Paragraph 99 alleges that:

Given Bemba’s effective control over all MLC military operations, Bemba knew, or, owing to the circumstances at the time, should have known that his troops had committed or were about to commit the crimes charged for the purpose of terrorizing

³⁵⁶ ICC-01/05-01/08-424, paragraphs 322 – 335 and 494.

³⁵⁷ ICC-01/05-01/08-593-Anx-Red, paragraph 98.

³⁵⁸ ICC-01/05-01/08-424, paragraphs 383 – 386.

and punishing those elements of the CAR civilian population perceived as sympathising with Bozizé's forces.³⁵⁹

In reaching its finding that the attack perpetrated by MLC troops against the CAR civilian population was conducted pursuant to an organised policy, the Pre-Trial Chamber relied on evidence that MLC troops threatened civilians for hiding rebels in their houses and committed crimes against civilians considered as rebels.³⁶⁰ Further, as discussed in paragraph 121 above, the Chamber concludes that the inclusion of the "should have known" standard exceeds the scope of the charges confirmed against the accused. Thus, the allegations in paragraph 99 should be amended to this limited extent.

217. The defence objects to the whole of paragraph 100 and seeks to remove it in its entirety from the Second Amended DCC.³⁶¹ This paragraph alleges that:

The facts set out above indicate that at a minimum BEMBA received admonitory information indicating the likelihood of his troops' illegal acts. At the very least, BEMBA was put on notice of the above-mentioned crimes. Despite his proactive duty to remain apprised of the acts of his subordinates, BEMBA failed to initiate further inquiries although he had available means to do so. His response to that information was that he did not believe what the media were reporting and dismissed it merely as "French propaganda" and isolated cases.

218. On the basis of the evidence before it, the Pre-Trial Chamber found that Mr Bemba "actually knew about the occurrence of the crimes committed during the five-month period of intervention".³⁶² The Chamber considers that this finding does not exceed these particular allegations and therefore paragraph 100 does not exceed the scope of the charges.

³⁵⁹ ICC-01/05-01/08-593-Anx-Red, paragraph 99.

³⁶⁰ ICC-01/05-01/08-424, paragraphs 109 – 110.

³⁶¹ ICC-01/05-01/08-694, paragraphs 125 – 126 and ICC-01/05-01/08-694-Conf-Exp-AnxA, page 36.

³⁶² ICC-01/05-01/08-424, paragraph 489.

Q. Mr Bemba failed to take all necessary and reasonable measures within his power to prevent or repress the commission of the crimes or to submit the matter to the competent authorities for investigation and prosecution (paragraphs 101 – 110)

*Alleged Breach: Exceeding the scope of the Confirmation Decision*³⁶³

219. The defence alleges that these paragraphs contain numerous allegations which have no basis in the Confirmation Decision and that the prosecution has made submissions and drawn conclusions which amount to pleadings.³⁶⁴

220. The defence objects to part of the title of this section of the Second Amended DCC which states that “[Mr Bemba failed to] submit the matter to the competent authorities for investigation and prosecution.”³⁶⁵

221. As discussed above, the Pre-Trial Chamber specifically discussed the defence contention that Mr Bemba called upon the United Nations Secretary General Special Representative to open an international investigation into crimes committed in the CAR during the 2002 -2003 intervention. The Pre-Trial Chamber discussed the adequacy of this measure, concluding that it was neither necessary nor reasonable.³⁶⁶ In light of this finding by the Pre-Trial Chamber, the Trial Chamber considers that this reference to Mr Bemba’s failure to submit the crimes to the competent authorities is within the scope of the charges.

222. The defence objects to the whole of paragraph 101 and requests that it is deleted.³⁶⁷ The paragraph sets out the extent of the prosecution’s description of Mr Bemba’s role as “Commander in Chief and political leader of the MLC”.³⁶⁸ The defence submits that the Pre-Trial Chamber did not evaluate

³⁶³ ICC-01/05-01/08-694, paragraphs 127 and 129.

³⁶⁴ ICC-01/05-01/08-694, paragraph 127.

³⁶⁵ ICC-01/05-01/08-694-Conf-Exp-AnxA, page 35.

³⁶⁶ ICC-01/05-01/08-424, paragraphs 497 – 498.

³⁶⁷ ICC-01/05-01/08-694, paragraph 128.

³⁶⁸ ICC-01/05-01/08-694-Conf-Exp-AnxA, page 35.

any of these factors when considering Mr Bemba's alleged failure to take necessary and reasonable measures, and accordingly it is suggested they go beyond the scope of the Confirmation Decision.³⁶⁹

223. The Pre-Trial Chamber concluded in the Confirmation Decision that at all times relevant to the present case Mr Bemba served as the *de jure* Commander-in-Chief of the ALC and had *de facto* ultimate control of the MLC as its President.³⁷⁰ The Pre-Trial Chamber further noted that according to Article 12 of the MLC Statute, the President of the MLC is also the Commander-in-Chief of the ALC.³⁷¹ The Chamber considers that, in these circumstances, the description of Mr Bemba as "Commander in Chief and political leader of the MLC" in paragraph 101 needs to be altered, consistently with the Chamber's finding in paragraph 43 above, so that it reads "President of the MLC and Commander-in-Chief of the ALC".

224. The list of factors set out in paragraph 101, also objected to by the defence,³⁷² provide a number of examples of the powers allegedly available to Mr Bemba in his capacity as "Commander in Chief and political leader of the MLC" (which is to be altered as indicated above). These are said to include powers to:

- i. issue decrees, orders and instructions to provide special measures for troop discipline.
- ii. appoint, promote, demote and dismiss commanders within the MLC structure.
- iii. unilaterally arrest or detain his subordinates in relation to disciplinary matters.
- iv. request the competent authorities to initiate investigations into troop discipline.

³⁶⁹ ICC-01/05-01/08-694, paragraph 128.

³⁷⁰ ICC-01/05-01/08-424, paragraphs 455 and 457.

³⁷¹ ICC-01/05-01/08-424, paragraph 453.

³⁷² ICC-01/05-01/08-694, paragraph 128.

- v. recourse to the MLC Military Tribunal and Disciplinary Board to prosecute troops in relation to discipline.
- vi. ensure compliance with investigations and prosecutions.
- vii. grant amnesty.
- viii. define the objectives of military operations – i.e. could give direct orders to ensure the concept of operation did not involve the commission of crimes against the civilian population.³⁷³

225. The Trial Chamber considers that all of these allegations constitute facts that are included in the ambit of facts already confirmed by the Pre-Trial Chamber, namely that Mr Bemba, as President of the MLC and Commander-in-Chief of the ALC, had effective authority and control over his forces. Furthermore, at paragraph 417, the Pre-Trial Chamber made the following observations:

The Chamber takes the view that there are nonetheless several factors which may indicate the existence of a superior's position of authority and effective control. These factors may include: (i) the official position of the suspect; (ii) his power to issue or give orders; (iii) the capacity to ensure compliance with the orders issued (i.e., ensure that they would be executed); (iv) his position within the military structure and the actual tasks that he carried out; (v) the capacity to order forces or units under his command, whether under his immediate command or at a lower levels, to engage in hostilities; (vi) the capacity to re-subordinate units or make changes to command structure; (vii) the power to promote, replace, remove or discipline any member of the forces; and (viii) the authority to send forces where hostilities take place and withdraw them at any given moment.³⁷⁴

226. The Chamber has taken into account the context in which these factors are listed (“may include”), which suggests that they are non-exhaustive. The Chamber therefore finds that the factors listed in paragraph 101 come within the Confirmation Decision. Furthermore, they are matters of evidential detail rather than providing additional facts to support the charges, and therefore they do not constitute a modification to, or exceed the scope of, the charges.

³⁷³ ICC-01/05-01/08-694-Conf-Exp-AnxA, paragraph 101.

³⁷⁴ ICC-01/05-01/08-424, paragraph 417.

227. The defence objects to the use in paragraph 102 of the phrase “should have known” in the sentence beginning “Bemba knew or should have known that the MLC troops were committing or about to commit crimes listed in paragraphs 50 to 58”,³⁷⁵ and it is argued that the “should have known” standard “does not form part of the charges as confirmed by the Chamber”.³⁷⁶
228. As discussed at paragraph 121 above, the Chamber considers that the introduction of the element “should have known” exceeds the scope of the charges, as confirmed. Thus, the allegation in paragraph 102 that Bemba “should have known” of the crimes committed by MLC soldiers is to be amended.
229. The defence objects to the suggestion in paragraph 103 that Mr Bemba failed to “punish” guilty subordinates, as it is argued that “the Chamber took care to restrict its findings to an alleged failure to prevent and reprimand.”³⁷⁷ The defence also seeks to have the first two sentences of paragraph 103 removed:

Bemba’s degree of effective control was extensive. Thus, he had a wide scope and variety of necessary and reasonable measures at his disposal to address the crimes as described in paragraphs 50 to 55.

230. As stated in paragraph above, the Pre-Trial Chamber found that Mr Bemba had effective control. Although there is no description of this control as “extensive”, the Chamber considers that this is a reasonable inference to be drawn from the findings of the Pre-Trial Chamber in relation to this matter.³⁷⁸ In the Confirmation Decision, the Pre-Trial Chamber found sufficient evidence to establish substantial grounds to believe that Mr Bemba “failed to take all necessary and reasonable measures within his power to prevent or

³⁷⁵ ICC-01/05-01/08-694-Conf-Exp-AnxA, page 35.

³⁷⁶ ICC-01/05-01/08-694, paragraph 131.

³⁷⁷ ICC-01/05-01/08-694, paragraph 130.

³⁷⁸ ICC-01/05-01/08-424, paragraphs 446 – 477.

repress the commission by the MLC troops of [...] crimes against humanity”.³⁷⁹ It follows that the Pre-Trial Chamber considered that Mr Bemba did have “necessary and reasonable measures” at his disposal, and that he failed to use them to prevent the commission of further crimes. In addition, although the Pre-Trial Chamber does not refer to Mr Bemba having a “wide scope” or to a “variety” of measures at his disposal, the Chamber, as above, considers that this is a reasonable inference that can be drawn from paragraphs 490 to 501 of the Confirmation Decision.³⁸⁰

231. In relation to the defence contention that “the Chamber took care to restrict its findings to an alleged failure to prevent and reprimand”, the Chamber considers that the findings of the Pre-Trial Chamber were not restricted in this way. At paragraph 496 of the Confirmation Decision:

[. . .] the Chamber reiterates that Mr Jean-Pierre Bemba neither addressed his troops any further, nor [. . .] took the reasonable and necessary preventive measures to avoid the occurrence of future crimes or any repressive measures to **punish** those responsible from his troops after crimes were committed during the relevant time referred to in the Amended DCC.³⁸¹ (emphasis added)

232. Similarly, at paragraph 498, the Pre-Trial Chamber found:

Mr Jean-Pierre Bemba had the material ability to trigger internal investigations into the allegations at the time, as he had previously done during the first week of the 2002-2003 intervention in the CAR (although the measure was not proportionate). Yet, he failed to do so since the beginning of November 2002 throughout the remaining period of intervention.³⁸²

Therefore the Chamber considers that the relevant allegations contained within paragraph 103 of the Second Amended DCC are within the scope of the charges.

³⁷⁹ ICC-01/05-01/08-424, paragraph 490.

³⁸⁰ ICC-01/05-01/08-424, paragraphs 490 – 501.

³⁸¹ ICC-01/05-01/08-424, paragraph 496.

³⁸² ICC-01/05-01/08-424, paragraph 498.

233. The defence objects to the allegations contained within paragraph 104 of the Second Amended DCC, that, *inter alia*, the MLC troops were not adequately trained in humanitarian law.³⁸³
234. The Pre-Trial Chamber found that “the MLC soldiers had been informed about the importance of respect for international humanitarian law”,³⁸⁴ although it did not make any findings in relation to the adequacy of this information, or whether it was given due regard in terms of operational decision-making. Therefore, the Chamber considers that the second and third sentences of paragraph 104 of the Second Amended DCC exceed the scope of the charges and the prosecution is accordingly instructed to remove them, or to amend them consistently with the Confirmation Decision.
235. In relation to the final sentence of paragraph 104,³⁸⁵ the Chamber finds that in light of the Pre-Trial Chamber’s findings concerning Mr Bemba’s power to issue orders³⁸⁶ and the fact that he did not take the necessary preventative steps or repressive measures,³⁸⁷ the allegation that he “did not issue clear and efficient orders [during] the operation to ensure that no crimes would be committed by MLC troops” is thus within the scope of the charges confirmed by the Trial Chamber. However, the prosecution is instructed to remove the words “prior to” from the final sentence of paragraph 104, as this reference to past orders is not within the scope of the charges as confirmed.
236. The defence submits that paragraph 105 of the Second Amended DCC is an inaccurate summary of the Pre-Trial Chamber’s finding in paragraph 501 of the Confirmation Decision.³⁸⁸

³⁸³ ICC-01/05-01/08-694, paragraph 132 and ICC-01/05-01/08-694-Conf-Exp-AnxA, page 36.

³⁸⁴ ICC-01/05-01/08-424, paragraph 491.

³⁸⁵ ICC-01/05-01/08-694-Conf-Exp-AnxA, page 36.

³⁸⁶ ICC-01/05-01/08-424, paragraph 458.

³⁸⁷ ICC-01/05-01/08-424, paragraph 496.

³⁸⁸ ICC-01/05-01/08-694, paragraph 133 and ICC-01/05-01/08-694-Conf-Exp-AnxA, page 36.

237. The Chamber has considered paragraph 501 of the Confirmation Decision in its entirety.³⁸⁹ The Chamber finds that the difference between the language used in paragraph 105 of the Second Amended DCC and that used in paragraph 501 of the Confirmation Decision is superficial. The substance of the allegations remains essentially the same and the allegations are therefore within the scope of the charges.

238. The defence objects to the whole of paragraph 106 and seeks to remove it in its entirety from the Document Containing the Charges.³⁹⁰ The defence submits that this paragraph contains “allegations which do not form part of the charges and appear to constitute the Prosecution’s views or evaluation of the evidence.”³⁹¹

239. In the Confirmation Decision, the Pre-Trial Chamber found sufficient evidence to establish substantial grounds to believe that Mr Bemba “failed to take all necessary and reasonable measures within his power to prevent or repress the commission by the MLC troops of [...] crimes against humanity”.³⁹² In considering whether Mr Bemba took reasonable and necessary preventative measures, the Pre-Trial Chamber referred to a Judgment of the International Military Tribunal for the Far East which makes a distinction between “routine orders” and those orders “as will prevent thereafter the commission of war crimes”.³⁹³ The Chamber considers that it was therefore not outside of the scope of the Confirmation Decision for the prosecution to state in paragraph 106 of the Second Amended DCC that “Bemba failed to issue appropriate orders to repress the commission of the crimes”.³⁹⁴

³⁸⁹ ICC-01/05-01/08-424, paragraph 501.

³⁹⁰ ICC-01/05-01/08-694, paragraph 132 and ICC-01/05-01/08-694-Conf-Exp-AnxA, page 36.

³⁹¹ ICC-01/05-01/08-694, paragraph 132.

³⁹² ICC-01/05-01/08-424, paragraphs 490, 495, 496 and 501.

³⁹³ ICC-01/05-01/08-424, paragraph 496.

³⁹⁴ ICC-01/05-01/08-593-Anx-Red.

240. With the respect to the allegation in the second sentence of paragraph 106, which states that Mr Bemba did not discipline the battalion or brigade commanders in charge of the soldiers responsible for the crimes, the Pre-Trial Chamber held that Mr Bemba's warning to only 200 soldiers out of the two battalions in the field was insufficient.³⁹⁵ Accordingly this allegation falls within the scope of the charges as confirmed.

241. In relation to the prosecution's allegation in the final sentence of paragraph 106 of the Second Amended DCC that Mr Bemba "chose not to exercise his supreme authority and control to withdraw battalions or units to protect against further abuses", the Chamber considers that this does not accurately reflect the findings of the Pre-Trial Chamber. Paragraph 500 of the Confirmation Decision states:

In this regard, the Chamber has concerns about the time taken by Mr Jean-Pierre Bemba to decide to withdraw his troops from the CAR, knowing that crimes had been committed as early as the first weeks of the operations, which even led to the crimes continuing to be committed. It is apparent that the MLC troops could have been withdrawn at any stage during the intervention. However, despite the need felt by Mr Jean-Pierre Bemba in January 2003 to withdraw, essentially as a result of international pressure, he delayed giving the order for withdrawal for at least a month, thus inevitably failing to prevent the crimes that took place between mid January and mid February 2003.³⁹⁶

Considering the above, the Chamber finds that the last sentence of paragraph 106 exceeds the precise factual findings contained in the Confirmation Decision. The prosecution therefore orders the prosecution to remove this sentence, or to amend it to reflect precisely the Pre-Trial Chamber's finding that Mr Bemba delayed giving the order for withdrawal.

242. The defence objects to the whole of paragraph 107 and seeks to remove it in its entirety from the Second Amended DCC.³⁹⁷ The defence submits that this

³⁹⁵ ICC-01/05-01/08-424, paragraph 496.

³⁹⁶ ICC-01/05-01/08-424, paragraph 500.

³⁹⁷ ICC-01/05-01/08-694, paragraph 132 and ICC-01/05-01/08-694-Conf-Exp-AnxA, page 36.

paragraph contains “allegations which do not form part of the charges and appear to constitute the Prosecution’s views or evaluation of the evidence.”³⁹⁸

243. The first allegation that is contained in paragraph 107 is that Mr Bemba “created an environment of lawlessness” and “encouraged a sense of impunity”. In the Confirmation Decision, this allegation was rejected by the Pre-Trial Chamber in the following paragraphs:

387. At the Hearing, the Prosecutor argued that “despite [Mr Jean-Pierre Bemba's] full knowledge of the commission of crimes in 2001, he sent the MLC troops to the CAR in 2002 and placed them in a permissive environment with ‘*carte blanche*’, allowing them to rape, kill, torture and pillage with impunity”. On reviewing the evidence presented, the Chamber realises that the Prosecutor's assertion was based on a sole witness statement - namely witness 15. Although it is true that witness 15 mentioned the term “*carte blanche*”, the context in which the expression was used does not support the Prosecutor's inference that Mr Jean-Pierre Bemba had the requisite intent.

388. The Chamber is convinced that that expression was used to convey the witness's own assessment of the nature and extent of the MLC troops' mandate in the 2002-2003 intervention in the CAR, rather than reflecting any explicit or implicit authorisation on the part of Mr Jean-Pierre Bemba to target the CAR civilian population. The witness's assessment was only based on the “suppositions”, to quote his words, that troops being sent to a foreign country with the “sole mandate [...] to save a president under threat” would mean that they were authorised to do whatever it took to achieve their mandate. According to the witness, those troops “were probably guided by their limits alone and the boundaries of their conscience”. For him, this was a “*carte blanche*”.³⁹⁹

Thus, this allegation exceeds the scope of the charges and the first sentence is to be removed.

244. The second sentence of paragraph 107 alleges that Mr Bemba failed to discipline the troops appropriately and encouraged a sense of impunity. The Chamber observes that this sentence alleges that it was Mr Bemba’s failure to act, rather than an affirmative act on his part, that contributed to the environment of impunity, as alleged. Accordingly, the Chamber finds that

³⁹⁸ ICC-01/05-01/08-694, paragraph 132.

³⁹⁹ ICC-01/05-01/08-424, paragraphs 387 and 388.

this assertion is within the scope of the facts and circumstances relied on in support of the charges confirmed by the Pre-Trial Chamber.

245. The third sentence of paragraph 107 alleges that Mr Bemba detained the perpetrators of crimes “to placate the civilians just to later release and relocate them”. The Chamber finds that this is not a factual allegation confirmed by the Pre-Trial Chamber, and it exceeds the scope of the charges. Accordingly, the third sentence should be removed.
246. The fourth sentence of paragraph 107 alleges that the proceeds of looting in the CAR were carried away by MLC troops “in plain view of MLC and CAR commanders”. The Pre-Trial Chamber relied on evidence of large-scale pillaging by MLC troops, who allegedly carried the goods away in full view of a number of witnesses.⁴⁰⁰ In light of the evidence relied on by the Pre-Trial Chamber, the Chamber finds that this allegation is within the scope of the facts and circumstances relied on by the Pre-Trial Chamber in support of the charges relating to pillaging.
247. The fifth sentence contained in paragraph 107 relates to the alleged looting of MLC troops and alleges that Mr Bemba personally “possessed and distributed looted items”. Again, this allegation was explicitly rejected by the Pre-Trial Chamber:

383. At the Hearing, the Prosecutor argued that Mr Jean-Pierre Bemba possessed “cars that were pillaged in the Central African Republic” in 2001 and 2002. He contended that Mr Jean-Pierre Bemba's “culpability is not limited to possession” since he stored the pillaged vehicles “on his property” and distributed them to MLC members and that, accordingly, he knew of pillaging and intended it to take place in the 2002-2003 intervention in the CAR.

384. The Chamber considers that the Prosecutor's arguments to prove Mr Jean-Pierre Bemba's intent are again based on the idea of past events. The Chamber has underlined in relation to the previous point that past conduct is not a sufficient factor

⁴⁰⁰ ICC-01/05-01/08-424, paragraphs 322 – 335 and 494.

to rely upon in order to infer the suspect's intent within the meaning of article 30 of the Statute. In particular, the Chamber finds it difficult to accept the argument put forth by the Prosecutor that because Mr Jean-Pierre Bemba possessed an allegedly pillaged vehicle from the 2001 intervention in the CAR, he must have intended that the crime of pillaging would occur with certainty as a consequence of sending his MLC troops to the CAR in 2002.

385. As to Mr Jean-Pierre Bemba's possession of pillaged vehicles from the 2002-2003 intervention in the CAR, the Chamber finds that the Prosecutor has not presented sufficient evidence in support of his allegation. The Prosecutor mainly relied on witness statement 37 and a summary statement of witness 33. Witness 37 stated that he saw vehicles coming into Gbadolite at the end of 2002, yet the witness does not know where these cars were coming from. Although the witness stated that he saw these vehicles parked in Mr Jean-Pierre Bemba's "parcel of land", he still added that all of the MLC vehicles were stored there. The witness does not even suggest that these vehicles were pillaged or distributed.⁴⁰¹

Accordingly, the Chamber finds that the fifth sentence of paragraph 107 alleges facts that were not confirmed by the Pre-Trial Chamber and orders the prosecution to delete this sentence.

248. The defence objects to two sections of paragraph 108 and seeks to have these sections removed.⁴⁰² The defence submits that this paragraph contains "allegations which do not form part of the charges and appear to constitute the Prosecution's views or evaluation of the evidence."⁴⁰³

249. The defence seeks to remove the first sentence of paragraph 108; "Bemba failed to use his ultimate authority to establish an effective system to punish and discipline the MLC soldiers for their crimes including looting, rape and murder."⁴⁰⁴ At paragraph 496 of the Confirmation Decision, the Pre-Trial Chamber found that Mr Bemba did not take any reasonable or necessary repressive measures "to punish those responsible from his troops".⁴⁰⁵ The Chamber therefore finds that this allegation is within the scope of the charges.

⁴⁰¹ ICC-01/05-01/08-424, paragraphs 383 – 385.

⁴⁰² ICC-01/05-01/08-694, paragraph 132 and ICC-01/05-01/08-694-Conf-Exp-AnxA, page 37.

⁴⁰³ ICC-01/05-01/08-694, paragraph 132.

⁴⁰⁴ ICC-01/05-01/08-694-Conf-Exp-AnxA, page 37.

⁴⁰⁵ ICC-01/05-01/08-424, paragraph 496.

250. The defence further seeks to remove the final two sentences of this paragraph: “Serious acts of violence were committed in Damara, Bossembélé, Bozoum, Bossangoa and they committed a massacre and a rape at Mongoumba. The MLC crimes continued until the moment of their withdrawal.” The Pre-Trial Chamber accepted the evidence of the prosecution in relation to the crimes which were committed in these areas,⁴⁰⁶ and the suggestion that the crimes alleged may properly be referred to as “[s]erious acts of violence”. Furthermore, the Pre-Trial Chamber confirmed the charges against the accused as continuing up until 15 March 2003,⁴⁰⁷ as this is the date when MLC troops were withdrawn, and therefore the Chamber considers that these sentences include an accurate reflection of the Confirmation Decision, and they fall within the scope of the charges confirmed against the accused.
251. The defence objects to the whole of paragraph 109 and seeks to remove it in its entirety from the Second Amended DCC.⁴⁰⁸ The defence submits that this paragraph contains “allegations which do not form part of the charges and appear to constitute the Prosecution’s views or evaluation of the evidence.”⁴⁰⁹
252. This paragraph alleges, *inter alia*, that Mr Bemba denied the commission of crimes by MLC troops and that he believed that public opinion had been misinformed. The Pre-Trial Chamber considered evidence that Mr Bemba claimed in a letter to the Special Representative of the UN Secretary-General of the CAR that “public opinion had been manipulated and misinformed”.⁴¹⁰ The Pre-Trial Chamber concluded that Mr Bemba was aware of the commission of crimes by his troops and rejected his assertions to the

⁴⁰⁶ ICC-01/05-01/08-424, paragraphs 116 – 117.

⁴⁰⁷ ICC-01/05-01/08-424, paragraph 490.

⁴⁰⁸ ICC-01/05-01/08-694, paragraph 132 and ICC-01/05-01/08-694-Conf-Exp-AnxA, page 37.

⁴⁰⁹ ICC-01/05-01/08-694, paragraph 132.

⁴¹⁰ ICC-01/05-01/08-424, paragraph 487.

contrary.⁴¹¹ Therefore the Chamber finds that the facts alleged in paragraph 109 do not exceed the scope of the charges.

253. Paragraph 110 concerns the investigation and Court Martial established by Mr Bemba in relation to the 2002-2003 intervention. It is alleged that “[o]nly seven or eight MLC soldiers were tried”, that the soldiers were variously charged with insubordination, attempted extortion and robbery but not with more serious crimes, and that one month following their convictions these soldiers were granted amnesty. Finally, it is alleged that upon receiving amnesty, the soldiers were reintegrated into the MLC.⁴¹²

254. The defence objects to the majority of paragraph 110, and suggests amendments thereto.⁴¹³ The defence submits that this paragraph contains “allegations which do not form part of the charges and appear to constitute the Prosecution’s views or evaluation of the evidence.”⁴¹⁴

255. The Pre-Trial Chamber relied on evidence that seven MLC soldiers were charged with “attempted extortion or theft with the use of force.”⁴¹⁵ Although the Pre-Trial Chamber makes no specific reference to the charge of insubordination, the lack of prison time served, the amnesty eventually granted to the soldiers, and the reincorporation of the soldiers into the MLC, the Chamber notes that these facts are contained in the witness statements and press reports relied on in the Confirmation Decision and thus do not exceed the scope of the charges.⁴¹⁶

⁴¹¹ ICC-01/05-01/08-424, paragraphs 488 – 489.

⁴¹² ICC-01/05-01/08-593-Anx-Red, paragraph 110.

⁴¹³ ICC-01/05-01/08-694, paragraph 132 and ICC-01/05-01/08-694-Conf-Exp-AnxA, page 37.

⁴¹⁴ ICC-01/05-01/08-694, paragraph 132.

⁴¹⁵ ICC-01/05-01/08-424, paragraph 494.

⁴¹⁶ ICC-01/05-01/08-424, paragraph 494, footnote 713.

R. Charges (pages 35 – 39)***Alleged breach: the scope of the charges has been broadened beyond those confirmed by the Pre-Trial Chamber***

256. The defence submits that the last section of the Second Amended DCC which contains the actual counts charged against Mr Bemba is deficient in that the prosecution has attempted to (i) extend the scope of the crimes that were confirmed beyond the Confirmation Decision and (ii) add words or expressions or to formulate its own conclusions in order to broaden the scope of the charges beyond what was actually confirmed.⁴¹⁷ The defence proposes its own amendments to the charges.⁴¹⁸

Count 1 (Rape constituting a Crime against Humanity)

257. Regarding Count 1 (Rape constituting a Crime against Humanity), the Pre-Trial Chamber found that “there is sufficient evidence to establish substantial grounds to believe that acts of rape constituting crimes against humanity directed against CAR civilians were committed by MLC soldiers as part of the widespread attack against the CAR civilian population from on or about 26 October 2002 to 15 March 2003, with the knowledge of the attack by MLC soldiers”.⁴¹⁹ The Pre-Trial Chamber found that acts of rape were committed against civilian men, women and children.⁴²⁰

258. The Trial Chamber therefore finds that the proposed revisions by the defence to the first paragraph of Count 1 are unnecessary.

259. As to the inclusion by the prosecution in the Second Amended DCC of references to unidentified victims 1 to 8, 26 October and 31 December 2002,

⁴¹⁷ ICC-01/05-01/08-694, paragraph 134.

⁴¹⁸ ICC-01/05-01/08-694-Conf-Exp-AnxA, pages 38 – 41.

⁴¹⁹ ICC-01/05-01/08-424, paragraph 160.

⁴²⁰ ICC-01/05-01/08-424, paragraphs 165 – 188.

Bangui; unidentified victims 9 to 30, October 2002 and 31 December 2002, Bangui; and unidentified victims 31 to 35, October 2002 to 31 December 2002, Bangui, the Pre-Trial Chamber did not rule against their inclusion in the charges. It merely stated that it had attached low probative value to the uncorroborated statement of Witness 47 in relation to unidentified victims 1 to 35. The Pre-Trial Chamber did not rely on that particular statement in confirming the charge of rape as a crime against humanity and it did not entertain the defence challenge.⁴²¹

260. In light of the findings in the Confirmation Decision as cited above, the Trial Chamber finds that Count 1 is properly drafted and reflects the Pre-Trial Chamber's findings without extending the scope of the crimes or broadening the scope of the charges.

Count 2 (Rape constituting a War Crime)

261. The defence advances the same objections to the way in which the prosecution has drafted Count 2 to those made for Count 1 as they arise out of the same alleged facts.⁴²²

262. With respect to rape as a war crime, the Pre-Trial Chamber found, *inter alia*, that "there is sufficient evidence to establish substantial grounds to believe that in the context of and in association with the armed conflict not of an international character on the territory of the CAR, acts of rape constituting war crimes pursuant to article 8(2)(e)(vi) of the Statute were committed on civilians by MLC soldiers from on or about 26 October 2002 to 15 March 2003."⁴²³ Specifically, the Pre-Trial Chamber states in its Confirmation Decision that, "the Chamber finds that civilian women and men were raped

⁴²¹ ICC-01/05-01/08-424, paragraph 169.

⁴²² ICC-01/05-01/08-694, paragraph 134; ICC-01/05-01/08-694-Conf-Exp-AnxA, pages 38 and 39.

⁴²³ ICC-01/05-01/08-424, paragraph 282.

from on or about 26 October 2002 to 15 March 2003 by MLC soldiers on the CAR territory".⁴²⁴

263. The Trial Chamber considers that since the charge in Count 2 arises out of the same facts as for Count 1, it follows that children are also included in the findings of the Pre-Trial Chamber, albeit not specifically mentioned in this section of the Confirmation Decision because the detailed evidence had been previously reviewed for Count 1 where that finding is made (see above).

264. As with Count 1 above the Trial Chamber finds that the proposed revisions by the defence to the first paragraph of Count 2 are unnecessary.

265. The second paragraph of Count 2 is identical to the second paragraph of Count 1 in that the prosecution has included references to unidentified victims 1 to 8, 26 October and 31 December 2002, Bangui; unidentified victims 9 to 30, October 2002 and 31 December 2002, Bangui; and unidentified victims 31 to 35, October 2002 to 31 December 2002, Bangui. The Pre-Trial Chamber did not rule against their inclusion in the charges. It merely stated that it had attached low probative value to the uncorroborated statement of Witness 47 in unidentified victims 1 to 35. The Pre-Trial Chamber did not rely on that particular statement in confirming the charge of rape as a crime against humanity and it did not entertain the defence challenge.⁴²⁵

266. In light of the findings in the Confirmation Decision as cited above, the Trial Chamber finds that Count 1 is properly drafted and reflects the Pre-Trial Chamber's findings without extending the scope of the crimes or broadening the scope of the charges.

⁴²⁴ ICC-01/05-01/08-424, paragraph 286,

⁴²⁵ ICC-01/05-01/08-424, paragraph 169.

Count 3 (Murder constituting a War Crime)

267. The defence proposes certain revisions to paragraph 1 of Count 3 of the Second Amended DCC, similar to those revisions proposed for Count 1 and 2 in that the defence requests that the word “committed” is replaced by “could be held responsible for” and it proposes that “killing of men, women and children civilians” is replaced by “war crimes for murder committed by subordinates”.⁴²⁶ Regarding the second paragraph of Count 3, the defence object to the inclusion of Timothée (last name unknown), Bossangoa; Christian Zilo, 30 October 2002, Boy Rabé; Unidentified victim 36, between October 2002 and 31 December 2002 near Bangui, and instead propose, “[t]he above charge of murder pertains to the murders of the cousin of witness 22 and the brother of witness 87, as described in the Confirmation Decision”.⁴²⁷

268. In the Confirmation Decision, the Pre-Trial Chamber relied on the evidence related to the death of two civilians, the cousin of Witness 22 and the brother of Witness 87 to find that as the MLC soldiers moved in battle throughout the CAR, they killed civilians, thus committing war crimes according to Article 8(2)(c)(i).⁴²⁸ The Pre-Trial Chamber also stated in its analysis of the evidence of Witness 22 and Witness 87, which applies equally to murder as a war crime and to murder as a crime against humanity (Count 4 below), that “[t]he two murders occurred during the Boy-Rabé attack on 30 October 2002 and the Bossangoa attack, and there is sufficient evidence showing that crimes against humanity, including murders, were committed in these localities from on or about 26 October 2002 until 15 March 2003.”⁴²⁹

269. As regards the death of unidentified victim 36, the Pre-Trial Chamber indicated that is was not convinced by the evidence and did not rely on this

⁴²⁶ ICC-01/05-01/08-694-Conf-Exp-AnxA, page 39.

⁴²⁷ ICC-01/05-01/08-694-Conf-Exp-AnxA, page 39.

⁴²⁸ ICC-01/05-01/08-424, paragraph 277.

⁴²⁹ ICC-01/05-01/08-424, paragraph 150.

evidence reported by Witness 47 for its determination regarding the count of murder.⁴³⁰ The Pre-Trial Chamber specifically stated:⁴³¹

The Chamber, in principle, concurs with the Prosecutor that although the victim is unidentified, this incident may be taken into consideration as evidence of murder. The Chamber further specifies that such evidence may be accepted to substantiate its finding if corroborated by other pieces of evidence. The Chamber, however, recalls that witness 47 is anonymous and his statement is not corroborated. For these reasons, the Chamber considers that there is not sufficient evidence to establish substantial grounds to believe that MLC soldiers killed Unidentified Victim 36 by gunshot between October 2002 and 31 December 2002 near Bangui. Accordingly, the Chamber does not deem necessary to address the challenge raised by the Defence on the lack of specificity of the dates of the alleged murder of Unidentified Victim 36.

270. In light of the above findings of the Pre-Trial Chamber, the Trial Chamber finds no reason to revise the language used in paragraph 1 of Count 3. Regarding paragraph 2, no mention of the actual names of the two murdered civilians is made in the Confirmation Decision. Instead these two individuals are consistently referred to as the cousin of Witness 22 and the brother of Witness 87. However, the Pre-Trial Chamber has expressly confirmed, as set out above, the locations and dates of the murders and therefore the Trial Chamber considers that the only revision that needs to be made is to substitute the names of the two murder victims with “the cousin of witness 22 and the brother of witness 87”, and the dates and locations can remain. Given the findings of the Pre-Trial Chamber in relation to unidentified victim 36, the Trial Chamber considers that due to the lack of evidence, this should be deleted.

Count 4 (Murder constituting a Crime against Humanity)

271. Count 4 arises out of the same facts as Count 3 and the defence therefore raises similar objections as noted above in relation to Count 3 that need not be rehearsed.

⁴³⁰ ICC-01/05-01/08-424, paragraph 155.

⁴³¹ ICC-01/05-01/08-424, paragraph 158.

272. The Pre-Trial Chamber concluded that “there is sufficient evidence to establish substantial grounds to believe that the crime against humanity of murder of CAR civilians was committed by MLC soldiers as part of the widespread attack directed against the CAR civilian population from on or about 26 October 2002 to 15 March 2003, with MLC soldiers having knowledge of such attack.”⁴³²
273. Further, the Pre-Trial Chamber stated that it “relies on the evidence related to the death of two civilians, in particular, the murder of the cousin of witness 22 in Bossangoa, and the murder of the brother of witness 87 in Boy-Rabe.”⁴³³ The Pre-Trial Chamber established that “MLC soldiers killed the cousin of witness 22 by gunshot in the Bossangoa attack on or about 26 October 2002 to 15 March 2003 and killed the brother of witness 87 by gunshot in the Boy-Rabé attack by MLC troops on 30 October 2002.”⁴³⁴
274. Finally the Pre-Trial Chamber noted that “[e]ven though witness 22 did not eye-witness the murder of her cousin, the Chamber finds that this hearsay evidence is sufficiently corroborated by indirect evidence referring to the commission of murders of CAR civilians in Bossangoa from on or about 26 October 2002 to 15 March 2003, especially when Bossangoa was recaptured by MLC troops backing the *Forces Armées Centrafricaines* (the “FACA”) in mid-February 2003.”⁴³⁵
275. In light of the above findings of the Pre-Trial Chamber, the Trial Chamber concludes there is no reason to revise the language used in paragraph 1 of Count 4. Regarding paragraph 2, as with Count 3 above, no mention of the names of the two murdered civilians is made in the Confirmation Decision.

⁴³² ICC-01/05-01/08-424, paragraph 129.

⁴³³ ICC-01/05-01/08-424, paragraph 140.

⁴³⁴ ICC-01/05-01/08-424, paragraph 144.

⁴³⁵ ICC-01/05-01/08-424, paragraph 147.

Instead these two individuals are always referred to as the cousin of Witness 22 and the brother of Witness 87. However, the Pre-Trial Chamber has expressly confirmed, as set out above, the locations and dates of the murders and so the Trial Chamber considers that the only revision that needs to be made is to substitute the names of the two murder victims with “the cousin of witness 22 and the brother of witness 87”, and the dates and locations can remain. Given the findings of the Pre-Trial Chamber in relation to unidentified victim 36, the Trial Chamber considers that due to the lack of evidence, this should be deleted.

Count 5 (Pillaging constituting a war crime)

276. The defence proposes alternative language to be used in the first paragraph of Count 5 in that it suggests, *inter alia*, that “committed war crimes through pillaging” should be replaced by “could be held responsible for “pillage” as a war crime”.⁴³⁶ It also suggests the deletion of the first sentence of the second paragraph of Count 5 which states, “[t]he villages and towns pillaged in the CAR include but are not limited to Bangui, Fou, PK12 and Mongoumba.”⁴³⁷ The defence also suggests that “[p]roperty and homes pillaged belonging to CAR civilians *include* [...]” should be changed to “Property and homes pillaged belonging to CAR civilians *are* [...]” (emphasis added).⁴³⁸

277. The Pre-Trial Chamber found that “there is sufficient evidence to establish substantial grounds to believe that acts of pillaging constituting war crimes pursuant to Article 8(2)(e)(v) of the Statute were committed by MLC soldiers in the context of the armed conflict not of an international character on the territory of the CAR from on or about 26 October 2002 to 15 March 2003”.⁴³⁹ It

⁴³⁶ ICC-01/05-01/08-694-Conf-Exp-AnxA, page 40.

⁴³⁷ ICC-01/05-01/08-694-Conf-Exp-AnxA, page 40.

⁴³⁸ ICC-01/05-01/08-694-Conf-Exp-AnxA, page 40.

⁴³⁹ ICC-01/05-01/08-424, paragraph 315.

confirmed that the evidence shows that “as MLC soldiers moved in battle from on or about 26 October 2002 to 15 March 2003 throughout the CAR territory, they appropriated for their own private or personal use belongings of civilians, [...], without the consent of the rightful owners”.⁴⁴⁰

278. In relation to paragraph 1 of Count 5, the Chamber does not consider it necessary to make the proposed revisions as this paragraph is drafted in keeping with the findings of the Pre-Trial Chamber in its Confirmation Decision.

279. Regarding the second paragraph of Count 5, the Trial Chamber finds that whilst certain locations are mentioned in the Confirmation Decision, there is no definitive list of places where pillaging took place and further that the Pre-Trial Chamber stated in its findings that “[t]he evidence shows that MLC soldiers went through the neighbourhoods in groups and searched for money and other valuable items”.⁴⁴¹ Witness 9’s evidence is also quoted in a footnote, stating “[t]o the knowledge of the witness, MLC soldiers pillaged the places where they were based, in particular Bangui and PK12 ”.⁴⁴² The Chamber considers that the Pre-Trial Chamber did not intend to limit acts of pillaging to the four locations cited.

IV. Order of the Chamber

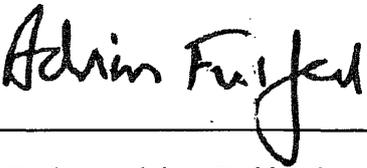
280. For the reasons set out above, the Chamber partially grants the defence application and hereby orders the prosecution to revise the Second Amended Document Containing the Charges according to the instructions in this Decision and to re-file the document by 19 August 2010.

⁴⁴⁰ ICC-01/05-01/08-424, paragraph 322.

⁴⁴¹ ICC-01/05-01/08-424, paragraph 322.

⁴⁴² ICC-01/05-01/08-424, footnote 413.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge Joyce Aluoch

Dated this 20 July 2010

At The Hague, The Netherlands