

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-02/06
Date: 7 November 2018

TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Chang-ho Chung

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public redacted version of ICC-01/04-02/06-2304-Conf

Response to the Defence Closing Brief on behalf of the Former Child Soldiers

Source: Office of Public Counsel for Victims (CLR1)

Document to be notified in accordance with regulation 31 of the *Regulations of the****Court to:*****The Office of the Prosecutor**

Ms Fatou Bensouda
 Mr James Stewart
 Ms Nicole Samson

Counsel for the Defence

Mr Stéphane Bourgon
 Mr Christopher Gosnell

Legal Representatives of the Victims

Ms Sarah Pellet
 Mr Alejandro Kiss

Legal Representatives of the Applicants

Mr Dmytro Suprun
 Ms Anne Grabowski

Unrepresented Victims**Unrepresented Applicants
(Participation/Reparation)****The Office of Public Counsel for
Victims****The Office of Public Counsel for the
Defence****States' Representatives****Amicus Curiae****REGISTRY**

Registrar

Mr Peter Lewis

Counsel Support Section**Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations
Section****Other**

1. The legal representative of the 283 former child soldiers admitted to participate in the present proceedings (the “Legal Representative”) respectfully submits her response to the Defence Closing Brief to the Chamber.¹ A public redacted version thereof will be provided as soon as practicable.

I. THE SCOPE OF THE PRESENT “RESPONSE”

2. During the hearing conducted on 5 December 2017, the parties and participants discussed *“the timeline for the submission of closing briefs and the presentation of the oral closing statements, and their respective expected length”*.² The Prosecution and the Legal Representatives requested the Chamber to organise the submission of closing briefs, following the jurisprudence of the ICTY, ICTR and the SCSL, which would have enabled the parties and participants file their briefs simultaneously. Where such a course is followed, the closing briefs are mainly construed as an opportunity for the parties and participants to put forward their respective cases based on their analysis of the evidence presented,³ rather than an opportunity to respond to each other’s brief.⁴

3. This proposal was, however, preliminarily rejected by the Chamber during said hearing,⁵ and later in the Order providing directions related to the closing briefs and statements.⁶ The Chamber staggered the filing of closing briefs thereby allowing the Defence to address the submissions made by the Prosecution and the Legal Representatives in its own brief.⁷ As a result, on 20 April 2018, the Prosecution and

¹ See the “Defence Closing Brief”, [No. ICC-01/04-02/06-2298-Conf](#) and [No. ICC-01/04-02/06-2298-Conf-Anx1](#), 2 July 2018. On 9 July 2018, the Defence filed the “Corrigendum of Annex 1 to the Defence Closing Brief”, [No. ICC-01/04-02/06-2298-Conf-Anx1-Corr](#), containing no less than 8 pages of corrections to be applied to its closing brief.

² See the “Order scheduling a status conference”, [No. ICC-01/04-02/06-2131](#), 28 November 2017, para. 2(c).

³ See [No. ICC-01/04-02/06-T-258-ENG](#), pp. 11, 17 and 20.

⁴ See ICTR, *Prosecutor v. Semanza*, ICTR-97-20-A, [Appeal Judgment](#), para. 36.

⁵ See [No. ICC-01/04-02/06-T-258-ENG](#), p. 10.

⁶ See the “Order providing directions related to the closing briefs and statements” (Trial Chamber VI), [No. ICC-01/04-02/06-2170](#), 28 December 2017, paras. 8, 13 and 15.

⁷ See [No. ICC-01/04-02/06-T-258-ENG](#), p. 10.

the Legal Representatives put forward their respective cases based on the analysis of the evidence presented.⁸ Subsequently, on 2 July 2018, the Defence responded to the Prosecutor's submissions, and allegedly to the Legal Representatives' submissions,⁹ in its closing brief.¹⁰

4. It follows that the present filing, instructed to be a "response",¹¹ addresses the closing brief of the Defence, which in turn constitutes a response to the closing brief of the Prosecution and, supposedly¹², of the Legal Representatives.

5. The present filing is not – and indeed cannot be – a response to Defence's contentions regarding the charges based on investigations and evidence led by the Defence. Such investigations, if any, have produced no visible results. Indeed, whilst the Defence announced during the trial that it would present more than 110 exonerating witnesses,¹³ it ended up mounting a defence on the basis of a handful of individuals, who except for one, testified after – and having had access to – the testimony of the Accused; let alone the expert witnesses who were deemed "essential" by the Defence¹⁴ but were never called before the Chamber.

⁸ See the "Closing Brief of the Common Legal Representative of the Victims of the Attacks", [No. ICC-01/04-02/06-2275-Conf](#), 20 April 2018; the "Closing brief on behalf of the Former Child Soldiers", [No. ICC-01/04-02/06-2276-Conf](#), 20 April 2018; and the "Prosecution's Final Closing Brief", [No. ICC-01/04-02/06-2277](#), 20 April 2018.

⁹ Although the Defence requested – and obtained – additional time and pages to respond to the Legal Representatives' closing briefs (see [No. ICC-01/04-02/06-2280](#), para. 9 and [No. ICC-01/04-02/06-2287](#), para. 5), the Defence seems to ignore the existence thereof. For the sake of completeness, the Defence refers to said briefs once in para. 941, but footnote 2705 refers to a Registry's Report and has nothing to do with the accompanying text.

¹⁰ See the "Defence Closing Brief", *supra* note 1.

¹¹ See the "Order providing directions related to the closing briefs and statements" (Trial Chamber VI), [No. ICC-01/04-02/06-2170](#), 28 December 2017, para. 15. See also the "Decision providing further directions on the closing briefs" (Trial Chamber VI), [No. ICC-01/04-02/06-2272](#), 13 April 2018, p. 10.

¹² See *supra* note 9.

¹³ See the "Corrected version of 'Defence Final Lists of Witnesses and Evidence', 26 April 2017, ICC-01/04-02/06-1881-Conf", [No. ICC-01/04-02/06-1881-Conf-Corr](#), 2 May 2017.

¹⁴ See [No. ICC-01/04-02/06-T-206-Red-ENG WT](#), pp. 19-20.

6. The available Defence evidence has already been contested and discredited by the Prosecution and the Legal Representatives in their respective briefs.¹⁵ The Legal Representative fully reiterates the entirety of the arguments contained in her closing brief¹⁶ and does not intend to repeat the same. Such a course would not be in the interests of victims. Indeed, submissions are not more persuasive because they are repeated in distinct documents.

II. GENERAL SUBMISSIONS ON THE DEFENCE CLOSING BRIEF

7. The Defence contests the submissions made by the Prosecution and, supposedly, the Legal Representatives;¹⁷ merely challenging the evidence adduced in support of the charges. Yet again, the Defence fails to cast reasonable doubt and the Chamber shall therefore proceed to convict the Accused. Indeed, the evidence on the record proves, beyond reasonable doubt, that the Accused is criminally responsible of the war crimes of conscripting and enlisting children under 15 and their use to participate actively in hostilities as well as the rape and sexual slavery of UPC/FPLC child soldiers between on or about 6 August 2002 and on or about 31 December 2003.¹⁸

8. Instead of submitting arguments liable to cast doubt on the case against the Accused, the Defence Closing Brief is replete with inaccurate representations of the evidence on the record. Seemingly preoccupied with the supposedly wrong image of Mr Bosco NTAGANDA (the “Accused” or “Mr NTAGANDA”) on the internet, depicting him as brutal commander,¹⁹ the Defence’s case “*is that the Prosecution picked the wrong organisation and the wrong accused*”.²⁰ But rather than demonstrating such hypothesis, the Defence blatantly alleges that a comparison between the evidence

¹⁵ See *supra* note 8.

¹⁶ See the “Closing brief on behalf of the Former Child Soldiers”, *idem*.

¹⁷ See *supra* note 9.

¹⁸ See the “Closing brief on behalf of the Former Child Soldiers”, *supra* note 8.

¹⁹ See the “Defence Closing Brief”, *supra* note 1, para. 4

²⁰ *Idem.*, para. 8.

adduced by the Prosecution with the testimony of the Accused and the evidence which supposedly corroborates his testimony should lead the Chamber to conclude that Mr NTAGANDA must be acquitted on all counts.²¹ Indeed, the whole Defence Closing Brief revolves on challenges to incriminating evidence based primarily, and almost exclusively, on the testimony of the Accused and the logbooks.²²

9. The Legal Representative is constrained by the page limit (25 pages) and the two-week time limit allotted by the Chamber and cannot therefore list and discuss each and every Defence faulty arguments.²³ Accordingly, the fact that a particular portion of the Defence Closing Brief, even if it concerns the interests of some or all 283 former child soldiers represented by her, is not being addressed *infra* by no means implies that such portion is accepted or otherwise goes “unchallenged”. Rather, facing said constraints, the Legal Representative is forced but to concentrate on the main aspects of the Defence submissions affecting the interests of her clients.

10. In order to properly cast doubt on the Prosecution case, the Defence must advance an interpretation of the facts that is based on logic and common sense, and have a rational link to the evidence, lack of evidence or inconsistencies in the evidence.²⁴ Far away from obliging, the Defence:

- points to a number of inconsistencies in the evidence on the record;²⁵ but contrary to the standards set out by the Court,²⁶ said inconsistencies can

²¹ *Ibid.*, para. 21.

²² *Ibid.*, *inter alia*, paras. 426, 455-456, 455 and *a contrario* para. 481, stating: “Considering the stressful times during which the messages were transcribed in the Ntaganda-Logbooks, Mr Ntaganda stated that these errors did not surprise him”.

²³ See the “Order providing directions related to the closing briefs and statements”, *supra* note 11, para. 15.

²⁴ See the “Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled ‘Judgment pursuant to article 74 of the Statute’”, [No. ICC-01/04-02/12-271-Corr A](#), 7 April 2015, paras. 109 *et seq.* and ICTR, *Prosecutor v. Rutaganda*, ICTR-96-3-A, [Appeal Judgement](#), 26 May 2003, para. 488. See also the “Closing brief on behalf of the Former Child Soldiers”, *supra* note 8, paras. 11-16.

²⁵ See the “Defence Closing Brief”, *supra* note 1, *inter alia* paras. 1189, 1206, 1212-1217, 1267-1268, and 1272.

be properly resolved by a reasonable interpretation of the relevant testimony and/or in view of the other evidence on the record;

- requests,²⁷ contrary to the standards set out by the Court,²⁸ that collateral facts are proven beyond reasonable doubt – a standard only applicable to the “*material facts*” as opposed to subsidiary or “*collateral facts*”;²⁹
- proposes a piecemeal approach to the assessment of the evidence,³⁰ contrary to the standards set out by the Court that require the Chamber to carry out a holistic evaluation and wage all the evidence taken together in relation to the fact at issue;³¹
- purports to discredit incriminating evidence pointing to peripheral detail, secondary imprecisions and contradictions,³² a standard that is contrary to the jurisprudence of the Court according to which a Chamber may rely on part of a witness’ testimony and reject other parts;³³

²⁶ See the “Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction”, [No. ICC-01/04-01/06-3121-Red A5](#), 1 December 2014 (the “*Lubanga* Appeal Judgment”), para. 23, citing ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16-A, [Appeal Judgement](#), 23 October 2001, para. 31.

²⁷ See the “Defence Closing Brief”, *supra* note 1, *inter alia*, para. 1542.

²⁸ See the *Lubanga* Appeal Judgment, *supra* note 26, para. 22.

²⁹ See the “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’”, [No. ICC-01/04-01/06-2205 OA15 OA16](#), 8 December 2009, footnote 163. See also the “Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled ‘Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons’”, [No. ICC-01/04-01/07-3363 OA13](#), 27 March 2013, para. 50.

³⁰ See the “Defence Closing Brief”, *supra* note 1, *inter alia*, para. 1174, 1427-1438, 1506 and 1512.

³¹ See the “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled ‘Judgment pursuant to Article 74 of the Statute’”, [No. ICC-01/05-01/13-2275-Red A A2 A3 A4 A5](#), 8 March 2018 (the “*Bemba* et al. Appeal Judgment”), paras. 598, 1195 and 1540. See also the *Lubanga* Appeal Judgment, *supra* note 26, para. 22.

³² See the “Defence Closing Brief”, *supra* note 1, *inter alia*, paras. 1176, 1284, 1302, and 1399-1414.

³³ See the “Judgment pursuant to Article 74 of the Statute” (Trial Chamber I), [No. ICC-01/04-01/06-2842](#), 14 March 2012 (the “*Lubanga* Judgment”), para. 339; the “Judgment pursuant to article 74 of the Statute” (Trial Chamber II), [No. ICC-01/04-01/07-3436-tENG](#), 7 March 2014, para. 84; and the “Judgment pursuant to Article 74 of the Statute” (Trial Chamber VII), [No. ICC-01/05-01/13-1989-Red](#), 19 October 2016, paras. 202 and 204. See also ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84, [Appeal Judgement](#), 19 July 2010, para. 201.

- intends to challenge inferences adverse to the Accused without showing, in contradiction with the standards set out by the Court,³⁴ that alternative inferences are (also) reasonable on the basis of the case record;³⁵ and
- challenges the credibility and reliability of individual items of evidence without addressing, contrary to the standards set out by the Court,³⁶ the fact that they are corroborated by other pieces of evidence.³⁷

11. In the Legal Representative's submission, none of the Defence arguments raises reasonable doubt that:

- Children below the age of 15 were conscripted and enlisted in the UPC/FPLC or used to actively participate in hostilities during the period contemplated in the confirmed charges;³⁸
- the UPC/FPLC conducted recruitment campaigns and abductions of children, including below the age of 15;³⁹
- the UPC/FPLC set up training camps⁴⁰ where child soldiers were trained;⁴¹
- living conditions in the UPC/FPLC were harsh and brutal discipline was inflicted upon children;⁴²

³⁴ See the *Bemba et al.* Appeal Judgment, *supra* note 31, para. 868. See also the "Judgment on the appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'", [No. ICC-02/05-01/09-73_OA](#), 3 February 2010, para. 33.

³⁵ See the "Defence Closing Brief", *supra* note 1, *inter alia*, paras. 1181, 1188, 1201-1204, 1336, 1366-1373, 1374-1381, 1382-1388, 1439-1491, 1389-1398, 1492-1494, 1501, and 1551 *et seq.*

³⁶ See the *Bemba et al.* Appeal Judgment, *supra* note 31, paras. 598, 1195 and 1540. See also the *Lubanga* Appeal Judgment, *supra* note 26, para. 22. See ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-A, [Appeal Judgement](#), 27 September 2007, para. 153, citing *Prosecutor v. Limaj et al.*, IT-03-66-T, [Judgement](#), 30 November 2005, para. 20.

³⁷ See the "Defence Closing Brief", *supra* note 1, *inter alia*, paras. 1185, 1179, 1283-1285, 1306, 1307, 1286-1301, 1415-1424, and 1497 *et seq.*

³⁸ See the "Closing brief on behalf of the Former Child Soldiers", *supra* note 8, paras. 20-53, 70 and 75-86.

³⁹ *Idem*, paras. 75-86.

⁴⁰ *Ibid.*, paras. 87-91.

⁴¹ *Ibid.*, paras. 92-96.

⁴² *Ibid.*, paras. 97-104.

- the Accused visited the UPC/FPLC training camps where he saw child soldiers being trained;⁴³
- non-genuine orders were issued by the UPC/FPLC to create the appearance of efforts made to demobilise children from said militia;⁴⁴
- children were used as guards and escorts of UPC/FPLC commanders;⁴⁵
- children participated in battles and were otherwise present on the battlefield;⁴⁶
- children were made to perform other activities, which qualify as active participation in hostilities;⁴⁷
- child soldiers were victims of the war crimes of rape and sexual slavery;⁴⁸ and
- the Accused is criminally responsible, beyond reasonable doubt, with regard to counts 6, 9, 14, 15 and 16.⁴⁹

III. SUBMISSIONS IN RESPONSE TO SPECIFIC ARGUMENTS AND UNSUPPORTED ALLEGATIONS RAISED BY THE DEFENCE

A. The scope of the charges of rape and sexual enslavement of child soldiers

12. The Defence puts forward an interpretation according to which, by virtue of regulation 52(b) of the Regulations of the Court and article 74(2) of the Rome Statute,⁵⁰ a conviction can only be entered in relation to charges formulating specific descriptions of rapes and acts of sexual violence against child soldiers.⁵¹ It adds that because a set of four events included in the Decision on the Confirmation of Charges

⁴³ *Ibid.*, paras. 105-108.

⁴⁴ *Ibid.*, paras. 109-114.

⁴⁵ *Ibid.*, paras. 120-130.

⁴⁶ *Ibid.*, paras. 131-145.

⁴⁷ *Ibid.*, paras. 146-156.

⁴⁸ *Ibid.*, paras. 177-186.

⁴⁹ *Ibid.*, paras. 215-228.

⁵⁰ Where the term 'Article' is used in the present response, it refers to the Rome Statute unless otherwise indicated.

⁵¹ See the "Defence Closing Brief", *supra* note 1, paras. 1541-1542.

(the “Confirmation Decision”) was not retained in the Updated Document Containing the Charges (the “UDCC”), no conviction can be entered in respect of the charges under consideration. These submissions must be rejected.

1. *Charging mass criminality*

13. By virtue of Article 67(1), the Accused is entitled to be informed of the “*nature, cause and content*” of the charges and “[t]o have adequate time and facilities for the preparation of the defence”. Moreover, in accordance with Article 74(2), the Chamber must ensure that the Judgment does not exceed the facts and circumstances described in the charges as confirmed by the Pre-Trial Chamber. Indeed, the Accused can only be considered to be adequately informed of the charges, and thus able to prepare or his defence, if he has been provided “*sufficiently detailed information*” concerning the charges against him.⁵²

14. According to the Chambers Practice Manual, “*no threshold of specificity of the charges can be established in abstracto*”. The required specificity of the charges depends on the nature of the case “*including the degree of the immediate involvement of the suspect in the acts fulfilling the material elements of the crimes*”. At the minimum, the charges must enable the suspect to “*identify the historical event(s) at issue and the criminal conduct alleged, in order to defend him- or herself*”.⁵³

15. In the *Lubanga* case, the Appeals Chamber indicated that “[t]he jurisprudence of the ad hoc tribunals establishes different levels of specificity required of the charges depending on the form of individual criminal responsibility charged”.⁵⁴ It cited the jurisprudence of the ICTY Appeals Chamber on the matter, which indicated that “[w]hen alleging that the accused personally carried out the acts underlying the crime in

⁵² See the *Lubanga* Appeal Judgment, *supra* note 26, paras. 121-123, citing ICTY, *Prosecutor v. Blaškić*, IT-95-14-A, [Appeal Judgement](#), 29 July 2004, paras. 210-211, and 213.

⁵³ See the [Chambers Practice Manual](#), May 2017, pp. 11 and 15.

⁵⁴ See the *Lubanga* Appeal Judgment, *supra* note 26, para. 122.

question, it is necessary for the Prosecution to set out the identity of the victim, the place and approximate date of the alleged criminal acts, and the means by which they were committed ‘with the greatest precision’.⁵⁵ In relation to other modes of liability “the Prosecution is required to identify the ‘particular acts’ or ‘the particular course of conduct’ on the part of the accused which forms the basis for the charges in question”.⁵⁶

16. The Appeals Chamber also noted that “where an accused is not alleged to have directly carried out the incriminated conduct and is charged for crimes committed on the basis of a common plan, the accused must be provided with detailed information regarding: (i) his or her alleged conduct that gives rise to criminal responsibility, including the contours of the common plan and its implementation as well as the accused’s contribution (ii) the related mental element; and (iii) the identities of any alleged co-perpetrators”. Even though the underlying criminal acts have been found to form “an integral part of the charges”,⁵⁷ the Appeals Chamber did not require a greater degree of specificity, with respect to the date and location of the underlying acts and the identity of the alleged victims, than what is possible in the circumstances.⁵⁸

17. Importantly, the Appeals Chamber has not made it mandatory for the Prosecution to plead, for a Pre-Trial Chamber to confirm and for a Trial Chamber to enter a conviction in relation to specific criminal acts, such as the recruitment, rape or sexual enslavement of a particular child. The Prosecutor retains discretion to formulate the charges in a manner appropriate to the type of crimes she decides to prosecute. If her investigations support a case of mass criminality, where an accused has not, likely, personally carried out the acts underlying a myriad of crimes, the charges may be properly formulated on the basis of “parameters”, as opposed to specific criminal acts. Such parameters must however provide details regarding the nature, cause and content of the charge to, *inter alia*, allow for a meaningful defence.

⁵⁵ See ICTY, *Prosecutor v. Blaskic*, *supra* note 52, para. 213.

⁵⁶ *Idem*.

⁵⁷ See the *Lubanga* Appeal Judgment, *supra* note 26, para. 123.

⁵⁸ *Idem*.

18. Where the charges are formulated by reference to parameters, the criminal acts constitute evidence by which the facts and circumstances described in the charges are to be proven. Evidence does not need to be pleaded in order to adequately inform the Accused of the charges. Notice of the charges may be provided in documents designed to afford information about the charges, including the Confirmation Decision and “auxiliary documents”, including the UDCC.

2. *The scope of the charges proffered in the present case*

19. The Legal Representative notes that, conspicuously, the Defence ignores the charge of rape and sexual slavery against child soldiers under the age of 15 years in its general description of the scope of the charges.⁵⁹ Notwithstanding, the historical events and the conduct of the Accused relevant to said crimes have been sufficiently identified in the Confirmation Decision and in the UDCC by reference to specific parameters. In the dispositive part of the Confirmation Decision, the Chamber indicated:

“b) decides to confirm, pursuant to article 61(7) of the Statute, the charges presented by the Prosecutor against Bosco Ntaganda to the extent specified in paragraphs 12, 31, 36, 74 and 97 of the present decision and to commit Bosco Ntaganda to a Trial Chamber for trial on the charges as confirmed” .⁶⁰

20. Furthermore, paragraph 74 reads as follows:

“On the basis of the evidence presented, the Chamber finds that: There are substantial grounds to believe that in the context of the Non International Armed Conflict, the UPC/FPLC soldiers committed acts of enlistment, including Mr. Ntaganda himself, as well as acts of conscription of children under the age of 15 years between on or about 6 August 2002 and 31 December 2003, in Ituri, in the DRC.

There are also substantial grounds to believe that the UPC/FPLC soldiers used children under the age of 15 years to participate actively in hostilities between on or about 6 August 2002 and on or about 30 May 2003,

⁵⁹ See the “Defence Closing Brief”, *supra* note 1, para. 23.

⁶⁰ See the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda” (Pre-Trial Chamber II), [No. ICC-01/04-02/06-309](#), 9 June 2014 (the “Confirmation Decision”), p. 63.

including Mr. Ntaganda himself, between on or about 6 August and March 2003, in Ituri, in the DRC.

There are substantial grounds to believe that the UPC/FPLC soldiers committed acts of rape and sexual slavery against child soldiers under the age of 15 years between on or about 6 August 2002 and 31 December 2003, in Ituri, in the DRC".⁶¹

21. In relation to the attribution of liability, the Confirmation Decision concluded:

"Accordingly, Mr NTAGANDA has been accused for the war crimes of rape, sexual slavery and conscription of children below 15 under Articles 25(3)(a) 'indirect co-perpetration', 25(3)(d)(i) or (ii), or 28(a); for enlistment of children below 15 under 25(3)(a) 'direct perpetration and/or indirect co-perpetration', 25(3)(d)(i) or (ii), or 28(a); and for use of children to actively participate in hostilities under Articles 25(3)(a) 'direct perpetration and/or indirect co-perpetration', 25(3)(b), 25(3)(d)(i) or (ii), or 28(a)".⁶²

22. Accordingly, the charges in the present case have been described by reference to parameters rather than specific criminal acts. In relation to the charges of enlistment, conscription and use of children under the age of 15 to actively participate in hostilities, there is no room for misunderstanding that they have been formulated broadly; they have not been limited to the specific criminal acts discussed in the Confirmation Decision but relate to a campaign. References to *inter alia* the implementation of a campaign of conscription and enlistment of soldiers in large numbers including men, women and children without regard to their age⁶³ and pressure being exercised on Hema families to contribute to the war effort by providing children⁶⁴ leave no doubt about it. The Defence has taken no issue with said reading of the charges in its Closing Brief.

⁶¹ *Idem*, para. 74.

⁶² See the summary in the "Closing brief on behalf of the Former Child Soldiers", *supra* note 8, para. 189.

⁶³ See the "Updated Document Containing the Charges", [No. ICC-01/04-02/06-458-AnxB](#), 16 February 2015 (the "UDCC"), para. 92.

⁶⁴ *Idem*, para. 94.

23. Conversely, the Defence advances a narrow interpretation of the charges of rape and sexual enslavement of child soldiers,⁶⁵ one that as demonstrated *infra* cannot be reconciled with the Confirmation Decision.

24. In order to properly understand where the misinterpretation lies, it is necessary to first address the allegation of the Defence pointing to inconsistencies between the document containing the charges and the UDCC. The Defence claims that the UDCC omitted reference to the following allegations, which conversely ‘properly’ appear in the Confirmation Decision:

*“(i) rape of P-0758 and other child soldiers at Camp Lingo; (ii) rape by Abelanga of a girl under 15 at Mandro between November 2002 until May 2003; (iii) rapes of young girls at Mandro Camp between mid-August and mid September; and (iv) rape of a girl aged 13 by Kitembo ‘until he was killed in Mongbwalu’”.*⁶⁶

25. If inconsistencies between the document containing the charges and the UDCC existed, the former prevails. The UDCC may indeed bring in additional details of charges the parameters of which can only be defined in the Confirmation Decision. However, what the Defence allegation proves is not that there are discrepancies between the two documents but rather that the Defence is misconstruing the charges. Contrary to the submission of the Defence, the four examples set out *supra* are not “*the only facts and circumstances on which a conviction could conceivably be entered*”.⁶⁷ In reality, these four allegations have been conceived as examples; evidence of broader charges properly formulated in (i) the Confirmation Decision; and retained in (ii) the UDCC. Accordingly, there exists no contradiction between the two documents.

⁶⁵ See the “Defence Closing Brief”, *supra* note 1, paras. 1541 and 1542.

⁶⁶ *Idem*, para. 1542.

⁶⁷ *Ibid*

26. The strategy of the Defence, once unveiled, consists of turning these examples into criminal acts. The procedural consequence thereof is that each would need to be established beyond reasonable doubt. Said strategy must fail.

27. In light of the procedural framework of the Court and the jurisprudence of the Appeals Chamber “*the parameters of the charges at trial*” are defined in “*the Decision on the Confirmation of the Charges*”.⁶⁸ The Confirmation Decision was explicit that “[t]he crimes under counts 6 and 9 are demonstrated by the following findings of the Chamber”.⁶⁹ What follows in the reasoning of the Pre-Trial Chamber is a set of examples that demonstrates – are evidence of – the crimes under counts 6 and 9.

28. In order to *demonstrate* the crimes under counts 6 and 9, the Chamber discussed the example of Witness P-0758, aged 13 at the time, abducted and raped throughout her training which lasted around 3 months in several UPC/FPLC camps.⁷⁰ It also considered the evidence that two other girls, one aged 9 and another under 13, who were also raped in Lingo camp; the continuous rape of one of his bodyguards by ABELANGA; and of a girl aged 13 by KISEMBO.⁷¹ It also reflected on the evidence according to which young girls under the age of 15 were raped in the Mandro camp during the timeframe covered by the charges.⁷² This finding is detached from any specific criminal act committed against identified victims. Importantly, the Confirmation Decision took into account that women in the UPC/FPLC camps, including children under the age of 15, were compared to a “*guduria*” – a large cooking pot, to express the fact that any soldiers could sleep with them at any time.⁷³ This clearly indicates that sexual crimes were part of an endemic

⁶⁸ See the *Lubanga* Appeal Judgment, *supra* note 26, para. 124. See also the “Decision on the Prosecutor’s appeal against the Decision on the Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute”, [No. ICC-01/09-01/11-1123](#), 13 December 2013, paras. 26-29.

⁶⁹ See the Confirmation Decision, *supra* note 60, para. 81 (emphasis added).

⁷⁰ *Idem*, para. 81 (emphasis added).

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

system of which not only the individuals referred to in the Confirmation Decision were the victims. Rather, it reflects a larger charge.

29. It follows that the specific instances of rape and sexual enslavement discussed in the Confirmation Decision are not the charges in the present case but evidence tendered in support of broader charges. Accordingly, in light of the scope of the Confirmation Decision, the Prosecution correctly formulated its UDCC describing the charges with enough details, but without referring to specific criminal acts.⁷⁴ It is also in line with said broad definition of the charges, linked to paragraph 74 of the Confirmation Decision,⁷⁵ that the Prosecution set out its conclusions in “The Charges” section of the UDCC⁷⁶ and their “*legal characterization*” as crimes of rape and sexual enslavement referring to the facts and circumstances described in paragraphs 100 *et seq* of the UDCC.⁷⁷

30. The trial then naturally proceeded on the basis of this formulation of the charges and an array of witnesses testified to the effect that soldiers, including young girls or PMF were sexually exploited, commonly and on a widespread basis, within the ranks of the UPC/FPLC.⁷⁸ Questions relevant to prove a broad understanding of the charges were allowed and preceded without opposition from the Defence.⁷⁹ The Defence had abundant opportunity to oppose said line of questioning at trial if, contrary to the understanding of the Pre-Trial Chamber and the scope of the charges reflected in the UDCC (as reviewed by the Trial Chamber), its submissions were that

⁷⁴ See the UDCC, *supra* note 63, paras. 100-103.

⁷⁵ See *supra* para. 20.

⁷⁶ See the UDCC, *supra* note 63, paras. 156.

⁷⁷ *Idem*, pp. 61-62.

⁷⁸ See the “Prosecution’s Final Closing Brief”, *supra* note 8, footnote 2400, referring to P-0963, P-0768, P-0898, P-0888, P-0190, P-0907, P-0758, P-0010, P-0016, and P-0031. In relation to sexual enslavement, see *idem*, footnote 2465, referring to P-0901, P-0963, P-0017, P-0055, P-0898, P-0190, P-0907, P-0010, P-0046, P-0016. See also the “Closing brief on behalf of the Former Child Soldiers”, *supra* note 8, paras. 177-186.

⁷⁹ See e.g. “Q. Sir, do you know whether the members of the UPC état-major général including Mr Ntaganda were aware that UPC commanders had sexual relations with their kadogos? A. I think so”, P-0963, [No. ICC-01/04-02/06-T-80-Red-ENG](#), p. 41.

said line of questioning was devised to elicit evidence on facts going beyond the scope of the charges. Yet, it chose to raise the argument for the first time in its closing brief.

31. The Legal Representative reiterates that the narrow interpretation of the charges of rape and sexual enslavement proposed by the Defence cannot be reconciled with the scope of the Confirmation Decision and the UDCC, and must therefore be rejected.

32. In order to overcome potential issues relevant to the determination of the charges, the Chamber should leave no doubt – or room – for interpretation as to the scope of the conviction. It is important that the Judgment makes it abundantly clear that the scope of the conviction is not limited to the specific criminal acts it may discuss. Because the criminal acts in the present case are samples of broader charges, there is no need for the Chamber to enter findings beyond reasonable doubt in relation to said criminal acts. The Accused must be found, beyond reasonable doubt, guilty of the charges. Indeed, where these are formulated broadly, it is unnecessary to apply said standard to the instances upon which an evidentiary inference is made, in support of the broader charge.

B. Revocation of P-0010's victim status

33. The Defence asserts that P-0010's "*right to participate in these proceedings [REDACTED] should be revoked*" arguing that she "*lied repeatedly about her date of birth and age of recruitment*".⁸⁰ The Legal Representative have already thoroughly explained the discrepancies regarding the date of birth of her client, P-0010.⁸¹ By the same token, the Prosecution also provided ample explanations as to the credibility of said witness and because of the page limit constraint, the Legal representative defers to

⁸⁰ See the "Defence Closing Brief", *supra* note 1, para. 1282.

⁸¹ See the "Closing brief on behalf of the Former Child Soldiers", *supra* note 8, para. 46 and footnote 147.

these explanations⁸² and posits that contradictions and weaknesses of P-0010's testimony, if any, should not affect her status as victim in the trial proceedings.

34. [REDACTED].

[REDACTED].

35. [REDACTED].⁸³ However, this standard is solely applicable when assessing evidence for the purpose of determining the guilt or innocence of an accused person.⁸⁴ Other Chambers have uniformly applied a *prima facie* standard to grant participating status to victims.⁸⁵ Even assuming *arguendo* that a higher threshold might apply at the end of the Trial, nothing justifies such a threshold to reach the “*beyond reasonable doubt*” standard which is only envisaged in the statutory framework to apply to the question of guilt or innocence. The drafting history of the Rome Statute and the Rules of Procedure and Evidence does not support the application of such a standard to the question of victim participation. In other words, reassessing P-0010's status of participating victim upon the “*beyond reasonable doubt*” standard would have no legal basis. Such a course may result in a reversal of said victim's right to participate in trial proceedings; a right granted on the basis of criteria in line with the legal texts of the Court and its jurisprudence.

36. Moreover, the Chamber shall ensure that a trial is fair.⁸⁶ The “fair trial” guarantees shall apply throughout the proceedings and in respect of all the parties

⁸² See the “Prosecution's Final Closing Brief”, *supra* note 8, paras. 740-750.

⁸³ [REDACTED].

⁸⁴ See Article 66(3).

⁸⁵ See the “Decision on victims' participation in trial proceedings” (Trial Chamber VI), [No. ICC-01/04-02/06-449](#), 6 February 2015, paras. 30 and 44. See also *inter alia*, the “Decision on victims' participation” (Trial Chamber I), [No. ICC-01/04-01/06-1119](#), 18 January 2008, para. 99; the “Decision on the treatment of applications for participation” (Trial Chamber II), [No. ICC-01/04-01/07-933-tENG](#), 26 February 2009, para. 10; the “Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties' observations on applications for participation by 86 applicants” (Trial Chamber III), [No. ICC-01/05-01/08-699](#), 22 February 2010, para. 19.

⁸⁶ See Article 64(2).

and participants, including victims.⁸⁷ Pursuant to Article 21(3), “[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as [...] or other status”.⁸⁸

37. According to internationally recognised human rights as developed by the European Court of Human Rights and the Inter-American Court of Human Rights, the right not to be discriminated against in the enjoyment of the rights guaranteed is violated when persons in analogous or “*relevant similar*” situations are treated differently without being provided with an objective and reasonable justification”.⁸⁹ The fundamental principle of equality and non-discrimination constitutes an outstanding element of the human rights protection system and has entered the realm of *jus cogens*.⁹⁰ A difference of treatment is discriminatory if it “*has no objective and reasonable justification*”; therefore if it does not pursue a “*legitimate aim*” or if there is “*no reasonable relationship of proportionality between the means employed and the aim sought to be realised*”.⁹¹

⁸⁷ In this regard, the Legal Representative posits that the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power adopted by the UN General Assembly on 29 November 1985 calls for enabling victims to access to Justice and to obtain redress and for providing them with fair treatment in this regard. See the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power adopted by the UN General Assembly on its 96th plenary meeting, UN Doc. [A/RES/40/34](#), 29 November 1985, Principles 4 to 7.

⁸⁸ See also in this regard the “Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006” (Appeals Chamber), [No. ICC-01/04-01/06-772](#), 14 December 2006, para. 36. See also the “Corrigendum to Decision on the applications by victims to participate in the proceedings” (Trial Chamber I), [No. ICC-01/04-01/06-1556-Corr-Anx1](#), 15 December 2008, para. 48.

⁸⁹ See ECHR, *Paulik v. Slovakia*, Application No. 10699/05, [Judgment of 10 October 2006](#), para. 51. See also, *inter alia*, ECHR, *Ponomaryovi v. Bulgaria*, Application No. 5335/05, [Judgment of 21 June 2011](#), para. 51; *D.H. and others v. the Czech Republic*, Application No. 57325/00, [Judgment of 13 November 2007](#), paras. 175 and 196; *Thlimmenos v. Greece*, Application No. 34369/97, [Judgment of 6 April 2000](#), para. 44; and *Larkos v. Cyprus*, Application No. 29515/95, [Judgment of 18 February 1999](#), para. 30.

⁹⁰ See IACHR, *Yatama v. Nicaragua*, [Judgment of 23 June 2005](#), para. 184.

⁹¹ See ECHR, *Paulik v. Slovakia*, *supra* note 89, para. 55. See also in this regard ECHR, *J.M. v. the United Kingdom*, Application No. 37060/06, [Judgment of 28 September 2010](#), para. 54; *Genovese v. Malta*, Application No. 53124/09, [Judgment of 11 October 2011](#), para. 43; *Moldovan and others v. Romania*, Applications Nos. 41138/98 and 64320/01, [Judgment No. 2 of 12 July 2005](#), para. 137; *Fretté v. France*, Application No. 36515/97, [Judgment of 26 February 2002](#), para. 34; and *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Applications Nos. 9214/80, 9473/81 and 9474/81, [Judgment of 28 May](#)

38. In the present instance, the evidence presented by P-0010, including the one related to her victim status, was subject of thorough examination by the parties, Pre-Trial Chamber II, and the Chamber.⁹² None of the other victims admitted to participate in the trial proceedings related to the present would be treated by the Chamber in the same manner should the Chamber consider the Defence argument.⁹³ It follows that the retracting P-0010's status would be discriminatory. Such a difference in treatment would pave the way for a discriminatory treatment, contrary to the international human rights jurisprudence.⁹⁴ The Legal Representative reminds in this regard that Judge Odio Benito stressed that *"it is unfair and discriminatory to impose upon individuals with dual status a higher evidentiary threshold (beyond reasonable doubt) as regards their victims' status, while all other victims participating in the proceedings have not been subject to thorough examination by the parties and the Chamber, as these young persons have been"*.⁹⁵

39. Moreover, retracting P-0010's victim status, within the framework of the Article 74 Decision would be disproportionate. The Chamber would need to resolve the alleged contradictions in her evidence if any, and only to the extent it is necessary to support a conviction. Conversely, if a conviction is sufficiently supported by other evidence on the record, there should be no need for the Chamber to address and eventually reject her incriminating evidence. Accordingly, the aim sought and the means requested by the Defence in the pursuit thereof are clearly disproportionate.⁹⁶

[1985](#), para. 72. See also IACHR, *Castaneda Gutman v. Mexico*, [Judgment of 6 August 2008](#), para. 212 and *Yatama v. Nicaragua*, *supra* note 90, para. 185.

⁹² See *inter alia* "Decision on Victim's Participation at the Confirmation of Charges Hearing and in related proceedings" (Pre-Trial Chamber II), [No. ICC-01/04-02/06-211](#), 15 January 2014 and [No. ICC-01/04-02/06-211-Conf-Exp-AnxA](#), pp. 5-7; and the "Second decision on victims' participation in trial proceedings" (Trial Chamber VI), [No. ICC-01/04-02/06-650](#), 16 June 2015.

⁹³ See *supra* para. 33.

⁹⁴ See *supra* para. 37.

⁹⁵ See the "Separate and Dissenting Opinion of Judge Odio Benito", [REDACTED], para. 35.

⁹⁶ See ECHR, *Paulik v. Slovakia*, *supra* note 89, para. 59.

40. In addition, failure to meet the “*beyond reasonable doubt*” standard would lead for said victim to be excluded from the reparation proceedings. Such a course would not only be discriminatory, but also contrary to the jurisprudence of the Appeals Chamber. Indeed, the applicable standard of proof at the reparations stage is “*balance of probabilities*”.⁹⁷

41. In sum, the Legal Representative argues that the request of the Defence, *i.e.* the difference in treatment of participating victims within the same case, on the one hand, and the application of the standard of proof “*beyond reasonable doubt*” to a victim enjoying the dual status of victim and witness, on the other hand, would significantly jeopardise the current regime of victims’ participation and reparations before the Court and must therefore be rejected.

C. Characterisation of the conflict

42. The Defence alleges that, contrary to the Confirmation Decision, the events took place in the context of an international armed conflict.⁹⁸ It also suggests that there are issues in relation to the contextual element of war crime.⁹⁹

43. The Defence, explicitly, raises these issues but makes no substantive, procedural or factual submissions to support thereof. This is not only legally unsound; it also prevents the parties and the participants from advancing a substantiated and informed response and renders it impossible for them to ascertain whether these concerns should have been raised at a different procedural stage of the proceedings. In this regard and notwithstanding, the Legal Representative notes that the Defence failed to raise any issues concerning these matters in its request for leave

⁹⁷ See the “Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of 7 August 2012 with AMENDED order for reparations (Annex A), [No. ICC-01/04-01/06-3129-AnxA A A2 A3](#), para. 65, footnote 37.

⁹⁸ See the “Defence Closing Brief”, *supra* note 1, para. 563.

⁹⁹ *Idem*, para. 564.

to appeal the Confirmation Decision.¹⁰⁰ Not least, this attitude prevented the Chamber from providing remedy during the course of the Trial.

44. These allegations are serious. But rather than advancing arguments in support thereof, the Defence merely states that it makes no specific submissions about them “*at this time*”.¹⁰¹

45. Accordingly, the Legal Representative posits that submissions on the topic would exceed the scope of the Defence “reply”. As noted, Defence submissions on the matter are absent from the Defence closing brief. Moreover, the issue cannot be brought up afresh during the Closing Statements. Indeed, the current stage of the Trial proceedings involving briefs, responses and a reply have been designed in a manner such that allows the parties and participants to consider each other arguments, sequentially.¹⁰² The whole purpose of this structure would be defeated if the parties were able to bring up their submissions on the merits as part of the Closing Statements, not least because this would not provide the other participants a meaningful opportunity to prepare a response. This rationale has been confirmed by the Chamber. Indeed, the latter specified it may intervene and seek clarifications at any time during the parties’ or participants’ closing statements. However, the “questions” are envisaged to be provided ahead of the hearing “*in order to allow the parties and participants to prepare*”.¹⁰³

46. Finally, should any submission on this issue be brought as a ground for appeal against a potential conviction, such an avenue would overlook the jurisprudence of the Appeals Chamber which cautioned a strategy such as the one

¹⁰⁰ See the “*Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014*”, [No. ICC-01/04-02/06-312](#), 16 June 2014.

¹⁰¹ *Idem*, paras. 563-564.

¹⁰² See *supra* paras. 2-4.

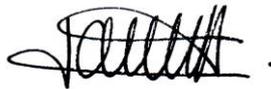
¹⁰³ See the “Order on closing statements”, [No. ICC-01/04-02/06-2299](#), 4 July 2018, para. 6.

intended by the Defence, rejecting factual allegations¹⁰⁴ or procedural matters challenging the fairness of the proceedings¹⁰⁵ brought for the first time on appeal.

47. It is disingenuous to advance vacuum allegations simply not to miss the opportunity to litigate the matter at a subsequent stage. Following the Appeal jurisprudence and the views referred to *supra*, the opportunity for the Defence to advance lines of arguments of this kind has precluded with its closing brief. Consequently, this blank allegation warrants rejection.

It is hereby certified that this document contains a total of 7,500 words¹⁰⁶ and hence complies with regulation 36 of the Regulations of the Court combined with footnote 12 of the “Order providing directions related to the closing briefs and statements”,¹⁰⁷ upheld in the “Decision providing further directions on the closing briefs”.¹⁰⁸

RESPECTFULLY SUBMITTED,



Sarah Pellet
Legal Representative of the
Former Child Soldiers

Dated this 7st Day of November 2018

At The Hague, The Netherlands

¹⁰⁴ See the “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘*Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo*’”, [No. ICC-01/04-01/06-824](#), 13 February 2007, para. 73.

¹⁰⁵ See the “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled ‘Decision Setting the Regime for Evidence Disclosure and Other Related Matters’”, [No. ICC-02/04-01/15-251](#), 17 June 2015, para. 45.

¹⁰⁶ This statement (103 words) is not included in the word count.

¹⁰⁷ See the “Order providing directions related to the closing briefs and statements” (Trial Chamber VI), [No. ICC-01/04-02/06-2170](#), 28 December 2017, footnote 12.

¹⁰⁸ See the “Decision providing further directions on the closing briefs” (Trial Chamber VI), [No. ICC-01/04-02/06-2272](#), 13 April 2018.