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TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Geoffrey Henderson

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

PUBLIC

**Prosecution's Additional Observations on the Areas of Disagreement
in the Updated Document Containing the Charges**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Mr Stéphane Bourgon
Mr Luc Boutin
Mr William St-Michel
Ms Chloé Grandon

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of 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

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section Other**

INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) submits additional observations on the proposed updated Document Containing the Charges (“Updated DCC”) filed on 14 November 2014.¹

2. The proposed Updated DCC accurately depicts the charges confirmed by the Pre-Trial Chamber in its decision on the confirmation of charges hearing (“Decision”)² and the facts and circumstances upon which those charges are based. The Defence has raised four issues with the proposed Updated DCC, each of which is intended to restrict its scope either by seeking to limit the charges where the Pre-Trial Chamber has not expressly done so or to limit the applicability of all but the last section of the charging document.³

3. The Defence’s four challenges to the proposed Updated DCC are premised on erroneous propositions that: (i) the language of paragraphs 36 and 97 in the Decision must be taken in isolation from the remainder of the Decision (issues 1 and 2); (ii) where the Pre-Trial Chamber is silent on a fact, this fact should be deleted from the Updated DCC (issue 4); and (iii) only the final section of the Updated DCC should apply to the case, presumably to restrict the facts and circumstances on which the charges are based and limit the scope of evidence that can be tendered at trial and/or the parameters of a legal re-characterisation of the facts under regulation 55 of the Regulations of the Court (“Regulations”)(issue 3).

4. These propositions have no factual or legal foundation. First, paragraphs 36 and 97 of the Decision must be read in light of the numerous supporting factual and legal findings made throughout the Decision and cannot artificially be read in isolation. Second, Chambers of this Court have held that a Pre-Trial Chamber’s silence on an issue cannot be construed as declining a particular fact. Third, the

¹ ICC-01/04-02/06-402.

² ICC-01/04-02/06-309.

³ ICC-01/04-02/06-402, para. 5.

Appeals Chamber has confirmed that the statutory provisions do not distinguish between material and subsidiary facts; all facts may be subject to a legal recharacterisation.⁴

5. Lastly, the Defence takes issue with footnote 10 of the Updated DCC wherein the Prosecution notes that the evidence of attacks prior to and following the First and Second Attacks will be used both to prove the contextual elements of crimes against humanity and the Accused's intent and knowledge. This is consistent with decisions of this Court including in the *Katanga* Article 74 Judgement that evidence of prior attacks is squarely relevant to an accused's intent and knowledge.⁵

PROCEDURAL HISTORY

6. On 10 January 2014, the Prosecution filed the Document Containing the Charges ("DCC").⁶ On 9 June 2014, Pre-Trial Chamber I issued the Decision.⁷

7. On 30 October 2014, the Chamber ordered the Prosecution to provide the Defence with a draft version of the updated DCC by 7 November 2014, following which the parties were to consult with a view to resolving any disputes about whether the document properly reflects the Decision.⁸

8. On 14 November 2014, the Prosecution filed the Updated DCC and a jointly submitted chart, attached as annex C, setting out the particular points of

⁴ ICC-02/11-01/11-572, para. 37.

⁵ ICC-01/04-01/07-3436, paras. 1684-1691. See: ICC-01/04-01/06-803-tEN, para. 152 and ICC-01/04-01/07-717, paras. 225-228. See also: *Prosecutor v Taylor*, SCSL-03-01-T, Judgement, 18 May 2012, paras. 92, 98-111; *Prosecutor v Nahimana, et al*, ICTR-96-11, Appeals Judgement, 28 November 2007, paras. 315-316; *Prosecutor v Prlic*, IT-04-74-T, Decision on Slobodan Praljak's Motion for Clarification of the Time Frame of the Alleged Joint Criminal Enterprise, 15 January 2009, page 9; *Prosecutor v Stakic*, IT-97-24-A, Appeal Judgement, 22 March 2006, paras. 122-128; *Prosecutor v Dordevic*, IT-05-87/1-A, Appeal Judgement, 27 January 2014, paras. 295-297; *Prosecutor v Karemera and Ngirumpatse*, ICTR-99-44-T, Judgement and Sentence, 2 February 2012, paras. 13 and 14; and *Prosecutor v Setako*, ICTR-04-81-T, Judgement and Sentence, 25 February 2010, para. 26.

⁶ ICC-01/04-02/06-203-AnxA.

⁷ ICC-01/04-02/06-309.

⁸ ICC-01/04-02/06-390 paras. 5 and 7.

disagreement (“Joint Chart”). The Prosecution’s submission also requested until 21 November 2014 to file additional observations,⁹ and noted that the Defence indicated that it may also provide additional submissions on paragraphs 44-46 and 48-51 of the Updated DCC related to issue (iv).¹⁰

9. On 17 November 2014, the Chamber granted the parties’ request to provide further observations according to the conditions proposed.¹¹

PROSECUTION’S SUBMISSIONS

10. The Updated DCC properly reflects the charges confirmed by the Pre-Trial Chamber. Where the Pre-Trial Chamber expressly rejected a particular fact, it is reflected in the Updated DCC.

11. The four areas of dispute between the parties are:

- i. the use of the word “including” in relation to locations in which a crime is alleged to have been committed;
- ii. the interpretation of the Pre-Trial Chamber’s findings in paragraphs 36 and 97 of the Decision;
- iii. the impact of Section H (ii) of the Updated DCC entitled “Legal characterisation of the facts”; and
- iv. whether specific factual allegations on which the Decision is silent necessitates the deletion of the allegation.

12. It is the Prosecution that selects the case to charge and its factual parameters.¹² Under the Rome Statute (“Statute”) and Rules of Procedure and Evidence (“Rules”),

⁹ ICC-01/04-02/06-402-Anx A.

¹⁰ ICC-01/04-02/06-402, para. 6.

¹¹ Email from Legal Officer of Trial Chamber VI, sent at 18:33 on 17 November 2014, referencing ICC-01/04-02/06-402, paras. 7-8.

¹² ICC-02/11-01/11-432-Anx-Corr, para. 51 (dissent of Judge Fernández de Gurmendi):

the Prosecution is responsible for setting and detailing the charges against a person:¹³ prior to the confirmation hearing, the Prosecution may amend or withdraw any charges (article 61(4)); and in the period between the issuance of the confirmation decision and the start of trial, there is a procedure by which the Prosecutor may “amend the charges” (article 61(9) and rule 128(1)). These provisions, along with rule 121 and regulation 52, set out that *the Prosecutor* is the charging entity, providing a “detailed description of the charges” (rule 121(3)) and “a statement of the facts... which provides a sufficient legal and factual basis to bring the person or persons to trial” (regulation 52).

13. The Pre-Trial Chamber’s authority under article 61(7) is to confirm those charges when there is sufficient evidence, to decline to confirm those charges when there is not, or to adjourn the hearing and request that the Prosecutor consider providing further evidence or amending a charge where the evidence appears to establish a different crime. The Pre-Trial Chamber does not have the power to modify the charges; it is expressly for the Prosecution to make such amendments.¹⁴ Where the Pre-Trial Chamber intends to limit the charges set out in the document containing the charges (for instance in temporal or geographic scope), it must do so expressly. As held by Trial Chamber V, mere silence cannot be interpreted as a denial to confirm charges or modes of liability, or to limit the facts in support of a charge.¹⁵ Indeed, Trial Chamber V found that the Pre-Trial Chamber, “may not have examined

“...the Chamber may indeed request the Prosecutor to consider amending the charges but only in relation to the legal characterisation of the facts. [Article 61(7)] does not allow the Chamber to involve itself in the Prosecutor’s selection of which facts to charge. In sum, it is for the Prosecutor and not for the Chamber to select her case and its factual parameters. The Pre-Trial Chamber is not an investigative chamber and does not have the mandate to direct the investigations of the Prosecutor.”

¹³ See article 61(4) and rules 121(3) and (4). See also ICC-01/04-01/06-2205, para. 94, where the Appeals Chamber held: “it is the Prosecutor who, pursuant to article 54(1) of the Statute, is tasked with the investigation of crimes under the jurisdiction of the Court and who, pursuant to article 61(1) and (3) of the Statute, proffers charges against suspects.”

¹⁴ ICC-01/09-01/11-522, paras. 14-15 and ICC-01/09-02/11-584, paras. 18-19.

¹⁵ ICC-01/09-01/11-522, paras. 19-20 and 50, and ICC-01/09-02/11-584, paras. 23, 25, 28, 33, 50 and 55. See also ICC-02/11-01/11-432-Anx-Corr, paras. 5, and 50-51 (dissenting opinion of Judge Fernández de Gurmendi).

in detail each factual allegation contained in the DCC, choosing instead to focus on only some selected allegations and evidence sufficient for the task before it”.¹⁶ Critically, Trial Chamber V held that this did not mean that the Pre-Trial Chamber did not confirm the charges themselves, as well as the facts and circumstances described in those charges and their legal characterisation, unless it explicitly declined to do so:

...the Chamber is not persuaded that, as a general principle, the Pre-Trial Chamber's silence on relevant statements of facts made in the DCC should result in their removal from the post-confirmation Updated DCC. The Chamber thus, in principle, authorises the prosecution to retain such factual allegations in the Updated DCC.¹⁷

i. Use of the word “including”

14. The first point of disagreement between the parties is on the use of the term “including” when describing the locations in which the crimes charged were committed.¹⁸ The Pre-Trial Chamber has not expressly rejected a single location within the Prosecution’s original charging document. To the contrary, the Pre-Trial Chamber refers itself to language such as “in and around”¹⁹, “surrounding”²⁰, “neighbouring villages”²¹, “inter alia”²² and “such as”²³ when describing the locations where the crimes may have occurred. To interpret the Decision as limiting the charges to only those locations specifically referred to by the Pre-Trial Chamber in paragraph 36 of the Decision ignores the language used in the rest of the Decision, is unnecessarily restrictive and constitutes a misunderstanding of the authority and function of the Pre-Trial Chamber.

¹⁶ ICC-01/09-02/11-522, para. 19 and ICC-01/09-02/11-584, para. 23.

¹⁷ ICC-01/09-02/11-522, para. 19 and ICC-01/09-02/11-584, para. 23.

¹⁸ This issue is a point of disagreement identified by numbers 3-6, 8, 12-26 and 29-33 in the Joint Chart.

¹⁹ Decision, para.38.

²⁰ Decision, paras. 44, 65, 66, 67 and 73.

²¹ Decision, para. 63

²² Decision, para. 67.

²³ Decision, para.67.

15. The majority of the Defence's points of disagreement with respect to this issue enumerated in the Joint Chart involve an interpretation of paragraph 36, which is also in issue (see issue (ii) below).²⁴

16. First, attempting to limit the charges only to those precise villages referred to in paragraph 36 of the Decision ignores the Pre-Trial Chamber's findings in other parts of the Decision.

17. In paragraph 29 of the Decision, the Pre-Trial Chamber defines the UPC/FPLC attack on "a number of villages in Banyali-Kilo *collectivité*", which occurred between on or about 20 November and on or about 6 December 2002, as the "*First Attack*". In this same paragraph it defines the UPC/FPLC attack on "a number of villages in Walendu-Djatsi *collectivité*", which occurred between on or about 12 and on or about 27 February 2003, as the "*Second Attack*". In paragraph 36, the Pre-Trial Chamber sets out its finding with respect to the crimes committed in the course of the *First Attack* and the *Second Attack*, and in so doing lists some of the locations within these two *collectivités* with respect to each count. Whilst the Pre-Trial Chamber does refer to a number of villages "as identified by the Chamber", it does not expressly reject any of the locations set out in the DCC in relation to any of the counts, or reject any of the evidence put forward by the Prosecution of the commission of crimes in these other places, nor does it state expressly that it has limited the counts to these specified locations.

18. Moreover, the Pre-Trial Chamber goes on to state in paragraph 37 that the findings in paragraph 36 "are more specifically supported by the facts presented in each of the following subsections".²⁵ In the paragraphs that follow (paragraphs 38 to 73), there are numerous instances when the Pre-Trial Chamber uses inclusive language intended to take into account other locations within each of the two

²⁴ The points of disagreement falling under both issues (i) and (ii) are identified by numbers 2-5 and 12-21 in the Joint Chart.

²⁵ Decision, para. 37.

collectivités than those set out in paragraph 36 as regards the various counts, for instance: “*in and around*”²⁶; “*heading to*”²⁷; “*in the surrounding forest*”²⁸; “in Sangi, UPC/FPLC forcibly took [women] *to a forest* and raped them”²⁹; “[a woman was raped] *on the road from Buli to Kobu*”³⁰; “was arrested... in Sangi [and then] made to carry pillaged goods *from Sangi to Kobu*, where she was raped repeatedly”³¹; “captured in Jitchu [and then] forced to carry pillaged goods *to Buli and Sangi*”³²; “captured *near* Ngabili [and then had] to carry pillaged good to Kobu [after which] she was held captive [in] Kobu and Bunia”³³; “taken prisoner [in Kobu], where she was raped... [and then taken to] Bunia [where he] continued to have sexual intercourse with her”³⁴; “the *offices of Kilo-Moto*”³⁵; “*in the neighbouring villages*”³⁶; “*in the surrounding villages... forced to live in the bush*”³⁷; “fled to the *surrounding bush* or to *other villages*”³⁸; “from *villages surrounding* Lipri, Kobu and Bambu... persons displaced from, *inter alia*, Nyangaray... fled to other *locations such as... forced to take refuge in the forest or on the hills*”³⁹; and “and their *surrounding villages*”⁴⁰ (italics added).

19. Several of the above examples also relate to the crime of sexual slavery and forcible transfer (and/or displacement of civilians)⁴¹, although not limited to these two crimes. Given the continuous nature of these two crimes, deleting the word

²⁶ Decision, para. 38.

²⁷ Decision, para. 44.

²⁸ Decision, para. 44.

²⁹ Decision, para. 51.

³⁰ Decision, para. 51.

³¹ Decision, para. 54.

³² Decision, para. 55.

³³ Decision, para. 56.

³⁴ Decision, para. 57.

³⁵ Decision, para. 62.

³⁶ Decision, para. 63.

³⁷ Decision, para. 65.

³⁸ Decision, para. 66.

³⁹ Decision, para. 67.

⁴⁰ Decision, para. 73.

⁴¹ The crimes of forcible transfer of population (crime against humanity) and displacement of civilians (war crime) will be referred to simply as “forcible transfer” in this filing.

“including” would significantly undermine the Pre-Trial Chamber’s findings in relation to these two crimes. As indicated in the Decision, individuals were often captured in one location, abused physically and sexually, used for forcible labour in other locations, and raped at still other locations or along the way.⁴² Similarly, with respect to the crime of forcible transfer, the Pre-Trial Chamber accepted that civilians fled from “surrounding villages”, “were forced to live in the bush”, “fled to the surrounding bush or to other villages”, “*inter alia*”, and fled to “other locations [*such as*]”⁴³ as evidence of this crime. By using these inclusive terms, the Decision encompasses acts occurring at these other locations within the *collectivité*, which are not specifically articulated in paragraph 36, as part of the charges.

20. Second, the Pre-Trial’s Chamber’s authority under article 61(7) does not extend to amending the charges.⁴⁴ It can confirm or reject charges or adjourn the hearing and request *the Prosecutor* to provide further evidence or amend a charge where the evidence appears to establish a different charge. Should the Pre-Trial Chamber decline to confirm any facts supporting a charge, this must be done explicitly.⁴⁵

21. The Prosecution is not required to present all of its evidence, but is rather only required to demonstrate there are substantial grounds to believe the crimes charged occurred. The limited role of the confirmation of charges hearing,⁴⁶ and the limited function and authority of the Pre-Trial Chamber, must guide any assessment on the limitations to be read into the Updated DCC. It would be highly speculative and inappropriate to suggest that because the Pre-Trial Chamber did not mention a

⁴² Decision, paras. 54-57.

⁴³ Decision, paras. 65-68.

⁴⁴ ICC-01/09-01/11-522, paras. 14-15 and ICC-01/09-02/11-584, paras. 18-19.

⁴⁵ ICC-01/09-01/11-522, paras. 14-15 and ICC-01/09-02/11-584, paras. 18-19.

⁴⁶ The Prosecution recalls that the confirmation hearing is not a trial or a mini-trial. See *e.g.* ICC-01/04-01/07-475 OA, para. 68; ICC-01/04-01/10-514 OA4, para. 47; ICC-01/04-01/07-717, para. 64; ICC-01/04-01/07-412, page 4; and ICC-02/05-02/09-35, para. 10; ICC-01/04-01/07-474, para. 100.

location in the Decision (or any fact), it means it has been rejected and ought to be removed from the Updated DCC.

22. Third, the use of the word “including” is consistent with the jurisprudence of other international criminal tribunals where it has been accepted that given the sheer scale of the alleged crimes, it is impractical to require too high a degree of specificity in the indictment.⁴⁷ What is ultimately required is for the charging instrument to set out in sufficient detail the essential aspects of the Prosecution’s case.⁴⁸ The Prosecution maintains that using the term “including” to refer to the locations specifically set out in the Decision as well as other locations within each of the two *collectivités* is consistent with the findings of the Pre-Trial Chamber. In the alternative, the Prosecution proposes the phrase “in or around” each of the enumerated locations in the Decision.

23. With respect to the crimes of sexual slavery and forcible transfer, however, in light of the continuous nature of these crimes, the Prosecution proposes the alternative language “during or following attacks in and around [list of villages] in [collectivité].”

24. In addition to the 23 instances in the Joint Chart where the Defence seeks to limit the locations referred to in the Updated DCC to those specifically set out in paragraph 36 of the Decision, there are two additional points of disagreement in the use of the word “including”, related to paragraphs 85 and 95 of the Updated DCC.⁴⁹

25. In paragraph 85, the Prosecution uses the word “including” to indicate that crimes are alleged to have occurred in additional locations within the Walendu-Djatsi

⁴⁷ *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR73, Decision on Aloys Ntabakuze’s Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence (18 September 2006) at para. 27. See also: *Prosecutor v Ntagerura et al*, ICTR-99-46-A, Judgement, 7 July 2006, at para. 23; and *Prosecutor v Krnojelac*, IT-97-25-A, Judgement, 17 September 2003, para. 132 (citing *Kupreskic*). See also e.g. ICC-01/05-01/08-836, paras. 84-89.

⁴⁸ *Prosecutor v Kupreskic*, IT-95-16-A, Appeal Judgment, 23 October 2001, at paras. 89-114.

⁴⁹ These points of disagreement are articulated at numbers 6 and 8 of the Joint Chart, respectively.

collectivité. Indeed, in paragraph 73 of the Decision, the Pre-Trial Chamber expressly finds that UPC/FPLC troops were ordered to “flatten” the villages of Kobu, Bambu, Lipri “and their surrounding villages”. The Pre-Trial Chamber goes on to set out examples of this destruction, including setting fire to houses and destroying fields, and then lists several locations to support this finding. In no way does the Pre-Trial Chamber indicate that these findings are exhaustive or that other locations within the *collectivité* are rejected from count 18. Rather, the Chamber refers to the general pattern of the property belonging to Lendu civilians, “the predominant ethnic group in the Walendu-Djatsi *collectivité*” to demonstrate how the evidence fulfils these elements of this crime.

26. Similarly, with respect to paragraph 95, the Prosecution maintains that the use of the word “including” is entirely appropriate and in accordance with the Decision. In paragraph 89 of the Decision, the Pre-Trial Chamber refers to the presence of children under the age of 15 “in a number of UPC/FPLC training camps” and then goes on to list some of them with reference to the evidence provided. There is no suggestion that this is an exhaustive list or that the charges are limited to these locations, in contrast to the express limitation placed on the temporal scope (“6 August 2002 until August 2003”) in this same paragraph of the Decision.

27. Moreover, the Pre-Trial Chamber specifically found that in light of the continuous nature of the child soldier crimes and the fact that the UPC/FPLC was continuously on the move, the Prosecution did not need to identify specific locations in which these crimes occurred, provided the acts fell within the broad temporal and geographic framework of the charges.⁵⁰ The Defence’s position on this paragraph of the proposed Updated DCC is completely at odds with the Pre-Trial Chamber’s express findings in this regard.

⁵⁰ Decision, para. 83.

ii. Interpreting Paragraphs 36 and 97 of the Decision

28. The Prosecution's observations with respect to paragraph 36 of the Decision are largely set out in the above section. In short, paragraph 36 needs to be read along with paragraph 29 (which defines the *First Attack* and the *Second Attack*), paragraph 37 and the other paragraphs of the Decision that rely on evidence of crimes happening outside of the locations specifically listed in paragraph 36. The Prosecution will not repeat its observations with respect to points number 3-5 and 12-21 in the Joint Chart, but will rather address the additional paragraphs of the Updated DCC that are disputed by the Defence.

29. Paragraph 72 of the Updated DCC states that UPC/FPLC commanders had 'concubines' at their camp in Mongbwalu. As the Prosecution notes in the Joint Chart, this term is drawn from the evidence of a witness.⁵¹ It is not a legal term, but rather the description provided by this witness.⁵² The Prosecution deleted from the Updated DCC the statement in paragraph 74 that "many UPC/FPLC commanders kept women and girls as sexual slaves" on the basis that the Pre-Trial Chamber was not satisfied that the evidence with respect to the *First Attack* demonstrates that perpetrators exercised the powers attaching to the rights of ownership over the victim as sexual slaves. However, the Pre-Trial Chamber did not reject the witness's evidence that UPC/FPLC commanders had concubines at their camp in Mongbwalu. Absent an express rejection of this witness's evidence by the Pre-Trial Chamber, this fact has been confirmed.

30. There is no basis to delete paragraphs 104 and 105 from the Updated DCC. The Prosecution never charged the Accused as a direct perpetrator of the crimes of rape and sexual slavery of child soldiers (counts 6 and 9), a fact the Pre-Trial

⁵¹ P-0038: DRC-OTP-2055-0146 at 0157.

⁵² Other witnesses also refer to 'concubines' being kept by UPC/FPLC commanders (P-0017: DRC-OTP-0174-1471 at 1487-1489; and P-0031: DRC-OTP-0162-0002 at 0028-0029 and DRC-OTP-0160-0422, 0423).

Chamber duly acknowledged in paragraph 144 of the Decision. Having noted that the Prosecution did not charge the Accused as a direct perpetrator for these two crimes, the Pre-Trial Chamber did not assess whether the Accused personally committed such crimes. The Pre-Trial Chamber's findings in paragraph 144 that there are no substantial grounds to believe that the Accused can be held responsible as a direct perpetrator for certain other crimes "*that he is charged with*" (emphasis added), has no bearing on counts 6 and 9, or on the factual allegations contained in paragraphs 104 and 105 of the Updated DCC.

31. Rather, these allegations about Bosco Ntaganda's conduct and the conduct of other UPC/FPLC commanders in respect of perpetrating sexual violence against girl and women soldiers are relevant for establishing Bosco Ntaganda's intent and knowledge with respect to the commission of these crimes (both as a result of his setting a negative example and his knowledge of the crimes). These factual allegations are also relevant to establish his responsibility including as an indirect co-perpetrator and a military commander. They are also relevant to establish the widespread and systematic nature of acts of rape and sexual slavery within the UPC/FPLC, contextual elements of crimes against humanity.⁵³ The Pre-Trial Chamber made no direct findings rejecting the facts in paragraphs 104 and 105 on this point. There is no justified reason for removing them from the Updated DCC.

32. The Defence also challenges the inclusion of the paragraphs 67, 71, 72 and 74 with respect to counts 7 and 8, on the basis that the Pre-Trial Chamber declined to confirm the crime of sexual slavery in the *First Attack*. All of these paragraph references are properly included.

⁵³ ICC-01/04-01/06-803-tEN, para.152 and ICC-01/04-01/07-717, paras. 225-228. See also authorities cited in footnote 5 as well as *Prosecutor v Perisic*, IT-04-81-T, Decision on defence motion to exclude the expert report of Morten Torkildsen, 30 October 2008 para. 15, Decision on Expert Reports of Ewa Tabeau, 23 April 2009, para. 16; and *Prosecutor v Gatete*, ICTR-2000-61-T, Decision on defence motion for exclusion of evidence and delineation of the defence case, 26 March 2010, paras. 23-27.

33. The Pre-Trial Chamber found that the acts set out in these four paragraphs, taken together, did not amount to sexual slavery in the course of this attack. However, it did not reject any of the factual allegations underlying these acts. The accepted acts such as capturing, detaining and raping women are relevant to the charges of sexual slavery in the *Second Attack*, including to Bosco Ntaganda's intent and knowledge, as well as for the modes of liability (such as command responsibility).

iii. Impact of Section H(ii) of the Updated DCC

34. The Prosecution maintains that the Updated DCC – in its entirety – is the operative charging document. Section H is a summary intended to provide assistance to the Accused, the Chamber and the participants by emphasising the most relevant facts and circumstances related to the charges, and then by listing the charges. In no way is section H, and particularly not sub-section H(ii) of the Updated DCC, the *only* relevant or binding section of the charging document.

35. The Appeals Chamber determined that none of the provisions of the Statute distinguish between “material facts” and “subsidiary facts”.⁵⁴ It was also unpersuaded by arguments that only “material facts” but not “subsidiary or collateral facts” may be the subject of a change in legal characterisation.⁵⁵ Accordingly, there is no merit in the Defence's argument that the Trial Chamber is confined to the facts set out in only one section of the Updated DCC. In the context of regulation 55(2), the Appeals Chamber confirmed that a Trial Chamber should not “be constrained exclusively to using the precise characterisations established by the Pre-Trial Chamber at a much earlier stage of the proceedings and with a necessarily more restricted view of the case as a whole.”⁵⁶

⁵⁴ ICC-02/11-01/11-572, paras. 36-37.

⁵⁵ ICC-01/04-01/07-3363, para. 50.

⁵⁶ ICC-01/04-01/07-3363, para. 57.

36. The Defence suggests that each count in sub-section H(ii) of the Updated DCC should recite the locations specifically mentioned by the Pre-Trial Chamber in paragraph 36 of the Decision.⁵⁷ For the reasons articulated in issue (i) above, the Prosecution maintains that the Decision confirms that crimes were committed in each of the two *collectivités* specified in the *First Attack* and the *Second Attack* in their entirety. The list of specific locations articulated in paragraph 36 is not meant to be exhaustive thereby limiting the charges to only those locations.

37. The Prosecution is not, in principle, opposed to adding a list of non-exhaustive locations to each of the charges set out in sub-section H(ii) of the Updated DCC, but only with terms such as “including” or “in or around” (with the exception for sexual slavery and forcible transfer) and on the understanding that sub-section H(ii) is not to be separated from the rest of the Updated DCC in terms of legal effect.

38. Indeed, the Prosecution does refer to specific locations for two of the charges in sub-section H(ii) of the Updated DCC, to reflect the fact that the Pre-Trial Chamber confirmed different modes of liability for these two crimes as between the *First Attack* and the *Second Attack*.

39. The Defence also seeks to exclude cross-references to certain paragraphs in the Updated DCC that are listed in sub-section H(ii) as the basis of the charges.

40. The first of these is with respect to count 3 (attacks against the civilian population), where the Defence objects to the cross-reference to the crime of forcible transfer in paragraph 87 of the Updated DCC. The Pre-Trial Chamber did not expressly find that the crime of forcible transfer cannot be the factual basis for the war crime of attacking civilians. In accordance with the decisions in the *Kenya* cases,

⁵⁷ These points of disagreement are articulated at numbers 22-33 of the Joint Chart.

this silence on the part of the Pre-Trial Chamber cannot operate to exclude these facts.⁵⁸

41. Importantly, in paragraph 45 of the Decision, the Pre-Trial Chamber states that the crime of “attacking civilians” requires that the perpetrator direct one or more acts of violence against civilians. The Chamber lists the *types* of conduct that may constitute such an attack in which it includes “murder, rape, pillage, attacks on protected objects and destruction of property”.⁵⁹ The Pre-Trial Chamber goes on to state that its findings in relation to counts 2, 5, 11, 17 and 18 “qualify as the underlying conduct of the war crime of attacking civilians.” There is no express mention of acts of displacement of civilians.

42. The Pre-Trial Chamber provides examples of the types of conduct that may constitute an “attack against civilians” without providing an exhaustive list. Had the Pre-Trial Chamber intended to limit the count 3 in this way, it would have to do so explicitly. The exercise of harmonising the Decision with the DCC is not a speculative one.

43. The Prosecution response to the Defence request to delete the references to paragraphs 67, 71, 72, 74 and 105 in sub-section H(ii) is set out in paragraphs 30 to 33 above.

iv. Silence by the PTC in the Decision does not necessitate the removal of a factual allegation

44. Trial Chamber V in the *Ruto & Sang* and *Kenyatta* proceedings held that where a Pre-Trial Chamber is silent in the confirmation hearing decision on relevant

⁵⁸ ICC-01/09-01/11-522, paras. 19-20 and ICC-01/09-02/11-584, paras. 23 and 25.

⁵⁹ Decision, paras. 46 and 47.

statements of facts made in the DCC, the Prosecution is authorised to retain such factual allegations in its updated DCC.⁶⁰

45. In these decisions, the Trial Chamber found a consistent proposition among Trial Chambers that the “confirmation hearing decision alone is not meant to serve as an authoritative statement of facts and circumstances described in the charges” or of their legal characterisation.⁶¹ In support of this proposition, Trial Chamber V referred to the findings of Trial Chamber II in *Katanga and Ngudjolo*⁶² and Trial Chamber III in *Bemba*.⁶³

46. On the basis of the same reasoning as set out in section (i), article 61(7) provides the Pre-Trial Chamber with the authority to confirm charges, decline charges, or adjourn the hearing. It does not grant the Pre-Trial Chamber the power to modify or limit the charges or the factual allegations upon which they are based, short of the Pre-Trial Chamber expressly rejecting them.⁶⁴

47. In the Joint Chart, the Defence disputes six words or phrases in the Updated DCC under this issue. The Defence also indicated that it may provide additional submissions on paragraphs 44-46 and 48-51 of the Updated DCC related to issue (iv). As set out herein, the Pre-Trial Chamber’s silence on these issues should not result in a change to the Updated DCC. The Accused’s role in the prior and subsequent attacks, as detailed, is also relevant to his intent and knowledge and the alternative modes of liability.

48. The Prosecution’s submission with respect to paragraph 72 is sufficiently articulated in the Joint Chart.⁶⁵ There is no basis to replace the word “women” with “the three nuns”. Critically, the Pre-Trial Chamber did not confine its findings of

⁶⁰ ICC-01/09-01/11-522, paras. 19-20 and 50, and ICC-01/09-02/11-584, paras. 23, 25, 28, 33, 50 and 55.

⁶¹ ICC-01/09-02/11-584, para. 20. *See also* ICC-01/09-01/11-522, para. 16.

⁶² ICC-01/04-01/07-1547-t-ENG, para. 13.

⁶³ ICC-01/05-01/08-836, para. 30.

⁶⁴ ICC-01/09-01/11-522, paras. 14-15 and ICC-01/09-02/11-584, paras. 18-19.

⁶⁵ Joint Chart, point number 1.

rape to three nuns, but clearly referred to them as an example of where UPC/FPLC soldiers raped women in Mongbwalu.⁶⁶ In any event, the term “women” in paragraph 72 is accurate as the three nuns are, indeed, women.

49. With respect to paragraph 85, the Prosecution refers to its submissions in section (i) on this paragraph with respect to the use of the phrase “including”.

50. The Defence’s points of disagreement in respect of paragraphs 95 and 98 are similar. Had the Pre-Trial Chamber intended to limit the factual allegation relating to the particular locations of training camps (paragraph 95) or the particular locations where children under the age of 15 actively participated in hostilities through combat (paragraph 98), it ought to have done so expressly.

51. Paragraph 95 of the Updated DCC refers to the location of various training camps. Paragraph 98 lists locations where children under the age of 15 actively participated in hostilities through combat. The Decision refers to select evidence in support of its findings on the location of training camps (in paragraphs 87, 89 and 90) and how and where children were specifically used by the UPC/FPLC “at different locations throughout the Province of Ituri”.⁶⁷ The Pre-Trial Chamber does not expressly reject any locations set out in the DCC or state that the list of locations of training camps or combat set out in paragraphs 87, 89 and 84 of the Decision are exhaustive. Indeed, the Pre-Trial Chamber found as a fact that the child soldier charges spanned the whole of Ituri and, given the continuous nature of these crimes and the fact that the UPC/FPLC were continuously on the move, held that it may be permissible for the Prosecution to not identify specific locations provided the acts fall within the temporal and geographic framework of the charges.⁶⁸

⁶⁶ Decision, para. 49: “This is *demonstrated* by the following facts...”.

⁶⁷ Decision, para. 93-96.

⁶⁸ Decision, para. 83.

REQUEST

52. The Prosecution requests that the Chamber approve the Updated DCC.

53. In the alternative to the word “including” when describing the geographic scope of the charges, the Prosecution proposes the adoption of the words “in or around”, and for the crimes of sexual slavery and forcible transfer, the words “during or following attacks in or around [list of villages] in [*collectivité*].”



Fatou Bensouda,
Prosecutor

Dated this 21st day of November 2014

At The Hague, The Netherlands