



Original: English

No.: ICC-01/04-02/06  
Date: 21 November 2014

**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**

**Additional Observations on Behalf of Mr Ntaganda  
Concerning the Prosecution's Updated Document Containing the Charges**

**Source : Defence Team of Mr Bosco Ntaganda**

**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**

Me Stéphane Bourgon  
Me Luc Boutin  
Me William St-Michel

**Legal Representatives of the Victims**

Ms Sarah Pellet  
Mr Dmytro Suprun

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(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**

Further to the Trial Chamber's ("Chamber") Order of 17 November 2014,<sup>1</sup> issued following the submission of the *"Prosecution's Submission of an Updated Document Containing the Charges, the Joint Submission of Areas of Disagreement and Request to File Additional Observations"* on 14 November 2014 ("Prosecution Submission"),<sup>2</sup> Counsel representing Bosco Ntaganda ("Mr Ntaganda" or "Defence") hereby file these:

**Additional Observations on Behalf of Mr Ntaganda  
Concerning the Prosecution's Updated Document Containing the Charges  
("Defence Additional Observations")**

## INTRODUCTION

1. Pursuant to the Chamber's Order of 30 October 2014,<sup>3</sup> Mr Ntaganda received a copy of the Prosecution's draft updated document containing the charges ("Draft Updated DCC") and was consulted by the Prosecution on the same.
2. Even though the Prosecution and the Defence were able to agree on most of the changes proposed in the Prosecution's Draft Updated DCC, some important disagreements remain for which the parties take the view that the Chamber's involvement is necessary.
3. As mentioned in the Prosecution Submission,<sup>4</sup> these Defence Additional Observations address four specific issues, which form the basis of the points on which the parties were not able to agree. They are submitted with the aim of assisting the Chamber in adjudicating the parties' disagreements.
4. As for the Prosecution's observations in paragraphs 10 and 11 of its Submission, the Defence takes the view that these observations are neither relevant nor binding on the Chamber and/or the Defence at this stage.

---

<sup>1</sup> Email of the Presiding Judge's Legal Officer, 17 November 2014.

<sup>2</sup> ICC-01/04-02/06-402.

<sup>3</sup> ICC-01/04-02/06-390.

<sup>4</sup> ICC-01/04-02/06-402, para.5.

## OVERVIEW

5. The Prosecution's proposed Updated DCC ("Updated DCC")<sup>5</sup> does not accurately reflect the charges as confirmed in the Confirmation Decision.<sup>6</sup> While the Confirmation Decision has clearly delineated the charges, the Updated DCC remains impermissibly vague regarding the exact scope of the Prosecution's case against Mr Ntaganda.

6. The Prosecution's addition and/or use of the word "including" in several paragraphs of the Updated DCC, in particular with respect to locations where crimes were allegedly committed, impermissibly infringes on Mr Ntaganda's right to be informed in detail of the nature, cause and content of the charges brought against him. The Prosecution's *modus operandi* impacts negatively on Mr Ntaganda's ability to conduct effective and meaningful investigations. It will also make the trial much longer.

7. Moreover, the insertion of the word "including" in relation to the locations where crimes were allegedly committed goes significantly beyond and ignores the authoritative and binding character of paragraph 36 of the Confirmation Decision. The Confirmation Decision makes clear which charges were confirmed, as well as the locations in which these crimes were allegedly committed.

8. In very much the same way, the Prosecution erroneously maintains factual allegations in relation to charges, the scope of which has been expressly limited to in paragraphs 36 and 97 of the Confirmation Decision.

9. Furthermore, bearing in mind the object and purpose of Section H (ii) of the Updated DCC and Mr Ntaganda's right to be informed in detail of the nature, cause and content of the charges, the Defence posits that Section H (ii) of the Updated DCC – i.e. the Legal Characterization of the Facts – must expressly set out, exhaustively,

---

<sup>5</sup> ICC-01/04-02/06-402-AnxB.

<sup>6</sup> Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309 ("Confirmation Decision").

the Prosecution's case against Mr Ntaganda. This implies, at a minimum and where appropriate: (i) clearly listing the locations where crimes were allegedly committed; (ii) deleting cross-references to factual allegations underpinning charges rejected and/or limited by the Pre-Trial Chamber; and (iii) deleting the word "including" when added by the Prosecution.

10. Lastly, maintaining in the Updated DCC factual allegations because they were not specifically addressed in the Confirmation Decision is not always in the interests of justice. Indeed, taking into consideration the Pre-Trial Chamber's analysis leading to the Confirmation Decision, it appears evident that the Pre-Trial Chamber did not address certain factual allegations on purpose. In such cases, as in the present case, the deletion of certain allegations is necessary.

11. In this regard, it must be stressed that maintaining in the Updated DCC factual allegations on which the Confirmation Decision is silent – on purpose – is likely to result in lengthy investigations by both parties and, in turn, impact negatively and significantly on the duration of the trial.

## SUBMISSIONS

12. As a preliminary matter, the Defence underscores that an Updated DCC serves the interests of a fair and expeditious trial, in enabling a fair and effective presentation of evidence.<sup>7</sup> An Updated DCC is critical on the ground that the Confirmation Decision did not provide a readily accessible statement of the facts underlying each charge.<sup>8</sup>

### **I. The Use of the Word "Including" in Relation to Locations in Which a Crime is Alleged to Have Been Committed**

---

<sup>7</sup> ICC-01/04-01/06-1548, para.13.

<sup>8</sup> ICC-01/09-01/11-439, para.6; ICC-01/05-01/08-836, para.30.

13. In several instances in the Updated DCC, the Prosecution adds<sup>9</sup> or maintains<sup>10</sup> the word “including” in relation to locations in which crimes were allegedly committed. In the Defence’s view, the word “including” instils undue confusion and ambiguity as to the scope of the Prosecution’s case against Mr Ntaganda. For instance, when it is alleged that Mr Ntaganda is criminally liable for attacks on protected objects in the *collectivité* of Walendu Djatsi (*including* in Bambu),<sup>11</sup> it is not clear whether count 17 for the Walendu Djatsi *collectivité* is limited to the sole village of Bambu or may encompass other locations.

14. Article 67(1)(c) of the Statute enshrines the right of the accused to be informed in detail of the nature, cause and content of the charges brought against him or her. The jurisprudence of the *ad hoc* tribunals clearly establishes that the degree of specificity required from the Prosecution in setting out the material facts underpinning a charge is to be determined on a case-by-case basis.<sup>12</sup> The degree of specificity required cannot be decided in the abstract.<sup>13</sup> The ICTY Appeals Chamber ruled that “[t]he Prosecution’s characterization of the alleged criminal conduct *and the proximity of the accused to the underlying crime* are decisive factors in determining the degree of specificity with which the Prosecution must plead the material facts of its case in the indictment in order to provide the accused with adequate notice”.<sup>14</sup> It is thus incorrect to contend that modes of liability that may involve remote conduct – such as indirect co-perpetration – allows the Prosecution to refer, in all circumstances, to crime locations with less specificity.

---

<sup>9</sup> ICC-01/04-02/06-402-AnxB, paras.79, 84, 85, 95, 157-a, 157-b, 158, 160, 162-a, 162-b, 162-c, 163, 165, p.62-65, counts 11-13, 17.

<sup>10</sup> ICC-01/04-02/06-402-AnxB, paras.78, 79, 84, 95.

<sup>11</sup> ICC-01/04-02/06-402-AnxB, para.165 (emphasis added).

<sup>12</sup> *Prosecutor v. Hadžić*, Case No. IT-04-75-PT, Decision on Defence Motion Alleging Defects in Form of First Amended Indictment, 10 November 2011, para.11.

<sup>13</sup> *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-AR73.3, Decision on Joint Defence Interlocutory Appeal Against Trial Chamber’s Decision on Joint Defence Motion to Strike the Prosecution’s Further Clarification of Identity of Victims, 26 January 2009, para.17.

<sup>14</sup> *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Judgement, 28 February 2005, para.28 (emphasis added).

15. The Defence submits that the nature of the case against Mr Ntaganda requires the Prosecution to be very precise in setting out the facts and circumstances supporting the charges, in particular with respect to locations. Although Mr Ntaganda is not charged as a direct perpetrator for all crimes listed in the Updated DCC, he is nevertheless alleged to have been close to the relevant events.<sup>15</sup> In such circumstances, the exact locations in which crimes were allegedly committed are of utmost relevance for the Defence in order to conduct effective investigations with a view to preparing a meaningful defence. The fact that the Pre-Trial Chamber found that there are substantial grounds to believe that Mr Ntaganda is responsible for certain crimes as an indirect co-perpetrator<sup>16</sup> does not justify *per se* a vague and imprecise reference to crime locations, such as the use of the word “including”.

16. Consequently, for the reasons set out above, the Defence respectfully requests that the word “including” be removed from the paragraphs of the Updated DCC identified in points 3-6, 8, 12-23, 25-26, and 29-33 of Annex C to the Prosecution Submission.

## **II. The Interpretation of the Pre-Trial Chamber’s Findings in Paragraphs 36 and 97 of the Confirmation Decision**

17. The Pre-Trial Chamber confirmed the charges presented by the Prosecution against Mr Ntaganda “to the extent specified” in paragraphs 12, 31, 36, 74 and 97 of the Confirmation Decision.<sup>17</sup> Accordingly, the Defence submits that the crime locations listed in paragraph 36 of the Confirmation Decision are exhaustive and not mere illustrations. In very much the same way, in cases where the scope of a charge has been expressly limited to in paragraphs 36 and 97 of the Confirmation Decision, the Defence asserts that factual allegations falling outside the scope of these charges cannot be maintained.

---

<sup>15</sup> See, e.g., ICC-01/04-02/06-402-AnxB, paras.1, 2, 4, 44, 45, 46, 48, 50, 51, 77, 64, 67.

<sup>16</sup> ICC-01/04-02/06-309, para 97.

<sup>17</sup> ICC-01/04-02/06-309, p.63 (b).

## A. The exhaustiveness of the list of crime locations

18. The Prosecution erroneously contends that « [l]imiting the charges only to precise villages does not accurately reflect the [Confirmation] Decision as a whole”.<sup>18</sup> It incorrectly suggests that paragraph 36 of the Confirmation Decision must be read together with paragraphs 29 and 38 to 73. The Prosecution’s holistic reading of the Confirmation Decision ignores the authoritative character of paragraph 36 and misrepresents the purpose of paragraphs 29 and 38 to 73.

19. At the outset, it must be stressed that a holistic reading of the Confirmation Decision for the purpose of defining the scope of the charges, in particular as regards the crime locations, is highly inappropriate. It is settled jurisprudence that the Prosecution is to ensure that the charges described in the Updated DCC reflect not only the temporal scope for each crime, but also the locations *as specified* in the Confirmation Decision.<sup>19</sup>

20. Unless the Pre-Trial Chamber has expressly used the term “including” or a similar expression in the Confirmation Decision,<sup>20</sup> the Defence posits that the Prosecution is precluded from adding the word “including” in the Updated DCC when referring to crime locations. In the *Ruto and Sang* case, Trial Chamber V ruled that the addition of the word “including” in the updated document containing the charges was inconsistent with the Pre-Trial Chamber’s statement that the charges against the accused were confirmed “to the extent specified in paragraph 349 [of the Confirmation Decision]” in the case of Mr Ruto and “to the extent specified in paragraph 367 [of the Confirmation Decision]” in the case of Mr Sang, which both specified precise crime locations.<sup>21</sup>

21. Furthermore, in the instant case, a plain and logical reading of paragraph 36 of the Confirmation Decision bolsters the assumption that the crimes locations listed

<sup>18</sup> ICC-01/04-02/06-402-AnxC, point 3.

<sup>19</sup> ICC-01/09-01/11-522, para.29.

<sup>20</sup> See, e.g., ICC-01/04-02/06-309, para.67 (“such as Petsy, Buli, Goy and Katho”).

<sup>21</sup> ICC-01/09-01/11-522, para.33.



therein are exhaustive and not merely illustrative. On the one hand, the Pre-Trial Chamber employed the word “in” when referring to the villages where crimes were allegedly committed. On the other hand, the lengthy inventory of villages for some counts<sup>22</sup> can only be demonstrative of the Pre-Trial Chamber’s intent to be comprehensive when listing the crime locations.

22. The Pre-Trial Chamber’s finding in paragraph 29 that the UPC/FPLC attacked a “number of villages” in the Banyali-Kilo and Walendu-Djatsi *collectivités* without further specificity cannot be relied upon to broaden the scope of crime locations specified in paragraph 36.

23. As evidenced by the structure of the Confirmation Decision, paragraph 29 defines the scope of the First and the Second Attacks for the sole purpose of establishing the *chapeau* elements of Article 7. This Court’s jurisprudence as well the *ad hoc* tribunals’ case-law clarified that the “widespread or systematic attack directed against a civilian population” and the underlying crimes are two distinct concepts,<sup>23</sup> the scope of the attack being generally wider than the crimes included in the charges brought against the accused.<sup>24</sup> Any suggestion that the absence of an exhaustive list of villages in paragraph 29 indicates that the Pre-Trial Chamber’s findings in paragraph 36 are only illustrative, is thus meritless.

24. The Pre-Trial Chamber’s holding that “the findings in paragraph 36 above are more specifically supported by the facts presented in each of the following subsections”<sup>25</sup> is of no support to the Prosecution’s arguments suggesting that paragraph 36 is not limitative.

---

<sup>22</sup> See, e.g., ICC-01/04-02/06-309, para.36 (count 18 in particular for the Second Attack).

<sup>23</sup> ICC-01-04-01-07-3436, para. 1124; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Judgement, 29 May 2013, vol. I, paras.42-43.

<sup>24</sup> See, e.g., *Prosecutor v. Nizeyimana*, Case No. ICTR-00-55C-T, Judgement, 19 June 2012, paras.1544 (finding that there was a widespread and systematic attack against the civilian population in Butare and in Rwanda generally), 1550 (finding Nizeyimana guilty of extermination as a crime against humanity only as it relates to the assault on Cyahinda Parish).

<sup>25</sup> ICC-01/04-02/06-309, para.37.

25. As regards the “continuing nature” of the crime of sexual slavery during the Second Attack,<sup>26</sup> the Defence notes that all locations where the crimes allegedly started and ended and which are analyzed by the Pre-Trial Chamber in paragraphs 54 to 57, are specified in paragraph 36.<sup>27</sup> Concerning the crime of forcible transfer/displacement,<sup>28</sup> the Pre-Trial Chamber’s analysis focused on the area left by the allegedly displaced persons, rather than their final destination. All the villages from which civilians were allegedly transferred during the First and the Second Attacks and which were examined by the Pre-Trial Chamber in paragraphs 65 to 67, are listed in paragraph 36.

26. The Defence further observes that the “inclusive” language referred to by the Prosecution in its comments<sup>29</sup> mainly concerns acts of forcible displacement.<sup>30</sup> The remaining language does not demonstrate how the locations considered by the Pre-Trial Chamber in its analysis of the evidence supporting the other counts were only illustrative of the scope of the charges.<sup>31</sup>

27. For all these reasons, the Deference reiterates that the word “including” should be deleted from the paragraphs of the Updated DCC identified in points 3-6, 8, 12-23, 25-26, and 29-33 of Annex C to the Prosecution Submission.

---

<sup>26</sup> ICC-01/04-02/06-402-AnxC, point 3.

<sup>27</sup> With the sole exception of Bunia.

<sup>28</sup> ICC-01/04-02/06-402-AnxC, point 3.

<sup>29</sup> ICC-01/04-02/06-402-AnxC, point 3.

<sup>30</sup> See ICC-01/04-02/06-309, paras.65 (“surrounding villages”), 66 (“surrounding bush”, “other villages”), 67 (“villages surrounding”, “*inter alia*”, “such as”).

<sup>31</sup> The Pre-Trial Chamber detailed the scope of the expression “in and around Mongbwalu” (para.38) in paragraphs 39 to 41. Moreover, the other expressions mentioned by the Prosecution clearly refer to the immediate vicinity of the villages: (i) the alleged killing of an aged man “heading to” Lipri (para.44); (ii) the alleged killing of “some 92” people in the centre of the village of Jitchu and in the “surrounding forest” (para.44); (iii) the alleged rape of P-0113 “on the road from” Buli to Kobu (para.51). In the latter case, the Defence observes that both villages are mentioned in paragraph 36 of the Confirmation Decision under counts 4 and 5 (rape of civilians). With respect to the expression “their surrounding villages” found in paragraph 73, the Defence notes that the whole sentence refers to the alleged order issued by the UPC/FPLC troops to “flatten” the villages, and not the villages where the UPC/FPLC allegedly set fire to the straw houses and destroyed permanent structures, which are specified in the following sentence in a limitative way.

## **B. Factual allegations falling outside the scope of certain charges**

28. Likewise, factual allegations falling outside the scope of certain charges that have been limited by the Pre-Trial Chamber must be removed as well as any cross-references thereto.<sup>32</sup> In particular, the Defence takes issue with: (i) a factual allegation suggesting that acts of sexual slavery were committed during the First Attack (in paragraph 72 of the draft Updated DCC); and (ii) the allegation that Mr Ntaganda himself raped and sexually enslaved girl and women soldiers (in paragraphs 104 and 105 of the draft Updated DCC).

29. In paragraph 53 of the Confirmation Decision, the Pre-Trial Chamber found that “there are substantial grounds to believe that the UPC/FPLC soldiers committed acts of sexual slavery only in the *Second Attack*, but not in the *First Attack*”.<sup>33</sup> Paragraph 36 of the Confirmation Decision echoes this finding by not mentioning counts 7-8 in the list of criminal acts allegedly committed during the First Attack. Despite the clear wording of the Pre-Trial Chamber’s finding, the Prosecution seeks to maintain in paragraph 72 a factual allegation suggesting the commission of acts of sexual slavery during the First Attack.

30. In this respect, the Prosecution argues that the term “concubines” “is not a legal term, in contrast to the term ‘sexual slaves’” and that this “language reflects the quoted evidence from a witness and as such should not be deleted.” The Defence notes that during the confirmation of the charges hearing, the Prosecution explicitly referred to the term “wives” in order to establish the crime of sexual slavery, hence granting this word a legal character comparable to “sexual slaves”.<sup>34</sup> Following the Prosecution’s reasoning, the term “concubines” – being very similar to the term “wives” – thus contains a legal character. The fifth sentence of paragraph 72 should then be removed, as the Pre-Trial Chamber declined to confirm the charges of sexual slavery in the context of the First Attack.

<sup>32</sup> Deletion of cross-references will be addressed below in section III.

<sup>33</sup> Emphasis in the original.

<sup>34</sup> ICC-01/04-02/06-T-8-CONF-ENG ET 11-01-2014, p.29 lines 16-25 and p.30 lines 1 -2, 22-24; ICC-01/04-02/06-T-8bis-CONF-ENG ET 11-01-2014, p.34 lines 4-13.

31. In paragraph 144 of the Confirmation Decision, the Pre-Trial Chamber observed that “[t]he Prosecutor has not charged Mr. Ntaganda as a direct perpetrator of any of the crimes set forth in counts 4 to 9”. Accordingly, the Pre-Trial Chamber found that there were no substantial grounds to believe that Mr Ntaganda can be held responsible as a direct perpetrator for these crimes. This finding is echoed in paragraphs 36 and 97 of the Confirmation Decision, whereby the Pre-Trial Chamber omitted to mention counts 4 to 9 when addressing Mr Ntaganda’s responsibility as a direct perpetrator.

32. While acknowledging that Mr Ntaganda was never charged as a direct perpetrator of the crimes of rape and sexual slavery of child soldiers (counts 6 and 9), the Prosecution erroneously argues that the allegation contained in paragraphs 104 and 105 of the DCC remains relevant for various evidentiary purposes.<sup>35</sup> The Defence underscores that in its determination of Mr Ntaganda’s intent and knowledge, the Pre-Trial Chamber did not consider the allegation contained in paragraphs 104 and 105. Likewise, the Pre-Trial Chamber did not examine this allegation when analyzing the evidence in support of the constituting elements of the modes of liability as charged.<sup>36</sup> Moreover, the “widespread and systematic nature” of the alleged acts underlying the charges of rape and sexual slavery against child soldiers is irrelevant in the context of war crimes.

33. In any case, any allegation suggesting that Mr Ntaganda committed himself acts of rape and sexual slavery against “girl” soldiers is inconsistent with paragraphs 36 and 97 of the Confirmation Decision. Hence, at a minimum, the references to “girl” soldiers and children “below the age of 15” should be deleted in paragraphs 104 and 105.

---

<sup>35</sup> ICC-01/04-02/06-402, points 10-11.

<sup>36</sup> ICC-01/04-02/06-309, paras.116, 117, 134, 155, 170, 172, and fn.630 (referring to paras.138-143, which do not mention any facts related to counts 6 and 9).

### **III. The Impact of Section H (ii) of the Updated DCC Entitled “Legal Characterization of the Facts”**

34. The suggestion that Section H (ii) of the Updated DCC (“Charges Section”) is a mere “snapshot” or a non-exhaustive overview of the Prosecution’s case against the Accused is devoid of any legal basis. Quite to the contrary, the purpose of the section setting out the legal characterization of the facts is to delineate the exact boundaries of the charges brought against the Accused, that is to say the precise facts and circumstances in support of these charges.

35. This Court’s jurisprudence has established a distinction between the facts and circumstances underlying the charges, on the one hand, and the other factual allegations which may be contained in a DCC, on the other hand.<sup>37</sup> While these other allegations may provide general background information<sup>38</sup> or indicate intermediate steps in the Prosecution’s chain of reasoning,<sup>39</sup> only the facts and circumstances underpinning the charges are the “fundamental points of reference” throughout the trial.<sup>40</sup>

36. With respect to the content of the Charges Section, the Defence submits that it should only refer to the factual allegations supporting each of the legal elements of the crime charged.<sup>41</sup> Background information should not be included in the Charges Section of a DCC.<sup>42</sup>

#### **A. Providing a clear list of the locations where crimes were allegedly committed**

37. In relation to counts 11 (pillaging), 12-13 (forcible transfer of population), 17 (attacks against protected objects) and 18 (destruction of property), the Prosecution added a list of crime locations corresponding to the villages specified in paragraph

---

<sup>37</sup> ICC-01/09-01/11-373, para.47.

<sup>38</sup> ICC-01/04-01/06-803-tEN, para.152.

<sup>39</sup> ICC-01/09-01/11-475, para.10.

<sup>40</sup> ICC-01/09-01/11-475, para.10.

<sup>41</sup> ICC-01/09-01/11-475, para.12.

<sup>42</sup> ICC-01/09-01/11-475, para.11

36 of the Confirmation Decision. Given that the Charges Section should set out in detail the facts and circumstances supporting the charges, including the crime locations, the Defence requests that a list similar to that provided for under counts 11, 12, 13, 17 and 18 be added for all other counts related to the First and Second Attack. With respect to the child soldiers-related charges (counts 6, 9, 14, 15 and 16), the Defence understands paragraph 74 of the Confirmation Decision as limiting the geographical scope of the charges to the region of Ituri.<sup>43</sup>

38. The Defence acknowledges that cross-references under a specific count are made to paragraphs in general, and do not distinguish between the various factual allegations therein, which might not all be relevant for the purpose of the charge. The Defence notes the approach taken in the *Kenya* cases where the Prosecution was instructed to specify the facts and circumstances in the Charges Section with no cross-references to other paragraphs of the DCC.<sup>44</sup> In the instant case, the Defence is of the view that such a list is not necessary, provided that crime locations are explicitly identified.

**B. Deleting cross-references to factual allegations underpinning charges rejected and/or limited by the Pre-Trial Chamber**

i. Attacks against civilians (count 3)

39. In paragraph 48 of the Confirmation Decision, the Pre-Trial Chamber found that the acts described in its “findings in relation to counts 2 (murder and attempted murder), 5 (rape), 11 (pillaging), 17 (attacking protected objects) and 18 (destroying the enemy’s property)” for the First and Second Attacks qualify as the underlying conduct of the war crime of attacking civilians.

---

<sup>43</sup> However, as argued below (*infra*, paras 54-57.), the Defence requests that some locations which are relevant to the child soldiers-related charges (such as the alleged training camps and the locations where children under the age of 15 allegedly participated in hostilities) be specified in the Updated DCC in a limitative way.

<sup>44</sup> ICC-01/09-01/11-475; ICC-01/09-02/11-536.

40. Even though the Pre-Trial Chamber's finding is indisputable, the Prosecution seeks to maintain in the Charges Section a cross-reference to paragraph 87 of the Updated DCC in its blanket reference to paragraphs 63 to 91 in relation to count 3.

41. In the *Kenyatta* case, Trial Chamber V ruled that when a pre-trial chamber finds that a given act does not fall within the legal meaning of a crime, it is appropriate to alter the passages of the charges section referring to this act so that the Updated DCC does not imply that the act is a crime for the purposes of the charges against the accused.<sup>45</sup> Accordingly, the cross-reference to paragraph 87 with respect to count 3 should be deleted.

42. The Prosecution's claim that "[t]he [Confirmation] Decision did not explicitly reject forcible displacement as an underlying act of attacks against civilian populations" is without merit. First, the list of underlying acts cannot reasonably be seen as a non-limitative enumeration, as acts of forcible displacement are the only acts constituting a war crime which are not mentioned. Second, paragraph 36 of the Confirmation Decision reflects the Pre-Trial Chamber's finding by omitting to mention locations where acts of forcible displacement took place in relation to count 3.<sup>46</sup> Furthermore, the Prosecution's truncated quote of paragraph 46 of the Confirmation Decision is of no support as the Pre-Trial Chamber did not mention acts of forcible displacement when referring to conducts which may constitute acts of violence for the purpose of the war crime of attacking civilians.

ii. Rape and sexual slavery of UPC/FPLC child soldiers (counts 6 and 9)

43. For the reasons explained above,<sup>47</sup> cross-references to paragraphs 104 and 105 must be deleted.

---

<sup>45</sup> ICC-01/09-02/11-584, paras.65-66.

<sup>46</sup> For example, in relation to the First Attack, the Pre-Trial Chamber indicated that acts of forcible transfer and displacement of civilians (counts 12 and 13) occurred in Mongbwalu and Nzebi, but did not mention the latter village in the list of villages for the crime of attacking civilians (count 3).

<sup>47</sup> *supra*, paras.31-33.

iii. Sexual slavery of civilians (counts 7 and 8)

44. In paragraph 53 of the Confirmation Decision, the Pre-Trial Chamber found that “there are substantial grounds to believe that the UPC/FPLC soldiers committed acts of sexual slavery only in the *Second Attack*, but not in the *First Attack*”.<sup>48</sup> Paragraph 36 of the Confirmation Decision echoes this finding by not mentioning counts 7-8 in the list of criminal acts allegedly committed during the First Attack.

45. Despite the clearness of the Pre-Trial Chamber’s finding, the Prosecution seeks to maintain in the Charges Section cross-references to paragraphs 67, 71, 72 and 74 – which all relate to the First Attack – with respect to counts 7 and 8.

46. In accordance with the *Kenyatta* ruling, the Defence respectfully requests that cross-references to paragraphs 67, 71, 72 and 74 with respect to counts 7 and 8 in the Charges Section be deleted.

47. The Prosecution erroneously claims that cross-referencing these paragraphs is relevant for: (i) contextual purposes for the findings of sexual slavery in the Second Attack; (ii) Mr Ntaganda’s intent and knowledge; and (iii) the modes of liability for counts 7 and 8.

48. Significantly, the Defence recalls that it is settled jurisprudence that the Charges Section should only refer to the facts and circumstances underlying the charges, and not to background facts.<sup>49</sup>

**IV. Whether Specific Factual Allegations on Which the Decision is Silent Necessitates the Deletion of the Allegation**

49. In the *Ruto and Sang* case, Trial Chamber V held that it was 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

---

<sup>48</sup> Emphasis in the original.

<sup>49</sup> *supra*, para36.



DCC.<sup>50</sup> While Trial Chamber V's holding may be appropriate in some circumstances, it is certainly not without exceptions.

50. Indeed, retaining in the Updated DCC factual allegations because they were not specifically addressed in the Confirmation Decision is not always in the interests of justice, in particular when a factual allegation was omitted on purpose. In determining whether an allegation must be maintained or not, certain factors have to be taken into account, in particular when maintaining the allegation results in expanding the charges against the accused or prejudices the rights of the accused.<sup>51</sup>

#### **A. The alleged rape of three nuns at Mr Ntaganda's camp**

51. In relation to the fourth sentence of paragraph 72 of the Updated DCC, the Prosecution seeks to replace the word "apartment" with the word "camp", with reference to paragraph 49 of the Confirmation Decision. Even though the Defence does not object to this modification, the word "Women prisoners" found in the same sentence must be replaced by the phrase "The three nuns" so as to exactly reflect the findings of the Pre-Trial Chamber in paragraph 49.<sup>52</sup>

52. The Prosecution erroneously argues that the alleged rape of the three nuns is only a "specific example" of rapes allegedly perpetrated in Mongbwalu after the takeover.<sup>53</sup> It further claims that the Pre-Trial Chamber remained silent as to whether there may be other examples of rape incidents in Mongbwalu and that it is therefore not appropriate to limit the phrase "women prisoners" to only the three nuns.

53. The Prosecution mischaracterizes the Defence's objection. The Defence does not suggest that the Pre-Trial Chamber limited its findings on the rapes allegedly committed in Mongbwalu to the specific incidents considered in the Confirmation Decision. Rather, the Defence submits that the Pre-Trial Chamber clearly limited the rapes allegedly committed at *Mr Ntaganda's camp* to those perpetrated against the

<sup>50</sup> ICC-01/09-01/11-522, para.19.

<sup>51</sup> ICC-01/09-01/11-584, paras.28, 31.

<sup>52</sup> ICC-01/04-02/06-402-AnxC, point 1.

<sup>53</sup> ICC-01/04-02/06-402-AnxC, points 10 and 11.

three nuns. Considering that the Pre-Trial Chamber confined its analysis of rapes committed at Mr Ntaganda's camp to the alleged rape of the three nuns, maintaining the current wording of the fourth sentence impermissibly expands the charges against Mr Ntaganda. Furthermore, Mr Ntaganda's proximity to the rapes allegedly committed at his camp further strongly militates in favor of clearly delineating the charges laid against him.<sup>54</sup>

**B. The addition of the word “including” with respect to the list of the fields allegedly destroyed by the UPC/FPLC troops (point n° 6) and the list of alleged training camps (point n° 8)**

54. With reference to paragraph 73 of the Confirmation Decision, the Prosecution seeks to add a sentence in paragraph 85 of the Updated DCC concerning the alleged destruction of fields. Referring to paragraph 89 of the Confirmation Decision, the Prosecution further seeks to include an additional sentence in paragraph 95 of the Updated DCC regarding the list of alleged training camps. The Defence has no objection to these additions, but disagrees with the inclusion of the word “including”, which does not mirror the Pre-Trial Chamber's findings in this regard.

55. Indeed, it stems clearly from the wording of paragraphs 73 and 89 of the Confirmation Decision that the Pre-Trial Chamber intended to be exhaustive when listing the fields that were allegedly destroyed by the UPC/FPLC troops and the alleged training camps. Adding the word “including” will prejudice the Accused by impairing his ability to conduct effective investigations. More importantly, it will also impact on the duration of the trial, given that Mr Ntaganda will have to investigate additional villages and training camps not specified in the Confirmation Decision.

**C. The list of alleged training camps (point n° 7) and the list of locations where children under the age of 15 allegedly participated in hostilities (point n° 9)**

56. The Defence requests that the words identified in point 7 of Annex C be deleted from paragraph 95 of the Updated DCC, so as to mirror the findings of the

---

<sup>54</sup> *supra*, para.14.

Pre-Trial Chamber in paragraph 89 of the Confirmation Decision. The Defence further requests that the phrases identified in point 9 of Annex C be removed from paragraph 95 of the Updated DCC, so as to accurately reflect the Pre-Trial Chamber's findings in paragraph 94 of the Confirmation Decision.

57. Indeed, it stems clearly from the wording of paragraphs 89 and 94 of the Confirmation Decision that the Pre-Trial Chamber intended to be exhaustive when listing the alleged training camps and the locations where children under the age of 15 allegedly participated in hostilities. As mentioned above, maintaining the allegations as such will prejudice the Accused by impairing his capacity to conduct effective investigations. More importantly, it will also impact on the duration of the trial, given that Mr Ntaganda will have to investigate additional villages and training camps not specified in the Confirmation Decision.

**D. Reference to Mr Ntaganda's involvement in paragraphs 44-46 and 48-51 of the Updated DCC**

58. At paragraphs 44-46 and 48-51 of the Updated DCC, the Prosecution refers to the involvement of Mr Ntaganda in the six attacks which, in addition to the First and Second Attacks, allegedly establish the *chapeau* elements of Article 7 (the "Contextual Attacks"). Considering that the Pre-Trial Chamber referred to the acts and conduct of Mr Ntaganda in other paragraphs of its Decision related to Contextual Attacks,<sup>55</sup> the Defence does not formally object to the wording of paragraphs 44-46 and 48-51 of the Updated DCC.

59. However, the Defence underscores that the Pre-Trial Chamber made absolutely no mention of the name or the involvement of Mr Ntaganda in its analysis of the Contextual Attacks.<sup>56</sup> In the Defence's view, the systematic silence on Mr Ntaganda's participation in the Contextual Attacks indicates that the Pre-Trial Chamber deliberately declined to confirm the Prosecution's allegations in this

---

<sup>55</sup> See, e.g., ICC-01/04-02/06-309, para.143 (referring to Mr Ntaganda having allegedly used children during combat operations in Zumbe in October 2002).

<sup>56</sup> ICC-01/04-02/06-309, paras.25-30.

regard. The purpose is quite obvious: as Mr Ntaganda is not charged of any of the crimes allegedly committed during the Contextual Attacks, his involvement therein is irrelevant for the purposes of the case.

60. The Defence emphasizes that maintaining such allegations in the Updated DCC will likely result in lengthy investigations by both parties and, in turn, impact negatively and significantly on the duration of the trial. While the parties' investigations will inevitably cover the First and the Second Attacks, the scope of the investigations will necessarily have to focus also on the details of the Contextual Attacks. Moreover, examination and cross-examination of witnesses will likely be much more extensive, as numerous witnesses will have to be questioned not only on Mr Ntaganda's involvement in the First and Second Attacks, but also on his alleged participation in each of the Contextual Attacks.

#### **RELIEF SOUGHT**

61. In light of the above observations, the Defence respectfully requests the Chamber to:

**INSTRUCT** the Prosecution to implement in the Updated DCC all the modifications identified by the Defence in Annex C to the Prosecution Submission.

**RESPECTFULLY SUBMITTED ON THIS 21<sup>ST</sup> DAY OF NOVEMBER 2014**

A handwritten signature in dark ink, appearing to read 'StB' with a flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda, The Hague, The Netherlands