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No.: **ICC-01/04-02/06**
Date: **27 January 2020**

THE APPEALS CHAMBER

Before: **Judge Howard Morrison, Presiding Judge**
Judge Chile Eboe-Osuji
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR V. BOSCO NTAGANDA

Public with Public Annex A and Confidential Annex B

Prosecution Response to "Defence Appeal Brief – Part I"

Source: **Office of the Prosecutor**

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INTRODUCTION

1. Ntaganda's first and third grounds of appeal erroneously interpret the law and misapprehend the facts. *First*, Ntaganda incorrectly interprets article 40 of the Statute by inserting in the text a non-existent, absolute prohibition for non-full-time judges to perform certain professional activities. Judge Ozaki never lost her appearance of independence. In any event, article 40 decisions by the Plenary are final and not appealable. On this basis alone, Ntaganda's first ground should be dismissed. *Second*, Ntaganda misunderstands the nature and circumstances of this case and the specificity required for its charges. The charges against Ntaganda are sufficiently specific and he was properly convicted of the fifteen criminal acts that he challenges. The Appeals Chamber should therefore dismiss Ntaganda's first and third grounds of appeal.

CONFIDENTIALITY

2. Annex B to this document is filed confidentially pursuant to regulation 23*bis*(1) of the Regulations of the Court, as it refers to confidential information. The Prosecution will file a public redacted version of Annex B at the earliest opportunity.

SUBMISSIONS

I. RESPONSE TO GROUND 1: JUDGE OZAKI DID NOT LOSE HER APPEARANCE OF INDEPENDENCE

3. Ntaganda's first ground of appeal should be dismissed. It amounts to a direct appeal against the Article 40 Plenary Decision.[1] Yet, article 40 Plenary decisions are *final* and cannot be appealed at any stage. Further, and to the extent that the Appeals Chamber decides to entertain Ntaganda's arguments, they are without merit and should be dismissed.

I.A. Ntaganda improperly appeals the Article 40 Plenary Decision

4. Ntaganda acknowledges that "in substance, [Ground 1] raises the same issues that were adjudicated in the Plenary's Decision on Independence".[2] Indeed, Ntaganda's arguments largely match his failed request for reconsideration of the Article 40 Plenary Decision.[3] Yet,

[1] Article 40 Plenary Decision.
[2] Appeal-Part I, para. 5.
[3] *Compare* Appeal-Part I, paras. 1-17, with Request for Reconsideration.

the Statute does not permit appeals against Plenary decisions pursuant to article 40.[4] Article 40(4) is clear: questions regarding the matters referred to therein "shall be decided by an absolute majority of the judges." No appeal against such decisions is found in the Statute. In particular, articles 81 and 82, which are to be restrictively interpreted and which "exhaustively" define rights of appeal,[5] do not include article 40 decisions among those that are appealable.[6] If it had been intended that such decisions were appealable, it would have been provided for.[7] If article 40 decisions cannot be appealed after the Plenary renders such decisions, they cannot be challenged *per se* in an appeal against a final judgment.

5. The object and purpose of article 40 supports the finality of such decisions. Article 40 seeks to ensure that any activity of judges is not likely to affect confidence in their independence. Given the potential ramifications of such matters on the Court's activities, efficiency requires that they are resolved promptly and definitively, without further and protracted litigation.[8]

6. In fact, Ntaganda, by only seeking reconsideration of the Article 40 Plenary Decision,[9] implicitly acknowledged that it was not subject to appeal; were that not the case, presumably an appeal would have been lodged following its issuance. Moreover, none of the prominent commentaries assert that article 40 Plenary decisions are appealable.[10] It would also appear

[4] Provisions of the Statute and the Rules must be interpreted according to their ordinary meaning, in context, and in light of their object and purpose: *see* VCLT, articles 31-32; *Bemba et al.* AJ, para. 675; *DRC* Extraordinary Review AD, para. 33; *Lubanga* Victims' Participation AJ, paras. 55-56.
[5] *DRC* Extraordinary Review AD, paras. 35-40; *Katanga* Article 108(1) AD, para. 11.
[6] *See similarly* *Katanga* Disqualification Application Plenary Decision, para. 44 ("the ordinary meaning of article 41(2)(b) of the Statute was neither ambiguous nor unreasonable. Nor was there any lacuna in the law which called for further judicial interpretation. The law was plain and determinate as to who was entitled to bring an application for the disqualification of a judge") and para. 45 ("considering disqualification an extraordinary remedy, the Majority found that the explicit wording of the Statute should be interpreted strictly, particularly in the absence of any apparent mistake in drafting").
[7] *See similarly* *Katanga* Article 108(1) AD, para. 13 (with respect to Presidency decisions under article 108); *Lubanga* Registrar's Requests AD, paras. 7-8 (with respect to Presidency decisions under rule 21(3) of the Rules and regulation 85(3) of the RoC). Legislative amendment is required to permit appeal against Plenary decisions under article 41. *See similarly* *Katanga* Article 108(1) AD, para. 16.
[8] *See by analogy* *Lubanga* Excusal Request Presidency Decision, p. 5 ("Noting also the placement of article 41 in Part IV of the Statute dealing with the composition and administration of the Court, the Presidency considers that a further objective of article 41 is ensuring the overall efficiency of the conduct of proceedings before the Court. As such, the Presidency prefers the latter understanding expressed in the preceding paragraph; namely that the relevant part of article 41(2)(a) is concerned with disqualification where a judge has previously been involved in any capacity which gives rise to a reasonable ground to doubt his or her impartiality. The Presidency finds this interpretation most consistent with the objective of ensuring that the impartiality of judges cannot reasonably be reproached, at the same time as ensuring the efficient conduct of proceedings").
[9] Request for Reconsideration.
[10] Staker *et al.*, pp. 1256-1257, m. 10; Schabas, pp. 726-727; Jones, pp. 241-257; Ambos, pp. 107-111.

incongruous that five judges hear an appeal against a decision rendered by the Plenary of judges, of which they have been a part.[11]

7. This is not to say that questions regarding the independence and/or impartiality of Judges cannot be raised in an appeal against a judgment if it is argued to purportedly affect the fairness of the proceedings[12]—even after requests for disqualification against those judges have been rejected. However, in those situations, the appellants' arguments supporting their grounds of appeal differed from those in their previous disqualification requests[13] and the Appeals Chambers were not required to simply review previous determinations.[14] But this is not what Ntaganda has done: he effectively requests the Appeals Chamber to review the Article 40 Plenary Decision.[15] The Court's legal framework does not allow this, and the cases Ntaganda relies on do not support his proposition either.[16]

I.B. The Plenary did not adopt an erroneously narrow view of judicial independence

8. To the extent that the Appeals Chamber decides to entertain Ntaganda's submissions as a ground of appeal purportedly affecting the fairness of the *Ntaganda* proceedings, his arguments equally fail. Judge Ozaki did not lose the appearance of her independence under

[11] *See similarly* Jones, p. 253 (noting that it is "more democratic" for decisions to be taken by a majority of the judges than only the Presidency). It would also be incongruous if parties, without a clear right to even invoke article 40 (*see* Staker *et al.*, p. 1257, m. 10), enjoyed the right to appeal a decision taken pursuant to it.
[12] *Galić* AJ, para. 31 ("the fact that a decision on disqualification cannot be appealed at trial does not necessarily mean that the impartiality of a Judge cannot be considered in an appeal from a judgement").
[13] In the ICTY *Čelebići* case, the Defences' arguments on appeal went beyond Judge Odio Benito's qualification to be an ICTY Judge: *compare* *Čelebići* Defence Motion on Judicial Independence, (fundamentally arguing that Judge Odio Benito could not be appointed to "the highest judicial offices" in Costa Rica under article 13, and that article 13 and rule 15 do not permit a judge holding both judicial and political office) with *Delić* Appeal, paras. 29-60, *Mucić* Appeal, paras. 1-15 and *Landžo* Appeal, pp. 18-36 (the appellants further arguing, *inter alia*, that Judge Odio Benito served as trustee of the UN Voluntary Fund for the Victims of Torture). The Defence acknowledged, and the Appeals Chamber confirmed, that additional arguments were advanced on appeal: *see e.g.* *Mucić* Appeal, para. 4 ("These issues were in part raised on a motion by the Defence that was filed with the Trial Chamber on the 25th May 1998") and *Čelebići* AJ, para. 677 ("The appellants relied upon additional material and arguments in relation to this issue [of Judge Odio Benito's judicial independence]"). In ECCC Case 002/01: *compare* Nuon Chea's Motion for Disqualification, paras. 15-19 (arguing that Judge Cartwright held *ex parte* meetings with Prosecution representatives) and Ieng Sary's Request for Investigation (requesting an investigation of these facts) and Ieng Sary's Appeal against Decision on Motions for Disqualification, paras. 29-46 with Nuon Chea's Appeal against Judgment, paras. 49-53 (arguing that Judge Cartwright's interview showed the Trial Chamber's bias).
[14] In *Čelebići: compare* *Čelebići* First Bureau Decision with *Čelebići* AJ, paras. 652-693 (the Appeals Chamber entertained the Defence arguments, went beyond the Bureau's analysis and did not "review" the correctness of the Bureau or Plenary decisions). In ECCC Case 002/01: *compare* Decision on Motions for Disqualification with *Case 002/01* AJ, paras. 110-116.
[15] Appeal-Part I, paras. 2-4.
[16] *Contra* Appeal-Part I, fn. 2. The *Valente*, *Whitfield* and *Campbell* cases concern specificities regarding the structure of the Canadian and United Kingdom judicial and prison adjudication systems, in light of Canadian and ECtHR legal frameworks.

article 40 due to the limited time that she was the Japanese Ambassador in Estonia while being a non-full time judge in the *Ntaganda* case.[17]

9. As previously submitted by the Prosecution,[18] Ntaganda incorrectly interprets the Statute by inserting in the text of article 40 a non-existent absolute prohibition for non-full-time judges to perform certain professional activities. The Statute does not contain such a blanket prohibition for non-full-time judges.[19] This is in contrast with *full-time judges* who are prohibited from engaging "in any other occupation of a professional nature" under article 40(3) of the Rome Statute. Likewise, in the context of the International Court of Justice ("ICJ"), article 16(1) of the ICJ Statute prohibits *all members* of the Court from exercising "any political or administrative function, or engag[ing] in any other occupation of a professional nature".[20] As commentators have noted, the drafters of the Rome Statute ultimately chose a more substantive and case-specific standard which requires scrutiny of the concrete facts of each case.[21] The Majority of the Plenary correctly applied this standard in its Article 40 Plenary Decision.[22]

10. Moreover, pursuant to article 21(1), the Court shall apply "[i]n the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence". The Code of Judicial Ethics, adopted by the Plenary of Judges in March 2015 in application of regulation 126 of the Regulations of the Court, provides "guidelines for general application", and does not trump the Statute. In addition, domestic legislation is not binding on the Court, and comparisons with domestic practice must be approached with caution on this point. The relationship between the Court and State Parties cannot be equated with the relationship between the different branches within a government of a State. As the ICTY Appeals Chamber held in the *Čelebići* case, the application of the principle of separation of powers between a State and the international tribunal is "misconceived" since "[t]he doctrine applies principally to ensure the separate and independent exercise of the different powers within the same sphere or political system".[23] Moreover, since the principle of separation of powers

[17] *Contra* Appeal-Part I, para. 16.
[18] Prosecution Response to Request for Reconsideration, paras. 23-28. *See also* Prosecution Response to Disqualification Request, paras. 19-23.
[19] *Contra* Appeal-Part I, paras. 7-12.
[20] *See* Article 40 Plenary Decision, para. 10.
[21] Jones, p. 243. *See also* Jones pp. 256-257.
[22] Article 40 Plenary Decision, paras. 10-14. *See also* Article 41 Plenary Decision, para. 36 (similarly endorsing a case-specific assessment of impartiality in disqualification proceedings).
[23] *Čelebići* AJ, para. 690.

seeks to avoid conflict of interests,[24] "[w]here the relevant powers arise in separate systems or in different planes – such as the national and the international – the potential for there to be any convergence in the subject matter of the powers, and […] a conflict of interest […], is greatly reduced."[25] Further, there is no known link or interest of Japan and Estonia in the *Ntaganda* case. Nor does Ntaganda suggest that there has been any.[26] In addition, Judge Ozaki exercised both functions during a very short period of time (around one month at most)[27] and only after the completion of the briefing in the case and the Chamber's substantive deliberations.[28] She provided robust assurances to avoid any appearance of partiality or lack of independence.[29]

11. Ntaganda fails again to demonstrate otherwise. *First*, he oversimplifies the Plenary's analysis of the relevant provision, conflating the two limbs of article 40(2) into one.[30] *Second*, the *non sequitur* alleged by Ntaganda is non-existent.[31] Article 40 forgoes broad references to abstract categories of prohibited functions, but rather requires a case-by-case analysis; therefore, concurrent employment with the executive of a State *may* be permissible depending on the case.[32] By contrast, Ntaganda's position that concurrent employment with the executive of a State is *always* prohibited[33] contradicts article 40, and is a *non sequitur* itself. *Third*, Ntaganda's portrayal of the ICTY legal framework is inaccurate.[34] Although the direct terms of the ICTY Statute do not expressly prohibit concurrent service in the executive of a State, ICTY judges are, pursuant to article 13*bis*(3), subject to the terms and conditions of service of the ICJ. This is considered to be an indirect reference to article 16 of the ICJ Statute, which does expressly prohibit it.[35]

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[24] *Čelebići* AJ, para. 690.
[25] *Čelebići* AJ, para. 690.
[26] Article 41 Plenary Decision, para. 37 ("The plenary of judges notes that the Disqualification Request makes no allegations concerning the nature of any potential overlap of the functions of the Ambassador of Japan to Estonia and the work of Judge Ozaki in the *Ntaganda* case").
[27] Article 41 Plenary Decision, para. 41.
[28] Article 40 Plenary Decision, para. 5 (quoting Judge Ozaki) and Reconsideration Decision, para. 33 (quoting Judge Ozaki).
[29] Article 41 Plenary Decision, para. 38.
[30] Appeal-Part I, para. 6. *Contra* Article 40 Plenary Decision, paras. 9-13.
[31] Appeal-Part I, para. 7.
[32] Article 40 Plenary Decision, para. 10.
[33] Appeal-Part I, paras. 11-12.
[34] Appeal-Part I, para. 10.
[35] *Čelebići* Second Bureau Decision, para. 7 (referring to article 13(4), which contained the equivalent provision at the time of Second Bureau Decision, *see* UN Security Council Resolution 1166 (1998) and UN Security Council Resolution 1329 (2000), both amending the ICTY Statute).

12. Further, Ntaganda's arguments relating to Judge Ozaki's income are speculative and unsubstantiated.[36] The Plenary previously rejected similar arguments in its Article 41 Plenary Decision.[37]

13. Finally, Ntaganda's suggestion that the Judges of the Appeals Chamber are conflicted, by virtue of having been part of the Plenary which decided the issue, and his "invitation" to consider their disqualification should not be entertained.[38] Ntaganda has not filed any request for disqualification under article 41 and nor has any Judge requested her or his excusal under rule 35.[39]

14. In any event, no disqualification is required. There is a distinction between the Plenary's administrative determination under article 41 (of "whether an activity of a judge, in general, is likely to affect confidence in a judge's independence")[40] and the Appeals Chamber's judicial determination of whether the fairness of certain proceedings is undermined by a judge's presence. Contrary to Ntaganda's submissions,[41] the ICTY Bureau and the Appeals Chamber in the *Čelebići* case—like the ICC Plenary and Presidency[42]—have endorsed this proposition. Both distinguished the ICTY Plenary's administrative determinations (of whether Judge Odio Benito could be a judge under article 13 of the ICTY Statute while holding the status of Vice-President of Costa Rica) and the Bureau's determination (of whether Judge Odio Benito should be disqualified pursuant to rule 15(A) as a judge in the *Čelebići* case because she held the status of Vice-President of Costa Rica).[43] Accordingly, the Bureau rejected the defence request to disqualify three judges of the Appeals Chamber

[36] Appeal-Part I, para. 13.
[37] Article 41 Plenary Decision, para. 49.
[38] Appeal-Part I, para. 5.
[39] *See* *Katanga* Request for Re-Composition Decision, para. 18.
[40] Reconsideration Decision, para. 17.
[41] Appeal-Part I, fn. 6. Ntaganda suggests that the Bureau (and not the Plenary) rendered "the first instance decision on Judge Odio Benito's independence", and that the Appeals Chamber determined the correctness of the Bureau's decision. This is inaccurate: *first*, the Appeals Chamber did not sit on an appeal of the Bureau's decision and limited its analysis to addressing the appellants' arguments on appeal; *second*, Ntaganda disregards that the Plenary had decided on Judge Odio Benito's qualification as an ICTY judge twice before: *see* *Čelebići* AJ, Annex A, para. 24 (indicating that the ICTY Plenary found twice (October 1997 and March 1998) that there was no incompatibility between Judge Odio Benito's status as Vice-President of Costa Rica and as a Judge, as Judge Odio Benito would not assume the Presidential functions until her tenure terminated as an ICTY Judge). That the First Bureau Decision briefly touched upon this question in resolving the Defence's request of disqualification under rule 15(A) is unsurprising, due to the connection between independence and impartiality. Yet, the Bureau expressly stated that its competence did "not extend to aspects of the applicants' motion raising matters going beyond the scope of Sub-rule 15(A)" and, unlike the Appeals Chamber, the Bureau did not analyse article 161 of the Costa Rican Constitution, although raised by the Defence. *See* *Čelebići* First Bureau Decision and *Čelebići* AJ, paras. 662-671.
[42] Reconsideration Decision, paras. 12, 16-17; *Ntaganda* First Excusal Request Decision, p. 4; *Ntaganda* Second Excusal Request Decision, p. 4.
[43] *Čelebići* Second Bureau Decision, paras. 14-15 and *Čelebići* AJ, Annex A, para. 25.

because they had participated in Plenary decisions endorsing Judge Odio Benito's qualification as an ICTY judge.[44] The Appeals Chamber subsequently ruled on—and rejected—the appellants' arguments on Judge Odio Benito's qualification and independence.[45]

15. In sum, Ntaganda's first ground of appeal should be dismissed.

II. RESPONSE TO GROUND THREE: THE CHARGES ARE SUFFICIENTLY SPECIFIC

16. Ntaganda's third ground of appeal misapprehends the nature and circumstances of this case and the required specificity of its charges. Contrary to Ntaganda's submissions, the charges in this case are sufficiently specific and conform with the Court's legal framework. In addition, the fifteen "criminal acts" that Ntaganda challenges ("the Challenged Acts")[46] fall squarely within the scope of the charges against him.[47] This case was not presented—nor were the charges confirmed—"'at the level of individual criminal acts', save in respect of counts 14-16", as Ntaganda submits.[48] Nor did the charges list "categories of crimes or stat[e], in broad general terms, the temporal and geographical parameters".[49] Instead, and depending on the types of crimes, the Pre-Trial Chamber confirmed charges within *confined temporal and geographical parameters*.[50] Ntaganda's attempt to compare this case and its charges with *Bemba* is not sustainable and should be rejected.[51]

17. Ntaganda further disregards and misunderstands relevant jurisprudence of the Court and of other international criminal tribunals.[52] He does not argue any prejudice to his rights to be informed promptly and in detail of the nature, cause and content of the charges and to have adequate time and facilities to prepare his defence under article 67(1)(a) and (b) of the Statute. And in any event there is no such prejudice since Ntaganda received timely, clear and consistent information of the charges and of further details which enabled him to conduct his defence, as set out below. Ntaganda's third ground of appeal must therefore be dismissed.

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[44] *Čelebići* Second Bureau Decision, paras. 14-18.
[45] *Čelebići* AJ, paras. 651-693.
[46] Appeal-Part I, paras. 18, 22(i)-(xv). The Prosecution adopts Ntaganda's enumeration of the Challenged Acts in paragraph 22 of the Appeal-Part I, and will refer to them hereinafter as Challenged Acts (i) to (xv).
[47] *Contra* Appeal-Part I, paras. 18-23.
[48] *Contra* Appeal-Part I, para. 21.
[49] *Contra* Appeal-Part I, para. 19.
[50] Confirmation Decision, paras. 12, 31, 36, 74, 97.
[51] *See below*, paras. 29-31.
[52] *See below*, paras. 32-34.

II.A. CHARGING PRINCIPLES

18. Before addressing Ntaganda's arguments, it is necessary to clarify some fundamental concepts concerning the charging of crimes under the Rome Statute which Ntaganda overlooks in his appeal. The charges are (a) the material facts establishing the elements of the crime (including the contextual elements) and modes of liability and (b) a legal characterisation of those facts.[53] The "materiality" of a given fact depends on the nature of the Prosecution's case and cannot be established in the abstract.[54]

19. It is well-established that the required level of specificity of the charges depends on the nature and characteristics of each case,[55] and "no threshold of specificity of the charges can be established *in abstracto*".[56] To determine the requisite level of specificity in each case, Chambers have consistently considered factors including: the nature of the case, including its scale of criminality;[57] the mode of liability,[58] including the proximity of the accused to the location where the crimes were committed;[59] the nature of the crime (for example, whether the crime is continuous and/or characterised by the movement of perpetrators and victims, and whether the crime is committed in numerous locations within a defined geographic

[53] *See* regulation 52(b) and (c) of the RoC. *See* UDCC Decision, para. 37 ("'charges' include a description of the relevant 'facts and circumstances', as well as a legal characterisation of the facts"); *Ongwen*, T-6, 19:25-20:6. *See also* *Lubanga* AJ, para. 119; *Lubanga* Regulation 55 AD, para. 97, fn. 163; *Al-Hassan* DCC Decision, para. 30 (noting that the "facts" include "the time and place of the alleged crimes and provide a sufficient legal and factual basis to bring the person charged to trial"). *See also* 2019 ICC Chambers Practice Manual, para. 35; ICTY Practice Manual, p. 36, para. 9.

[54] *Ruto & Sang* Charges Order, para. 11. *See also* *Blaškić* AJ, para. 210; *Kvočka et al.* AJ, para. 28; *Đorđević* AJ, para. 331; *Kupreškić et al.* AJ, para. 89.

[55] Judgment, para. 38; *Ongwen*, T-6, 20:7-9; *Prlić et al.* AJ, para. 28; *Brima et al.* AJ, para. 37, citing *Kupreškić et al.* AJ, para. 89; *Taylor* AJ, para. 40 (stating that whether a non-exhaustive pleading of locations is adequate or defective depends on whether the indictment provides the accused with sufficient notice to enable him to prepare his defence). *See also* 2019 ICC Chambers Practice Manual, para. 38.

[56] 2019 ICC Chambers Practice Manual, para. 38. *See also* *Blaškić* AJ, para. 210.

[57] *Kupreškić et al.* AJ, paras. 89 ("there may be instances where the sheer scale of the alleged crimes 'makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes'"); *Kvočka et al.* AJ, para. 30; *Brima et al.* AJ, para. 41; ICTY Practice Manual, p. 37, para. 10. Notwithstanding, as the identity of the victims is valuable to the preparation of the Defence case, if the Prosecution is in a position to name the victims, it should do so. *See* *Kupreškić et al.* AJ, para. 90.

[58] *Lubanga* AJ, para. 122 (quoting the *Blaškić* AJ, paras. 210-213); *Sesay et al.* AJ, paras. 48-49.

[59] *Sesay et al.* AJ, para. 830; *Kvočka et al.* AJ, para. 65, citing *Galić* Leave to Appeal Decision, para. 15 ("Whether or not a fact is material depends upon the proximity of the accused person to the events for which that person is alleged to be criminally responsible […] As the proximity of the accused person to those events becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused person himself upon which the Prosecution relies to establish his responsibility as an accessory or a superior to the persons who personally committed the acts giving rise to the charges against him"); *Blaškić* AJ, para. 210.

area)[60] and, if applicable, case-specific considerations, such as the fallibility of witnesses' recollections[61] and other case-specific considerations.[62]

20. Although the Prosecution is responsible for pleading the charges,[63] the decision confirming the charges defines the parameters of the charges for the purposes of trial.[64] This does not exclude that "further details about the charges, as confirmed by the Pre-Trial Chamber, may, depending on the circumstances, also be contained in other auxiliary documents".[65] These "further details" cannot, however, expand the scope of the charges (and thus add additional charges). Any additional information must fall within the already specified parameters of the charges and provide the accused with further notice and assist in preparing their defence.

21. In this case, the Confirmation Decision must be read together with the updated document containing the charges ("UDCC"), in which "unruled upon allegations [] may also constitute the 'facts and circumstances described in the charges'".[66] Ntaganda himself has applied the same approach by reading the Confirmation Decision and UDCC together when

[60] *Sesay et al.* AJ, para. 830; *Taylor* TJ, paras. 119, 1018; Confirmation Decision, para. 83; UDCC Decision, para. 31.
[61] *Kvočka et al.* AJ, para. 30.
[62] For example, in the *Al-Hassan* case, the Victims Participation and Reparations Section "note[d] that it [was] unable to make a clear determination on certain applications for participation that do not include the precise date of the alleged crimes [and] "explain[ed] that the victims may lack familiarity with the Western calendar or may not recall the precise date of events because of the trauma suffered". *See* *Al-Hassan* Victims' Participation Decision, para. 17.
[63] 2019 ICC Chambers Practice Manual, para. 38; *Ruto & Sang* Charges Order, para. 4; *Lubanga* Regulation 55 AD, para. 94; *Bemba et al.* Updated DCC Judge Eboe-Osuji Partly Dissenting Opinion, para. 92.
[64] *Lubanga* AJ, para. 124. *See also* *Bemba* TJ, para. 32; *Katanga* TJ, para. 12; *Katanga* Summary Charges Decision, paras. 22-23; *Bemba et al.* Updated DCC Judge Eboe-Osuji Partly Dissenting Opinion, para. 22 (further noting: "to the extent that 'defining parameters' is accepted as connoting circumscription of boundaries and limits"). *See also* 2019 ICC Chambers Practice Manual, para. 57.
[65] *Lubanga* AJ, para. 124. *See also* Judgment, para. 37; UDCC Decision, paras. 17, 32, 39, 40 (finding that although the parameters of the charges are contained within the Confirmation Decision, "unruled upon allegations in the DCC may also constitute the 'facts and circumstances described in the charges'", and that the Confirmation Decision must be understood by reference to the DCC).
[66] UDCC Decision, paras. 32, 39-40; *see relatedly* *Bemba* AJ, para. 113 (finding that the Pre-Trial Chamber's failure to rely on certain criminal acts in the confirmation decision did not mean that the Pre-Trial Chamber intended to exclude those acts from the case against Bemba; rather it had simply decided not to rely on them due to evidential shortcomings for the purposes of confirmation. The Appeals Chamber considered that the criminal acts in question nonetheless formed part of the "facts and circumstances described in the charges" and were within the scope of the trial). For the purposes of this appeal, the Prosecution uses the term "charges" to refer to factual allegations included in the Confirmation Decision and UDCC.

examining the specificity of the charges in the Defence Closing Brief,[67] his closing oral submissions,[68] and in his appeal.[69]

22. Chambers in this Court have varied in their preferences and practice as to the form of the confirmation decision and as to the need to update the Prosecution's document containing the charges ("DCC"). The *Ntaganda* Confirmation Decision and its UDCC pre-date the Pre-Trial (now Chambers) Practice Manual, which does not set out legal requirements, but rather 'best practice' guidance to the Chambers.[70] In accordance with the Practice Manual,[71] confirmation decisions in most recent cases incorporate the Prosecution's DCC (as confirmed) at the end of the Decision.[72] In these cases, the Prosecution has not ordinarily been required to file an updated DCC.[73] That the practice has changed since the Confirmation Decision was issued does not render the previous practice of filing UDCCs defective, as the Appeals Chamber has confirmed.[74]

II.B. THE CHARGES ARE SUFFICIENTLY SPECIFIC AND ENCOMPASS THE CHALLENGED ACTS

23. In accordance with the above principles, the Trial Chamber in this case correctly held that "[t]he determination whether the parameters are sufficiently specific to frame a charge in compliance with Regulation 52(b) of the Regulations shall be made on a case-by-case basis,

[67] *See e.g.* Defence Closing Brief, paras. 655-656 (in which Ntaganda cites to the UDCC to identify the crimes with which Ntaganda was and was not charged).
[68] T-263-Red2-Eng, 88:20-23 ("[A] criminal case rests on the Prosecution to prove beyond reasonable doubt and that burden and that standard applies to each and every element of the crime and mode of liability with which the accused is charged in the UDC").
[69] *See* Appeal-Part I, paras. 21 and 22 (referring to specific paragraphs of the UDCC to argue that the details of underlying incidents were not contained therein).
[70] 2015 ICC Pre-Trial Practice Manual, p. 4.
[71] 2015 ICC Pre-Trial Practice Manual, p. 18; 2017 ICC Chambers Practice Manual, p. 18; 2019 ICC Chambers Practice Manual, para. 61 (each stating that the operative part of the confirmation decision shall reproduce *verbatim* the charges presented by the Prosecutor that are confirmed).
[72] *See e.g. Ongwen* Confirmation Decision, p. 71; *Bemba et al.* Confirmation Decision, p. 47; *Al Mahdi* Confirmation Decision, p. 22; *Al-Hassan* Confirmation Decision, p. 451 (cross-referencing to paragraphs of the confirmation decision).
[73] *See e.g.* in the *Ongwen*, *Bemba et al.* and *Al-Hassan* cases.
[74] *Bemba et al.* AJ, para. 198 (noting that a UDCC was filed in *Ntaganda* and stating that in the past, the filing of a UDCC may have been justified in order to remedy any uncertainties in the confirmation decision and/or assist in the preparation of the trial). *See also Ruto & Sang* Updated DCC Decision, para. 16 (noting that "[t]he practice of the Pre-Trial Chambers so far is consistent with the proposition that the confirmation decision alone is not meant to serve as an authoritative statement of facts and circumstances described in the charges as well as of their legal characterisation on which the trial should proceed" and referring to the *Katanga & Ngudjolo* and *Bemba* cases).

taking into account, *inter alia*, the nature of the crime charged and the circumstances of the case".[75]

24. Accordingly, the Chamber found that while "[c]ertain charges can be properly framed only at the level of individual criminal acts",[76] "[s]ome charges may be properly framed more broadly (*e.g.* deportation of 'civilians' across a range of times and places), and need not necessarily be framed as a specific incident or an aggregate of acts (*e.g.* deportation of identified persons at a particular time and place)".[77] Importantly, other charges related to certain types of criminal acts (such as murder as a crime against humanity) also need not be framed at the level of individual criminal acts, but can be framed with regard to "narrowly confined temporal and geographic space and/or other parameters" as long as the individual criminal acts "fall within the specific parameters of the charge as confirmed by the pre-trial chamber".[78] The Chamber also considered relevant "whether the crimes charged are of a continuous nature" where the "elements of the relevant crimes may therefore be fulfilled during a certain period, which can potentially occur over a prolonged period of time".[79]

25. Thus, the Trial Chamber in this case (following the Pre-Trial Chamber's approach in the Confirmation Decision)[80] distinguished between crimes committed against child soldiers under the age of 15 years and the rest of the crimes and assessed specificity in accordance with the nature of each crime. Ntaganda does not engage with the Chamber's reasoning, alleging only that it is "unsupported and contradicts the approach in *Bemba*".[81] But this is inaccurate. As shown below, the Chamber's approach is correct and consistent with the Court's legal framework, its jurisprudence and the charging practice of other international criminal tribunals which have similarly drawn such a distinction.

II.B.1. The charging of crimes other than against child soldiers

26. The scope of the charges for crimes other than against child soldiers (which is limited to specific locations in Ituri and concrete dates) are sufficiently specific and cannot be compared to the *Bemba* case. The *Ntaganda* charging approach is consistent with the jurisprudence of

[75] Judgment, para. 38.
[76] Judgment, para. 39.
[77] Judgment, para. 40 (further noting that "In these cases, the individual criminal acts do not delimit the charge, and other acts that were not explicitly mentioned in the confirmation decision but are proven beyond reasonable doubt can be equally used to prove this charge, as long as they fall within the specific parameters of the charge as confirmed by the pre-trial chamber").
[78] Judgment, para. 41.
[79] Judgment, para. 42.
[80] Confirmation Decision, para. 35.
[81] Appeal-Part I, para. 21.

this Court and that of other international courts and tribunals. All Challenged Acts fall within the scope of the charges and Ntaganda was correctly convicted of them.

II.B.1.i. The charges are sufficiently specific

27. *First*, the charges against Ntaganda regarding crimes other than against child soldiers (such as murder, rape, pillaging and destruction of property) were framed by reference to narrow temporal and geographical parameters. The crimes were committed on or about 20 November to on or about 6 December 2002 for the First Attack (*i.e.* two weeks and two days), and on or about 12 to on or about 27 February 2003 for the Second Attack (*i.e.* two weeks and one day).[82] Further, the charges exhaustively identified the villages where the acts were committed[83] and gave more specific dates on which the UPC/FPLC forces committed the crimes in each locality.[84] For example, killings occurred during the attack on Kilo on or about 6 December 2002; killings in Sangi took place on or after the pacification meeting on 25 February 2003; and killings took place in Ngongo, Bambu and Jitchu on 25 and 26 February 2003.[85] The UDCC provides further details of the underlying criminal acts, providing a day-by-day description of the manner in which the crimes were committed as the attacks unfolded, referencing specific locations and timeframes.[86] These are not "broad general terms".[87] Rather, the facts are identified "with sufficient clarity and detail" to provide Ntaganda with an understanding of the nature and scale of the case against him.[88]

28. Further, the charges refer to a non-exhaustive list of underlying criminal acts and victims within these confined locations.[89] Ntaganda did not seek leave to appeal these aspects

[82] Confirmation Decision, paras. 29, 36; UDCC, para. 63 (first attack) and para. 77 (second attack). While the Pre-Trial Chamber refers to the "First Attack" and "Second Attack" to refer to these two time periods, the Trial Chamber uses the terminology "First Operation" and "Second Operation".
[83] Confirmation Decision, paras. 36, 74; UDCC, para. 63 (first attack) and para. 77 and fn. 45 (second attack). *See* UDCC Decision, paras. 70-74 (stating that the list of locations is exhaustive with the caveats of para. 74, that is the term 'in or around' encompasses "crimes committed in the surroundings of the villages in question, noting that the precise limits of the villages may not be clearly ascertainable" and "the geographic areas between the villages in question and, in certain exceptional cases, immediately neighbouring villages within that geographic area").
[84] Confirmation Decision, paras. 38-44 (murder and attempted murder), 45-48 (attacking civilians), 49-52 (rape), 53-57 (sexual slavery), 59-63 (pillaging), 65-67 (forcible transfer), 69-70 (attacking protected objects), 72-73 (destroying the enemy's property), 81-82 (rape and sexual slavery of child soldiers), 85-96 (conscription, enlistment and use of child soldiers).
[85] Confirmation Decision, paras. 41, 43-44.
[86] UDCC, paras. 63-75 (regarding the First Attack), 76-91 (regarding the Second Attack), paras. 92-108 (regarding crimes against child soldiers).
[87] *Contra* Appeal-Part I, para. 19.
[88] *Contra* Appeal-Part I, para. 21.
[89] *See e.g.* Confirmation Decision, paras. 38-44 (murder and attempted murder), 49-52 (rape), 59-63 (pillaging), 72-73 (destroying the enemy's property).

of the Confirmation Decision.[90] The Trial Chamber confirmed this approach in deciding on the Defence's challenge to the UDCC before the start of the trial. For example, the Trial Chamber held that certain individual acts of rape identified in the Confirmation Decision were "illustrative" incidents of rape falling within narrowly confined parameters of the charges ("*acts of rape were committed 'against civilian women in Mongbwalu*").[91] It also held that "the Pre-Trial Chamber made a broad, non-exhaustive finding regarding relevant acts of violence for the purposes of the crime of 'attacks against the civilian population'".[92] Ntaganda did not seek leave to appeal the Trial Chamber's decision.[93]

29. This is not a confirmation "by sample".[94] Ntaganda misunderstands the purpose of confirmation proceedings (to ensure that the Prosecution's allegations are sufficiently strong to commit the person to trial)[95] and the function of a confirmation decision (to define the parameters of the trial[96] and to inform the accused of the factual and legal basis of the accusation in order to prepare her/ his defence).[97] The Conviction Decision did not go beyond the "facts and circumstances" of the charges and Ntaganda was adequately informed of the charges against him and capably prepared his defence; nor does he argue lack of or insufficient notice or any prejudice resulting from it. Nor was Ntaganda's conviction "by

[90] Defence ALA Decision, (seeking leave to appeal the Confirmation Decision on two grounds unrelated to the parameters of the charges for crimes against child soldiers).
[91] UDCC Decision, para. 30 referring to Confirmation Decision, para. 49. *See* Defence UDCC Submissions, paras. 51-53.
[92] UDCC Decision, para. 57.
[93] Judgment, para. 36.
[94] *Contra* Appeal-Part I, para. 20 referring to *Bemba* Judges Van der Wyngaert and Morrison Separate Opinion, para. 29. *But see Galić* TJ, paras. 186-189 (noting that "the scale was so great that the Schedules to the individual groups of counts in this indictment set forth only a small representative number of individual incidents for specificity of pleading." Thus, "the Schedules serve a procedural requirement – that of proper notice. They should not be understood as reducing the Prosecution's case to the scheduled incidents, and the trial was not conducted on that understanding". "The Trial Chamber was hence in a position to assess in each case, in accordance with the law set out in Part II of this Judgement and in fairness to the Accused, whether a scheduled incident is beyond reasonable doubt representative of the alleged campaign of sniping and shelling or whether it is reasonable to believe that the victim was hit by ABiH forces, by a stray bullet, or taken for a combatant"); *Galić* AJ, para. 3. Galić was charged with conducting a campaign of shelling and sniping against civilian areas of Sarajevo between 10 September 1992 and 10 August 1994.
[95] Confirmation Decision, para. 9; *Lubanga* Confirmation Decision, para. 39. *See also Ongwen* Confirmation Decision, para. 14 ("the procedure of confirmation of charges protects the suspect from wrongful and unfounded accusations by ensuring that 'only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought' are committed for trial").
[96] *See Ruto & Sang* Charges Order, para. 8; *Ongwen*, T-6, 19:22-23; *Banda & Jerbo* Confirmation Decision, para. 34; 2019 ICC Chambers Practice Manual, paras. 56-57.
[97] *Ruto & Sang* Charges Order, para. 8; *Ongwen*, T-6, 19:20-21; *Mbarushimana* Confirmation Decision, para. 112; *Lubanga* Regulation 55 AD, fn. 163; *Bemba* Confirmation Decision, para. 208; 2019 ICC Chambers Practice Manual, para. 38 ("the Pre-Trial Chamber must verify […] that the charges enable the suspect to identify the historical event(s) at issue and the criminal conduct alleged, in order to defend him or herself"). *See also* ICTY Practice Manual, p. 35, para. 3.

sample" either.[98] The Chamber was specific regarding the scope of the conviction and identified the victims if the evidence permitted it.[99]

30. *Second*, Ntaganda's attempt to draw an analogy between the facts and charges of his case with the *Bemba* case is erroneous. The two are markedly different. In *Bemba*, the Appeals Chamber found that the Confirmation Decision and the documents containing the charges (pre and post confirmation) outlined "in very general terms the temporal and geographical frame during which crimes were allegedly committed" (that is "[f]rom on or about 26 October 2002 to 15 March 2003 […] in the Central African Republic")[100] and that these "[were] too broad to amount to a meaningful 'description' of the charges against Mr Bemba in terms of article 74(2) of the Statute".[101] The Appeals Chamber thus found it was necessary to interpret the charges "in the form of identified criminal acts" set out in the evidential analysis in the Confirmation Decision,[102] stating:

> "*[I]n the present case* the Prosecutor had formulated the charges at a level of detail sufficient for the purposes of that provision only in respect of the criminal acts. For that reason, adding any additional criminal acts of murder, rape and pillage would have required an amendment to the charges, which, however, did not occur in the case at hand. In this regard, the Appeals Chamber wishes to underline that this is not to say that adding specific criminal acts after confirmation would in all circumstances require an amendment to the charges—this is a question that may be left open for the purposes of disposing of the present ground of appeal; nevertheless, given the way in which the Prosecutor has pleaded the charges *in the case at hand*, this was the only course of action that would have allowed additional criminal acts to enter the scope of the trial."[103]

31. Conversely, the *Ntaganda* case is pleaded with a significantly higher degree of specificity.[104] As shown above, the charges are framed with respect to narrow geographical

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[98] *Contra* *Bemba* Judges Van der Wyngaert and Morrison Separate Opinion, para. 23.
[99] Judgment, para. 1199; *see also* Sentencing Decision, paras. 40, 41, 47 (murder), 56 (intentionally attacking civilians in five locations), 92 (sexual slavery of civilian population), 93 (rape and sexual slavery of female UPC/FPLC members under the age of 15), 98 (rape of civilian population), 160 (forcible transfer from five localities). With respect to the conscription, enlistment and use of children under the age of 15, the Trial Chamber, on the basis of the evidence received, was not in a position to make a finding as the precise number or proportion of recruits: Sentencing Decision, para. 83. This is not uncommon for this type of crimes: *see e.g.* *Taylor* TJ, para. 1596. With respect to pillage, although it found that pillage was committed on a significant scale, the Chamber was likewise unable to make findings on the precise amount of pillaged items: Sentencing Decision, para. 140. This is also not uncommon for these crimes: *see e.g.* *Taylor* TJ, paras. 1877-1963 and *Katanga* TJ, paras. 949-957.
[100] *Bemba* AJ, para. 109 (referring to the pre-confirmation Amended Document Containing the Charges). *See also* para. 110 (referring to the Confirmation Decision and the Amended Document Containing the Charges, which follow the same structure as the pre-confirmation Amended Document Containing the Charges).
[101] *Bemba* AJ, para. 110.
[102] *Bemba* AJ, para. 111.
[103] *Bemba* AJ, paras. 115 (emphasis added).
[104] *See above*, paras. 26-28.

and temporal parameters where crimes were committed and thus provide a meaningful description of the charges against Ntaganda. This is different from *Bemba* and does not, therefore, require the same interpretation of the charges. Indeed, the *Bemba* Appeals Chamber underlined that its approach was specific to the circumstances of *that* case.

32. *Third*, the charging approach in this case is consistent with jurisprudence of this Court and that of other international courts and tribunals. ICC Chambers (in the *Katanga*, *Mbarushimana*, *Ruto and Sang* and *Muthaura and Kenyatta* cases) have found charges of murder framed with respect to exhaustive lists of locations to be sufficiently specific.[105] ICTY charges have also been framed according to these parameters.[106] Likewise, at the SCSL, Chambers have permitted charges for crimes other than those of continuous nature to be framed with respect to locations exhaustively specified in the indictment.[107] However, in certain cases, the "non-specific and inclusive pleading of locations" was deemed acceptable "in light of the sheer scale of the alleged crimes".[108]

33. The jurisprudence in this Court and in the *ad hoc* tribunals also concur that charges need not always be pleaded to the level of specific victims, and that the Prosecution need not

[105] *See* *Mbarushimana* Confirmation Decision, paras. 82 ("The DCC must contain a statement of the material facts underlying the charges, to include the dates and locations of the alleged incidents to the greatest degree of specificity possible in the circumstances"), 83 ("Accordingly, the Chamber will assess the charges only in relation to the locations specified under each count contained in the DCC"). *See also* para. 84 ("With regard to the Defence challenge to the references to 'Busurungi and surrounding villages' and 'Busurungi and neighbouring villages', the Chamber finds the description of the location in question to be sufficiently precise, particularly given the relatively narrow geographic area involved and the fact that the relevant details as to the wider locations surrounding Busurungi are to be found when the DCC is read in conjunction with the LoE"). The charges against Mbarushimana were not confirmed because the Chamber found that there were not substantial grounds to believe the factual allegations underpinning the elements of the crimes and the accused's personal involvement in the crimes. *See also* *Ruto & Sang* Second UDCC, pp. 42 and 48 (setting out the charge of murder "in Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town, and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya"). The *Ruto & Sang* Second UDCC was filed pursuant to the Trial Chamber's instructions to adapt the Updated DCC to reflect the specifically charged locations as confirmed by the Pre-Trial Chamber. *See* *Ruto & Sang* Updated DCC Decision, paras. 31-33 referring to *Ruto & Sang* Confirmation Decision, para. 99. *See also* *Kenyatta* Second UDCC, p. 30 (confirming charges of murder, "in or around Nakuru town […]").

[106] *See e.g.* *Šainović et al.* Indictment, paras. 74-75 and schedules A to K; *Stanišić* Indictment, para. 17 and schedule A (listing municipalities and a non-exhaustive list of victims).

[107] *Taylor* TJ, paras. 115, 117 (with respect to the crimes of sexual violence, abductions and forced labour and pillage, the Trial Chamber accepted that the broader 'location of Freetown and Western area without specific location' was sufficient to provide adequate notice). *See also* *Taylor* AJ, para. 40 citing *Brima et al.* AJ, para. 64 (where the Appeals Chamber confirmed the Trial Chamber's decision to limit the geographical scope of the indictment to the locations listed, rather than considering the list non-exhaustive). *See also* *Sesay et al.* AJ, paras. 835-836 (finding that "[t]he Prosecution's failure to plead Wendedu as a location in the Indictment rendered the Indictment defective with respect to the pleading of Kallon's instigation of murder at Wendedu" and that "Kallon was not put on notice of the charge that he instigated murder at Wendedu").

[108] *Taylor* AJ, para. 40 citing *Sesay et al.* AJ, para. 52 and *Brima et al.* AJ, para. 41 (both holding: "In some cases, the widespread nature and sheer scale of crimes make it unnecessary and impracticable to require a high degree of specificity").

always identify every single victim in order to meet its obligation of specifying the material facts of the case. Indeed, while in *Lubanga*, the Appeals Chamber held that "the underlying criminal acts form an integral part of the charges […], and sufficiently detailed information must be provided in order for the accused person to effectively defend him or herself against",[109] it also found that "the Prosecutor must provide details as to the date and location of the underlying acts and identify the alleged victims *to the greatest degree of specificity possible in the circumstances*".[110] The Chamber's refusal to stipulate a mandatory level of specificity for underlying acts and victims' identification is consonant with the case-specific nature of such a determination.[111] In the same vein, the Appeals Chamber in *Bemba* did not foreclose the possibility of framing charges in a way other than at the level of individual criminal acts.[112] Nor were all the victims for whom Katanga was convicted of murder in Bogoro on or about 23 February 2002[113] identified in the Confirmation Decision[114] and Amended Pre-Confirmation DCC, which referred to "the killings of at least two hundred civilian residents of, or persons present at Bogoro village [….] including [two named victims]".[115]

34. The ICTY and ICTR took a similar approach. In *Kupreškić,* the Appeals Chamber found that "there may be instances where the sheer scale of the alleged crimes 'makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of crimes'".[116] In *Ntakirutimana*, the Appeals Chamber further held that "[t]he inability to identify victims is reconcilable with the right of the accused to know the material facts of the charges against him because, in such circumstances, the accused's ability to prepare an effective defence to the charges does not depend on knowing the identity of every single alleged victim".[117] Thus, in *Šainović et al.*,

[109] *Lubanga* AJ, para. 123.
[110] *Lubanga* AJ, para. 123 (emphasis added).
[111] *See above* para. 19. In addition, a high degree of specificity has been found impracticable given the widespread nature and scale of crimes: *see Kupreškić et al.* AJ, para. 89; *Kvočka et al.* Form of Indictment Decision, para. 17; *see also*, *Sesay et al.* AJ, para. 48; *Brima et al.* AJ, para. 41. This however does not absolve the Prosecution from its duty to inform the suspect of the factual allegations underlying the charges against him: *see Mbarushimana* Confirmation Decision, para. 112.
[112] *Bemba* AJ, para. 115 ("In this regard, the Appeals Chamber wishes to underline that this is not to say that adding specific criminal acts after confirmation would in all circumstances require an amendment to the charges—this is a question that may be left open for the purposes of disposing of the present ground of appeal").
[113] *Katanga* Judgment, Annex F.
[114] *Katanga* Confirmation Decision, para. 422 ("pursuant to article 7(1)(a) of the Statute, it is sufficient to demonstrate that there are substantial grounds to believe that the suspects intended to cause and did cause the death of civilians as part of the widespread or systematic attack, even if their identities are unknown").
[115] *Katanga* Amended Pre-Confirmation DCC, para. 87 and count 2 at pp. 30-31.
[116] *Kupreškić et al.* AJ, para. 89.
[117] *Ntakirutimana et al.* AJ, para. 73.

the Appeals Chamber accepted that the indictment and its schedules did not purport to provide exhaustive lists of victims, and upheld the Trial Chamber's finding that 93 victims had been killed, even if it was unable to conclude that their names appeared in the schedules.[118] And so did the Trial Chamber in *Stanišić & Župljanin* which, upon "the Defence submission that 'there was no preliminary announcement to the effect that the Prosecution was intending to amplify or add to the indictment by introducing new victims", held that "a plain reading of Schedules A and B of the indictment indicates that the number of victims is not exhaustive".[119] Moreover, in *Đorđevic*, the Appeals Chamber confirmed the accused's conviction for an incident (the murder of four members of a family at a particular address in the Querim district) that was not expressly listed in the indictment, and came to light during trial, on the basis that the incident fell within the already specific parameters of the charges (which described that "over 50 persons were killed" in various "houses of Kosovo Albanians in the Querim district" on 1 April 1999).[120]

II.B.1.ii. The Challenged Acts concerning crimes other than crimes against child soldiers fall within the scope of the charges

35. Consistent with the above jurisprudence, all thirteen Challenged Acts regarding crimes other than those against child soldiers fall within the narrow temporal and geographical parameters of the charges:

- Challenged Act (i) relates to murder and attempted murder in Bambu on or about 19 February 2003, in the course of the Second Attack.[121]
- Challenged Acts (ii), (vi) and (vii) relate to murder and attempted murder in Kobu on or about 18, 25 and 26 February 2003, in the course of the Second Attack.[122]
- Challenged Act (iii) relates to murder in Kilo on or about 6 December 2002, in the course of the First Attack.[123]

[118] *Šainović et al.* AJ, paras. 235, 558.
[119] *Stanišić & Župljanin* Database Decision, para. 43.
[120] *Đorđević* AJ, paras. 654-655. *But see* paras. 657-661 (where the Appeals Chamber overturned the Trial Chamber's conviction regarding the murder of two men because the indictment specifically referred to the murder of only women and children in a courtyard and the Prosecution PTB and witnesses summary did not provide sufficient notice). Moreover, the jurisprudence further indicates that regardless of whether the identity of a victim is a "material fact", since it is information valuable to the preparation of the defence, the Prosecution should provide such information if it is available. *See* *Kupreškić et al.* AJ, para. 90; *Gotovina* 26 January 2009 AD, para. 18; *Šainović et al.* AJ, para. 233.
[121] Confirmation Decision, paras. 36; UDCC, para. 81.
[122] Confirmation Decision, paras. 36, 42-43, UDCC, para. 80 (re Challenged Act (ii)); Confirmation Decision, paras. 36, 42, 52, UDCC, paras. 84, 89 (re Challenged Act (vi)); Confirmation Decision, paras. 36, 42-43 and UDCC, paras. 89-90 (re Challenged Act (vii)).

- Challenged Act (iv) relates to murder in Mongbwalu after the takeover, and in Sayo on or about 23 November 2003, in the course of the First Attack.[124]
- Challenged Act (v) relates to murder in Sangi on or about 25 and 27 February 2003, in the course of the Second Attack.[125]
- Challenged Act (viii) relates to intentionally attacking civilians in Sayo during the UPC/FPLC advance on Sayo on or about 23 November 2002, in the course of the First Attack.[126]
- Challenged Act (ix) refers to rape in Mongbwalu after the takeover by UPC/FPLC soldiers, and in Kilo on or about 6 December 2002, in the course of the First Attack.[127]
- Challenged Act (x) refers to rape during the attack on Kobu, and in Sangi on or about 25 February 2003, in the course of the Second Attack.[128]
- Challenged Act (xi) refers to rape in Sangi on or about 26 or 27 February 2003, in the course of the Second Attack.[129]
- Challenged Act (xiii) refers to looting in the course of the First and Second Attacks after the takeover of Mongbwalu, Sayo, Kobu and Lipri and on 19 February 2003 in Bambu.[130]
- Challenged Act (xv) refers to destruction of property during the assault on Sayo on or about 23 November 2002, in the course of the First Attack.[131]

36. In conclusion, the thirteen Challenged Acts fall within the scope of the charges and Ntaganda was correctly convicted of them.

II.B.2. The charging of crimes against child soldiers

37. The charges for crimes against child soldiers (in Ituri, between on or about 6 August 2002 and 31 December 2003 for the crimes of enlistment, conscription, rape and sexual

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[123] Confirmation Decision, paras. 36, 41; UDCC, para. 63.
[124] Confirmation Decision, paras. 36, 38, 40; UDCC, paras. 66, 69-70.
[125] Confirmation Decision, paras. 36, 43, 51; UDCC, para. 83.
[126] Confirmation Decision, paras. 36, 139, 169; UDCC, paras. 68-69.
[127] Confirmation Decision, paras. 36, 49, 50; UDCC, paras. 72, 74.
[128] Confirmation Decision, paras. 36, 51; UDCC, para. 84.
[129] Confirmation Decision, paras. 36, 51, 55; UDCC, para. 84.
[130] Confirmation Decision, paras. 36, 59-62; UDCC, paras. 72, 81, 85.
[131] Confirmation Decision, paras. 36, 72; UDCC, para. 69.

slavery of child soldiers,[132] and between on or about 6 August 2002 and 30 May 2003 for the crime of use of children under the age of 15 to participate in hostilities)[133] are sufficiently specific. The *Ntaganda* charging approach with respect to these crimes is consistent with the jurisprudence of this Court and that of other international Courts and tribunals. Challenged Acts (xii) and (xiv) fall within the scope of the charges and Ntaganda was correctly convicted of them.

II.B.2.i. The charges are sufficiently specific

38. *First*, the Pre-Trial Chamber in the Confirmation Decision confirmed broader parameters for the crimes of conscription, enlistment and use of child soldiers under the age of 15 "in light of the continuous nature of the crimes under article 8(2)(e)(vii) of the Statute, coupled with the fact that the UPC/FPLC was continually on the move between various locations in the Province of Ituri".[134] The Pre-Trial Chamber correctly applied the same parameters to the crimes of sexual slavery and rape against child soldiers.[135] Although rape is ordinarily not considered a continuous crime, in this case it is appropriate to treat it as such because the perpetrators and victims (UPC/FPLC) were continuously on the move and the victims were raped repeatedly during their recruitment. In addition, the Chamber provided further indicators, such as a non-exhaustive list of training sites for the conscription and enlistment,[136] and more specific types of conduct, locations and timeframes for the crime of use.[137] Ntaganda did not seek leave to appeal this aspect of the decision.[138]

39. The Trial Chamber endorsed the Pre-Trial Chamber's approach before the start of the trial, further clarifying the scope of these charges.[139] Ntaganda did not seek leave to appeal this decision either. Moreover, in dismissing the Defence's closing submissions that some of these crimes were vaguely pled, the Trial Chamber recalled that these charges were framed with respect to these temporal and geographical parameters due to the continuous nature of some of the crimes and to the fact that victims and perpetrators (UPC/FPLC soldiers) were

[132] Judgment, paras. 968 and 1112; Confirmation Decision, para. 74.
[133] Judgment, para. 1113; Confirmation Decision, para. 74.
[134] Confirmation Decision, para. 83.
[135] Confirmation Decision, para. 74.
[136] Confirmation Decision, paras. 87-88.
[137] Confirmation Decision, paras. 93-96. *See* Judgment, para. 1113.
[138] Defence ALA Decision, (seeking leave to appeal the Confirmation Decision on two grounds unrelated to the parameters of the charges for crimes against child soldiers).
[139] UDCC Decision, para. 31. *See* Defence UDCC Submissions, paras. 56-57.

continuously on the move.[140] Indeed, the charges are sufficiently specific in light of the characteristics of these crimes and the circumstances of victims and perpetrators in this case.

40. *Second*, this approach is consistent with *Lubanga* and was unchallenged in *Bemba*. Mr Lubanga was charged and convicted for the enlistment, conscription and use of children under the age of 15 in Ituri from early September 2002 to 13 August 2003.[141] The Appeals Chamber found that framing the material facts as a pattern, rather than through multiple individual acts, was a permissible and adequate basis for a conviction.[142]

41. Further support is provided by the jurisprudence of the SCSL, where Chambers have deemed broad geographical and temporal parameters to be acceptable for crimes of conscription, enlistment and use of child soldiers (*i.e.*, all of Sierra Leone, at all times relevant to the indictment—30 November 1996 to 18 January 2002 in the *Taylor* case)[143] and for rape and sexual slavery of the civilian population (all locations in two districts and Freetown and the Western Area of Sierra Leone for periods of time ranging from three months to five years in the *Taylor* case), due to the prolonged nature of the crimes and the fact that the perpetrators were on the move, which made pleading concrete locations impracticable.[144]

II.B.2.ii. The Challenged Acts regarding crimes against child soldiers fall within the scope of the charges

42. Challenged Acts (xii) and (xiv) likewise fall within the parameters of the charges:

- Challenged Act (xii) (regarding the rape and sexual slavery of P-0883 over several months at Bule training camp, and Mave, the escort to Floribert Kisembo who was

[140] Judgment, paras. 968 (for rape and sexual slavery of child soldiers: Confirmation Decision, para. 74 (between on or about 6 August 2002 and 31 December 2003)), 1112 (for conscription and enlistment: Confirmation Decision, paras. 74 (between on or about 6 August 2002 and on or about 31 December 2003, in Ituri)), 1113 (for use of children under 15 to participate in hostilities: Confirmation Decision, paras. 74 (between on or about 6 August 2002 and March 2003)) and 93-96 (setting out types of conduct, and more specific locations and timeframes).
[141] *Lubanga* TJ, para. 1358. The charges were framed in two parts: first, presenting a 'pattern' of enlistment, conscription and use of individuals under the age of 15 to participate actively in hostilities and, second, setting out factual allegations relevant to named alleged child soldiers: *see* *Lubanga* AJ, para. 131. The Trial Chamber decided not to rely on the named alleged child soldiers in its decision to convict Mr Lubanga: *Lubanga* TJ, para. 480.
[142] *Lubanga* AJ, paras. 131-132, 135.
[143] *Taylor* Amended Indictment, para. 22. *See* *Taylor* TJ, paras. 118-119, 1355.
[144] *Taylor* Amended Indictment, paras. 14-17. *See* *Taylor* TJ, paras. 118-119, 875, 1017-1018. *See also* *Brima et al.* TJ, paras. 39-41 (although noting that the Prosecution should have pleaded the continuous crimes with more particularity). No charges of rape and sexual slavery against child soldiers have been presented in other tribunals.

raped regularly, including at the *Appartements* camp)[145] falls within the parameters of the crime of rape and sexual slavery against child soldiers committed in Ituri between on or about 6 August 2002 and 31 December 2003.[146]

- Challenged Act (xiv) (the use of children to participate in hostilities in the assault on Sayo on or about 24 November 2002 (First Attack)),[147] falls within the parameters of the charges for this crime: Ituri, between on or about 6 August 2002 and 30 May 2003.[148] Although Sayo is not specifically mentioned in the charges, the list of locations where children participated in hostilities is non-exhaustive.[149]

43. In conclusion, the two Challenged Acts with respect to crimes against child soldiers fall within the scope of the charges and Ntaganda was correctly convicted of them.

II.C. Ntaganda received adequate notice of the charges and the Challenged Acts and was able to adequately prepare his defence

44. Ntaganda focuses his appeal on the purported lack of specificity of the charges in this case and does not argue his rights were violated under article 67(1)(a)[150] and (b).[151] But even if the Appeals Chamber decides to assess whether there is any such violation, the Prosecution submits that there is none. Ntaganda received adequate notice of the charges. He also received adequate notice of the information relevant to the Challenged Acts and was able to prepare his defence accordingly. As shown below and in Annex B,[152] a large part of the Challenged Acts was referred to in the Confirmation Decision and/or UDCC. The Prosecution gave further, structured notice of additional Challenged Acts *prior* to the start of the trial through the In-depth Analysis Chart ("IDAC") (identifying the evidence in support of each legal element of the crimes charged),[153] the pre-trial brief ("PTB"),[154] summaries of

[145] Judgment, paras. 409, 411, 974, 1199.
[146] Confirmation Decision, para. 74. *See also* UDCC, para. 100. *See* Judgment, para. 969.
[147] Judgment, paras. 500, 511, fn. 1508.
[148] Confirmation Decision, para. 74. *See also* UDCC, para. 98.
[149] UDCC, para. 98 ("elsewhere").
[150] Statute, article 67(1)(a) ("[…] the accused shall be entitled […] To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks").
[151] Statute, article 67(1)(b) ("[…] the accused shall be entitled […] To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence").
[152] The Chart in Annex B does not contain submissions. Its purpose is to assist the Chamber by identifying whether (and if so, where) the Challenged Acts were referenced in the Confirmation Decision and UDCC, when the related evidence was notified to the Defence, and the Defence's submissions at trial in that respect.
[153] The IDAC was filed on 20 January 2014 with the Document Containing the Charges, approximately one year and eight months before the commencement of the trial on 2 September 2015, and provided the Defence with detailed factual allegations citing the evidence in support of each legal element of the crimes charged.

witness evidence (summarising the evidence that the Prosecution expected to elicit from the witness at trial, thus allowing the Defence to prepare for cross-examination),[155] and the list of evidence.[156] Of the Challenged Acts, it was only in relation to Challenged Act (i) that the details of the incident were elicited *during* the testimony of a witness. That said, there was no prejudice and Ntaganda's defence was not materially impaired. In any event, Ntaganda does not allege any prejudice in respect of any Challenged Act.

45. The purpose of article 67(1)(a) is to provide an accused person with the information necessary for the preparation of a defence.[157] In this case, the description of the charges by reference to the narrow temporal and geographical parameters, together with the non-exhaustive list of incidents provided in the Confirmation Decision and the UDCC, satisfied the accused's right under art 67(1)(a). Nor did the Chamber err in considering evidence regarding additional criminal acts and victims falling within those parameters.[158] Chambers of other international courts and tribunals have followed the same approach and have relied on evidence of additional incidents and victims falling within the parameters of the indictment as long as the accused person received sufficient notice.[159]

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[154] The PTB was filed on 9 March 2015, approximately six months before the commencement of the trial on 2 September 2015.
[155] *See* Trial Date Order, para. 9(a) (instructing the Prosecution to file the summaries on 15 January 2015). The Prosecution filed additional summaries on 2 March 2015. *See* Prosecution Witness Summaries.
[156] *See* Trial Date Order, para. 9(c) (instructing the Prosecution to file a list of evidence by 2 March 2015). The Chamber subsequently issued an oral ruling setting out the procedure to amend the list of evidence: T-19-Eng, 11:7-12:3).
[157] Schabas and McDermott, p. 1660, mn. 19; Schabas, p. 1028.
[158] Although the Appeals Chamber has stated that "ideally" the investigations should "largely be completed" during the confirmation proceedings, it has allowed for investigations to continue beyond confirmation. *See* *Mbarushimana* Confirmation AD, para. 44 and *Lubanga* Disclosure AD, paras. 2, 54.
[159] *See e.g.* *Stanišić & Simatović* Preliminary Motions Decision ("CONSIDERING that the Prosecution is not required to provide exhaustive lists of all the names of towns and villages attacked or details and exact number of victims and that, *until sufficient notice is given by the Prosecution*, the accused is entitled to proceed upon the basis that what is provided in a list is exhaustive in nature") (emphasis added). *See e.g.* *Stanišić & Simatović* TJ, para. 45 (deciding on the Defence submission that the indictment did not identify certain training camps: "the Trial Chamber notes that the Indictment gave notice of the Prosecution's intention to rely on the establishment of a number of training centres in Serb held parts of Croatia and Bosnia-Herzegovina. Further information about the location and timing of their operation was a matter of evidence to be presented in the course of the proceedings. Consequently, the Trial Chamber considers the Defence to have had sufficient notice in this respect", and see fn. 77, referring to the Prosecution PTB, list of evidence and witness testimony to establish notice); *Gacumbitsi* AJ, paras. 55-58 (examining whether the accused received notice of the killing of a person not mentioned in the Indictment but falling within the parameters through a summary form disclosed prior to trial showing the charges to which each witness's testimony was expected to correspond); *Naletilić & Martinović* AJ, paras. 32-35 (concluding that the accused was not put on notice of an incident through the information in the Prosecution PTB and witnesses' charts because they were equally vague), 40-44 (concluding that the summary of witnesses failed to provide clear and consistent information to the accused regarding the date and identity of victims that Martinović was alleged to personally have beaten), 45 (concluding that the accused was put on notice through a summary of evidence of another victim personally beaten by Martinović not named in the Indictment but falling within its parameters).

46. The Appeals Chamber in *Lubanga* also endorsed this approach. In order to determine whether the accused's person has received sufficient notice,[160] the Appeals Chamber held that "auxiliary documents [designed to provide information about the charges]" and "submissions by the Prosecutor" provided before the start of the trial must be considered.[161] The Appeals Chamber referred to documents such as an IDAC, list and summary of evidence and updated or amended DCCs as examples of auxiliary documents.[162] It further held that "[t]o the extent that further information is provided in the course of the trial, this can only go towards assessing whether prejudice caused by the lack of detail of the charges may have been cured".[163] Thus, notice provided after the start of the trial is not necessarily fatal; rather, it requires a case-by-case assessment of any impact that such notice might have had on the Defence's preparation.

47. In this case, Ntaganda received clear, timely and consistent information regarding the Challenged Acts. Four of the Challenged Acts ((iii), (vi), (viii)[164] and (xv)) and some aspects of the incidents in seven other Challenged Acts ((iv), (vii), (ix), (x), (xi), (xii) and (xiii)) are identified or referred to in the Confirmation Decision and/or UDCC.[165] The Prosecution notified Ntaganda of the rest of the Challenged Acts, apart from Challenged Act (i)

[160] On appeal, Mr Lubanga argued that there was no sufficient "detail in the charges with respect to the dates and places pertaining to instances of enlistment, conscription or participation in hostilities as with respect to the identity of victim, that is, the underlying criminal acts". *See* *Lubanga* AJ, para. 131.
[161] *Lubanga* AJ, paras. 128-130. *See also* *Bemba et al.* Updated DCC Judge Eboe-Osuji Partly Dissenting Opinion, para. 97 ("the Prosecutor's charging document is not the only document to be considered in determining whether adequate notice of the charges has been given to the accused").
[162] *Lubanga* AJ, paras. 125-126, 132. The PTB and opening submissions are examples of submissions before the start of the trial. The Appeals Chamber ultimately dismissed this aspect of the appeal because Mr Lubanga had not substantiated his arguments nor shown prejudice. *See* para. 136. Likewise, commentators have stated that article 67(1)(a) "must be taken in combination with the very thorough disclosure requirements that are imposed upon the Prosecutor". *See* Schabas and McDermott, p. 1660, mn. 20; Schabas, p. 1029.
[163] *Lubanga* AJ, para. 129. Notably, at the ICTY and ICTR, if an indictment had been found defective because material facts were not pleaded with sufficient specificity, Chambers still assessed whether the accused received clear, consistent and timely notice and whether she/he was accorded a fair trial. Notwithstanding the differences between their legal frameworks (at the ICTY/ICTR the Prosecution could request an amendment during the trial to add material facts) the Chambers' approach to "curing" indictments lacking sufficient detail (which is different than omitting material facts) is relevant. *See* *Blaškić* AJ, para. 221; *Kupreškić et al.* AJ, para. 114; *Gacumbitsi* AJ, paras. 55-58.
[164] The circumstances of Ntaganda's targeting of civilians with a grenade launcher are expressly referred to in paragraphs 139 and 169 of the Confirmation Decision and paragraph 68 of the UDCC. Notwithstanding the Pre-Trial Chamber and Trial Chamber's differing legal characterisation of Ntaganda's involvement in this incident, the Defence had sufficient notice of the underlying facts. *See* *Bemba et al.* AJ, paras. 183-184; *Al Mahdi* TJ, paras. 59-61.
[165] Challenged Acts (iii), (iv), (vi), (vii), (viii), (ix) (x), (xi), (xii) (xiii), (xv). *See* Annex B, Charging and Notice Chart, row (b) for reference to the Confirmation Decision/UDCC for each Challenged Act.

(discussed below), *before the start of the trial* either in the PTB and/or the IDAC and/or list and summaries of evidence:[166]

- For Challenged Act (ii) (the murder of the two children during the assault on Kobu) the Prosecution disclosed P-0790's statements[167] and filed the witness summary on 2 March 2015.[168]
- For Challenged Act (xiv) (use of children to participate in hostilities in Sayo), the Prosecution disclosed P-0886's statement[169] and filed the witness summary on 2 March 2015.[170]

48. With respect to Challenged Act (i), the murder of nine patients in Bambu hospital during the Second Attack came out during witness testimony at trial. In his statement (and witness summary) disclosed prior to trial, P-0863 only referred to the attempted murder of one person in the hospital. In his testimony in court, he gave plausible reasons why he did not mention the deaths in his statement.[171] Ntaganda's ability to prepare his defence was not materially impaired. *First*, the incident falls squarely within the parameters of the charges. The Confirmation Decision refers to "murder and attempted murder" in Bambu "during the Second Attack",[172] and the UDCC further specifies that "at least 12 civilians" were killed on or about 19 February 2003 when the UPC/FPLC attacked Bambu.[173] Ntaganda was therefore on notice of these charges. *Second*, the Confirmation Decision refers to the attack of the hospital in Bambu,[174] and the statement and summary of P-0863 (on whose evidence the Trial Chamber relied) were disclosed prior to the trial.[175] In its opening submissions, the Prosecution stated that people were found dead in the Bambu hospital after the UPC attack.[176] P-0863's testimony regarding nine persons murdered in the hospital was fully consonant with

[166] Challenged Act (v), and the remaining aspects of Challenged Acts (iv), (vii), (ix), (x), (xi), (xii) and (xiii) were referred to in the IDAC or PTB. *See* Annex B, row (c) for each Challenged Act.
[167] *See* Disclosure Filing, Annex A.
[168] Prosecution Witness Summaries, pp. 113-114. *See also* Annex B, Challenged Act (ii), row (c).
[169] *See* Disclosure Filing, Annex A.
[170] Prosecution Witness Summaries, pp. 108-109. *See also* Annex B, Challenged Act (xiv), row (c).
[171] Judgment, fn. 1811 (P-0863 testified about the nine persons killed when specifically asked whether any patients died as a result of UPC attacks). It is not uncommon that witnesses provide further detail if they are questioned on the same topic in different contexts: *see Kamuhanda* AJ, paras. 136-137. *See also Kajelijeli* AJ, para. 176 ("to suggest that if something were true a witness would have included it in a statement or a confession letter is obviously speculative and, in general, it cannot substantiate a claim that a Trial Chamber erred in assessing the witness's credibility").
[172] Confirmation Decision, para. 36.
[173] UDCC, para. 81.
[174] While the attack is mentioned in the context of the charge of pillaging, the charges must be read as a whole. *See Prlić et al.* AJ, para. 27; *Nyiramasuhuko et al.* AJ, para. 510.
[175] Prosecution Witness Summaries, pp. 93-95.
[176] Prosecutor Opening Submissions: T-23-Eng, 49:23-25.

the charges and the evidence adduced. The Defence cross-examined P-0863 on these murders[177] and subsequently challenged his testimony (on the merits) in his closing submissions.[178] Ntaganda's ability to defend himself was not prejudiced.

49. Finally, and with respect to Challenged Act (iii) (the murder of various individuals in Kilo), the three-day discrepancy between the Trial Chamber's findings (which refers to the event as occurring on 9 December 2002)[179] and the Confirmation Decision (which dates it on 6 December 2002)[180] is not determinative. Minor discrepancies in dates and locations between the charges and the evidence do not entail an acquittal for those charges.[181] Indeed, Ntaganda was able to identify the alleged criminal conduct and crime to prepare his defence accordingly.[182] The charges must be read as a whole,[183] and the Prosecution provided timely, consistent and clear evidence that murder took place in Kilo in the course of the First Attack.[184]

50. Ntaganda has shown neither error by the Trial Chamber, nor that he has suffered any prejudice. Ntaganda's third ground of appeal should be dismissed.

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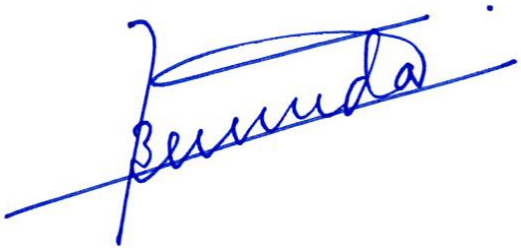
[177] T-181-Conf-Eng,17:11-30:21. *See also*, Annex B, Challenged Act (i), row (d). *See similarly* *Brima et al.* AJ, para. 115 (considering that the accused cross-examined witnesses with respect to specific incidents to determine whether he suffered prejudice).
[178] Defence Closing Brief, para. 906. *See also*, Annex B, Challenged Act (i), row (d).
[179] Judgment, para. 543.
[180] Confirmation Decision, para. 41.
[181] *Kunarac et al.* AJ, para. 217 ("The Appeals Chamber finds that the Trial Chamber's evaluation of the evidence and its findings on these points are reasonable. While the Trial Chamber did not indicate the specific day on which the crimes occurred, it did mention with sufficient precision the relevant period. Moreover, in the view of the Appeals Chamber, minor discrepancies between the dates in the Trial Judgement and those in the Indictment in this case go to prove the difficulty, in the absence of documentary evidence, of reconstructing events several years after they occurred and not, as implied by the Appellant, that the events charged in Indictment IT-96-23 did not occur"); *Prlić et al.* AJ, paras. 67-68 (where the Appeals Chamber found that the accused had received sufficient clear and timely notice of the relevant facts regarding an attack that the Trial Chamber found to have occurred in May or June 1993, but which had been pleaded in the indictment as taking place between June to mid-August 1993); *Rutaganda* AJ, paras. 297, 302, 304-306 (where the Appeals Chamber found that although the Trial Chamber found that the accused distributed weapons on 8, 15 and 24 April 1994, this was reasonably close to the dates pleaded in the indictment—which were "on or about 6 April 1994"; it further found that the indictment had to be read as a whole and that the Prosecution did not envisage a single act of distribution of weapons, that the date was not an essential part of the alleged crime, and that the accused did not suffer prejudice. Moreover, the accused also did not object to the evidence at trial on the basis that the incident fell outside the scope of the charges).
[182] *Rutaganda* AJ, paras. 302-304; *Ngirabatware* AJ, paras. 38-40 (examining whether the Prosecution had led consistent evidence throughout the proceedings in relation to the location of the roadblock, and whether the accused suffered prejudice).
[183] *Prlić et al.* AJ, para. 27; *Nyiramasuhuko et al.* AJ, para. 510.
[184] IDAC, pp. 263-264; PTB, para. 154. *See also*, Annex B, Challenged Act (iii), row (c).

CONCLUSION

51. For all these reasons, Ntaganda's first and third grounds of appeal should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 27th day of January 2020

At The Hague, The Netherlands