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TRIAL CHAMBER VI

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public

Decision on the updated document containing the charges

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

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Others

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Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 61(3) and (7), 64, 67(1) and 74(2) of the Rome Statute ('Statute') and Regulations 52 and 55 of the Regulations of the Court ('Regulations'), issues the following 'Decision on the updated document containing the charges'.

I. Procedural history

1. On 14 October 2014, the Chamber received written submissions in preparation for a status conference held on 17 October 2014, from the Office of the Prosecutor ('Prosecution') and the defence team for Mr Ntaganda ('Defence') on the need for clarification, if any, on the nature, cause and content of the charges.¹ During the aforementioned status conference, the Chamber heard further submissions by the parties on this matter,² with both parties expressing a wish for an updated document containing the charges ('Updated DCC').³
2. On 30 October 2014, the Chamber directed the Prosecution to provide the Defence with a draft Updated DCC by 7 November 2014.⁴ Both parties were ordered to liaise together thereafter with a view to resolving any areas of disagreement as to whether the confirmation decision in this case

¹ See 'Order Scheduling a Status Conference and Setting the Commencement Date for the Trial', 9 October 2014, ICC-01/04-02/06-382 (a corrigendum of which was filed as ICC-01/04-02/06-382-Corr on 28 November 2014), para. 3 and page 8; Prosecution Submissions in Preparation for the 17 October 2014 Status Conference, ICC-01/04-02/06-385 ('Prosecution Submissions for 17 October 2014 Status Conference'); Written Submissions on Behalf of Mr Ntaganda - 9 October 2014 Status Conference, ICC-01/04-02/06-384 ('Defence Submissions for 17 October 2014 Status Conference'). The Chamber notes that preliminary submissions had already been made on this issue during the first status conference convened by the Chamber – see Transcript of hearing of 11 September 2014, ICC-01/04-02/06-T-13-ENG ET, page 35, line 13 to page 36, line 18 and page 38, lines 15-23 (Prosecution submissions) and page 36, line 21 to page 38, line 10 (Defence submissions).

² Transcript of hearing on 17 October 2014, ICC-01/04-02/06-T-15-ENG ET.

³ For Defence, see, e.g., ICC-01/04-02/06-T-15-ENG ET, page 5, lines 16-18 and page 6, lines 17-21. For Prosecution, see, e.g., ICC-01/04-02/06-T-15-ENG ET, page 8, lines 7 and 16-18.

⁴ Order instructing the Prosecution to prepare an updated document containing the charges, ICC-01/04-02/06-390 ('Order of 30 October 2014').

(‘Confirmation Decision’)⁵ was properly reflected in the draft Updated DCC.⁶

3. The Chamber further ordered that the Updated DCC should contain references to the relevant paragraphs of the Confirmation Decision, and should not include any facts and circumstances explicitly rejected therein by the Pre-Trial Chamber.⁷
4. The Prosecution was ordered to file the draft Updated DCC with the Chamber by 14 November 2014 and to jointly submit, in an annex to the Updated DCC, any points of disagreement that could not be resolved during *inter partes* consultations.⁸
5. Accordingly, on 14 November 2014, the Prosecution submitted a filing (‘Prosecution Submissions’)⁹ attaching a draft Updated DCC, at Annexes A and B (‘Prosecution Proposal’)¹⁰ and a joint submission, with the Defence, of outstanding areas of disagreement, at Annex C (‘Joint Submission’).¹¹ The Prosecution Submissions also contained a request for leave, on behalf of both parties, to submit additional observations in relation to the four principal areas of outstanding disagreement.¹²
6. Having been authorised to do so by the Chamber,¹³ on 21 November 2014, the Prosecution¹⁴ and Defence¹⁵ filed the said additional observations

⁵ Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, ICC-01/04-02/06-309.

⁶ Order of 30 October 2014, ICC-01/04-02/06-390, para. 5.

⁷ Order of 30 October 2014, ICC-01/04-02/06-390, para. 6.

⁸ Order of 30 October 2014, ICC-01/04-02/06-390, para. 7.

⁹ Prosecution’s Submission of an Updated Document Containing the Charges, the Joint Submission of Areas of Disagreement and Request to File Additional Observations, ICC-01/04-02/06-402, with Public Annexes A, B and C.

¹⁰ See ICC-01/04-02/06-402-AnxA and B.

¹¹ See ICC-01/04-02/06-402-AnxC.

¹² Prosecution Submissions, ICC-01/04-02/06-402, paras 7 and 12. See also para. 5 (for the categorisation of the points of dispute into four principal areas).

¹³ Email communication from Legal Officer of the Chamber to the parties on 17 November 2014 at 18:33.

¹⁴ Prosecution’s Additional Observations on the Areas of Disagreement in the Updated Document Containing the Charges, ICC-01/04-02/06-403.

(‘Prosecution Additional Observations’ and ‘Defence Additional Observations’, respectively).

7. On 2 December 2014, the Chamber convened a status conference during which further oral submissions were made in relation to the disputed aspects of the Prosecution Proposal.¹⁶

II. Purpose of an Updated DCC

8. The Chamber notes that both parties have expressed the need for an Updated DCC in this case.¹⁷

i. Prosecution submissions

9. The Prosecution avers that an Updated DCC is ‘both appropriate and necessary before the commencement of trial’.¹⁸ Referring to the approach taken by Trial Chamber V in the *Kenya* cases,¹⁹ the Prosecution argues that an Updated DCC is ‘legally appropriate’ because, as opposed to the Confirmation Decision itself, it is intended to be the operative charging document at trial²⁰ that provides the clearest notice to the Defence on the ‘nature, cause and content of the charges’.²¹ The Prosecution thus endorses the view of Trial Chamber V that ‘the description of the charges in the DCC, amended to harmonise it with the findings made in the Confirmation Decision, rather than the Confirmation Decision itself, provides a sufficiently authoritative statement of the charges relevant to

¹⁵ Additional Observations on Behalf of Mr Ntaganda Concerning the Prosecution’s Updated Document Containing the Charges, ICC-01/04-02/06-405.

¹⁶ See Transcript of hearing on 2 December 2014, ICC-01/04-02/06-T-17-CONF-ENG-ET, page 10, line 13 to page 11, line 15 and page 15, lines 2-14.

¹⁷ For Defence, *see, e.g.*, ICC-01/04-02/06-T-15-ENG ET, page 5, lines 16-18 and page 6, lines 17-21. For Prosecution, *see, e.g.*, ICC-01/04-02/06-T-15-ENG ET, page 8, lines 7 and 16-18.

¹⁸ Prosecution Submissions for 17 October 2014 Status Conference, ICC-01/04-02/06-385, para. 6.

¹⁹ *Prosecutor v William Samoei Ruto and Joshua Arap Sang* (‘*Ruto and Sang* case’) and *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* (‘*Kenyatta* case’).

²⁰ Prosecution Submissions for 17 October 2014 Status Conference, ICC-01/04-02/06-385, para. 7.

²¹ Prosecution Submissions for 17 October 2014 Status Conference, ICC-01/04-02/06-385, para. 10.

the trial proceedings'.²² The Prosecution argues that the Court's statutory framework establishes the Prosecution as the 'charging entity'.²³

10. The Prosecution submits that the confirmation procedure is a mechanism for determining whether the requisite standard under Article 61 of the Statute is met; it is not 'a mechanism for the Pre-Trial Chamber to rewrite those charges'.²⁴ The Prosecution argues that the Pre-Trial Chamber need not enter a finding on every allegation in the Document Containing the Charges ('DCC'),²⁵ and that such silence does not prevent those allegations, contained in the DCC though not reflected in the Confirmation Decision, from being relied on at trial.²⁶

11. The Prosecution further submits that an Updated DCC is 'necessary' in this case because the Confirmation Decision 'does not provide sufficient clarity and specificity on its own in order to facilitate the Accused's understanding of the charges as confirmed'.²⁷ Specifically, the Prosecution argues that while the charges against the accused are specified in five operative paragraphs of the Confirmation Decision, these paragraphs alone 'do not contain the entirety of the information necessary to provide

²² Prosecution Submissions for 17 October 2014 Status Conference, ICC-01/04-02/06-385, para. 10, referring to *Ruto and Sang* case, Decision on the content of the updated document containing the charges, 28 December 2012, ICC-01/09-01/11-522 ('*Ruto and Sang* Decision on Updated DCC'), para. 18; *Kenyatta* case, Decision on the content of the updated document containing the charges, 28 December 2012, ICC-01/09-02/11-584, para. 22 ('*Kenyatta* Decision on Updated DCC').

²³ Prosecution Submissions for 17 October 2014 Status Conference, ICC-01/04-02/06-385, paras 11-12, referring to Articles 61(9) and 74(2) of the Statute, Rules 121 and 128(1) of the Rules of Procedure and Evidence and Regulations 52 and 55(1) of the Regulations.

²⁴ Prosecution Submissions for 17 October 2014 Status Conference, ICC-01/04-02/06-385, para. 13.

²⁵ See Annex A to Prosecution's submission of document containing the charges and the list of evidence, 10 January 2014, ICC-01/04-02/06-203-AnxA.

²⁶ Prosecution Submissions for 17 October 2014 Status Conference, ICC-01/04-02/06-385, paras 14-16.

²⁷ Prosecution Submissions for 17 October 2014 Status Conference, ICC-01/04-02/06-385, para. 8. See also para. 18 submitting that an Updated DCC is necessary as a practical matter, *inter alia*, to avoid having to cross-refer to two documents in order to fully understand the charges. The Prosecution notes at para. 19 that, in *The Prosecutor v. Thomas Lubanga Dyilo*, an Updated DCC was ordered to 'ensure that there is complete understanding of the "statement of facts"'; in *The Prosecutor v. Jean-Pierre Bemba Gombo* and the *Kenya* cases, an Updated DCC was ordered 'because the confirmation decision did not provide a readily accessible statement of the facts that underlined each charge'.

the appropriate level of specificity and notice of the charges'.²⁸ Therefore, in its submission, other paragraphs of the Confirmation Decision must be referred to in order to fully understand the operative paragraphs, for example, the 'temporal jurisdiction' and the defined terms of 'First Attack' and 'Second Attack'.²⁹

12. Further, the Prosecution argues that an Updated DCC is warranted because in the Confirmation Decision, the Pre-Trial Chamber (i) confirmed only some modes of liability for particular charges; (ii) altered the geographical scope of the charges outlined in the DCC; (iii) altered timeframes for the contextual elements and two main incidents charged; and (iv) set out specific locations in which specific crimes took place, differing from the DCC.³⁰ On this basis, the Prosecution concludes that 'it is important in this case for clarity going forward',³¹ in particular to provide sufficient notice to Mr Ntaganda of the parameters of the charges,³² to file an Updated DCC.

13. The Prosecution notes that any change to the DCC would be confined to 'adjusting the original charges to the [C]onfirmation [D]ecision', and that allegations explicitly rejected by the Pre-Trial Chamber 'cannot form part of the case at trial'.³³

²⁸ Prosecution Submissions for 17 October 2014 Status Conference, ICC-01/04-02/06-385, para. 21.

²⁹ Prosecution Submissions for 17 October 2014 Status Conference, ICC-01/04-02/06-385, paras 22-23; ICC-01/04-02/06-T-15-ENG ET, page 8, line 24 to page 9, line 3.

³⁰ ICC-01/04-02/06-T-15-ENG ET, page 7, line 23 to page 8, line 6. *See also* Prosecution Submissions for 17 October 2014 Status Conference, ICC-01/04-02/06-385, paras 22-23.

³¹ ICC-01/04-02/06-T-15-ENG ET, page 8, lines 7 and 16-18.

³² Prosecution Submissions for 17 October 2014 Status Conference, ICC-01/04-02/06-385, paras 23-24.

³³ Prosecution Submissions for 17 October 2014 Status Conference, ICC-01/04-02/06-385, para. 14.

ii. Defence submissions

14. The Defence submits that, while it evidently takes exception to the outcome of the Confirmation Decision, it is satisfied with its 'general structure', which it states 'allows Mr Ntaganda to understand in general the nature of the accusations brought against him'.³⁴ Notwithstanding, the Defence avers that it is 'necessary to be informed of the Prosecution's understanding of the charges, as confirmed by the Pre-Trial Chamber', in the form of an Updated DCC.³⁵ The Defence emphasises that the Updated DCC should not go beyond the Confirmation Decision.³⁶ In particular, the Defence argues that, if certain allegations have not been confirmed, they should be removed from the document 'so that the document we are working with is the one that will be operational at trial'.³⁷

15. The Defence avers that, in its view, 'there is no doubt' that, once agreed upon, the Updated DCC would be 'the operative document for trial'.³⁸ While it also submits that it will require a 'further exhaustive document setting out in detail [the Prosecution's] theory of the case and the evidence upon which [the Prosecution] intends to rely at Trial',³⁹ whether in the form of a pre-trial brief or a footnoted Updated DCC, three months before the commencement of trial,⁴⁰ the Defence does not require 'detailed

³⁴ Defence Submissions for 17 October 2014 Status Conference, ICC-01/04-02/06-384, para. 2.

³⁵ Defence Submissions for 17 October 2014 Status Conference, ICC-01/04-02/06-384, para. 3. *See also* ICC-01/04-02/06-T-15-ENG, page 5, lines 16-22.

³⁶ ICC-01/04-02/06-T-15-ENG, page 12, lines 13-14.

³⁷ ICC-01/04-02/06-T-15-ENG, page 5, lines 22-25.

³⁸ ICC-01/04-02/06-T-15-ENG, page 7, lines 13-17.

³⁹ Defence Submissions for 17 October 2014 Status Conference, ICC-01/04-02/06-384, para. 5.

⁴⁰ ICC-01/04-02/06-T-13-ENG, page 38, line 7. *See also* Defence Submissions for 17 October 2014 Status Conference, ICC-01/04-02/06-384, para. 5. This request is further discussed in Section IV below.

footnotes and cross-referencing to the evidence' in the Updated DCC being currently finalised between the parties.⁴¹

iii. Findings of the Chamber

16. The Chamber recalls that, a reasonable time before the confirmation of charges hearing, an accused is to be provided with 'a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial'.⁴² Regulation 52 of the Regulations elaborates upon the required content of the document containing the charges. Following the confirmation hearing, the Pre-Trial Chamber may then, *inter alia*, confirm or decline to confirm the charges presented.⁴³

17. As recently stated by the Appeals Chamber, the decision on the confirmation of charges 'defines the parameters of the charges at trial'.⁴⁴ However, an updated document containing the charges which conforms to the charges as confirmed by the Pre-Trial Chamber, may be used in discharging the Prosecution's burden of informing the accused of the nature and content of the charges, including of underlying facts and circumstances.⁴⁵

18. The Chamber notes that, in this case, the parties are in agreement that an Updated DCC is necessary, *inter alia*, to provide the accused with clear

⁴¹ ICC-01/04-02/06-T-15-ENG, page 6, lines 22-23. *See also* Defence Submissions for 17 October 2014 Status Conference, ICC-01/04-02/06-384, para. 3.

⁴² Article 61(3)(a) of the Statute. *See also* Article 67(1)(a) of the Statute.

⁴³ Article 61(7) of the Statute.

⁴⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121-Red (A5) ('*Lubanga A5 Judgment*'), para. 124. This would be without prejudice to charges which are subsequently amended or withdrawn pursuant to Article 61(9) of the Statute (*see* Article 74(2) of the Statute).

⁴⁵ *Lubanga A5 Judgment*, ICC-01/04-01/06-3121-Red, paras 124-128. *See also* Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 8 December 2009, ICC-01/04-01/06-2205 (OA15 OA16), ('*Lubanga OA 15 OA 16 Judgment*'), footnote 163.

notice of the Prosecution's understanding of the charges as confirmed by the Pre-Trial Chamber, and to act as an 'operative document' for the purposes of the trial.

19. It was on that basis that the Chamber, in the Order of 30 October 2014, directed the parties to consult and the Prosecution to submit an Updated DCC. The Chamber hereby re-emphasises that the charges in the Updated DCC must conform to the scope of the charges as confirmed in the Confirmation Decision.⁴⁶ Therefore, in considering the points of disagreement between the parties as addressed in further detail below, the Chamber has had reference to the authoritative determination of the scope of the charges as contained in the Confirmation Decision.

20. Additionally, noting the apparent areas of disagreement between the parties, the Chamber considers it helpful for clarification to be provided on those matters, through the preparation of the Updated DCC, at this early stage.

III. Submissions and analysis on disputed areas of the Prosecution Proposal

21. Overall, the Prosecution submits that the suggested Updated DCC contained in the Prosecution Proposal 'accurately depicts the charges confirmed' in the Confirmation Decision.⁴⁷ According to the Defence, in its current form, the Prosecution Proposal 'does not accurately reflect the charges as confirmed in the Confirmation Decision' and remains 'impermissibly vague'.⁴⁸

⁴⁶ See Order of 30 October 2014, ICC-01/04-02/06-390, paras 5-6.

⁴⁷ Prosecution Additional Observations, ICC-01/04-02/06-403, paras 2 and 10.

⁴⁸ Defence Additional Observations, ICC-01/04-02/06-405, para. 5.

22. The Chamber has considered only the updates to the DCC which have been challenged by the Defence, and holds that other undisputed amendments may remain therein.⁴⁹ There are four main areas of contention upon which the parties now seek the Chamber's involvement to facilitate finalisation of the Updated DCC. These are, in the order in which the Chamber will address them: (i) whether specific factual allegations on which the Confirmation Decision is silent necessitates the deletion of those allegations; (ii) the interpretation of the Pre-Trial Chamber's findings in paragraphs 36 and 97 of the Confirmation Decision; (iii) the impact of the part in section H of the Updated DCC entitled 'Legal characterisation of the facts' ('Section H (ii)');⁵⁰ and (iv) the use of the word 'including' in relation to specific locations in which a crime is alleged to have been committed.⁵¹

23. Within these four main areas of disagreement, in some cases with a degree of overlap, the parties have outlined 33 individual points of contention as contained in the Joint Submission ('Issues').⁵² In this decision, the individual Issues will be referred to by number (1-33) corresponding to the numbers assigned in the Joint Submission.

24. The following sections will address the findings of the Chamber in relation to each disputed area in order to inform the submission of a final Updated DCC. Although not summarised in full in this decision, the Chamber has considered each of the submissions for all of the Issues to

⁴⁹ The Chamber notes in particular in this context the Defence's submission relating to paragraphs 44-46 and 48-51 of the Prosecution Proposal (*see* Defence Additional Observations, ICC-01/04-02/06-405, paras 58-60; ICC-01/04-02/06-T-17-CONF-ENG, page 10, line 17 to page 11, line 15), which is consequently not addressed.

⁵⁰ The parties refer to the part in Section H entitled 'Legal characterisation of the facts' as 'Section H (ii)', although it appears in the Prosecution Proposal that the section is mislabelled as 'H(i)'. Notwithstanding, for clarity and uniformity, the Chamber will refer to the 'Legal characterisation of the facts' part in 'H' as 'Section H (ii)', and notes that the Prosecution will need to amend this accordingly in the final Updated DCC.

⁵¹ *See* Prosecution Submissions, ICC-01/04-02/06-402, para. 5.

⁵² The Chamber has relied upon the categorisations applied by the parties, *see* Prosecution Submissions, ICC-01/04-02/06-402, para. 5 and Joint Submission, ICC-01/04-02/06-402-AnxC.

which they have relevance, noting that there is a degree of overlap between the submissions made across the four disputed categories. To the extent that Issues fall under more than one category of disagreement, the Chamber has reserved its specific disposition regarding the Issue in question until the section of the decision considering the final category under which the Issue falls.

A. Silence by the Pre-Trial Chamber in the Confirmation Decision necessitating removal of a factual allegation

25. The first area of disagreement between the parties that the Chamber will address is whether or not silence by the Pre-Trial Chamber on a particular factual allegation requires the removal of that allegation.⁵³

i. Prosecution submissions

26. The Prosecution contends that, as held in the *Kenya* cases, ‘where a Pre-Trial Chamber is silent in the confirmation hearing decision on relevant statements of fact made in the DCC’, the Prosecution is authorised to retain factual assertions.⁵⁴ The Prosecution argues, on this basis, that any requests by the Defence to exclude factual allegations from the Updated DCC on the basis that they are not referred to in the Confirmation Decision ought to be rejected.⁵⁵

⁵³ Prosecution’s Additional Observations, ICC-01/04-02/06-403, paras 44-51 and Defence Additional Observations, ICC-01/04-02/06-405, paras 49-60.

⁵⁴ Prosecution’s Additional Observations, ICC-01/04-02/06-403, para. 44, *referring to Ruto and Sang* Decision on Updated DCC, ICC-01/09-01/11-522, paras 19-20 and 50, and *Kenyatta* Decision on Updated DCC, ICC-01/09-02/11-584, paras 23, 25, 28, 33, 50 and 55. *See also* paras 4, 13 and 46.

⁵⁵ Prosecution’s Additional Observations, ICC-01/04-02/06-403, para. 47.

ii. *Defence submissions*

27. The Defence argues that Trial Chamber V's finding on the interpretation of silence was a general principle to which there are exceptions,⁵⁶ as retaining 'factual allegations because they were not specifically addressed in the Confirmation Decision is not always in the interests of justice'.⁵⁷ In light of this, the Defence submits that certain factors need to be taken into account in determining whether or not a factual allegation should be maintained, such as whether or not the fact was omitted on purpose, whether or not it expands the charges against the accused or whether or not it prejudices the rights of the accused,⁵⁸ such as by 'impairing' the ability to conduct effective investigations or negatively impacting the length of the trial.⁵⁹

iii. *Findings of the Chamber*

28. The Chamber concurs with Trial Chamber V that, as a general principle, where the Pre-Trial Chamber was silent on a particular allegation in the DCC it cannot be presumed to have been rejected and such silence need not automatically result in its removal from the Updated DCC.⁶⁰ This arises from the nature of the confirmation proceedings whereby the Pre-Trial Chamber is not required to consider each factual allegation in detail but rather only to determine whether there is sufficient evidence to establish substantial grounds to believe that the crimes charged were committed.⁶¹ The Chamber nonetheless acknowledges that there may be

⁵⁶ Defence Additional Observations, ICC-01/04-02/06-405, para. 49.

⁵⁷ Defence Additional Observations, ICC-01/04-02/06-405, para. 50; *see also* para. 10.

⁵⁸ Defence Additional Observations, ICC-01/04-02/06-405, para. 50; *see also* para. 10.

⁵⁹ Defence Additional Observations, ICC-01/04-02/06-405, paras 55, 57 and 60.

⁶⁰ *See Ruto and Sang* Decision on Updated DCC, ICC-01/09-01/11-522, paras 19-20; *Kenyatta* Decision on Updated DCC, ICC-01/09-02/11-584, para. 23.

⁶¹ *Ruto and Sang* Decision on Updated DCC, ICC-01/09-01/11-522, paras 19-20; *Kenyatta* Decision on Updated DCC, ICC-01/09-02/11-584, para. 23.

certain circumstances in which it would be inappropriate to retain particular allegations, including where permitting their retention may be significantly misleading or prejudicial.

29. The Chamber has applied this reasoning to its consideration of each of the Issues falling under this category of disagreement. The Issues which the Chamber will specifically dispose of now under this category are **Issues 1, 7 and 9.**

30. **Issue 1** relates to whether the language in the Prosecution Proposal referring to '[w]omen prisoners' having been raped at a camp in Mongbwalu requires amendment in light of the Pre-Trial Chamber's finding that 'three nuns' were raped there.⁶² It is clear to the Chamber that the Pre-Trial Chamber's finding is illustrative and is not intended to amend the facts and circumstances presented. This is apparent, *inter alia*, from the preceding sentences of paragraph 49 of the Confirmation Decision which finds generally that acts of rape were committed 'against civilian women in Mongbwalu'.⁶³ Therefore, the wording in the Prosecution Proposal can be retained.

31. **Issues 7 and 9,**⁶⁴ relate to the identification of camp sites, and locations and timeframes during which it is alleged that child soldiers participated in hostilities. The Chamber considers that the general principle as to silence applies and the allegations may be retained as reflected in the Prosecution Proposal. This is additionally supported by the language in paragraph 87 of the Confirmation Decision which does not attempt to

⁶² See Confirmation Decision, ICC-01/04-02/06-309, para. 49; Prosecution Proposal ICC-01/04-02/06-402-AnxB, para. 72.

⁶³ Confirmation Decision, ICC-01/04-02/06-309, para. 49.

⁶⁴ See Prosecution's Additional Observations, ICC-01/04-02/06-403, paras 25-27; Defence Additional Observations, ICC-01/04-02/06-405, paras 56-57.

exhaustively list training camps as it commences with '[f]or example'.⁶⁵ In this context, the Chamber also notes that, in relation to Counts 14-16 (enlistment and conscription of child soldiers and their use to participate actively in hostilities), the Pre-Trial Chamber explicitly indicated that, due to the nature of the crimes in question and the particular factual circumstances, it considered a more inclusive approach to the articulation of the relevant facts and circumstances to be permissible.⁶⁶ In the Chamber's view, in this context, the Pre-Trial Chamber's analysis of certain factual allegations in determining that the crimes in question had been established to the requisite standard shall not be interpreted as having limited the facts and circumstances as presented in the DCC.

32. Finally, in the context of this category, and although not raised by the parties, the Chamber notes that the Pre-Trial Chamber did not find it necessary to exhaustively consider alternate *mens rea* requirements in the Confirmation Decision. For example, the Chamber notes that, in the context of the accused's alleged liability under Article 28 of the Statute, the Confirmation Decision addresses only the standard that the accused 'knew', and not whether he 'should have known'.⁶⁷ For the sake of clarity, the Chamber considers it appropriate to indicate that, consistent with the approach outlined above, in such cases it does not consider the alternative component to have been rejected in the Confirmation Decision and the allegation may therefore be retained in the Updated DCC and litigated at trial.

⁶⁵ Confirmation Decision, ICC-01/04-02/06-309, para. 87.

⁶⁶ See Confirmation Decision, ICC-01/04-02/06-309, para. 83.

⁶⁷ Confirmation Decision, ICC-01/04-02/06-309, para. 167. See also Confirmation Decision, ICC-01/04-02/06-309, para. 162 (making an express finding only in relation to the *mens rea* standard set out in Article 25(3)(d)(ii), albeit with the qualifier 'at least').

B. Interpretation of Paragraphs 36 and 97 of the Confirmation Decision

33. The second category of disagreement between the parties that the Chamber will address is the interpretation of paragraphs 36 and 97 of the Confirmation Decision.⁶⁸

i. Prosecution submissions

34. The Prosecution states that these paragraphs ‘must be read in light of the numerous supporting factual and legal findings made throughout the [Confirmation] Decision and cannot artificially be read in isolation’.⁶⁹ Specifically, as considered further in Section D below, the Prosecution argues that paragraph 36 must be read with paragraphs 29, 37 and ‘the other paragraphs of the [Confirmation] Decision that rely on evidence of crimes happening outside of the locations specifically listed in paragraph 36’.⁷⁰ The Prosecution additionally reiterates that, absent an express rejection, a fact is confirmed⁷¹ and can remain in the Updated DCC.⁷²

ii. Defence submissions

35. The Defence submits that the Pre-Trial Chamber stated that it had confirmed the charges presented by the Prosecution ‘to the extent specified’ in paragraphs 12, 31, 36, 74 and 97 of the Confirmation Decision.⁷³ In the view of the Defence, paragraph 36 of the Confirmation Decision bears an ‘authoritative and binding character’.⁷⁴ Consequently, it submits that the locations listed therein are ‘exhaustive’⁷⁵ and, relatedly,

⁶⁸ Prosecution Submissions, ICC-01/04-02/06-402, para. 5.

⁶⁹ Prosecution’s Additional Observations, ICC-01/04-02/06-403, para. 4.

⁷⁰ Prosecution’s Additional Observations, ICC-01/04-02/06-403, para. 28.

⁷¹ Prosecution’s Additional Observations, ICC-01/04-02/06-403, para. 29.

⁷² Prosecution’s Additional Observations, ICC-01/04-02/06-403, paras 32 and 33.

⁷³ Defence Additional Observations, ICC-01/04-02/06-405, para. 17, *referring to* Confirmation Decision, ICC-01/04-02/06-309, page 63.

⁷⁴ Defence Additional Observations, ICC-01/04-02/06-405, para. 7; *see also* para. 18.

⁷⁵ Defence Additional Observations, ICC-01/04-02/06-405, para. 17; *see also* para. 21.

that factual allegations ‘falling outside the scope of the charges’, which the Defence avers has been ‘expressly limited’ in paragraphs 36 and 97 of the Confirmation Decision, cannot be maintained.⁷⁶ The Defence claims ‘that a holistic reading of the Confirmation Decision for the purpose of defining the scope of the charges (...) is highly inappropriate’.⁷⁷

iii. Findings of the Chamber

36. The Chamber notes that the Pre-Trial Chamber confirmed the ‘charges presented by the Prosecutor [...] to the extent specified in paragraphs 12, 31, 36, 74 and 97’ of the Confirmation Decision.⁷⁸ However, in the Chamber’s view, it is apparent that those paragraphs alone are not intended to provide a comprehensive statement of the charges.

37. In that regard, the Chamber notes that ‘charges’ include a description of the relevant ‘facts and circumstances’, as well as a legal characterisation of the facts.⁷⁹ The Appeals Chamber has described the relevant facts as being those ‘factual allegations which support each of the legal elements of the crime charged’.⁸⁰ Guidance as to the scope of the content of the charges is also provided in Regulation 52 of the Regulations which states, in relevant part, that the document containing the charges should include, *inter alia*, ‘a statement of the facts, including the time and place of the alleged crime, which provides a sufficient legal and factual basis to bring the person or persons to trial’.

⁷⁶ Defence Additional Observations, ICC-01/04-02/06-405, paras 8 and 17.

⁷⁷ Defence Additional Observations, ICC-01/04-02/06-405, para. 19.

⁷⁸ Confirmation Decision, ICC-01/04-02/06-309, page 63.

⁷⁹ See e.g. Article 74(2) of the Statute and Regulation 52 of the Regulations. See also *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 28 March 2012, ICC-01/04-01/06-2842, (‘*Lubanga Trial Judgment*’), para. 2.

⁸⁰ *Lubanga OA 15 OA 16 Judgment*, ICC-01/04-01/06-2205, footnote 163.

38. Having regard to the required content of the charges, the Chamber finds that the factual information provided in the 'operative paragraphs' of the Confirmation Decision alone would be insufficient to meet the required standard of notification of the nature, cause and content of the charges to the accused.⁸¹ Moreover, the Confirmation Decision makes the interpretation and understanding of those 'operative paragraphs' necessarily dependent on other portions of the decision, including through the use of defined terms⁸² and through the indication that the findings in those paragraphs are 'more specifically supported' by facts contained in subsequent subsections of the decision.⁸³

39. The Chamber additionally notes that, rather than explicitly designating any specific portion of the Confirmation Decision as comprehensively articulating the relevant 'facts and circumstances' confirmed, the Pre-Trial Chamber instead confirmed the 'charges presented by the Prosecutor', to the extent specified in the 'operative paragraphs'.⁸⁴ In the Chamber's view, this means that, although the parameters of the charges confirmed by the Pre-Trial Chamber are contained in the Confirmation Decision, unruly upon allegations in the DCC may also constitute the 'facts and circumstances described in the charges'. As a general principle, and as noted in Section A above, where the Pre-Trial Chamber was silent on a particular allegation in the DCC, it cannot be presumed to have been rejected, and such silence need not automatically result in its removal from the Updated DCC.

⁸¹ See Article 67(1)(a) of the Statute. See also discussion in *Lubanga A5 Judgment*, ICC-01/04-01/06-3121-Red, paras 118-121.

⁸² See e.g. Confirmation Decision, ICC-01/04-02/06-309, para. 36 (where the defined terms 'First Attack', 'Second Attack' and 'Non-International Armed Conflict' are used, it is noted that, *inter alia*, the applicable temporal scope for the crimes can only be understood through reference to how these terms have been defined).

⁸³ See Confirmation Decision, ICC-01/04-02/06-309, paras 13, 32, 37, 75 and 98. It is noted however that the Confirmation Decision does not explicitly designate any particular section as comprehensively articulating the relevant 'facts and circumstances' for the purposes of the charges.

⁸⁴ Confirmation Decision, ICC-01/04-02/06-309, page 63.

40. Accordingly, the Chamber finds that, in principle, the 'operative paragraphs' of the Confirmation Decision, including paragraphs 36 and 97, must be read in context and understood by reference to other relevant portions of the Confirmation Decision, as well as to the charges as presented in the DCC. The Chamber has applied this approach in its consideration of the Issues arising under this category of disagreement, including where specifically ruled upon in subsequent sections of this decision.

41. The Chamber will now turn to consideration of **Issues 2, 10 and 11** as falling under this category.

42. In respect of **Issue 2**, the Chamber notes that there is no dispute as to the fact that the Pre-Trial Chamber declined to confirm the crime of sexual slavery in the context of the First Attack.⁸⁵ However, the parties disagree as to whether, as a consequence, the term 'concubine' must be removed from the Updated DCC on the basis that it has a 'legal character' specific to the crime of sexual slavery.⁸⁶

43. The Chamber notes the Pre-Trial Chamber's finding that the requisite right of ownership for the purposes of the crime of sexual slavery had been insufficiently established.⁸⁷ The Chamber considers that the term 'concubine' could be construed as having being linked to the crime of sexual slavery as originally pleaded. Consequently, the Chamber finds that the Prosecution must delete the relevant sentence containing the term 'concubine' from paragraph 72 of the Prosecution Proposal.

⁸⁵ Where the terms 'First Attack' and 'Second Attack' are used in this decision they carry the meanings attributed in the Confirmation Decision, *see* Confirmation Decision, ICC-01/04-02/06-309, para. 29.

⁸⁶ *See* Defence Additional Observations, ICC-01/04-02/06-405, paras 29-30; Prosecution's Additional Observations, ICC-01/04-02/06-403, para. 29.

⁸⁷ Confirmation Decision, ICC-01/04-02/06-309, para. 53.

44. **Issues 10 and 11** concern factual allegations regarding the accused's direct participation in rape and sexual enslavement. The Defence submits that these allegations should be deleted on the basis that Mr Ntaganda is not charged as a direct perpetrator with such crimes,⁸⁸ while the Prosecution submits that the allegations were not expressly considered or rejected by the Pre-Trial Chamber and have relevance to other aspects of the charges, and may therefore be retained.⁸⁹

45. The Chamber considers that the reason the Pre-Trial Chamber made no express finding in relation to these allegations is because Mr Ntaganda was never charged as a direct perpetrator and consequently they did not form a necessary part of case before it. Noting the seriousness of the allegations relating to conduct which has not been charged, the Chamber considers it appropriate that the paragraphs in question be amended or, as applicable, deleted, to avoid giving the impression that the allegations constitute acts for which the accused is charged. Specifically, in respect of **Issue 10**, the Chamber directs that, in the first sentence of paragraph 104 of the Prosecution Proposal the words 'Bosco Ntaganda and' be deleted and, in respect of **Issue 11**, that paragraph 105 of the Prosecution Proposal be deleted.

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

46. The third area of disagreement between the parties that the Chamber will address is the impact of Section H(ii) of the Prosecution Proposal, entitled 'Legal characterisation of the facts'.

⁸⁸ See Defence Additional Observations, ICC-01/04-02/06-405, paras 31-33 (relying on paragraph 144 of the Confirmation Decision).

⁸⁹ Prosecution's Additional Observations, ICC-01/04-02/06-403, paras 30-31.

i. Prosecution submissions

47. The Prosecution submits that Section H(ii) 'is a summary intended to provide assistance to the Accused' and that 'in no way' is it meant to be read as the '*only* relevant or binding section or charging document'.⁹⁰ It argues that, rather, the Updated DCC 'in its entirety – is the operative charging document'.⁹¹ Relying on the Appeals Chamber's confirmation 'that the statutory provisions do not distinguish between material and subsidiary facts',⁹² the Prosecution submits that 'there is no merit in the Defence's argument that the Trial Chamber is confined to the facts set out in only one section of the Updated DCC'.⁹³

48. As considered in further detail in Section D below, the Prosecution submits that the specific locations identified in paragraph 36 of the Confirmation Decision are not exhaustive and, on this basis, rejects the Defence request to enumerate each location against each relevant count in Section H(ii) of the Updated DCC. However, it is not opposed to adding a non-exhaustive list of locations to each of the counts in Section H, as long as this section would not be 'separated from the rest of the Updated DCC in terms of legal effect'.⁹⁴ The Prosecution also rejects the Defence proposal to exclude certain cross-references to paragraphs elsewhere in the Prosecution Proposal from Section H(ii).⁹⁵

⁹⁰ Prosecution's Additional Observations, ICC-01/04-02/06-403, para. 34.

⁹¹ Prosecution's Additional Observations, ICC-01/04-02/06-403, para. 34.

⁹² Prosecution's Additional Observations, ICC-01/04-02/06-403, paras 4 and 35.

⁹³ Prosecution's Additional Observations, ICC-01/04-02/06-403, para. 35; *see also* paras 5 and 30-31.

⁹⁴ Prosecution's Additional Observations, ICC-01/04-02/06-403, para. 37. The Prosecution does, however, refer to specific locations for two of the charges in Section H where different modes of liability were confirmed as between the First and Second Attacks.

⁹⁵ Prosecution's Additional Observations, ICC-01/04-02/06-403, paras 39-43.

ii. Defence submissions

49. The Defence submits that, contrary to what the Prosecution asserts, the purpose of Section H(ii) 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.'⁹⁶ The Defence states that background information should not be included in this section and that there should only be the 'factual allegations supporting each of the legal elements of the crime charged'.⁹⁷ Consequently, the Defence submits that in Section H(ii): (a) the Prosecution should provide a 'clear list of the locations where crimes were allegedly committed',⁹⁸ and (b) that cross-references to factual allegations supporting charges that were either rejected or limited by the Pre-Trial Chamber should be removed.⁹⁹

iii. Findings of the Chamber

50. As a preliminary matter, the Chamber notes that it is not persuaded by the Defence submission that Section H(ii), in isolation, is intended to, or can in fact, be considered to comprise the entirety of the relevant facts and circumstances in the case. For example, Section H(ii) does not incorporate, even by reference, the facts and circumstances underlying the contextual elements (set out in Section E of Prosecution Proposal) or of the accused's individual criminal responsibility (set out in Section G of the Prosecution Proposal). Each of these are necessary components for establishing 'a sufficient legal and factual basis to bring [an accused] to trial',¹⁰⁰ and, in the Chamber's view, therefore comprise part of the 'facts and circumstances' to be described in the charges.

⁹⁶ Defence Additional Observations, ICC-01/04-02/06-405, para. 34; *see also* para. 9.

⁹⁷ Defence Additional Observations, ICC-01/04-02/06-405, para. 36.

⁹⁸ Defence Additional Observations, ICC-01/04-02/06-405, paras 37-38.

⁹⁹ Defence Additional Observations, ICC-01/04-02/06-405, paras 39-48.

¹⁰⁰ *See* Regulation 52(b) of the Regulations.

51. The Chamber has consequently understood the Defence's submissions to relate to the description of the specific *underlying acts*.¹⁰¹ In that context, the Chamber considers that Section H(ii) is not merely a summary, as submitted by the Prosecution, but rather contains, either directly or by cross-reference, the comprehensive facts and circumstances in relation to the underlying acts.

52. Further, the Chamber recalls that the purpose of ordering an Updated DCC in the present case, as in previous cases before the Court, is to ensure that there is a mutual and comprehensive understanding of the charges confirmed by the Pre-Trial Chamber in the Confirmation Decision.¹⁰² This is especially important in light of the accused's right under Article 67(1)(a) of the Statute to be informed 'in detail of the nature, cause and content of the charge(s)' which will form the basis of the trial¹⁰³ and upon which the Chamber's ruling under Article 74(2) of the Statute will be based.

53. As noted by the Appeals Chamber, relevant 'facts', within the meaning of Article 74(2) of the Statute and Regulation 55 of the Regulations, are to be distinguished from, *inter alia*, 'background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged'.¹⁰⁴

¹⁰¹ See *Lubanga A5 Judgment*, ICC-01/04-01/06-3121-Red, para. 123 (describing the 'underlying criminal acts' as 'an integral part of the charges' against an accused).

¹⁰² See also *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Order for the prosecution to file an amended document containing the charges, 9 December 2008, ICC-01/04-01/06-1548, para. 13.

¹⁰³ *The Prosecutor v. Germain Katanga*, Appeals Chamber, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 5 of the Regulations of the Court and severing the charges against the accused persons", 27 March 2013, ICC-01/04-01/07-3363 (OA 13).

¹⁰⁴ *Lubanga OA 15 OA 16 Judgment*, ICC-01/04-01/06-2205, footnote 163.

54. The Chamber considers it desirable, in principle, and to the extent possible, for background information and evidential analysis to be separated out from the relevant ‘facts and circumstances’ in charging documents. However, it is noted that there is no absolute requirement for this to be done.¹⁰⁵

55. While the Chamber observes that the locations in which the crimes in each count were allegedly committed are specified elsewhere in the Prosecution Proposal, and incorporated by way of cross-reference in Section H(ii), the Chamber is persuaded by the Defence submission that Section H(ii) ought also to specifically outline, *inter alia*, these locations, where appropriate. The Chamber notes further that the Prosecution has not adopted a uniform approach to listing of locations in Section H(ii), with locations only being listed for Counts 11, 12, 13 and 17. Therefore, in respect of **Issues 22-23, 25-26, 29 and 33**, the Chamber orders the Prosecution to list the locations in which each of the counts allegedly occurred, preceded by the qualifier ‘in or around’, in accordance with the specific guidance on geographical scope as outlined in Section D of this decision.

56. The remaining Issues falling under this category which will be specifically considered at this point are **Issues 24, 27 and 28**.

57. **Issue 24** relates to the permissibility of retaining a cross-reference to a paragraph describing the ‘trapping’ of a displaced population.¹⁰⁶ The Chamber notes that the Pre-Trial Chamber made a broad, non-exhaustive, finding regarding relevant acts of violence for the purposes of the crime

¹⁰⁵ See e.g. *Ruto and Sang* Decision on Updated DCC, ICC-01/09-01/11-522, para. 10.

¹⁰⁶ Prosecution Proposal, ICC-01/04-02/06-402-AnxB, para. 87 (*see also* Count 3, page 61 where the proposed cross-reference is located).

of ‘attacks against the civilian population’.¹⁰⁷ Additionally, the Chamber considers that, regardless of how the conduct might be characterised for the purpose of any other charged crime, the factual allegations in paragraph 87 of the Prosecution Proposal, which identifies a particular civilian population, could be of relevance to the war crime of ‘attacks against the civilian population’. Consequently, the Chamber finds that the cross-reference may be retained.

58. On **Issue 27**, although the crime of sexual slavery was not confirmed in respect of the First Attack, the Chamber considers that certain of the factual allegations may still serve to support elements of the crime of sexual slavery as confirmed in the context of the Second Attack, such as, for example, *mens rea* requirements. Consequently, the Chamber does not consider it necessary to order the removal of the cross-reference from Counts 7-8 of the Prosecution Proposal.

59. In respect of **Issue 28**, in light of the Chamber’s finding at Section B above regarding the deletion of paragraph 105 of the Updated DCC, the cross-reference to that paragraph contained in Count 9 should also be deleted.

D. Use of the word ‘including’

60. The final area of disagreement between the parties that the Chamber will address is whether it is permissible to add or retain the word ‘including’ in the list of locations where the alleged crimes committed in the context of the First and Second Attacks occurred, or whether the locations explicitly listed in paragraph 36 of the Confirmation Decision are intended to be exhaustive.¹⁰⁸

¹⁰⁷ See Confirmation Decision, ICC-01/04-02/06-309, paras 45-46 and 48.

¹⁰⁸ See Prosecution Additional Observations, ICC-01/04-02/06-403, paras 14-27; Defence Additional Observations, ICC-01/04-02/06-405, paras 13-16.

i. Prosecution submissions

61. The Prosecution submits that ‘the Pre-Trial Chamber has not expressly rejected a single location within the Prosecution’s original charging document’, and indeed used more expansive language when referring to locations in which crimes allegedly occurred, such as ‘in and around’, ‘neighbouring villages’ and ‘surrounding’.¹⁰⁹ Therefore, if the areas where the alleged crimes took place were intended to be limited to those specifically mentioned in paragraph 36 of the Confirmation Decision, the Prosecution contends that this would: (i) ignore ‘the language used in the rest of the [Confirmation] Decision’¹¹⁰ as well as the ‘findings in other parts of the [Confirmation] Decision’;¹¹¹ (ii) be ‘unnecessarily restrictive’;¹¹² and (iii) ‘constitute a misunderstanding’ of the Pre-Trial Chamber’s authority and function.¹¹³

62. The Prosecution also argues that the use of the word ‘including’ is consistent with the jurisprudence of other international criminal tribunals, which deal with crimes on a large scale, and thus require less specificity in the indictment.¹¹⁴

63. The Prosecution requests that the Chamber accept the Prosecution Proposal. If the Chamber declines to do so, the Prosecution suggests the adoption of the words ‘in or around’ as an alternative to the word ‘including’,¹¹⁵ or, when the alleged crime bears a ‘continuous nature’, such as the crime of sexual slavery or forcible transfer, the Prosecution

¹⁰⁹ Prosecution’s Additional Observations, ICC-01/04-02/06-403, para. 14.

¹¹⁰ Prosecution’s Additional Observations, ICC-01/04-02/06-403, para. 14, *see also* paras 17 - 19.

¹¹¹ Prosecution’s Additional Observations, ICC-01/04-02/06-403, para. 16.

¹¹² Prosecution’s Additional Observations, ICC-01/04-02/06-403, para. 14.

¹¹³ Prosecution’s Additional Observations, ICC-01/04-02/06-403, para. 14.

¹¹⁴ Prosecution’s Additional Observations, ICC-01/04-02/06-403, para. 22.

¹¹⁵ Prosecution’s Additional Observations, ICC-01/04-02/06-403, paras 22; *see also* paras 37 and 53.

proposes to replace the word 'including' by 'during or following attacks in and around'.¹¹⁶

ii. *Defence submissions*

64. The Defence argues that the 'word "including" instils undue confusion and ambiguity as to the scope of the Prosecution's case against Mr Ntaganda'.¹¹⁷ By way of example, the Defence notes that the amended paragraph 165 of the Prosecution Proposal, which states that Mr Ntaganda is liable for attacks on protected objects in the *collectivité* of Walendu Djatsi (*including* in Bambu), renders it unclear whether count 17 for the Walendu Djatsi *collectivité* is limited to the village of Bambu or whether it extends to other locations.¹¹⁸

65. Referring to jurisprudence of the International Criminal Tribunal for the former Yugoslavia ('ICTY') Appeals Chamber, the Defence argues that the characterisation of the alleged 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, which must be done on a case-by-case basis.¹¹⁹ Therefore, the Defence avers that the Prosecution is incorrect when it contends that crime locations can 'in all circumstances' be less specific when the modes of liability involve remote conduct.¹²⁰ The Defence submits that, due to the nature of the case, the Prosecution is required 'to be very precise in setting out the facts and circumstances supporting the charges, in particular with respect to locations', even where Mr Ntaganda is not

¹¹⁶ Prosecution's Additional Observations, ICC-01/04-02/06-403, para. 23; *see also* paras 27, 37 and 53.

¹¹⁷ Defence Additional Observations, ICC-01/04-02/06-405, para. 13.

¹¹⁸ Defence Additional Observations, ICC-01/04-02/06-405, para. 13.

¹¹⁹ Defence Additional Observations, ICC-01/04-02/06-405, para. 14 (emphasis in the original).

¹²⁰ Defence Additional Observations, ICC-01/04-02/06-405, para. 14.

charged as a direct perpetrator, as 'he is nevertheless alleged to have been close to the relevant events'.¹²¹

66. Therefore, if the Confirmation Decision does not use the word 'including' or 'a similar expression', the Defence advances that the Prosecution should be precluded from doing so in the Updated DCC.¹²² In so arguing, the Defence refers to findings of Trial Chamber V in the *Ruto and Sang* case,¹²³ in which it was held that 'the addition of the word "including" in the [Updated DCC] was inconsistent with the Pre-Trial Chamber's statement that the charges against the accused were confirmed "to the extent specified" in' a paragraph specifying precise crime locations.¹²⁴

67. Concerning the Prosecution's argument on the 'continuous nature' of certain crimes, the Defence submits that 'all locations where the crimes allegedly started and ended and which are analysed by the Pre-Trial Chamber (...) are in paragraph 36' of the Confirmation Decision¹²⁵ and that these locations are not therefore meant as a mere illustration.¹²⁶

68. Consequently, the Defence requests that the word 'including' be removed from the paragraphs of the Updated DCC identified in the Joint Submission.¹²⁷

¹²¹ Defence Additional Observations, ICC-01/04-02/06-405, para. 15.

¹²² Defence Additional Observations, ICC-01/04-02/06-405, para. 20.

¹²³ Defence Additional Observations, ICC-01/04-02/06-405, para. 20.

¹²⁴ Defence Additional Observations, ICC-01/04-02/06-405, para. 20, referring to *Ruto and Sang* Decision on Updated DCC, ICC-01/09-01/11-522, para. 33.

¹²⁵ Defence Additional Observations, ICC-01/04-02/06-405, para. 25.

¹²⁶ Defence Additional Observations, ICC-01/04-02/06-405, para. 26.

¹²⁷ Defence Additional Observations, ICC-01/04-02/06-405, para. 16.

iii. Findings of the Chamber

69. The Chamber is cognisant of its obligation under Article 67(1)(a) of the Statute to ensure that Mr Ntaganda is informed 'in detail' of the charges against him and considers accordingly that, with respect to the underlying criminal acts in the case, the locations ought to be identified with 'the greatest degree of specificity possible in the circumstances'.¹²⁸

70. The Chamber does not accept the Prosecution's argument¹²⁹ that paragraphs 29 and 36 of the Confirmation Decision should be read together in a manner which confirms the charged crimes for the entirety of the Banyali-Kilo and Walendu-Djatsi *collectivités*. This is apparent, *inter alia*, from the language of paragraph 29 itself, which defines the First Attack and Second Attack as having occurred in 'a number of villages' within those *collectivités* 'as identified by the Chamber'.¹³⁰ Moreover, in the Chamber's view, paragraph 36 of the Confirmation Decision, and its supporting paragraphs, evidences a clear intention to specify differentiated locations for each of the different confirmed crimes.

71. In respect of the Prosecution's argument that this constitutes an impermissible amendment of the charges presented, the Chamber notes that the Pre-Trial Chamber's findings in this regard are consistent with the specifically-identified locations pleaded in Section F and Section H (by way of cross reference) of the DCC. The Chamber therefore emphasises that the Updated DCC must reflect specific locations within the *collectivités*, in accordance with the Chamber's instructions below.

¹²⁸ *Lubanga A5 Judgment*, ICC-01/04-01/06-3121-Red, paras 3 and 122-123.

¹²⁹ See Prosecution's Additional Observations, ICC-01/04-02/06-403, para. 36.

¹³⁰ It is noted that paragraph 29 of the Confirmation Decision does not itself identify the villages in question, nor does it explicitly state where the complete list of villages which underlie each of the attacks, as defined, are identified.

72. Accordingly, the Chamber considers the proposed use of the word ‘including’, in relation to locations in which crimes allegedly occurred, to be impermissibly broad in the context of the confirmed charges.¹³¹ The Chamber shall not, therefore, authorise its introduction into the Updated DCC in a manner which would have such an expansive effect. An exception is crimes relating to child soldiers (*see Issue 8 below*), in relation to which the Pre-Trial Chamber stated that the exact locations in which these crimes allegedly occurred did not need to be specified, provided that the relevant acts occurred ‘within the temporal and geographical framework of the charges’.¹³²

73. Though the Chamber rejects the general use of the word ‘including’ from the Updated DCC, it does consider that the phrase ‘in or around’ may be used. The Chamber is not, as indicated in Section B above, persuaded by the Defence submission that paragraph 36 of the Confirmation Decision is to be read in isolation as an exhaustive list of the specific locations in relation to each count charged.¹³³ In that regard, the Chamber finds that the Pre-Trial Chamber’s use of the term ‘in’ (followed by particular locations) in paragraph 36 of the Confirmation Decision must be read in light of the geographical qualifications used elsewhere in the Confirmation Decision. For example, the five villages in which the crimes of murder and attempted murder allegedly took place during the First Attack, as listed in paragraph 36 of the Confirmation Decision, are tempered by the qualifying words ‘in and around Mongbwalu’¹³⁴ and

¹³¹ However the Chamber notes that the specific Trial Chamber V jurisprudence relied on by the Defence (Defence Additional Observations, ICC-01/04-02/06-405, para. 20, referring to *Ruto and Sang* Decision on Updated DCC, ICC-01/09-01/11-522, para. 33) was in a context where the Pre-Trial Chamber had given express consideration to the meaning and use of the word ‘including’.

¹³² Confirmation Decision, ICC-01/04-02/06-309, para. 83.

¹³³ *See* paras 38-40 above.

¹³⁴ Confirmation Decision, ICC-01/04-02/06-309, para. 38.

‘fleeing civilians’,¹³⁵ both of which potentially broaden the geographical scope of the crimes. Similarly, in the context of murder and attempted murder in the Second Attack, the Pre-Trial Chamber referred to ‘in the centre of the village and the surrounding forest’.¹³⁶

74. Consequently, the Chamber considers that use of the word ‘in’ in paragraph 36 of the Confirmation Decision was intended to encompass crimes committed in the surroundings of the villages in question, noting that the precise limits of the villages may not be clearly ascertainable. It therefore finds that the Prosecution’s alternative wording of ‘in or around’ is appropriate. The Chamber finds that this should be understood as also encompassing, where further specific locations are either upheld in the Confirmation Decision or are pleaded in the DCC and not ruled upon in the Confirmation Decision, the geographic areas between the villages in question¹³⁷ and, in certain exceptional cases, immediately neighbouring villages within that geographic area.¹³⁸ Although such explicit qualifying language is not present in respect of each count,¹³⁹ the Chamber considers that, given the lack of differentiation by the Pre-Trial Chamber in this regard, it is appropriate to apply this interpretation consistently across paragraph 36 of the Confirmation Decision.

¹³⁵ Confirmation Decision, ICC-01/04-02/06-309, para. 39.

¹³⁶ Confirmation Decision ICC-01/04-02/06-309, para. 44. *See also e.g.* in the context of the crime of rape Confirmation Decision ICC-01/04-02/06-309, para. 51 (referring to more than five women in Sangi being forcibly taken ‘to a forest and raped’).

¹³⁷ *See e.g.* Confirmation Decision, ICC-01/04-02/06-309, para. 51 (referring to an act of rape alleged to have occurred ‘on the road from Buli to Kobu’).

¹³⁸ *See in particular* DCC, ICC-01/04-02/06-203-AnxA, para. 81, cross-referred to in respect of Counts 12-13, (referring to an attack on ‘Petsy and several other villages’ which ‘caused the population that had taken refuge there to flee further into the bush...’) and para. 86, cross-referred to in respect of Counts 1-2 (referring to the shooting of those hiding in ‘Gola, Buli ... and the surrounding forest areas’). These specific factual allegations are unaddressed in the Confirmation Decision and, in the circumstances, the Chamber considers that the general principle applicable to silence as outlined in Section A above should apply.

¹³⁹ *See e.g.* the crimes of attacks against protected objects (Confirmation Decision ICC-01/04-02/06-309, paras 69-70) and destruction of enemy property (Confirmation Decision ICC-01/04-02/06-309, paras 72-73) where the Confirmation Decision does not contain such potentially expansive qualifying language.

75. The Chamber notes the Prosecution proposed alternative wording of ‘**during or following** attacks in and around [villages] in [*collectivité*]’ in relation to the crimes allegedly of a continuous nature, such as forcible transfer and sexual slavery (emphasis added). However, the Prosecution has not adequately explained why the temporal scope for the continuous crime allegations requires this adjustment. Accordingly, the Chamber has not distinguished between continuous and other crimes in this respect and considers that legal submissions on this issue, if relevant, may be heard at the appropriate time at the end of the case.

76. The Chamber will now proceed to rule upon each of the remaining Issues.

a) General rule - where the use of the qualification ‘in or around’ is permitted in the Updated DCC

77. Applying the principles outlined above, the Chamber finds that for each of the disputed incidences where the word ‘including’ has been used in the Prosecution Proposal this should be replaced by the term ‘in or around’, subject to the exceptions outlined in the immediately following subsection. For the sake of clarity, this finding permitting the use of the phrase ‘in or around’ is applicable to **Issues 4-5, 12-21 and 30-32**.

78. The Chamber recalls that it has already found that Section H(ii) of the Updated DCC should list the specific locations for each of the Counts, in accordance with the findings of this section.¹⁴⁰ The Chamber therefore confirms, in respect of **Issues 22, 25-26, 29 and 33**, that, when listing locations in Section H(ii), the term ‘in or around’, rather than ‘including’, is to be used.

¹⁴⁰ See paragraph 55 above.

79. **Issue 23** concerns the Defence request to add the locations specified in paragraph 36 of the Confirmation Decision as regards Count 3 (attacks against the civilian population), without the word 'including'. The Chamber notes that the Confirmation Decision does not contain any explanation for the selection of locations contained in paragraph 36 in the context of the war crime of 'attacks against the civilian population'. However, the Pre-Trial Chamber had listed certain criteria that it considered to be applicable to the war crime of 'attacks against the civilian population'. Without prejudice to the Chamber's assessment of the legal characterisation of this crime, the Chamber considers that the locations identified in the context of this count arise from the Pre-Trial Chamber's assessment of the underlying conduct in light of the criteria mentioned by it. Therefore, the Chamber directs that the locations identified in paragraph 36 of the Confirmation Decision in respect of attacks against the civilian population be listed in Section H(ii) using, consistent with the findings above in this section, the words 'in or around'.

b) Exceptions

80. **Issue 3** concerns the deletion of the word 'including' from paragraph 79 of the Prosecution Proposal. As indicated above (in the context of **Issues 15-16 and 19**), the Chamber has found that the words 'in or around' the specific locations identified in paragraph 36 of the Confirmation Decision appropriately describe the confirmed geographical scope for the crimes of forcible transfer and displacement, including as an underlying act of persecution. However, the Chamber notes that the proposed use of the word 'including', in paragraph 79 of the Prosecution Proposal, is limited to 'villages surrounding Lipri, Kobu and Bambu [...] including in [...]'. In the Chamber's view, this specific usage of 'including' is consistent with

the Pre-Trial Chamber's finding at paragraph 67 of the Confirmation Decision¹⁴¹ and with the Chamber's findings above. Consequently, the Chamber shall permit the retention of the word 'including' in paragraph 79 of the Updated DCC, on the understanding that its specific usage in this context does not expand the geographical scope of Counts 12-13 beyond that already indicated above.

81. **Issue 6** concerns the deletion of the word 'including' from the list of villages where fields were allegedly destroyed throughout the Second Attack.¹⁴² The Confirmation Decision refers to fields being destroyed in three specific villages (as part of Count 18 of the DCC).¹⁴³ The Chamber notes that nowhere in the DCC was there any reference specifically to damage to fields or crops, and the Prosecution has not otherwise, in the context of this Issue, clearly identified a relevant factual allegation in the DCC. Consequently, the Chamber does not consider that this is a case of an allegation on which the Pre-Trial Chamber did not pronounce, and for which the general principle applicable to silence, as outlined in Section A above, should apply. The Chamber therefore finds that the Prosecution Proposal should be amended to reflect the Pre-Trial Chamber's specific finding by the deletion of the word 'including'. However, the Chamber notes that it does not consider this to in any way impact the confirmed geographic scope of Count 18.

82. **Issue 8** concerns the proposed deletion of the word 'including' in relation to the location of training camps in order to reflect paragraph 89 of the Confirmation Decision. The Chamber notes that paragraph 89 of the

¹⁴¹ Confirmation Decision, ICC-01/04-02/06-309, para. 67 ('forcibly transferred civilians from villages *surrounding* Lipri, Kobu and Bambu. *For example*, [...] displaced from, *inter alia*, Nyangaray [...]') (emphasis added)).

¹⁴² See Prosecution's Additional Observations, ICC-01/04-02/06-403, para. 25; Defence Additional Observations, ICC-01/04-02/06-405, paras 54-55.

¹⁴³ Confirmation Decision, ICC-01/04-02/06-309, para. 73.

Confirmation Decision refers to ‘a number of UPC/FPLC training camps’ where there were children under the age of 15 between 6 August 2002 and August 2003, and lists Mandro, Rwampara, Lingo and Mongbwalu. The Chamber therefore considers that the Confirmation Decision did not exhaustively enumerate the geographical locations for counts 14-16 in paragraph 89, and in light of the Pre-Trial Chamber’s statement at paragraph 83 of the Confirmation Decision,¹⁴⁴ finds that the Prosecution’s proposed wording in paragraph 95 of the Prosecution Proposal, utilising ‘including’, may be retained.¹⁴⁵

IV. Requirement for a pre-trial brief

83. The Chamber notes that, in addition to the Updated DCC, both parties have expressed the desirability of a pre-trial brief (‘PTB’) in this case.

i. Prosecution submissions

84. The Prosecution proposes submitting a PTB three months prior to trial, which will contain ‘the factual narrative underpinning the charges in greater detail than in [the Updated DCC]’, including citations to relevant evidence, which are not contained in the Updated DCC.¹⁴⁶ The Prosecution argues that, in addition, to provide greater notice to Mr Ntaganda of the Prosecution’s case, the PTB will also ‘serve as a useful tool’ to the Chamber and the Defence by: (i) containing legal submissions on the contextual elements of Articles 7 and 8 of the Statute and the legal elements of the crimes and the criminal responsibility of Mr Ntaganda;

¹⁴⁴ Confirmation Decision, ICC-01/04-02/06-309, para. 83.

¹⁴⁵ See also the Chamber’s findings above in respect of **Issues 7 and 9**.

¹⁴⁶ Prosecution Submissions for 17 October 2014 Status Conference, ICC-01/04-02/06-385, para. 26. It is noted that the Prosecution also initially submitted that it would have ‘no difficulty providing [the PTB] two months prior to trial as requested by the Defence’ - see ICC-01/04-02/06-T-13-ENG ET, page 39, lines 1-2. However, the Chamber considers that its later submission on timing supersedes the former – see ICC-01/04-02/06-T-15-ENG ET, page 9, lines 24-25.

and (ii) an outline of the factual basis of the Prosecution's case.¹⁴⁷ The Prosecution emphasises that the PTB should not replace the Updated DCC¹⁴⁸ but will rather correspond with the format of pre-trial briefs at the ICTY, and in other proceedings before the Court.¹⁴⁹

85. The Prosecution submits that there is no need for a footnoted version of the Updated DCC as the PTB will provide references to the most current relevant evidence 'at a point in time closest to trial'.¹⁵⁰ Indeed, at the most recent status conference, the Prosecution indicated that the PTB 'is intended to be a footnoted document, not the updated DCC with footnotes.'¹⁵¹ However, the Prosecution had previously indicated that, although not a statutory requirement, should the Chamber require a footnoted Updated DCC to be provided, it could also be submitted three months before the scheduled start of trial.¹⁵²

ii. Defence submissions

86. The Defence submits that, in addition to an Updated DCC, it is necessary for the Prosecution to 'submit a further exhaustive document setting out in detail its theory of the case and the evidence upon which it intends to rely at Trial'.¹⁵³ It avers that, while such a document is not provided for under the Court's statutory framework,¹⁵⁴ there is an 'imperative necessity for Mr Ntaganda to know in detail the case he has to meet with sufficient lead time, to prepare for trial'.¹⁵⁵ The Defence submits that such

¹⁴⁷ Prosecution Submissions for 17 October 2014 Status Conference, ICC-01/04-02/06-385, para. 27.

¹⁴⁸ Prosecution Submissions for 17 October 2014 Status Conference, ICC-01/04-02/06-385, para. 27.

¹⁴⁹ See ICC-01/04-02/06-T-17-CONF-ENG ET, page 15, lines 15-22.

¹⁵⁰ Prosecution Submissions for 17 October 2014 Status Conference, ICC-01/04-02/06-385, para. 26.

¹⁵¹ ICC-01/04-02/06-T-17-CONF-ENG ET, page 15, lines 17-18.

¹⁵² ICC-01/04-02/06-T-13-ENG, page 38, lines 20-23.

¹⁵³ Defence Submissions for 17 October 2014 Status Conference, ICC-01/04-02/06-384, para. 5. See also ICC-01/04-02/06-T-17-CONF-ENG ET, page 12, lines 3-6.

¹⁵⁴ ICC-01/04-02/06-T-13-ENG ET, page 37, lines 23-24.

¹⁵⁵ Defence Submissions for 17 October 2014 Status Conference, ICC-01/04-02/06-384, para. 5. See also ICC-01/04-02/06-T-15-ENG ET, page 10, lines 13-18.

document should be filed 'no later than three months prior to the beginning of Trial'.¹⁵⁶

87. The Defence submits that such a document could either consist of a PTB or a 'detailed Updated DCC with footnotes'.¹⁵⁷ While it initially stated that it would require both documents,¹⁵⁸ the Defence later clarified that a footnoted Updated DCC could merely be an alternative format to the PTB as a document outlining the Prosecution's case theory.¹⁵⁹

iii. Findings of the Chamber

88. The Chamber notes that, while not provided for in the Court's statutory framework, previous cases before this Court have required the Prosecution to file a PTB in addition to an updated document containing the charges. For example, in the *Kenya* cases, Trial Chamber V ordered the Prosecution to file a PTB approximately three months before the trial commencement date, as 'a document explaining its case with reference to the evidence it intends to rely on at trial'.¹⁶⁰ This follows the approach of other international tribunals whose statutory frameworks require the

¹⁵⁶ Defence Submissions for 17 October 2014 Status Conference, ICC-01/04-02/06-384, para. 5. It is noted that, at the Status Conference of 11 September 2014, the Defence submitted the Prosecution should be ordered to file its 'pre-trial brief or its theory of the case under a narrative format two months prior to beginning of trial' – see ICC-01/04-02/06-T-13-ENG ET, page 38, lines 5-8. However, the Chamber considers that its later submission on timing supersedes the former. The requested deadline of the PTB to be filed three months before trial was reiterated by the Defence at the most recent status conference – see ICC-01/04-02/06-T-17-CONF-ENG ET, page 11, lines 19-23.

¹⁵⁷ Defence Submissions for 17 October 2014 Status Conference, ICC-01/04-02/06-384, para. 5. See also ICC-01/04-02/06-T-17-CONF-ENG ET, page 12, lines 3-6.

¹⁵⁸ ICC-01/04-02/06-T-13-ENG ET, page 38, lines 5-10. See generally page 37, lines 4-23, referring to the Defence request for i) an updated DCC; (ii) an Updated DCC with footnotes; and (iii) a PTB.

¹⁵⁹ ICC-01/04-02/06-T-17-CONF-ENG ET, page 11, line 24 to page 12, line 6.

¹⁶⁰ Decision on the schedule leading up to trial, 9 July 2012, ICC-01/09-01/11-440, para. 16; Decision on the schedule leading up to trial, 9 July 2012, ICC-01/09-02/11-451, para. 20. The Chamber notes that in the *Prosecutor v. Thomas Lubanga Dyilo*, such document was also ordered by Trial Chamber I but called a 'summary of presentation of evidence' – see Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, 9 November 2007, ICC-01/04-01/06-1019, para. 26 ('[T]he prosecution shall serve a document which explains its case by reference to the witnesses it intends to call and the other evidence it intends to rely upon. Furthermore, this document shall explain how the evidence relates to the charges. This document will be referred to as the "summary of presentation of evidence"').

Prosecution to provide a PTB which specifies, in relation to each count, a summary of the evidence it intends to rely upon regarding the alleged commission of the crime and the form of criminal responsibility for which the accused is allegedly liable.¹⁶¹

89. Accordingly, having considered the parties' submissions, and in line with this jurisprudence, the Chamber finds it appropriate to order a PTB containing, for each count, a summary of the relevant evidence upon which the Prosecution intends to rely, and which clearly explains how the evidence relates to the charges. The PTB should be filed no later than three months before the trial commencement date. On the basis that the PTB will contain footnoted references to the evidence to be relied upon by the Prosecution, the Chamber does not consider it necessary to order a footnoted Updated DCC.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ORDERS the Prosecution to file an Updated DCC by 16 February 2015, reflecting the following:

- the language as contained in the Prosecution Proposal may be retained in respect of **Issues 1, 3, 7-9, 24 and 27**;
- in respect of **Issue 2**, the sentence containing the word 'concubine' in paragraph 72 of the Prosecution Proposal is to be deleted;

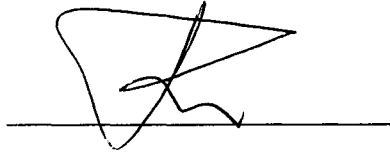
¹⁶¹ See, e.g., Rule 91(G)(1) of the Special Tribunal for Lebanon Rules of Procedure and Evidence, Rule 65ter(E)(i) of the Rules of Procedure and Evidence of the ICTY and ICTY, *Prosecutor vs Brđanin and Talić*, IT-99-36-PT, Trial Chamber II, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 62.

- in respect of **Issue 6**, the word 'including' should be deleted from paragraph 85 of the Prosecution Proposal;
- in respect of **Issue 10**, the words 'Bosco Ntaganda and' are to be deleted from the first sentence of paragraph 104 of the Prosecution Proposal;
- in respect of **Issue 11**, paragraph 105 of the Prosecution Proposal is to be deleted;
- in respect of **Issue 28**, the cross-reference to paragraph 105 of the Prosecution Proposal is to be deleted from Count 9 in Section H(ii);
- the word 'including' in the Prosecution Proposal is to be replaced by the words 'in or around' in the case of **Issues 4-5, 12-21 and 30-32**;
- in respect of **Issues 22-23, 25-26, 29 and 33**, the list of specific locations, as contained in paragraph 36 of the Confirmation Decision, is to be included in Section H(ii) of the Updated DCC for each Count, preceded by the words 'in or around'; and
- the formatting of the Prosecution Proposal is to be amended as indicated in footnote 50 above;

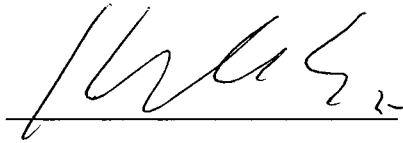
ORDERS the Prosecution to file a pre-trial brief, as described in paragraph 89 above, no later than three months before the commencement date of trial; and

REJECTS all other requests.

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

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Judge Robert Fremr, Presiding Judge

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Judge Kuniko Ozaki

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Judge Geoffrey Henderson

Dated 6 February 2015

At The Hague, The Netherlands