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No.: **ICC-01/04-02/06**

Date: **7 September 2020**

THE APPEALS CHAMBER

Before:

**Judge Howard Morrison, Presiding
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 Annexes A and B and Confidential Annex C

Public redacted version of “Defence reply to ‘Prosecution response to ‘Defence Appeal Brief – Part I’”, 27 January 2020, ICC-01/04-02/06-2464”, 2 July 2020, ICC-01/04-02/06-2548-Conf

Source: Defence Team of Mr. Bosco Ntaganda

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

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Further to the “Defence request for leave to reply to the ‘Prosecution Response to Defence Appeal Brief – Part I’”¹ and the “Order regarding the hearing scheduled for 29 June – 1 July 2020”,² Counsel for Mr. Ntaganda (“Defence” or “Mr. Ntaganda”) hereby submit this:

Defence reply to “Prosecution response to ‘Defence Appeal Brief – Part I’”, 27 January 2020, ICC-01/04-02/06-2464³

GROUND 1⁴

1. Judge Ozaki engineered a change in her status from a full-time to a part-time Judge “as of 11 February 2019 inclusive”⁵ to allow her to accept a paid position as Japan’s Ambassador to Estonia. In her request to the Presidency for this change, she cited “personal reasons”,⁶ concealing her intention to immediately assume this diplomatic post. [REDACTED].⁷ Having already assumed the post, Judge Ozaki informed the Plenary that if not permitted to occupy both her judicial and diplomatic roles simultaneously, she would resign.⁸ Her resignation would have necessitated Mr. Ntaganda’s retrial, and additional years of pre-trial incarceration, which she was openly willing to risk.⁹ The Plenary Decision on Independence¹⁰ was one step in a series of interlocutory litigation about whether – in these circumstances – Judge Ozaki could still be said to be independent of the influence, or the **appearance of influence** in the eyes of reasonable objective observers, of the Government of Japan.¹¹

2. The Prosecution is wrong that Ground 1 “amounts to a direct appeal against the Article 40 Plenary Decision”,¹² and should be dismissed on that basis. The gravamen of the appeal is the impact on the fairness of proceedings arising from the participation of a Judge

¹ [Defence-Request-2466](#).

² [Order-2542](#).

³ The Reply as well as Annex C are filed confidentially pursuant to regulation 23bis(1) of the RoC, as they refer to confidential material and evidence on the record. The Defence undertakes to submit a public redacted version in due course.

⁴ [Defence-Request-2466](#), paras.11-12.

⁵ [Decision-2326-Anx1](#), para.3.

⁶ [Decision-2326-Anx1](#), para.3.

⁷ [Annex A to the Disqualification-Request](#), p.3.

⁸ [Decision-2326-Anx1](#), p.2: “I respectfully submit that this letter be treated as my request to be approved of my continuing participation in the Ntaganda case on the basis as set out above, or, alternatively, in case my request is denied, my letter of resignation as a judge of this Court pursuant to Rule 37 of the Rules of Procedure and Evidence, as of 12 February 2019 when I ceased to be a fulltime judge of the Court.”

⁹ [Statute](#), article 74(1).

¹⁰ [Decision-2326-Anx1](#).

¹¹ See Annex A compiling all 49 filings and submissions concerning the interlocutory litigation on the status of Judge Ozaki.

¹² [Prosecution Response – Part I](#), para.3.

whom, it is argued, had lost the necessary conditions of judicial independence.¹³ An overlap in issues exists and is inevitable.¹⁴ This does not mean that issues of independence cannot now be scrutinised by the Appeals Chamber.

3. The Prosecution further argues, however, that such matters can only be raised if the arguments raised on appeal are different from those advanced at first instance.¹⁵ New and different arguments are not a pre-requisite to concerns as to judicial independence or impartiality being raised on appeal from conviction. Appeals Chambers have considered challenges to independence and impartiality when raised for the first time on appeal,¹⁶ and when grounded in the same arguments already raised at trial.¹⁷ Independence and impartiality are a “special circumstance”¹⁸ and matters of “general importance”¹⁹ which Appeals Chambers have addressed, regardless of if, when and how they were previously raised.

4. Moreover, in the cases cited by the Prosecution in which the appellants raised “new” and “different” issues on appeal, the accused had been given the opportunity to raise their concerns about the conduct of the Judges at trial, and fully brief the issues of impartiality and independence at first instance.²⁰ In Mr. Ntaganda’s case, the Plenary Decision on Independence was issued without him being given the chance to make submissions, in violation of his right to be heard, and in a departure from practice.²¹ Mr. Ntaganda was only informed that Judge Ozaki was already acting as Japan’s Ambassador to Estonia for a (then-undisclosed) period on 22 March 2018, from the Plenary Decision itself. [REDACTED],²² meaning that Judge Ozaki was adjudicating the *Ntaganda* case [REDACTED]. There was no chance for Mr. Ntaganda to raise his concerns as to Judge Ozaki’s independence or seek timely disclosure of further information surrounding her appointment; the decisions had

¹³ [Prosecution Response – Part I](#), para.3.

¹⁴ [Defence Appeal Brief – Part I](#), para.5.

¹⁵ [Prosecution Response – Part I](#), para.7.

¹⁶ [ICTY-Šainović-AJ](#), para.182: “The Appeals Chamber observes that Lukić did not raise the question of Judge Bonomy’s impartiality before the Trial Chamber. Although such an omission could constitute waiver of the right to raise the matter on appeal, it has been the practice of the Appeals Chamber to treat the issue of bias as a special circumstance allowing it to address the merits of the challenge despite the waiver. The Appeals Chamber will therefore consider the merits of Lukić’s challenges.” See also [ICTY-Martić-AJ](#), paras.44-45; [ICTY-Galić-AJ](#), paras.27,34; [ICTY-Stanišić-AJ](#), para.27.

¹⁷ [ICTR-Niyitegeka-AJ](#), paras.43-44,46.

¹⁸ [ICTY-Šainović-AJ](#), para.182.

¹⁹ [ICTY-Furundžija-AJ](#), para.173.

²⁰ [Prosecution Response – Part I](#), fn.13.

²¹ [Banda-Decision-344](#); [Lubanga-Decision-3040](#); [Katanga-Decision-3504](#); [Lubanga-Decision-3459](#); [Al-Hassan-Decision-398](#); [Lubanga-Decision-3154](#); [Al-Hassan-Decision-458](#).

²² [Annex A to the Disqualification-Request](#).

already been taken through a confidential process to which he had not been a party, or even informed.

5. The Prosecution raises the purported brief duration of Judge Ozaki's concurrent service with the Government of Japan while she was deliberating on the guilt or innocence of Mr. Ntaganda as a factor that negates any loss of judicial independence.²³ This argument tacitly acknowledges that such concurrent service is inimical to judicial independence, but can be tolerated when of limited duration or confined to a particular phase of the trial proceedings. This argument finds no place in the ICC Code of Judicial Ethics, the *travaux préparatoires* of article 40, or in any national expression of the rule. No such unprecedented "*de minimis*" exception should be created by the Appeals Chamber.²⁴

6. Nor is the Prosecution correct to suggest that the separation of the executive and judicial functions does not apply where the overlap is between a national executive office and an international judicial office.²⁵ On the contrary, the need for such independence is as great as ever given that the governments of the Assembly of State Parties collectively represent the executive correlate of the ICC judiciary. Furthermore, the need for such independence is greater than in national systems given the importance of reinforcing the strictly judicial nature of ICC adjudication – a quality that is constantly under attack given the controversial nature of many criminal proceedings that must be undertaken by the ICC. Indeed, Japan is the greatest financial contributor among the ICC State Parties,²⁶ and has made public statements about being "**deeply concerned**" by ICC accused being acquitted by the Court.²⁷ Rather than being part of any functioning and independent system of criminal justice, Japan believes that acquittals at the ICC indicate: "the challenges we face in the collection and evaluation of evidence, and the performance in trials". The Japanese Ambassador was open in his address to the ASP in 2019, that if acquittals are allowed to continue "**justice cannot be brought** to the international community, the victims will have no relief", and he urged the ICC to take steps to "prevent such unusual circumstances from happening again", before then making

²³ [Prosecution Response – Part I](#), paras.8,10.

²⁴ [Defence Appeal Brief – Part I](#), paras.8,11-14.

²⁵ [Prosecution Response – Part I](#), para.10.

²⁶ [Financial statements of the International Criminal Court for the year ended 31 December 2018, Eighteenth session](#), The Hague, 2-7 December 2019, p.42.

²⁷ [Japan Statement by H.E. Horinouchi Hidehisa, Ambassador of Japan to the Netherlands, at the 18th Session of the Assembly of States Parties to the Rome Statute of the ICC](#), 3 December 2019, p.2: "we are deeply concerned about prolonged proceedings and the recent consecutive acquittals."

reference to Japan's 261 million euro contribution to the Court.²⁸ Judge Ozaki, when deciding whether to acquit or convict Mr. Ntaganda, was in an employment relationship with the Court's largest contributor, who wanted the unusual circumstances of acquittals to stop.

7. Whether fulfilling the position on a full-time or a part-time basis, Judges must remain separate from the appearance of influence of the executive branch of government; a more far-reaching principle that extends beyond domestic doctrines and law.²⁹ The fact that the executive is a national one, and the judicial office an international one, does not render this principle obsolete. A lack of separation of influence undermines independence, and the Prosecution did not attempt to contradict Mr. Ntaganda's submission that no domestic or State practice supports the view that an international criminal judge could simultaneously serve in her State's executive and still be viewed as independent. Nor did Mr. Ntaganda suggest that the Code of Judicial Ethics trumps the Statute, but that the Code provides interpretative guidance on the requirements of international human rights and on the content of the Statute itself.

8. Judge Ozaki had every opportunity for transparency and to bring clarity to key questions; whether she was being paid, whether she was an employee of the Japanese Government; whether she had given undertakings as to independence to one or either of her two masters.³⁰ Rather than taking this opportunity for transparency, she deliberately withheld information from both her fellow Judges and the parties, and then claimed that Mr. Ntaganda's lawyers were speculating on the very questions about which they had been denied the facts.³¹ Even in resignation, and even after recognising that the criticism of her conduct was such that it may "lead to the deterioration of the public confidence in the Court", Judge Ozaki argued that she had done nothing wrong.³² The lack of candour in respect of these facts, in itself, reinforced the appearance of a lack of independence. A re-trial or permanent stay is required.

GROUND 3³³

²⁸ [Japan Statement by H.E. Horinouchi Hidehisa, Ambassador of Japan to the Netherlands, at the 18th Session of the Assembly of States Parties to the Rome Statute of the ICC](#), 3 December 2019, pp.2,3 (emphasis added).

²⁹ [Defence Appeal Brief – Part I](#), para.8.

³⁰ [Decision-2326-Anx1](#), p.2.

³¹ [Annex to Notification-2351](#), p.3.

³² [Decision-2346](#), para.33.

³³ [Defence-Request-2466](#), paras.13-15.

9. The Prosecution's serious concern that Mr. Ntaganda's conviction exceeds the scope of the confirmed charges is palpable from the 19-pages it devotes to this one appeal ground. The Prosecution is right to be concerned. A simple analysis of the Confirmation Decision demonstrates that none of the Challenged Acts were confirmed and, thus, any conviction based thereon exceeds the scope of the charges.

10. None of the arguments advanced by the Prosecution meet Mr. Ntaganda's challenges to his conviction under this appeal ground. The following analysis shows that the level of factual abstraction which the Prosecution argues is sufficient to plead charges at the ICC does not withstand scrutiny.³⁴ Further, the Prosecution's arguments that additional criminal acts can be added by advance disclosure in documents such as the UDCC, the PTB, statement summaries, the list of evidence and the incredibly unwieldy IDAC, must be dismissed as irrelevant.³⁵

I. Crimes other than against child soldiers: the charges were not, and cannot be, framed by reference to geographical and temporal parameters alone³⁶

11. Contrary to the Prosecution's assertions, the charges in this case were not framed solely by reference to "narrow temporal and geographical parameters",³⁷ with details of underlying criminal acts being provided on a "non-exhaustive" basis.³⁸ This position is not supported by a proper review of how the charges were pled in this case. More fundamentally, it conflicts with the binding jurisprudence of this Court.

12. When confirming the charges concerning crimes other than against child soldiers, the Pre-Trial Chamber expressly directed that the geographical and temporal parameters of Counts 1, 2, 3, 4, 5, 7, 8, 10, 11, 12, 13, 17 and 18 stated in paragraph 36 of the Confirmation Decision were to be "more specifically supported by the facts presented in each subsections",³⁹ all of which set out in detail various underlying criminal acts.

13. The Pre-Trial Chamber's approach to framing the charges case was correct. While the Prosecution tries to ignore the factual allegations set out in the Confirmation Decision⁴⁰ and to

³⁴ *E.g.*, [Prosecution Response – Part I](#), paras.16,27,28,45.

³⁵ [Prosecution Response – Part I](#), paras.44 *et seq.*

³⁶ First issue for reply. See [Defence-Request-2466](#), para.13, first bullet point.

³⁷ [Prosecution Response – Part I](#), para.27. See also paras.16 and 45.

³⁸ [Prosecution Response – Part I](#), para.28. See also para.45.

³⁹ [Confirmation Decision](#), para.75.

⁴⁰ [Confirmation Decision](#), paras.38-73.

mischaracterise them as “non-exhaustive”,⁴¹ the Court’s jurisprudence establishes that the underlying criminal acts are “integral” to the charges.⁴² Indeed, “it seems to be beyond controversy that both the facts and their legal characterisation concur to make a charge.”⁴³

14. Of additional relevance, particularly given the level of abstraction involved in the Prosecution’s approach to charging, is the Appeals Chamber’s observation in *Bemba* that “[s]imply listing the categories of crimes with which a person is to be charged or stating, in broad general terms, the temporal and geographical parameters of the charge is not sufficient to comply with the requirements of regulation 52(b) of the Regulations of the Court and does not allow for a meaningful application of article 74(2) of the Statute.”⁴⁴

15. The fact that the temporal and geographical parameters in the present case are narrower than those in *Bemba* does not mean that “the *Ntaganda* case is pleaded with a significantly higher degree of specificity”,⁴⁵ rather, it is irrelevant. The nub of this ground of appeal (which the Prosecution fails to grasp) is that, within those parameters (whether broad or narrow), must fall the “criminal acts that form the basis of criminal responsibility and that must be established at trial beyond a reasonable doubt.”⁴⁶ Those criminal acts must be meaningfully, and exhaustively, identified as part of the confirmation process.

16. It is on this basis that the Prosecution’s assertion that it is sufficient that “the charges refer to a non-exhaustive list of underlying criminal acts and victims within these confined locations”⁴⁷ must be rejected. Notwithstanding the Prosecution’s protestations to the contrary,⁴⁸ if such an assertion were correct (which it is not), it would amount to confirmation “by sample”. By reference to the reasoning of Judges Van den Wyngaert and Morrison in *Bemba*, Mr. Ntaganda has already argued that such an approach must be rejected.⁴⁹ Further, as discussed below, if additional criminal acts⁵⁰ can be added during trial, it renders the whole confirmation process redundant.

⁴¹ [Prosecution Response – Part I](#), paras.28,45.

⁴² [Lubanga-AJ-3121](#), para.123; [Bemba-AJ-3636](#), para.104.

⁴³ [Yekatom-Ngaïssona-Decision-517](#), para.18.

⁴⁴ [Bemba-AJ-3636](#), para.110. See also [Lubanga-Decision-2205](#), fn.163; [Lubanga-AJ-3121](#), para.123.

⁴⁵ [Prosecution Response – Part I](#), para.31 (footnote omitted).

⁴⁶ [Bemba-Separate-Opinion-3636](#), para.25.

⁴⁷ [Prosecution Response – Part I](#), para.28. Also para.45.

⁴⁸ [Prosecution Response – Part I](#), para.29.

⁴⁹ [Defence Appeal Brief – Part I](#), para 20.

⁵⁰ The Defence notes that all the Challenged Acts are criminal acts rather than “further details about the charges” within the meaning of [Lubanga-AJ-3121](#), para.124. See para.25 below.

17. Of significance is also the approach taken by the Prosecution in the *Yekatom and Ngaïssona* case, which completely undermines its position in the present case. In *Yekatom and Ngaïssona*, notwithstanding the fact that a second instance of rape took place within the same temporal and geographical “context of the 5 December 2013 attack on Bossangoa”⁵¹ as an already confirmed instance of rape, the Prosecution sought unsuccessfully to amend the charges against Mr. Ngaïssona under article 61(9).⁵² In both the present and the *Yekatom and Ngaïssona* case, the charges of rape were pled at the level of individual criminal acts. There is, therefore, no good reason as to why recourse was properly made to article 61(9) in *Yekatom and Ngaïssona* and not in the present case save that the Prosecution has realised its mistake.

18. Therefore, in the present case, it was only by reference to the additional and, it is submitted, exhaustive, factual detail provided in paragraphs 38 to 73 of the Confirmation Decision that the charges could be properly and meaningfully constituted by the Pre-Trial Chamber. In essence, the confirmed charges comprise both the factual and legal elements set out in paragraphs 36 to 73 of the Confirmation Decision and not simply paragraph 36 alone. A review of the “factual allegations”⁵³ presented in these paragraphs of the Confirmation Decision establishes that the Challenged Acts are not meaningfully referred to therein. Accordingly, they fall outside “the facts and circumstances described in the charges”⁵⁴ and should not have formed any part of Mr. Ntaganda’s conviction.

II. The continuing nature of being a child soldier does not circumvent the need to plead discrete underlying criminal acts of rape⁵⁵

19. Given the continuing nature of the crimes, the overall thrust of the Prosecution’s argument in relation to the charges of rape and sexual slavery committed against child soldiers is that, if the relevant Challenged Act falls within the extremely broad temporal and geographical parameters confirmed for these charges, then that is sufficient to bring it within the scope of the charges.⁵⁶ The fact that those acts comprising Challenged Act (xii) were not

⁵¹ [Yekatom-Ngaïssona-Decision-517](#), para.19.

⁵² The Pre-Trial Chamber rejected the request on the basis that, contrary to the Prosecution’s application, the purported amendment to an existing charge was more properly characterised as an additional charge. [Yekatom-Ngaïssona-Decision-517](#), para.20.

⁵³ [Lubanga-Decision-2205](#), fn.163.

⁵⁴ [Statute](#), article 74(2).

⁵⁵ Third issue for reply. See [Defence-Request-2466](#), para.13, third bullet point.

⁵⁶ [Prosecution Response – Part I](#), paras.38-39.

expressly confirmed is considered irrelevant by the Prosecution. The Prosecution's approach should be dismissed for the following reasons.

20. *First*, the approach ignores the Confirmation Decision. Paragraphs 81 to 82 show that the crimes of rape and sexual slavery were confirmed by reference to specific incidents concerning the repeated rapes of particular child soldiers at particular locations during specific time periods. The Pre-Trial Chamber's approach stands to reason. The crimes of rape and sexual slavery are committed by relatively discrete events, *e.g.*, an act of rape which, if repeated, can constitute sexual slavery. Therefore, while sexual slavery is a crime of a continuous nature, it is built on discrete underlying acts of rape. Crucially, none of the incidents referred to in these two paragraphs of the Confirmation Decision concern the rape and sexual slavery of either P-0883 at Camp Bule or Mave, who was assigned to Floribert Kisembo, which comprise Challenged Act (xii).⁵⁷

21. *Second*, it ignores the Court's jurisprudence discussed above which establishes that "the alleged criminal acts are not a mere illustration of the charges" but "[o]n the contrary [...] are an integral component thereof, which must be pleaded by the Prosecutor and confirmed by the Pre-Trial Chamber."⁵⁸ The failure to plead the acts which comprise Challenged Act (xii) is fatal to their inclusion in any conviction.

III. "Notice" (article 67) is irrelevant to the scope of the confirmed charges (article 74)⁵⁹

22. Mr. Ntaganda "does not argue his rights were violated under article 67(1)(a) and (b)" of the Statute for good reason.⁶⁰ Notice is irrelevant to the question of whether the Challenged Acts exceed the scope of the confirmed charges.⁶¹ At this Court, notice under article 67 is not a means of side stepping the confirmation process. It is at the point of confirmation that the scope of the charges crystallises. It is for this reason that the ancillary issue of whether the defence sought leave to appeal any aspect of the scope of the charges is equally irrelevant.⁶²

⁵⁷ *Contra* [Prosecution Response – Part I](#), para.42. *See also* [Defence Response – Part I](#), para.22.

⁵⁸ [Bemba-Separate-Opinion-3636](#), para.25.

⁵⁹ Second issue for reply. *See* [Defence-Request-2466](#), para.13, second bullet point. This issue is dealt with out of order to reflect the order in which the Prosecution dealt with the "notice" argument in the [Prosecution Response – Part I](#).

⁶⁰ [Prosecution Response – Part I](#), para.44.

⁶¹ *Contra* [Prosecution Response – Part I](#), paras.44 *et seq.*

⁶² [Prosecution Response – Part I](#), paras.28,38.

23. The Defence's approach sits comfortably within "the [particular] procedural architecture of the International Criminal Court".⁶³ At this Court, additional criminal acts cannot be added by advance disclosure post-confirmation because a Trial Chamber has no power to amend the factual allegations comprising the charges.⁶⁴ This is in contrast to the position at the *ad hoc* tribunals, rendering irrelevant any reliance on the approach taken at those tribunals.⁶⁵ Rather, at the ICC, changes to the confirmed charges can only be made in limited circumstances. Before the start of trial, amendments can be made with the permission of the Pre-Trial Chamber pursuant to article 61(9) of the Statute. Once trial has commenced, the only changes which are permitted are to the legal characterisation of the charges under regulation 55 of the RoC⁶⁶ or a withdrawal of the charges under article 61(9).⁶⁷

24. The fact that it is the Pre-Trial Chamber alone which has the power to set the factual boundaries of the trial⁶⁸ is "critical in ensuring the possibility for the accused to clearly understand the charges against which he or she has to prepare his or her defence at trial."⁶⁹ It is in this way that an accused's rights under article 67(1) are preserved.

25. In erroneously relying on notice as a means of amending the charges, the Prosecution improperly extends the use which can be made of auxiliary documents such as the UDCC, the PTB, statement summaries, the list of evidence and the IDAC.⁷⁰ While auxiliary documents may, in certain circumstances, contain "further details about the charges, as confirmed by the Pre-Trial Chamber",⁷¹ "further details" are necessarily those which elaborate or clarify the existing charges, *e.g.*, the identity of a previously unidentified victim, or corroborative evidence as to the identity of the perpetrator. To permit a Trial Chamber to add new

⁶³ [Bemba-Separate-Opinion-3636](#), para.19.

⁶⁴ [Statute](#), article 61(11). While a Trial Chamber "may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings", its powers are expressly stated to be "subject to paragraph 9". See also [Defence Response – Part I](#), para.30.

⁶⁵ [Prosecution Response – Part I](#), para.45. See also [Defence Response – Part I](#), para.15.

⁶⁶ [Regulation 55\(1\)](#) expressly states that the factual parameters of the case cannot be changed through its operation ("[...] the Chamber may change the legal characterisation of facts [...] without exceeding the facts and circumstances described in the charges and any amendments to the charges.")

⁶⁷ See also [Defence Response – Part I](#), para.30.

⁶⁸ [Yekatom-Ngaissona-Decision-517](#), para.23; [Lubanga-AJ-3121](#), para.124.

⁶⁹ [Yekatom-Ngaissona-Decision-517](#), para.24; [Katanga-Decision-1547](#), para.22.

⁷⁰ [Prosecution Response – Part I](#), paras.44 *et seq.*

⁷¹ [Lubanga-AJ-3121](#), para.124.

underlying acts, which are themselves individual crimes, capable of amounting to charges, as “further details” would be to amend the charges without recourse to article 61(9).⁷²

26. As regards the murders at Bambu hospital, the Prosecution’s own submissions underline that this incident falls outside the scope of the confirmed charges.⁷³ The short point is that the Prosecution is unable to demonstrate that P-0863’s evidence was relied on at Confirmation. Indeed, it cannot do so because this witness’ evidence was gathered as part of a post-confirmation investigation.⁷⁴ Rather, in relation to the alleged killing of at least 12 civilians in Bambu,⁷⁵ only the criminal acts specified in paragraph 44 of the Confirmation Decision were confirmed, none of which relate to an incident at the hospital.⁷⁶ The reference to Bambu hospital (without more) in the context of pillaging is self-evidently irrelevant to a murder charge.⁷⁷

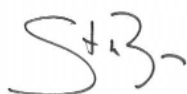
27. Finally, nowhere does Mr. Ntaganda argue that any of the Challenged Acts fall outside the scope of the charges due to “[m]inor discrepancies in dates and locations.”⁷⁸ The Prosecution’s argument in paragraph 49 of its response, therefore, should be ignored.

28. In sum, the Prosecution’s extensive but wholly irrelevant submissions on notice should be dismissed.

IV. Conclusion

29. For the reasons set out above, the Prosecution’s arguments in relation to the above three issues should be dismissed.

RESPECTFULLY SUBMITTED THIS 7TH DAY OF SEPTEMBER 2020



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⁷² Support for this conclusion is provided by the approach taken by Pre-Trial Chamber II. See [Yekatom-Ngaïssona-Decision-517](#), para.24.

⁷³ [Prosecution Response – Part I](#), para.48.

⁷⁴ The witness’ statement ([DRC-OTP-2068-0251](#)) is dated [REDACTED].

⁷⁵ [DCC](#), para.81. Also the post-confirmation [UDCC](#), para.81.

⁷⁶ [Confirmation Decision](#), para.44 citing at fns.165 and 166 to the statements of P-0046 and P-0804 (not P-0863).

⁷⁷ [Prosecution Response – Part I](#), para.48.

⁷⁸ [Prosecution Response – Part I](#), para.49.