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TRIAL CHAMBER VI

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public

Prosecution's motion for reconsideration of a discrete portion of the Decision on the updated document containing the charges or in the alternative, application for leave to appeal

Source: Office of the Prosecutor

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

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Introduction

1. The Prosecution requests the Trial Chamber ("Chamber") to reconsider a discrete portion of its Decision on the updated document containing the charges ("Decision"),¹ in which it ordered the Prosecution to remove from the document containing the charges ("DCC") references to Mr Ntaganda having personally raped and sexually enslaved girl and women soldiers in paragraphs 104 and 105 of the DCC (and cross references in Court 9).²

2. The Chamber ordered the Prosecution to remove these references based on its view that the Pre-Trial Chamber had made no express finding on these allegations "because Mr Ntaganda was never charged as a direct perpetrator [of these crimes] and consequently they did not form a necessary part of [the] case before it."³ The Prosecution respectfully submits that the Chamber partly misapprehended the scope of the Prosecution's case against Mr Ntaganda, as based on the facts set out in paragraphs 104 and 105 of DCC and confirmed by the Pre-Trial Chamber. In particular, the Trial Chamber appears to have wrongly construed the Pre-Trial Chamber's failure to mention these facts in its decision on the confirmation of charges ("Confirmation Decision")⁴ as a positive *rejection* of these facts, rendering them incapable of forming the basis of the charges against Mr Ntaganda. A proper reading of the Confirmation Decision (together with the DCC), however, shows that these facts were confirmed by the Pre-Trial Chamber as facts underlying the charges against Mr Ntaganda. If not corrected, the Trial Chamber's ruling would result in the exclusion of facts relating to an important aspect of Mr Ntaganda's criminal conduct from the DCC, notwithstanding their confirmation by the Pre-Trial Chamber for trial. In addition, the exclusion of these portions of the DCC would unjustifiably lead to the crimes of rape and sexual

¹ ICC-01/04-02/06-450.

² Decision, paras.45, 59.

³ Decision, para.45.

⁴ ICC-01/04-02/06-309.

slavery alleged against Mr Ntaganda in this case being treated differently from other crimes alleged against him. To avoid these manifestly unsound and unsatisfactory consequences, the Chamber should reconsider the relevant part of its Decision.

3. In the alternative, the Prosecution seeks leave to appeal the Decision inasmuch as the Trial Chamber erred in paragraphs 45 and 59 of the Decision when it ordered the Prosecution to exclude references from the DCC to Mr Ntaganda having personally raped and sexually enslaved girl and women soldiers in paragraphs 104 and 105 of the DCC (and cross references in Count 9) by failing to properly understand the scope of the charges against Mr Ntaganda in the DCC as confirmed by the Pre-Trial Chamber. In particular, the Prosecution requests that the following issues be certified for appeal:
 - (a) Whether the Trial Chamber misinterpreted the Pre-Trial Chamber's findings in the Confirmation Decision when stating in paragraph 45 that the reason why the Pre-Trial Chamber did not expressly make findings in relation to the factual allegation that Mr Ntaganda personally raped and sexually enslaved girl and women soldiers was because Mr Ntaganda was not charged as a direct perpetrator and consequently the factual allegation did not form a necessary part of the case against him ("First Issue"); and
 - (b) Whether in relation to the charges that Mr Ntaganda personally raped and sexually enslaved girl and women soldiers, the Trial Chamber misapplied its own articulated standard for determining whether facts not expressly confirmed by the Pre-Trial Chamber should be considered as forming part of the charges ("Second Issue").

Motion for reconsideration

4. A Chamber has the discretion to reconsider its decision when it is manifestly unsound and its consequences are manifestly unsatisfactory,⁵ or when new or previously unavailable information requires the Chamber to reconsider its previous ruling.⁶
 - (i) The Trial Chamber misunderstood the scope of the Prosecution's charges, as confirmed by the Pre-Trial Chamber, with respect to Mr Ntaganda having personally raped and sexually enslaved girl and women soldiers
5. The Trial Chamber stated that in its view, the Pre-Trial Chamber had found that the Prosecution's allegations that Mr Ntaganda personally committed rape and sexual slavery of child soldiers was not a necessary part of the case against Mr Ntaganda because he was not being charged as a direct perpetrator of these crimes.⁷ In so finding, the Trial Chamber appears to have misunderstood the scope of the Prosecution's allegations that Mr Ntaganda personally committed rape and sexual slavery and their relevance to the Prosecution's charges against him, as confirmed by the Pre-Trial Chamber.
6. At paragraphs 104 and 105 of the DCC, the Prosecution alleged that "**Bosco NTAGANDA** and other commanders led by negative example. They raped girl and women soldiers, including those below the age of 15, and kept them as sex slaves. [...] **Bosco NTAGANDA** himself raped and/or sexually enslaved women

⁵ Trial Chamber I has accepted the possibility of reconsidering decisions in exceptional circumstances. See ICC-01/04-01/06-2705, paras.13-18. Other Chambers, like Pre-Trial Chamber II in the Uganda Situation, have concluded that there is no express statutory authority to reconsider rulings (see, e.g., ICC-02/04-01/05-60, para.18). The Prosecution notes that the Appeals Chamber has affirmed that this Court may exercise inherent judicial powers, as in its authority to issue a permanent stay of proceedings even though no article or rule expressly provides for it (ICC-01/04-01/06-772 OA4, paras.36-39).

⁶ ICC-01/05-01/08-1691-Red, para.17. An analogous application of Article 84 also supports this submission.

⁷ Decision, para.45.

and girls in the UPC/FPLC, including in his escort, which communicated a message of official approval and further contributed to the crimes.”⁸

7. The Prosecution agrees that it did not charge Mr Ntaganda as a direct perpetrator of the crimes of rape and sexual slavery of child soldiers (Counts 6 and 9) pursuant to article 25(3)(a) of the Rome Statute (“Statute”). Nevertheless, the factual allegations that Mr Ntaganda personally raped and sexually enslaved girl and women soldiers did form part of the basis of the Prosecution’s charges against Mr Ntaganda under article 25(3)(a) (indirect co-perpetration), article 25(3)(d) and article 28 of the Statute.
8. First, the Prosecution relied on the allegations in paragraphs 104 and 105 of the DCC, that Mr Ntaganda personally committed rape and sexual slavery of girl and women soldiers, to establish (part of) his contribution to the crimes of rape and sexual slavery of child soldiers pursuant to modes of liability under article 25(3) other than direct perpetration. When setting out the relevant facts forming the basis for his responsibility as an indirect co-perpetrator under article 25(3)(a), the Prosecution submitted that Mr Ntaganda contributed to the crimes charged, *inter alia*, by “facilitating and/or encouraging the commission of crimes by the UPC/FPLC and the Hema civilian supporters *through his own criminal actions* [...]”.⁹ Similarly, when setting out the relevant facts forming the basis for Mr Ntaganda’s criminal responsibility under article 25(3)(d), the Prosecution submitted that his criminal responsibility arose, *inter alia*, because Mr Ntaganda “*personally committed crimes* which, coupled with his failure to prevent and punish UPC/FPLC troops for committing these crimes on each occasion, sent a clear signal to the UPC/FPLC troops that the commission of crimes was officially tolerated.”¹⁰ The Prosecution reiterated these factual assertions in its summary of

⁸ See also DCC filed prior to the confirmation of charges hearing: ICC-01/04-02/06-203-AnxA.

⁹ ICC-01/04-02/06-203-AnxA, para.126(d) (emphasis added).

¹⁰ ICC-01/04-02/06-203-AnxA, para.134 (emphasis added).

the charges in paragraph 167(3) of the DCC¹¹ and in its submissions during the confirmation of charges hearing.¹²

9. Second, the Prosecution also relied on the allegations in paragraph 104 and 105 of the DCC, that Mr Ntaganda personally committed rape and sexual slavery of girl and women soldiers, to establish his responsibility for the crimes of rape and sexual slavery of child soldiers as a military commander pursuant to article 28. In its DCC, the Prosecution submitted that Mr Ntaganda's knowledge that his subordinates were committing or were about to commit such crimes could be inferred from, *inter alia*, "his own involvement in the perpetration [...] and/or execution of such crimes".¹³ During the confirmation of charges hearing, the Prosecution submitted that Mr Ntaganda's knowledge of the extended commission of the crimes of rape and sexual slavery committed by his soldiers could be inferred from the fact that he himself personally sexually exploited girl soldiers at his residence.¹⁴
10. There is no indication in the Confirmation Decision that the Pre-Trial Chamber misunderstood the scope of the DCC and in particular the relevance of the allegations in paragraphs 104 and 105 to the charges alleged against Mr Ntaganda. It is precisely because Mr Ntaganda was not charged for the crimes of rape and sexual slavery of girl and women soldiers as a *direct perpetrator* that it must have been clear to the Pre-Trial Chamber that the facts alleged in the DCC as to his personal participation in raping and sexually enslaving girl and women soldiers had a different purpose, namely those set out in the previous paragraphs. As a result, the Trial Chamber was wrong to conclude that the Pre-Trial Chamber viewed the allegations that Mr Ntaganda personally raped and sexually enslaved girl and women soldiers as an unnecessary part of the case before it.¹⁵ For the

¹¹ ICC-01/04-02/06-203-AnxA, para. 167(e).

¹² ICC-01/04-02/06-258-AnxA8, p.13.

¹³ ICC-01/04-02/06-203-AnxA, para.149(a).

¹⁴ See for instance ICC-01/04-02/06-258-AnxA9, p.32.

¹⁵ *Contra*, Decision, para.45.

same reason, the Trial Chamber's own conclusion that these "allegations relat[e] to conduct which has not been charged"¹⁶ is incorrect.

- (ii) The Trial Chamber wrongly found the Pre-Trial Chamber's failure to expressly mention the allegations that Mr Ntaganda personally committed rape and sexual slavery was because Mr Ntaganda was never charged of these crimes as a direct perpetrator

11. Without exhaustively referring to every single fact alleged in the DCC, the Pre-Trial Chamber confirmed, *inter alia*, that there were substantial grounds to believe that Mr Ntaganda was responsible for the rape of child soldiers (Count 6) and sexual slavery of child soldiers (Count 9) pursuant to the modes of liability of indirect co-perpetration under article 25(3)(a); contributing to a crime committed by a group of persons acting with a common purpose under article 25(3)(d); and command responsibility under article 28(a).¹⁷

12. However, the Trial Chamber concluded that the Pre-Trial Chamber failed to make an express finding on the allegations that Mr Ntaganda personally committed rape and sexual slavery because he "was never charged as a direct perpetrator and consequently [these facts] did not form a necessary part of the case before it".¹⁸ On this basis, it ordered the Prosecution to remove these allegations from the Updated DCC. As demonstrated above, its conclusion was predicated on a misunderstanding of the Confirmation Decision.

13. The Trial Chamber's conclusion is also at odds with its earlier reasoning which accepted that the Pre-Trial Chamber was not required to enter express findings in relation to each and every fact referred to in the DCC for those charges to be confirmed. The Trial Chamber held that the Pre-Trial Chamber, when confirming the charges against Mr Ntaganda, was "not required to consider each factual

¹⁶ Decision, para.45.

¹⁷ Confirmation Decision, para.97.

¹⁸ Decision, para.45.

allegation in detail but [only had] to determine whether there [was] sufficient evidence to establish substantial grounds to believe that the crimes charged were committed”.¹⁹

14. The Pre-Trial Chamber had conducted a “comprehensive analysis of evidence contained in the lists of evidence, the DCC, the in-depth analysis charts, the submissions made during the [confirmation hearing], and the final written submission of the parties and participants”.²⁰ There is no reason to assume that the Pre-Trial Chamber’s analysis somehow overlooked the facts alleged in paragraphs 104 and 105 of the DCC regarding Mr Ntaganda’s personal commission of rape and sexual slavery, and the relevance of these allegations for the charges against him.

15. Accordingly, the Pre-Trial Chamber’s failure to mention the allegations that Mr Ntaganda personally committed rape and sexual slavery of girl and women soldiers does not mean that the Pre-Trial Chamber implicitly rejected those allegations because it regarded them as not being a necessary or relevant part of the case. Rather, the Pre-Trial Chamber’s “silence” on this aspect of the Prosecution’s case simply suggests that the Chamber did not view these facts as being strictly necessary to establish substantial grounds to believe that Mr Ntaganda was responsible for the crimes in Counts 6 and 9 pursuant to the charged modes of liability. Given the limited scope of a confirmation decision, which the Trial Chamber accepted,²¹ a Pre-Trial Chamber will not dismiss factual allegations simply because they are not, in that Chamber’s view, strictly necessary to establish the threshold under article 61(7). The Decision, however, seems to assume that the Pre-Trial Chamber did exactly that.²² This misunderstanding appears to lie at the heart of the Trial Chamber’s instruction to exclude the

¹⁹ Decision, para.28.

²⁰ Confirmation Decision, para.8.

²¹ See Decision, para.28.

²² Decision, para.45.

allegations of his personal commission of rape and sexual slavery from paragraphs 104 and 105 of the DCC.

(iii) Reconsideration is warranted to avoid the unsound and unsatisfactory outcome of the Decision

16. First, the Trial Chamber's order to the Prosecution, based on its misinterpretation of the scope of the charges in the DCC and the Pre-Trial Chamber's Confirmation Decision, will lead to the exclusion of facts relating to an important aspect of Mr Ntaganda's criminal conduct from the DCC, notwithstanding their being confirmed by the Pre-Trial Chamber for trial. Reconsideration of the Decision is warranted to avoid this unsound and unsatisfactory outcome.

17. Second, the Trial Chamber's order will also lead to certain inconsistencies in the treatment of the crimes of rape and sexual slavery and other crimes charged against Mr Ntaganda. In particular, the Decision does not require the Prosecution to amend paragraphs 126(d), 134 and 167(e) of the DCC, which state that Mr Ntaganda provided a contribution to the charged crimes under various modes of liability, other than direct perpetration under article 25(3)(a), by personally committing crimes. Nor does it require the Prosecution to amend paragraph 149(a) which states that Mr Ntaganda's knowledge that his subordinates were committing or were about to commit crimes can be inferred from, *inter alia*, "his own involvement in the perpetration [...] and/or execution of such crimes".

18. As a result, the Prosecution may rely on Mr Ntaganda's personal commission of *certain* crimes, such as murder, pillaging and child soldier offences, to establish his contribution to those crimes pursuant to article 25(3)(a), 25(3)(d) and article 28. However, the Prosecution will be unable to rely on Mr Ntaganda's personal commission of rape and sexual slavery as a basis for his contribution to the crimes of rape and sexual slavery of child soldiers.

19. This unequal treatment of the crimes included in the DCC is another unsound and unsatisfactory outcome of the Decision. The Prosecution will be deprived of the possibility of relying on an important aspect of Mr Ntaganda's conduct (namely, his own personal commission of raping and sexually enslaving girl and women soldiers) to establish his contribution to, the crimes of rape and sexual slavery committed by his soldiers. At the same time, the Prosecution will be able to rely on Mr Ntaganda's own personal commission of *other* crimes to establish his contribution to those crimes. There is no legal, factual or logical justification for this different treatment. As already stated, the Trial Chamber noted that Mr Ntaganda was not charged with the crimes of rape and sexual slavery under the mode of liability of direct perpetration²³ However, this fact is irrelevant in this context, because the difference in treatment concerns Mr Ntaganda's alleged responsibility under modes of liability *other* than direct perpetration.

20. Finally, further inconsistencies have arisen in the DCC as a result of the Decision. In particular, the Decision orders the Prosecution to delete from Count 9 the cross reference to paragraph 105 of the DCC,²⁴ but it does not require the Prosecution to delete the cross reference in Count 9 to paragraph 104 of the DCC. Nor does it require the Prosecution to delete any cross reference to these paragraphs in Count 6 of the DCC. While this may simply be an oversight by the Trial Chamber, it further demonstrates that the Decision has led to an unsound and unsatisfactory outcome.

(iv) Conclusion on the motion for reconsideration

21. To prevent the Decision's unsound and unsatisfactory outcomes and to avoid the resulting inconsistencies in the DCC, the Trial Chamber should reconsider its decision to exclude references to Mr Ntaganda's personal commission of rape and

²³ Decision, para.45.

²⁴ Decision, para.59.

sexual slavery of girl and women soldiers and allow the Prosecution to retain paragraphs 104 and 105 (and cross references in Count 9) in the DCC.

Application for leave to appeal

22. In the alternative, the Prosecution seeks leave to appeal the Decision on whether the Trial Chamber erred in paragraphs 45 and 59 of the Decision when it ordered the Prosecution to exclude references from the DCC to Mr Ntaganda having personally raped and sexually enslaved girl and women soldiers in paragraphs 104 and 105 of the DCC (and cross references in Count 9) by failing to properly understand the scope of the charges against Mr Ntaganda in the DCC as confirmed by the Pre-Trial Chamber. In particular:

- (a) Whether the Trial Chamber misinterpreted the Pre-Trial Chamber's findings in the Confirmation Decision, when it stated in paragraph 45 of the Decision that the reason why the Pre-Trial Chamber did not expressly make findings in relation to the factual allegation that Mr Ntaganda personally raped and sexually enslaved girl and women soldiers was because Mr Ntaganda was not charged as a direct perpetrator and consequently the factual allegation did not form a necessary part of the case against him ("First Issue"); and
- (b) Whether in relation to the charges that Mr Ntaganda personally raped and sexually enslaved girl and women soldiers, the Trial Chamber misapplied its own articulated standard for determining whether facts not expressly confirmed by the Pre-Trial Chamber should be considered as forming part of the charges. ("Second Issue").

(i) *The Issues are appealable*

23. The Appeals Chamber has held that for the purposes of leave to appeal under article 82(1)(d) "[a]n issue is constituted by a subject the resolution of which is

essential for the determination of matters arising in the judicial cause under examination”.²⁵ Because the Issues identify subjects the resolution of which is essential for the determination of whether the allegations that Mr Ntaganda personally committed rape and sexual slavery may be retained in the DCC, it is an appealable issue within the meaning of article 82(1)(d).

24. As the Prosecution has already argued in paragraphs 5 to 15 above in its request for reconsideration, the Trial Chamber misinterpreted the Confirmation Decision. In particular the Trial Chamber found that the Pre-Trial Chamber’s failure to expressly refer to the allegations that Mr Ntaganda personally raped and sexually enslaved girl and women soldiers when confirming the charges against Mr Ntaganda for rape and sexual slavery of child soldiers in Counts 6 and 9 was because the Pre-Trial Chamber was of the view that they did not form a necessary part of the case against Mr Ntaganda. However, for the reasons stated in paragraphs 5 to 15 above, it is submitted that the Trial Chamber misunderstood the scope of the charges for rape and sexual slavery of child soldiers in the DCC as confirmed by the Pre-Trial Chamber. This matter is raised under the First Issue.
25. In addition, if leave to appeal is granted, the Prosecution will argue that the Trial Chamber misapplied its own articulated standard for determining whether facts not expressly confirmed by the Pre-Trial Chamber should be considered as forming part of the charges. This matter is raised under the Second Issue and is explained in more detail in the following paragraphs.
26. The Trial Chamber found 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. [...] The Chamber nonetheless acknowledged that there

²⁵ ICC-01/04-168 OA3, paras. 9-10. See also, ICC-01/04-01/06-1433 OA11, Dissenting Opinion of Judge Song, para. 4, specifying that “[a] decision “involves” an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

may be certain circumstances in which it would be inappropriate to retain particular allegations, including where permitting their retention may be significantly misleading or prejudicial”.²⁶

27. If leave to appeal is granted, the Prosecution will argue that retaining the relevant factual allegations as to Mr Ntaganda’s personal commission of rape and sexual slavery of girl and women soldiers is neither misleading nor prejudicial. Indeed, the retention of these facts is important as they constitute one of the ways that Mr Ntaganda contributed to the crimes of rape and sexual slavery committed by his soldiers and should therefore be thereby liable as an indirect co-perpetrator under article 25(3)(a), under article 25(3)(d) and/or under article 28. The DCC clearly set out the relevance of these allegations to the Prosecution’s case.²⁷ In addition, retaining these allegations would ensure that the DCC is internally consistent, and would avoid the relevant portions of the DCC being out of sync with other parts of the DCC.²⁸

28. Moreover, retaining the relevant factual allegations would not cause any unfair prejudice to Mr Ntaganda or be otherwise inappropriate. The allegations that Mr Ntaganda personally committed rape and sexual slavery against girl and women soldiers has been part of the Prosecution’s case since prior to the confirmation hearing and Mr Ntaganda has had due notice of these allegations. At the confirmation hearing he was given the full opportunity to defend himself against these allegations and likewise will be able to defend himself against them at his trial. Finally, retaining these allegations would avoid the charges of rape and sexual slavery being treated differently from the charges based on other crimes in this case.²⁹

²⁶ Decision, para.28.

²⁷ See paras.5-10 above.

²⁸ See paras.16-20 above.

²⁹ See paras.17-19 above.

(ii) *The Issues meet the criteria for leave to appeal under article 82(1)(d)*

29. Issues concerning the content of a charging document generally meet the criteria for leave to appeal.³⁰ In the only comparable precedent before this court, the Single Judge of Pre-Trial Chamber II in the *Ruto and Sang* case granted leave to appeal.³¹ Similarly, a Chamber of the ICTY granted leave to appeal on such an issue having found that “dispelling uncertainty over an important aspect of the case against [the accused]” justifies certification for appeal.³²

The Issues affect the fair conduct of the proceedings

30. As a result of the Decision, the Prosecution has been ordered to excise from its case an important aspect of Mr Ntaganda’s criminal conduct which formed part of the charges of rape and sexual slavery of child soldiers under Counts 6 and 9. As such, the Issues affect the fairness of the proceedings because it impacts on the Prosecution’s ability to properly exercise its powers and fulfil its duties in article 54,³³ including its ability to present its case³⁴ and to establish the truth.

31. In addition, the Issues affect the fairness of the proceedings *vis-à-vis* the victims of the crimes of rape and sexual slavery of girl and women soldiers and the witnesses who could testify about his personal commission of such crimes.³⁵ Regardless of the fact that Mr Ntaganda is not charged as a direct perpetrator of these crimes, the victims and witnesses may now be deprived of the full truth being established in relation to the charged crimes. Moreover, the girl and women

³⁰ The Prosecution notes that the Decision does not rule on the admissibility at trial of evidence relating to Mr Ntaganda’s personal commission of rape and sexual slavery against girl and women soldiers. That issue, to be decided at trial, is separate from whether the Trial Chamber was wrong to order the Prosecution to delete the underlying facts of his personal commission of rape and sexual slavery from the DCC. The Prosecution submits that even if these factual allegations are removed from the DCC as forming a basis for his liability under article 25(3)(a) (indirect co-perpetration), article 25(3)(d) and article 28, evidence of such matters may still be admissible as circumstantial evidence to establish Mr Ntaganda’s intent and knowledge under article 25 and 28.

³¹ ICC-01/09-01/11-912, see in particular paras.65-66.

³² *Prosecutor v. Haradinaj*, IT-04-84bis-PT, Decision on Application on behalf of Ramush Haradinaj for Certification Pursuant to Rule 73(b), 3 February 2011, para.18.

<http://www.icty.org/x/cases/haradinaj/tdec/en/110203.pdf>

³³ ICC-01/04-135-tENG, paras.38-39.

³⁴ ICC-02/04-01/05-90 (reclassified pursuant to ICC-02/04-01/05-135), para. 24.

³⁵ ICC-01/04-01/06-2463, para.30.

soldiers who were raped or sexually enslaved directly by Mr Ntaganda will be treated differently from the victims of other crimes directly perpetrated by Mr Ntaganda.

The Issues affect the expeditious conduct of the proceedings

32. The Issues affect the expeditious conduct of the proceedings because it impacts how the Prosecution may establish Mr Ntaganda's contribution to the crimes of rape and sexual slavery of child soldiers under Counts 6 and 9 under article 25(3)(a) (indirect co-perpetration), article 25(3)(d) and article 28(a). The Decision curtails the Prosecution's reliance on Mr Ntaganda's personal commission of rape and sexual slavery as relevant contributions to the crimes of rape and sexual slavery of child soldiers committed by his soldiers. This may necessitate further investigations and possibly delay the trial.

The Issues affect the outcome of the trial

33. The Single Judge of Pre-Trial Chamber II in the case *Ruto and Sang* case found that the question whether a certain fact is included in the charges "would significantly affect the outcome of the trial as additional crimes allegedly committed [...] will not form the factual basis upon which the judgment pursuant to article 74 of the Statute will be rendered".³⁶ In this case, the Decision prevents the Prosecution from relying on Mr Ntaganda's own commission of crimes as underlying contributing acts to the rapes and sexual slavery committed by his soldiers, thereby forming part of his liability under article 25(3)(a) (indirect-coperpetration), article 25(3)(d) and article 28. This has clear implications for the outcome of the case.

³⁶ ICC-01/09-01/11-912, para.65.

Immediate resolution of the Issues will materially advance the proceedings

34. An immediate determination by the Appeals Chamber of the Issues will materially advance the proceedings as it will permit the case to proceed on safe grounds and with certainty as to the factual basis on which the upcoming trial will be conducted.³⁷ It will remove doubt as to whether the Prosecution can rely on the fact that Mr Ntaganda personally committed crimes of rape and sexual enslavement against girl and women soldiers to establish his contribution to the crimes charged in Counts 6 and 9 pursuant to the modes of liability under article 25(3)(a) (indirect perpetration) and article 25(3)(d), and to establish his knowledge under article 28. In this sense, immediate appellate intervention would also “[r]emov[e] doubts about the correctness of [the] decision”.³⁸

(iii) *Conclusion on the application for leave to appeal*

35. For the reasons set out above, the Prosecution requests that if the Trial Chamber decides not to reconsider the Decision as requested above, that it grant the Prosecution leave to appeal the Decision on the Issues outlined above.

Overall conclusion

36. Based on the foregoing, the Prosecution requests that the Chamber reconsider the discrete portion of the Decision referred to above and allow the Prosecution to retain references to Mr Ntaganda having personally raped and sexually enslaved girl and women soldiers in paragraphs 104 and 105 of the DCC (and cross references in Court 9).

37. In the alternative, the Prosecution requests that the Chamber grant leave to appeal the Decision on the Issues outlined above.

³⁷ ICC-01/09-01/11-912, para.66.

³⁸ ICC-01/04-168, paras.14-15,18.



Fatou Bensouda, Prosecutor

Dated this 16th day of February 2015

At The Hague, The Netherlands