



Original: **English**

No.: ICC-01/04-02/06
Date: **20 February 2015**

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

**Response on Behalf of Mr Ntaganda to Prosecution Motion for Reconsideration
and Prosecution Application for Leave to Appeal**

Source: Defence Team of Mr Bosco Ntaganda

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Me Stéphane Bourgon
Me Luc Boutin
Me William St-Michel

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Further to the “*Decision on the updated document containing the charges*” issued by Trial Chamber VI (“Chamber”) on 6 February 2015¹ (“Impugned Decision”) and the submission of the “*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*” on 16 February 2015² (“Prosecution Motion for Reconsideration” and “Prosecution Application for Leave to Appeal”), Counsel representing Mr Ntaganda (“Mr Ntaganda” or “Defence”) hereby submit this:

**Response on Behalf of Mr Ntaganda to Prosecution Motion for Reconsideration
and Prosecution Application for Leave to Appeal**

OVERVIEW

1. The Defence opposes both the Prosecution Motion for Reconsideration and the Prosecution Application for Leave to Appeal.
2. While a Chamber has the power to reconsider its own decisions in very precise circumstances, the Prosecution fails to meet both prongs of the applicable conjunctive test.
3. The Prosecution Motion for Reconsideration fails to demonstrate a clear error of reasoning on the part of the Chamber and thus to show that the Impugned Decision is manifestly unsound. Indeed, the Prosecution Motion for Reconsideration: (i) is but an attempt to relitigate prior arguments duly considered by the Chamber that failed; and (ii) fails to show that the Trial Chamber misapplied its own ruling on silences by the Pre-Trial Chamber.
4. The Prosecution Motion for Reconsideration also fails to demonstrate that the Impugned Decision results in inconsistencies giving rise to manifestly unsatisfactory consequences amounting to an injustice.

¹ ICC-01/04-02/06-450.

² ICC-01/04-02/06-460.

5. Reconsideration of the Impugned Decision is thus unwarranted.
6. The Prosecution Application for Leave to Appeal illustrates no more than mere disagreements with the Impugned Decision, thereby failing to identify any appealable issues.
7. Moreover, considering that Mr Ntaganda is not charged as a direct perpetrator for the crimes of rape and sexual slavery of child soldiers, the Prosecution submissions that the Impugned Decision involves issues: (i) that would significantly affect the fair and expeditious conduct of the proceedings, as it may *inter alia* necessitate further investigations; and (ii) that would significantly affect the outcome of the trial, are without merit.
8. Lastly, the Prosecution submissions in its Application for Leave to Appeal make it clear that whether or not leave to appeal is granted, it intends to impermissibly adduce evidence at trial on the allegations originally contained in paragraphs 104 and 105 of the Updated DCC³ ("Removed Allegations"), that is, conduct which has not been charged. It is thus evident that immediate resolution by the Appeals Chamber of the issues put forward by the Prosecution as such will not materially advance the proceedings.

I. THE PROSECUTION MOTION FOR RECONSIDERATION

A. Chambers Have the Power to Reconsider their Own Decisions

9. The Defence acknowledges that, although not expressly provided for in the legal framework of the International Criminal Court ("Court"), a Chamber has the power to reconsider its own decision when it is "manifestly unsound" and its consequences are "manifestly unsatisfactory"⁴ in the sense that its decision rests on a clear error of reasoning and would result in an injustice.⁵

³ By "Updated DCC", the Defence refers to ICC-01/04-02/06-402-AnxA.

⁴ ICC-01/04-01/06-2705 ("*Lubanga* Decision"), para.18, referred to in ICC-01/09-02/11-863 ("*Kenyatta* Decision"), para.11.

⁵ It stems from the *Lubanga* Decision that guidance was sought from the jurisprudence of the *ad hoc* tribunals in articulating the test for reconsideration by a Chamber of its own decisions: *Lubanga*

10. As clearly established in the jurisprudence of the Court, the applicable is test is cumulative.⁶
 11. Significantly, the Prosecution Motion for Reconsideration fails on both prongs, as the Prosecution fails to demonstrate that the Impugned Decision is both manifestly unsound and that its consequences are manifestly unsatisfactory.
- B. The Prosecution Fails to Demonstrate that the Impugned Decision is Manifestly Unsound**
- (i) *The Prosecution Motion for Reconsideration is but an attempt to relitigate prior arguments duly considered by the Chamber that failed*
 12. The Prosecution incorrectly contends that the Chamber “misunderstood” the scope of the Removed Allegations and their relevance to modes of liability other than direct perpetration. Indeed, it is evident that the Chamber carefully considered the Prosecution arguments with respect to the relevance of the Removed Allegations to other modes of liability.⁷
 13. It cannot be presumed lightly that the Chamber misconstrued the purpose of the Removed Allegations when ordering their removal from the Updated DCC.
 14. Significantly, far from demonstrating an error in the Chamber’s understanding of the purpose of the Removed Allegations, the Prosecution merely repeats its arguments in favour of retaining the Removed Allegations previously advanced in its Observations on the Updated DCC,⁸ which the

Decision, paras.15-18. *See inter alia The Prosecutor v. Radovan Karadzic*, IT-95-5/18-T, Decision on Prosecution’s request for reconsideration of Trial Chamber’s 11 November 2010 Decision, 10 December 2010, para.8.

⁶ *Lubanga* Decision, para.18 (“[...] irregular decisions can be varied if they are manifestly unsound *and* their consequences are manifestly unsatisfactory [...]”) (emphasis added) For a recent application, *see Kenyatta* Decision, para.12.

⁷ Impugned Decision, paras.44-45.

⁸ Compare paragraphs 30 and 31 of the Prosecution’s Additional Observations on the Areas of Disagreement in the Updated Document Containing the Charges (ICC-01/04-02/06-403) with paragraphs 6 to 9 of the Prosecution Motion for Reconsideration.

Chamber rejected. Such mere disagreement with the Chamber's analysis of the Removed Allegations certainly does not establish that the Impugned Decision is unsound.

(ii) *The Prosecution Motion for Reconsideration fails to show that the Chamber misapplied its own ruling on silences by the Pre-Trial Chamber*

15. The Prosecution argument that the Chamber's instruction to delete the Removed Allegations from the Updated DCC is at odds with the Chamber's previous ruling on silences by the Pre-Trial Chamber, is without merit.

16. As a preliminary matter in this regard, the Defence underscores that the Prosecution's speculation – as to what the Chamber *appears* to have understood from the Confirmation Decision⁹ as well as on what basis the Chamber *appears* to have ordered the deletion of the Removed Allegations¹⁰ – is revealing on the basis that it fails to establish any error in the Chamber's reasoning.

17. While the Chamber ruled 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”, it also acknowledged that “there may be circumstances in which it would be inappropriate to retain particular allegations, including where permitting their retention may be significantly misleading or prejudicial”.¹¹

⁹ Prosecution Motion for Reconsideration, paras.2 (“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 [...] as a positive *rejection* of these facts [...]”), 5 (“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”).

¹⁰ Prosecution Motion for Reconsideration, para.15 (“This misunderstanding appears to lie at the heart of the Trial Chamber's instruction to exclude the allegations of [Mr Ntaganda's] personal commission of rape and sexual slavery from paragraphs 104 and 105 of the DCC”).

¹¹ Impugned Decision, para.28.

18. Contrary to what the Prosecution implies, the Chamber's instruction to delete the Removed Allegations from the Updated DCC is not grounded on the assumption that the Pre-Trial Chamber's silence on the said allegations is indicative of their rejection. It is rather based on the seriousness of the Removed Allegations and the need to avoid giving the impression that the Removed Allegations constitute acts for which Mr Ntaganda is charged.
19. The Prosecution thus fails to show that the Chamber misapplied its own ruling on silences by the Pre-Trial Chamber.

Conclusion

20. It follows from the above that the Prosecution fails to demonstrate any clear error of reasoning on the part of the Chamber and thus to show that the Impugned Decision is manifestly unsound.

C. The Prosecution Fails to Demonstrate that the Impugned Decision Would Lead to Unsatisfactory Consequences

21. The Prosecution's argument that the Impugned Decision would lead to the exclusion of allegations relating to an "important" aspect of Mr Ntaganda's alleged criminal conduct "notwithstanding their being confirmed by the Pre-Trial Chamber for trial"¹² is based on an incorrect premise. Nothing indicates that the Pre-Trial Chamber "confirmed" the Removed Allegations. Indeed, the purpose of the confirmation stage is to confirm the charges brought by the Prosecution against Mr Ntaganda, not every single factual allegation contained in the DCC.¹³
22. Furthermore, the purported inconsistencies in the treatment of the crimes of rape and sexual slavery and other crimes charged against Mr Ntaganda¹⁴ cannot be regarded as an unsatisfactory consequence of the Impugned

¹² Prosecution Motion for Reconsideration, para.16.

¹³ Impugned Decision, para.28, *referring to* ICC-01/09-01/11-522, paras.19-20; ICC-01/09-02/11-584, para.23.

¹⁴ Prosecution Motion for Reconsideration, paras.17-19.

Decision. Any reference to Mr Ntaganda's alleged "own criminal actions" is necessarily linked to those crimes for which he is charged as a direct perpetrator. By not charging Mr Ntaganda as a direct perpetrator of the crimes of rape and sexual slavery of child soldiers, the Prosecution deliberately opted not to attach a legal characterization to these allegations.

Conclusion

23. In light of the above, the Prosecution Motion for Reconsideration fails on both prongs of the applicable test for reconsideration, as the Prosecution fails to demonstrate that the Impugned Decision is both manifestly unsound and that its consequences are manifestly unsatisfactory.

24. The Prosecution Motion for Reconsideration must therefore be denied.

II. THE PROSECUTION APPLICATION FOR LEAVE TO APPEAL

25. Likewise, the Prosecution Application for Leave to Appeal the Impugned Decision must be denied.

26. Firstly, none of the two issues put forward by the Prosecution in its Application are 'appealable' issues arising out of the Impugned Decision.

27. Secondly, the Prosecution Application for Leave to Appeal fails to meet the appellate standard as set out in Article 82(1)(d) of the Statute. In particular, the Prosecution fails to demonstrate that: (i) the two proposed issues affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (ii) the immediate resolution of the two proposed issues would materially advance the proceedings.

A. The Prosecution Application for Leave to Appeal Fails to Identify Appealable Issues

28. It is well-established jurisprudence that the appealing party must identify an 'appealable' issue, namely "an identifiable subject or topic requiring a

decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.¹⁵

29. Under its first proposed issue, the Prosecution merely requires appellate adjudication of arguments previously advanced in its Observations on the Updated DCC,¹⁶ which the Chamber carefully considered and rejected.¹⁷ As it only shows a mere disagreement with the Chamber over the relevance of the Removed Allegations to the modes of liability other than direct perpetration, the first proposed issue cannot be regarded as an ‘appealable’ issue.
30. The second proposed issue – whether the Chamber misapplied its own articulated standard on silences by the Pre-Trial Chamber – constitutes a misrepresentation of the Chamber’s application of the said ruling. As explained above, the Chamber acknowledged that there are exceptions to the principle according to which a silence on the part of the Pre-Trial Chamber on a factual allegation does not necessarily result in its removal from the Updated DCC, including where permitting its retention may be significantly misleading or prejudicial.
31. The Prosecution’s second proposed issue overlooks that the factors – on which the Chamber’s discretionary instruction to exclude the Removed Allegations from the Updated DCC is grounded – fall within these exceptions. Accordingly, the second proposed issue fails to qualify as an ‘appealable’ issue.

¹⁵ ICC-01/04-618, para.9.

¹⁶ Compare paragraphs 30 and 31 of the Prosecution’s Additional Observations on the Areas of Disagreement in the Updated Document Containing the Charges (ICC-01/04-02/06-403) with paragraph 24 of the Prosecution Application for Leave to Appeal.

¹⁷ Impugned Decision, para.44.

B. The Prosecution Application for Leave to Appeal Fails to Show that the Impugned Decision Involves Issues that Would Significantly Affect the Fair and Expeditious Conduct of the Proceedings or the Outcome of the Trial

32. Relying on mere speculations and incorrect legal assumptions, the Prosecution also fails to demonstrate that its two proposed issues significantly affect the (i) fair and (ii) expeditious conduct of the proceedings, or the (iii) outcome of the trial.

(i) *The two proposed issues do not affect the fair conduct of the proceedings*

33. At no time during the confirmation of charges process – other than for a mere allusion linked to Witness P-0038¹⁸ – did the Prosecution specify that the phrase “*his own criminal actions*” or similar phrases, referred to in various paragraphs of the DCC,¹⁹ encompassed the Removed Allegations. Moreover, until now the Prosecution has never labeled the Removed Allegations as an important aspect of its case.

34. Thus, the Prosecution’s new characterization of Mr Ntaganda’s alleged personal commission of rape and sexual slavery of child soldiers as an “important aspect” of his alleged criminal conduct²⁰ is but an attempt to cure its silence on these allegations throughout the confirmation process. The Prosecution therefore incorrectly contends that the Chamber’s instruction to delete the Removed Allegations impacts on its ability to properly exercise its powers and fulfill its duties in Article 54, including its ability to present its case. As such, the Prosecution fails to demonstrate that the Impugned Decision involves issues that would significantly affect the fair conduct of the proceedings.

¹⁸ ICC-01/04-02/06-258-AnxA9, p.16.

¹⁹ See *inter alia* Updated DCC, paras.126(d), 134, 149(a) and 167(e).

²⁰ Prosecution Application for Leave to Appeal, para.30.

(ii) *The two proposed issues do not affect the expeditious conduct of the proceedings*

35. The Prosecution's claim that the two proposed issues would affect the expeditious conduct of the proceedings – as this may necessitate further investigations and possibly delay the trial – is wholly speculative. Moreover, the Prosecution fails to substantiate its claim.

36. Bearing in mind that the Updated DCC includes many ways in which Mr Ntaganda would have contributed to the crimes of rape and sexual slavery of child soldiers, and considering that the Prosecution's case has always been and remains that Mr Ntaganda is not responsible for these crimes as a direct perpetrator but pursuant to three other modes of liability, the Impugned Decision does not impact the Prosecution's ability to lead its case.

(iii) *The two proposed issues do not significantly affect the outcome of the trial*

37. As noted by the Chamber, Mr Ntaganda is not charged as a direct perpetrator for the crimes of rape and sexual slavery of child soldiers.²¹ Hence, the Chamber's exercise of its discretion to instruct the deletion of the Removed Allegations from the Updated DCC will not result in preventing any crime alleged in the DCC from forming the factual basis upon which the judgement pursuant to Article 74 of the Statute will be rendered.

38. In this regard, the Prosecution's arguments in paragraph 33 misconstrue the holding of the Single Judge of Pre-Trial Chamber II in the *Ruto and Sang* case.²²

C. The Prosecution Application for Leave to Appeal Fails to Show that Immediate Resolution by the Appeals Chamber of the Proposed Issues May Materially Advance the Proceedings

39. It stems from the Prosecution Application for Leave to Appeal that the Prosecution's real aim in seeking leave to appeal – and for that matter in seeking reconsideration of the Impugned Decision – is to pave the way to

²¹ Impugned Decision, para.45.

²² ICC-01/09-01/11-912, para.65.

being able to lead evidence at trial on allegations relating to conduct which has not been charged, despite the deletion of the Removed Allegations.²³

40. More importantly, the Prosecution submissions in its Application for Leave to Appeal make it clear that whether or not leave to appeal is granted, it will attempt to impermissibly adduce evidence at trial on allegations relating to conduct which has not been charged.
41. It is thus evident that immediate resolution by the Appeals Chamber of the issues put forward by the Prosecution as such, will not materially advance the proceedings.
42. In this regard, the Prosecution Application for Leave to Appeal can only be labeled as inappropriate.

RELIEF SOUGHT

43. In light of the above submissions and arguments, the Defence respectfully requests the Chamber to: (i) deny the Prosecution Motion for Reconsideration; and (ii) deny the Prosecution Application for Leave to Appeal.

RESPECTFULLY SUBMITTED ON THIS 20th DAY OF FEBRUARY 2015



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands

²³ See, in particular: Prosecution Application for Leave to Appeal, para.34 and fn.30.