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Pénale
Internationale**



**International
Criminal
Court**

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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

Common Legal Representatives' joint response to 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"

Source: Office of Public Counsel for Victims

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

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I. PROCEDURAL BACKGROUND

1. On 6 February 2015, Trial Chamber VI (the “Chamber”) issued the “Decision on the updated document containing the charges” (the “Decision”), directing the Prosecution to *inter alia* amend or delete allegations regarding the accused direct participation in rape and sexual enslavement as they could wrongly “[give] *the impression that [they] constitute acts for which the accused is charged*”.¹

2. On 16 February 2015, the Prosecution filed its “[...] Submission of an Updated Document Containing the Charges pursuant to ICC-01/04-02/06-450”.²

3. On the same day, the Prosecution further submitted its “[...] [M]otion 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” (the “Prosecution Motion”). In particular, the Prosecution requested the Chamber to reconsider the discrete portion of its Decision on the updated document containing the charges in which it ordered the Prosecution to remove references to the accused having personally raped and sexually enslaved girl and women soldiers, or, in the alternative, to grant it leave to appeal the Decision with respect to said aspect.³

4. In conformity with regulations 24(2) and 65(3) of the Regulations of the Court, the Common Legal Representatives respectfully jointly submit their response to the Prosecution Motion.

¹ See the “Decision on the updated document containing the charges” (Trial Chamber VI), No. ICC-01/04-02/06-450, 6 February 2015, paras. 44-45 (the “Decision”).

² See the “Prosecution’s Submission of an Updated Document Containing the Charges pursuant to ICC-01/04-02/06-450”, No. ICC-01/04-02/06-458, 16 February 2015.

³ See 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”, No. ICC-01/04-02/06-460, 16 February 2015 (the “Prosecution Motion”).

II. SUBMISSIONS

5. The issues raised by the Prosecution are determinative for the question as to whether, and to which extent, the alleged facts regarding the personal involvement of the accused in the commission of the crimes of rape and sexual slavery against girls and women soldiers will be addressed in the trial proceedings. These issues are of crucial importance for the victims and, in particular, directly touch upon the interests of the victims represented by the Common Legal Representative of the Child soldiers. In this regard, the latter underlines that at least one of her clients is directly concerned by these facts as direct victim of rape and sexual enslavement perpetrated by the accused. Therefore, should said allegations be excluded from the scope of the trial proceedings or not be addressed exhaustively, the victims of rape and sexual slavery will be deprived of the opportunity for the Chamber to establish the truth about the crimes they suffered from and for said victims to obtain reparations for the crimes committed against them.

6. As a consequence, the Common Legal Representatives fully support the Prosecution Motion and submit that the relevant part of the Decision should be reconsidered by the Chamber. In the alternative and in the event that the request for reconsideration is dismissed, the Common Legal Representatives request the Chamber to grant leave to appeal the Decision with respect to the two issues identified by the Prosecution in its Motion. For the purposes of this filing, the Common Legal Representatives fully endorse the arguments of the Prosecution and will not repeat said argumentation.

1. Submissions regarding the request for reconsideration

7. The Common Legal Representatives submit that the Prosecution correctly characterised its Motion as a request for reconsideration of the Decision. Reconsideration is warranted as it constitutes an appropriate remedy in light of the

unsound nature and manifestly unsatisfactory consequences of the Chamber's findings in the relevant part of said decision.⁴ In particular, the Common Legal Representatives underline that the jurisprudence of the Court regarding the availability of such a remedy at the trial stage and in exceptional circumstances is clearly established.⁵ Moreover, the Common Legal Representatives recall the jurisprudence according to which *"the powers of a chamber allow it to reconsider its own decisions, prompted by (one of) the parties or proprio motu"*.⁶ In this regard, the Prosecution correctly prompted the Chamber for reconsideration of the Decision. As underlined by Trial Chamber I, *"[t]he reason for permitting the exercise of this discretion is, not least, that it maintains public confidence in the criminal judicial system."*⁷

8. In relation to the applicable criteria for reconsideration requests, the Common Legal Representatives submit that the Trial Chamber has a duty to ensure that the trial is fair and expeditious in accordance to article 64(2) of the Rome Statute. The Common Legal Representatives contend that the criteria first established by Trial Chamber I to determine in which circumstances decisions should be considered irregular and thus open for reconsideration, *"manifestly unsound"* and with *"consequences [...] manifestly unsatisfactory"*, are based on the following notions: the demonstration of a clear error in reasoning, or the demonstration that the decision

⁴ *Idem*, paras. 4 to 21.

⁵ See the "Decision on the defence request to reconsider the "Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010" (Trial Chamber I), No. ICC-01/04-01/06-2705, 30 March 2011; the "Decision on the request to present views and concerns of victims on their legal representation at the trial phase" (Trial Chamber V), No. ICC-01/09-01/11-511, 13 December 2012; the "Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial" (Trial Chamber V(B)), No. ICC-01/09-02/11-863, 26 November 2013; the "Public redacted version of "Decision on 'Defence Request for Reconsideration of the 'Decision on 'Defence request for recall of Witness P-178'", ICC-01/05-01/08-3186-Conf"" (Trial Chamber III), No. ICC-01/05-01/08-3204-Red, 11 December 2014.

⁶ See the "Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial" (Trial Chamber V(B)), No. ICC-01/09-02/11-863, 26 November 2013, para. 11.

⁷ See the "Decision on the defence request to reconsider the "Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010" (Trial Chamber I), No. ICC-01/04-01/06-2705, 30 March 2011, para. 18.

was erroneous or constitute an abuse of power on the part of the Chamber resulting in an injustice.⁸

9. The Common Legal Representatives argue that the Prosecution properly established the unsound nature and the unsatisfactory consequences resulting from the implementation of the relevant part of the Decision. The Prosecution submissions identify clear errors in the reasoning of the Chamber: in relation to the misinterpretation of the Pre-Trial Chamber's findings on the one hand, and with respect to the misapplication of its own standard on the other hand.

10. The two issues for which the Prosecution requests a reconsideration are namely (i) the fact that 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"*; and (ii) that 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. With regard to the first issue, the Common Legal Representatives submit that it is obvious that the Prosecution did not mention the facts at hand in its Document containing the charges to support a different mode of liability against the accused (*i.e.* direct perpetration) in the first place,⁹ but rather in support of those modes of liability presented in said document and subsequently confirmed by the Pre-Trial Chamber. Regarding the second issue, the Common Legal Representatives contend that the Chamber's conclusion drawn from the Confirmation Decision obviously contradicts

⁸ See the "Decision on the defence request to reconsider the "Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010" (Trial Chamber I), No. ICC-01/04-01/06-2705, 30 March 2011, paras. 13 to 18.

⁹ As clarified several times by the Prosecution and noted by the Pre-Trial Chamber. See the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda" (Pre-Trial Chamber II), No. ICC-01/04-02/06-309, 9 June 2014, para. 144: *"The Prosecutor has not charged Mr. Ntaganda as a direct perpetrator of any of the crimes set forth in counts 4 to 9"*.

its own reasoning according to which: *“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. 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.”*¹⁰ In this regard, the Common Legal Representatives submit that the “silence” of the Pre-Trial Chamber cannot legally be construed as the Chamber did and underline that the Pre-Trial Chamber did not need to mention all the facts taken into consideration as underpinning the charges confirmed and has only to clearly reject the facts that it considered unsupported. In the present instance, the Pre-Trial Chamber clearly did not reject the facts at stake.

12. Finally, the Common Legal Representatives contend that it will be in the interests of judicial economy and of the expeditiousness of the proceedings to address the relevant part of the Decision through a reconsideration procedure rather than the procedure under article 82(1)(d) of the Rome Statute.

2. Submissions regarding the request for leave to appeal

13. Should the Chamber deem that the admissibility criteria applicable to reconsider the relevant part of the Decision are not met and/or the issues raised by the Prosecution require a determination by the Appeals Chamber, the Common Legal Representatives fully support the Prosecution alternative request for leave to appeal under article 82(1)(d) of the Rome Statute.

¹⁰ See the Decision, *supra* note 1, para. 28.

a. The criteria contained in article 82(1)(d) of the Rome Statute

14. Article 82(1)(d) of the Rome Statute limits the possibility to file an appeal against *“a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”*.

15. The jurisprudence of the Court established the complementary character of the two components set out in article 82(1)(d) of the Rome Statute, as well as the necessity to show their cumulative existence in order to be granted leave to appeal.¹¹

16. In this regard, the Appeals Chamber determined that *“[e]vidently, article 82(1)(d) of the Statute has two components. The first concerns the prerequisites for the definition of an appealable issue and the second the criteria by reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber”*.¹² The Appeals Chamber also considered that *“[n]ot every issue may constitute the subject of an appeal. It must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’”*.¹³ Moreover, pursuant to the constant jurisprudence of the Court, *“the mere fact that an issue is of general interest or could be raised in future pre-trial or trial proceedings is not sufficient to warrant the granting of leave to appeal”*,¹⁴ and *“[l]eave to file interlocutory appeals against decisions should therefore only be granted in exceptional circumstances”*.¹⁵

¹¹ See the “Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s applications for warrants of arrest under article 58” (Pre-Trial Chamber II), No. ICC-02/04-01/05-20-US-Exp, 19 August 2005, para. 21. See also the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, paras. 8 and 14.

¹² See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 11, para. 8.

¹³ *Idem*, para. 10.

¹⁴ See the “Decision on the Prosecutor’s application for leave to appeal the Decision on the ‘Protocol on investigations in relation to witnesses benefiting from protective measures’” (Trial Chamber II), No. ICC-01/04-01/07-2375-tENG, 8 September 2010, para. 4. See also the “Decision on Ruto Defence’s

17. Furthermore, a Chamber presented with an application for leave to appeal must not enter into examining or considering *"arguments on the merits or the substance of the appeal"* because said arguments are more appropriately for consideration and examination before the Appeals Chamber if and when leave to appeal is granted.¹⁶ Consistent with said jurisprudence, Pre-Trial Chamber I found that applications for leave to appeal should not contain in detail the arguments which the party intends to raise before the Appeals Chamber, but only the appealable issue(s) *"by way of indicating a specific factual and/or legal error"*.¹⁷

18. According to the established jurisprudence, in analysing whether an appealable issue would *"significantly affect"* the fair and expeditious conduct of the proceedings under article 82(1)(d) of the Rome Statute, the notion of *"fairness"* must be understood as making reference to situations *"when a party is provided with the genuine opportunity to present its case - under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent - and to be appraised of and comment on the observations and evidence submitted to the Court that might influence its decision"*.¹⁸ In turn, *"expeditiousness"* must be read as *"closely linked to the concept of proceedings 'within a reasonable time', namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned"*.¹⁹

Application for Leave to Appeal the 'Decision on the Prosecution's Request to Add New Witnesses to its List of Witnesses'" (Trial Chamber V(a)), No. ICC-01/09-01/11-983, 24 September 2013, para. 20.

¹⁵ See the "Decision on the Prosecutor's application for leave to appeal the Decision on the 'Protocol on investigations in relation to witnesses benefiting from protective measures'", *supra* note 14, para. 4. See also the "Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges" (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, para. 7.

¹⁶ See the "Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58", *supra* note 11, para. 22.

¹⁷ See the "Decision on three applications for leave to appeal" (Pre-Trial Chamber I), No. ICC-02/11-01/11-307, 30 November 2012 (dated 29 November 2012), para. 70.

¹⁸ See *e.g.* the "Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure" (Pre-Trial Chamber III, Single Judge), No. ICC-01/05-01/08-75, 25 August 2008, para. 14.

¹⁹ *Idem*, para. 18.

19. Finally, the Appeals Chamber stated that in order to determine whether an issue would significantly affect the “outcome of the trial” under article 82(1)(d) of the Rome Statute, “[t]he Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence”.²⁰

b. Application of the criteria contained in article 82(1)(d) of the Rome Statute to the Prosecution Motion

20. The Prosecution seeks leave to appeal the Decision in relation to the following two issues:

“(a) Whether the trial Chamber misinterpreted the Pre-Trial Chamber’s findings in the Confirmation Decision, when it stated [...] that the reason why the Pre-Trial Chamber did not expressly make findings in relation to the factual allegations 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”)”.*²¹

21. The Common Legal Representatives submit first that the Prosecution’s contentions put forward in its request for leave to appeal do not constitute a mere disagreement with the Chamber’s findings but raise important issues which significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial, and the immediate resolution of which by the Appeals Chamber will consequently materially advance them. Therefore, the issues raised by the Prosecution meet the requirements of article 82(1)(d) of the Rome Statute as developed by the jurisprudence of the Court.

²⁰ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 11, para. 13.

²¹ See the Prosecution Motion, *supra* note 3, para. 22.

22. The Appeals Chamber stated that “[o]nly an ‘issue’ may form the subject-matter of an appealable decision”,²² and defined the term “issue” as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.²³ In this regard, the Common Legal Representatives contend that the Prosecution correctly identified two specific legal errors underpinning the Decision and as such, that the two issues concerned do arise from said decision.²⁴ The conclusions of the Chamber to which the two issues are attached arose from the Decision for the first time. Moreover, both issues are “constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”.²⁵ Indeed, should the relevant part of the Decision be maintained, the alleged facts regarding the involvement of the accused in the commission of the crimes of rape and sexual slavery against girls and women soldiers will be ruled out at the current stage from the scope of the trial proceedings, despite the fact that the Pre-Trial Chamber is the sole relevant authority to confirm the charges and delimit the scope of the case.

23. Furthermore, the Common Legal Representatives submit that should the relevant part of the Decision be maintained, the Prosecution will be prevented from presenting an important aspect of the accused’s criminal conduct, despite the fact that the Pre-Trial Chamber did not exclude it when confirming the charges against him, resulting in a blatant unfairness for the Prosecution which has the duty to present its case in full and to prove the responsibility of the accused after having the possibility to test the evidence in its possession at trial and before the Trial Chamber. This unfairness will in turn prejudice the establishment of the truth the Chamber is responsible of, which will cause an irremediable prejudice to the rights of victims to be presented with and understand the events they have been suffering from.

²² See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 11, para. 9.

²³ *Idem*.

²⁴ See the “Decision on three applications for leave to appeal”, *supra* note 17, para. 70.

²⁵ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 11, paras. 9-10.

24. The Common Legal Representatives further support the Prosecution's argument²⁶ according to which absent the possibility to rely on this important part of the accused's conduct to demonstrate how the component of the confirmed modes of liability are established, not only would the Chamber be deprived of an important factual part of the events, but also can the Chamber already anticipate that delays may certainly happen in the proceedings in order for the Prosecution to reinforce other aspects of the evidence available and possibly to gather other evidence. Confronted with such a perspective, the Common Legal Representatives submit that such a scenario will obviously not be in the best interest of the Defence nor in compliance with the expeditiousness of the proceedings. Once again, in turn, not only would the parties and the Chamber be prejudiced by such delays but also the victims, who are entitled to know the truth of what happened to them as expeditiously as possible, especially noting that the events under scrutiny occurred more than 13 years ago.

25. In addition, the Common Legal Representatives cannot but draw the attention of the Chamber on two possible prejudicial consequences of the Decision should its relevant part be maintained. On the one hand, some of the charges confirmed under the modes of responsibility envisaged to date may not be established sufficiently in the course of the trial, since the facts at stake form an integral part of the Prosecution's evidence. Consequently and on the other hand, the victims will be prevented from understanding in full and accessing the truth of what they have been going through, in turn preventing an accurate account of the events to be established.

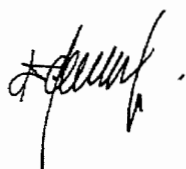
26. In conclusion, the Common Legal Representatives submit that only two judicial and legal ways exist within the legal framework of the Court to establish the truth. The first stage follows the public debate occurring at the confirmation of the charges hearing, sanctioned by the decision of a pre-trial chamber on the charges that are confirmed for trial. The second stage is the trial itself, in the course of which

²⁶ See the Prosecution Motion, *supra* note 3, para. 32.

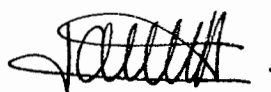
evidence, theories and material are tested, as much as possible publicly, and following which, only, a trial chamber will issue a judgment on the guilt or the innocence of an accused. If a pre-trial chamber did not exclude facts, charges or modes of liability at the confirmation stage, the only next proper judicial way of assessing the evidence is via a contradictory, fair and public testing at trial. In the meantime, and mindful of the rights of the Defence, the Common Legal Representatives note that the current debate on the relevant part of the Decision will form part of the record of the case, including after a possible correction of the Chamber's conclusions, thus preventing any prejudice to the rights of the Defence.

27. Consequently, the Common Legal Representatives submit that the two issues as identified by the Prosecution arise from the Decision and meet the criteria for granting leave to appeal under article 82(1)(d) of the Rome Statute.

FOR THE FOREGOING REASONS, the Common Legal Representatives respectfully request the Trial Chamber to grant the Prosecution's request for reconsideration, or, in the alternative, to grant leave to appeal with respect to the two issues identified in the Request under article 82(1)(d) of the Rome Statute.



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Victims of the Attacks



Sarah Pellet
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Dated this 20th day of February 2015

At The Hague, The Netherlands