

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 18 March 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

**Decision on the Prosecution's request for reconsideration or, in the alternative,
leave to appeal**

Decision 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 Bosco Ntaganda

Mr Stéphane Bourgon

Mr Luc Boutin

Legal Representatives of Victims

Ms Sarah Pellet

Mr Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**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**

Others

Trial Chamber VI ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64, 67 and 82(1)(d) of the Rome Statute ('Statute'), Rule 155 of the Rules of Procedure and Evidence ('Rules') and Regulation 65 of the Regulations of the Court ('Regulations'), issues the following 'Decision on the Prosecution's request for reconsideration or, in the alternative, leave to appeal'.

I. Procedural history

1. On 30 October 2014, the Chamber ordered the Office of the Prosecutor ('Prosecution') to file a draft updated document containing the charges, reflecting the confirmation decision,¹ by 14 November 2014, together with an annex identifying any points of disagreement that could not be resolved during *inter partes* consultations with the defence team for Mr Ntaganda ('Defence').²
2. Accordingly, on 14 November 2014, the Prosecution submitted a draft updated document containing the charges ('Prosecution Proposal'), and identified outstanding areas of disagreement.³
3. Having been authorised to do so by the Chamber,⁴ on 21 November 2014, the Prosecution⁵ and Defence⁶ filed additional observations in relation to the principal areas of disagreement.
4. On 6 February 2015, the Chamber issued a decision ruling on the outstanding points of disagreement ('Impugned Decision'),⁷ including, in particular, directing

¹ Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, ICC-01/04-02/06-309.

² Order instructing the Prosecution to prepare an updated document containing the charges, ICC-01/04-02/06-390, para. 7.

³ Prosecution's Submission of an Updated Document Containing the Charges, the Joint Submission of Areas of Disagreement and Request to File Additional Observations, ICC-01/04-02/06-402, with Public Annexes A, B and C.

⁴ E-mail communication from a Legal Officer of the Chamber to the parties on 17 November 2014 at 18:33.

⁵ Prosecution's Additional Observations on the Areas of Disagreement in the Updated Document Containing the Charges, ICC-01/04-02/06-403.

⁶ Additional Observations on Behalf of Mr Ntaganda Concerning the Prosecution's Updated Document Containing the Charges, ICC-01/04-02/06-405.

that factual allegations concerning Mr Ntaganda's direct participation in rape and sexual slavery be removed from the Prosecution Proposal.⁸

5. On 16 February 2015, the Prosecution sought reconsideration or, in the alternative, leave to appeal a discrete portion of the Impugned Decision ('Request').⁹
6. On 20 February 2015, the Defence responded opposing the Request ('Defence Response').¹⁰
7. Also on 20 February 2015, the Legal Representatives of Victims ('LRVs') filed a joint response supporting the Request ('LRVs Response').¹¹

II. Submissions and analysis

A. Reconsideration

1. Submissions

8. The Prosecution submits that the Chamber 'misunderstood the scope of the Prosecution's allegations that Mr Ntaganda personally committed rape and sexual slavery', and the relevance of the allegations to the charges confirmed by the Pre-Trial Chamber.¹² It submits that the allegations were relied upon to establish part of Mr Ntaganda's contribution to the crimes charged under Article 25 of the Statute, and his knowledge under Article 28 of the Statute.¹³ The Prosecution asserts that consequently the Chamber 'was wrong to conclude' that the Pre-Trial Chamber considered the allegations to be an unnecessary part of the

⁷ Decision on the updated document containing the charges, ICC-01/04-02/06-450.

⁸ Impugned Decision, ICC-01/04-02/06-450, paras 44-45 and the disposition, page 40.

⁹ 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, ICC-01/04-02/06-460.

¹⁰ Response on Behalf of Mr Ntaganda to Prosecution Motion for Reconsideration and Prosecution Application for Leave to Appeal, ICC-01/04-02/06-468.

¹¹ 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", ICC-01/04-02/06-469.

¹² Request, ICC-01/04-02/06-460, paras 2, 5 and 7.

¹³ Request, ICC-01/04-02/06-460, paras 8-9.

case before it, and to itself conclude that the allegations relate to conduct which has not been charged.¹⁴ It contends that the Chamber's conclusion was also contrary to the reasoning which had accepted that the Pre-Trial Chamber is not required to enter an express finding in relation to each allegation pleaded.¹⁵ The Prosecution submits that the fact the Pre-Trial Chamber did not mention the allegations in question does not mean it 'implicitly rejected' them, but rather that they were not 'strictly necessary to establish substantial grounds to believe' in respect of the charged crimes and modes of liability.¹⁶

9. Furthermore, the Prosecution argues that reconsideration is warranted to 'avoid the unsound and unsatisfactory outcome' of the Impugned Decision, including: (i) the exclusion of facts which were confirmed by the Pre-Trial Chamber from the document containing the charges;¹⁷ (ii) inconsistency in so far as personal commission could be used to establish Mr Ntaganda's contribution to certain crimes, but not rape and sexual slavery of girl and women soldiers;¹⁸ and (iii) further inconsistency arising from the Impugned Decision as a result of the fact that the Chamber did not require the deletion of certain cross-references in Counts 6 and 9.¹⁹
10. The LRVs submit that the Request directly impacts the interests of their clients regarding the extent to which the allegations in question 'will be addressed in the trial proceedings'.²⁰ In respect of reconsideration, the LRVs endorse the submissions of the Prosecution.²¹

¹⁴ Request, ICC-01/04-02/06-460, paras 10 and 12.

¹⁵ Request, ICC-01/04-02/06-460, para. 13.

¹⁶ Request, ICC-01/04-02/06-460, paras 14-15.

¹⁷ Request, ICC-01/04-02/06-460, para. 16.

¹⁸ Request, ICC-01/04-02/06-460, paras 17-19.

¹⁹ Request, ICC-01/04-02/06-460, para. 20.

²⁰ LRVs Response, ICC-01/04-02/06-469, para. 5.

²¹ LRVs Response, ICC-01/04-02/06-469, paras 6, 9-11.

11. The Defence acknowledges that chambers have the power to reconsider their own decisions,²² but submits that the Prosecution has failed to meet the requisite test.²³ The Defence argues that the reconsideration portion of the Request: (i) is merely an attempt to re-litigate submissions which the Chamber had previously rejected;²⁴ and (ii) misconstrues the Impugned Decision.²⁵ The Defence contests the Prosecution's submission that the Impugned Decision would lead to unsatisfactory consequences, arguing that '[n]othing indicates' that the Pre-Trial Chamber confirmed the allegations in question.²⁶ The Defence also submits that any contribution through Mr Ntaganda's own criminal actions is 'necessarily linked' to those crimes for which Mr Ntaganda is charged as a direct perpetrator, and the Prosecution 'deliberately opted' not to legally characterise the allegations in question.²⁷

2. Analysis

12. As the Chamber has previously held,²⁸ the Statute does not provide guidance on reconsideration of interlocutory decisions,²⁹ but the Chamber considers that the powers of a chamber allow it to reconsider its own decisions, prompted by one of the parties or *proprio motu*.³⁰ Reconsideration is exceptional, and should only be

²² Defence Response, ICC-01/04-02/06-468, paras 2, 9-10.

²³ Defence Response, ICC-01/04-02/06-468, paras 2 and 11.

²⁴ Defence Response, ICC-01/04-02/06-468, paras 3, 12-14.

²⁵ Defence Response, ICC-01/04-02/06-468, paras 15-19.

²⁶ Defence Response, ICC-01/04-02/06-468, para. 21.

²⁷ Defence Response, ICC-01/04-02/06-468, para. 22.

²⁸ Decision on the Defence request for reconsideration and clarification, 27 February 2015, ICC-01/04-02/06-483, para. 10.

²⁹ See Article 84 of the Statute expressly permitting revision of a final conviction or sentence in light of, *inter alia*, new evidence.

³⁰ Article 64(2) and (3) of the Statute; Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705 ('*Lubanga* Reconsideration Decision'); Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the request to present views and concerns of victims on their legal representation at the trial phase, 14 December 2012, ICC-01/09-01/11-511, para. 6; Trial Chamber V(B), *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, 26 November 2013, ICC-01/09-02/11-863 ('*Kenyatta* Reconsideration Decision').

done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.³¹

13. The Chamber considers that the Prosecution has failed to meet this standard. In arguing that the Chamber directed that the allegations in question be removed on the basis that they did not form part of the Prosecution's case, or had been rejected by the Pre-Trial Chamber, the Prosecution misconstrues the Impugned Decision. The Chamber had merely noted that the legal characterisation of the allegations, or lack thereof, had made it unnecessary for the Pre-Trial Chamber to expressly address them.³² The Chamber's direction for their removal in fact rested on a finding that deletion was appropriate 'to avoid giving the impression that [they] constitute acts for which the accused is charged'.³³ This does not provide a basis for concluding that the Chamber did not appreciate the purpose for which the allegations had been pleaded.

14. Moreover, contrary to the Prosecution's submissions, this approach is also fully consistent with the Chamber finding that allegations upon which the Pre-Trial Chamber was silent may be retained in the updated document containing the charges, except in circumstances where their retention 'may be significantly misleading or prejudicial'.³⁴

15. The Prosecution's submission that the Impugned Decision would lead to inconsistency between the treatment of rape and sexual slavery and that of other

³¹ See Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits, 10 February 2015, ICC-01/09-01/11-1813, para. 19; ICTR, Appeals Chamber, *Jean Uwinkindi v. The Prosecutor*, Decision on Uwinkindi's Motion for Review or Reconsideration of the Decision on Referral to Rwanda and the Related Prosecution Motion, 23 February 2012, ICTR-01-75-AR11bis, para. 11; ICTR, Appeals Chamber, *Juvénal Kajelijeli v. the Prosecutor*, Judgement, ICTR-98-44A-A, para. 203; ICTY, Appeals Chamber, *Prosecutor v. Zdravko Mucić et al.*, Judgment on Sentence Appeal, 8 April 2003, IT-96-21-Abis, para. 49. For similar criteria, see also *Kenyatta Reconsideration Decision*, ICC-01/09-02/11-863, para. 11; *Lubanga Reconsideration Decision*, ICC-01/04-01/06-2705, para. 18 (the Chamber may reconsider past decisions when they are 'manifestly unsound and their consequences are manifestly unsatisfactory').

³² Impugned Decision, ICC-01/04-02/06-450, para. 45.

³³ Impugned Decision, ICC-01/04-02/06-450, para. 45.

³⁴ Impugned Decision, ICC-01/04-02/06-450, para. 28.

charged crimes similarly finds no basis in the Impugned Decision. The Chamber made no finding as to what could or could not be relied upon for the purpose of demonstrating Mr Ntaganda's contribution, or *mens rea*, in respect of any of the confirmed crimes or modes of liability, including the crimes falling under Counts 6 and 9. As the Appeals Chamber has noted, factual allegations forming part of the confirmed facts and circumstances are to be distinguished from, *inter alia*, 'evidence put forward [...] to support a charge'.³⁵

16. Finally, regarding the alleged inconsistency in cross-referencing, the Chamber considers that no such issue arises. The relevance of the paragraphs in question to Counts 6 and 9 has not been disputed, and there would therefore have been no basis for the Chamber to order deletion beyond that which was done.³⁶

B. Leave to appeal

1. Submissions

17. The Prosecution seeks leave to appeal the following two issues ('Issues'):³⁷

A. Whether the 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

³⁵ Appeals Chamber, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court', 8 December 2009, ICC-01/04-01/06-2205 (OA 15 OA 16), footnote 163. *See also* Trial Chamber III, Decision on the Defence application for corrections to the Document Containing the Charges and for the Prosecution to file a Second Amended Document Containing the Charges, 20 July 2010, ICC-01/05-01/08-836, paras 53 and 215.

³⁶ The Chamber notes in this regard that in the updated document containing the charges the Prosecution chose to retain paragraph 105, with no content, rather than to delete it entirely and make any required corresponding changes to cross-referencing throughout.

³⁷ Request, ICC-01/04-02/06-460, paras 3 and 22.

B. Whether in relation to the charges that Mr Ntaganda personally raped and sexually enslaved girl and women soldiers, the 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').

18. In arguing that the Issues constitute appealable issues within the meaning of Article 82(1)(d) of the Statute, the Prosecution relies primarily on its submissions made in the context of the reconsideration request.³⁸ In respect of the Second Issue, it is submitted that if leave to appeal is granted the Prosecution would argue that retaining the allegations 'is neither misleading nor prejudicial'.³⁹
19. The Prosecution submits that the Issues affect the fair conduct of the proceedings because: (i) requiring the Prosecution to 'excise' the allegations from its case impacts its ability to 'properly exercise its powers and fulfil its duties' under Article 54 of the Statute, including to present its case and establish the truth;⁴⁰ and (ii) victims may be 'deprived of the full truth being established' in relation to the charged crimes of rape and sexual slavery of girl and women soldiers.⁴¹ It submits that the Issues affect the expeditiousness of the trial by curtailing the manner in which it may prove Mr Ntaganda's contribution to the crimes of rape and sexual slavery of girl and women soldiers, and therefore 'may necessitate further investigations'.⁴² Based on the same alleged impact of the Impugned Decision, the Prosecution additionally contends that the outcome of the trial would be affected.⁴³

³⁸ Request, ICC-01/04-02/06-460, paras 24-28.

³⁹ Request, ICC-01/04-02/06-460, paras 27-28.

⁴⁰ Request, ICC-01/04-02/06-460, para. 30.

⁴¹ Request, ICC-01/04-02/06-460, para. 31.

⁴² Request, ICC-01/04-02/06-460, para. 32.

⁴³ Request, ICC-01/04-02/06-460, para. 33. *See also* para. 29 arguing that issues concerning the content of a charging document 'generally meet the criteria for leave to appeal'.

20. The Prosecution argues that appellate review would materially advance the proceedings by permitting the trial to proceed 'on safe grounds' and 'with certainty as to the factual basis', removing doubt as to whether the Prosecution can rely on Mr Ntaganda's alleged personal commission of rape and sexual slavery of girl and women soldiers to establish his contribution to Counts 6 and 9 under Article 25 of the Statute, and his knowledge under Article 28 of the Statute.⁴⁴
21. The LRVs submit that the Issues constitute appealable issues arising from the Impugned Decision.⁴⁵ They argue that the Impugned Decision would result in the Prosecution being 'prevented from presenting' an important aspect of the accused's conduct, despite the fact that the Pre-Trial Chamber as the 'sole relevant authority to confirm the charges' did not exclude it.⁴⁶ The LRVs submit that this will in turn 'prejudice the establishment of the truth'.⁴⁷ The LRVs support the Prosecution's submissions regarding the impact this would have on the expeditiousness of the proceedings.⁴⁸
22. The Defence submits that the Prosecution had never previously labelled the factual allegations in question as 'an important aspect of its case'.⁴⁹ It is argued that therefore the Prosecution incorrectly characterises the impact that the Impugned Decision would have on the fair conduct of proceedings.⁵⁰ The Defence argues that the Prosecution's submissions regarding expeditiousness are speculative and unsubstantiated.⁵¹

⁴⁴ Request, ICC-01/04-02/06-460, para. 34.

⁴⁵ LRVs Response, ICC-01/04-02/06-469, paras 21-22.

⁴⁶ LRVs Response, ICC-01/04-02/06-469, paras 22-23.

⁴⁷ LRVs Response, ICC-01/04-02/06-469, para. 23 and 25-26.

⁴⁸ LRVs Response, ICC-01/04-02/06-469, para. 24.

⁴⁹ Defence Response, ICC-01/04-02/06-468, paras 33-34. *See also* para. 36 submitting that the Impugned Decision does not change the nature of the Prosecution's case.

⁵⁰ Defence Response, ICC-01/04-02/06-468, para. 34.

⁵¹ Defence Response, ICC-01/04-02/06-468, para. 35.

23. The Defence submits that the jurisprudence relied upon by the Prosecution, for the purposes of demonstrating impact on the outcome of the trial, related to a different factual scenario not arising in this case where, it is submitted, the Impugned Decision will not result in preventing any crimes alleged in the document containing the charges from forming part of the factual basis of the judgment.⁵² The Defence submits that the 'real aim' of the Request is to 'pave the way' for leading evidence at trial relating to the factual allegations in question, regardless of whether or not leave to appeal is granted, and, consequently, immediate resolution by the Appeals Chamber would not materially advance the proceedings.⁵³

2. Analysis

24. Article 82(1)(d) of the Statute sets the requirements applicable to the granting of a request for leave to appeal, as follows:

A. whether the decision involves an issue that would significantly affect:

- i. the fair and expeditious conduct of proceedings; or
- ii. the outcome of the trial; and

B. whether in the opinion of the Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

25. The Chamber recalls that, for the purposes of the first prong of the test, the Appeals Chamber has defined an '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'.⁵⁴ The Chamber further notes that no

⁵² Defence Response, ICC-01/04-02/06-468, paras 37-38.

⁵³ Defence Response, ICC-01/04-02/06-468, paras 39-42.

⁵⁴ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168 ('DRC OA 3 Judgment'), para. 9.

automatic right of appeal is conferred by Article 82(1)(d) of the Statute. A right of appeal will arise only if, in the Chamber's opinion, the impugned decision 'must receive the immediate attention of the Appeals Chamber'.⁵⁵

26. The Chamber considers that neither of the Issues constitutes an appealable issue arising from the Impugned Decision, within the meaning of Article 82(1)(d) of the Statute. As noted above,⁵⁶ the First Issue misinterprets the Chamber's finding in the Impugned Decision, including the basis upon which the Chamber directed that the allegations in question be removed from the updated document containing the charges. In respect of the Second Issue, the Chamber considers that it lacks the necessary specificity to constitute an appealable issue. It is necessary that a discrete issue be identified for resolution by the Appeals Chamber, rather than arguing that the entirety of the Chamber's reasoning is erroneous.⁵⁷ As framed, the Second Issue does not identify any particular error in the Chamber's articulation or application of the relevant standard, and appears to merely disagree with the Chamber's assessment as to whether or not retention of the allegations in question would be misleading or prejudicial.

27. Having so found, it is unnecessary for the Chamber to continue to consider the remaining criteria under Article 82(1)(d) of the Statute. Nonetheless, the Chamber notes that the Prosecution's submissions regarding the impact of the Issues on the fairness and expeditiousness of the proceedings, as well as the outcome of the trial, are premised on an interpretation which, as indicated above, finds no basis in the Impugned Decision.

⁵⁵ *DRC OA 3 Judgment*, ICC-01/04-168, para. 20.

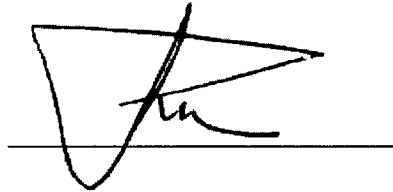
⁵⁶ See para. 13 above. See also para. 15 above.

⁵⁷ *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Decision on the joint defence request for leave to appeal the decision on witness preparation, 13 February 2013, ICC-01/09-01/11-596, para. 11.

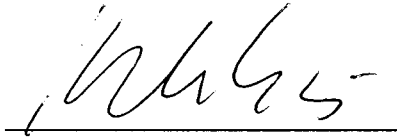
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request.

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

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Judge Robert Fremr, Presiding Judge

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Judge Kuniko Ozaki

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Judge Geoffrey Henderson

Dated 18 March 2015

At The Hague, The Netherlands