



Original: English

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

Date: 15 June 2015

TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Chang-ho Chung

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public

**Prosecution second request for notice to be given of a possible
recharacterisation pursuant to regulation 55(2)**

Source: Office of the Prosecutor

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

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

**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 Other
Section**

Introduction

1. The Prosecution requests that Trial Chamber VI (“Chamber”) give notice to the Parties and participants, pursuant to regulation 55(2) of the Regulations of the Court (“Regulations”), that the legal characterisation of the facts¹ may change to accord with a further alternative mode of liability, namely direct perpetration under article 25(3)(a) of the Statute for the war crime of conscription of children under the age of 15, punishable under article 8(2)(e)(vii) of the Statute.²
2. Providing such notice at the start of the trial³ allows the Parties and participants to prepare and advance their case with a view to the possibility of the Chamber modifying the legal characterisation in this way. It also respects the Accused’s fair trial rights by limiting prejudice and delays which could ensue were the Chamber to provide notice at a later stage in the proceedings.

Procedural History

3. On 10 January 2014, the Prosecution submitted the Document Containing the Charges in which it charged the Accused, *inter alia*, with the war crime of conscription of children under the age of 15 pursuant to article 8(2)(e)(vii) of the Statute. He was charged, in the alternative, under article 25(3)(a) (direct perpetration, direct or indirect co-perpetration), article 25(3)(b), article 25(3)(d)(i) or (ii), or article 28(a) of the Statute.⁴

¹ Facts as contained in the Updated Document Containing the Charges, ICC-01/04-02/06-458-AnxA (“Updated DCC”).

² The crime of conscription is charged in count 14 of the Updated DCC.

³ Regulation 55(2) provides that notice may be provided “at any time during the trial.” Therefore, the start of trial is the earliest opportunity for the Chamber to provide such notice.

⁴ ICC-01/04-02/06-203-AnxA.

4. On 7 March 2014, the Prosecution filed its submissions on issues that were raised during the confirmation of charges hearing.⁵ In these submissions, the Prosecution urged Pre-Trial Chamber II (“Pre-Trial Chamber”) to assess the sufficiency of the evidence presented in relation to each alternative mode of liability in order to avoid having to request the Chamber provide notice of a possible recharacterisation under regulation 55(2) prior to or at the outset of the trial.⁶
5. On 9 June 2014, the Pre-Trial Chamber issued the Confirmation Decision,⁷ finding, *inter alia*, there were substantial grounds to believe the Accused was responsible for conscripting children between 6 August 2002 and 31 December 2003 pursuant to article 25(3)(a) (as an indirect co-perpetrator), article 25(3)(d)(i) or (ii), or article 28(a) of the Statute. The Pre-Trial Chamber found “no substantial grounds to believe that Mr. Ntaganda can be held responsible as a direct perpetrator” in relation to the crime of conscription since the Prosecution had “not brought forward sufficient evidence establishing that Mr. Ntaganda carried out any of the objective elements” of this crime.⁸
6. On 14 November 2014, the Prosecution submitted a proposed Updated DCC.⁹
7. On 6 February 2015, the Chamber issued its “Decision on the updated document containing the charges” (“Decision”) in which it ordered the

⁵ ICC-01/04-02/06-276-Conf with public redacted version at ICC-01/04-02/06-276-Red.

⁶ ICC-01/04-02/06-276-Conf, para.268 with public redacted version at ICC-01/04-02/06-276-Red, para.268.

⁷ ICC-01/04-02/06-309 (Confirmation Decision).

⁸ Confirmation Decision, para.144.

⁹ ICC-01/04-02/06-402-AnxA.

Prosecution to file an Updated DCC reflecting the Chamber's findings in the Decision by 16 February 2015.¹⁰

8. On 16 February 2015, the Prosecution filed the Updated DCC.¹¹
9. On 9 March 2015, the Prosecution requested that the Chamber give notice to the Parties and participants, pursuant to regulation 55(2) of the Regulations, that the legal characterisation of the facts as contained in the Updated DCC may change to accord with a further alternative mode of liability, that of direct co-perpetration under article 25(3)(a) of the Statute, for all 18 counts.¹² On 18 March 2015, the Defence opposed this request.¹³

Prosecution's Submissions

I. Applicable Law and Jurisprudence

a. Regulation 55

10. Regulation 55 of the Regulations provides that in its decision under article 74, a Chamber may change the legal characterisation of facts to accord with the crimes or with the form of participation of the accused. This change cannot exceed the facts and circumstances described in the charges and any amendments thereto. In this light, if at any time during the trial it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The

¹⁰ ICC-01/04-02/06-450.

¹¹ Updated DCC.

¹² ICC-01/04-02/06-501.

¹³ ICC-01/04-02/06-522.

regulation also provides that a number of measures may be adopted in order to safeguard the rights of the Accused.

11. Trial Chambers of this Court have notified parties and participants of a change in the legal characterisation of facts to accord with the crimes or modes of participation under regulation 55 of the Regulations. In the *Lubanga* proceedings, further to the Prosecution's request,¹⁴ Trial Chamber I gave notice before trial began that it "may modify the characterisation of the facts" in relation to the nature of the armed conflict,¹⁵ and advised the Parties to prepare their case on this basis.¹⁶
12. In the *Ruto and Sang* proceedings, Trial Chamber V(A) provided notice shortly after the commencement of trial of the possibility that Mr Ruto's alleged criminal responsibility may be recharacterised under article 25(3)(b), (c) or (d) of the Statute.¹⁷ Trial Chamber V(A) noted that "[t]he regulation gives no guidance as to the type of information that should trigger the appearance of possible recharacterisation in the view of the Chamber" and that "for an application for the notice of a possibility of a legal recharacterisation, facts and circumstances pleaded in the charging document can also sufficiently inform the Chamber as to the apparent possibility of an eventual change in legal characterisation."¹⁸

¹⁴ ICC-01/04-01/06-953.

¹⁵ ICC-01/04-01/06-1084, para.48.

¹⁶ ICC-01/04-01/06-1084, para.49.

¹⁷ ICC-01/09-01/11-1122, p.20 ("*Ruto and Sang* Decision").

¹⁸ *Ruto and Sang* Decision, para.24.

13. The Trial Chamber in both the *Bemba*¹⁹ and the *Katanga*²⁰ proceedings also gave notice as provided for under regulation 55(2), albeit at a later stage of the proceedings.

b. Article 25(3)(a)

14. Article 25(3)(a) of the Statute provides that a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person “[c]ommits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible”. As such, an individual can be held liable as a direct perpetrator, a direct co-perpetrator and/or an indirect co-perpetrator under this provision.

15. In the Confirmation Decision, the Pre-Trial Chamber recalled that for direct perpetration:

...it must be established that [the Accused] physically carried out an objective element of the offence and that he acted with: (i) intent and knowledge pursuant to article 30 of the Statute, unless another subjective element is provided in the Statute or the Elements of Crimes; and (ii) a specific subjective element (*dolus specialis*) when required by a particular crime.²¹

16. The Pre-Trial Chamber held, based on the evidence presented at the confirmation of charges hearing, there were substantial grounds to believe the Accused was responsible for conscripting children under the age of 15 from 6 August 2002 until 31 December 2003 as an indirect co-perpetrator, but not as a

¹⁹ See ICC-01/05-01/08-2324, para.5.

²⁰ See ICC-01/04-01/07-3319-tENG/FRA, p.29. This decision was confirmed by the Appeals Chamber, see ICC-01/04-01/07-3363, p.39.

²¹ Confirmation Decision, para.136.

direct perpetrator on the basis that there was insufficient evidence to establish that he carried out the objective elements of the crime.²²

17. The Prosecution has since gathered additional evidence of the Accused's direct participation in the conscription of children under the age of 15 which it referred to in the Pre-Trial Brief²³ and intends to present at trial. As such, the Prosecution requests that the Chamber give notice of the possibility of a recharacterisation of the Accused's form of participation in the crime of conscription.

II. Notice of a possible recharacterisation is required

18. The facts and circumstances underlying direct perpetration as a mode of liability for the crime of conscription are contained in the Updated DCC in the following passages:

From the time of its foundation, the UPC enlisted children under the age of 15 into their ranks. This included children who by their physical appearance were manifestly under the age of 15 and were referred to as *kadogos*, a Swahili word meaning "small". **Bosco NTAGANDA was in charge of their recruitment.** Between on or about 6 August of 2002 and on or about 31 December 2003, throughout Ituri, **Bosco NTAGANDA and his co-perpetrators, both personally and through the UPC/FPLC, forcibly recruited and enlisted children, including those manifestly under the age of 15.** UPC/FPLC forces abducted mainly boys, but also girls, and forcibly incorporated them into the ranks of the UPC/FPLC. These recruitment drives were directly or indirectly targeted at youth, including those under the age of 15.²⁴

The UPC/FPLC and Bosco NTAGANDA pressured Hema families to contribute to the war effort by providing children to the Hema militia.²⁵

Between April and August 2002, **Bosco NTAGANDA and other co-perpetrators contributed to the implementation of the Common Plan by**

²² Confirmation Decision, para.144.

²³ See ICC-01/04-02/06-503-Conf-Exp-AnxA, paras.365-382 and the corresponding footnotes.

²⁴ Updated DCC, para.93 (emphasis added).

²⁵ Updated DCC, para.94 (emphasis added).

establishing training camps, **recruiting young persons including children under the age of 15**²⁶

...starting from on or about at least 6 August 2002 through on or about 31 December 2003, and in various locations throughout Ituri including Bunia, **Bosco NTAGANDA and his co-perpetrators directly and/or through others recruited children under the age of 15 into the UPC/FPLC.**²⁷

19. Accordingly, the Chamber could modify the legal characterisation of the facts to include direct perpetration of the crime of conscription by the Accused without exceeding the facts and the circumstances set out in the Updated DCC.
20. Further, the “overlapping legal requirements” of the crimes of conscription and enlistment²⁸ and the Pre-Trial Chamber’s confirmation of direct perpetration as a mode of liability for the crime of enlistment provide added reason for the Chamber to give notice of a possible recharacterisation at this stage.²⁹ Indeed, the Appeals Chamber has stated that a Trial Chamber can deal with these two crimes together.³⁰
21. As noted in *Ruto and Sang*, a Document Containing the Charges sufficiently informs the Chamber of the apparent possibility of an eventual change in legal characterisation.³¹ The facts contained in the Updated DCC regarding conscription lend themselves to being recharacterised to include direct perpetration.

²⁶ Updated DCC, para.114 (emphasis added).

²⁷ Updated DCC, para.164 (emphasis added).

²⁸ The distinction in the legal requirements of the two crimes is the element of compulsion that is necessary for conscription, see ICC-01/04-01/06-3121, para.311 (“*Lubanga* Appeal Judgement”).

²⁹ Confirmation Decision, para.143.

³⁰ *Lubanga* Appeal Judgement, paras.307, 311.

³¹ See *Ruto and Sang* Decision, para.24.

III. Notice should be provided at the start of trial

22. Although notice of the possibility of a recharacterisation may be given at any time during the trial, the Appeals Chamber has pronounced that it “should always be given as early as possible”.³² Trial Chamber V(A) also stated that it is best to assess the need for the legal recharacterisation of facts as early as possible “particularly in circumstances in which the Prosecution has made an early application for this notice on the basis of the facts and circumstances pleaded in the charging document”.³³
23. Providing notice at the start of the trial rather than at a later stage will better safeguard the Accused’s rights provided for under article 67(1) of the Statute by ensuring that the Accused: (i) is informed in detail of the nature, cause and content of the charges against him; (ii) has adequate time for the preparation of his defence; and (iii) is tried without undue delay.
24. Providing notice at the outset of the trial permits the Parties to present their evidence and examine witnesses with full knowledge of the possibility that the Accused’s conduct in relation to the crime of conscription could be recharacterised as direct perpetration. It also allows the Chamber to consider the evidence in light of this additional mode of liability as it is tendered, rather than retroactively.
25. Providing notice at this early stage would also avoid delays, such as those envisaged in regulation 55(3)(a) of the Regulations, and would avoid recalling witnesses and/or calling new witnesses, as envisaged in regulation 55(3)(b) of the Regulations. Therefore, giving notice of the possibility of

³² ICC-01/04-01/07-3363, para.24.

³³ *Ruto and Sang* Decision, para.27.

recharacterisation prior to the start of the trial could avoid extending the length of the trial.³⁴

26. As Trial Chamber V(A) held in the *Ruto and Sang* proceedings:

[W]aiting to give such notice increases the chances of prejudice to the Defence. The remediation of this prejudice may involve pressures either to reopen the case in certain respects, recall witnesses that have already testified or, out of respect for the rights of the accused, to forego legal recharacterisation that might otherwise have been in the interests of justice in the case. Such pressures are highly undesirable, and if earlier notice is given then they are avoidable.³⁵

IV. The proposed notice does not impact on the scope of the trial

27. The proposed notice would not affect the contested issues for trial. The Prosecution is not attempting to alter the facts or circumstances of the charges. Rather, the Prosecution is suggesting that within the scope of the charge of conscription, there is an additional way to characterise the Accused's alleged criminal responsibility.

28. As set out above, the allegations relevant to the Accused's liability as a direct perpetrator of the crime of conscription are already contained in the Updated DCC. Therefore, neither the proposed notice nor the recharacterisation would exceed the facts and circumstances currently set out in the charges.

³⁴ See *Ruto and Sang* Decision, para.42.

³⁵ *Ruto and Sang* Decision, para.27.

Relief

29. Based on the foregoing, the Prosecution asks that at the start of the trial, the Chamber give notice to the Parties and participants, pursuant to regulation 55(2) of the Regulations, that it may modify the legal characterisation of the facts to accord with an additional mode of liability, direct perpetration, with respect to count 14.



Fatou Bensouda,
Prosecutor

Dated this 15th day of June 2015
At The Hague, The Netherlands