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

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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

Public redacted version of "Response on behalf of Mr Ntaganda to 'Prosecution second request for notice to be given of a possible recharacterisation pursuant to regulation 55(2)'"

Source: Defence Team of Mr Bosco Ntaganda

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

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Further to the *“Prosecution second request for notice to be given of a possible recharacterisation pursuant to regulation 55(2)”* submitted by the Office of the Prosecutor (“Prosecution”) on 15 June 2015 (“Prosecution Second Request”),¹ Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Response on behalf of Mr Ntaganda to “Prosecution second request for notice to be given of a possible recharacterisation pursuant to regulation 55(2)”

“Defence Response”

1. The Defence hereby responds to the Prosecution Second Request seeking Trial Chamber VI (“Chamber”) to give notice to the Parties that the legal characterisation of the facts as contained in the Updated Document Containing the Charges (“Updated DCC”)² may change so as to accord with a further alternate 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 (article 8(2)(e)(viii) of the Statute) (“war crime of conscription”).
2. For the reasons expressed below, the Defence submits that the Prosecution Second Request should be denied.
3. In its Confirmation Decision,³ the Pre-Trial Chamber specifically declined to confirm the charge of direct perpetration in relation to the war crime of conscription. As acknowledged by the Prosecution,⁴ the Pre-Trial Chamber found that – in spite of the Prosecution’s submissions in this regard⁵ – there

¹ ICC-01/04-02/06-646.

² ICC-01/04-02/06-458-AnxA.

³ ICC-01/04-02/06-309 (“Confirmation Decision”).

⁴ Prosecution Second Request, para.5.

⁵ ICC-01/04-02/06-T-8Bis-Red-ENG, pp. 4-13 (“[...] Former senior military insider P-0055 states that Bosco Ntaganda explained to him that the UPC mobilisation procedure relied on elders and community leaders to mobilise young people to join the ranks of the FPLC and to fundraise for its movement. The UPC used these community leaders to assist with recruitment by exerting pressure on the Hema population to provide such support. Bosco Ntaganda introduced Witness P-0055 to one such community leader. [...] Before he joined the UPC, military insider P-0038 remembers Bosco Ntaganda and Chief Kahwa visiting Mabanga and telling the population: ‘If you do not join the army,

was no substantial grounds to believe that Mr Ntaganda can be held responsible as a direct perpetrator in relation to the war 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.⁶

4. In its Second Request, the Prosecution contends that since the issuance of the Confirmation Decision, it has gathered ‘additional evidence’ of Mr Ntaganda’s alleged direct participation in the war crime of conscription, which it refers to in its Pre-Trial Brief.⁷ In support of its contention, the Prosecution makes a general and vague reference to paragraphs 365 to 382 of its Pre-Trial Brief and the corresponding footnotes, without specifying which of the elements cited therein constitute ‘additional evidence’.⁸

5. The Prosecution Second Request is but an attempt to circumvent the procedure set out in Article 61(8) of the Statute, which provides:

Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.

6. It clearly follows from Article 61(8) that when provided with additional evidence supporting a charge which the Pre-Trial Chamber declined to confirm, the only avenue open to the Prosecution is to subsequently request its confirmation, not to seek the provision of a notice of a possible change in the legal characterisation of the facts.

you will find that your village will be razed down and that will be your problem.’ [...]); ICC-01/04-02/06-T-8Bis-Red-ENG, pp. 36-39 (“[...] Finally, my colleague, Ms Samson, has described how Bosco Ntaganda was also involved in the conscription, enlistment, as well as use of child soldiers. And I refer, by way of example, to the evidence as articulated from Witnesses P-0016, P-0046, P-0758, and P-0010.”).

⁶ Confirmation Decision, para.144.

⁷ Prosecution Second Request, para.17.

⁸ [REDACTED].

7. At the outset, the Defence notes that the Prosecution Second Request rests on the incorrect premise that each count of the Updated DCC should be regarded as a *single* charge, the scope of which could encompass all modes of liability charged therein.⁹
8. In its Confirmation Decision, the Pre-Trial Chamber made it clear that it would treat the different modes of liability put forward by the Prosecution in relation to the 18 counts as *different* charges:

Additionally, the Chamber may be presented with facts, supported with evidence, which may satisfy different modes of responsibility. Accordingly, the Chamber considers that at this stage of the proceedings it may confirm alternative charges presented by the Prosecutor as long as each charge is supported by sufficient evidence to establish substantial grounds to believe that the suspect has committed one or more of the crimes charged. In this regard, the Chamber recalls article 61(5) of the Statute, which levies on the Prosecutor to support “each charge” with sufficient evidence. Whether or not the Prosecutor has done so is a question to be assessed by the Chamber in light of its determination under article 61(7) of the Statute. Accordingly, the Prosecutor’s “failure” to support the charges against Mr. Ntaganda, as asserted by his Defence, is mainly an evidentiary question which should be resolved under this article. Should the Chamber determine that the Prosecutor has not supported each charge with sufficient evidence to the required evidentiary threshold, the result is, inter alia, to decline to confirm one or more of the charges.¹⁰

9. It follows that when finding that there were no substantial grounds to believe that Mr Ntaganda could be held responsible as a direct perpetrator for the war crime of conscription,¹¹ the Pre-Trial Chamber declined to confirm the charge of direct perpetration for the war crime of conscription.
10. It is thus irrelevant whether or not the facts and circumstances pleaded in the Updated DCC provide a sufficient factual basis for the addition of the mode of liability of direct perpetration in relation to the war crime of conscription. The Prosecution can simply not rely on Regulation 55 of the Regulations of

⁹ Cf. Prosecution Second Request, para.27 (“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.”) (emphasis added)

¹⁰ Confirmation Decision, para.100 (emphasis added).

¹¹ Confirmation Decision, para.144.

the Court in order to revive a charge that was specifically not confirmed by the Pre-Trial Chamber.

11. Furthermore, the situation at hand is fundamentally different from the circumstances which have led other trial chambers to provide notice of a possible change in the legal characterisation of the facts in relation to one or more modes of liability.
12. Contrary to the present case – whereas the Prosecution seeks the provision of a Regulation 55 notice for a mode of liability which it charged at the confirmation stage, but which the Pre-Trial Chamber specifically declined to confirm – the circumstances prevailing in the *Katanga and Ngudjolo, Ruto and Sang* and *Bemba* cases did not give rise to the application of the procedure set out in Article 61(8). Indeed, in these three cases, the modes of liability which made the object of the Regulation 55 notices given to the parties and participants were not charged at the confirmation stage, and, as such, were not envisioned by the pre-trial chambers.¹²
13. Accordingly, the Defence posits that the trial of Mr Ntaganda must proceed on the basis of the modes of liability confirmed by the Pre-Trial Chamber for

¹² ***Katanga and Ngudjolo case:*** At the confirmation stage, the Prosecution charged Mr Katanga and Mr Ngudjolo in the first place with criminal responsibility as “co-perpetrators of a common plan”, pursuant to Article 25(3)(a). In the alternative, the Prosecution charged Mr Katanga and Mr Ngudjolo with criminal responsibility under Article 25(3)(b): ICC-01/04-01/07-717, paras.469-470. The charges have been confirmed on the basis of indirect co-perpetration, pursuant to Article 25(3)(a). The Regulation 55 notice given at trial dealt with a total different mode of liability, namely Article 25(3)(d). ***Ruto and Sang case:*** At the confirmation stage, the Prosecution charged Mr Ruto only as an indirect co-perpetrator (Article 25(3)(a)) in relation to all crimes charged: ICC-01/09-01/11-373, para.285. The Regulation 55 notice given at trial concerned the modes of liability set out in Articles 25(3)(b), (c) and (d). ***Bemba case:*** At the confirmation stage, the Prosecution charged Mr Bemba with criminal responsibility under Article 25(3)(a). The pre-trial chamber declined to confirm the charges brought against Mr Bemba under this provision, but – after having requested the Prosecution to consider submitting an amended document containing the charges addressing Article 28 as a possible mode of criminal liability – confirmed the charges on the latter. The Regulation 55 notice given at trial simply aimed at putting the parties and participants on notice that the Chamber may modify the legal characterisation of the facts so as to consider *in the same mode of responsibility* the alternate form of knowledge contained in Article 28(a)(i): ICC-01/04-02/06-2324, para.5.

this crime and not on the basis of a mode of liability which could be added at a later time.

14. Thus, the Defence opposes the Prosecution's submission that "[p]roviding 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."¹³ The presentation of evidence and the examination of witnesses must proceed on the sole basis of the Updated DCC¹⁴ and not on a mere possibility of a legal recharacterisation of the facts contained therein.

CONFIDENTIALITY

15. Pursuant to Regulations 23*bis* (1) and (2) RoC, this Defence Response is submitted on a confidential basis as it refers to excerpts of the Pre-Trial Brief, which bears the same classification. A public redacted version of the Defence Response is filed separately.

RELIEF SOUGHT

In light of the above submissions, the Defence respectfully requests the Chamber to:

DENY the Prosecution Second Request.

RESPECTFULLY SUBMITTED ON THIS 7TH DAY OF JULY 2015



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¹³ Prosecution Second Request, para.24.

¹⁴ ICC-01/04-02/06-450, para.51.