

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 9 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

**Prosecution 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:

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Introduction

1. The Office of the Prosecutor (“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 (“RoC”) that the legal characterisation of the facts¹ may change so as to accord with a further alternative mode of liability: direct co-perpetration under article 25(3)(a) of the Rome Statute (“Statute”) for all counts (“Request”).
2. Providing notice at the start of the trial² of this possibility allows the Parties to prepare their cases on the basis that the Chamber may make such a modification and 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.

Statement of Facts

3. On 10 January 2014, the Prosecution submitted the Document Containing the Charges (“DCC”), in which it charged the Accused with 18 counts of crimes against humanity and war crimes pursuant to articles 25(3)(a) (direct perpetration, direct or indirect co-perpetration), 25(3)(b) (ordering or inducing), 25(3)(d)(i) or (ii), 25(3)(f), or 28(a) of the Statute.³
4. On 7 March 2014, the Prosecution filed its submissions on issues that were raised during the confirmation of charges hearing.⁴ In these submissions, the

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

² 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.

³ ICC-01/04-02/06-203-AnxA.

⁴ ICC-01/04-02/06-276-Conf-Red.

Prosecution urged Pre-Trial Chamber II (“Pre-Trial Chamber”) to assess the sufficiency of the evidence to establish substantial grounds to believe in relation to each alternative mode of liability in order to avoid the need for a regulation 55(2) request prior to or at the outset of the trial.⁵

5. On 9 June 2014, the Pre-Trial Chamber issued the Confirmation Decision,⁶ finding substantial grounds to believe that the Accused was responsible for the crimes charged in all 18 counts pursuant to all modes of liability *except* direct co-perpetration.⁷

6. For co-perpetration, the Pre-Trial Chamber found that

“jointly with other persons, Mr. Ntaganda committed the crimes in counts 1 to 18 ‘through another person’, namely UPC/FPLC members and/or Hema civilians [...]. Accordingly, the Chamber finds that Mr. Ntaganda bears criminal responsibility as an indirect co-perpetrator, and not as a direct co-perpetrator, under article 25(3)(a) of the Statute for the crimes set forth in said counts.”⁸

7. On 14 November 2014, the Prosecution submitted a proposed Updated DCC.⁹ In the filing accompanying this submission, the Prosecution noted that “[t]o provide maximum guarantees to the Accused, the Prosecution stresses that, under regulation 55 of the Regulations of the Court, the Trial Chamber may

⁵ ICC-01/04-02/06-276-Conf-Red, para.268.

⁶ ICC-01/04-02/06-309 (Confirmation Decision).

⁷ All other modes of liability charged were confirmed by the Pre-Trial Chamber, though not in relation to every single count. For example, direct perpetration was confirmed in relation to counts 1-3, 10, 11, and 15-17, but not in relation to count 12.

⁸ Confirmation Decision, para.102.

⁹ ICC-01/04-02/06-402-AnxA.

change the legal characterisation of the facts to include direct co-perpetration as a form of criminal responsibility.”¹⁰

8. On 6 February 2015, the Chamber issued its “Decision on the updated document containing the charges” (“Decision”) in which it ordered the Prosecution to file an Updated DCC by 16 February 2015 reflecting the Chamber’s findings contained in this Decision.¹¹
9. On 16 February 2015, the Prosecution provided an Updated DCC, in line with the Chamber’s Decision.¹²

Applicable Law and Jurisprudence

10. Regulation 55 of the RoC provides as follows:

1. In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.
2. 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 Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.
3. For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure that the accused shall: (a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1 (b); and (b) If necessary, be given the opportunity to

¹⁰ ICC-01/04-02/06-402, para.10.

¹¹ ICC-01/04-02/06-450.

¹² ICC-01/04-02/06-458-AnxA.

examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1 (e).

11. In *Lubanga*, further to the Prosecution's request,¹³ 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,¹⁴ and advised the Parties to prepare their case on this basis.¹⁵
12. In *Ruto and Sang*, 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.¹⁶ Trial Chamber V(A) noted 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."¹⁷
13. The *Bemba*¹⁸ and *Katanga*¹⁹ Trial Chambers also gave regulation 55(2) notices, albeit at a later stage of the proceedings.

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,

¹³ ICC-01/04-01/06-953.

¹⁴ ICC-01/04-01/06-1084, para.48.

¹⁵ ICC-01/04-01/06-1084, para.49.

¹⁶ ICC-01/09-01/11-1122, p.20 ("*Ruto and Sang* Decision").

¹⁷ *Ruto and Sang* Decision, para.24.

¹⁸ See ICC-01/05-01/08-2324, para.5.

¹⁹ 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.

jointly with another or through another person, regardless of whether that other person is criminally responsible”.

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

“it must be established that he 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.”²⁰

16. The Pre-Trial Chamber did not set out the elements required for direct co-perpetration. Nor did the Chamber attempt to reconcile its approach with the existent jurisprudence on those elements, which requires the following elements for direct co-perpetration: (i) an agreement or common plan between the accused and at least one other co-perpetrator that, once implemented, resulted in the commission of the relevant crime in the ordinary course of events; (ii) that the accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime; (iii) that the accused intended to commit the relevant crime or was aware that by implementing the common plan this consequence would occur in the ordinary course of events; (iv) that the accused was aware that he provided an essential contribution to the implementation of the common plan; and (v) that the accused was aware of the factual circumstances that established the existence of an armed conflict and the link between these circumstances and his conduct.²¹ Notably, and consistent with relevant doctrinal and

²⁰ Confirmation Decision, para.136.

²¹ See ICC-01/04-01/06-2842 (*Lubanga* Trial Judgement), para.1018.

jurisprudential developments, direct co-perpetration is *not* limited to instances of physical execution of any element of a crime.²²

17. For *indirect* co-perpetration, the Pre-Trial Chamber recalled that the objective and subjective elements under article 25(3)(a) of the Statute are that: (i) the suspect must be part of a common plan or an agreement with one or more persons; (ii) the suspect and the other co-perpetrator(s) must carry out essential contributions in a coordinated manner which result in the fulfilment of the material elements of the crime; (iii) the suspect must have control over the organisation; (iv) the organisation must consist of an organised and hierarchical apparatus of power; (v) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect; (vi) the suspect must satisfy the subjective elements of the crimes namely (a) intent and knowledge within the meaning of article 30 of the Statute, unless otherwise provided in the Statute or the Elements of Crimes; (b) and specific intent (*dolus specialis*) where required; (vii) the suspect and the other co-perpetrators must be mutually aware and accept that implementing the common plan will result in the fulfilment of the material elements of the crimes; and (viii) the suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s).²³

²² Indeed, limiting direct co-perpetration to the physical joint performance of elements of the *actus reus* has long been considered to be a flawed and inadequate approach. See, *inter alia*, C. Roxin, *Täterschaft und Tatherrschaft*, 6th edition (1995), pp.34 et seq.

²³ Confirmation Decision, paras.104, 121. This reflects the approach adopted in *Ruto and Sang*, see ICC-01/09-01/11-373, paras.292, 333.

Prosecution's Submissions

Notice is required in the instant case

18. The Pre-Trial Chamber found that all the objective²⁴ and subjective²⁵ elements of *indirect* co-perpetration had been satisfied and confirmed this mode of liability for all counts. The Pre-Trial Chamber also found that all the objective and subjective elements of *direct perpetration* had been satisfied²⁶ and confirmed this mode of liability for eight counts.
19. As set out in the Updated DCC,²⁷ the Accused is charged as an individual *direct perpetrator* in relation to Counts 1 and 2 (murder and attempted murder), Count 3 (attacks against the civilian population), Count 10 (persecution), Count 11 (pillaging), Count 15 (enlistment of children under the age of 15), Count 16 (use of children under the age of 15 to participate actively in hostilities), and Count 17 (attacks against protected objects).
20. The Updated DCC also establishes that all of the crimes for which the Accused is charged as a direct perpetrator form part of or were the consequence in the ordinary course of a common plan between one or more persons.²⁸ Moreover, it refers to the co-perpetrators' commission of and contributions to the charged crimes. Accordingly, it would be possible to recharacterise the Accused's conduct in relation to these charges as direct co-

²⁴ See Confirmation Decision, paras.105-120.

²⁵ See Confirmation Decision, paras.122-135.

²⁶ See Confirmation Decision, paras.137-143.

²⁷ See Updated DCC, para.2.

²⁸ See Updated DCC, para.1 which defines the common plan as including the commission of "murder or attempted murder, attacks against a civilian population, rape, sexual slavery, persecution, pillaging, forcible transfer of the population, enlistment and conscription of children under the age of 15 and their use to participate actively in hostilities, attacks against protected objects and, destruction of property".

perpetration without exceeding the facts and the circumstances described in the Updated DCC.

21. Given the overlap between the elements of direct and indirect co-perpetration,²⁹ and in view of the close proximity of the co-perpetrators to the crimes including by committing them themselves, if all factual components of the charged conduct, including those underpinning the theory of indirect co-perpetration, are established, it should be open to the Trial Chamber to consider the Accused's responsibility as a direct co-perpetrator.
22. As noted in *Ruto and Sang*, a DCC sufficiently informs the Chamber of the apparent possibility of an eventual change in legal characterisation.³⁰ The material facts already contained in the Updated DCC lend themselves to being recharacterised as direct co-perpetration.
23. First, the Updated DCC sets out material facts that show: (i) the existence of a common plan or agreement between two or more persons;³¹ and (ii) that the Accused and his co-perpetrators made essential contributions in a coordinated manner which resulted in the fulfilment of the material elements of the crimes.³²

²⁹ The principal distinction between indirect co-perpetration and direct co-perpetration is that indirect co-perpetration requires that the crimes be committed through a person/s other than the co-perpetrators whereas for direct co-perpetration it is the co-perpetrators who must commit the crime. As a consequence of this distinction, indirect co-perpetration also requires that a number of elements not required for direct co-perpetration be established (that (i) the suspect must have control over the organisation; (ii) the organisation must consist of an organised and hierarchical apparatus of power; and (iii) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect).

³⁰ See para.12, fn.17 above.

³¹ See, e.g. Updated DCC, paras.1, 3, 15-16, 44, 57-60, 111-119, 154.

³² See, e.g., Updated DCC, paras.2, 5, 6, 7, 8, 9, 24, 49-52, 56, 59-60, 63-74, 77, 93-95, 98-99, 120-132, 134-135, 152-155, 167.

24. The Updated DCC states that in implementing the common plan, the co-perpetrators³³ “committed a series of crimes, including the crimes charged”.³⁴ More specifically, the Updated DCC sets out that the co-perpetrators:³⁵

(i) made essential contributions;³⁶

(ii) committed attacks against civilians;³⁷

(iii) committed acts of persecution;³⁸

(iv) forcibly recruited and enlisted children, including those manifestly under the age of 15;³⁹ and

(v) used children under the age of 15 to participate actively in hostilities.⁴⁰

25. Finally, the facts contained in the Updated DCC address the subjective elements of direct co-perpetration.⁴¹

³³ The list of co-perpetrators provided in the Updated DCC is not exhaustive, *see* Updated DCC, para.16 stating that “**Bosco NTAGANDA** acted in concert with other co-perpetrators including”. The Updated DCC refers to the co-perpetrators as including LUBANGA, KISEMBO (until early December 2003), KAHWA (until end November 2002), RAFIKI, BAGONZA (until 2 December 2002), TCHALIGONZA and KASANGAKI, *see* Updated DCC, para.16.

³⁴ Updated DCC, para.154.

³⁵ Since the Accused is, by definition, one of the co-perpetrators, the crimes for which he is charged as a direct co-perpetrator (noted at para.19 above) also constitute instances of the direct commission of crimes by perpetrators.

³⁶ Updated DCC, paras.7, 44, 50-51, 59, 77, 92, 114, 119, 152-154, 164.

³⁷ Updated DCC, paras.5, 15, 59, 77, 114.

³⁸ Updated DCC, paras.162.

³⁹ Updated DCC, para.93; *see also* paras.114, 164.

⁴⁰ Updated DCC, para.99. The co-perpetrators were also UPC/FPLC commanders, *see* Updated DCC, fn.12, paras. 18, 20-21, 118. Therefore, references in the Updated DCC to crimes committed by UPC/FPLC commanders could be attributed to the co-perpetrators. The Updated DCC sets out that UPC/FPLC commanders used child soldiers in their escort and to participate actively in hostilities, *see* Updated DCC, paras.65, 99. The Updated DCC also sets out that UPC/FPLC commanders routinely raped and sexually enslaved their soldiers, including child soldiers under the age of 15, *see* Updated DCC, paras.100-101, 104, 107.

⁴¹ *See, e.g.,* Updated DCC, paras.10, 12, 40, 55, 135, 137-144, 161, 170.

Notice should be provided at the start of trial

26. Although notice of the possibility of a recharacterisation may be given at any time during the trial, the Appeals Chamber has stated that it is preferable that it “should always be given as early as possible”.⁴² Trial Chamber V(A) has 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”.⁴³
27. Providing notice at the start of the trial, rather than at a later stage, will safeguard the Accused’s rights pursuant to 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.
28. Should notice be provided at the outset of the trial, both the Prosecution and the Defence could present their evidence and examine witnesses with full knowledge of the possibility that the Accused’s conduct could be recharacterised as direct co-perpetration. It would also allow the Chamber to consider the evidence in light of this additional mode of liability as it is tendered, rather than retroactively.
29. Providing notice at this early stage would also avoid delays by making adjournments unnecessary, such as those envisaged in regulation 55(3)(a) of the RoC, or the recall of witnesses and/or calling of new witnesses, envisaged in regulation 55(3)(b) of the RoC. Therefore, giving notice of the possibility of

⁴² ICC-01/04-01/07-3363, para.24.

⁴³ *Ruto and Sang* Decision, para.27.

recharacterisation early in the proceedings could avoid significantly extending the length of the trial.⁴⁴

30. As held by Trial Chamber V(A),

“waiting 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.”⁴⁵

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

31. The proposed notice would not affect the contested issues for trial. The Prosecution is not suggesting any alteration of the facts or circumstances of the charges. Rather, the Prosecution is suggesting that within the scope of the charges, there is one additional way in which the Accused’s alleged criminal responsibility may be characterised.

32. As argued above, the allegations relevant to the liability of the Accused through direct co-perpetration are already contained in the Updated DCC. Therefore, neither the proposed notice, nor an eventual recharacterisation, would exceed the facts and circumstances described in the charges.

⁴⁴ See *Ruto and Sang* Decision, para. 42.

⁴⁵ *Ruto and Sang* Decision, para.27.

Relief Requested

33. Based on the foregoing, the Prosecution requests that, at the start of trial, the Chamber give notice to the Parties and participants pursuant to regulation 55(2) of the RoC that the legal characterisation of the facts may change so as to accord with a further alternative mode of liability: direct co-perpetration under article 25(3)(a) of the Statute for all counts.



Fatou Bensouda, Prosecutor

Dated this 9th day of March 2015
At The Hague, The Netherlands