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

Date: **18 March 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

**Response on behalf of Mr Ntaganda to “Prosecution 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 submission of the *“Prosecution request for notice to be given of a possible recharacterisation pursuant to regulation 55(2)”* by the Office of the Prosecutor (“Prosecution”) on 9 March 2015 (“Prosecution Request”), Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

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

1. The Defence hereby responds to the Prosecution 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”)¹ may change so as to accord with a further alternate mode of liability, namely direct co-perpetration under Article 25(3)(a) of the Statute.

2. As a preliminary matter, the Defence wishes to underscore that in the guise of seeking to “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”,² the Prosecution Request is really preparing the ground for the addition of a seventh mode of liability, which has been specifically rejected by the Pre-Trial Chamber³ and which the Chamber has refrained from giving notice of to the Parties.⁴

3. The Prosecution Request, using a shotgun approach, is illustrative of its inability to lead a straightforward case against Mr Ntaganda by setting out clearly

¹ ICC-01/04-02/06-458-AnxA.

² Prosecution Request, para.27.

³ ICC-01/04-02/06-309, para.102.

⁴ In its *“Decision on the updated document containing the charges”*, ICC-01/04-02/06-450, the Chamber neither addressed nor pronounced on the Prosecution’s submission made in its *“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, that “under regulation 55 of the Regulations of the Court, the Trial Chamber may change the legal characterisation of the facts to include direct co-perpetration as a form of criminal liability” (para.10).

the link between the alleged violations committed and Mr Ntaganda's acts and conduct.

4. In order for the Chamber to provide notice of the possibility of a change of the legal characterisation of facts at this stage of the proceedings, i.e. before the commencement of the trial, the facts and circumstances pleaded in the Updated DCC must sufficiently inform the Chamber as to the apparent possibility of an eventual change in legal characterisation.⁵

5. In this regard, the Defence posits that when such a possible change relates to a mode of liability, the allegations, facts and circumstances pleaded in the Updated DCC must provide a sufficient basis to support a finding on each of the constitutive elements of the additional mode of responsibility sought.

6. As noted by the Prosecution,⁶ the Pre-Trial Chamber did not set out the constitutive elements required for direct co-perpetration. Moreover, contrary to what the Prosecution implies,⁷ the constitutive elements of direct co-perpetration are not clearly defined in the jurisprudence of the Court. In particular, it is not clear whether the physical perpetrators of the crimes must be part of the common plan or not.⁸

7. The Prosecution's argument that "it should be open to the Trial Chamber to consider the Accused's responsibility as a direct co-perpetrator"⁹ if all factual components of the charged conduct, including those underpinning the theory of indirect co-perpetration, are established, is of no assistance here.

⁵ Cf. ICC-01/09-01/11-1122, para.24.

⁶ Prosecution Request, para.16.

⁷ Prosecution Request, para.16.

⁸ Compare ICC-01/04-01/06-2842, para.1018(i) (Trial Chamber I ruled that "the prosecution must prove [...] that (i) there was an agreement or common plan between the accused and *at least one* other co-perpetrator [...]" (emphasis added), thereby implying that the physical perpetrators of the crimes need not be part of the common plan) with ICC-02/05-03/09-121-Corr-Red, para.129 (Pre-Trial Chamber I stated that "[t]he first objective requirement of co-perpetration based on joint control over the crime is the existence of an agreement or common plan between two or more persons who physically carry out the elements of the crime"). In this regard, the Prosecution notes that the main difference between indirect co-perpetration and direct co-perpetration lies in the fact that, for the latter, "it is the co-perpetrators who must commit the crime": Prosecution Request, fn.29.

⁹ Prosecution Request, para.21.

8. In fact, even though Mr Ntaganda is charged as an individual direct perpetrator in relation to certain counts, the Updated DCC makes it clear that it would not be possible to change the legal characterisation of his acts and conduct to direct co-perpetration without exceeding the facts and circumstances described therein. Indeed, it appears that the Updated DCC contains no allegations suggesting that the *physical* perpetrators of the crimes – other than Mr Ntaganda and the other alleged co-perpetrators – were part of the alleged common plan.

9. Accordingly, the Prosecution Request should be denied.

10. Should the Chamber nonetheless be inclined to grant the Prosecution Request and provide notice of the possibility of a change in the legal characterisation of the facts so as to accord with direct co-perpetration, the Defence respectfully submits that the Chamber must precisely identify: (i) the essential elements of direct co-perpetration as a mode of liability; and (ii) the allegations, facts and circumstances pleaded in the Updated DCC that sufficiently inform the Chamber as to the apparent possibility of an eventual change in legal characterisation.¹⁰

11. Lastly, whether or not the Chamber decides to provide notice to the Parties that the legal characterisation of facts may change so as to accord with direct co-perpetration as an additional mode of responsibility, there can be no doubt that the trial of Mr Ntaganda will proceed on the basis of the modes of liability confirmed by the Pre-Trial Chamber and not on the basis of a mode of liability which could be added at a later time.

12. Thus, the Defence opposes the Prosecution's submission that in the event the requested notice is provided "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."¹¹ The presentation of evidence and the examination of witnesses must proceed on the sole

¹⁰ Cf. ICC-01/09-01/11-1122, para.24.

¹¹ Prosecution Request, para.28.

basis of the Updated DCC¹² and not on a mere possibility of a legal recharacterisation of the facts contained therein.

RESPECTFULLY SUBMITTED ON THIS 18th DAY OF MARCH 2015

A handwritten signature in black ink, appearing to read 'StB' with a flourish at the end.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands

¹² ICC-01/04-02/06-450, para.18.