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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 Submissions in Preparation for the 17 October 2014 Status Conference

Source: The Office of the Prosecutor

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

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I. Introduction

1. The Office of the Prosecutor ("Prosecution") submits its observations pursuant to the order of Trial Chamber VI ("Chamber") of 9 October 2014 on "(1) the need for clarification, if any, on the nature, cause and content of the charges; and (2) protocols to be agreed on in the case".¹
2. On the first issue, an amended Document Containing the Charges ("DCC") reflecting the charges as confirmed by the Pre-Trial Chamber is the authoritative statement of the charges for the purposes of trial. The statutory texts expressly refer to amendments to the charges; indeed, the Trial Chamber's ultimate decision on guilt or innocence is restricted to the facts and circumstances described in the charges or any amendments thereto. Moreover, the Pre-Trial Chamber's confirmation decision does not necessarily review every detail of the DCC, as it is required only to assess the sufficiency of the evidence to meet the "substantial grounds" threshold. An amended DCC is necessary both legally to ensure that the Accused understands the nature, cause and content of the charges, and practically to avoid the need to review two documents (the initial DCC and the confirmation hearing decision) in order to determine the parameters of the case against him.
3. On the issue of protocols, the parties will meet prior to the status conference to discuss a redaction protocol and a protocol on the handling of confidential information and contact with the witnesses of the opposing party and will advise the Chamber of progress at the status conference on 17 October 2014.

¹ ICC-01/04-02/06-382, para.2.

4. The Prosecution awaits the submission of three additional proposed Protocols by the Registry² and will thereafter be in a position to discuss any necessary modifications to the Protocols.

II. Procedural History

5. On 9 October 2014, the Chamber scheduled a status conference for 17 October 2014 and invited the parties to submit written submissions on: (a) the need for clarification, if any, on the nature, cause and content of the charges; and (b) protocols to be agreed on in the case.

III. Prosecution's Submissions

A. *The amended DCC is the operative charging document*

6. The Prosecution submits that the provision of an amended DCC is both appropriate and necessary before the commencement of trial.
7. First, it is legally *appropriate* because the amended DCC is intended to be the operative charging document at trial.
8. Second, it is *necessary* because the Confirmation of Charges Decision ("Confirmation Decision") does not provide sufficient clarity and specificity on its own in order to facilitate the Accused's understanding of the charges as confirmed.

(i) *The amended DCC is the operative charging document at trial*

9. Trial Chamber V in *Ruto and Sang* and *Kenyatta* held that:

² ICC-01/04-02/06-350, paras. 3-8: (i) Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, (ii) Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses, and (iii) Proposed Mechanisms for Exchange of Information on individuals Enjoying Dual Status.

[T]he Confirmation Decision cannot be expected to serve as the only authoritative statement of the charges for the trial. The Chamber is of the view that the description of the charges in the DCC, amended to harmonise it with the findings made in the Confirmation Decision, rather than the Confirmation Decision itself, provides a sufficiently authoritative statement of the charges relevant to the trial proceedings.³

10. The Prosecution submits that the accurate legal position is as stated by Trial Chamber V in the two Kenya cases: namely, that the authoritative document is the amended DCC, reflecting charges as confirmed in the Confirmation Decision, and not the Confirmation Decision itself. Article 74 of the Rome Statute (“Statute”) expressly confines the decision on guilt or innocence to “the facts and circumstances described in the charges and in any amendments to the charges”. Both from a statutory and a practical perspective, an amended DCC serves to provide the accused with the clearest and fairest notice of the nature, cause and content of the charges; allegations that the Pre-Trial Chamber explicitly rejected in the confirmation decision may not be relied upon at trial.⁴

11. Importantly, article 61(9) of the Statute and rule 128(1) of the Rules of Procedure and Evidence (“Rules”) establish a procedure through which the Prosecutor may “amend the charges” in the period between the issuance of the confirmation decision and the start of trial. These provisions, along with rule 121 and regulation 52 of the Regulations of the Court (“RoC”), set out that the Prosecutor is the charging entity, providing a “detailed description of the charges”(rule 121(3)) and “a statement of the facts...which provides a sufficient legal and factual basis to bring the person or persons to trial” (regulation 52). These provisions work only if there is a charging document for the Prosecutor to amend, *i.e.*, a DCC. If, as the *Katanga* jurisprudence appears to suggest, the confirmation decision were intended to become the

³ ICC-01/09-01/11-522, para. 18; ICC-01/09-02/11-584, para. 22.

⁴ ICC-01/09-01/11-522, paras. 12-20; ICC-01/09-02/11-584, paras. 16-23.

operative charging document after confirmation, article 61(9) and rule 128(1) would speak in terms of “amendments to the confirmation decision”, which would need to be done by the Pre-Trial Chamber, not the Prosecution.

12. Equally tellingly, article 74(2) of the Statute and regulation 55(1) of the RoC require the Trial Chamber to evaluate the evidence offered at trial against “the charges and any amendments to the charges”. These two provisions underscore that the charges: (i) are the reference point against which the Trial Chamber must evaluate the evidence presented at trial; and (ii) may be amended after confirmation, which presuppose that they continue to have legal effect at the trial stage.⁵

13. The contrary view effectively transfers to the Pre-Trial Chamber the charging functions that the Statute, Rules and RoC assign to the Prosecution, and fundamentally alters the nature of the confirmation decision: the latter is a determination on whether the charges brought by the Prosecution meet the requisite standard under article 61 of the Statute; it is not a mechanism for the Pre-Trial Chamber to rewrite those charges.

14. The Prosecution acknowledges that any amendment to the DCC at this stage should be confined to adjusting the original charges to the confirmation decision. Similarly, where the Confirmation Decision explicitly rejects an allegation, it cannot form part of the case at trial. However, where the Confirmation Decision is simply silent on factual allegations contained in the DCC, that allegation should be able to be relied on at trial. Trial Chamber V held that such an approach was a lawful one:

[T]he Chamber is not persuaded that, as a general principle, the Pre-Trial Chamber’s silence on relevant statements of facts made in the DCC should result in their

⁵ See also, ICC-01/09-01/11-522, Concurring Separate Opinion of Judge Eboe-Osuji, paras. 12, 20 and 24.

removal from the post-confirmation Updated DCC. The Chamber will thus, in principle, authorise the prosecution to retain such factual allegations in the Updated DCC.⁶

15. Pre-Trial Chambers have endorsed the view that a confirmation decision's silence on a factual allegation contained in the DCC does not prevent the allegation from being relied on at trial. In the Kenya cases, Pre-Trial Chamber II explained that it would:

. . . not engage in an examination of each and every subsidiary fact which is mentioned in the document containing the charges and upon which the Prosecutor relies to prove the existence of one or more facts described in the charges . . . this does not prevent the Prosecutor from relying on these or other subsidiary facts in the future, in the same way that the parties are not precluded from relying at trial upon new or additional evidence from that presented at the pre-trial stage of the case.⁷

16. This is, at least in part, because at confirmation the Pre-Trial Chamber need only satisfy itself that there are "substantial grounds to believe" the person committed the crime charged, and need not enter a finding on every allegation in the DCC. The limited scope of confirmation proceedings means that Pre-Trial Chambers often focus on evidence that is "relevant and sufficient to evaluate elements of a given crimes according to the requisite threshold and [may choose] not to analyse in detail each of the facts and circumstances described in the charges contained in the DCC".⁸

17. Even where Chambers have determined that the confirmation decision is the authoritative document,⁹ it did not in practice render moot the need for an amended DCC in most of those cases, as set out in greater detail below.

⁶ ICC-01/09-01/11-522, paras. 19-20; ICC-01/09-02/11-584, para. 23.

⁷ ICC-01/09-02/11-382-Red, para. 60; ICC-01/09-01/11-37, para. 48. Pre-Trial Chamber I adopted the same view in the *Gbagbo* and *Blé Goudé* cases. See, ICC-02/11-01/11-325, para. 27 and ICC-02/11-02/11-57, para. 11.

⁸ ICC-01/09-01/11-522, para. 17; ICC-01/09-02/11-584, para. 21.

⁹ ICC-01/04-01/07-1547-tENG, paras. 14, 16. As noted in paragraph 20, the *Katanga* Trial Chamber ordered the Prosecution to file a "Summary of the Charges", rather than an amended DCC. The difference is essentially a semantic one, as both serve the same purpose. ICC-01/05-01/08-836, para. 37. Furthermore, it is important to note that an amended DCC *was* ordered to be filed by the Prosecution

(ii) *An amended DCC is necessary*

18. The Confirmation Decision¹⁰ in the instant case does not on its own sufficiently set out the facts and circumstances of the charges as required under article 67(1)(a) of the Statute. Nor is it suitable on a practical level to refer to two documents in order for the accused to understand the complete nature of the charges, in order for the Chamber to read out the charges at the outset of trial, or in order to ensure a fair and effective presentation of the evidence. The Prosecution submits that where the charges have been confirmed in their entirety, or where the impact of the confirmation decision on the original charges is minimal, an amended DCC may not be necessary. However, in circumstances where the confirmation decision has produced a tangible modification of the original charges (e.g. because it did not confirm portions of a charge), an amended DCC adjusting the original charges to the confirmation decision will be warranted in order to ensure clarity, adequate notice and legal certainty at trial.

19. The *Lubanga* Trial Chamber found that an amended DCC was required “to ensure that there is complete understanding of the ‘statement of facts’ underlying the charges confirmed.”¹¹ Similarly, the *Bemba*,¹² *Ruto and Sang*¹³ and *Kenyatta*¹⁴ Trial Chambers each deemed it necessary that an amended

in the *Bemba* case, “which reflected the final way in which the Pre-Trial Chamber had described [the charges]”. See, ICC-01/05-01/08-T-14-ENG ET WT, page 13, lines 5 – 10. The amended DCC reflected the “(i) the confirmed charges against the Accused; and (ii) the facts and circumstances upon which each charge is based, with reference to the specific findings in the confirmation decision”, ICC-01/05-01/08-593, para. 4. ICC-02/05-03/09-214, para. 33. The issue of whether or not an amended DCC is to be filed is currently the subject of live litigation before the *Banda* Trial Chamber. See, Prosecution filing ICC-02/05-03/09-572 and Defence response ICC-02/05-03/09-581, which has yet to be decided.

¹⁰ ICC-01/04-02/06-309.

¹¹ ICC-01/04-01/06-1548, paras 12-13.

¹² ICC-01/05-01/08-836, para. 30.

¹³ ICC-01/09-01/11-439, para. 7.

¹⁴ ICC-01/09-02/11-450, para. 8.

DCC be provided for the purposes of trial, because the confirmation decision did not provide a readily accessible statement of the facts that underlined each charge.

20. Even in the case of *Katanga and Ngudjolo*, the Trial Chamber observed that the confirmation decision in that case did not “accurately [recapitulate] in summary form the facts and circumstances described in the charges as well as the legal characterisations which [the Pre-Trial Chamber] intended to confirm.”¹⁵ Consequently, it ordered the Prosecution to file a “Summary of the Charges”:

“[a] Summary of the Charges reiterating the language of the Pre-Trial Chamber in its Confirmation Decision and proceeding charge by charge, numbering each one. It should be noted that this document cannot merely restate the finding of the Pre-Trial Chamber at the conclusion of each charge it examined. Thus the Prosecutor must also extract from the exposition preceding each conclusion, the factual findings on which that Chamber relied in order to reach its decision.”¹⁶

21. The Pre-Trial Chamber in this case confirmed the charges against the Accused to the extent specified in five operative paragraphs of the Confirmation Decision.¹⁷ However, these five paragraphs alone do not contain the entirety of the information necessary to provide the appropriate level of specificity and notice of the charges.

22. For example, the operative paragraphs refer to defined terms set out elsewhere in the Confirmation Decision (e.g., the “First Attack” and “Second Attack”).¹⁸ It is necessary to review other paragraphs outside the operative paragraphs for the full understanding of these defined terms.

¹⁵ ICC-01/04-01/07-1547-tENG, para. 13.

¹⁶ ICC-01/04-01/07-1547-tENG, para. 29.

¹⁷ ICC-01/04-02/06-309, p. 63, para. (b) referring to paras. 12, 31, 36, 74, and 97.

¹⁸ See, for example, ICC-01/04-02/06-309, paras. 36 and 97 referring to the “First Attack” and “Second Attack”, defined at para. 29.

23. Further, the operative paragraphs refer to crimes in specific locations within broad temporal parameters, while the non-operative paragraphs provide additional specificity as to the particular timeframe relevant to a charge in a particular location.¹⁹ To this extent, the operative paragraphs of the Confirmation Decision do not provide sufficient notice to the Accused of the parameters of the charges against him, and the extensive cross-referencing required in order to properly understand the charges as confirmed, could lead to confusion and uncertainty.

24. The Defence has underlined the importance of an amended DCC, so that the Accused “knows the case he has to meet”.²⁰ It will permit the trial to proceed in a timely and efficient manner, providing the Defence and the Chamber with a central reference point for the charges with the greatest clarity on the case to be met.

25. The Prosecution can submit an amended DCC without footnotes by 28 November 2014.

(iii) Pre-Trial Brief

26. In addition to the Amended DCC, the Prosecution proposes submitting a Pre-Trial Brief three months prior to trial. This brief will contain the factual narrative underpinning the charges in greater detail than in the amended DCC, which focusses on the key facts relevant to the charges. Importantly, the Pre-Trial Brief will also contain citations to relevant evidence, which the amended DCC will not contain. Indeed, there will not be a need for a footnoted version of the amended DCC because the Pre-Trial Brief will

¹⁹ See, for example, ICC-01/04-02/06-309, para. 36 referring to murder taking places in Kilo during the “First Attack”, and para. 41 stating that UPC/PLC soldiers killed civilians in Kilo on or about 6 December 2002.

²⁰ ICC-01/04-02/06-T-13-ENG ET, p.36, line 21 to p.38, line 11; ICC-01/04-02/06-364, para. 7.

contain references to the most current and relevant evidence at a point in time closest to trial.

27. The Pre-Trial Brief will also serve as a useful tool for the Chamber and the Defence by developing legal submissions on, *inter alia*, the contextual elements of articles 7 and 8 of the Statute, legal elements of the crimes and the Accused's criminal responsibility, in addition to charting out the factual basis of the Prosecution's case against Bosco NTAGANDA. While this may serve to provide greater notice to the Accused of the Prosecution's case, the Pre-Trial Brief does not replace the amended DCC. In particular, the article 74 decision must still be confined to the facts and circumstances set out in the charging document and any amendments to it.

B. Protocols

(i) Protocol Establishing a Redaction Regime

28. The Prosecution is drafting a proposed Protocol Establishing a Redaction Regime based on a similar mechanism adopted in the *Kenyatta* and *Ruto and Sang* cases.²¹ The proposed protocol will include pre-approved "Standard Justification" categories for which redactions are directly applied by the parties without the need for individual approval by the Trial Chamber. For any other redactions the parties will need to file an application to the Chamber. The categories are based on categories identified by Pre-Trial Chamber II in this case,²² further broken down into sub-categories to provide more information to the party receiving disclosure. Mechanisms for the resolution of disputes will also be included.

²¹ ICC-01/09-02/11-495-AnxA-Corr; ICC-01/09-02/11-495 (decision adopting the Protocol); ICC-01/09-01/11-458-AnxA-Corr; ICC-01/09-01/11-458 (decision adopting the Protocol).

²² ICC-01/04-02/06-117-Conf-Red2, para. 31.

29. The parties will meet in advance of the status conference to discuss a redaction protocol and will update the Chamber during the status conference to be held on 17 October 2014.

(ii) Protocol on the Handling of Confidential Information during Investigations and Contact with Witnesses of the Opposing Party

30. This Protocol was submitted to Pre-Trial Chamber II in December 2013, after extensive discussions between the Prosecution and the Defence.²³ The Pre-Trial Chamber resolved a dispute between the parties on two provisions and ordered the draft to be circulated to the Victims and Witnesses Unit (“VWU”).²⁴

31. The VWU and Common Legal Representatives have provided input to the draft protocol. The Prosecution is awaiting a response from new Defence counsel on the revisions and will meet with the Defence in advance of the status conference to discuss further.

32. Adoption of both the redaction protocol and the protocol on the handling of confidential information is crucial to the implementation of an expeditious disclosure process.

(iii) Remaining Protocols proposed by the Registry

33. In previous submissions,²⁵ the Registry proposed the adoption of three additional protocols: (1) a protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, (2) a protocol on the vulnerability assessment and support procedure used to facilitate the

²³ ICC-01/04-02/06-167-AnxA.

²⁴ ICC-01/04-02/06-185, paras. 5, 6-8, 16-18. The two disputed provisions were para. 21, concerning witnesses participating in the ICCPP, and para. 26, concerning witnesses who allegedly suffered from sexual and gender based violence. The Single Judge ordered amendments to para. 21, and approved para. 26 in the form suggested by the Prosecution: ICC-01/04-02/06-185, paras. 15, 21.

²⁵ ICC-01/04-02/06-350, paras. 3-8.

testimony of vulnerable witnesses, and (3) a protocol on proposed mechanisms for exchange of information on individuals enjoying dual status. The Registry proposes to prepare those protocols based on mechanisms adopted or discussed in other cases but with adjustments to fit the particularities of the *Ntaganda* case.

34. The Prosecution does not foresee major difficulties in reaching agreements on the protocols on the assessment of vulnerability and on dual status witnesses, based on the models identified by the Registry. More careful review will have to be conducted once the parties and participants receive the draft protocols.

35. In relation to the witness familiarisation protocol, the Prosecution intends to apply for authorisation to prepare witnesses for trial. Consequently, the appropriate model for the familiarisation protocol can only be determined after a decision of the Chamber on such an application.

IV. Conclusion

36. The Prosecution respectfully provides these submissions as requested in the Chamber's Order of 9 October 2014.



Fatou Bensouda
Prosecutor

Dated this 14th day of October 2014

At The Hague, The Netherlands