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THE APPEALS CHAMBER

Before: **Judge Christine Van den Wyngaert, Presiding Judge**
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Piotr Hofmański
Judge Raul C. Pangalangan

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR v. BOSCO NTAGANDA

Public
Former Child Soldiers' observations on the "Document in support of the appeal on behalf of Mr Ntaganda against Trial Chamber VI's 'Decision on the Defence's Challenge to the jurisdiction of the Court in respect of Counts 6 and 9', ICC-01/04-02/06-892"

Source: **Office of Public Counsel for Victims (CLR1)**

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I. INTRODUCTION

1. The Common Legal Representative of the former child soldiers (the "Legal Representative") hereby submits her observations on the Document in support of the appeal on behalf of Mr Ntaganda (the "Appeal")[1] against Trial Chamber VI's "Decision on the Defence's Challenge to the jurisdiction of the Court in respect of Counts 6 and 9"(the "Impugned Decision").[2]

2. The Legal Representative submits that, in the context of an appeal pursuant to article 82(1)(a) of the Rome Statute, only matters directly related to the jurisdiction of the Court may be brought to the consideration of the Appeals Chamber (the "Chamber") for review. For this reason, the Legal Representative takes the view that the first and second grounds of appeal are not properly brought before the Chamber. Prior leave from the Trial Chamber was required, pursuant to article 82(1)(d) of the Rome Statute, in order for the Chamber to review the non-jurisdictional aspects of the Impugned Decision. Accordingly, the first two grounds must be dismissed *in limine* as inadmissible.

3. Conversely, the Legal Representative notes that, under the third ground of Appeal, the Defence seeks to challenge the Trial Chamber's determination that the argument raised were not jurisdictional in nature. This specific finding may be properly appealed under article 82(1)(a) of the Rome Statute. However, the Legal Representative submits that the third ground must be dismissed on its merits. The Defence failed to identify any clear error in the Trial Chamber's reasoning, let alone an error that would have materially affected the outcome of the Impugned Decision. Instead, in support of its Appeal, the Defence advanced a series of factual and legal

[1] See the "Document in support of the appeal on behalf of Mr Ntaganda against Trial Chamber VI's "Decision on the Defence's Challenge to the jurisdiction of the Court in respect of Counts 6 and 9", ICC-01/04-02/06-892", No. ICC-01/04-02/06-972 OA 2, 2 November 2015 (the "Document in support of Appeal").
[2] See the "Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9" (Trial Chamber VI), No. ICC-01/04-02/06-892, 9 October 2015 (the "Impugned Decision").

assumptions, which are either incorrect or yet to be determined in the course of trial. This *per se* is a clear indication that the Defence challenge was not properly formed. The Trial Chamber's holding that the arguments raised were not jurisdictional is unimpeachable and must therefore be confirmed on appeal.

II. SUBMISSIONS

A. The appeal is only admissible with respect to the third ground, grounds one and two must be dismissed *in limine*

4. The Legal Representative submits that the Appeal is admissible only with respect to the third ground, namely, whether the Trial Chamber "*erred in law in failing to find that these matters are jurisdictional in nature and that they require immediate resolution in the interests of justice*".[3] Indeed, a ruling characterising a challenge as non-jurisdictional in nature may qualify as an appealable decision with respect to jurisdiction under article 82(1)(a) of the Rome Statute.

5. In contrast, grounds one and two of the Appeal do not address jurisdiction-related findings of the Trial Chamber's conclusions. Instead, the Defence seeks to put forward arguments relate to the scope and contours of the crimes set out in article 8(2)(e) and 8(2)(e)(vi) of the Rome Statute. The arguments relate to the merits of the case and are not even remotely connected to the Court's jurisdiction.

6. The first ground of appeal relates to whether the crimes set out in article 8(2)(e)(vi) of the Rome Statute are restricted to a particular category of victims. This ground clearly does not relate to the jurisdiction of the Court, but rather to the contours of the war crimes under the relevant provisions of the Statute. As correctly pointed out by the Prosecution, whether a war crime covers a particular class of victims is a matter "*of statutory interpretation*" and thus, must not be confused with the "*Court's jurisdiction* rationae materiae *over the crimes of rape and sexual slavery under*

[3] See the Document in support of Appeal, *supra* note 1, para. 3.

article 8(2)(e)(vi) of the Statute".[4] The first ground is therefore inadmissible in the context of an appeal under article 82(1)(a) of the Rome Statute. Likewise, under the second ground of appeal, the Defence mainly argues that the Chamber did not properly consider the labelling by the Prosecutor of counts 6 and 9 of the Document containing the Charges (the "DCC"), by ruling that they are "*descriptive*" of "*the alleged victims*" and merely "*serv*[e] *to denote between the different groups of victims that allegedly resulted from these acts*".[5] In this regard, the Defence's main argument appears to be that the Trial Chamber should have treated counts 6 and 9 of the DCC as constituting different crimes from those set out in counts 5 and 8.[6] This ground of appeal, which challenges the Trial Chamber's approach to the counts contained in the DCC, does not relate to the notion of "jurisdiction" as defined in articles 19 and 82(1)(a) of the Rome Statute. Whether one or more counts are properly worded in the DCC is a procedural issue that is markedly distinct from the subject-matter jurisdiction of the Court. While the former is a mere description of the alleged criminal conduct, the latter aims to determine whether the Court can proceed with a substantive examination of the crimes with which the accused is charged. Moreover, since counts 6 and 9 of the DCC make reference to a specific provision of the Statute, *i.e.* article 8(2)(e)(vi), which on its face criminalises the acts of rape and sexual slavery, the Trial Chamber could not have reasonably declared these counts as falling outside the jurisdiction of the Court simply on the basis of the language used by the Prosecutor in the DCC.

7. Since the matters raised in the first two grounds of Appeal do not give rise to any jurisdictional issue, they must be treated as substantive arguments that cannot be properly addressed by the Chamber under article 82(1)(a) of the Rome Statute. Indeed, the drafting history of the Statute reveals that the parties to the negotiations intended to set different procedural modalities for interlocutory appeals depending

[4] See the "Prosecution's application to dismiss *in limine* Bosco Ntaganda's Appeal against Trial Chamber VI's decision in respect of Counts 6 and 9", No. ICC-01/04-02/06-952 OA 2, 27 October 2015, para. 2.
[5] See the Document in support of Appeal, *supra* note 1, para. 11.
[6] *Idem*, paras. 11-13.

on the "*grounds upon which an interlocutory appeal* [is] *based*".[7] Compliance with the formal requirements established in the legal texts of the Court is therefore essential for an appeal to be admissible before the ICC. This approach is also consistent with the Appeals Chamber's ruling in the *Gbagbo* case, in which it dismissed *in limine* specific parts of an appeal brought under article 82(1)(a) of the Rome Statute because the appellant sought to address non-jurisdictional aspects of the decision challenged.[8]

8. The Legal Representative therefore requests the Chamber to dismiss the first two grounds of appeal *in limine* as inadmissible.

B. The third ground must be dismissed on the merits: The Trial Chamber was correct in finding that the Defence challenge is not jurisdictional

9. As noted *supra*, only the third ground may be the subject of the Chamber's consideration in the context of the present Appeal. It concerns whether the Trial Chamber "*erred in law in failing to find that these matters are jurisdictional in nature and that they require immediate resolution in the interests of justice*".[9] As the Appeals Chamber previously noted, "*the Impugned Decision focused primarily on the issue of whether the Challenge to Counts 6 and 9 was jurisdictional in nature*".[10] This specific finding may be the subject of a direct appeal pursuant to article 82(1)(a) of the Rome Statute, precisely because it constitutes a determination with respect to jurisdiction by the Trial Chamber. However, for the reasons outlined *infra*, the Legal Representative requests the Chamber to dismiss the third ground on its merits. Despite being admissible for the purpose of appellate review, the Legal

[7] See BRADY (H.) and JENNINGS (M.), "Appeal and Revision", in LEE (R.) (Ed.), *The International Criminal Court: the Making of the Rome Statute*, Kluwer Law International, 1999, p. 299.
[8] See the "Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings" (Appeals Chamber), No. ICC-02/11-01/11-321 OA2, 12 December 2012, para. 2.
[9] See the Document in support of Appeal, *supra* note 1, para. 3.
[10] See the "Decision on the Prosecutor's application to dismiss the appeal *in limine* and directions on the submission of observations pursuant to article 19 (3) of the Rome Statute and rule 59 (3) of the Rules of Procedure and Evidence" (Appeals Chamber), No. ICC-01/04-02/06-966 OA 2, 29 October 2015, para. 9.

Representative submits that the Defence failed to identify any error in the Trial Chamber's holding that the arguments raised by the Defence were not jurisdictional.

a) The Defence failed to establish that the Rome Statute imposes a restriction on the victims of rape/sexual slavery

10. The Trial Chamber's finding that the "*Court has jurisdiction over the war crimes of rape and sexual slavery, as such*" and that article 8(2)(e)(vi) of the Rome Statute "*does not specify who can be victims of the war crimes listed therein*" is unimpeachable.[11] Likewise, the Chamber was correct in ruling that because the "*Elements of Crimes refer only to 'person' and 'persons'*", no limitation exists as to the type of victims of the acts of rape and sexual slavery.[12] Indeed, the language of article 8(2)(e)(vi) of the Statute is sufficiently broad to include all acts of "*rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions*".

11. Contrary to the Defence assertion,[13] article 8(2)(e)(vi) of the Rome Statute does not explicitly restrict the acts of rape/sexual slavery to a particular category of victims. Moreover, it is clear from the plain wording of this provision that the reference to common article 3 of the four Geneva Conventions was intended to include "*other forms of sexual violence*" in addition to those explicitly listed in the Statute. Hence, the Rome Statute criminalises all acts of rape and sexual slavery as war crimes irrespective of whether such acts are explicitly provided for in the Geneva Conventions.[14] Likewise, the Elements of Crimes do not impose a

[11] See the Impugned Decision, *supra* note 2, para. 25.
[12] *Idem.*
[13] See the Document in support of Appeal, *supra* note 1, paras. 7-10.
[14] In this regard, the Statute may be construed as reinforcing the protection available under international humanitarian law. As noted by the Prosecution, the scope of protection has been significantly extended since the adoption of the Geneva Conventions, most notably in the Additional Protocols. See the "Prosecution's response to Mr Ntaganda's appeal against the "Decision on the Defence's Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9", No. ICC-01/04-02/06-1034+Anx1 OA2, 24 November 2015, para. 41 (the "Prosecution Response").

requirement that the victim of the war crimes in article 8(2)(e)(vi) be linked or affiliated to an "adverse party".

b) The Defence failed to demonstrate that child soldiers are unprotected against the acts of rape/sexual slavery under customary international law or the Geneva Conventions

12. Even if the Chamber were of the view that article 8(2)(e) of the Rome Statute should be strictly interpreted in light of customary international law and the Geneva Conventions, the Legal Representative submits that the Defence failed to provide any authority in support of its contention that the acts of rape/sexual slavery committed against child soldiers fall outside the scope of international humanitarian law.

13. First, the Legal Representative concurs with the Prosecution's submission that article 3 common to the Geneva Conventions does not restrict the crimes of rape/sexual slavery to a specific category of victims, nor does it require a different affiliation between the victim and the perpetrator. The Legal Representative hereby adopts the Prosecution's submissions in this respect.[15]

14. Moreover, the Defence argument that war crimes do not encompass acts committed by a member of an armed group against another member of the same group is entirely misconceived.[16] For instance, it is well-established that the war crimes related to child soldiers, such as use of child soldiers to actively participate in hostilities provided for in article 8(2)(e)(vii) of the Rome Statute, are typically and naturally perpetrated by members belonging to the same armed group. Moreover, the Defence's reliance to the RUF Trial Judgment is misplaced.[17] First, the findings made therein focus on the specific situation of international armed conflicts, whereas the present case concerns a non-international armed conflict. Second, the Judgement

[15] See the No. ICC-01/04-02/06-1034, 24 November 2015, paras. 33-34.
[16] See the Document in support of Appeal, *supra* note 1, para. 5.
[17] *Idem.*

referred to by the Defence is of limited relevance since it does not address the specific acts of rape and sexual violence committed against child soldiers forcibly recruited into the ranks of an armed group. Indeed, the specific findings cited by the Defence relate to the killing (as opposed to rape/sexual slavery) of a regular soldier (as opposed to child soldier), who was an *hors de combat* member of the AFRC fighting alongside the RUF.[18] A cautious approach is therefore warranted given the difference in the nature of the conflict, the status of the victims, and in the nature of the war crimes alleged.

15. Furthermore, none of the academic references cited by the Defence specifically address the protection of child soldiers against the acts of rape and sexual slavery.[19] With the exception of Wells, the views expressed appear to be all premised on the assumption that the victims of the war crimes are either regular army soldiers or members of armed groups, not child soldiers.[20] Moreover, the position taken by some commentators seems to provide support for the view that child soldiers are protected against the acts of rape and sexual slavery under international humanitarian law. For instance, Gaggioli states that "*if the military commander rapes a person detained for reasons connected to the armed conflict, such an act clearly constitutes a violation of IHL*".[21] There is no doubt, at least in the present case, that the status of the victims as "child soldiers" provides sufficient *nexus* with the armed conflict. All acts of rape/sexual slavery against UPC child soldiers were perpetrated after the victims had been enlisted or forcibly conscripted into the ranks of the UPC because of the armed conflict in Ituri. It is only logical that these heinous acts, particularly sexual slavery, could not be perpetrated without the prior recruitment of the victims into the armed group.

[18] See STSL, *Sesay* et al., SCSL-04-15-T, Judgement, 2 March 2009, paras. 1451-1454.
[19] See the Document in support of Appeal, *supra* note 1, footnote 11.
[20] *Idem.*
[21] *Ibid.*

16. The specific case of child soldiers is only addressed by Wells. As correctly pointed out by the Prosecution,[22] the views expressed provide support for the proposition that certain acts may be punishable as war crimes when committed against children not taking active or direct part in the hostilities. It is again only logical that rape and sexual slavery of child soldiers could not take place while they were taking active or direct part in the hostilities. Both categories of acts occurred at distinct times and in different contexts. Child soldiers could not therefore be considered, at the very moment they were raped and sexual enslaved, as lawful "military targets". Moreover, the Legal Representative posits that such crimes occurred before the end of the military training as well. Under article 4(1) of the Second Additional Protocol to the Geneva Conventions, they would remain protected under international humanitarian law because, when the rapes were committed, they were not taking a "*direct part in hostilities*" or "*ha*[d] *ceased to take a direct part in hostilities*".[23]

17. Moreover, the Legal Representative submits that the prohibition of the acts of rape and sexual slavery are increasingly considered as part of *jus cogens* norms.[24] Given the peremptory character of these prohibitions, the existence of these war crimes cannot be made dependent on whether or not the victim was actively participating in hostilities. It would also lead to the absurd consequence where child soldiers are protected against their unlawful recruitment into armed groups, but not

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[22] See the Prosecution Response, *supra* note 14, para. 34.

[23] While article 4(1) of the Second Additional Protocol to the Geneva Conventions may be considered as reinforcing the protection available under the Geneva Conventions, the chapeau of article 8(2)(e) of the Rome Statute mandates the Court to interpret the crimes in accordance with "*the established framework of international law*". Such a framework includes not only the Geneva Conventions, but also the subsequent international legal instruments such as the Additional Protocols and the Convention on the Rights of the Child.

[24] For instance, the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime stated that "sexual slavery is slavery and its prohibition is a *jus cogens* norm", see UN Sub-Commission on Human Rights, Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime, Final report (cited in Vol. II, Ch. 32, § 1885). See also P. V. Sellers, The Cultural Value of Sexual Violence, American Society of International Law Proceedings, American Society of International Law Proceedings, vol. 93, 1999, p. 324 (no circumstances exist in which rape can be authorized or tolerated or escape penal sanction under customary international law or international treaty law).

against the crimes that may occur as a consequence of such recruitment, such as rape and sexual slavery.

18. Even assuming *arguendo*, as submitted by the Defence,[25] that child soldiers should not have been actively participating in the hostilities in order to benefit from the protection available under international humanitarian law, the Legal Representative concurs with the Prosecution' submission that the mere recruitment of child soldiers into a non-State organised group does not constitute *per se* "*active participation in hostilities*".[26] Indeed, whether or not child soldiers actively participate in the hostilities is a factual matter to be resolved by the Trial Chamber on the basis of the evidence tendered at trial. The status of the victims as "child soldiers" does not necessarily imply that they have actively participated in the hostilities, if at all. Moreover, it is clear from the wording of article 8(2)(e)(vii) of the Rome Statute that the enlistment, conscription and use of child soldiers to participate actively in the hostilities are, if not separate crimes, at least distinct acts depicting different forms of criminal conduct.[27] Hence, under the Rome Statute, a child soldier can be conscripted or enlisted without actively participating in the hostilities, and thus, may qualify as a "protected person" under common article 3 of the Geneva Conventions.

19. More generally, the Defence's arguments regarding the applicability of international humanitarian law are premised on a conceptual flaw. The Defence appears to treat the concepts of "soldier", "fighter", "member of armed group" and "child soldier" as synonymous.[28] This is plainly incorrect. In doing so, the Defence

[25] See the Document in support of Appeal, *supra* note 1, para. 6.
[26] See the Prosecution Response, *supra* note 14, paras. 36 *et seq*.
[27] The Appeals Chamber did not take a clear position on the issue. It nevertheless clarified that "enlistment", "conscription" and "use to participate actively in hostilities" "*are separate crimes or different prescribed conducts of one crime*". See the "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction" (Appeals Chamber), No. ICC-01/04-01/06-3121-Red A5, para. 38. Moreover, it was ruled that "[t]*he prohibition against using children under the age of 15 to participate actively in hostilities is not dependent on the individuals concerned having been earlier conscripted or enlisted into the relevant armed force or group*." See "Judgment pursuant to Article 74 of the Statute" (Trial Chamber I), No. ICC-01/04-01/06-2842, 14 March 2012, para. 620.
[28] See the Document in support of Appeal, *supra* note 1, paras. 14, 15 and 18.

completely overlooks the special status and protection afforded to children under International Humanitarian Law and International Human Rights Law instruments. The Defence also fails to explain how "child soldiers", by definition forcibly conscripted into armed group, can be, as a matter of law, considered "*members of an armed groups*" on the same basis as other combatants.

20. The Defence also makes incongruent arguments regarding the status of child soldiers and the scope of their protection. While recognising the special protection afforded to children, the Defence submits that such protection is "*contingent upon the capture of the child*".[29] The Defence does not, however, explain how such protection cannot be extended to UPC child soldiers who have been forcibly conscripted into armed groups, or to those victims who have been sexually enslaved. Both situations may reasonably qualify as a "capture of child". Moreover, not only does the Defence contend that the child soldiers may not be considered as civilians, but it argues that they may not even benefit from the protection granted to combatants (or prisoners of war) because of their affiliation to the same armed group as the perpetrators. Such an interpretation completely defeats the purpose of granting a special protection to the children in armed conflicts.

c) The jurisprudence of the Court clearly established that the contours and the scope of a war crime is not a jurisdictional matter

21. The findings made in the Impugned Decision are not only consistent with the relevant provisions of the legal texts of the Court, but also in line with the jurisprudence of the Appeals Chamber. In *Ruto* et al. case, similar arguments were put forward by the Defence and were subsequently dismissed by the Appeals Chamber as non-jurisdictional. Although the Defence in that case contended that the Court lacked jurisdiction over the crimes charged, arguing that the Pre-Trial Chamber misconstrued the requirement for an organisational policy as a constitutive

[29] *Idem*, para. 17.

element of the crimes against humanity, the Appeals Chamber rejected this argument holding that the matter relates to "*the substantive merits*" of the case as opposed to the Court's "*subject-matter jurisdiction*".[30] The Chamber further clarified that the alleged lack of one or more constitutive elements of a crime does not affect the Court's jurisdiction. In this regard, the Chamber stated that "[e]*ven if the Trial Chamber were not to find, in law or on the evidence, that there was an 'organizational policy' this would not mean that the Court did not have jurisdiction over the case but rather that crimes against humanity were not committed*".[31]

22. In the present case, the Defence contends that there exist "pre-conditions" for the war crimes set forth in article 8(2)(e) and 8(2)(e)(vi) of the Rome Stature namely, that the victims of the crimes fall within the category of "protected persons".[32] This specific argument relates to the constitutive elements of the crimes, not to the jurisdiction of the Court. Even if the Chamber were to find that the "pre-conditions" are part of the constitutive elements of the war crimes, this would require a further substantive legal and factual assessment in order to determine whether the victims concerned are, in effect, "protected persons". A determination as to whether an individual qualifies as a "protected person" is clearly an issue that pertains to the merits of the case. It involves a consideration of several factors including, whether the person is member of an armed group, bearing the status of "soldier", is taking direct part in the hostilities, or was *hors combat* at the relevant time. It also requires the determination of the specific contours and scope of protection afforded to child soldiers under international humanitarian law.

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[30] See the « Decision on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", No. ICC-01/09-01/11-414 OA4, 24 May 2012, para. 30.

[31] *Idem*, para. 31.

[32] See the Document in support of Appeal, *supra* note 1, paras. 2 and 7.

d) The Defence appeal is premised on a series of assumptions which are either incorrect or yet to be determined in the course of trial

23. The Legal Representative further notes that many of the arguments put forward by the Defence are premised on factual or legal assumptions which are either incorrect or yet to be established in the course of the trial. Such aspects of the case cannot be properly addressed in the context of a jurisdictional challenge because they require prior consideration of the merits of the case.

24. Accordingly, it is submitted that the Defence contention that the Trial Chamber erred in finding that the arguments raised were not jurisdictional is without merits.[33] This argument is flawed in many respects, for the following reasons:

1- The Defence assumes, without providing sufficient evidence in support, that only specific forms of rape and sexual slavery may qualify as war crimes under article 8(2)(e)(vi) of the Rome Statute. In this respect, the Defence submits that, depending on the status or identity of the victim, the same acts of rape/sexual slavery may not be covered by the Statute but rather constitute an "entire category of crimes".[34]

2- Second, while no such requirement is explicitly referred to in the Statute or the Elements of the Crimes, the Defence assumes that certain implied "pre-conditions" exist. Although the Defence does not provide an exhaustive list of all the presumed "pre-conditions", it nevertheless contends that the scope of article 8(2)(e)(vi) of the Rome Statute must be restricted to a specific category of victims namely, the "protected persons".[35]

[33] *Idem*, paras. 21 *et seq.*
[34] *Ibid.*, para. 23.
[35] *Ibid.*, para. 2.

3- The Defence further assumes that "child soldiers", as an entire group of victims, do not fall within the category of protected persons. In doing so, the Defence seems to consider that all UPC child soldiers are not covered by common article 3 of the Geneva Conventions *i.e.*, "[p]*ersons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat*.'"[36] This assumption is made notwithstanding the specificities of each case and the variant degrees of children's involvement in the armed conflict in Ituri.

4- The Defence assumes that the special protection afforded to children under the Second Additional Protocol to the Geneva Conventions, does not include the "*retention of civilian status, let alone dual civilian and combatant status*".[37] It further submits that the protection granted to children is limited to "*entitlements to receive education and that all appropriate steps be taken to facilitate return to their families*".[38]

5- The Defence also assumes that the acts of rape and sexual slavery committed against "unprotected persons" do not fall within the ambit of war crimes and international humanitarian law.[39]

6- The Defence assumes that the child soldiers form a homogeneous group along with the perpetrators, and that they may be all considered as part of "the same armed group".[40] In this respect, the Defence does not seek to establish a distinction between the victims of conscription and those of enlistment, nor seek to explain the basis for the difference in treatment between the civilian victims of sexual slavery and the UPC victims of sexual slavery.

[36] *Ibid.*, paras. 7, 9, 14-17.
[37] *Ibid.*, para. 17.
[38] *Ibid.*, para. 17.
[39] *Ibid.*, para. 18.
[40] *Ibid.*, para. 24.

25. On the basis of these wrongful factual and legal assumptions, the Defence mounted its "jurisdictional challenge", as well as its Appeal against the Impugned Decision. The Appeals Chamber is now requested to declare that "*Counts 6 and 9 fall beyond the jurisdiction conferred by the Rome Statute*". Not only are these assertions factually weak and legally questionable, but they lack a sufficient foundation. Incidentally, the Defence itself recognises that the aforementioned issues need to be resolved prior to any final decision on jurisdiction.

26. More importantly, the very fact that these matters constitute the main points of contention is a clear indication that the subject-matter of the Appeal does not relate to the issue of jurisdiction. Rather, what the Appeals Chamber is requested to consider are substantive issues of law and facts pertaining to the merits of the case. The Defence failed to identify any error in the Trial Chamber's holding that the challenge was not jurisdictional. The Appeal must therefore be dismissed.

e) A challenge which requires prior consideration of the merits of the case cannot qualify as a jurisdictional challenge

27. Since the success of the Appeal depends on resolving a litany of issues pertaining to the merits of the case, the Legal Representative submits that the Appeal cannot be treated as a jurisdictional challenge. Under article 19 of the Rome Statute, a challenge to the jurisdiction of the Court is designed to allow the parties to raise preliminary objections before addressing any substantive questions related to the case. This is the reason for prescribing that, in principle, any "*challenge shall take place prior to or at the commencement of the trial*".[41] If the resolution of substantive issues were permissible in the context of the jurisdictional challenges, it would defeat the requirement that such challenges must be raised at the earliest opportunity.

28. Moreover, in the context of jurisdictional challenges, the Appeals Chamber previously held that "*as part of the reasons in support of a ground of appeal, an appellant is*

[41] See article 19(4) of the Rome Statute.

obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the Impugned Decision".[42] It was ruled that "[t]*he appellant therefore has a duty to substantiate how an error materially affects the Impugned Decision. In relation to an error of law, the Appeals Chamber held that a decision is materially affected by an error law if the Pre-Trial or Trial Chamber would have rendered a decision that is substantially different from the decision that was affected by the error, if it had not made the error*".[43] The Defence, as the challenging party, is therefore required to identify clear errors in the Impugned Decision and provide adequate proof in support of its contention. A judicial ruling at first instance cannot be overturned, as is the case in the present Appeal, on the basis of mere assumptions or untested allegations. This would defeat the corrective nature of appellate review. Likewise, if the Chamber were to consider the correctness of purely hypothetical arguments "*it would, in effect, be giving an advisory opinion, which is not the Appeals Chamber's role*".[44]

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[42] See for instance the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled 'Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence'" (Appeals Chamber), No. ICC-01/05-01/08-1019 OA 4, 19 November 2010, para. 69.

[43] See the "Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings" (Appeals Chamber), No. ICC-02/11-01/11-321 OA2, 12 December 2012, para. 2.

[44] See the "Decision on the Prosecutor's appeal against the 'Decision on the Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute'" (Appeals Chamber), No. ICC-01/09-01/11-1123 OA 6, 13 December 2013, para. 25. See also the "Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 6 December 2007", No. ICC-02/05-138 OA OA 2 OA 3, 18 June 2008, para. 18; the "Decision on Victims Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 24 December 2007", No. ICC-01/04-503 OA 4 OA 5 OA 6, 30 June 2008, para. 30; the "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case" (Appeals Chamber), No. ICC-01/04-01/07-1497 OA 8, 25 September 2009, para. 38.

29. Moreover, in ruling on an appeal, the Chamber has to consider whether the relief sought can, at this stage, be granted. If it cannot, the Appeal must be dismissed.[45] The Legal Representative submits that since the arguments raised in the Appeal require the resolution of other complex factual and legal aspects of the case, the relief sought by the Defence (i.e. to declare counts 6 and 9 as falling outside the jurisdiction of the Court) cannot be granted by the Chamber.

30. Accordingly, the Defence failed to identify an error in the Impugned Decision. Given the complexity and the nature of the arguments raised in the challenge, it was entirely reasonable for the Trial Chamber to defer its ruling on the merits of the Defence request until the end of the trial.[46] As the Chamber noted, the Defence did not challenge the existence of the war crimes of rape and sexual slavery under article 8(2)(e)(vi) of the Rome Statute, but rather whether they apply to "child soldiers".[47] The Chamber therefore correctly recognised that the arguments raised are matters to be addressed at trial.

FOR THESE REASONS, the Legal Representative respectfully requests the Chamber to:

(i) Dismiss the first and second grounds *in limine* since they do not relate to the issue of jurisdiction, nor do they refer to a specific finding on jurisdiction in the Impugned Decision and,

(ii) Dismiss the third ground on its merits, and confirm the Trial Chamber's holding that the Defence challenge is not jurisdictional.

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[45] The Appeals Chamber has ruled that "[b]*efore addressing the merits of the* […] *arguments as to why the Impugned Decision was erroneous, the Appeals Chamber has to consider whether the relief sought can, at this point in time, still be granted. If it cannot, there is no reason for the Appeals Chamber to address the merits of the appeal, and it would have to be dismissed*".

[46] See the Impugned Decision, *supra* note 2, para. 28.

[47] *Idem*, para. 25.

It is hereby certified that this document contains a total of 5,753 words and complies in all respects with the requirements of Regulation 36 of the Regulations of the Court.[48]

Sarah Pellet
Common Legal Representative of the Former
Child soldiers

Dated this 30th Day of November 2015

At The Hague, The Netherlands

[48] This statement (30 words), not itself included in the word count, follows the Appeals Chamber's direction. See No. ICC-01/11-01/11-565 OA6, 24 July 2014, para. 32.