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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

**Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in
respect of Counts 6 and 9 of the Document containing the charges**

Source: Defence Team of Mr Bosco Ntaganda

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Nicole Samson

Counsel for the Defence

Me Stéphane Bourgon
Me Luc Boutin
Me Isabelle Martineau
Mlle Margaux Portier

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation / Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Further to the oral decision rendered by Trial Chamber VI (“Chamber”) on 3 July 2015¹ setting the commencement date of the trial to 2 September 2015 and pursuant to Article 19(4) of the Rome Statute (“Statute”) and Rule 58 of the Rules of Procedure and Evidence (“Rules”), Counsel representing Mr Bosco Ntaganda (“Defence”) hereby submit this:

Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Document containing the charges

“Defence Application”

OVERVIEW

1. Pursuant to Article 19(4) and Rule 58, the Defence hereby formally challenges the jurisdiction of the International Criminal Court (“Court”) in respect of Counts 6 and 9 of the Updated document containing the charges (“DCC”).²
2. The Defence notes that further to the Confirmation hearing it requested Pre-Trial Chamber II to decline to confirm all charges comprised in the Document containing the charges including Counts 6 and 9 on the basis that *inter alia* “la réelle question qui se pose en l’espèce n’est donc pas de déterminer quelles protections sont accordées par le DIH aux enfants dans le cadre des conflits armés, mais de déterminer si les chefs 6 et 9 constituent des crimes relevant de la juridiction de la Cour aux termes de l’Article 8(2)(e)(iv)”.³ The Defence did not however formally challenge the jurisdiction of the Court in relation to Counts 6 and 9 pursuant to Article 19 and Rule 58. On this basis, the Defence respectfully posits that the jurisdiction of the Court is hereby formally challenged pursuant to Article 19 and Rule 58 for the first time.
3. Should the Chamber take the view that the jurisdiction of the Court in respect of Counts 6 and 9 has already been challenged once pursuant to Article 19(4),

¹ ICC-01/04-02/06-T-22-CONF-ENG, p.4, 1.5 to p.5, 1.20.

² ICC-01/04-02/06-458.

³ ICC-01/04-02/06-292.

- the Defence submits that exceptional circumstances justify the Chamber granting leave to the Defence to challenge the jurisdiction of the Court in relation to Counts 6 and 9 at this time.
4. Such exceptional circumstances include, *inter alia*, the fact that Pre-Trial Chamber II's ruling that it is "[...] not barred from exercising jurisdiction over the crimes in Counts 6 and 9",⁴ rests solely on its assessment whether UPC/FPLC child soldiers were taking direct/active part in hostilities at the time they were victims of acts of rape and/or sexual slavery⁵. Significantly, Pre-Trial Chamber II did not address many other arguments put forward by the Parties and one of the Legal Representatives. The addition by the Prosecution, since the Decision confirming the charges, of new witnesses either alleged to have been victims of Counts 6 and 9 or expected to adduce evidence in relation to Counts 6 and 9, is yet another exceptional circumstance.⁶
 5. The DCC makes it clear that the Prosecution regards Counts 6 and 9 as distinct from Counts 5 and 8, whereas the latter charge Mr Ntaganda with rape and sexual slavery of *civilians* as war crimes and the former charge Mr Ntaganda with rape and sexual slavery of *child soldiers* as war crimes.
 6. The Court, and by extension the Chamber, does not have jurisdiction over Counts 6 and 9 which charge Mr Ntaganda with crimes that do not form part of the Court's *rationae materiae* jurisdiction.
 7. Significantly, the *rationae materiae* jurisdiction of the Court is exhaustive and does not include the crimes of rape and sexual slavery of child soldiers.

⁴ Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ICC-01/04-02/06-309 ("Decision confirming the charges"), para.80.

⁵ Decision confirming the charges, para.77.

⁶ See *inter alia* witnesses P-0883, P-0888, P-0901 and P-0769.

8. Article 8(2)(e)(vi) – which specifically refers to Article 3 common to the four Geneva Conventions (“Common Article 3”) – does not foresee the possibility of child soldiers being victims of the war crimes of rape and sexual slavery.
9. Indeed, child soldiers who are members of the same armed group as the Accused, are not included in the category of “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention or any other cause”.
10. Moreover, the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (“Protocol Additional II”) finds no application in this case.
11. In any event, even if Protocol Additional II were to find application, child soldiers are not included in the category of “[a]ll persons who do not take a direct part of who have ceased to take part in hostilities, whether or not their liberty has been restricted”, as set out in Article 4(1) of the Protocol.
12. It is also noteworthy that rape and sexual slavery of child soldiers are not recognized as war crimes under customary international law.
13. Consequently, notwithstanding the protection afforded to child soldiers in the context of an international or a non-international armed conflict – and even though rape and sexual slavery of child soldiers are reprehensible acts subject to criminal prosecution in national jurisdictions – the Court, and by extension the Chamber, does not have jurisdiction over Counts 6 and 9.
14. Proceedings pursuant to Counts 6 and 9 must therefore be discontinued forthwith.
15. In accordance with Article 19(4), this Defence Application is brought before the opening of the trial.

SUBMISSIONS

I. The crimes of rape and sexual slavery of child soldiers are not crimes listed in the Statute

16. The DCC charges Mr Ntaganda with rape and sexual slavery of UPC/FPLC child soldiers pursuant to Article 8(2)(e)(vi) of the Statute.⁷
17. Article 8(2)(e) applies to “[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, *namely*, any of the following acts”⁸ listed in Article 8(2)(e)(i) to Article 8(2)(e)(xv). Among these acts, Article 8(2)(e)(vi) includes “[c]ommitting rape, sexual slavery [...] and any other of sexual violence also constituting a serious violation of article 3 common to the four Geneva Convention”.
18. Consistent with Article 22 of the Statute – which provides that the definition of a crime shall be strictly construed and shall not be extended by analogy – Article 8 of the Statute, which sets out a list of war crimes, must be regarded as establishing an *exhaustive* list of war crimes over which the Court can exercise its jurisdiction pursuant to the Statute.
19. This position is supported by the drafting history of the Statute, which shows that a large majority of States were eager to limit the jurisdiction of the ICC to the core crimes listed in Article 5,⁹ and by extension to the specific crimes listed in Article 8.
20. Laws and customs of war in the context of a non-international armed conflict mainly consist of the Common Article 3, the Additional Protocol II and customary law applicable to non-international conflicts, and – in the present

⁷ DCC, para.100-108, Count 6, p.61 and Count 9, p.62.

⁸ Emphasis added.

⁹ Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court, Article 1 para.1.

case – to conflicts opposing armed groups within a State excluding governmental forces.

II. Common Article 3 of the Geneva Conventions does not apply to child soldiers

21. Common Article 3 applies to: (i) persons taking no active part in the hostilities; (ii) members of armed forces who have laid down their arms; and (iii) those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause.
22. A literal interpretation of Common Article 3, in accordance with the ordinary meaning to be given to the words used therein, necessarily excludes child soldiers from the ambit of Common Article 3.
23. In referring to “[p]ersons taking no active part in the hostilities”, Common Article 3 aims at protecting any person not involved in a conflict, such as civilians. Evidently, this does not include child soldiers incorporated in any armed groups involved in a non-international armed conflict.
24. “Members of armed forces who have laid down their arms” refers to *adversaries* who surrendered. Such category does not encompass soldiers – including child soldiers – of an accused’s own armed forces.
25. Similarly, the category “those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause” is limited to adversaries. Child soldiers are excluded from the ambit of this category.
26. The ICRC commentary on Common Article 3 supports this conclusion.¹⁰
27. Moreover, the phrase “laws and customs of war” as stated in Article 8(2)(e) essentially refers to international humanitarian law (“IHL”). IHL typically protects persons and objects belonging to one of the parties to the conflict

¹⁰ ICRC, Commentary on the Geneva Convention of 12 August 1949, Volume I, p.51-53.

from certain abusive or overly destructive *conduct by an adversary party* to the conflict.¹¹

III. Other than for the crimes of enlistment, conscription and use to participate actively in hostilities, child soldiers cannot be victims of war crimes

28. It is well established that the laws of armed conflict do not protect members of armed groups from acts of violence directed against them by their own forces.¹²
29. It follows that acts of violence prohibited pursuant to Common Article 3 committed against child soldiers – who are incorporated into an armed group by members belonging to the same armed group – are not acts which give rise to individual criminal responsibility under the laws of armed conflict in the context of either a non-international armed conflict or an international armed conflict.
30. The fact that the crime of using child soldiers to participate actively in hostilities can be committed by a perpetrator against members of his own party to the conflict,¹³ is an express exception to the principle that war crimes can only be committed against members of the adversaries or those in the hands of a party to the conflict by virtue of being detained or interned. This exception cannot serve as a justification to extend the scope of Article 8(2)(e)(vi) to child soldiers.
31. In the *Commentary on the Rome Statute of the International Criminal Court*, Michael Cottier qualifies the crime of child soldiers as an “unusual war crime” as it protects children against their own authorities. Perpetrators and victims of these war crimes thus may belong to the same party to the conflict.

¹¹ Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, Article 8 para.2.

¹² Special Court for Sierra Leone, *The Prosecutor v. Sesay et al.*, SCSL-04-15-T, Judgement, 2 March 2009, para.1451.

¹³ *Katanga*, Decision on the confirmation of the charges, ICC-01/04-01/07-717, para.248.

This criminalization of acts committed against or '*vis-à-vis*' persons belonging to the same party to the conflict deviates fundamentally from the general thrust of IHL and the law of war crimes, which typically regulate acts committed against persons belonging to an adverse party to the conflict.¹⁴

32. It is also significant that no norms of customary international law recognize rape or sexual slavery of child soldiers as war crimes.

IV. Additional Protocol II is not applicable to this case

33. Additional Protocol II applies to “[...] all armed conflicts [...] which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups [...]”.¹⁵

34. As explained in the Commentary on Additional Protocol II:

The Protocol applies on the one hand in a situation where the armed forces of the government confront dissident armed forces [...] In its draft the ICRC had provided that the Protocol would be applicable in the case of several factions confronting each other without involvement of the government's armed forces, for example, if the established government had disappeared or was too weak to intervene. Such a situation, it appeared to the Conference, was merely a theoretical textbook example and the provision was dropped, even though the ICRC had already been confronted with this type of situation. Thus unfortunately the definition does not cover such cases and only common Article 3 will apply to them.¹⁶

35. Considering that the DCC neither alleges nor suggest that the national armed forces of the Democratic Republic of the Congo were involved in the alleged non-international armed conflict between the FPLC and other organised

¹⁴ Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court, Article 8 para.228. The Defence notes that this paragraph interprets the crime of child soldiers participating in hostilities in the context of international armed conflicts. Nevertheless, interpretation of the same crime committed in hostilities in the context of a non-international conflict at para.318 to 321 also refers to the interpretation provided under Article 8(2)(b)(xxvi).

¹⁵ Additional Protocol II, Article 1(1).

¹⁶ Commentary of 1987 on Additional Protocol II, paras.4460-4461.

- armed groups in Ituri,¹⁷ Additional Protocol II does not apply to the present case.
36. In any event, even if Additional Protocol II did find application in the present case, Article 4 does not prohibit rape and sexual violence against child soldiers of the same armed group as the perpetrator.
37. At the outset, the Defence notes that the personal field of application of Additional Protocol II is limited to people “affected by an armed conflict”.¹⁸ The Commentary on Additional Protocol II specifies that these persons are: (i) persons who do not, or no longer, take part in hostilities and enjoy the rules of protection laid down by Additional Protocol II for their benefit; and (ii) persons who must, within the meaning of the Protocol, conform to certain rules of conduct with respect to the adversary and the civilian population.¹⁹
38. Regarding persons who do not, or no longer take part in hostilities, the Commentary on Additional Protocol II makes clear that:
- [Part II, entitled ‘Humane Treatment’] is aimed at protecting persons who do not, or no longer, participate in hostilities against abuses of power and against inhuman and cruel treatment which may be inflicted upon them by the military or civilian authorities into whose hands they have fallen. As the Protocol does not provide for different categories of persons who enjoy a special status, such as prisoners of war in international armed conflicts, the rules laid down here apply equally to all persons affected by the armed conflict who are in the power of the enemy (the wounded and sick, persons deprived of their liberty, or whose liberty has been restricted), whether they are military or civilians.²⁰
39. In the same vein, Article 4 of Additional Protocol II does not apply to child soldiers as it concerns specifically “[a]ll persons who do not take a direct part or who have ceased to take part in hostilities”.

¹⁷ DCC, para.61.

¹⁸ Additional Protocol II, Article 2.

¹⁹ Commentary of 1987 on Additional Protocol II, para.4485.

²⁰ Commentary of 1987 on Additional Protocol II, para.4507 (emphasis added).

40. Article 4(3) of Additional Protocol II provides for specific protections for children.
41. The Defence notes that these protections apply to children under the age of fifteen who take part in hostilities *only when* they are captured. These protections are thus inapposite to child soldiers who are victims of acts of violence committed by a perpetrator in the same armed group. In the instant case, Mr Ntaganda is charged with rape and sexual slavery of alleged FPLC child soldiers. He is not charged with rape and sexual slavery of enemy child soldiers captured.

V. The body of laws applicable to international armed conflicts supports the position that child soldiers are not the potential victims envisaged by 8(2)(e)(vi)

42. The language of Article 75 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)²¹ mirrors that of Articles 4, 5 and 6 of Additional Protocol II in the context of an international armed conflict.
43. This demonstrates that laws of the armed conflict, whether international or non-international, whether statutory or customary, do not apply to acts of violence committed against members of the perpetrator's own armed group, regardless of the age of the victim.

CONCLUSION

44. It stems from the above that child soldiers cannot be victims of rape and sexual slavery as a war crime under the laws and customs of war applicable to armed conflicts not of an international character.

²¹ "In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict [...] shall be treated humanely in all circumstances", Article 75, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts.

45. Thus, trying Mr Ntaganda under Counts 6 and 9 of the DCC would violate the internationally applicable principle of criminal law "*nullum crimen sine lege*" enacted in Article 22 of the Statute.
46. In such circumstances, the Chamber must decline to exercise its jurisdiction over the crimes charged in Counts 6 and 9 of the DCC.

RELIEF SOUGHT

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

FIND that the *rationae materiae* jurisdiction of the Court does not include rape and sexual slavery of child soldiers as war crimes;

HOLD that it is barred from exercising jurisdiction over Counts 6 and 9: rape and sexual slavery of child soldiers; and

ORDER the proceedings in respect of all other Counts in the DCC to continue with the caveat that no evidence related to the crimes charged in Counts 6 and 9 shall be presented until a final decision on the Defence Application is rendered.

RESPECTFULLY SUBMITTED ON THIS 1ST DAY OF SEPTEMBER 2015



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands