



Original: **English**

No.: ICC-01/04-02/06
Date: 24 September 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

Reply on behalf of Mr Ntaganda to “Prosecution Response to the ‘Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Documents containing the charges’, ICC-01/04-02/06-804”

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

Legal Representatives of Victims

Ms Sarah Pellet
Mr Dmytro Suprun

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 submission of the *“Prosecution Response to the ‘Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Documents containing the charges’”* on 11 September 2015 (“Prosecution Response”),¹ Counsel representing Mr Ntaganda (“Defence”) hereby submit this:

Reply on behalf of Mr Ntaganda to “Prosecution Response to the ‘Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Documents containing the charges’, ICC-01/04-02/06-804”

“Defence Reply”

INTRODUCTION

1. On 1 September 2015, the Defence submitted its *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”).²
2. On 11 September 2015, the Prosecution submitted the Prosecution Response to the Defence Application.
3. On 17 September 2015, the Defence Submitted its *Request on behalf of Mr Ntaganda seeking leave to reply to ‘Prosecution Response to the ‘Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Documents containing the Charges’, ICC-01/04-02/06-804* (“Defence Request”).³
4. The Defence sought leave to reply on three issues namely: (i) whether the Defence Application is a proper jurisdiction challenge within the meaning of Article 19; (ii) whether the addition of new witnesses relevant to Counts 6 and 9 of the Updated Document containing the charges (“Updated DCC”) after the confirmation of charges is an ‘exceptional circumstance’ warranting

¹ ICC-01/04-02/06-818.

² ICC-01/04-02/06-804.

³ ICC-01/04-02/06-835.

leave to make a 'second' jurisdictional challenge; and (iii) whether granting the Defence Application will unduly delay trial proceedings.

5. On 18 September 2015, the Chamber granted, by email, leave to reply on the first issue as defined in the request for leave to reply, i.e. "whether the Defence Application is a proper jurisdiction challenge within the meaning of Article 19".⁴

SUBMISSIONS

6. The Prosecution's reliance on the *Gotovina* decision is misplaced. The jurisprudence of the ICTY demarcates clearly between jurisdictional and non-jurisdictional challenges: the former concerns "whether the crime charged is envisioned by the statute,"⁵ whereas the latter concerns "the contours and elements of modes of liability" and the contours of recognized crimes.⁶
7. For example, a challenge to the existence of the mode of liability known as "co-perpetratorship" is jurisdictional,⁷ as is a claim that a particular crime as formulated does not constitute a war crime.⁸ The challenges in *Gotovina*, on

⁴ Email from Trial Chamber VI Communications to the Defence, 18 September 2015, 12:44.

⁵ *Karadžić*, IT-95-5/18-AR72.1/AR.72.2/AR72.3, Decision on Radovan Karadžić's Motions Challenging Jurisdiction (Omission Liability, JCE-II – Special Intent Crimes, Superior Responsibility), 25 June 2009, para. 36.

⁶ *Id.*: "As *Tolimir* and *Gotovina* demonstrate, the Appeals Chamber's approach to subject matter jurisdiction now focuses on whether the crime charged is envisioned by the statute, and whether the mode of liability upholds the principle of individual criminal responsibility; the contours and elements of modes of liability are considered an 'issue of law [...] which can be properly advanced and argued during the course of trial'; *Tolimir*, IT-05-88/2-AR72.1, Decision on Tolimir's "Interlocutory Appeal Against the Decision of the Trial Chamber on the Part of the Second Preliminary Motion Concerning the Jurisdiction of the Tribunal", 25 February 2009, para. 10: "Genocide and Conspiracy to Commit Genocide, which are within the Tribunal's subject-matter jurisdiction, are still charged, whatever the relationship between these crimes and JCEs, and whether or not the Prosecution has provided sufficient support or correct details regarding the *actus reus* and *mens rea*."

⁷ *Prlić et al.*, IT-04-74-AR72.3, Decision on Petković's Appeal on Jurisdiction, 23 April 2008, para. 21: "The Appeals Chamber finds that in this case, the ambiguities existing in the Indictment could in fact have been easily removed, given the Appeals Chamber's dismissal of "co-perpetratorship" as a jurisdictionally valid mode of liability."

⁸ *Strugar & Jokić*, IT-01-42-PT, Decision on Defence Preliminary Motion Challenging Jurisdiction, 7 June 2002, para. 32: "The requirement for the application of Article 3 of the Statute that the

the other hand, all concerned challenges to the proper definition of recognized crimes,⁹ or even the sufficiency of the factual pleading in relation to those recognized crimes.¹⁰ The *Gotovina* challenges bear no resemblance to the challenge brought here – which is that the crimes alleged do not exist.

8. The Prosecution is incorrect in characterizing the Defence's challenges to the formulation of Counts 6 and 9 as reflecting no more than a disagreement about the "scope of application", or the "statutory interpretation", of Article 8(2)(e)(vi) of the Statute. This argument might be tenable if the Prosecution had sought to bring these alleged crimes within Counts 5 and 8, rather than attempting to posit the separate – and wholly unknown – crimes set forth in Counts 6 and 9. The Prosecution, not the Defence, has purported to define the crime of "rape of [...] child soldiers, a war crime" and "[s]exual slavery of [...] child soldiers, a war crime." These crimes, as formulated by the Prosecution, are claimed to be inherently incompatible with the definition of war crime for the reasons set out in the motion. This is not a debate about the contours or elements of the crimes defined in Counts 5 and 8, which are recognized war crimes.

violations of the laws and customs of war with which the Accused is charged, constitute violations of a rule of international humanitarian law is thus fulfilled."

⁹ *Gotovina et al.*, Decision on Ante Gotovina's interlocutory appeal against decision on several motions challenging jurisdiction, 6 June 2007, para. 11: "the Appellant submits that with respect to Counts 1-3 of the Joint Indictment, the Trial Chamber erred in law by expanding the *actus reus* of deportation and forcible transfer as crimes against humanity under Article 5 of the Statute when it failed to find that there is an 'occupied territory' requirement pursuant to Article 49(1) of Geneva Convention IV and Article 17(1) of Protocol II to the Geneva Convention for these crimes"; para. 16: "[t]he Appellant notes that one of the fundamental requirements for grave breaches provisions under Article 2 of the Statute is that 'protected persons' be 'in the hands of' a party to the conflict"; para. 22: "[f]inally, under this fourth ground of appeal, the Appellant claims that the Trial Chamber erred in law when it confirmed that the applicable *mens rea* for third category or the extended form of joint criminal enterprise ("JCE") liability is *dolus eventualis*".

¹⁰ *Id.*, para. 19: "[t]he Appellant's third ground of appeal alleges that the Trial Chamber erred by failing to weigh considerations in a reasonable manner when it declined to find that the facts as pleaded in the Indictment constitute *debellatio* or 'the end of an armed conflict which results in the occupation of the whole enemy's territory and the cessation of all hostilities'"

9. As acknowledged by the Prosecution itself, it is a debate about jurisdiction: in its *Letter of Instructions for Expert on Children associated with armed groups in Armed Conflict and Violence against Women in Armed Conflict*, the Prosecution requested a written report on expert conclusions on several questions including *inter alia*: “The legal basis, if any, for the Court to exercise jurisdiction under article 8(2)(e)(vi) regarding the crimes of rape and/or sexual slavery committed against members of the same armed group?”.¹¹
10. No additional factual or legal arguments need to be elucidated through trial in order to assess whether the challenge is founded¹². The claim asserted by the Defence Application is that the definition of the crime is itself inherently incompatible with the definition of “war crime.” No further facts or arguments need to be elucidated in order to adjudicate this issue.
11. The Prosecution has charged Count 6 and 9 as autonomous crimes with the apparent purpose of expanding the law. During a press conference prior to the Opening Statements in the present case, the Prosecutor stated that “for the first time, [it] has charged a person with committing these crimes in his own group [...] I think it is *an innovation that the Office of the Prosecution will be bringing to international criminal justice*”.¹³ This “innovation” is permissible only if it falls within the jurisdiction of the Court.
12. The degree of “innovation” cannot be understated. The crimes charges would alter the basic foundations of *jus in bello* and international humanitarian law. It is hard to imagine any matter that more directly concerns jurisdiction.

¹¹ DRC-OTP-2084-0059, para. 10 (letter dated 24 March 2015).

¹² Prosecution Response, para. 23. See also *Former child soldiers’ response to the “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”*, ICC-01/04-02/06-814, 9 September 2015, paras. 3-4.

¹³ *Ntaganda* case: Press Conference, 1 September 2015, min 33 : 38 to min 34 :07. Press Conference available on the Youtube channel of the court: <https://www.youtube.com/watch?v=gOgZc-IgDIA>.

RELIEF SOUGHT

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

GRANT the Defence Application.

RESPECTFULLY SUBMITTED ON THIS 24TH DAY OF SEPTEMBER 2015

A handwritten signature in black ink, appearing to read 'StB-'.

Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands