

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 9 October 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**

**Decision on the Defence's challenge to the jurisdiction of the Court in respect of  
Counts 6 and 9**

Decision 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 Bosco Ntaganda**

Mr Stéphane Bourgon  
Mr Luc Boutin

**Legal Representatives of Victims**

Ms Sarah Pellet  
Mr Dmytro Suprun

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

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

**States' Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**Trial Chamber VI** ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 8 and 19 of the Rome Statute ('Statute') and Rule 58 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9'.

## I. PROCEDURAL HISTORY

1. On 10 January 2014, the Office of the Prosecutor ('Prosecution') filed the Document Containing the Charges ('DCC'),<sup>1</sup> in which the Prosecution charged Mr Ntaganda with, inter alia, '[r]ape of UPC/FPLC child soldiers, a war crime, punishable pursuant to article 8(2)(e)(vi)' (Count 6) and '[s]exual slavery of UPC/FPLC child soldiers, a war crime, punishable pursuant to article 8(2)(e)(vi)' (Count 9).<sup>2</sup>
2. From 10 to 14 February 2014, the confirmation hearing took place, during which the defence team for Mr Ntaganda ('Defence') argued that the charges contained in Counts 6 and 9 cannot be confirmed.<sup>3</sup> In its written submissions, the Defence made further submissions on this issue.<sup>4</sup>
3. On 9 June 2014, Pre-Trial Chamber II confirmed charges against Mr Ntaganda ('Confirmation Decision'), including Counts 6 and 9.<sup>5</sup>
4. On 2 June 2015, the Chamber instructed the parties and participants to file by 15 June 2015 'any motion or request on matters that [they] [...] wish to bring to the

<sup>1</sup> ICC-01/04-02/06-203-AnxA. An Updated Document Containing the Charges ('Updated DCC') was filed on 16 February 2015 (ICC-01/04-02/06-458-AnxA).

<sup>2</sup> DCC, ICC-01/04-02/06-203-AnxA, pp 57-58.

<sup>3</sup> Transcript of Hearing of 13 February 2014, ICC-01/04-02/06-T-10-RED-ENG, page 27, lines 5-25.

<sup>4</sup> Conclusions écrites de la Défense de Bosco Ntaganda suite à l'Audience de confirmation des charges, 14 April 2014, ICC-01/04-02/06-292-Red2, paras 250-263.

<sup>5</sup> 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.

Chamber's attention or wish to be decided prior to the start of trial', then set for 2 July 2015.<sup>6</sup> After the start of trial was postponed until 2 September 2015, the Chamber reset the aforementioned deadline to 12 August 2015.<sup>7</sup>

5. On 1 September 2015, the Defence filed an application challenging the jurisdiction of the Court in respect of Counts 6 and 9 of the Updated DCC ('Request').<sup>8</sup>
6. On 9 September 2015, the Legal Representative of former child soldiers ('Legal Representative') filed a response, requesting the Chamber to dismiss the Request ('LRV Response').<sup>9</sup>
7. On 11 September 2015, the Prosecution responded to the Request ('Prosecution Response'),<sup>10</sup> requesting the Chamber to dismiss it *in limine*.<sup>11</sup>
8. On 17 September 2015, following a request for clarification, the Chamber provided guidance that 'pending the decision it will allow the Prosecution to ask question[s], if any, and thus to elicit evidence on Counts 6 and 9'.<sup>12</sup>
9. Also on 17 September 2015, the Defence requested leave to reply to the Prosecution Response on three issues.<sup>13</sup> On 18 September 2015, the Chamber granted the request in part, by permitting the Defence to reply to the first issue as phrased by the Defence (namely, 'whether the Defence Application is a proper jurisdiction challenge within the meaning of Article 19'), by 24

<sup>6</sup> Decision on the conduct of proceedings, ICC-01/04-02/06-619, para. 8.

<sup>7</sup> Order resetting certain pre-trial deadlines and other related matters, ICC-01/04-02/06-745, para. 3.

<sup>8</sup> Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9, ICC-01/04-02/06-804, page 12.

<sup>9</sup> 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.

<sup>10</sup> Prosecution Response to the "Application on behalf of Mr Ntaganda challenging the jurisdiction of the Court in respect of Counts 6 and 9", ICC-01/04-02/06-804, ICC-01/04-02/06-818.

<sup>11</sup> Prosecution Response, ICC-01/04-02/06-818, paras 42-43.

<sup>12</sup> Transcript of Hearing of 17 September 2015, ICC-01/04-02/06-T-27-Red-ENG, page 27, lines 11-13.

<sup>13</sup> 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", ICC-01/04-02/06-835.

September 2015.<sup>14</sup> The Chamber considered that it would not be assisted by further submissions on the other two issues.<sup>15</sup>

10. On 24 September 2015, the Defence filed its reply.<sup>16</sup>

## II. Submissions

### *Defence*

11. The Defence requests the Chamber to find that the Court lacks material jurisdiction over rape and sexual slavery of child soldiers, as included in Counts 6 and 9, and to order that no evidence shall be presented in relation to the crimes charged in the aforementioned counts until a final decision on this request is rendered.<sup>17</sup>
12. The Defence submits that it has not yet formally challenged the jurisdiction of the Court in relation to Counts 6 and 9.<sup>18</sup> The Defence further submits that pursuant to Article 22 of the Statute, the Court's subject matter jurisdiction is exhaustive and that Article 8(2)(e)(vi) of the Statute, which mentions Common Article 3 of the 1949 Geneva Conventions ('Common Article 3'), does not include the crimes of rape and sexual slavery of child soldiers.<sup>19</sup> It contends that Common Article 3 applies to persons taking no active part in the hostilities, adversaries who surrendered, and adversaries who were *hors de combat*.<sup>20</sup> According to the Defence, these three categories all exclude child soldiers that

<sup>14</sup> E-mail from Legal Officer of the Chamber to the Defence on 18 September 2015, at 12:45.

<sup>15</sup> E-mail from Legal Officer of the Chamber to the Defence on 18 September 2015, at 12:45.

<sup>16</sup> 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", ICC-01/04-02/06-863.

<sup>17</sup> Request, ICC-01/04-02/06-804, p. 12.

<sup>18</sup> Request, ICC-01/04-02/06-804, para.2.

<sup>19</sup> Request, ICC-01/04-02/06-804, paras 8-9 and 21-27.

<sup>20</sup> Request, ICC-01/04-02/06-804, paras 23-25.

have been incorporated in an armed group involved in a non-international armed conflict.<sup>21</sup>

13. The Defence further argues that the laws of armed conflict do not protect members of armed groups from acts of violence directed against them by their own forces, and that the crime of using child soldiers to participate actively in hostilities is to be seen as an express exception to this principle.<sup>22</sup> It submits that therefore, other than for the crimes of enlistment, conscription and use to participate actively in hostilities, child soldiers cannot be victims of war crimes.<sup>23</sup> The Defence also argues that rape and sexual slavery of child soldiers are not recognised as war crimes under customary international law.<sup>24</sup>
14. Moreover, the Defence argues that the Second Additional Protocol to the Geneva Conventions of 12 August 1949 ('Additional Protocol II'), which was referred to with respect to Counts 6 and 9 by Pre-Trial Chamber II in the Confirmation Decision, is not applicable to the situation in the present case;<sup>25</sup> and even if it were to be applicable, it avers that the relevant provision does not, in fact, prohibit rape and sexual violence against child soldiers belonging to the same armed group as the perpetrator.<sup>26</sup>
15. In its reply, the Defence submits that the Prosecution's reliance on ICTY case law is misplaced. It further takes issue with the Prosecution's argument that the challenge is not a jurisdictional one. In this regard, it points at two occasions where the Prosecution, in the Defence's view, referred to Count 6 and 9 as a jurisdictional matter, namely in its letter of instructions for one of the proposed

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<sup>21</sup> Request, ICC-01/04-02/06-804, paras 21-27.

<sup>22</sup> Request, ICC-01/04-02/06-804, paras 28 and 30.

<sup>23</sup> Request, ICC-01/04-02/06-804, paras 28-32.

<sup>24</sup> Request, ICC-01/04-02/06-804, paras 12, 42-43.

<sup>25</sup> Request, ICC-01/04-02/06-804, paras 10 and 33-35.

<sup>26</sup> Request, ICC-01/04-02/06-804, paras 36-41.

expert witnesses<sup>27</sup> and during the press conference held at the Court's premises on the day prior to the commencement of the trial.<sup>28</sup>

### *Prosecution*

16. The Prosecution submits that the Request raises issues of statutory interpretation which can only be disposed of in the final judgment on the merits, and does not constitute a proper jurisdictional challenge.<sup>29</sup> The Prosecution further submits that whether child soldiers can qualify as victims of Article 8(2)(e)(vi) of the Statute is a question of the scope of application of said article and as such is a question of substantive law.<sup>30</sup>
17. Furthermore, the Prosecution points to Article 19 of the Statute, which provides that a jurisdictional challenge can be made 'only once', unless exceptional circumstances exist. According to the Prosecution, the Defence's arguments were already duly considered, and rejected, at the confirmation stage, after which the Defence did not seek leave to appeal this issue.<sup>31</sup>
18. As to the timing of the request, the Prosecution further argues that the challenge comes too late and would unduly delay trial proceedings. It stresses that the Defence has been on notice of the charges contained in Counts 6 and 9 since the DCC was filed.<sup>32</sup>

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<sup>27</sup> Reply, ICC-01/04-02/06-863, para. 9.

<sup>28</sup> Reply, ICC-01/04-02/06-863, para. 11.

<sup>29</sup> Prosecution Response, ICC-01/04-02/06-818, paras 2 and 20-24.

<sup>30</sup> Prosecution Response, ICC-01/04-02/06-818, paras 20-21.

<sup>31</sup> Prosecution Response, ICC-01/04-02/06-818, paras 25-31

<sup>32</sup> Prosecution Response, ICC-01/04-02/06-818, paras 4 and 37.

*Legal Representative*

19. The Legal Representative submits that the Request should be dismissed *in limine*, referring to the 12 August 2015 deadline the Chamber had set for any motion or request that needed to be decided before the start of trial.<sup>33</sup>
20. The Legal Representative further submits that even if the Request would be considered, it is inadmissible because it does not relate to a jurisdictional matter, but rather to the interpretation of various provisions of international humanitarian law ('IHL'), and to the scope of the war crime as included in Article 8(2)(e)(vi) of the Statute. These, she argues, are questions of a factual, legal and evidentiary nature.<sup>34</sup>
21. The Legal Representative also avers that the Request improperly seeks to re-litigate matters that already have been addressed at the pre-trial stage,<sup>35</sup> and that it attempts to have the charges amended and/or the underlying facts and circumstances changed.<sup>36</sup>

**III. Analysis**

22. At the outset, the Chamber notes that pursuant to Article 19(4) of the Statute a challenge to jurisdiction may take place 'prior to or at the commencement of trial'. Nonetheless, the Chamber considers that this should be read in light of the deadlines set by the Chamber for 15 June and 12 August 2015, respectively, to which the Defence appears not to have given due regard. While noting its concern at the filing of the Request only one day before the commencement of the trial, given the seriousness of a challenge to the Court's jurisdiction and the

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<sup>33</sup> LRV Response, ICC-01/04-02/06-814, para. 2.

<sup>34</sup> LRV Response, ICC-01/04-02/06-814, paras 5-11.

<sup>35</sup> LRV Response, ICC-01/04-02/06-814, paras 12-14.

<sup>36</sup> LRV Response, ICC-01/04-02/06-814, paras 15-19.



potential impact that such a challenge, if it were to succeed, would have on the proceedings and the presentation of evidence, the Chamber will nevertheless entertain the Request. However, the Chamber emphasises the importance of adhering to deadlines set by the Chamber.

23. As to the Request itself, the Chamber observes that the Defence filed its motion as a challenge to the Court's jurisdiction, but both the Prosecution and the Legal Representative aver that the Request does not qualify as such. In this regard, the Chamber notes the Defence's reference to the Prosecution's questions to one of the proposed expert witnesses, which appears to indicate that the Prosecution does view, or at least in the past viewed, the present matter to be related to Court's material jurisdiction. However, the determination of whether a challenge falls within the scope of a jurisdictional challenge is to be made by the Chamber.
24. The scope of challenges to jurisdiction has been defined narrowly by the Appeals Chamber, which referred to jurisprudence of the *ad hoc* tribunals, especially the International Criminal Tribunal for the former Yugoslavia ('ICTY') when it noted that the question 'whether a crime or mode of liability existed under customary international law [...] falls within the scope of a jurisdictional challenge', whilst 'challenges relating to the contours or elements of crimes' do not and are instead to be addressed at trial.<sup>37</sup>

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<sup>37</sup> *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* 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", ICC-01/09-01/11-414 ('Ruto, Kosgey and Sang Decision'), para. 31; and *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta 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", ICC-01/09-02/11-425 ('Muthaura, Kenyatta and Ali Decision'), para. 37; both referring to ICTY, *Prosecutor v. Milan Milutinovic and others*, Decision on Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration, 22 March 2006, IT-05-87-PT, para 23, in which the ICTY Appeals Chamber set out that the existence of a crime falls within the scope of a challenge to subject-matter jurisdiction, because such jurisdiction is 'to be determined both by the Statute, insofar as it sets out the jurisdictional framework of the International Tribunal, and by customary international law, insofar as the Tribunal's power to convict an accused of any crime listed in the Statute depends on its existence qua custom at the time this crime was allegedly committed'.

25. In the present case, it need not be assessed whether a crime exists under customary international law, because the war crimes within the Court's jurisdiction are set out in Article 8 of the Statute in an exhaustive list.<sup>38</sup> The Court has jurisdiction over the war crimes of rape and sexual slavery, as such, and the Defence does not challenge that this is the case. As to these crimes, which are included in Article 8(2)(e)(vi) of the Statute, the Chamber observes that the aforementioned provision does not specify who can be victims of the war crimes listed therein, and that the corresponding Elements of Crimes refer only to 'person' and 'persons'. Whereas for certain crimes, the relevant provisions or their respective elements of crime explicitly limit the scope of the criminal conduct to certain types of victims, no such statutory limitation is provided for with respect to rape and sexual slavery.
26. Moreover, the Chamber observes that the term 'child soldier' is not a legal one, and that it cannot be found in the Court's statutory framework, or any of the relevant international legal instruments applicable to the involvement of children in armed conflict. Instead, the phrase 'UPC/FPLC child soldiers' is a descriptive one that refers to the alleged victims of the alleged rape and sexual slavery listed under Counts 6 and 9. The question as to which persons can be included in this phrase is to be addressed at trial.
27. Furthermore, the Defence posits that the Prosecution charged Counts 6 and 9 as 'autonomous crimes',<sup>39</sup> and that trying Mr Ntaganda for these crimes would violate the principle of *nullum crimen sine lege*.<sup>40</sup> However, the Chamber considers that these counts describe a particular set of alleged acts that are charged pursuant to Article 8(2)(e)(vi) of the Statute. The use of separate counts serves to denote between the different groups of victims that allegedly resulted

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<sup>38</sup> See, e.g., William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010), p. 213.

<sup>39</sup> Reply, ICC-01/04-02/06-863, para. 11.

<sup>40</sup> Request, ICC-01/04-02/06-804, para. 45.

from these acts, as opposed to the alleged victims of the acts charged under Counts 5 and 8.<sup>41</sup> The Chamber further recalls that, at the Court, regardless of how the alleged behaviour may be charged by way of counts, any sentences pronounced are divided by 'crime' and not by 'count'.<sup>42</sup>

28. The Chamber need not address at this stage whether such children, or persons generally, can under the applicable law be victims of rape and sexual slavery pursuant to Article 8(2)(e)(vi) when committed by members of the same group. Such questions of substantive law are to be addressed when the Chamber makes its assessment of whether the Prosecution has proven the crimes charged.
29. On the basis of the foregoing, the Chamber considers that there is no reason to limit the presentation of evidence with respect to the crimes of rape and sexual slavery to only specific types of victims, noting additionally the interrelatedness of any evidence regarding the alleged involvement of children, and that such evidence could also have relevance to other crimes, or modes of liability, charged.

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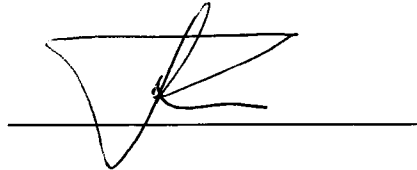
<sup>41</sup> Counts 5 and 8, in relevant parts, refer to 'Rape of civilians, a war crime, punishable pursuant to article 8(2)(e)(vi)' and 'Sexual slavery of civilians, a war crime, punishable pursuant to article 8(2)(e)(vi)', respectively. See Updated DCC, ICC-01/04-02/06-458-AnxA, pp. 61-62.

<sup>42</sup> Article 78(3) of the Statute.

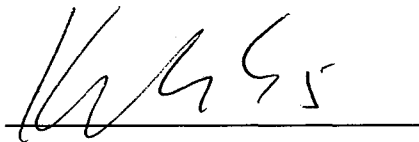
**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**REJECTS** the Request.


Done in both English and French, the English version being authoritative.

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**Judge Robert Fremr, Presiding Judge**

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**Judge Kuniko Ozaki**

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**Judge Chang-ho Chung**

Dated 9 October 2015

At The Hague, The Netherlands