

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/04-02/06**
Date: **5 December 2016**

TRIAL CHAMBER VI

Before: **Judge Robert Fremr, Presiding Judge**
Judge Kinoko Ozaki
Judge Chang-ho Chung

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR V. BOSCO NTAGANDA

Public

**Request for leave to submit amicus curiae observations on
whether the ICC has jurisdiction over crimes committed against
child soldiers by members of the same armed force.**

Source: Professor Dermot Groome
The Pennsylvania State University, Dickinson Law

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 Christopher Gosnell

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
Professor Dermot Groome (applicant)

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. Pursuant to Rule 103(1) of the ICC Rules of Procedure and Evidence (“RPE”) Professor Dermot Groome (“the applicant”) requests that the Trial Chamber grant him leave to submit written observations on the pending jurisdictional issue of whether Article 8 (2)(e)(vi) of the ICC Statute (rape and sexual enslavement) applies to crimes committed by members of an armed force against children under the age of 15 who were unlawfully incorporated into the same armed force. Such written observations “will be useful for a proper determination” of the issue.¹
2. The applicant submits that the Trial Chamber should, in its discretion, grant him leave to make submissions on this issue for the following reasons:
 - a. The applicant has been engaged in research on this issue since shortly after the charges against Bosco Ntaganda were confirmed on 9 June 2014.
 - b. The applicant is qualified to assist the Chamber as an amicus curiae in its determination of the jurisdictional issue that is currently pending.
 - c. The issue is one of first impression.
 - d. Children under 15 who have been unlawfully incorporated into armed forces are increasingly being victimized by members of the force that incorporated them. Other courts will consider the precedent established by this Trial Chamber.

Relevant Procedural History

3. On 10 January 2014, the Office of the Prosecutor (OTP) filed the Document Containing the Charges against Ntaganda.² Counts 6 and 9 allege that Ntaganda is criminally liable for rape and sexual slavery against child soldiers within the

¹ *Prosecutor v. Thomas Lubanga Dyilo*, Case no. ICC-01/04-01/06 “Decision on “Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence” (22 April 2008) para. 8.

² *Prosecutor v. Ntaganda*, ICC-01/04-02/06, “Prosecution’s Submission of Document Containing the Charges and the List of Evidence (Annex A)”, 10 January 2014.

UPC/FPLC in violation of Article 8(2)(e)(vi) of the ICC Statute. Other counts allege crimes of sexual violence against non-members of the UPC/FPLC. During the confirmation hearing, *Ntaganda's* Defense registered its strong objection to counts 6 and 9 arguing “that the crimes committed by members of armed forces on members of the same armed force do not come within the jurisdiction of international humanitarian law nor within international criminal law”.³ The Defence did not formally challenge jurisdiction pursuant to Article 19 at that time.

4. The Pre-Trial Chamber received written submissions on the issue and ultimately confirmed Counts 6 and 9 of the indictment.⁴ The Chamber, after considering Defence arguments, found that girls alleged to have been raped and sexually enslaved by members of the UPC/FPLC were non-combatants during the commission of these crimes and thus protected by the prohibitions against rape and sexual slavery. It found that their enlistment or conscription into the UPC/FPLC was not determinative of their combatant status because their incorporation was in violation of the prohibition against unlawfully enlisting or conscripting children. The Chamber held that child soldiers lose the protections afforded them by international humanitarian law only when, and for as long as, they are active participants in hostilities.⁵ The Chamber then considered that the crimes of rape and sexual slavery “involve elements of force/coercion or the

³ Transcript of hearing of 13 February 2014, ICC-01/04-02/06-T-10-RED-ENG, page 27, lines 15-17. The Defence continued the argument:

[T]he Defence asserts that the crimes committed by members of armed forces on members of the same armed force do not come within the jurisdiction of international humanitarian law nor within international criminal law. Customary international law applying to all armed conflicts, be it international or non-international, is made up of several principles that are intended to protect civilians and making a clear distinction between civilians and combatants. Such law also sets out rules relating to the ways in which war is waged. International humanitarian law is not intended to protect combatants from crimes committed by combatants within the same group. Such crimes come under national law and human rights law. Thus, the charges found in counts 6 and 9 cannot be confirmed in accordance with the principle of legality.

⁴ *Prosecutor v. Ntaganda*, ICC-01/04-02/06, “Decision Pursuant to Article 67(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda”, 9 June 2014.

⁵ *Ibid.*, para. 78.

exercise of rights of ownership” and concluded that “those subject to rape and/or sexual enslavement cannot be considered to have taken active part in hostilities during the *specific time* when they were subject to acts of sexual nature, including rape”.⁶

5. On 1 September 2015, the *Ntaganda* Defence formally challenged the ICC’s jurisdiction pursuant to Article 19(4) asserting that the Chamber and the ICC did not have jurisdiction over crimes committed upon child soldiers by members of their own force. Trial Chamber VI decided this application on 9 October 2015, finding that the issue was not a jurisdictional one requiring immediate resolution, but one involving the substantive interpretation of Article 8(2)(e)(vi), “to be addressed when the Chamber makes its assessment of whether the Prosecution has proved the crimes charged”.⁷
6. The Defence appealed the Trial Chamber’s decision⁸ and on 22 March 2016, the Appeals Chamber entered its judgment.⁹ The Appeals Chamber found that the “question of whether there are restrictions on the categories of persons who may be victims of the war crimes of rape and sexual slavery is an essential legal issue which is jurisdictional in nature”¹⁰ and remanded the issue for the Trial Chamber’s determination “in accordance with the requirements of article 19 of the Statute”.¹¹ As of this date, there is no public decision by the Trial Chamber on the matter.

⁶ *Ibid*, para. 79, (*emphasis added*).

⁷ *Prosecutor v. Ntaganda*, ICC-01/04-02/06, “Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9”, 9 October 2015, para. 28.

⁸ *Prosecutor v. Ntaganda*, ICC-01/04-02/06, “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’”, 19 October 2015.

⁹ *Prosecutor v. Ntaganda*, ICC-01/04-02/06 OA2, “Judgment on the Appeal of Mr Bosco Ntaganda against the ‘Decision on the Defence’s Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9’”, 22 March 2016.

¹⁰ *Ibid*, para. 40.

¹¹ *Ibid*, para. 42.

Relevant Jurisprudence

7. Rule 103(1) of the RPE provides:

At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.

A chamber may, in its discretion, grant leave for the submission of observations by an amicus curiae if the chamber determines that receiving such observations “may assist”¹² and “will be useful for a proper determination of the case”.¹³

Submissions in Support of Application

Qualifications of Applicant

8. Dermot Groome is a professor of law on the faculty of The Pennsylvania State University, Dickinson Law where he teaches: international criminal law, U.S. criminal law and human rights law.¹⁴ He is also an experienced domestic and international prosecutor (6 and 11.5 years respectively). When he was an Assistant District Attorney in Manhattan he was a member of the Sex Crimes Unit and handled numerous rape cases. As a prosecutor in the ICTY he had a senior position

¹² *Lubanga*, Amicus Curiae International Criminal Bar Decision, *supra*, fn 1, para. 8.

¹³ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case no. ICC-01/04-01/07, “Decision on an Amicus Curiae Application and on the *Requête Tendante à Obtenir Présentations des Témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux Autorités Néerlandaises aux Fins D’asile*’ (articles 68 and 93(7) of the Statute)” (9 June 2011) para. 53.

¹⁴ Professor Groome is the author of *THE HANDBOOK OF HUMAN RIGHTS INVESTIGATION* (2nd ed., 2011) and several scholarly articles and book chapters including: *Criminological Aspects of Investigating Mass Criminality* in *CRIMINOLOGICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW*, Ilias Bantekas and Emannuela Mylonaki, eds. (Cambridge University Press, 2014); *The Right to Truth*, in *COMMENTARY ON THE UN PRINCIPLES TO COMBAT IMPUNITY*, Paola Gaeta, and Frank Haldemann eds. (Oxford University Press, forthcoming, 2017); *No Witness No Case: The Conduct and Quality of ICC Investigations*, 3 Penn St. J.L. & Int’l Aff. 1 (2014); *The Right to Truth in the Fight Against Impunity*, 29 Berkeley J. Int’l L. 175 (2011); *The Church Abuse Scandal, Were Crimes Against Humanity Committed?*, 11 Chicago J. Int’l L. 439 (2011); and *Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Responsibility?*, 31 Fordham Int’l L. J. 911 (2008).

in the prosecution of five international trials, each with a component of sexual violence.¹⁵ In 2014, Groome co-authored an expert report on the ICC.¹⁶

9. Groome has conducted significant research on this issue and is writing an academic paper exploring it. On 29 November 2016, he presented his research at a conference organized by the ICRC and the Minerva Center of Hebrew University of Jerusalem and now has the benefit of scholarly input from his peers.

The issue is one of first impression and will be of importance in other cases.

10. Counts 6 and 9 of the Document Containing Charges is the first time the OTP has alleged the commission of crimes of sexual violence by members of an armed force against children incorporated into that armed force. The Trial Chamber is called upon to make an important determination of whether the ICC has jurisdiction over such crimes.

11. In its Confirmation Decision, the Pre-Trial Chamber developed a “specific time” test (described above) in which the child’s combatant/civilian status may change depending upon whether the child is being victimized or is actively engaged in hostilities. This is similar to the concept known as “revolving door” protection.¹⁷ With all due respect, the applicant submits that the “specific time” test presents interpretive difficulties under certain circumstances.

12. The problem of child soldiers being subjected to acts of sexual violence is a growing problem. This past October, the Secretary-General released a report on children and armed conflict in Colombia. During a one year period, there were

¹⁵ Groome led the prosecution of the following cases: *Prosecutor v. Ratko Mladić*, Case no. IT-09-92 (from Mladić’s arrest in May 2011 until July 2014), *Prosecutor v. Jovica Stanišić & Franko Simatović*, Case no. IT-03-69, *Prosecutor v. Milan Lukić & Sredoje Lukić*, Case no. IT-98-32/1; and *Prosecutor v. Mitar Vailjević*, Case no. IT-98-32. He also led the investigation of Slobodan Milošević for crimes committed in Bosnia and served as a senior member of the prosecution team during the trial, *Prosecutor v. Slobodan Milošević*, Case no. IT-02-54.

¹⁶ Dermot Groome, Dr. Guénaél Mettraux, Judge Shireen Fisher, Prof. Alex Whiting, Gabrielle McIntyre, Jerome de Hemptinne and Prof. Göran Sluiter, EXPERT INITIATIVE ON PROMOTING EFFECTIVENESS AT THE INTERNATIONAL CRIMINAL COURT (May 2014). See, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2659331.

¹⁷ See, US Department of Defense Office of General Counsel, DEPARTMENT OF DEFENSE LAW OF WAR MANUAL (2015) (US Laws of War Manual), §5.9.4.2

1,556 verified cases of children who were unlawfully conscripted by the FARC-EP, some as young as eight years old. The Secretary-General reports that the conflict in Colombia has “put children at increased risk of sexual violence...[g]irls associated with armed groups were particularly vulnerable”.¹⁸

13. The applicant submits that the Chamber will be assisted by the applicant’s research and findings. If the Chamber invites a written submission, the applicant will submit a filing of approximately 20 pages summarizing his research and his findings on the issue within two weeks. Such submission will facilitate the Chamber entering a more fully informed determination of the issue.

Relief Requested

14. The applicant respectfully requests that the Chamber grant leave for the applicant to make written submissions as an amicus curiae on the following question:

Does the Chamber have jurisdiction to adjudicate a violation of Article 8(2)(e)(vi) when such violation is alleged to be against a child under the age of 15 and committed by a member of the armed force that unlawfully incorporated that child into its ranks?

Respectfully Submitted,



Professor Dermot Groome
The Pennsylvania State University, Dickinson Law

Dated: 5 December 2016
At: Carlisle, Pennsylvania
United States of America

¹⁸ UNSG, Report of the Secretary-General on Children and Armed Conflict in Columbia, S/2016/837, 4 October 2016, paras. 30-31. *See more generally*, UNSG, Report of the Secretary-General on Children and Armed Conflict A/70/836-S/2016/360, 20 April 2016. http://www.un.org/ga/search/view_doc.asp?symbol=s/2016/360&referer=/english/&Lang=E