

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: ICC-01/04-02/06
Date: 9 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 Document

**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"**

Source: Office of Public Counsel for Victims (CLR1)

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

Mr Stéphane Bourgon
Mr Luc Boutin

Legal Representatives of the Victims

Ms Sarah Pellet
Mr Dmytro Suprun

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**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**

Other

1. The Common Legal Representative of former child soldiers (the “Legal Representative”) hereby submits her observations in 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” (the “Defence Application” or the “Application”)¹ pursuant to regulation 24(2) of the Regulations of the Court. The Application directly affects the interests of the former child soldiers participating in this case, particularly the interests of those who have suffered from acts of rape and sexual slavery.

I. IN THE MAIN, THE APPLICATION SHALL BE REJECTED *IN LIMINE*

2. The Legal Representative submits that the Defence Application must be dismissed *in limine* as inadmissible. The Application was submitted a day before the opening of the trial and almost three weeks after the expiration of the deadline established by the Trial Chamber “to file any motion or request on matters they wish to bring to the Chamber’s attention or wish to be decided prior to the Start of the trial”.² For this reason alone, and without any other consideration, the Legal Representative submits that the Application shall be dismissed *in limine*.

II. IN THE ALTERNATIVE, THE APPLICATION SHALL BE DISMISSED AS INADMISSIBLE

3. Even if, by extraordinary, the Chamber were to further entertain the Defence Application, said application shall still be dismissed as inadmissible. The Defence does not seek to raise any jurisdictional matter which may possibly fall within the purview of article 19 of the Rome Statute. Instead, the Defence attempts to re-litigate issues previously resolved by Pre-Trial Chamber II in the decision on the confirmation of charges. Although the Defence frames its Application as a “challenge

¹ See 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”, No. ICC-01/04-02/06-804, 1 September 2015 (the “Defence Application”).

² See the “Order resetting certain pre-trial deadlines and other related matters” (Trial Chamber), No. ICC-01/04-02/06-745, 24 July 2015, para. 3.

to the jurisdiction of the Court”, the grounds identified mainly relate to the definition, scope and constitutive elements of the war crimes of rape and sexual slavery set out in article 8(2)(e)(vi) of the Rome Statute. These issues are clearly not jurisdictional matters, but rather matters to be addressed during trial.

4. Moreover, the arguments put forward by the Defence appear to be based on numerous factual and legal assumptions which are either incorrect or yet to be established in the course of the trial. Lastly, the Defence Application improperly and impermissibly requests the Chamber to modify the charges as confirmed by Pre-Trial Chamber II, by declining to hear evidence and submissions in relation to counts 6 and 9 of the Document Containing the Charges.

A. The Defence’s Application does not relate to a jurisdictional matter

5. The Defence challenges “*the jurisdiction of the Court in relation to Counts 6 and 9 pursuant to Article 19 and Rule 58*” of the Rules.³ In support of its claim, the Defence provides three interrelated arguments: first, it contends that “[c]ommon Article 3 of the Geneva Conventions does not apply to child soldiers”;⁴ second, it argues that child soldiers cannot be victims of war crimes “[o]ther than for the crimes of enlistment, conscription and use to participate actively in hostilities”;⁵ third, that “Additional Protocol II is not applicable to this case”.⁶

6. It is submitted that none of the above issues directly relates to the question of the jurisdiction of the Court. Indeed, the questions related to the interpretation to be given to Common Article 3 of the Geneva Conventions, or to the provisions of Additional Protocol II, and the proper interpretation of the scope of article 8(2)(e)(vi) of the Rome Statute constitute substantive matters which relate to the merits of this

³ See the Defence’s Application, *supra* note 1, para. 2.

⁴ *Idem*, paras. 21-27.

⁵ *Ibid.*, paras. 28-32.

⁶ *Ibid.*, paras. 33-41.

case. As such, they represent core aspects of the factual, legal, and evidentiary debate in the instant case and may not therefore be addressed in a jurisdictional challenge under article 19 of the Rome Statute.

7. Moreover, the Legal Representative notes that the Defence's core challenge relates to the scope of application of article 8(2)(e)(vi) of the Rome Statute namely, whether this legal provision applies to the child soldiers under the age of 15 who were recruited in the UPC/FPLC ranks.⁷ The extent to which the war crimes of rape and sexual slavery apply to UPC child soldiers is a legal question which relates to the scope of the application and the constitutive elements of the specific war crime. Indeed, what is at issue is the impact of the status of victims as "child soldiers" on the commission of the war crimes of rape and sexual slavery under the Rome Statute. This legal question does not require consideration of either the material, personal or territorial jurisdiction of the Court. Rather, as is clear from the Defence's submissions, the Chamber is invited to make an authoritative interpretation of customary international law, the Geneva Conventions, and the Additional Protocols thereto. While these legal principles and instruments may inform the Chamber's analysis of the crimes charged, they are nonetheless immaterial to the delimitation and delineation of the jurisdiction of the Court. Indeed, said jurisdiction is solely defined by the legal parameters laid out in the legal texts of the Court. The Statute and the Elements of Crimes set out in detail the crimes over which the Court has jurisdiction.

8. Since the legal texts of the Court explicitly criminalise the acts of rape and sexual slavery, and to the extent that the Defence does not challenge or deny the existence of such crimes, the Legal Representative submits that the issues raised in the Defence Application are irrelevant to the determination of the Court's jurisdiction. Indeed, insofar as the arguments put forth relate to the scope of the crimes charged, and to whether they would cover individuals having the status of

⁷ *Ibid.*, paras. 42-43.

child soldiers, the Chamber must treat the Defence Application as a substantive defence's argument.

9. This position finds support in the jurisprudence of this Court and other *ad hoc* tribunals, which sets a clear distinction between jurisdictional matters as opposed to the contours of a crime. For instance, the Appeals Chamber previously cited, with approval, the jurisprudence of the *ad hoc* tribunals which "*distinguishe[s] – in particular, in its more recent case-law – between whether a crime or mode of liability existed under customary international law, which falls within the scope of a jurisdictional challenge, from challenges relating to the contours or elements of crimes or modes of liability, which are matters for trial*".⁸ Thus, the determination of the specific contours of the crimes is not considered as a jurisdictional matter.

10. Accordingly, and contrary to the Defence's submissions, the Defence Application does not constitute "*a formal challenge to the jurisdiction of the Court*".⁹ For this reason, it would appear procedurally inappropriate to address these substantive submissions before the start of the Prosecution's case and prior to any submissions having been made by the victims.

11. Moreover, the Legal Representative 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. For instance, the Defence asserts that child soldiers are of the "*same armed group as the Accused*"¹⁰ and that they are not included in the category of "*persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those*

⁸ 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" (Appeals Chamber), No. ICC-01/09-01/11-414 OA3 OA4, 24 May 2015, paras. 31 *et seq.*

⁹ See the Defence's Application, *supra* note 1, para. 1.

¹⁰ *Idem*, para. 9.

placed ‘hors de combat’ by sickness, wounds, detention or any other cause”.¹¹ The Defense also assumes that the child soldiers concerned “are not included in the category of all 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”.¹² Likewise, and without citing any authority, the Defense argues that the “rape and sexual slavery of child soldiers are not recognized as war crimes under customary international law”.¹³ All these assertions remain to be proven, and it would be premature for the Chamber to address these factual and legal questions prior to any adversarial proceedings.

B. The Defence’s Application improperly seeks to re-open issues litigated at pre-trial

12. These procedural deficiencies are compounded by the Defence’s attempt to re-litigate matters already resolved by Pre-Trial Chamber II in the Decision on the Confirmation of Charges (the “Confirmation Decision”). In particular, the Defence challenges the Pre-Trial Chamber’s finding that it is “not barred from exercising jurisdiction over the crimes in Counts 6 and 9”.¹⁴ The Defence further contends that “Pre-Trial Chamber II did not address many other arguments put forward by the Parties and one of the Legal Representatives”.¹⁵

13. Although the Defence appears to disagree with the Pre-Trial Chamber’s analysis of counts 6 and 9 of the charges, it did not, however, seek leave to appeal the Confirmation Decision with respect to this issue.¹⁶ Thus, the conclusions adopted and the findings reached in the Confirmation Decision are final. Under the Court’s procedural framework, requesting leave to appeal the Confirmation Decision constituted the only avenue available to the Defence to seek judicial review of the

¹¹ *Ibid.*

¹² *Ibid.*, para. 11.

¹³ *Ibid.*, para. 12.

¹⁴ *Ibid.* para. 4.

¹⁵ *Ibid.*

¹⁶ See the “Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014”, No. ICC-01/04-02/06-312, 16 June 2014.

disputed findings. In this regard, a challenge to the jurisdiction of the Court cannot be used as a backdoor measure for the review or reconsideration of final judicial rulings at the pre-trial stage, more than a year after the expiration of the deadline.

14. Moreover, should the Defence be minded to yet again put forward the change in the composition of its team to justify this move, the Legal Representative contends that said change took place at the request of the Accused and is immaterial to the issue at stake. She also takes issue with the fact that this change is systematically put forward by the Defence to get round the applicable texts of the Court.¹⁷

C. The Defence improperly seeks to amend the charges as well as the underlying facts and circumstances of the charges

15. In the same vein, proceedings with respect to jurisdiction do not constitute the proper *forum* for requesting the amendment or the withdrawal of charges previously confirmed. Indeed, the Defence requests the Chamber not to authorise the submission of any “*evidence related to the crimes charged in Counts 6 and 9*”.¹⁸ This, in effect, amounts to a withdrawal of the charges as confirmed by Pre-Trial Chamber II and shall therefore be rejected.

16. Under the legal texts of the Court, a Trial Chamber does not have the power to refrain from considering the confirmed charges. Article 61(9) of the Rome Statute is clear in that the power to withdraw the confirmed charges lies solely with the Prosecutor, subject to leave being granted by the relevant chamber. Requesting the Trial Chamber not to consider the facts and circumstances underlying a confirmed

¹⁷ See *inter alia*. the “Urgent request on behalf of Mr NTAGANDA seeking to postpone the presentation of the Prosecution’s Case until 2 November 2015 at the earliest”, No. ICC-01/04-02/06-541-Red, 2 April 2015 and the “Victims’ observations in response to the ‘Urgent request on behalf of Mr NTAGANDA seeking to postpone the presentation of the Prosecution’s Case until 2 November 2015 at the earliest’”, No. ICC-01/04-02/06-556, 14 April 2015, in particular paras. 19-21.

¹⁸ See the Defence’s Application, *supra* note 1, p. 12.

charge would thus breach “*the distribution of powers under the Statute*”.¹⁹ This reading of the Statute is consistent with the practice of the Court. For instance, in the *Kenyatta* case, Trial Chamber V(b) did not act *proprio motu* to withdraw the charges against the accused. Rather, the Trial Chamber directed “*the Prosecution to file a notice [...] indicating either (i) its withdrawal of the charges in this case; or (ii) that the evidentiary basis has improved to a degree which would justify proceeding to trial*”.²⁰

17. The Appeals Chamber also clarified the respective roles of the trial chamber and the Prosecutor with respect to the amendment of the charges:

“[T]he Appeals Chamber recalls that article 61 (9) addresses primarily the powers of the Prosecutor to seek an amendment, addition or substitution of the charges, at his or her own initiative and prior to the commencement of the trial; the terms of the provision do not exclude the possibility that a Trial Chamber modifies the legal characterisation of the facts on its own motion once the trial has commenced”.²¹

18. Similarly, in the *Ruto* case, the Appeals Chamber held that “*once the trial has commenced, it is no longer possible to amend or to add to the charges, irrespective of when the Prosecutor filed her request to amend the charges*”.²² It further noted that “[t]he purpose of this is obvious: at the beginning of the trial, its parameters must be clear. The only

¹⁹ This principle was referred to by the Appeals Chamber in the context of the amendment of charges. See the “Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court” (Appeals Chamber), No. ICC-01/04-01/06-2205 OA15 OA16, 8 December 2009, para. 94.

²⁰ See the “Decision on Prosecution's application for a further adjournment” (Trial Chamber), No. ICC-01/09-02/11-981, 3 December 2014, p. 26.

²¹ See the “Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court” (Appeals Chamber), No. ICC-01/04-01/06-2205 OA15 OA16, 8 December 2009, para. 77.

²² 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, 13 December 2013 OA6, para. 31.

modification possible under the Court's legal framework thereafter is a change to the legal characterisation of the facts pursuant to regulation 55 of the Regulations of the Court [...]".²³

19. Thus, although a trial chamber may not decline to consider a charge confirmed by the pre-trial chamber, it may nevertheless decide to change its legal characterisation.

FOR THESE REASONS, the Legal Representative respectfully requests the Chamber to dismiss the Defence Application *in limine*. In the alternative, she respectfully requests the Chamber to dismiss said application as inadmissible. The Legal Representative nonetheless reserves her right to respond to the merits of the arguments raised therein in the course of the proceedings at trial.



Sarah Pellet
Common Legal Representative of the
Child soldiers

Dated this 9th Day of September 2015

At The Hague, The Netherlands

²³ *Idem*, para. 29.