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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

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 Document Containing the Charges", ICC-01/04-02/06-804

Source: **The Office of the Prosecutor**

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
Me Isabelle Martineau

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

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

Other

Victims Participation and Reparations Section

Introduction

1. The Office of the Prosecutor ("Prosecution") requests Trial Chamber VI ("Chamber") to reject the Defence request for: (i) a finding that the Court lacks material jurisdiction over the war crimes of rape and sexual slavery perpetrated against child soldiers who were members of the same armed group as the Accused; and (ii) an order that no evidence shall be presented on these crimes until a final decision on this request is rendered ("Defence Application").[1] The Defence Application should be rejected *in limine.*

2. First, although it is presented as a jurisdictional challenge, the Defence Application in fact raises issues of statutory interpretation that can only be disposed of in the final decision under article 74 of the Statute.

3. Second, should the Chamber consider that the matters raised in the Defence Application are properly brought as a jurisdictional challenge, it should nevertheless be rejected: the Defence has already raised the same arguments at the confirmation stage and these arguments were rejected by Pre-Trial Chamber II ("PTC"). The PTC found that it was not barred from exercising jurisdiction over the crimes charged in Counts 6 and 9 of the Document Containing the Charges ("DCC"). The Defence did not seek leave to appeal that decision on this issue. Even if those arguments were not framed as a jurisdictional challenge, that was effectively their goal. Allowing the Defence to bring the same challenge a second time would effectively enable the Defence to seek the quasi-appellate review by the Chamber of the PTC's confirmation decision.

4. Third, the Defence Application should be rejected because it comes too late and if granted will delay the start of the evidentiary phase of the trial.

[1] ICC-01/04-02/06-804, paras.1, 13-14, p.12.

5. Should the Chamber decide to entertain the merits of the Defence Application, the Prosecution reserves the right to respond to the Defence Application on the merits.

Procedural Background

6. On 10 January 2014, the Prosecution filed the DCC. Counts 6 and 9 alleged that the Accused was criminally responsible for the rape and sexual slavery of children under the age of 15 years who were members of the UPC/FPLC ("UPC/FPLC Child Soldiers") pursuant to article 8(2)(e)(vi) of the Statute.[2] The DCC explicitly referred to Common Article 3 to the Geneva Conventions and Additional Protocol II in support of Counts 6 and 9.[3]

7. On 10 to 14 February 2014, the confirmation hearing in the case took place before the PTC. During the hearing, both Parties referred to Article 4 of Additional Protocol II to the Geneva Conventions in their submissions concerning Counts 6 and 9 of the DCC.[4] The Defence submitted that Article 4(3) of Additional Protocol II "*in no way can be used to interpret Article 8 to expand the scope thereof to victims who might be part of the same group as the perpetrator of the crime*"; 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*"; and that the charges contained in Counts 6 and 9 "*cannot be confirmed in accordance with the principle of legality*".[5]

8. On 7 March 2014, the Prosecution filed submissions on issues that were raised during the confirmation of charges hearing.[6] The Prosecution's submissions

[2] ICC-01/04-02/06-203, Counts 6 and 9, and paras.100-106.
[3] ICC-01/04-02/06-203, para.107 and fns.12 and 13.
[4] ICC-01/04-02/06-T-10-Red-ENG, p.27, lns.5-25 (Defence submissions on the inapplicability of Article 4(3) of Additional Protocol II); ICC-01/04-02/06-T-10-Red-ENG, p.61, ln.17 to p.63, ln.18 (Prosecution response to the Defence submissions that rape and sexual slavery of child soldiers does not constitute a war crime).
[5] ICC-01/04-02/06-T-10-Red-ENG, p.27, lns.12-25.
[6] ICC-01/04-02/06-276-Red.

reasserted that the rape and sexual enslavement of UPC/FPLC Child Soldiers constitute war crimes, and referred to Common Article 3 to the Geneva Conventions and Article 4(3) of Additional Protocol II in support of its submissions.[7]

9. On 14 April 2014, the Defence filed observations on issues arising out of the confirmation of charges hearing. The Defence again opposed the Prosecution's interpretation of article 8(2)(e)(vi), specifically the reliance on Article 4(3) of Additional Protocol II; and submitted that the Court had no jurisdiction over the crimes charged in Counts 6 and 9 of the DCC.[8]

10. On 9 June 2014, the PTC confirmed the charges against the Accused, including those under counts 6 and 9 of the DCC.[9] The PTC referred to Common Article 3 and Additional Protocol II in the relevant part of the decision.[10]

11. On 16 June 2014, the Defence sought leave to appeal the decision on the confirmation of charges on two issues, which related to Counts 1, 2, 4, 5, 7, 8, 12, 13, 17 and 18 of the DCC.[11] The Defence did not seek leave to appeal the decision on any issues related to Counts 6 and 9.

12. On 4 July 2014, the PTC refused the Defence's request for leave to appeal the confirmation decision.[12]

13. On 18 July 2014, the Presidency referred the case to the Chamber.[13]

[7] ICC-01/04-02/06-458-AnxA, para.107 and fns.63, 64
[8] ICC-01/04-02/06-292-Red2, para.251.
[9] ICC-01/04-02/06-309, para.80.
[10] ICC-01/04-02/06-309, paras.77-78.
[11] ICC-01/04-02/06-312.
[12] ICC-01/04-02/06-322. The decision was notified on 7 July 2014.
[13] ICC-01/04-02/06-337.

14. On 2 June 2015, the Chamber directed the Parties and Participants to file any motions requiring determination prior to the start of the trial by 15 June 2015.[14]

15. On 24 July 2015, the Chamber re-set to 12 August 2015 the deadline for any motions requiring determination prior to the start of the trial.[15]

16. On 1 September 2015, the day before the opening of the trial, the Defence filed its challenge to the jurisdiction of the Court.[16]

17. On 2 September 2015, the trial of the Accused began.

18. On 9 September 2015, the Legal Representative of former child soldiers responded to the Defence Application.[17]

19. On 9 September 2015, the Defence sought a postponement of the cross-examination of Prosecution Witness P-0901.[18]

Prosecution's Submissions

The Defence Application is not a proper jurisdictional challenge

20. The Prosecution submits that the Defence Application is not properly brought under article 19 of the Statute because it does not challenge any of the pre-conditions for the exercise of jurisdiction by the Court.[19] In particular, the Defence does not challenge that the Court has jurisdiction over the crimes of rape and sexual slavery committed in non-international armed conflict pursuant to article

[14] ICC-01/04-02/06-619, para.8.
[15] ICC-01/04-02/06-745, para.3.
[16] ICC-01/04-02/06-804.
[17] ICC-01/04-02/06-814.
[18] ICC-01/04-02/06-815-Conf-Exp.
[19] The Appeals Chamber has identified four facets of jurisdiction: "subject-matter jurisdiction also identified by the Latin maxim jurisdiction *ratione materiae*, jurisdiction over persons, symbolized by the Latin maxim jurisdiction *ratione personae*, territorial jurisdiction – jurisdiction *ratione loci* - and lastly jurisdiction *ratione temporis*." ICC-01/04-01/06-772, para.21.

8(2)(e)(vi). Rather, and despite characterising its request as a challenge to the Court's material jurisdiction,[20] what the Defence disputes is the *scope of application* of article 8(2)(e)(vi), specifically whether it provides a basis to prosecute the Accused under counts 6 and 9 of the DCC for acts allegedly perpetrated against UPC/FPLC Child Soldiers.

21. The Prosecution submits that the Defence's position[21] that UPC/FPLC Child Soldiers are not "the potential victims envisaged"[22] in article 8(2)(e)(vi) is a question of statutory construction of the Court's substantive law, not a question of jurisdiction. The war crimes alleged under article 8 are unquestionably within the Court's subject-matter jurisdiction.

22. The ICTY Appeals Chamber, faced with a similar Defence argument in the *Gotovina* case,[23] refused to consider it a proper jurisdictional challenge:

> The Appeals Chamber considers that the Appellant's second ground of appeal fails to raise a proper jurisdictional challenge under Rule 72(D)(iv) of the Rules. **The Appellant does not dispute that the International Tribunal has jurisdiction over crimes charged** under Articles 3 and 5 of the Statute as violations of Common Article 3 of the Geneva Conventions. Furthermore, he does not dispute that "committed against persons taking no active part in the hostilities" is a proper element of such crimes under customary international law. **Rather, he contests the definition of that element** and argues that the jurisprudence of the International Tribunal demonstrates

[20] ICC-01/04-02/06-804, paras.6, 7 and p.12.
[21] The Defence's arguments can be summarised as follows: (i) the exhaustive list of war crimes in article 8 does not include the rape and sexual slavery of child soldiers of the Accused's own armed group (Defence Application, section I (paras.16-20)); (ii) the reference to Common Article 3 of the Geneva Conventions in article 8(2)(e)(vi) does not extend the scope of application of that article to child soldiers (Defence Application, section II (paras.8-9, 21-27); (iii) the only war crime of which child soldiers can be alleged to be victims is their enlistment, conscription and use (Defence Application, section III (paras.28-32); (iv) the protections of Article 4(3) of Additional Protocol II to the Geneva Conventions do not apply in the case and, even if they did, they would only apply to "enemy child soldiers" when they are captured (Defence Application, section IV (paras.10-11, 33-41)); and (v) the laws applicable to international armed conflicts support the position that child soldiers are not the potential victims envisaged by article 8(2)(e)(vi) (Defence Application, section V (paras.42-43).
[22] Defence Application, section V at p.11: "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)".
[23] Gotovina challenged jurisdiction of the ICTY on the grounds that the indictment "violates *nullem* [sic] *crimen sine lege* by expanding definitions of crimes beyond customary law, which is the basis for the Tribunal's jurisdiction *ratione materiae*." Defendant Ante Gotovina's Reply to Prosecution Response to Interlocutory Appeal Challenging Jurisdiction, 17 April 2007, para.4, cited in ICTY Appeals Chamber, *Prosecutor v. Ante Gotovina*, Decision on Ante Gotovina's Interlocutory Appeal against decision on several motions challenging jurisdiction, 6 June 2007 (hereinafter, *Gotovina* Appeal), para.10.

> that *it should be interpreted narrowly* to require that such persons be shown to be in the hands of a party to the conflict akin to the "protected person" element for crimes alleged to be grave breaches of the Geneva Conventions under Article 2 of the Statute. **Such arguments are properly raised on the merits at trial and do not demonstrate that the International Tribunal lacks subject-matter jurisdiction over the crimes and the elements of those crimes** under Counts 8 and 9 of the Joint Indictment. Therefore, the Appellant's second ground of appeal is dismissed.[24]

23. The Defence Application should therefore be dismissed summarily. Though it purports to argue that the Court lacks material jurisdiction over the crimes charged in Counts 6 and 9, the Defence Application in fact raises an issue of statutory interpretation that does not go to the Chamber's competence over these charges.

24. That is not to say that the Defence is not entitled to contest the Prosecution's position that article 8(2)(e)(vi) applies on its face to the particular acts charged in Counts 6 and 9. However, the issue should be raised and considered during the trial, as with other issues of statutory interpretation, not as a preliminary matter to trial proceedings. The Parties and Participants should have an opportunity to address the Chamber on the interpretation of the provision in their closing arguments, and the Chamber can make a decision on the merits of the case under article 74.

There are no exceptional circumstances justifying a second jurisdictional challenge

25. Should the Chamber consider that the matters raised in the Defence Application are properly brought as a jurisdictional challenge, the Defence Application should in any case be rejected because the Defence's arguments were heard and rejected by the PTC at the confirmation stage and the Defence has not demonstrated that

[24] *Gotovina* Appeal, para.18. Emphasis added, footnotes omitted. Under the same rationale, the Court also rejected the claim that the interpretation of the definition for the *actus reus* of the crimes of deportation and forcible transfer should be narrow and limited to displacement from "occupied territory". The Appeals Chamber held that the Gotovina "may bring these arguments before the Trial Chamber to be considered on the merits at trial; however, they do not demonstrate the Tribunal's lack of subject-matter jurisdiction"; *Gotovina* Appeal, para.15.

there are exceptional circumstances justifying leave for it to challenge the Court's jurisdiction a second time pursuant to article 19(4).

26. As noted in the Defence Application, the Defence argued at confirmation that the PTC should decline to confirm the charges.[25] Although it did not at the time explicitly ground that request on article 19 of the Statute, its request was the same one that it now makes before the Chamber. At confirmation the Defence submitted that "*les crimes reprochés aux chefs 6 et 9, tels que formulés par le Procureur, **ne relèvent pas de la compétence de la Cour***".[26] The Defence now "*formally challenges the jurisdiction of the […] Court*", explicitly grounding this challenge on article 19.[27]

27. Not only is the request the same; all of the arguments raised by the Defence at confirmation are made again in the Defence Application.[28] Though the Defence Application develops its previous arguments further, and advances some other arguments for the first time,[29] article 19 does not permit the jurisdiction of the Court to be challenged piecemeal. The language of article 19 is clear: the Accused

[25] Defence Application, para.2, citing the Defence final observations following the confirmation hearing, ICC-01/04-02/06-292-Red2. The Defence confirmation hearing submissions cited in the Defence Application can be found at para.254 of ICC-01/04-02/06-292-Red2.
[26] ICC-01/04-02/06-292-Red2, para.251 (emphasis added).
[27] Defence Application, para.1.
[28] All of the following propositions are advanced in the Defence's submissions at confirmation as well as in the Defence Application: the Court's material jurisdiction is exhaustive and does not include the crimes of rape and sexual slavery of child soldiers, which are not expressly provided for in the Statute (ICC-01/04-02/06-292-Red2, para.253 and Defence Application, para.7); article 22 of the Statute requires a strict construction, not extended by analogy, of article 8 (ICC-01/04-02/06-T-10-Red-ENG WT, p.26, ln.24 to p.27, ln.9, ICC-01/04-02/06-292-Red2, para.253, and Defence Application, para.18); international humanitarian law does not protect persons taking part in hostilities from crimes committed by persons taking part in hostilities on the same side (ICC-01/04-02/06-T-10- Red-ENG WT, p.27, lns.15-23, ICC-01/04-02/06-292-Red2, paras.258, 260 and Defence Application, paras.7, 24, 27, 28, 36); and the criminalisation of the enlistment, recruitment and use of child soldiers by members of the same party to the conflict is an express exception to the principle that war crimes can only be committed against members of the other side (ICC-01/04-02/06-292-Red2, para.259 and Defence Application, paras.30-31).
[29] Unlike the Defence submissions before the PTC, the Defence Application develops the argument that Common Article 3 to the Geneva Conventions "does not apply to child soldiers" and that Additional Protocol II to the Geneva Conventions is inapplicable in the case. Defence Application, sections II and IV. The Prosecution notes that nothing prevented the Defence from making these arguments at the confirmation stage. The Prosecution referred to Common Article 3 to the Geneva Conventions and Additional Protocol II in the DCC and in its closing submissions at confirmation. *See* ICC-01/04-02/06-T-10-Red-ENG WT, p.61, ln.17 to p.63, ln.18, esp. p.62, ln.2; ICC-01/04-02/06-458-AnxA, para.107 and fns.63, 64. The PTC also referred to Common Article 3 and Additional Protocol II. *See* ICC-01/04-02/06-309, paras.77-78.

can challenge the jurisdiction of the Court "only once" unless exceptional circumstances justify a second challenge. The fact that an accused decides not to frame their claim as a jurisdictional challenge the first time should not operate as a license to that accused to bring exactly the same arguments under the guise of a fresh jurisdictional challenge on the verge of the trial, thereby circumventing the express limitations imposed by article 19.

28. The Defence's arguments were duly considered[30] and rejected[31] at confirmation. The PTC found that it was not barred from exercising jurisdiction over the crimes charged in Counts 6 and 9 of the DCC. If the Defence Application is a jurisdictional challenge, so was its request for dismissal of Counts 6 and 9 at confirmation, and the Defence bears the burden of demonstrating "exceptional circumstances" justifying leave for it to make the same jurisdictional challenge for a second time.

29. The circumstances advanced in the Defence Application do not constitute exceptional circumstances:[32]

    (i) It is neither accurate, nor exceptional, that the PTC's rejection of the Defence's arguments at confirmation "rests solely" on its assessment of whether UPC/FPLC Child Soldiers were taking direct or active part in hostilities at the time that they were victims of acts of rape and/or sexual slavery.[33] The PTC stated that it based its decision on the confirmation of charges "*on a comprehensive analysis of (…) the submissions made during the Hearing, and the final written submissions of the parties and participants*".[34] Moreover, the Defence had an opportunity to seek leave to appeal the PTC's findings under Counts 6 and 9 and did

[30] ICC-01/04-02/06-309, para.76.
[31] ICC-01/04-02/06-309, para.80.
[32] *Cf* Defence Application, para.4.
[33] Defence Application, para.4.
[34] ICC-01/04-02/06-309, para.8.

not do so. The Prosecution submits that the Defence is estopped from arguing that the very PTC findings it did not challenge give rise to "exceptional circumstances".

(ii) The addition, after confirmation, of new witnesses who are either alleged to be victims of Counts 6 and 9 or who are expected to give evidence in relation to those counts, is also not exceptional. It is inherent to confirmation proceedings that the Prosecution will not put forth, at that time, all of the evidence on which it will subsequently seek to rely at trial. Further, while new witnesses relevant to Counts 6 and 9 are expected to provide additional examples of the acts of rape and sexual slavery of UPC/FPLC Child Soldiers charged in Counts 6 and 9, their evidence has not and will not change the facts and circumstances described in the charges. Moreover, the Prosecution notes that while the addition of new witnesses increases the likelihood that the evidence will suffice for a conviction, the additional evidence does not have an impact on the legal question at the heart of the Defence Application, whether the Court has jurisdiction over Counts 6 and 9.

30. As noted, the Defence did not seek to appeal the PTC's findings under Counts 6 and 9 of the DCC.[35] Allowing the Defence to bring the same jurisdictional challenge a second time would effectively give the Defence a remedy that is not available under the Statute: the quasi-appellate review by the Chamber of the PTC's confirmation decision. Indeed, faced with a comparable request, the *Lubanga* Trial Chamber I held that it had had "*no authority to ignore, strike down or declare null and void the charges as confirmed by the Pre-Trial Chamber*".[36]

[35] ICC-01/04-02/06-312.
[36] ICC-01/04-01/06-1084, para.39.

31. In the decision on the confirmation of charges in *Ruto, Kosgey and Sang*, Pre-Trial Chamber II ("PTC II") rejected the challenges brought by the three Defence teams pursuant to article 19(2)(a), finding, in relevant part, that they constituted an attempt to obtain a right to appeal against a decision taken at an earlier stage in the case:

> 34. Thus, the majority does not find a persuasive reason to revisit its previous finding on the question or to reverse its original approach, given that the majority remains in favour of providing an effective interpretation to article 7(2)(a) of the Statute. **Moreover, the Chamber observes that the Defences' submissions disputing the legal findings of the 31 March 2010 Decision are actually an attempt to obtain a right to appeal on this point of law and at this stage of the proceedings.** In this respect, although not determinative of the issue under examination, **the Chamber finds it rather notable that the Suspects failed to avail themselves of the right to appeal the Decision on Summons to Appear, which reiterated the same legal findings** of the 31 March 2010 Decision, pursuant to article 82(l)(a) of the Statute and rule 154(1) of the Rules. Accordingly, the Chamber rejects this part of the Defences' jurisdictional challenges.[37]

The Defence Application comes too late and will unduly delay trial proceedings

32. The Defence Application comes too late and if granted will delay the start of the evidentiary phase of the trial.

[37] ICC-01/09-01/11-373, para.34 (emphasis added). In *Ruto, Kosgey and Sang*, PTC II rejected the challenges to the material jurisdiction of the Court brought by the three Defence teams. It dismissed the legal aspect of the challenge – concerning the definition of an "organisation" for the purposes of article 7(2)(a) of the Statute – because it found no persuasive reason to revisit the findings it had made in its earlier decision authorising the opening of an investigation into the situation in Kenya. See ICC-01/09-01/11-373, paras.33-34 and ICC-01/09-19-Corr, section (II)(A)(1). It also dismissed, *in limine*, the factual aspect of the challenge, based on the sufficiency of the evidence presented in support of the organisational requirement, stating: "*(…) the Chamber is of the view that the Defences' second point cannot be qualified as a jurisdictional challenge under article 19(2)(a) of the Statute, despite the Defences' arguments expressed in their Final Written Observations. It is clear from the Defences' submissions that the essence of this part of their filings is to challenge the merits of the Prosecutor's case on the facts. In the Chamber's opinion, this part of the Defences' submissions is in effect an evidentiary challenge under article 61(5) and (6) of the Statute which, in principle, should be resolved pursuant to the standard provided for in article 61(7) of the Statute in the relevant part of the decision, namely, under the section concerning the contextual elements of the crimes against humanity (…)*" (footnotes omitted, emphasis added). PTC II concluded: "*Having said the above, the Chamber therefore considers that this second part of the Defences' challenges to jurisdiction of the Court, based on the merits of the case, should be dismissed in limine*". ICC-01/09-01/11-373, paras.35-36.

33. Trial Chamber II ("TC II") stated in *Katanga* that article 19 requires challenges to admissibility or jurisdiction to be made "*at the earliest opportunity, so as to avoid obstructing or delaying the proceedings*".[38]

34. Consistent with its duty to ensure that the trial is fair and expeditious, the Chamber set a deadline by which the Parties and Participants should have filed any motions or requests on matters they wished to be decided prior to the start of trial.[39] That deadline, which expired on 12 August 2015 and foresaw an abbreviated period for responses by 20 August, fell three weeks prior to the opening of the trial and over one month prior to the start of the testimony of the first witness. Instead of abiding by that deadline, the Defence Application was filed on the eve of the opening of the trial.[40]

35. In *Katanga*, TC II refused to entertain the merits of a Defence application[41] which invoked the doctrine of abuse of process in order to challenge the Court's jurisdiction because it was not brought "in a timely manner". TC II stated:

> 62. **When a party wishes to raise an issue, particularly if the issue might have repercussions on the conduct of the proceedings, it is incumbent on that party to submit the matter to the judges by motion and in a timely manner**. If the filing of such a motion is contingent on obtaining information or further documents, the party in question must inform the Chamber of its need to receive such information or documents before submitting its motion. Moreover, **if the objection has already been raised before the Pre-Trial Chamber, and if the party wishes to take it up again before the Trial Chamber, then it is obliged to bring it to the latter's attention, promptly** and in accordance with the appropriate procedure.
>
> (…)

[38] ICC-01/04-01/07-1666-Red-tENG, para.41 (hereinafter "*Katanga* Trial Chamber Decision"), cited in an Appeals Chamber decision which found no error in TC II's decision, ICC-01/04-01/07-1666-Red-tENG. See ICC-01/04-01/07-2259, para.17.
[39] ICC-01/04-02/06-619, para.8 and ICC-01/04-02/06-745, para.32.
[40] *See* ICC-01/04-02/06-T-23-ENG ET, p.4, lns.7-16.
[41] The *Katanga* Trial Chamber Decision concerned a Defence request for a motion for a declaration of unlawful detention and stay of proceedings. In its analysis, TC II observed that the Defence had invoked the doctrine of abuse of process "*in order to challenge the Court's jurisdiction*". *Katanga* Trial Chamber Decision, para.36; see also paras.43-48.

> 65. By not filing its Motion until seven months after the initial invitation to the Defence to submit to the Chamber the relevant issues which it wished the latter to rule, the Defence has not met the aforementioned obligation in regard to expeditiousness, despite the many opportunities subsequently provided to it.
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> 66. Accordingly, having regard to all the circumstances of the case and in the absence of any convincing explanation from the Defence for Germain Katanga, the Chamber considers that **the Motion was filed at too advanced a stage in the proceedings and therefore finds it inadmissible**.[42]

36. The Appeals Chamber upheld TC II's decision: "*The Appeals Chamber sees merit in the Trial Chamber's conclusion that strategic reasons in themselves could not justify the untimely filing of the motion*."[43]

37. The Accused has been on notice of the charges contained in Counts 6 and 9 since the DCC was first filed, on 10 January 2014.[44] It was aware, and in fact responded, to the Prosecution's submissions as to the legal basis for the allegations contained in those counts. At the very latest, the Accused was on notice by 9 June 2014, when the PTC confirmed the charges,[45] that he was to face charges of rape and sexual slavery of UPC/FPLC Child Soldiers as war crimes in non-international armed conflict. The arguments advanced in the Defence Application as "exceptional circumstances" are not so. The Defence Application should be dismissed as having been filed too late.

38. It is not merely hypothetical that the Defence Application will delay the proceedings, if granted. Consistent with rule 58 of the Rules of Procedure and Evidence, if a jurisdictional challenge is likely to cause undue delay, it must be decided in advance of trial proceedings.[46] The Defence has already requested an

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[42] *Katanga* Trial Chamber Decision, paras.62, 65 and 66 (emphasis added).
[43] ICC-01/04-01/07-2259, para.79.
[44] ICC-01/04-02/06-203-AnxB.
[45] ICC-01/04-02/06-309.
[46] "*When a Chamber receives a request or application raising a challenge or question concerning its jurisdiction (…) in accordance with article 19, paragraph 2 or 3 (…) it shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. It may hold a hearing.* ***It may join the challenge*** *or question* ***to*** *a confirmation or* ***a trial proceeding as long as this does not cause undue delay, and in this circumstance shall hear and decide on the challenge*** *or question* ***first***" (emphasis added).

order 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*".[47] Many of the Prosecution's witnesses, including the second witness, P-0901,[48] whose witness preparation has already begun, are expected to give evidence "related" to Counts 6 and 9. There is therefore no question that granting the Defence Application would delay the trial. The effect of the Defence Application, if granted, would be to prevent the Prosecution from eliciting the evidence relevant to those counts, or to force the Prosecution to recall the witnesses after a final decision on the Defence Application is rendered.

Conclusion

39. The legal issues addressed in the Defence Application merit consideration by the Chamber; however, a jurisdictional challenge is not the correct procedure.

40. The importance of preserving the distinction between jurisdictional challenges and mere disagreements as to statutory interpretation cannot be overemphasised. Entertaining arguments about the interpretation of the law in the guise of jurisdictional challenges would result in undue delays to trial proceedings.

41. Allowing for multiple, unjustified and untimely challenges to the jurisdiction of the Court would also undermine the Court's ability to ensure that it deals expeditiously with the cases of which it is properly seized.

Relief

42. Based on the foregoing, the Prosecution requests the Chamber to dismiss the Defence Application *in limine* as being improperly brought under article 19.

[47] Defence Application, p.12.
[48] ICC-01/04-02-06-491-Conf-AnxB, p.41-43 at para.24; ICC-01/04-02/06-503-AnxA-Red2, paras.435, 448, 452, 454, 455, 457.

43. Should the Chamber consider that the matters raised in the Defence Application are properly brought as a jurisdictional challenge, the Prosecution requests that the Chamber find that:

    (i) the Defence has not demonstrated exceptional circumstances justifying bringing a jurisdictional challenge twice; and/or

    (ii) the Defence Application was brought too late;

    and dismiss the Defence Application *in limine*.

44. Should the Chamber decide to entertain the merits of the Defence Application, the Prosecution requests to be given an opportunity to address the Chamber on the merits of the Defence Application.

Fatou Bensouda, Prosecutor

Dated this 11th day of September 2015
At The Hague, The Netherlands