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Date: **2 November 2015**

THE APPEALS CHAMBER

Before: **Judge Christine Van den Wyngaert, Presiding Judge**
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Piotr Hofmański
Judge Raul C. Pangalangan

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF
THE PROSECUTOR V. BOSCO NTAGANDA

Public

Document in support of the 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*", ICC-01/04-02/06-892

Source: **Defence Team of Mr Bosco Ntaganda**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Further to the *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", ICC-01/-4-02/06-892*[1] submitted on 19 October 2015, and pursuant to Regulation 64(2) of the Regulations of the Court, Counsel representing Mr Ntaganda ("Defence") hereby submit this:

Document in support of the 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", ICC-01/04-02/06-892

"Document in support of the appeal"

INTRODUCTION

1. The Prosecution has charged, and Pre-Trial Chamber II confirmed,[2] the war crimes of "rape of UCP/FPLC child solders"[3] and "sexual slavery of UPC/FPLC child soldiers"[4] as amongst the crimes to be tried in this case. The Prosecution has also separately charged "rape of civilians"[5] and "sexual slavery of civilians."[6] Rather than attempting to subsume the alleged rapes and sexual slavery of conscripted children as war crimes against civilians, the Prosecution has chosen to define rape and sexual slavery of "child soldiers" as a separate war crime. The Prosecution has confirmed that the reference to "child soldiers" is meant to refer to "children under the age of 15 years of age *who were members of* the UPC/FPLC."[7]

2. These are not war crimes and do not fall within the ICC's war crimes' jurisdiction. The notion of war crime, which is expressly imported by

[1] ICC-01/04-02/06-909.
[2] Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, ICC-01/04-02/06-309, para. 76-82.
[3] Updated Document Concerning the Charges, 16 February 2013, ICC-01/04-02/06-458-AnxA ("UDCC"), Count 6.
[4] UDCC, Count 9.
[5] UDCC, Counts 4 and 5.
[6] UDCC, Counts 7 and 8.
[7] 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, 11 September 2015, ICC-01/04-02/06-818 ("Prosecution Response"), para. 6 (emphasis added).

reference into Article 8(2)(e) and 8(2)(e)(vi) itself, entails certain pre-conditions. One of those pre-conditions is that the victim falls within a protected category of persons. Members of an armed force who are victimized by fellow members of the armed force do not fall within a protected category. The alleged crimes of rape and sexual slavery "of UPC/FPLC child soldiers" by fellow UPC/FPLC soldiers not only do not fall within the jurisdiction of Article 8(2)(e), but are directly and categorically incompatible with the conditions of a war crime.

3. Three grounds of appeal are presented against the *Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9* ("Decision").[8] First, the Trial Chamber VI ("Trial Chamber") erred in law in stating that Article 8(2)(e)(vi) involves no restriction on the category of victims. Second, the Trial Chamber erred in law in failing to apprehend that Counts 6 and 9 define the category of alleged victims in a way that is incompatible with the recognised categories of victims of war crimes. Third, the Trial Chamber erred in law in failing to find that these matters are jurisdictional in nature and that they require immediate resolution in the interests of justice, even assuming that the same jurisdictional challenge was previously raised.

4. The proper remedy, given these errors, is for the Appeals Chamber to find that crimes committed by members of an armed group against other members of the same group cannot constitute a war crime; and, accordingly, to declare that Counts 6 and 9 fall beyond the jurisdiction conferred by the Rome Statute.

[8] ICC-01/04-02/06-892.

GROUNDS OF APPEAL

A. First ground of appeal: The Trial Chamber erred in law in stating that Article 8(2)(e)(vi) involves no restriction on the class of victims

5. It is well-established as a matter of customary and conventional international law that war crimes, whether in international or non-international armed conflict, do not encompass acts committed by a member of an armed force against another member of the same force. As stated in the RUF Trial Judgement:

> The Chamber is of the opinion that the law of armed conflict does not protect members of armed groups from acts of violence directed against them by their own forces.
>
> The law of international armed conflict regulates the conduct of combatants *vis-à-vis* their adversaries and persons *hors de combat* who do not belong to any of the armed groups participating in the hostilities.
>
> [...]
>
> The law of international armed conflict was never intended to criminalise acts of violence committed by one member of an armed group against another, such conduct remaining first and foremost the province of the criminal of the State of the armed group concerned and human rights law. In our view, a different approach would constitute an inappropriate reconceptualization of a fundamental principle of international humanitarian law.[9]

Cassese[10] and many other commentators[11] agree that war crimes do not encompass crimes allegedly committed against members of one's own armed forces.[12]

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[9] *Sesay et al*, SCSL-04-15-T, Judgement, 2 March 2009 ("RUF Trial Judgement" or "RUF TJ"), paras. 1451-1453 (Even if the judgement refers to "international armed conflict", the accused were charged of war crimes committed in the context of a non-international armed conflict, see *ibid*, para. 977. Those excerpts should therefore be understood to apply to war crimes committed in non-international armed conflicts.).

[10] A. Cassese, *International Criminal Law* (Oxford: Oxford UP, 2013), p. 67 ("crimes committed by combatants of one party to the conflict against members of their own armed forces do not constitute war crimes.").

[11] C. Focarelli, International Law as Social Construct: The Struggle for Global Justice (Oxford: Oxford UP, 2012), p. 392 ("[o]ffences committed by servicemen against their own military, whatever their nationality, do not qualify as war crimes"); G. Gaggioli, "Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law" (2014) 96 *IRRC* 503, p.515 ("In the context of a non-international armed conflict, if a military commander rapes a subordinate soldier in a

6. This "trite"[13] observation arises from the fundamental tenant of international humanitarian law that the status of the victim must be identified before it can be said that a war crime has been committed. In non-international armed conflict, this requirement is reflected in Common Article 3 of the Geneva Conventions, which prohibits, specifically and solely, acts committed against "[p]ersons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed '*hors de combat*.'"[14] ICTR cases have described the characterization of the identity of the victim as a "threshold requirement."[15]

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military barracks as a form of punishment – as he may have done already in peacetime – without this act having any link to the armed conflict situation, IHL would not apply to the act. This rape would/should however be prohibited under domestic law. It also constitutes a human rights violation if the military commander committed the rape in his official capacity (i.e. by using his position of authority and the means of his function). On the other hand, in the same armed conflict, if the military commander rapes a person detained for reasons connected to the armed conflict, such an act clearly constitutes a violation of IHL (and human rights law). The nexus derives from a number of elements here: the identity of the perpetrator (a military commander), the identity of the victim (a person detained for reasons related to the armed conflict), and the context (situation of vulnerability of detainees to the Detaining Power"); W. A. Schabas, The International Criminal Court, A commentary on the Rome Statute, p.210 (affirming the same principle in respect of international armed conflicts); S. L. Wells, "Crimes Against Child Soldiers in Armed Conflict Situations: Application and Limits of International Humanitarian Law", p.304.

[12] See Prosecution's submissions on issues that were raised during the confirmation of charges hearing, 7 March 2014, ICC-01/04-02/06-276-Conf ("Prosecution submissions (confirmation of charges)") para. 187 (The Prosecution's claim that Article 8(2)(e)(vii) – which itself criminalizes the enlistment or conscription of child soldiers – is an "exception" to this principle that somehow demonstrates the demise of the principle is unfounded. First, when the crime is committed it is committed against a civilian, not a member of the armed force. Second, even assuming that it does constitute an exception, it is precisely the type of narrowly-delimited exception that proves the rule, rather than destroying it.)

[13] RUF TJ, para. 1453.

[14] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Filed, 12 August 1949, 75 U.N.T.S. 31, Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 U.N.T.S. 85, Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287 ("Geneva Conventions"), Art. 3. *See also* Protocol additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ("Additional Protocol II"), Art. 4(1) (conferring protections on "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities").

[15] *See e.g. Ndindiliyimana et al*., ICTR-00-56-T, Judgement and Sentence, 17 May 2011, para. 2129; *Bagosora et al*, ICTR-98-41-T, Judgement and Sentence, 18 December 2008 para. 2229; Semanza, ICTR-97-20-T, Judgement and Sentence, 15 May 2003, para. 512.

7. The text of Article 8 of the ICC Statute is clear that the usual pre-conditions for a "war crime" were not meant to be displaced or discarded. First, Article 8 is entitled "war crimes", thus expressly invoking a well-established concept of conventional and customary international humanitarian law. Second, Article 8(2)(e) has a chapeau provision that expressly refers to the ensuing enumerated acts as "violations of the laws and customs applicable in armed conflicts not of an international character." Third, these enumerated acts are said to be "within the established framework of international law." Fourth, Article 8(2)(e)(vi) expressly prohibits "any other form of sexual violence *also constituting* a serious violation of article 3 common to the four Geneva Conventions." This formulation implies that rape and sexual slavery are *also* to be understood as crimes under Common Article 3 of the Geneva Conventions.

8. The Trial Chamber, instead of interpreting Article 8(2)(e)(vi) in accordance with accepted international humanitarian law, dismembered the provision from that context, despite the specific textual indications in the Statute to the contrary. Specifically, the Trial Chamber reasoned that it could apply sub-paragraphs (i) through (xv) without regard to any such contextual or chapeau elements:

> 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.[16]

The Trial Chamber's interpretation, accordingly, is that only such contextual elements as are expressly mentioned in sub-sections (i) through (xv) should be

[16] Decision, para. 25.

deemed as having been imported into the Rome Statute from the "established framework of international law."

9. This statement ignores the chapeau of Article 8(2)(e); ignores the status of these enumerated crimes as "war crimes"; and ignores the specific language of Article 8(2)(e)(vi) referring to these acts as "constituting a serious violation of article 3 common to the four Geneva Conventions." These sources dictate, as a threshold matter, that these crimes can be committed only against "persons taking no active part in hostilities," including civilians and members of the opposing forces who are no longer engaged in combat.[17]

10. The Trial Chamber's purported elimination of the threshold requirements for the existence of a war crime under conventional and customary humanitarian international law – in particular, the status of the victim as required under "the established framework of international law – constitutes an error of law".

B. Second ground of appeal: The Trial Chamber erred in law in failing to apprehend that Counts 6 and 9 define the victims in a manner that is categorically incompatible with a war crime

11. The Trial Chamber asserted that the manner in which Counts 6 and 9 have been defined is merely "descriptive" of "the alleged victims" rather than being categorically improper. In particular, the Trial Chamber argues that

[17] As stated in M. Cottier, "Article 8", in Triffterer, ed., Commentary on the Rome Statute of the International Criminal Court (Munich: Beck, 2008), p. 295 ("Hence, we must examine with regard to each war crime what treaty or customary international humanitarian law rules it is derived from, and what violation of humanitarian law it precisely criminalizes, to determine the material and mental elements of the offense. For instance, the concept of 'civilian' contained for instance in article 8 para. 2 (b)(i) carries a very precise and carefully delineated meaning under humanitarian law. […] Also, conduct that might appear criminal if one exclusively looks at the working of article 8 may not be unlawful under certain circumstances for which the relevant humanitarian rule provides for an exception to the rule. For instance, even though article 8 para. 2(b)(viii) clearly criminalizes 'transfers' of the population of occupied territory and does not mention any exception, an Occupying Power may, based on customary international humanitarian law (reflected in article 49 para. 2 GCIV) and hence also under article 8, displace members of the population of occupied territory from a given area in order to evacuate them 'if the security of the population or imperative military reasons so demands.' Similarly, the notion of 'willful killing' under article 8 para. 2 (a)(i) is far from criminalizing and intentional killing in armed conflict situations, *but only the killing of protected persons*") (italics added).

Counts 6 and 9 (rape and sexual slavery of child soldiers) are distinct from Counts 5 and 8 (charging rape and sexual slavery of civilians) only insofar as they "serv[e] to denote between the different groups of victims that allegedly resulted from these acts."[18]

12. The Trial Chamber's conclusion is an error of law. Counts 5 and 8, respectively, charge the crimes of "rape of civilians" and "sexual slavery of civilians." Both counts correctly refer to Article 8(2)(e)(vi) as the basis for this crime. Both of these counts also correctly recognize that the category of victims – civilians – must be identified as part of the pleading of the crime.

13. The Prosecution, incidentally, could have sought to include the allegation of the rape and sexual slavery of children under the age of 15 under Counts 5 and 8. Such a pleading would have been factually weak, but at least legally correct. The Prosecution instead decided to create two entirely separate counts framed as follows:

> **COUNT 6: RAPE OF UPC/FPLC CHILD SOLDIERS**
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> Based on the facts and circumstances described in paragraphs 100-106, **Bosco NTAGANDA** is criminally responsible for:
>
> **Count 6**: Rape of UPC/FPLC child soldiers, **a war crime**, punishable pursuant to article 8(2)(e)(vi), as well as 25(3)(a) – indirect co-perpetration, 25(3)(d)(i) or (ii), or 28(a).
>
> **COUNT 9: SEXUAL SLAVERY OF UPC/FPLC CHILD SOLDIERS**
>
> Based on the facts and circumstances described in paragraphs 100-104 and 106, **Bosco NTAGANDA** is criminally responsible for:
>
> Count 9: Sexual slavery of UPC/FPLC child soldiers, **a war crime**, punishable pursuant to article 8(2)(e)(vi), as well as 25(3)(a) – indirect co-perpetration, 25(3)(d)(i) or (ii), or 28(a).

14. These counts expressly identify the category of victims as "soldiers" – indeed, "soldiers" of the very same group as the alleged perpetrators. The plain

[18] Decision, para. 27.

meaning of "soldier" is clear. Any ambiguity as to the status of the alleged victims is dispelled by the Prosecution's own submissions:

> 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.[19]

15. The expression "members" is clear and accords with the International Committee of the Red Cross's view that members of rebel fighting forces, despite certain issues of classification, have a relatively stable and non-transitory status in international humanitarian law:

> While it is generally recognized that members of state armed forces in non-international armed conflict do not qualify as civilians, treaty law, state practice, and international jurisprudence have not unequivocally settled whether the same applies to members of organized armed groups (i.e. the armed forces of non-state parties to an armed conflict). Because organized armed groups generally cannot qualify as regular armed forces under national law, it might be tempting to conclude that membership in such groups is simply a continuous form of civilian direct participation in hostilities. Accordingly, members of organized armed groups would be regarded as civilians who, owing to their continuous direct participation in hostilities, lose protection against direct attack for the entire duration of their membership. However, this approach would seriously undermine the conceptual integrity of the categories of persons underlying the principle of distinction, most notably *because it would create parties to non-international armed conflicts whose entire armed forces remain part of the civilian population. As the wording and logic of Article 3 GC I-IV and Additional Protocol II (AP II) reveals, civilians, armed forces, and organized armed groups of the parties to the conflict are mutually exclusive categories also in non-international armed conflict*.[20]

16. Common Article 3 of the Geneva Conventions also acknowledges that fighters in rebel forces are not merely civilians directly participating in hostilities. This provision, which directly addresses "armed conflict[s] not of an international character," refers to "members of armed forces who have laid down their arms and those placed '*hors de combat*'" – implying that these concepts of

[19] Prosecution Response, para. 6.

[20] N. Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities, (Geneva: ICRC, 2009), pp. 27-28 (emphasis added, footnotes omitted).

"membership" apply to rebel groups as well as to State forces. Indeed, the reference to "*hors de combat*" would be superfluous and unnecessary if rebel fighters were nothing more than civilians engaging in hostilities.

17. The Prosecution has previously attempted to argue[21] that persons under the age of 15 integrated into a rebel fighting force nevertheless exceptionally retain their civilian status. This interpretation arises from the following words in Article 4(3) of Additional Protocol II: "Children shall be provided with the care and aid they require, and in particular: […] (d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct party in hostilities despite the provisions of sub-paragraph (c) *and are captured*."[22] The United Kingdom's Joint Service Manual of the Law of Armed Conflict correctly explains that this provision means that "[i]f captured, under-aged members of the armed forces are entitled to be treated as prisoners of war, but are also entitled to the special protection afforded to children."[23] Those "special protections" do not include retention of civilian status, let alone dual civilian and combatant status, but rather the protections expressly set out in Article 4(3)(a) and (b) – namely, entitlements to receive education and that all appropriate steps be taken to facilitate return to their families. Even the Prosecution has acknowledged in its previous submissions that Article 4(3)(d)

[21] Prosecution submissions (confirmation of charges), para. 189 ("Treaty law also provides continuing protections for children. Article 4(3) of Additional Protocol II applicable in non-international armed conflict provides that '[c]hildren shall be provided with the care and aid they require'. Article 4(3)(d) provides continuing protections for children even when the prohibition on recruiting child soldiers in article 4(3)(c) is breached and children actively participate in hostilities.")

[22] Additional Protocol II, Art. 4 (3)(d) (emphasis added).

[23] United Kingdom, Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict*, (2004), s. 4.10.4. See also C. Pilloud *et al*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC, 1987), para. 4507 (Part II, entitled 'Humane Treatment' "is aimed at protecting persons who do not, or no longer, participate in hostilities against abuses of power and against inhuman and cruel treatment which may be inflicted upon them by the military or civilian authorities *into whose hands they have fallen*. As the Protocol does not provide for different categories of persons who enjoy a special status, such as prisoners of war in international armed conflicts, the rules laid down here apply equally to all persons affected by the armed conflict *who are in the power of the enemy* (the wounded and sick, persons deprived of their liberty, or whose liberty has been restricted), whether they are military or civilians.") (emphasis added)

is "contingent upon the capture of the child."[24] The Prosecution's only basis for arguing that the provisions should be given wider application is the contention that this provision reflects an alleged statutory "motivation"[25] that should be extended *by analogy* to other situations.

18. Strong policy considerations run contrary to this "motivation", however. Most importantly, the distinction between civilians and members of armed forces/groups in armed conflict should be maintained and reinforced by the clearest rules possible. Those considerations are, if anything, even stronger in the context of non-international armed conflict. The Prosecution has accepted these considerations in employing the term "membership" and referring to the victims as "soldiers." The crime purportedly defined on the basis of this concept of "membership", however, falls outside of the ambit of war crimes.

19. This may be perceived to be an unfortunate consequence in the scope of the application of war crimes to heinous acts committed within an armed force. The larger picture, however, is that maintaining the clearest distinction between civilians and combatants serves important theoretical and practical purposes. Permitting these charges to go forward, especially on the basis asserted by the Trial Chamber, will cause confusion and ambiguity that would undermine the clarity of the distinction between combatants/members of armed groups and civilians.

20. Any attempt to widen or expand the established scope of war crimes by resort to analogy or inferential reasoning would also violate Article 22 of the Statute, which requires that the "definition of a crime shall be strictly construed and shall not be extended by analogy." Defining a war crime which, by its very terms alleges crimes by members of an armed group against other members of the same group, would constitute a radical and unprecedented extension by analogy of war crimes.

[24] Prosecution submissions (confirmation of charges), para. 190 (emphasis added).
[25] *Id*.

C. Third ground of appeal: The Trial Chamber erred in finding that the arguments raised were not jurisdictional

21. The Trial Chamber prefaced its analysis of whether the issues raised by the Defence were jurisdictional with the comment that the "scope of challenges to jurisdiction has been defined narrowly by the Appeals Chamber."[26] The Appeals Chamber, however, has never described the scope of jurisdictional challenges as either narrow or broad. A distinction has been articulated between a challenge to "the contours or elements of crimes or modes of liability, which are matters for trial" or "whether a crime or mode of liability exist[s] under customary international law,"[27] which is a jurisdictional question.

22. The aforementioned distinction was derived from ICTY case-law, which has a rich jurisprudence (albeit in a looser statutory framework) distinguishing jurisdictional from non-jurisdictional issues. Challenges to the existence of the mode of liability known as "co-perpetratorship" has been deemed jurisdictional,[28] as were claims that a particular crime as formulated did not constitute a war crime.[29] In *Gotovina*, on the other hand, challenges were rejected where they focused only on the proper definition of recognized crimes,[30] or even the sufficiency of the factual pleading in relation to those

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[26] Decision, para. 24.

[27] *Kenyatta et al*, 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", 24 May 2012, ICC-01/09-02/11-425, para. 37; *Ruto & 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", 24 May 2012, ICC-01/09-01/11-414, para. 31.

[28] *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.")

[29] *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 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.")

[30] *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

recognized crimes.[31] Relying on this guidance, the Appeals Chamber in the *Ruto* and *Kenyatta* cases rejected a purported challenge to jurisdiction that depended on the proper definition of "organizational policy" under Article 7(2)(a) of the Statute.

23. The questions raised in this appeal, in contrast to *Ruto* and *Kenyatta*, are much more fundamental and categorical than those concerning the proper definition of "organizational policy." They involve whether an entire category of crimes properly falls within the scope of the ICC Statute.

24. The Trial Chamber believed that it did not need to "asses[s] whether a crime exists under customary law" only because it believed that the crimes set out in sub-sections (i) through (xv) of Article 8(2)(e) were free-standing and comprehensive "as such"[32] and, accordingly, required no further analysis of the pre-conditions for the application of a "war crime". As discussed above, the chapeau elements of Article 8(2)(e), as well as the specific language of Article 8(2)(e)(vi), both incorporate by reference concepts of conventional and customary international law, such as "armed conflic[t]". These concepts have been described at the ICTR as "threshold" issues.[33] They should likewise be recognized as jurisdictional because they concern the existence of a crime in respect of an entire category of circumstances – i.e. whether the war crimes of

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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*").

[31] *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'")

[32] Decision, para. 25.

[33] *See e.g. Ndindiliyimana et al*., ICTR-00-56-T, Judgement and Sentence, 17 May 2011, para. 2129; *Bagosora et al*, ICTR-98-41-T, Judgement and Sentence, 18 December 2008 para. 2229; Semanza, ICTR-97-20-T, Judgement and Sentence, 15 May 2003, para. 512

rape and sexual slavery pertain to acts committed by members of an armed group against other members of the same armed group.

25. The question will not be elucidated through any factual exposition at trial. Either the crime exists, or it does not. Additional evidence will not assist in resolving the issue. Addressing the issue now one way or the other will assist the efficiency of trial proceedings. The Trial Chamber's apparent reliance on the fact that the issue involves "questions of substantive law"[34] is an argument in favour, not against, treating the issue as jurisdictional.

26. The Prosecution has itself previously acknowledged that the issue was jurisdictional. A letter purporting to instruct an expert on children associated with armed groups in armed conflict sought advice on: "[t]he 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?"[35] The Prosecutor has likewise described these counts as constituting *an innovation that the office of the Prosecution will be bringing to international criminal justice*".[36] This is not a description that corresponds to the mere inclusion of an additional material fact to an uncontroversial crime.

27. The Trial Chamber's perception[37] that Counts 6 and 9 only refer to a different set of factual circumstances in respect of crimes charged in Counts 5 and 8 is at the heart of its finding that the issue is not jurisdictional. As described above, however, Counts 6 and 9 do not merely identify different groups being victims of the same crime. On the contrary, the Prosecution has sought to expressly define a new crime that rejects the requirement of "civilians" being the victims of the crime by defining a crime against "members" of the armed group – i.e. "soldiers." This is much more than a mere factual variation of the

[34] Decision, para. 28.
[35] DRC-OTP-2084-0059, para.10.
[36] Ntaganda case: Press Conference, 1 September 2015, min. 33:38 to min. 34:07. Available online: <https://www.youtube.com/watch?v=gOgZc-IgDlA>.
[37] Decision, para. 27.

crimes defined in Counts 5 and 8, which refer expressly to crimes against "civilians." It is precisely to dispense with that requirement that the Prosecution formulated separate Counts, and separate crimes, under Counts 6 and 9.

CONCLUSION

Striking Counts 6 and 9 is appropriate and in the interests of justice, even assuming that the present appeal constitutes a second jurisdictional request

28. Assuming that the present request is deemed a second jurisdictional challenge, exceptional circumstances justify entertaining this request. Although the Trial Chamber did not address this issue, the Appeals Chamber has the discretion in the interests of justice and judicial economy to resolve this question without further remand to the Trial Chamber.

29. The Trial Chamber acknowledged that the challenge of the Court's jurisdiction is "serious" and underscored the importance of "the potential impact that such a challenge, if it were to succeed, would have on the proceedings and the presentation of the evidence."[38] The resolution of the Defence challenge would likely significantly affect the scope of evidence adduced which, in turn, has significant efficiency consequences for these proceedings. It would not be efficient to expend resources and time on a charge that is beyond the Court's jurisdiction.

30. This not only constitutes a waste of judicial resources, but risks the summoning of victims and witnesses to court unnecessarily. This constitutes a substantial potential unnecessary burden for such witnesses, especially in light of the time, effort and expense associated with calling witnesses to The Hague from Africa.

[38] Decision, para. 22.

31. The defendant will also be prejudiced by being compelled to expend considerable time and resources addressing crimes that do not fall within the Court's jurisdiction and of which he cannot be convicted.

32. Finally, the proceedings as a whole will be less focused and encompass matters that will waste the judicial resources of the Trial Chamber itself.

33. The foregoing constitutes substantial negative consequences that can be addressed by entertaining this jurisdiction challenge now. These consequences are sufficiently substantial as to justify, on an exceptional basis, authorizing a second jurisdictional challenge to ensure that the Court remains within the scope of its jurisdiction.

RELIEF SOUGHT

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

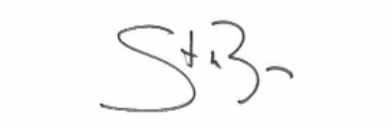
DECLARE that the Defence appeal is a properly formed jurisdictional challenge;

GRANT the Defence appeal and **QUASH** Trial Chamber VI's decision;

FIND that crimes committed by members of an armed group against other members of the same group cannot constitute war crimes; and

DECLARE that Counts 6 and 9 fall beyond the jurisdiction conferred by the Rome Statute.

RESPECTFULLY SUBMITTED ON THIS 2ND DAY OF NOVEMBER 2015



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