



Original: **English**

No.: ICC-01/04-02/06  
Date: 23 February 2017

**THE APPEALS CHAMBER**

**Before:** Judge Sanji Mmasenono Monageng, Presiding Judge  
Judge Christine Van Den Wyngaert  
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**

**Request on behalf of Mr Ntaganda seeking leave to reply to the “Corrected version of ‘Prosecution’s Response to Ntaganda’s ‘Appeal from the Second Decision on the Defence’s Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9’”**

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

**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**

Me Stéphane Bourgon  
Me Christopher Gosnell

**Legal Representatives of Victims**

Ms Sarah Pellet  
Mr Dmytro Suprun

**Legal Representatives of 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**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

Further to the “Corrected version of ‘Prosecution’s Response to Ntaganda’s ‘Appeal from the Second Decision on the Defence’s Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9’” submitted on 21 February 2017 (“Response”),<sup>1</sup> Counsel representing Mr Ntaganda (“Defence”) hereby submits this:

**Request on behalf of Mr Ntaganda seeking leave to reply to the “Corrected version of ‘Prosecution’s Response to Ntaganda’s ‘Appeal from the Second Decision on the Defence’s Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9’”**

1. The Defence respectfully requests leave to reply to the following arguments presented in the Response:
  - a. Whether the Appeals Chamber is precluded from considering or relying on the words “also constituting” in Articles 8(2)(e)(vi) and 8(2)(b)(xxii) in this appeal;<sup>2</sup>
  - b. Whether “in circumstances where the activities or status of the victim is material to liability under articles 8(2)(b) and (e), the Elements of Crimes expressly set out such a requirement”<sup>3</sup> or whether, rather, there are provisions that also rely on the *chapeaux* to import well-established jurisdictional limitations;
  - c. Whether customary international law has no place in the interpretation of Article 8(2)(b) and (e);<sup>4</sup>
  - d. Whether Article 8(2)(b)(xxii) (defining rape and other crimes) overlaps with any provision of Article 8(2)(a) (pertaining to Grave Breaches) and

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<sup>1</sup> ICC-01/04-02/06-1794-Corr.

<sup>2</sup> Response, para. 26 (“[t]he *only way for the Defence to win this appeal* is then to convince the Appeals Chamber that [...] the *chapeaux* of article 8(2)(b) and 8(2)(e)” imports a “status/activity requirement not expressly provided under article 8(2)(b) and (e)”.

<sup>3</sup> Response, para. 24.

<sup>4</sup> Response, para. 30 (“while [customary international law] is the primary source of the ICTY’s applicable law, it should be considered at this Court only ‘in the second place’ when there is a lacuna in the Statute. Here no lacuna exists.”)

whether Article 8(2)(e)(vi) overlaps with any provision of Article 8(2)(c);<sup>5</sup>

- e. Whether the Defence's interpretation of the phrase "within the established framework of international law" constitutes a "blank cheque" that overthrows the "principle of legality" and undermines the "drafters' efforts to strictly define the punishable crimes";<sup>6</sup>
- f. Whether the words "within the established framework of international law" can be properly interpreted as "simply reiterat[ing] that the acts listed are indeed serious violations of the laws and customs" of war,<sup>7</sup> whereas the words immediately preceding ("[o]ther serious violations of the laws and customs" of war) render the Prosecution's interpretation redundant;
- g. Whether the Defence has posited, as the Prosecution asserts, "a general 'adverse party' requirement" under Common Article 3<sup>8</sup> (as opposed to an adverse party requirement for those not taking no active part in hostilities);
- h. Whether a "properly applied" version of the nexus requirement,<sup>9</sup> or the statutory gravity threshold,<sup>10</sup> can substitute for other jurisdictional requirements;
- i. Whether the Prosecution's claim that members of armed forces are within the "power" of their own armed forces is consistent with the

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<sup>5</sup> Response, paras. 37 (in respect of Article 8(2)(b)(xxii), 47 (in respect of Article 8(2)(e)(vi)).

<sup>6</sup> Response, paras. 1, 41-42.

<sup>7</sup> Response, para. 42.

<sup>8</sup> Response, para. 59, 73, 76 79, 81-83.

<sup>9</sup> Response, paras. 88-90, 92.

<sup>10</sup> Response, paras. 91, 93.

well-established understanding of that term in international humanitarian law;<sup>11</sup>

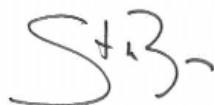
- j. Whether the Prosecution is correct that there are two separate and discrete bodies of law governing targeting and protection within the phrase “taking no active part in hostilities,”<sup>12</sup> and the implications that would arise from this bifurcation; and
- k. Whether the Prosecution is correct that it has made no pleading that is incompatible with a finding by the Trial Chamber that the alleged child soldiers were not taking no active part in hostilities at the relevant time,<sup>13</sup> and that it can now be permitted to claim that the alleged child soldiers are merely civilians directly participating in hostilities.<sup>14</sup>

- 2. The Defence submits that additional submissions on these issues, especially in the context of the Prosecution’s voluminous and novel submissions, would materially assist the Chamber in its adjudication of the pending appeal.

## RELIEF SOUGHT

- 3. The Defence respectfully requests leave to file a reply on the foregoing issues.

**RESPECTFULLY SUBMITTED ON THIS 23<sup>rd</sup> DAY OF FEBRUARY 2017**



Me Stéphane Bourgon, Counsel for Bosco Ntaganda

The Hague, The Netherlands

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<sup>11</sup> Response, para. 110, 114 (“a child may be unlawfully recruited; they may be considered *arguendo* to take a continuous combat function (if the *DPH Interpretive Guidance* is accepted), based on their specific conduct, and hence to be liable to targeting at all times by the adverse party; and they may simultaneously be protected against inhumane treatment by the persons who have ‘power’ over them”).

<sup>12</sup> Response, paras. 97-114.

<sup>13</sup> Response, paras. 97-111.

<sup>14</sup> Response, para. 112 (“This Court has previously held, correctly, that ‘any determination as to whether a person is directly participating in hostilities must be carried out on a case-by-case basis.’”)