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No. ICC-01/04-02/06 OA 2

Date: 22 March 2016

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

Judgment

on the appeal of Mr Bosco Ntaganda against the “Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9”

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for the Defence
Mr Stéphane Bourgon
Mr Luc Boutin

Legal Representatives of Victims
Ms Sarah Pellet
Mr Dmytro Suprun

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI entitled “Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9” of 9 October 2015 (ICC-01/04-02/06-892),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The “Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9” is reversed and the matter is remanded to the Trial Chamber for it to address in accordance with the requirements of article 19 of the Statute.

REASONS

I. KEY FINDINGS

1. Decisions rejecting challenges under article 19 of the Statute on the grounds that they do not challenge the jurisdiction of the Court are considered to be “decisions with respect to jurisdiction” within the meaning of article 82 (1) (a) of the Statute and appeals against such decisions are admissible.
2. In relation to decisions of this nature, it is necessary to assess whether a proper jurisdictional challenge has been raised, but erroneously not addressed by the first instance Chamber on the basis that it was not a jurisdictional challenge.
3. Challenges, which would, if successful, eliminate the legal basis for a charge on the facts alleged by the Prosecutor may be considered to be jurisdictional challenges.

II. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber and Trial Chamber

4. On 9 June 2014, Pre-Trial Chamber II confirmed the charges against Mr Bosco Ntaganda (“Mr Ntaganda”), which included, *inter alia*, war crimes of rape and sexual slavery of child soldiers in the *Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo* (“UPC/FPLC”) by UPC/FPLC members under article 8 (2) (e) (vi) of the Statute (“Counts 6 and 9”).¹

5. On 1 September 2015, Mr Ntaganda challenged the subject-matter jurisdiction of the Court before Trial Chamber VI (“Trial Chamber”) with respect to Counts 6 and 9² (“Mr Ntaganda’s Challenge”). Mr Ntaganda argued that article 8 (2) (e) (vi) of the Statute does not foresee the possibility of child soldiers who are members of the same armed group as the accused being victims of the war crimes of rape and sexual slavery.³

6. On 9 October 2015, having received submissions from the legal representative of former child soldiers (“Victims”)⁴ and the Prosecutor,⁵ and a reply from

¹ “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda”, [ICC-01/04-02/06-309](#), paras 76-82. In so doing, Pre-Trial Chamber II rejected Mr Ntaganda’s arguments that the crimes of rape and sexual slavery of child soldiers “are not foreseen by the Statute, as international humanitarian law (“IHL”) does not protect persons taking part in hostilities from crimes committed by other persons taking part in hostilities on the same side of the armed conflict”. See also Transcript of 13 February 2014, [ICC-01/04-02/06-T-10-Red-ENG](#) (WT), p. 26, line 20 - p. 27; “Conclusions écrites de la Défense de Bosco Ntaganda suite à l’Audience de confirmation des charges”, 8 April 2014, ICC-01/04-02/06-292-Conf-Exp; a public redacted version dated 14 April 2014 was registered on 15 April 2014 ([ICC-01/04-02/06-292-Red2](#)), para. 251.

² “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](#).

³ [Mr Ntaganda’s Challenge](#), paras 8-13.

⁴ “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’”, 9 September 2015, [ICC-01/04-02/06-814](#).

⁵ “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](#) (“Prosecutor’s Response”).

Mr Ntaganda to the Prosecutor's response,⁶ the Trial Chamber rejected Mr Ntaganda's Challenge⁷ ("Impugned Decision").

B. Proceedings before the Appeals Chamber

7. On 19 October 2015, Mr Ntaganda appealed the Impugned Decision.⁸
8. On 27 October 2015, the Prosecutor filed an application for the Appeals Chamber to dismiss Mr Ntaganda's appeal *in limine* and to "issue directions on the future conduct of the proceedings [...]"⁹ ("Prosecutor's Application for the Appeal to be Declared Inadmissible"). Mr Ntaganda filed a response to this application on 29 October 2015.¹⁰ On the same day, the Appeals Chamber rejected the Prosecutor's application ("Decision of 29 October 2015"), finding "that it would be in the interests of judicial economy to hear submissions on the admissibility of the present appeal in conjunction with the submissions on the merits [...] without prejudice to the question of whether the appeal is admissible".¹¹
9. On 2 November 2015, Mr Ntaganda filed the document in support of the appeal¹² ("Document in Support of the Appeal"), to which the Prosecutor responded on 24 November 2015.¹³

⁶ "Reply on behalf of Mr Ntaganda to '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 Documents containing the charges'', ICC-01/04-02/06-804'", 24 September 2015, [ICC-01/04-02/06-863](#).

⁷ "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](#), p. 12.

⁸ "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", [ICC-01/04-02/06-909](#) (OA 2).

⁹ "Prosecution's application to dismiss *in limine* Bosco Ntaganda's Appeal against Trial Chamber VI's decision in respect of Counts 6 and 9", [ICC-01/04-02/06-952](#) (OA 2), paras 12-13.

¹⁰ "Expedited preliminary response on behalf of Mr Ntaganda to 'Prosecution's application to dismiss *in limine* Bosco Ntaganda's Appeal against Trial Chamber VI's decision in respect of Counts 6 and 9'", [ICC-01/04-02/06-965](#) (OA 2) ("Mr Ntaganda's Response to Prosecutor's Application for the Appeal to be Declared Inadmissible").

¹¹ "Decision on the Prosecutor's application to dismiss the appeal *in limine* and directions on the submission of observations pursuant to article 19 (3) of the Rome Statute and rule 59 (3) of the Rules of Procedure and Evidence", [ICC-01/04-02/06-966](#) (OA 2), para. 9.

¹² "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", [ICC-01/04-02/06-972](#) (OA 2).

¹³ "Prosecution's response to Mr Ntaganda's appeal against the 'Decision on the Defence's Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9'", [ICC-01/04-02/06-1034](#) (OA 2) ("Response to the Document in Support of the Appeal").

10. On 30 November 2015, the Victims filed their observations on the Document in Support of the Appeal,¹⁴ to which Mr Ntaganda responded on 7 December 2015.¹⁵ The Prosecutor did not file a response to those observations.

III. RELEVANT PARTS OF THE IMPUGNED DECISION

11. In the Impugned Decision, the Trial Chamber rejected Mr Ntaganda's Challenge, which was framed as a challenge to the Court's jurisdiction under article 19 of the Statute. In determining whether Mr Ntaganda's Challenge was jurisdictional in nature, the Trial Chamber stated that the Appeals Chamber had narrowly defined the scope of challenges to jurisdiction, citing two Appeals Chamber decisions in the cases of *The Prosecutor v. William Samoei Ruto et al.* and *The Prosecutor v. Francis Kirimi Muthaura et al.*¹⁶ ("*Ruto et al.* OA 3 OA 4 Decision" and "*Muthaura et al.* OA 4 Decision", respectively).¹⁷ The Trial Chamber stated that the Appeals Chamber had referred to jurisprudence of the *ad hoc* tribunals, in particular the International Criminal Tribunal for the former Yugoslavia ("ICTY"), "when it noted that the question 'whether a crime or mode of liability existed under customary international law [...] falls within the scope of a jurisdictional challenge', whilst 'challenges relating to the contours or elements of crimes' do not and are instead to be addressed at trial".¹⁸

12. The Trial Chamber decided that in this case there was no need to assess "whether a crime exists under customary international law, because the war crimes

¹⁴ "Former Child Soldiers' observations on the '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", [ICC-01/04-02/06-1040](#) (OA 2) ("Victims' Observations").

¹⁵ "Response to 'Former Child Soldiers' observations on the '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'", [ICC-01/04-02/06-1045](#) (OA 2) ("Mr Ntaganda's Response to the Victims' Observations").

¹⁶ "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](#) (OA 3 OA 4); "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](#) (OA 4).

¹⁷ [Impugned Decision](#), para. 24.

¹⁸ [Impugned Decision](#), para. 24, referring to [Ruto et al. OA 3 OA 4 Decision](#), para. 31 and [Muthaura et al. OA 4 Decision](#), para. 37; both referring to ICTY, Trial Chamber, *Prosecutor v. Milan Milutinović et al.*, "[Decision on Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration](#)", 22 March 2006, IT-05-87-PT, para. 23.

within the Court’s jurisdiction are set out in Article 8 of the Statute in an exhaustive list”.¹⁹ It stated that “[t]he 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”.²⁰ The Trial Chamber noted that, unlike other provisions of the Statute, article 8 (2) (e) (vi) of the Statute “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’”.²¹

13. The Trial Chamber observed “that the term ‘child soldier’ is not a legal one”, but rather “a descriptive one that refers to the alleged victims of the alleged rape and sexual slavery listed under Counts 6 and 9” and stated that “[t]he question as to which persons can be included in this phrase is to be addressed at trial”.²² It concluded:

The Chamber need not address at this stage whether such children, or persons generally, can under the applicable law be victims of rape and sexual slavery pursuant to Article 8(2)(e)(vi) when committed by members of the same group. Such questions of substantive law are to be addressed when the Chamber makes its assessment of whether the Prosecution has proven the crimes charged.²³

IV. ADMISSIBILITY OF THE APPEAL

14. In the Decision of 29 October 2015, the Appeals Chamber rejected the Prosecutor’s Application for the Appeal to be Declared Inadmissible. In so doing, however, it did not reject the Prosecutor’s submissions contained within that application on their merits. Rather, it decided that submissions related to the admissibility of the appeal should be made in conjunction with the submissions on the merits of the appeal.²⁴ It therefore left open the question as to whether the appeal was admissible. The Appeals Chamber considers it appropriate to address this issue first.

15. Article 82 (1) (a) of the Statute provides that either party may appeal “a decision with respect to jurisdiction or admissibility”. In previous decisions, the Appeals Chamber has given the following interpretation of this provision:

¹⁹ [Impugned Decision](#), para. 25.

²⁰ [Impugned Decision](#), para. 25.

²¹ [Impugned Decision](#), para. 25.

²² [Impugned Decision](#), para. 26.

²³ [Impugned Decision](#), para. 28.

²⁴ [Decision of 29 October 2015](#), paras 9-10.

The Appeals Chamber understands from the phrase “decision with respect to” that the operative part of the decision itself must pertain directly to a question on the jurisdiction of the Court or the admissibility of a case. It is not sufficient that there is an indirect or tangential link between the underlying decision and questions of jurisdiction or admissibility. As previously held by the Appeals Chamber, a decision of a Pre-Trial or Trial Chamber may constitute a “decision with respect to [...] admissibility” only to the extent that it consisted of or “was based on” a ruling that a case was admissible or inadmissible. [...]

[...] In the view of the Appeals Chamber, the specific references to article 82 of the Statute and the use of identical language in articles 19 (6) and 82 (1) (a) of the Statute indicate that the right to appeal a decision on jurisdiction or admissibility is intended to be limited only to those instances in which a Pre-Trial or Trial Chamber issues a ruling specifically on the jurisdiction of the Court or the admissibility of the case.²⁵

The Appeals Chamber has also stated:

It is the nature, and not the ultimate effect or implication of a decision, that determines whether an appeal falls under article 82 (1) (a) of the Statute. Even if the ultimate impact of a decision of a Pre-Trial or Trial Chamber were to affect the admissibility of cases, that fact would not, in and of itself, render the decision a “decision with respect to [...] admissibility” under article 82 (1) (a).²⁶

16. The Prosecutor argues, by reference to the above jurisprudence, that Mr Ntaganda improperly filed his appeal under article 82 (1) (a) of the Statute.²⁷ The Prosecutor submits that the Trial Chamber “did not rule on the jurisdiction of the

²⁵ *Situation in the Republic of Kenya*, “Decision on the admissibility of the ‘Appeal of the Government of Kenya against the ‘Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence’”, 10 August 2011, [ICC-01/09-78](#) (OA) (“*Kenya Appeals Chamber Decision on Admissibility of Appeal*”), paras 15-16. See also *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Decision on the admissibility of the ‘Appeal Against Decision on Application Under Rule 103’ of Ms Mishana Hosseinioun of 7 February 2012”, dated 9 March 2011 and registered on 9 March 2012, [ICC-01/11-01/11-74](#) (OA) (“*Mishana Hosseinioun Appeals Chamber Decision on Admissibility of Appeal*”), para. 10; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Decision on ‘Government of Libya’s Appeal Against the ‘Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi’” of 10 April 2012”, 25 April 2012, [ICC-01/11-01/11-126](#) (OA 2) (“*Libya Appeals Chamber Decision on Admissibility of Appeal*”), para. 13; *The Prosecutor v. Germain Katanga*, “Decision on the admissibility of the appeal against the ‘Decision on the application for the interim release of detained Witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350’”, 20 January 2014, [ICC-01/04-01/07-3424](#) (OA 14), para. 33; *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, “Decision on the admissibility of the Prosecutor’s appeal against the ‘Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation’”, 6 November 2015, [ICC-01/13-51](#) (OA), paras 41-43.

²⁶ [Kenya Appeals Chamber Decision on Admissibility of Appeal](#), para. 17.

²⁷ [Prosecutor’s Application for the Appeal to be Declared Inadmissible](#), para. 1. See also para. 4, referring to [Kenya Appeals Chamber Decision on Admissibility of Appeal](#), paras 15-17; [Mishana Hosseinioun Appeals Chamber Decision on Admissibility of Appeal](#), paras 10-11; [Libya Appeals Chamber Decision on Admissibility of Appeal](#), para. 13.

Court”, but found that “Mr Ntaganda did not challenge the Court’s jurisdiction over the crimes of rape and sexual slavery” and “refused to address Mr Ntaganda’s arguments as it considered that they are questions ‘of substantive law [...] to be addressed when the Chamber makes its assessment of whether the Prosecution has proven the crimes charged’”.²⁸ According to the Prosecutor, the Impugned Decision was therefore not a decision “with respect to jurisdiction” within the meaning of article 82 (1) (a) of the Statute and the appeal is inadmissible.²⁹ Conversely, the Victims submit that “a ruling characterising a challenge as non-jurisdictional in nature may qualify as an appealable decision with respect to jurisdiction under article 82(1)(a) of the Rome Statute”.³⁰ They argue that this “constitutes a determination with respect to jurisdiction”.³¹ Mr Ntaganda did not respond to the Prosecutor’s arguments, other than to state that he opposed her application.³²

17. In the present case, the Appeals Chamber notes that Mr Ntaganda filed a challenge which he framed as a challenge to the subject-matter jurisdiction of the Court pursuant to article 19 of the Statute.³³ Although the Trial Chamber did not explicitly find that Mr Ntaganda’s Challenge did not raise a question of jurisdiction, the Appeals Chamber considers that this is the clear import of its reasoning and ultimate conclusion.³⁴ The Trial Chamber found that the question is one of “substantive law [...] to be addressed when the Chamber makes its assessment of whether the Prosecution has proven the crimes charged”.³⁵ On this basis, the Trial Chamber rejected Mr Ntaganda’s Challenge. The question arises as to whether the Appeals Chamber can review the correctness of this conclusion.

18. The Appeals Chamber considers that, if Mr Ntaganda’s Challenge were a proper challenge to jurisdiction, the matter should have been determined by the Trial Chamber, provided that the procedural requirements were deemed to have been satisfied. It is noted that various provisions of the Statute and the Rules of Procedure

²⁸ [Prosecutor’s Application for the Appeal to be Declared Inadmissible](#), paras 7-8, referring to [Impugned Decision](#), p. 12, paras 25, 28.

²⁹ [Prosecutor’s Application for the Appeal to be Declared Inadmissible](#), para. 12.

³⁰ [Victims’ Observations](#), para. 4.

³¹ [Victims’ Observations](#), para. 9.

³² [Mr Ntaganda’s Response to Prosecutor’s Application for the Appeal to be Declared Inadmissible](#), para. 2.

³³ [Mr Ntaganda’s Challenge](#), para. 1.

³⁴ [Impugned Decision](#), paras 24-28.

³⁵ [Impugned Decision](#), para. 28.

and Evidence address the timing of challenges to jurisdiction and related decisions. Article 19 (1) of the Statute provides that “[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it”. Article 19 (4) provides that a challenge to jurisdiction will “take place prior to or at the commencement of the trial”, with subsequent challenges permitted only in exceptional circumstances. Rule 58 (2) of the Rules of Procedure and Evidence provides that a Chamber may join a “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”. Rule 58 (4) of the Rules of Procedure and Evidence provides that challenges to jurisdiction shall be determined before challenges to admissibility. Articles 19 (6) and 82 (1) (a) allow the parties a right of appeal without leave for decisions in respect of jurisdiction. Read together, these provisions underline the importance of questions of jurisdiction being settled as early as possible in the proceedings.

19. If the Appeals Chamber were to dismiss appeals against decisions rejecting challenges on the grounds that they are not proper jurisdictional challenges, potentially valid questions as to the Court’s jurisdiction could be left unresolved until the end of trial without any possibility for appellate intervention. In such circumstances, a Chamber could erroneously continue to assume jurisdiction over a crime, despite the fact that a proper jurisdictional challenge had been raised and not determined. The Appeals Chamber finds that it is important to preserve appellate scrutiny of such decisions and that this approach is consonant with the spirit of the Statute as described above.

20. For this reason, the Appeals Chamber is of the view that decisions rejecting challenges on the grounds that they are not proper jurisdictional challenges are subject to different considerations to those articulated in its prior jurisprudence on the admissibility of appeals under article 82 (1) (a) of the Statute set out above.³⁶ None of these decisions concerned a first instance decision rejecting a challenge to jurisdiction brought under article 19 of the Statute on this basis. The Appeals Chamber considers that, in relation to decisions of this nature, it is necessary to assess whether a proper jurisdictional challenge has been raised, but erroneously not addressed by the first instance Chamber on the basis that it was not a jurisdictional challenge. Therefore,

³⁶ *Supra* para. 15.

decisions rejecting challenges under article 19 of the Statute on the grounds that they do not challenge the jurisdiction of the Court are considered to be “decisions with respect to jurisdiction” within the meaning of article 82 (1) (a) of the Statute and appeals against such decisions are admissible.

21. For these reasons, the Appeals Chamber finds that the present appeal is admissible.

V. MERITS

A. First and Second Grounds of Appeal

22. The Appeals Chamber notes that the first two grounds of appeal repeat and expand upon arguments originally raised before the Trial Chamber. In essence, Mr Ntaganda requests the Appeals Chamber to determine the issue of whether the war crimes of rape and sexual slavery under article 8 (2) (e) (vi) of the Statute can be committed against child soldiers of the same armed group as the alleged perpetrator.³⁷ The Trial Chamber ultimately declined to determine this question in the Impugned Decision.³⁸

23. The Appeals Chamber notes that decisions with respect to jurisdiction are subject to a direct right of appeal under article 82 (1) (a) of the Statute, which denotes the importance of jurisdictional questions being subject to appellate review. The Appeals Chamber has previously emphasised the corrective nature of proceedings on appeal, which are “conducted with the purpose of reviewing the proceedings before the Pre-Trial [or Trial] Chamber” and the scope of which is determined by the scope of the relevant proceedings before the Pre-Trial or Trial Chamber.³⁹ The Appeals

³⁷ [Document in Support of the Appeal](#), p. 17.

³⁸ [Impugned Decision](#), para. 28.

³⁹ *The Prosecutor v. Simone Gbagbo*, “Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled ‘Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo’”, 27 May 2015, ICC-02/11-01/12-75-Conf (OA); a public redacted version was registered on 27 May 2015 ([ICC-02/11-01/12-75-Red](#) (OA)), para. 33; *The Prosecutor v. Francis Kirimi Muthaura et al.*, “Decision on the ‘Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber’s Decision on Admissibility’”, 28 July 2011, [ICC-01/09-02/11-202](#) (OA), paras 11-12; *The Prosecutor v. William Samoei Ruto et al.*, “Decision on the ‘Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber’s Decision on Admissibility’”, 28 July 2011, [ICC-01/09-01/11-234](#) (OA), paras 12-13. See also *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’”, 21 May 2014,

Chamber considers that it is particularly important to adhere to this corrective role when reviewing decisions with respect to jurisdiction.⁴⁰

24. As the Trial Chamber did not determine the issue set out above, the Appeals Chamber does not consider it appropriate to consider further the first and second grounds of appeal, which are directed towards this question. On this basis, they are dismissed *in limine*.

B. Third Ground of Appeal

1. Summary of Submissions of the Parties and Participants

25. Mr Ntaganda argues, by reference to the jurisprudence of the ICTY and the Court, that the issues in the present case should be recognized as jurisdictional.⁴¹ Mr Ntaganda suggests that the Trial Chamber failed to appreciate that the wording of article 8 (2) (e) (vi) and its *chapeau* “incorporate by reference concepts of conventional and customary international law [...]”.⁴² He submits that these concepts should “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 rape and sexual slavery pertain to acts committed by members of an armed group against other members of the same armed group”.⁴³ In his view, “[this] question will not be elucidated through any factual exposition at trial”; “[e]ither the crime exists, or it does not”.⁴⁴ He argues that addressing this question now would contribute to the efficiency of trial proceedings.⁴⁵

ICC-01/11-01/11-547-Conf (OA 4); a public redacted version was registered on 21 May 2014 ([ICC-01/11-01/11-547-Red](#)), paras 42-43; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on the admissibility of the case against Abdullah Al-Senussi’”, 24 July 2014, [ICC-01/11-01/11-565](#) (OA 6), para. 57.

⁴⁰ See for similar reasoning *The Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2”, 3 March 2015, [ICC-01/04-01/06-3129](#) (A A 2 A 3), paras 237-239.

⁴¹ [Document in Support of the Appeal](#), paras 22-23.

⁴² [Document in Support of the Appeal](#), para. 24.

⁴³ [Document in Support of the Appeal](#), para. 24.

⁴⁴ [Document in Support of the Appeal](#), para. 25.

⁴⁵ [Document in Support of the Appeal](#), para. 25.

26. In response, the Prosecutor submits that “[a]rguments on the ‘substantive merits’ of the case, whether legal or evidentiary, are not jurisdictional”.⁴⁶ She asserts that “[a] challenge to jurisdiction questions the Court’s *competence* to adjudicate a given matter; it is not a legal or evidentiary filter for particular cases”.⁴⁷ The Prosecutor argues that Mr Ntaganda’s Challenge did not call into question the existence of the war crimes of rape and sexual slavery, but rather concerned “the *application* of the law to the facts of this case, to determine whether the crimes charged under the Statute were indeed committed [...]”.⁴⁸ The Prosecutor submits that legal questions are not ordinarily jurisdictional and that “[i]f anything, the opposite is true: questions of substantive law are typically addressed at the end of a trial, and not before its commencement [...]”.⁴⁹ She avers that “[c]onducting legal analysis in the context of relevant facts [...] not only promotes judicial economy but ensures that the law is firmly anchored in the reality to which it must apply”.⁵⁰ Therefore, the Prosecutor requests that “[t]he third ground of appeal, and hence the Appeal itself, [...] be dismissed”.⁵¹

27. The Victims submit that Mr Ntaganda’s arguments relate to the constitutive elements of the crimes and raise an issue that pertains to the merits of the case and not to the jurisdiction of the Court.⁵² The Victims submit that “a challenge to the jurisdiction of the Court is designed to allow the parties to raise preliminary objections before addressing any substantive questions related to the case” and that, “[i]f the resolution of substantive issues were permissible in the context of the jurisdictional challenges, it would defeat the requirement that such challenges must be raised at the earliest opportunity”.⁵³

2. *Determination by the Appeals Chamber*

28. Mr Ntaganda’s Challenge is premised on the contention that, as a matter of law, article 8 (2) (e) (vi) of the Statute does not foresee the possibility of “UPC/FPLC child

⁴⁶ [Response to the Document in Support of the Appeal](#), para. 7.

⁴⁷ [Response to the Document in Support of the Appeal](#), para. 7 (emphasis in original), referring to *Ruto et al. OA 3 OA 4 Decision*, para. 29.

⁴⁸ [Response to the Document in Support of the Appeal](#), para. 9.

⁴⁹ [Response to the Document in Support of the Appeal](#), para. 12 (emphasis in original).

⁵⁰ [Response to the Document in Support of the Appeal](#), para. 12.

⁵¹ [Response to the Document in Support of the Appeal](#), para. 18.

⁵² [Victims’ Observations](#), para. 22.

⁵³ [Victims’ Observations](#), para. 27.

soldiers” being victims of the war crimes of rape and sexual slavery committed by members of the UPC/FPLC.⁵⁴ The legal question raised by Mr Ntaganda is derived from the wording of article 8 (2) (e) (vi) of the Statute and the related Elements of Crimes. In this respect, the Appeals Chamber notes that article 8 reads in relevant part:

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, ‘war crimes’ means:

[...]

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

[...]

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions.

[...]

29. As noted by the Trial Chamber, article 8 (2) (e) (vi) of the Statute “does not specify who can be victims of the war crimes listed therein, and [...] the corresponding Elements of Crimes refer only to ‘person’ and ‘persons’”.⁵⁵

30. Nonetheless, the Appeals Chamber notes that the chapeau of article 8 (2) (e) of the Statute specifies that the crimes listed therein are “serious violations of the laws and customs applicable in armed conflicts not of an international character, *within the established framework of international law*” (emphasis added), while the introduction to article 8 in the Elements of Crimes requires the Court to interpret the elements for war crimes “within the established framework of the international law of armed conflict [...]”. In addition, article 8 (2) (e) (vi) of the Statute refers to “any other form of sexual violence *also* constituting a serious violation of article 3 common to the four Geneva Conventions” (emphasis added). Article 3 common to the Geneva

⁵⁴ [Mr Ntaganda’s Challenge](#), paras 8-14.

⁵⁵ [Impugned Decision](#), para. 25. Articles 8 (2) (e) (vi) - 1, 8 (2) (e) (vi) - 2 of the Elements of Crimes.

Conventions provides protection to specified persons – namely those “taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause”.⁵⁶

31. Accordingly, the Appeals Chamber considers that, while article 8 (2) (e) (vi) of the Statute does not contain any explicit restriction on the categories of persons who may be victims of the war crimes of rape and sexual slavery, the question arises as to whether such restrictions must be derived from the applicable law, including the above-mentioned references. For the reasons set out in paragraphs 22 to 24 above, the Appeals Chamber does not consider it appropriate to address this question on the merits and nothing in the present judgment should be interpreted as predetermining this matter.

32. The sole question for the Appeals Chamber to determine in the present appeal is whether Mr Ntaganda’s contention that the war crimes of rape and sexual slavery under article 8 (2) (e) (vi) of the Statute do not encompass the rape and sexual slavery of child soldiers by members of the same armed group constitutes a challenge to the jurisdiction of the Court and whether the Trial Chamber erred in rejecting his challenge on the basis that it was rather a matter for determination at trial.

33. In respect of errors of law, the Appeals Chamber has repeatedly held that it “will not defer to the relevant Chamber’s legal interpretation, but will arrive at its own conclusion as to the appropriate law and determine whether or not the first instance

⁵⁶ Article 3, common to the four Geneva Conventions, provides: “In the case of armed conflict not of an international character [...], each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for. [...].”

Chamber misinterpreted the law”⁵⁷. The Appeals Chamber also recalls that “an appellant is not only obliged to set out an alleged error, ‘but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision’”⁵⁸.

34. The Appeals Chamber notes that the Trial Chamber’s conclusion that Mr Ntaganda’s Challenge raised a matter for determination at trial, rather than a jurisdictional issue, was premised on its understanding that the Appeals Chamber had narrowly defined the scope of challenges to jurisdiction in the *Ruto et al.* OA 3 OA 4 Decision and the *Muthaura et al.* OA 4 Decision.⁵⁹ The Prosecutor’s arguments are based upon a similar assessment of the Appeals Chamber’s prior jurisprudence, which, in her view, supports the conclusion that Mr Ntaganda’s Challenge is not jurisdictional, but is rather an argument to be determined on the merits of the case.⁶⁰

35. The Appeals Chamber notes that the decisions in those cases primarily addressed challenges to the Pre-Trial Chamber’s legal interpretation of ‘organizational policy’ (part of the *chapeau* elements of article 7 (1) of the Statute), and its finding that there was sufficient evidence to establish substantial grounds to believe that an ‘organizational policy’ existed.⁶¹ The Appeals Chamber considered

⁵⁷ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, “Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled ‘Decision on Prosecution Request for Admission of Prior Recorded Testimony’”, 12 February 2016, [ICC-01/09-01/11-2024](#) (OA 10), para. 20. See also *The Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 23 December 2014 entitled ‘Decision on “Defence Urgent Motion for Provisional Release”’”, 20 May 2015, ICC-01/05-01/08-3249-Conf (OA 11); a public redacted version was registered on the same date ([ICC-01/05-01/08-3249-Red](#) (OA 11)) (“*Bemba* OA 11 Judgment”), para. 19; *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled ‘Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation’”, 17 February 2012, [ICC-02/05-03/09-295](#) (OA 2), para. 20; *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, “Judgment on the appeal of Mr Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber II of 17 March 2014 entitled ‘Decision on the “Requête de mise en liberté” submitted by the Defence for Jean-Jacques Mangenda’”, 11 July 2014, [ICC-01/05-01/13-560](#) (OA 4), para. 26.

⁵⁸ [Bemba OA 11 Judgment](#), para. 20; *The Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled ‘Decision on the Admissibility and Abuse of Process Challenges’”, 19 October 2010, [ICC-01/05-01/08-962](#) (OA 3), para. 102, citing *The Prosecutor v. Joseph Kony et al.*, “Judgment on the appeal of the Defence against the ‘Decision on the admissibility of the case under article 19 (1) of the Statute’ of 10 March 2009”, 16 September 2009, [ICC-02/04-01/05-408](#) (OA 3), para. 48.

⁵⁹ [Impugned Decision](#), para. 24.

⁶⁰ [Response to the Document in Support of the Appeal](#), paras 7-9.

⁶¹ [Ruto et al. OA 3 OA 4 Decision](#), paras 17-18; [Muthaura et al. OA 4 Decision](#), paras 22-24.

this issue in the context of a challenge to jurisdiction that was raised at the start of the confirmation process which it stated was “designed to consider the matters raised on [those] appeals and filter unmeritorious cases from progressing to trial”.⁶² The Appeals Chamber, in those decisions, found that “the interpretation and existence of an ‘organizational policy’ relate to the substantive merits of this case as opposed to the issue of whether the Court has subject-matter jurisdiction to consider such questions”.⁶³

36. The Appeals Chamber underlines that, in the *Ruto et al.* OA 3 OA 4 Decision and the *Muthaura et al.* OA 4 Decision, it did not address, nor was it faced with the question of whether resolving a legal issue alone could have resulted in the crimes charged falling outside the jurisdiction of the Court. As stated above, the challenges under examination in those appeals required the resolution of the question of whether an organizational policy existed both in law *and in fact*. As noted by the Appeals Chamber, “in the context of [those] case[s], treating the interpretation and existence of ‘organizational policy’ as jurisdictional matters [would have conflated] the separate concepts of jurisdiction and the confirmation process”.⁶⁴

37. The Appeals Chamber finds the issue in the present case to be distinguishable from those raised in the Kenya cases. Mr Ntaganda’s Challenge requires an exclusively legal determination as to whether the factual allegations correspond to the crime under international humanitarian law. If his arguments were to be accepted, the result would be a finding that the Statute restricts the applicability of war crimes in a way that fully excludes the set of facts as charged. The Appeals Chamber notes that, in contrast to the challenges considered in the *Ruto et al.* OA 3 OA 4 Decision and the *Muthaura et al.* OA 4 Decision, no additional factual or evidentiary determinations are required in the present case in order to resolve the legal issue raised by Mr Ntaganda. In this regard, the scope of the group intended by the Prosecutor to fall within the description ‘child soldiers’ is clearly specified to be “children under the age

⁶² [Ruto et al. OA 3 OA 4 Decision](#), para. 29; [Muthaura et al. OA 4 Decision](#), para. 35.

⁶³ [Ruto et al. OA 3 OA 4 Decision](#), para. 30; [Muthaura et al. OA 4 Decision](#), para. 36.

⁶⁴ [Ruto et al. OA 3 OA 4 Decision](#), para. 29; [Muthaura et al. OA 4 Decision](#), para. 35.

of 15 years who were members of the UPC/FPLC” and this allegation is undisputed for the purposes of the present appeal.⁶⁵

38. The Appeals Chamber acknowledges that references to the jurisprudence of the *ad hoc* tribunals and the Extraordinary Chambers in the Courts of Cambodia and certain findings in the *Ruto et al.* OA 3 OA 4 Decision and the *Muthaura et al.* OA 4 Decision may suggest that the question of subject-matter jurisdiction is limited to whether the Prosecutor has alleged crimes that are listed in the Statute, and that any other legal or factual issues related to the exercise of this jurisdiction must be determined on the merits.⁶⁶ However, these findings must be read in light of the context in which they appear, namely in rejecting the argument that a finding that the contextual elements of crimes against humanity exist in law and in fact is *per se* a jurisdictional matter and that any challenge to these findings, legal or factual, is necessarily jurisdictional in nature.

39. In the view of the Appeals Chamber, the question of whether the Court has subject-matter jurisdiction cannot be confined exclusively to an examination of whether the Prosecutor has successfully recited the elements of a crime listed under article 5 of the Statute. In certain circumstances, the question of whether the facts alleged correspond to the crime charged may also acquire a jurisdictional dimension. This is so, for example, where a particular legal interpretation could result in the allegations being characterised either as an ordinary crime as opposed to one of the crimes over which the Court has jurisdiction or simply as non-criminal in nature. The Appeals Chamber finds that challenges, which would, if successful, eliminate the legal basis for a charge on the facts alleged by the Prosecutor may be considered to be jurisdictional challenges. Accordingly, some verification as to whether the facts alleged correspond in law to the crimes charged may be necessary, depending on the

⁶⁵ See [Prosecutor’s Response](#), para. 6; [Document in Support of the Appeal](#), paras 1-4.

⁶⁶ See [Ruto et al. OA 3 OA 4 Decision](#), para. 30; [Muthaura et al. OA 4 Decision](#), para. 36: “As the Prosecutor has expressly alleged crimes against humanity, including the existence of an organizational policy, the Appeals Chamber finds that the Court has subject-matter jurisdiction over the crimes with which [the suspects] have been charged. Whether the Prosecutor can establish the existence of such a policy, in law and on the evidence, is a question to be determined on the merits. [...] Even if the Trial Chamber were not to find, in law or on the evidence, that there was an ‘organizational policy’ this would not mean that the Court did not have jurisdiction over the case but rather that crimes against humanity were not committed”. See also [Ruto et al. OA 3 OA 4 Decision](#), paras 31-32; [Muthaura et al. OA 4 Decision](#), para. 37.

circumstances, in order to determine whether the Court has jurisdiction over such crimes.

40. In the context of the present case, the Appeals Chamber finds that the question of whether there are restrictions on the categories of persons who may be victims of the war crimes of rape and sexual slavery is an essential legal issue which is jurisdictional in nature. If the Trial Chamber were to determine that the war crimes of rape and sexual slavery under article 8 (2) (e) (vi) of the Statute cannot, as a matter of law, cover rape and sexual slavery of child soldiers in the same armed group as the perpetrator, the necessary implication would be that article 8 (2) (e) (vi) of the Statute *per se* excludes from its ambit the acts of rape and sexual slavery against child soldiers as charged in this case. Accordingly, the Trial Chamber would not need to address whether, on the basis of the evidence submitted and discussed before it, the Prosecutor had succeeded in proving the relevant allegations. The Appeals Chamber considers that the appropriate result of such a legal finding would be that the Court lacks jurisdiction *ratione materiae* to prosecute the alleged acts as war crimes.

41. As highlighted above, issues as to the Court's jurisdiction should be resolved as early as possible in the proceedings.⁶⁷ In situations such as the present, this may be of heightened importance given that former child soldiers may be called as witnesses to provide detailed testimony about traumatic events related to the charges of rape and sexual slavery in circumstances where it may be found that such crimes, even if established, would not amount in law to war crimes prosecutable by the Court. In the view of the Appeals Chamber, resolution of such questions at an early stage is also important in terms of enhancing the efficiency of proceedings. The Court has competence to adjudicate the crimes charged by the Prosecutor under Counts 6 and 9 only where it is found that the war crimes of rape and sexual slavery under article 8 (2) (e) (vi) of the Statute may, either in principle or only in certain circumstances, be committed against child soldiers. Any factual or evidentiary assessments that may need to be carried out as a result of such a legal finding would be made on the merits of the case.

⁶⁷ *Supra* para. 18.

42. In view of the foregoing, the Appeals Chamber finds that Mr Ntaganda's Challenge constitutes a challenge to the jurisdiction of the Court and that the Trial Chamber erred in rejecting it on the basis that it was rather a matter for determination at trial. Accordingly, Mr Ntaganda's Challenge must be remanded to the Trial Chamber for it to address in accordance with the requirements of article 19 of the Statute. The question of whether the requirements of article 19 (4) of the Statute are satisfied in the circumstances of this case is a matter for the Trial Chamber to determine.

VI. APPROPRIATE RELIEF

43. In an appeal pursuant to article 82 (1) (a) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case, the Appeals Chamber reverses the Impugned Decision and remands Mr Ntaganda's Challenge to the Trial Chamber.

Done in both English and French, the English version being authoritative.



Judge Christine Van den Wyngaert
Presiding Judge

Dated this 22nd day March 2016

At The Hague, The Netherlands