

THE PROSECUTOR v. BOSCO NTAGANDA

Case No. ICC-01/04-02/06

The Appeals Chamber of the International Criminal Court

Judgement on the appeal of Mr. Ntaganda against the “Second Decision on the Defence’s challenge to the Jurisdiction of the Court in respect of Counts 6 and 9”

June 15, 2017

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

Prosecution: Ms. Fatou Bensouda, Prosecutor
Ms. Helen Brady

Defense: Mr. Stéphane Bourgon
Mr. Christopher Gosnell

Gender keywords: Child Soldiers, Rape, Sexual Slavery

Procedural history: On January 10, 2014, the Office of the Prosecutor of the International Criminal Court (ICC) filed the Document Containing Charges against Bosco Ntaganda, in which the Prosecution charged him with several offenses, including the rape of UPC/FLPC¹ child soldiers, allegedly committed by other members of the UPC/FLPC, as a war crime punishable pursuant to Article 8(2)(e)(vi) of the Rome Statute, (Count 6), and sexual slavery of child soldiers as a war crime, punishable pursuant to Article 8(2)(e)(vi), (Count 9) (¶ 3). During the Confirmation of Charges hearing, Ntaganda argued against the confirmation of these two charges on the basis that “crimes committed by members of armed forces on members of the same armed force do not come within the jurisdiction of international humanitarian law nor within international criminal law” (¶ 4). On June 9, 2014, Pre-Trial Chamber II confirmed the charges against Ntaganda, including the war crimes of rape and sexual slavery allegedly committed against child soldiers as charged by the Prosecution under Counts 6 and 9 (¶ 5). On September 1, 2015, Ntaganda filed an application before the Trial Chamber challenging the subject matter jurisdiction of the Chamber in respect of Counts 6 and 9 (¶ 6). On October 9, 2015, the Trial Chamber issued a decision rejecting the application filed by the Defense and finding that the matter should be addressed at trial (¶ 7).

On October 19, 2015, the Defense appealed the Trial Chamber’s decision (¶ 8). On March 22, 2016, the Appeals Chamber held 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” and remanded the matter to the Trial

¹ UPC/FLPC stands for *Union des Patriotes Congolais* and its military wing *Forces Patriotiques pour la Libération du Congo*. The UPC/FLPC was an organized armed group, involved in an armed conflict against the *Armée Populaire Congolaise* (“APC”) and other *Lendu* militias.

Chamber (¶ 9). On January 4, 2017, the Trial Chamber issued its Second Decision on the Defense’s Challenge to the Jurisdiction of the Chamber in Respect of Counts 6 and 9, holding that “members of the same armed force are not *per se* excluded as potential victims of the war crimes of rape and sexual slavery” under Article 8 of the Rome Statute (¶ 11). On January 26, 2017, Ntaganda filed the “Appeal from the Second Decision on the Defense’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9” (¶ 12). On June 15, 2017, the Appeals Chamber issued its decision on the appeal, which is digested here.

Disposition: The Appeals Chamber finds that “members of an armed force or group are not categorically excluded from protection against the war crimes of rape and sexual slavery under article 8 (2) (b) (xxii) and (2) (e) (vi) of the Statute when committed by members of the same armed force or group” and affirms the Trial Chamber’s finding that it has jurisdiction to try the accused for the charges of rape and sexual slavery as war crimes (¶¶ 2, 71).

Key Gender-Based Holdings:

CHILD SOLDIERS

- The Prosecution charged Ntaganda with rape and sexual slavery as war crimes under Article 8 of the Rome Statute, alleging that members of the UPC/FLPC subjected child soldiers from the same armed group to these offenses (¶ 3). As noted above, the Trial Chamber confirmed this charge, the Defense appealed that decision, and the Appeals Chamber remanded the matter back to the Trial Chamber (¶ 9). In its consideration of the issue on remand, the Trial Chamber concluded that the status of the victims did not preclude jurisdiction over these charges as “the protection against sexual violence under international law is not limited to members of the opposing armed forces, who are *hors de combat*, or civilians not directly participating in hostilities” (¶ 24). Having made this determination, the Trial Chamber stated that it did not need to consider whether or not the child soldiers would be considered part of the UPC/FPLC armed group, and determined that “as a general principle of law, there is a duty not to recognise situations created by certain serious breaches of international law” (*id.*). The Trial Chamber found that to deprive the victims of these crimes of protection under international humanitarian law and to protect the accused from liability for crimes allegedly committed against the children, thus allowing him to benefit from their unlawful conscription, would be inconsistent with this principle (*id.*).
- On appeal, the Prosecutor submitted arguments on the issue of the victims’ membership in the UPC/FPLC, noting “there are three distinct principles concerning the present subject-matter i.e. ‘prohibition on unlawfully recruiting children [...]; the right of a civilian not taking direct part in hostilities not to be made the direct object of attack, and the fundamental and universal protection against inhumane treatment provided to all persons not taking active part in hostilities by C[ommon] A[r]ticle 3’” (¶ 37). The Prosecutor argued that all three of these principles may coincide, “resulting in a situation where a child may be unlawfully recruited, considered to take a continuous combat function based on their specific conduct and therefore, liable to be targeted at any time,” but nonetheless retain protection “against inhumane treatment by persons who have power over them” (*id.*). The Prosecutor contended that a child unlawfully enlisted or conscripted is not automatically excluded from Common Article 3’s protections as the question of whether they were directly participating in hostilities at the material time is a factual issue to be determined at trial (¶ 38).

- The Appeals Chamber agrees that the protections of Common Article 3 apply to anyone as long as they were not directly participating in hostilities at the material time (¶ 60). The Appeals Chamber notes also that Geneva Conventions I and II protect, respectively, wounded and sick on land and the wounded and shipwrecked at sea, regardless of whether or not the victims are members of enemy armed forces, supporting the position that status requirements are not universally applied under international humanitarian law (¶ 59). The Appeal Chamber concedes that, previously, the grave breaches regime has not been applied to victims belonging to the same armed forces as the perpetrators, but is nonetheless “unconvinced” that status requirements are considered a general rule of international humanitarian law (¶ 60). The Appeals Chamber concludes that “international humanitarian law does not contain a general rule that categorically excludes members of an armed group from protection against crimes committed by members of the same armed group” (¶ 63). The Appeals Chamber finds further that the issue of whether or not “the child soldiers’ membership in an armed group would...preclude a finding that they were nevertheless, at the relevant time, not actively participating in hostilities” is moot, given the Appeals Chamber’s determination that there are no status requirements for the war crimes of rape and sexual slavery (¶ 69). These findings are detailed below under “Rape.”

RAPE

- The Prosecution charged Ntaganda with rape as a war crime, alleging that members of the UPC/FLPC subjected child soldiers from the same armed group to rape and sexual slavery under Article 8(2)(e)(vi) of the Rome Statute (¶ 3). As noted above, the Trial Chamber confirmed this charge, the Defense appealed that decision, and the Appeals Chamber remanded the matter back to the Trial Chamber (¶ 9). On remand, the Trial Chamber held that nothing in Article 8(2)(e)(vi) limited the application of the charges of rape and sexual slavery as war crimes to victims having the status required by the grave breaches of the Geneva Conventions or Common Article 3, concluding that “‘members of the same armed force are not *per se* excluded as potential victims of the war crimes of rape and sexual slavery’” (¶ 11).
- In his appeal, Ntaganda challenged the Trial Chamber’s finding, claiming that the Trial Court had erred in law “when it held that victims of the war crimes of rape and sexual slavery listed in Article 8(2)(b) and (e) do not have to be ‘protected persons’ in the sense of the Geneva Conventions of 1949” or “[p]ersons taking no active part in the hostilities” in the sense of Common Article 3 to the 1949 Geneva Conventions (¶ 16). Furthermore, the Defense argued that not only did these status requirements apply to the victims in this case, but the victims did not meet these requirements because child soldiers who have been recruited into an armed force cannot meet the status of “taking no active part in hostilities” (*id.*).
- The Appeals Chamber considers the Trial Chamber’s position that “the Court’s statutory framework does not require that the victims of the war crimes of rape be ‘protected persons’ within the meaning of the Geneva Conventions or ‘persons taking no active part in the hostilities’ within the meaning of Common Article 3” (¶ 21). The Appeals Chamber recalls the Trial Chamber’s findings that this position is supported by the fact that war crimes are divided into four categories within Article 8 of the Rome Statute and

that rape is included in a sub-section of Article 8 that does not include in its *chapeau* reference to grave breaches of the Geneva Conventions or to Common Article 3 (*id.*). The Appeals Chamber sets out Article 8(2)(e)(vi), which prohibits as a war crime “(vi) [c]ommitting rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions” (¶ 18). The Appeals Chamber acknowledges the Trial Chamber’s position that although this provision references “constituting a serious violation of article 3 common to the four Geneva Conventions,” this limitation applies only to “any other form of sexual violence” not to the enumerated offenses—including rape and sexual slavery—that precede this last offense (¶ 22). The Appeals Chamber recalls the Trial Chamber’s findings that during the drafting of Article 8, the drafters clearly intended this reference to Common Article 3 to provide a gravity threshold applicable to “any other form of sexual violence” and that the drafters also clearly intended the war crimes of rape and sexual slavery to be in a distinct category, having rejected initial proposals to include these offenses under the categories of Article 8 enumerating grave breaches of the Geneva Conventions or violations of Common Article 3 (¶ 22). The Appeals Chamber also reviews the Trial Chamber’s findings that the “broader international legal framework”—as reflected in a range of international humanitarian law treaties, general principles of international humanitarian law including the Marten’s Clause, and jurisprudence from the International Criminal Tribunal for the former Yugoslavia—also supports finding that these status requirements do not apply to rape and sexual slavery as war crimes (¶¶ 23-24).

- The Appeals Chamber affirms the Trial Chamber’s holding that Articles 8(2)(b)(xxii) and (e)(vi) of the Rome Statute do not include status requirements that apply to victims of rape and sexual slavery as a war crime (¶ 49). The Appeals Chamber agrees with the Trial Chamber’s holding that the qualifying language referencing acts “constituting a serious violation of article 3 common to the four Geneva Conventions” applies only to “any other form of sexual violence” and incorporates status requirements on this residual category of crimes to ensure that a certain gravity threshold is maintained to “exclude lesser forms of sexual violence or harassment which would not amount to crimes of the most serious concern to the international community” (*id.*). The Appeals Chamber finds that such language is not applicable to rape because “rape and sexual slavery are by definition crimes of a gravity comparable to that of a grave breach of the Geneva Conventions or serious violation of Common Article 3” (*id.*).
- The Appeals Chamber also agrees with the Trial Chamber’s finding that the drafters intended to place rape and sexual slavery in a separate category of war crimes outside of the grave breaches and Common Article 3 sections and that while there is no explicit evidence that the drafters directly intended to dispense of status requirements for the provision prohibiting rape and sexual slavery, it is also clear that the debate surrounding the drafting of these provisions “centred on the need for special protection of children during armed conflict in respect of the crimes of conscription and enlistment, and, to a more limited extent, on the sexual exploitation of children and women during armed conflict” (¶ 50).
- In addition to affirming the Trial Chamber’s findings regarding a statutory analysis of Article 8 and its drafting history, the Appeals Chamber reviews its findings regarding the broader international law framework pertaining to the issue of status requirements for the

application of the relevant war crimes. The Appeals Chamber analyzes international humanitarian law treaties and case law, applying these norms to determine whether or not a broader status requirement exists for all war crimes which would preclude the prosecution of crimes committed against members of one's own forces. It concludes by finding that it "is persuaded that international humanitarian law does not contain a general rule that categorically excludes members of an armed group from protection against crimes committed by members of the same armed group" (¶ 63).

- The Appeals Chamber then considers whether, despite the lack of a broader mandate under international humanitarian law to apply these status requirements to all war crimes, a mandate exists creating status requirements that specifically apply to rape and sexual slavery (¶ 64). The Appeals Chamber rejects this possibility, finding that "the prohibitions of rape and sexual slavery in armed conflict are without a doubt well established under international humanitarian law" and that while these prohibitions have generally been applied in contexts protecting civilians and persons *hors de combat*, there is nonetheless "no conceivable reason" to believe international humanitarian law limits who may be victims of such conduct, especially in the absence of such a limitation on war crimes generally (¶¶ 64-65). Finally, the Appeals Chamber "agrees with the Trial Chamber's finding that 'there is never a justification to engage in sexual violence against any person; irrespective of whether or not this person may be liable to be targeted and killed under international humanitarian law'" (¶ 65). The Appeals Chamber concludes that there is "no reason to introduce Status Requirements to article 8 (2)(b)(xxii) and (e)(vi) of the Statute on the basis of the 'established framework of international law'" (¶ 66).
- Based on this finding and its finding above regarding the statutory analysis of Article 8, the Appeals Chamber holds that "members of an armed force or group are not categorically excluded from protection against the war crimes of rape and sexual slavery under article 8 (2) (b) (xxii) and (2) (e) (vi) of the Statute when committed by members of the same armed force or group" and affirms the Trial Chamber's finding that it has jurisdiction to try the accused for the charges of rape and sexual slavery as war crimes (¶¶ 2, 71).

SEXUAL SLAVERY

- The Prosecution charged Ntaganda with sexual slavery as a war crime, alleging that members of the UPC/FLPC subjected child soldiers from the same armed group to sexual slavery under Article 8(2)(e)(vi) of the Rome Statute (¶ 3). As noted above, the Defense repeatedly appealed the confirmation of these charges on jurisdictional grounds. The Appeals Chamber's analysis of the issue is detailed above under "Rape," as it applied to both the charges of rape and sexual slavery. The Appeals Chamber affirms the Trial Chamber's decision regarding jurisdiction, holding that "members of an armed force or group are not categorically excluded from protection against the war crimes of rape and sexual slavery under article 8 (2)(b)(xxii) and (2)(e)(vi) of the Statute when committed by members of the same armed force or group" and affirms the Trial Chamber's finding that it has jurisdiction to try the accused for the charges of rape and sexual slavery as war crimes (¶¶ 2, 71).