

THE PROSECUTOR v. BOSCO NTAGANDA

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

The Trial Chamber of the International Criminal Court

Second Decision on the Defense's Challenge to the Jurisdiction of the Chamber in Respect of
Counts 6 and 9
January 4, 2017

Judges: Judge Robert Fremr
Judge Kuniko Ozaki
Judge Chang-ho Chung

Prosecution: Ms. Fatou Bensouda
Mr. James Stewart
Ms. Nicole Samson

Defense: Mr. Stéphane Bourgon
Mr. Christopher Gosnell

Gender Keyword(s): 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 alleged Ntaganda had served as Deputy Chief of General Staff for Military Operations,¹ the key military commander of the UPC/FLPC,² and charged him with several offenses, including the rape of 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, also punishable pursuant to Article 8(2)(e)(vi), (Count 9) (¶¶ 1, 21).

At the Confirmation of Charges hearing, which took place from February 10 to 14, 2014, the Defense argued that the charges contained in Counts 6 and 9 could not be confirmed (¶ 2). The Defense argued that the principles of international humanitarian law were not meant to protect members of an armed group against crimes committed by the members of the same armed group (¶ 20). 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 (¶ 3).

On September 1, 2015, the Defense filed an application before the Trial Chamber challenging the jurisdiction of the Chamber in respect of Counts 6 and 9 (¶ 4). On October 9, 2015, the Chamber issued a decision rejecting the application filed by the Defense and finding that the matter should be addressed at trial (¶ 5).

¹ *Prosecutor v. Bosco Ntaganda*, Document Containing the Charges, January 10, 2014, ¶ 6.

² UPC/FLPC stands for *Unions des Patriotes* 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.

On October 19, 2015, the Defense appealed the Trial Chamber’s decision (¶ 6). 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 Chamber for a determination on this question (¶ 7). 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, which is digested here.

Disposition: Trial Chamber finds that “members of the same armed force are not *per se* excluded as potential victims of the war crimes of rape and sexual slavery, as listed in Article 8(2)(b)(xxii) and (e)(vi); whether as a result of the way these crimes have been incorporated in the Statute, or on the basis of the framework of international humanitarian law, or international law more generally. Without prejudice to whether such acts have taken place, the Chamber therefore finds that it has jurisdiction over the conduct charged pursuant to Counts 6 and 9” (¶ 54).

Key Gender Based Holdings:

CHILD SOLDIERS

- The Prosecution charged Ntaganda with the rape and sexual slavery of child soldiers of the UPC/FPLC armed group (¶ 27). The Defense argued that the Trial Chamber does not have jurisdiction over these alleged acts of rape and sexual violence, as they were allegedly committed by members of an armed group against members of the same armed group (*id.*).
- As noted under “Rape” and “Sexual Slavery” below, the Trial Chamber finds that “protection against sexual violence under international humanitarian law is not limited to members of the opposing armed forces, who are *hors de combat*, or civilians not directly participating in hostilities” (¶ 53). The Trial Chamber therefore decides that in order to answer the jurisdictional challenge, it does not have to address whether or not the persons alleged to have been “child soldiers” in the allegations underlying Counts 6 and 9 are to be considered as “members” of the UPC/FPLC armed group at the time the crimes were allegedly committed (¶ 53).
- The Trial Chamber goes on to observe 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 finds it is inconsistent with this principle to deprive victims of protection under international humanitarian law because they were conscripted as child soldiers, resulting in a loss of their civilian status, and to protect the accused from liability for crimes allegedly committed against the children, allowing him to benefit from their conscription, which constituted a breach of international law (*id.*).

RAPE

- Under Count 6, the Prosecution charged Ntaganda with rape as a war crime under Article 8(2)(e)(vi) of the Rome Statute, which enumerates several acts of sexual violence committed during non-international armed conflict (¶¶ 1, 36). The Defense argued that alleged acts of rape committed by members of an armed group against members of the

same armed group do not fall within the subject matter jurisdiction of the ICC because: “i) Article 8(2)(e)(vi), which prohibits rape, sexual slavery and other sexual offences as war crimes, is subject to the established requirements of international law; ii) according to Common Article 3 of the Geneva Conventions of 1949, ‘war crimes may not be committed by members of an armed force against fellow members of the same armed force’; iii) the Prosecution has defined the victims of the crimes in Counts 6 and 9 as being ‘members’ of the same armed force as the perpetrators; iv) the notion of ‘membership’ of an armed force is not compatible with ‘taking no active part in hostilities’; and v) international humanitarian law does not recognize any exception to this exclusion of acts committed by members of an armed group” (¶ 27).

- The Trial Chamber assesses this argument using a textual analysis of Article 8 and the Elements of Crimes, a review of the *travaux préparatoires* regarding the relevant provisions, ICC case law, and a review of the broader international legal framework on this issue (¶¶ 34-54).
- First, the Chamber recalls that Article 8 lists four categories of war crimes: “i) Grave breaches of the Geneva Conventions; ii) other serious violations of the laws and customs applicable in international armed conflict; iii) serious violations of Common Article 3; iv) other serious violations of the laws and customs applicable in armed conflicts not of an international character” (¶ 40). The Trial Chamber notes that some of the sub-sections under Article 8 make specific reference to grave breaches of the Geneva Conventions or to serious violations of Common Article 3, while the others reference “other serious violations of the laws and customs” applicable to either international or non-international conflict (*id.*). While the grave breaches regime of the Geneva Conventions as well as Common Article 3 historically include requirements with regard to the status of the victim, there are no such status requirements that apply to the “other serious violations of the laws and customs” of war provisions (*id.*). There is also nothing in the statutory framework to suggest that rape and sexual slavery must be prosecuted as grave breaches or violations of Common Article 3 (*id.*). Furthermore, while some of the provisions under Article 8 explicitly specify that the victim must have a certain status—*i.e.*, be *hors de combat*—the rape and sexual slavery provisions do not include such language (*id.*).
- The Trial Chamber finds further support for this interpretation in the Elements of Crimes for these offenses, which also omit any status requirements, as well as commentary regarding the drafting process, which reflects the drafters’ desire to include sexual offenses in a category distinct from grave breaches and violations of Common Article 3 (¶¶ 41-42).
- Finally, the Trial Chamber notes that ICC case law has not established a victim’s status as an element of rape as a war crime that Prosecutors must prove (¶ 43). Thus, the Chamber holds that “the Court’s statutory framework does not require the victims of the crimes contained in Article 8(2)(b)(xxii) and (e)(vi) to be protected persons in the (limited) sense of grave breaches or Common Article 3” (¶ 44).
- With regard to the international legal framework on this issue, the Trial Chamber finds that rape and other forms of sexual violence have long been prohibited by international humanitarian law, citing the 1863 Lieber Code, the Geneva Conventions, and the Additional Protocols to the Geneva Conventions, which all prohibit rape as well as other forms of sexual violence including outrages upon personal dignity and enforced prostitution (¶ 46). The Trial Chamber notes further the jurisprudence of the International

Tribunal for the former Yugoslavia (ICTY), which held that rape and other forms of sexual violence constitute war crimes under customary international law (*id.*). The Trial Chamber acknowledges that while in many of these contexts, express prohibitions of rape under international humanitarian law “appear in contexts protecting civilians and persons *hors de combat* in the power of a party to the conflict,” the Trial Chamber “does not consider those explicit protections to exhaustively define, or indeed limit, the scope of the protection against such conduct” (¶ 47). In support of this finding, the Trial Chamber refers to the “Martens Clause,” a principle of international humanitarian law which provides that “in situations not covered by specific agreements, ‘civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience’” (*id.*). The Trial Chamber looks to the purpose of international humanitarian law, which is to mitigate the suffering that results from armed conflict while allowing belligerents to use armed force against each other and pursue military operations, recognizing that some damage and harm is inevitable and to some extent accepted when proportionate to military necessity (¶ 48). In line with this principle, the Trial Chamber finds that “[r]aping and sexually enslaving children under the age of 15 years or indeed any persons would never bring any accepted military advantage, nor can there ever be a necessity to engage in such conduct” (*id.*). Furthermore, the Trial Chamber states that under international humanitarian law, “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” (¶ 49). The Trial Chamber also points to commentary from the International Committee of the Red Cross (ICRC), which has addressed the application of Common Article 3 to sexual abuse against members of one’s own force by stating that “[t]he fact that [...] the abuse [is] committed by their own Party should not be a ground to deny such persons the protection of common Article 3,” given the fact that Common Article 3 is a “minimum yardstick” applicable “in all armed conflicts” and reflecting “elementary considerations of humanity” (¶ 50). Therefore, the Trial Chamber concludes that limiting the application of the prohibition on rape and sexual slavery as war crimes would be contrary to the purpose behind the core principles of international humanitarian law (¶ 48).

- Based on this analysis, the Trial Chamber finds that “members of the same armed force are not *per se* excluded as potential victims of the war crimes of rape and sexual slavery, as listed in Article 8(2)(b)(xxii) and (e)(vi); whether as a result of the way these crimes have been incorporated in the Statute, or on the basis of the framework of international humanitarian law, or international law more generally. Without prejudice to whether such acts have taken place, the Chamber therefore finds that it has jurisdiction over the conduct charged pursuant to Counts 6 and 9” (¶ 54).

SEXUAL SLAVERY

- The Prosecution charged Ntaganda with sexual slavery as a war crime under Count 9, alleging that members of the UPC/FLPC subjected child soldiers who were members of the same group to sexual slavery under Article 8(2)(e)(vi) of the Rome Statute (¶¶ 1, 21). The Defense’s argument is detailed above under “Rape,” as it applied to both the charges of rape and sexual slavery. The Trial Chamber’s assessment of the Defense’s argument is also detailed under “Rape” above, as its analysis applied to both the charges of rape

and of sexual slavery as war crimes. The Trial Chamber distinguishes the two crimes only when reviewing their prohibition under customary international law, and in this regard the Trial Chamber notes that slavery is prohibited in all forms under Additional Protocol II to the Geneva Conventions, which therefore includes sexual slavery, and that “sexual slavery can also be considered to fall within the general prohibitions on indecent assault and attacks against honour as applicable to rape, as well as enforced prostitution” (¶ 46). The Trial Chamber concludes that “prohibitions on rape and (sexual) slavery also form part of customary international humanitarian law, applicable both in times of international and non-international armed conflicts” (*id.*). The Trial Chamber cites as additional support for this view the fact that “sexual slavery has been recognised as constituting a particular form of slavery” and that it thus enjoys the same *jus cogens* status under international law as slavery, a prohibition from which derogation is not permissible (¶ 51).

- Based on the above and the findings detailed under “Rape” above, the Trial Chamber concludes that “members of the same armed force are not *per se* excluded as potential victims of the war crimes of rape and sexual slavery, as listed in Article 8(2)(b)(xxii) and (e)(vi); whether as a result of the way these crimes have been incorporated in the Statute, or on the basis of the framework of international humanitarian law, or international law more generally. Without prejudice to whether such acts have taken place, the Chamber therefore finds that it has jurisdiction over the conduct charged pursuant to Counts 6 and 9” (¶ 54).