

1 International Criminal Court
2 Appeals Chamber - Courtroom 1
3 Situation: Democratic Republic of the Congo
4 In the case of The Prosecutor v. Bosco Ntaganda - ICC-01/04-02/06
5 Presiding Judge Christine Van den Wyngaert
6 Appeals Chamber Judgment
7 Tuesday, 22 March 2016
8 (The judgment starts in open session at 4.30 p.m.)
9 THE COURT USHER: All rise.
10 The International Criminal Court is now in session.
11 Please be seated.
12 PRESIDING JUDGE VAN DEN WYNGAERT: Good afternoon to everybody.
13 The court is now in session.
14 Would the court officer please call the case.
15 THE COURT OFFICER: Thank you, Madam President.
16 The situation in the Democratic Republic of the Congo, in the case of The Prosecutor
17 versus Bosco Ntaganda, case reference ICC-01/04-02/06.
18 We are in open session.
19 PRESIDING JUDGE VAN DEN WYNGAERT: I am Judge Christine Van den Wyngaert
20 and I am the Presiding Judge in the appeal in the case of The Prosecutor versus
21 Bosco Ntaganda. Today, on behalf of the Appeals Chamber, I will be delivering the
22 judgment on Mr Ntaganda's appeal against the decision of Trial Chamber VI entitled
23 "Decision on the Defence's challenge to the jurisdiction of the Court in respect of
24 counts 6 and 9."
25 The decision was rendered on 9 October 2015 and in today's summary I will refer to it as

1 the impugned decision and I will refer to Trial Chamber VI as the Trial Chamber.
2 The other Judges of the Appeals Chamber on this appeal are Judge Sanji Mmasenono
3 Monageng, Judge Howard Morrison, Judge Piotr Hofmański and Judge Raul C.
4 Pangalangan.
5 May I now ask the parties to introduce themselves for the record, starting with the
6 Defence counsel for Mr Ntaganda.
7 MR BOURGON: (Interpretation) Good afternoon, Madam President. Good afternoon
8 to everyone. Representing Bosco Ntaganda, who is present with us, there is
9 Isabelle Martineau, Sandrine De Sena, Margaux Portier, Maître Isabelle Martineau,
10 Maître William St-Michel and myself, Stéphane Bourgon. Thank you, Madam President.
11 PRESIDING JUDGE VAN DEN WYNGAERT: Thank you very much.
12 The Office of the Prosecutor.
13 MR GALLMETZER: Good afternoon, your Honour. The Office of the Prosecutor this
14 afternoon is represented by Ms Nicole Samson, Mr Matthew Cross and my name is
15 Reinhold Gallmetzer.
16 PRESIDING JUDGE VAN DEN WYNGAERT: Thank you very much.
17 And Legal Representative for the victims.
18 MR ABDOU: Good afternoon, Madam President. The former child soldiers are today
19 represented by myself, Mohamed Abdou, associate legal officer at the Office of Public
20 Counsel of Victims.
21 PRESIDING JUDGE VAN DEN WYNGAERT: Thank you very much.
22 I shall now summarise the Appeals Chamber's judgment and reasoning. I would like to
23 emphasise that the written judgment is the only authoritative account of the Appeals
24 Chamber's ruling and reasons. The written judgment, which is unanimous, will be made
25 available immediately after this hearing.

1 I shall start with a brief account on the relevant procedural history.

2 Charges have been confirmed against Mr Bosco Ntaganda, including alleged war crimes
3 under Article 8(2)(e)(vi) of the Statute of rape and sexual slavery of UPC/FPLC child
4 soldiers by other UPC/FPLC members. These are counts 6 and 9 of the Prosecution
5 charges.

6 On 1 September 2015, Mr Ntaganda challenged the Court's subject-matter jurisdiction
7 over counts 6 and 9 before the Trial Chamber, arguing that the Statute does not foresee the
8 possibility of child soldiers who are members of the same armed group as the perpetrators
9 being victims of war crimes of rape and sexual slavery.

10 The Trial Chamber rejected the challenge to jurisdiction, implicitly finding that this was
11 not a jurisdictional matter. This is the impugned decision in the present appeal.

12 On 19 October 2015, Mr Ntaganda appealed this decision and the Prosecutor applied for
13 the appeal to be dismissed in limine. The Appeals Chamber, on 29 October 2015, found
14 that it would hear submissions on the admissibility of the appeal in conjunction with
15 submissions on the merits and I will first summarise the Appeals Chamber's findings on
16 the question of admissibility.

17 The Appeals Chamber considers that, had Mr Ntaganda's challenge been a proper
18 challenge to jurisdiction, and assuming the procedural requirements were satisfied, the
19 matter should have been determined by the Trial Chamber. In this regard, it is noted that
20 various provisions of the Statute and the Rules of Procedure and Evidence underline the
21 importance of jurisdictional questions being settled as early as possible in the proceedings.

22 If an appeal were dismissed only because the underlying decision rejected a challenge as
23 non-jurisdictional, a potentially valid challenge could be unresolved until the end of a
24 trial, without any possibility for appellate intervention. For this reason the Appeals
25 Chamber finds that it is important to preserve appellate scrutiny of decisions that reject

1 jurisdictional challenges on the grounds that they are not proper jurisdictional challenges.
2 In relation to such decisions, the Appeals Chamber finds that it is necessary for it to assess
3 whether a proper jurisdictional challenge has been raised, but erroneously not addressed
4 by the first instance Chamber. Therefore, the appeal is admissible.

5 I shall now turn to the merits of the appeal. Mr Ntaganda argues that his challenge is
6 jurisdictional because it concerns the existence of the war crimes of rape and sexual
7 slavery when allegedly perpetrated by members of an armed group against other
8 members of the same group. The Prosecutor argues that Mr Ntaganda's appeal does not
9 call into question the existence of war crimes of rape and sexual slavery, but rather
10 concerns the application of the law to the facts of this case and that this is not
11 jurisdictional in nature. Similarly, the Legal Representatives of Victims, who are former
12 child soldiers, they submit that Mr Ntaganda's arguments relate to the merits of the case
13 and not to the jurisdiction of the Court.

14 The question for the Appeals Chamber to determine is whether Mr Ntaganda's challenge
15 constitutes a challenge to the jurisdiction of the Court and whether the Trial Chamber
16 erred in rejecting this challenge on the basis that it was a matter for determination at trial.
17 Mr Ntaganda's challenge is premised on the contention that, as a matter of law, the Statute
18 does not foresee the possibility of UPC/FPLC child soldiers being victims of the war
19 crimes of rape and sexual slavery committed by members of the UPC/FPLC. As noted by
20 the Trial Chamber, Article 8(2)(e)(vi) of the Statute, quote, "does not specify who can be
21 victims of the war crimes listed therein." Unquote. Nonetheless, the question arises as
22 to whether such restrictions must be derived from the applicable law, taking into account
23 the chapeau of Article 8(2)(e) of the Statute, the introduction to Article 8 in the Elements of
24 Crimes and/or the reference to Article 3 common to the four Geneva Conventions in
25 Article 8(2)(e)(vi) itself.

1 The Trial Chamber's conclusion that this question raised a matter for determination at trial
2 was premised on its understanding that the Appeals Chamber had narrowly defined a
3 scope of challenges of jurisdiction in two decisions in the Ruto et al and Muthaura et al
4 cases, which I shall refer to as the Kenya decisions.

5 The Appeals Chamber notes that the Kenya decisions addressed challenges to the legal
6 interpretation of "organisational policy" and to the factual finding that there was sufficient
7 evidence to substantiate the existence of the organisational policy. In other words, the
8 challenges in the Kenya cases called into question whether an organisational policy
9 existed both as a matter of law and as a matter of fact. The Appeals Chamber found that
10 those challenges related to the substantive merits of the case rather than the subject-matter
11 jurisdiction of the Court.

12 The issue in the present case is distinguishable from those raised in the Kenya cases.

13 Mr Ntaganda's challenge requires an exclusively legal determination as to whether the
14 factual allegations correspond to the crime under international humanitarian law. Unlike
15 the Kenya cases, no additional factual or evidentiary determinations are required in order
16 to resolve the legal issue raised by Mr Ntaganda.

17 The Appeals Chamber acknowledges that certain references in the Kenya decisions may
18 suggest that subject-matter jurisdiction is linked only to the question of whether the
19 Prosecutor has alleged crimes that are listed in the Statute, and that any other legal or
20 factual issues related to the exercise of jurisdiction must be determined on the merits.
21 However, these findings must be read in the context in which they appear, namely, in
22 rejecting the argument that the contextual elements of crimes against humanity are
23 jurisdictional and that any challenge to these findings, legal or factual, is necessarily
24 jurisdictional in nature.

25 In the view of the Appeals Chamber, the question of whether the Court has subject-matter

1 jurisdiction cannot be confined exclusively to an examination of whether the Prosecution
2 has successfully recited the elements of a crime listed under Article 5 of the Statute. The
3 Appeals Chamber finds that, in certain circumstances, the question of whether the facts
4 alleged correspond to the crime charged may also acquire a jurisdictional dimension.
5 This is so, for example, where a particular legal interpretation could result in the
6 allegations being characterised either as non-criminal in nature, or as an ordinary crime,
7 as opposed to one of the crimes over which the Court has jurisdiction. In general terms,
8 challenges which would, if successful, eliminate the legal basis for a charge on the facts
9 alleged by the Prosecution may be considered to be jurisdictional challenges.

10 Applying this ruling to the present case, the Appeals Chamber finds that the question of
11 whether there are restrictions on the categories of persons who may be victims of the war
12 crimes of rape and sexual slavery is an essential legal issue which ought to be decided
13 upon sooner rather than later in order to determine whether the Court has jurisdiction
14 over the crimes charged. If Mr Ntaganda's arguments were accepted, the result would be
15 a finding that the set of facts charged are not, in law, war crimes and the necessary
16 implication of this would be that the Statute per se excludes from its ambit the rape and
17 sexual slavery of child soldiers charged in this case. The appropriate result of such a
18 finding would be that the Court lacks jurisdiction to prosecute the alleged acts as war
19 crimes.

20 For these reasons, the Appeals Chamber finds that Mr Ntaganda's challenge constitutes a
21 challenge to the jurisdiction of the Court and that the Trial Chamber erred in rejecting it
22 on the basis that it was rather a matter for determination at trial.

23 The Appeals Chamber notes that, under the first two grounds of appeal, Mr Ntaganda
24 essentially requests the Appeals Chamber to determine the substantive legal issue which
25 is the subject of this challenge. The Trial Chamber ultimately did not determine this

- 1 question in the impugned decision and the Appeals Chamber does not consider it
- 2 appropriate to address the first and second grounds of appeal in these circumstances.
- 3 Therefore, they are dismissed in limine.
- 4 For the reasons given, the Appeals Chamber reverses the impugned decision and remands
- 5 Mr Ntaganda's challenge to the Trial Chamber.
- 6 This concludes my summary of the judgment.
- 7 I thank the interpreters, the court officer and the participants.
- 8 The session is now closed.
- 9 THE COURT USHER: All rise.
- 10 (The judgment ends in open session at 4.46 p.m.)