

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 Sanji Mmasenono Monageng
6 Appeal Chamber Delivery of Judgment
7 Thursday, 15 June 2017
8 (The hearing starts in open session at 9.31 a.m.)
9 THE COURT USHER: [9:31:11] All rise.
10 The International Criminal Court is now in session.
11 Please be seated.
12 PRESIDING JUDGE MONAGENG: [9:31:29] Good morning. Would the court
13 officer please call the case.
14 THE COURT OFFICER: [9:31:46] Thank you, Madam President. The situation in
15 the Democratic Republic of the Congo in the case of the Prosecutor versus
16 Bosco Ntaganda, case reference ICC-01/04-02/06.
17 We are in open session.
18 PRESIDING JUDGE MONAGENG: [9:32:02] Thank you.
19 My name is Sanji Mmasenono Monageng and I am the Presiding Judge on the appeal
20 arising from the case of the Prosecutor against Bosco Ntaganda. The other judges of
21 the Appeals Chamber on this appeal are Judge Christine Van den Wyngaert,
22 Judge Howard Morrison, Judge Piotr Hofmánski and Judge Raúl Pangalangan. I am
23 joined today by legal staff of the Appeals Division, Mr Volker Nerlich, Ms Natasha
24 Naidoo, Ms Juliana Borenstein and Mr Tom Cornell.
25 May I ask the parties and participants to introduce themselves for the record, starting

1 with the Office of the Prosecutor.

2 MS BRADY: [9:33:03] Good morning. Good morning, your Honour. Appearing
3 on behalf of the Prosecution, with me today are Nicole Samson, senior trial lawyer;
4 Dianne Luping, trial lawyer; Matteo Costi, appeals counsel; and Matthew Cross,
5 appeals counsel. And I'm Helen Brady, the senior appeals counsel. Thank you.

6 PRESIDING JUDGE MONAGENG: [9:33:25] Thank you very much.

7 The Defence for Mr Ntaganda, please.

8 MS YAHYA HAAGE: Good morning, your Honour. For Mr Bosco Ntaganda, who
9 is present here in the courtroom today, there is Mr Stéphane Bourgon, counsel;
10 Ms Sandrine De Sena, case manager; Isabelle Martineau, legal assistant;
11 Erik Cookson-Montin, legal assistant; and myself, Marlène Yahya Haage. And,
12 sorry, Sara Eve Levac as well.

13 PRESIDING JUDGE MONAGENG: [9:33:52] Thank you.

14 Legal Representatives for Victims.

15 MS PELLET: [9:33:57] (Interpretation) Thank you, your Honour.

16 The former child soldiers are represented by myself, Sarah Pellet, and
17 Vony Rambolamanana.

18 PRESIDING JUDGE MONAGENG: [09:34:12] Thank you very much.

19 MS GRABOWSKI: [9:34:15] Good morning, your Honour. The victims of the
20 attacks are represented by myself, Anne Grabowski.

21 PRESIDING JUDGE MONAGENG: [9:34:20] Thank you very much.

22 Today the Appeals Chamber is delivering its judgment on the appeal of Mr Ntaganda
23 against the decision of Trial Chamber VI entitled "Second decision on the Defence's
24 challenge to the jurisdiction of the Court in respect of Counts 6 and 9". In today's
25 summary, I will refer to this decision as the Impugned Decision.

1 In a moment, I shall summarise the Appeals Chamber's judgment, which was taken
2 unanimously. This summary is not part of the written judgment, which is the only
3 authoritative account of the Appeals Chamber's ruling and reasons. The written
4 judgment will be made available to the parties and participants at the conclusion of
5 this hearing.

6 By way of background, under Counts 6 and 9 of the Updated Document Containing
7 the Charges, Mr Ntaganda is alleged to be criminally responsible for the rape and
8 sexual slavery of child soldiers under his command, which are war crimes,

9 punishable pursuant to Article 8(2)(e)(vi) of the Statute. In light of these counts,

10 Mr Ntaganda argued that the war crimes of rape and sexual slavery could not pertain
11 to acts committed by members of an armed group against other members of the same
12 armed group.

13 In this regard, the Trial Chamber rejected his arguments and found that members of
14 the same armed force are not per se excluded as potential victims of the war crimes of
15 rape and sexual slavery.

16 On 26 January 2017, Mr Ntaganda filed the document in support of his appeal and,
17 on 17 and 23 February 2017, the Prosecutor and the victims of the group of former
18 child soldiers participating in the proceedings submitted their respective responses
19 thereto.

20 I shall now turn to the merits of the present appeal.

21 The principal issue arising in this appeal is whether the Trial Chamber erred in law
22 when it held that victims of war crimes of rape and sexual slavery listed in

23 Article 8(2)(b) and (e) do not have to be "protected persons" in the sense of the

24 Geneva Conventions of 1949 or "[p]ersons taking no active part in the hostilities" in

25 the sense of Common Article 3 to the 1949 Geneva Conventions. Collectively, these

1 categories of protected persons were referred to by Mr Ntaganda and the Trial
2 Chamber as "Status Requirements".

3 The Trial Chamber arrived at its ruling on the basis of both a textual interpretation of
4 Article 8 of the Rome Statute and an examination of the broader international legal
5 framework. With respect to the Trial Chamber's textual analysis, the Appeals
6 Chamber finds no error in the Trial Chamber's determination that, based on the
7 ordinary meaning, context and drafting history of Article 8(2)(b)(xxii) and (e)(vi), the
8 Status Requirements do not apply to victims of the war crimes of rape and sexual
9 slavery.

10 With respect to the Trial Chamber's analysis and findings on the "broader
11 international legal framework", the Appeals Chamber notes that the mainstay of
12 Mr Ntaganda's appeal rests on the assertion that the provisions pursuant to
13 Article 8(2)(b) and (e) are "expressly made subject" to customary international law by
14 reference to the "established framework of international law" in the chapeaux of these
15 provisions, such that "[t]he protections recognised in Common Article 3 in
16 non-international armed conflict, according to that provision, are applicable only to
17 persons taking 'no active part in hostilities'".

18 Consequently, the Appeals Chamber considers that its first enquiry is whether the
19 expression "established framework of international law" permits, in principle, the
20 introduction of additional elements to the crimes listed in Article 8(2)(b) and (e). For
21 reasons more fully explained in the judgment, the Appeals Chamber disagrees with
22 the arguments of the Prosecutor in this respect. The Appeals Chamber considers that
23 if customary or conventional international law stipulates, in respect of a given war
24 crime set out in Article 8(2)(b) or (e) of the Statute, an additional element of that
25 crime, the Court cannot be precluded from applying it to ensure consistency of the

1 provision with international humanitarian law, irrespective of whether this requires
2 ascribing to a term in the provision a particular interpretation or reading an
3 additional element into it.

4 In the view of the Appeals Chamber, this does not violate the principle of legality
5 recognised in Article 22 of the Statute, which protects accused persons against a broad
6 interpretation of the elements of the crimes or their extension by analogy; it does not
7 impede the identification of additional elements that need to be established before an
8 accused person can be convicted.

9 Having so determined, the Appeals Chamber's next enquiry is whether "the
10 established framework of international law" introduces, as an additional element,
11 Status Requirements to the war crimes of rape and sexual slavery.

12 The Appeals Chamber considers that international humanitarian law not only
13 governs actions of parties to the conflict in relation to each other, but also concerns
14 itself with protecting vulnerable persons during armed conflict and assuring
15 fundamental guarantees to persons not taking active part in the hostilities.

16 Protection is required in particular against harm suffered from the enemy forces since
17 violence - and potential abuses - during armed conflict are typically directed against,
18 or inflicted on, enemy combatants or enemy civilians.

19 This is reflected, in particular, in Geneva Conventions III and IV where the
20 protections against grave breaches in these conventions are narrow in scope owing to
21 the nature of their respective subject matter. In contrast, Geneva Conventions I and
22 II extend protection irrespective of affiliation or any distinction based on sex, race or
23 nationality. Notwithstanding this, the Appeals Chamber is not aware of any case in
24 which the grave breaches regime has been applied to situations in which victims
25 belonged to the same armed force as the perpetrators. The Appeals Chamber is,

1 however, unconvinced that this, in and of itself, reflects the fact that Status
2 Requirements exist as a general rule of international humanitarian law.
3 In this regard, and as noted by the Prosecutor, the principle preserved in Common
4 Article 3 provides for unqualified protection against inhumane treatment irrespective
5 of a person's affiliation, requiring only that the persons were taking no active part in
6 hostilities at the material time.

7 With respect to Mr Ntaganda's reliance on an academic reference, which cites two
8 mid-twentieth century cases, namely Pilz and Motosuke in support of his argument
9 that intra-force crimes do not constitute war crimes, the Appeals Chamber finds this
10 to be unpersuasive, as in the view of the Appeals Chamber, it does not represent
11 strong precedent that the notion of war crimes is generally limited to cases where
12 victims are nationals of the opposing party.

13 In the circumstances, the Appeals Chamber is persuaded that international
14 humanitarian law does not contain a general rule that categorically excludes members
15 of an armed group from protection against crimes committed by members of the
16 same armed group.

17 In the same vein, the Appeals Chamber observes that the prohibitions of rape and
18 sexual slavery in armed conflict are without a doubt well established under
19 international humanitarian law. In this regard, the question arising before the
20 Appeals Chamber is whether the Status Requirements exist in international
21 humanitarian law specifically for the war crimes of rape and sexual slavery. In the
22 view of the Appeals Chamber, there is no conceivable reason for reaching such a
23 conclusion. Accordingly, in the absence of any general rule excluding members of
24 armed forces from protection against violations by members of the same armed force,
25 there is no ground for assuming the existence of such a rule specifically for the crimes

1 of rape and sexual slavery.

2 The Appeals Chamber therefore finds no reason to introduce Status Requirements to
3 Article 8(2)(b)(xxii) and (e)(vi) of the Statute on the basis of the "established
4 framework of international law".

5 The Appeals Chamber appreciates the seemingly unprecedented nature of this
6 conclusion. The Appeals Chamber is also mindful of Mr Ntaganda's apprehensions
7 that this conclusion seems to result from a "wider application" of the Rome Statute
8 through "judicial activism" or amounts to a "substantial and unjustified extension of
9 the scope of war crimes law". However, as just reasoned, the conclusion is not only
10 permissible under Article 8(2)(b)(xxii) and Article 8(2)(e)(vi) of the Statute, but is also
11 aligned with the principles and case law within the established framework of
12 international law.

13 The Appeals Chamber emphasises in this context, however, that the elements of crime
14 for each war crime contain an express nexus requirement which must be established
15 in each particular instance. Thus, it must be established that the conduct in question
16 "took place in the context of and was associated with an armed conflict" of either
17 international or non-international character. In the view of the Appeals Chamber, it
18 is this nexus requirement, and not the purported Status Requirement, that sufficiently
19 and appropriately delineates war crimes from ordinary crimes. The Appeals
20 Chamber considers that any undue expansion of the reach of the law of war crimes
21 can be effectively prevented by a rigorous application of the nexus requirement.

22 For these reasons, the Appeals Chamber rejects Mr Ntaganda's grounds of appeal and
23 decides to confirm the Impugned Decision.

24 This concludes my summary of the judgment. I thank the interpreters, court
25 reporters, parties and participants. The session is now closed.

- 1 THE COURT USHER: [9:50:22] All rise.
- 2 (The hearing ends in open session at 9.50 a.m.)