

Ntaganda Case: Lessons learnt from Katanga, Lubanga, and Bemba cases

*Caso Ntaganda:
Lições extraídas dos casos Katanga,
Lubanga e Bemba*

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Abstract: The Prosecutor v. Bosco Ntaganda was the first case in which the International Criminal Court (ICC) issued a conviction on sexual and gender-based crimes (SGBCs). However, Ntaganda's condemnation for rape and sexual slavery came as the crowning point of a lengthy process of development of the Court's approach to the prosecution of sexual and gender crimes, along three cases- Thomas Lubanga Dyilo, Germain Katanga e Jean-Pierre Bemba Gombo. The present work analyses the impact of each of the cases in the International Criminal Court handling of sexual and gender-based crimes and how they paved the way for punishment of Ntaganda for the crimes of rape and sexual slavery.

Keywords: Ntaganda, sexual and gender-based crimes, International Criminal Court

Resumo: O caso do Promotor v. Bosco Ntaganda foi o primeiro em que a Corte Penal Internacional emitiu uma condenação por crimes sexuais e de gênero. No entanto, a condenação de Ntaganda por estupro e escravidão sexual veio como o ponto culminante de um longo processo de desenvolvimento da abordagem do Tribunal para o julgamento de crimes sexuais e de gênero, ao longo de três casos - Thomas Lubanga Dyilo, Germain Katanga e Jean- Pierre Bemba Gombo. O presente trabalho analisa o impacto de cada um dos três casos no tratamento de crimes sexuais e de gênero pela Corte Penal Internacional e como abriram caminho para a punição de Ntaganda pelos delitos de estupro e escravidão sexual.

Palavras-chave: Ntaganda, crimes sexuais e de gênero, Tribunal Penal Internacional

1. Introduction

The Prosecutor v. Bosco Ntaganda case is a landmark. For the first time, the International Criminal Court entered a final judgment convicting a defendant for sexual and gender-based crimes. On 8 July 2019 the Trial Chamber (TC) VI issued a verdict and found Ntaganda guilty on 18 counts,

including of being co-perpetrator of the crimes of rape and sexual slavery, as war crimes and crimes against humanity. On 7 November of the same year, he was sentenced to 30 years imprisonment. Subsequently, on 30 March 2021, the Appeals Chamber (AC) confirmed the verdict, by Majority, and the sentence, by unanimity.¹

In the antecedent cases involving sexual and gender-based crimes in which final judgments were entered (namely, the Prosecutor v. Thomas Dyilo Lubanga, the Prosecutor v. Germain Katanga and Prosecutor v. Jean-Pierre Bemba Gombo), the ICC did not render a final conviction for sexual and gender-based crimes. Such circumstance tarnished the Court's credibility and put in doubt its ability to try this class of crimes.²

Nevertheless, in spite of their discouraging outcomes, the Lubanga, Katanga and Bemba cases were fundamental and allowed the Court to progress in prosecuting SGBCs.³

In view of that, the present work shows how each of the cases contributed to capacitate the Court, promoting a better approach in its handling of the sexual and gender-based crimes, which ultimately led to Ntaganda's final conviction for rape and sexual slavery.

2 The Prosecutor v. Thomas Dyilo Lubanga

The Prosecutor vs. Thomas Lubanga Dyilo was the International Criminal Court's first case/ trial/ verdict. Therefore, was a lot of expectation with regard to how the case would be conducted.⁴

The background was the armed conflict of a non-international character that took place the region of Ituri in the Democratic Republic of the Congo (DRC) between 2002 and 2003. Lubanga was the president of the "Union des Patriotes Congolais" (UPC). It made use of "Force Patriotique pour la Libération du Congo" (FPLC), its military wing, to carry out large-scale military operations against the Lendu militia forces and Lendu civilians, so as to establish Hema dominance and control in Ituri. In the course of the conflict, the UPC/ FPLC allegedly perpetrated several of the crimes enlisted in the Rome Statute, including rape and sexual slavery.⁵

Since the Rome Statute furnished the ICC with the most progressive structure in history of sexual and gender-based violence in International Criminal Law, it was expected that the crimes rape and sexual

¹ ICC, Ntaganda case, Trial Chamber VI, Judgment, 8 July 2019; ICC, Ntaganda case, Appeals Chamber, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', 30 March 2021; ICC, case, Appeals Chamber, Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of 7 November 2019 entitled 'Sentencing judgment, 30 March 2021; ICC website, Press Release, ICC Trial Chamber VI declares Bosco Ntaganda guilty of war crimes and crimes against humanity, 2019; United Nations, ReliefWeb, International Criminal Court Upholds Landmark Conviction of Warlord for Atrocities Committed in the Democratic Republic of the Congo - Democratic Republic of the Congo

² ICC, The Prosecutor v. Thomas Dyilo Lubanga, Case No. ICC-01/04-01/06; ICC, the Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07; ICC, the Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08; KAMBALE, P. K. (2015). In De VOS, C., KENDALL, S., & STAHL, C. (eds.), pp. 171-197; DAMASKA, M. R. (2009), pp. 19-35.

³ AMARAL, A. S. S. do (2020), pp. 480-498

⁴ ICC website, Case Information Sheet, Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo, 15 December 2017

⁵ *Ibidem*; ICC, Lubanga case, Pre-Trial Chamber I, Document Containing the Charges, Article 61(3) (a), Annex 2, pp. 3-7, paras. 4-5, 12-14, 19 (28 August 2006); ICC, Lubanga case, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, pp. 24, 591, paras. 25, 27, 1359 (14 March 2012); ICC, The Office of the Prosecutor. Report on the activities performed during the first three years (June 2003 – June 2006), p. 2

slavery allegedly perpetrated would be investigated and included in the charges.⁶

Nonetheless, the Office of the Prosecutor (OTP) opted for a practical approach based on the political convenience of gathering evidence quickly in detriment of a more thorough accounting of the full extent of the DRC conflict. In the Document Containing the Charges, the Prosecutor only accused Lubanga of the crimes of conscripting and enlisting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities.⁷

As a consequence, although it was well reported that rape and other types of sexual-oriented crimes were largely committed during the UPC/ FPLC operations, they were not among the initial charges brought by the OTP. Also, there was no amendment to the charges in order to include more crimes since the Prosecution sustained that it was not feasible to amend them within an acceptable time frame. Further, the Prosecution opposed the legal re-characterisation of the facts as sexual slavery and inhuman and/or cruel treatment, which had been requested by the legal representatives of the victims, who were dissatisfied with the lack of charges related to SGBCs. The Prosecution thwarted a comprehensive prosecution of the crimes, including rape and sexual slavery.⁸

On 14 March 2012, Lubanga was found guilty of the crimes of conscripting and enlisting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities. Subsequently, he was sentenced to 14 years imprisonment and the Appeals Chamber maintained the Trial Chamber's judgment and sentence.⁹

Despite Lubanga's conviction, there was an overall dissatisfaction with the Prosecution's limited charging. The OTP's approach prevented a fuller accounting of the broad range of the criminality perpetrated by the UPC/FPLC in the conflict at issue. Victims, Non-Governmental Organizations (NGOs) and women's rights institutions especially resented the absence of charges of rape and sexual slavery in the case.¹⁰

In view of that, in the 2011 Gender Report Card, the Prosecutor (after asserting that the OTP had "explained the gender dimension of the crime of enlisting and conscripting children under the age of 15 years" during the trial of the Lubanga case) affirmed that "[t]he office took note of the reactions of civil

⁶ INDER, B. (2008), p. 3

⁷ KAMBALE, P. K. (2015). In De VOS, C., KENDALL, S., & STAHN, C. (eds.), pp. 171-197; ICC, Lubanga case, Pre-Trial Chamber I, Document Containing the Charges, Article 61(3) (a), Annex 2, p. 24

⁸ ICC, Lubanga case, [Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute](#), 10 July 2012, p. 24, para. 60; ICC, Lubanga case, Trial Chamber I, Prosecution's Application for Leave to Appeal the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 12 August 2019, pp. 8-9, paras. 22-23; ICC, Lubanga case, Trial Chamber I, Prosecution's Further Observations Regarding the Legal Representatives' Joint Request Made Pursuant to Regulation 55, 12 June 2009; ICC, The Office of the Prosecutor. Report on the activities performed during the first three years (June 2003 – June 2006), p. 2; ICC website, Case Information Sheet, Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo; ICC website, Case Information Sheet, Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo; KAMBALE, P. K. (2015). In De VOS, C., KENDALL, S., & STAHN, C. (eds.), pp. 171-197

⁹ ICC, Lubanga case, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012; ICC, Lubanga case, Trial Chamber I, Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012; ICC, Lubanga case, Appeals Chamber, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014

¹⁰ Women's Initiatives for Gender Justice, Statement by the Women's Initiatives for Gender Justice on the Arrest of Germain Katanga; PIA-COMELLA, J. (2013), p.3; KAMBALE, P. K. (2015). In De VOS, C., KENDALL, S., & STAHN, C. (eds.), pp. 171-197; ICC, The Office of the Prosecutor. Report on the activities performed during the first three years, pp.7-8; ICC website, Case Information Sheet, Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo

society and their preference for these aspects to be explicitly charged.”¹¹

The background of the Ntaganda case comprises the same facts of the Lubanga case, specifically the attack promoted by the UPC/FPLC in Ituri in the DRC during 2002/2003. Ntaganda was Deputy Chief of Staff in charge of Operations and Organisation in UPC/FPLC.¹²

However, when reviewing the events and criminal conduct, the OTP’s strategy was distinct from the one it had deployed in the case against Lubanga.

Besides bringing charges for the crimes of conscripting and enlisting children under the age of 15 years into an armed group and using them to participate actively in hostilities, the Prosecution accused Ntaganda of the following crimes: rape and sexual slavery (as crimes against humanity and war crimes and against children under the age of 15 years incorporated into the UPC/FPLC); murder and attempted murder; intentionally directing attacks against civilians; persecution; pillage; forcible transfer of population; ordering the displacement of the civilian population; intentionally directing attacks against protected objects; destroying the adversary’s property.¹³

It is noteworthy that Ntaganda was charged of rape and sexual slavery, as an indirect co-perpetrator under article 25(3)(a) of the Rome Statute, committed not only against women of non-Hema origin, but also against children under 15 years of age who were part of the UPC/FPLC.

The ICC adduced that militia members who are subject to rape and/or sexual enslavement cannot be regarded as being taking active part in hostilities at the specific time they suffer sexual abuse. Therefore, it understood that UPC/FPLC child soldiers under the age of 15 are within the scope of protection against SGBCs. Accordingly, the Court innovated on the matter by considering that child soldiers can be regarded as victims of the crimes of rape and sexual slavery (as war crimes) perpetrated by combatants from the same armed forces.¹⁴

Therefore, the Prosecution enlarged the list of crimes when charging Ntaganda with crimes related to the same facts tackled in the Lubanga case. It was an opportunity to amend the rather limited accusation against Lubanga and provide victims and the DRC society with a fuller accounting of the crimes. Moreover, the ICC enhanced the protection against SGBCs crimes by rendering that the combatants can carry out such crimes against women and girls who are members of their own militia.

The Appeals Chamber upheld the Trial Chamber VI verdict in which it found Ntaganda guilty of all the 18 counts of war crimes and crimes against humanity, including the crimes of rape and sexual slavery, being sentenced to 30 years imprisonment. While the TC VI decision was the Court’s first conviction based on sexual slavery, the Appeals Chamber judgment was the first time in which the ICC secured a final conviction against a defendant based on sexual and gender-based crimes.¹⁵

¹¹ ICC, the Office of the Prosecutor, Fatou Bensouda. Launch of the Gender Report Card on the International Criminal Court 2011, 13 December 2011, p.3

¹² ICC, Ntaganda case, Trial Chamber VI, Judgment, 8 July 2019

¹³ “Ibidem”

¹⁴ ICC, Ntaganda case, Pre-Trial Chamber II, Decision on the charges, 9 June 2014, p. 29; ICC, Ntaganda case, Conclusions écrites de la Défense de Bosco Ntaganda suite à l’Audience de confirmation des charges, 14 April 2014, paras 251-263; ICC, Ntaganda case, Pre-trial Chamber II, Prosecution’s Submission of Document Containing the Charges and the List of Evidence, Annex A, 10 January 2014, pp. 33-35

¹⁵ ICC, Ntaganda case, Trial Chamber VI, Judgment, 8 July 2019, pp. 535-539; ICC, Ntaganda case, Trial Chamber VI, Sentencing Judgment, 7 November 2019; ICC, Ntaganda case, The Appeals Chamber, Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of 7 November 2019 entitled ‘Sentencing judgment, 30 March 2021

Therefore, the Court's change of the approach in relation to the charges, in general, and to sexual and gender violence, in particular, was of paramount importance. Due to such paradigm shift, victims of sexual violence perpetrated by the UPC/FPLC during the Ituri attack, who were disappointed by the lack of SGBCs charges and the overall unfolding of the Lubanga case, could finally experience vindication and a sense of justice when the Appeals Chamber confirmed Ntaganda's condemnation for the crimes of rape and sexual slavery "inter alia".

3 The Prosecutor v. Germain Katanga

In this case, the second in which the International Criminal Court had to deal with sexual and gender-based crimes, Katanga was charged with rape and sexual slavery, as both war crimes and crimes against humanity. In view of the lack of SGBCs charges in the Lubanga case, it constituted a step forward in the prosecution of such crimes before the Court.¹⁶

Initially, the Trial Chamber II affirmed that the acts of sexual violence during the attack to destruct Bogoro's civilian population were perpetrated with the same goal and objectively constituted part of that operation, not being isolated acts. In spite of that, the Chamber ultimately understood that rape and sexual slavery were not part of the militia's common purpose, as set up in art. 25(3)(d) of the Statute. It sustained that the perpetration of rape and sexual slavery was not crucial to achieve the goal of eliminating the Hema population. Also, in support of its finding, the TC II affirmed that such crimes were not part of the militia's "modus operandi" in its prior attacks and did not occur repeatedly and/or on a large scale.¹⁷

As a result, even though the Chamber recognised that rape and sexual slavery had been committed during the attack, it regarded that the group's criminal common purpose did not necessarily encompass their commission. Accordingly, it found that such crimes did not fall within the common purpose, and, hence, Katanga could not be considered responsible for them in the terms of article 25(3)(d) of the Rome Statute.¹⁸

Moreover, the Trial Chamber II adopted a restrictive interpretation of indirect co-perpetration in the terms of article 25(3)(a) of the Statute demanding proof that the defendant devised the crime, supervised its preparation, and was in charge of its performance and execution. This strategy consists in a high threshold for the prosecution of SGBCs. In fact, sexual violence crimes, even when widespread, normally are committed because they are tolerated and permitted instead of being directly ordered or planned.¹⁹

On the other hand, in the Ntaganda case, the Trial Chamber VI when addressing joint commission within the meaning of article 25(3)(a) of the Statute, understood that it was not a requirement that the common plan between individuals was expressly directed at the perpetration of a crime. It was enough

¹⁶ AMARAL, A. S. S. do (2020), p. 388

¹⁷ ICC, Katanga case, Trial Chamber II, Judgment pursuant to article 74 of the Statute, 7 March 2014, pp. 442, 637, 638

¹⁸ "Ibidem"

¹⁹ ICC website, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba 2018; ICC, Katanga case, Trial Chamber II, Judgment pursuant to article 74 of the Statute, 7 March 2014, pp. 541-542

that the common plan encompassed a “critical element of criminality”,²⁰ and that it was “virtually certain”²¹ that the execution of the common plan would result in the commission of the crimes at stake.²²

Following this logic, the Chamber considered that Ntaganda together with other co-perpetrators had an agreement to eliminate the Lendu population, which meant beyond reasonable doubt for civilians to be raped and subjected to sexual slavery, among other crimes.²³

Additionally, it regarded that Ntaganda “foresaw with virtual certainty”²⁴ that the implementation of the common plan would lead to the perpetration of the crimes of recruitment and active use in hostilities of children under the age of 15 within the UPC/FPLC as well as the rape and sexual slavery of these kids.²⁵

In this respect, the TC VI affirmed that although Ntaganda knew that UPC/FPLC commanders and fighters were subjecting girls below the age of 15 years to sexual violence, the latter were placed in UPC/FPLC camps together with male combatants, being exposed to suffer sexual abuses. Consequently, he was aware that it was nearly inescapable that the young female recruits and soldiers would be raped and sexual enslaved as a consequence of the execution of the common plan.²⁶

Therefore, in accordance with the Chamber’s view, were part of the common plan not only the rape and subjection to sexual slavery of civilians during the attack to drive out the Lendu population but also the rape and sexual slavery of children recruited into UPC/FPLC. Thus, the Court went beyond its previous findings on SGBCs and enlarged the range of protection of women against such crimes by disposing that combatants also can perpetrate rape and sexual slavery against women and girls members of their own militia.²⁷

Hence, while in the Katanga case the ICC had a restrictive interpretation of the criminal conducts which could be considered part of the common purpose, which caused the exclusion of sexual crimes and Katanga not being held accountable for them in the terms of article 25(3)(a), in the Ntaganda case the Court’s approach was more flexible. It stated that for crimes to be regarded as integrating the common plan, it would suffice that their commission was foreseeable as an “almost inevitable outcome” of the implementation of the common plan” and, hence, considered that rape and sexual slavery were within the common plan.²⁸

The ICC’s decision to apply a more comprehensive criterion to judge the crimes which are subsumed into the common plan enabled Ntaganda’s conviction for the crimes of rape and sexual slavery.

²⁰ ICC, Ntaganda case, Trial Chamber VI, Judgment, 8 July 2019, p. 367

²¹ “Ibidem”

²² ICC, Ntaganda case, Trial Chamber VI, Judgment, 8 July 2019, pp. 367, 379

²³ ICC, Ntaganda case, Trial Chamber VI, Judgment, 8 July 2019, p. 379

²⁴ “Ibidem”

²⁵ ICC, Ntaganda case, Pre-Trial Chamber II, Decision on the charges, 9 June 2014, p. 49-50; ICC, Ntaganda case, Trial Chamber VI, Judgment, 8 July 2019, pp. 367, 379

²⁶ “Ibidem”; ICC, Ntaganda case, Trial Chamber VI, Judgment, 8 July 2019, pp. 372-373, 379

²⁷ ICC, Ntaganda case, Trial Chamber VI, Judgment, 8 July 2019, pp. 379, 536

²⁸ ICC, Ntaganda case, Pre-Trial Chamber II, Decision on the charges, 9 June 2014, p. 49

4 The Prosecutor v. Jean-Pierre Bemba Gombo

The Bemba case was the first case of the International Criminal Court whose main focus was the perpetration of sexual crimes, specifically rapes.²⁹

In the 2016 judgment, the Trial Chamber III considered Bemba guilty as a person effectively acting as a military commander of the crimes of rape, murder and pillaging. He was sentenced to 18 years of imprisonment.³⁰

It passed almost 14 years since the beginning of the works of the International Criminal Court before an accused was tried and condemned by the Court for sexual and gender-based crimes for the first time. Also, it was the first ICC conviction based on the accused person's command responsibility for the his/her troops actions.³¹

However, the verdict and sentence were subject to appeals and, by Majority, the Appeals Chamber decided to reverse the judgment.³²

The Majority "adopted a number of modifications to the standard of appellate review for alleged errors of fact".³³ Instead of verifying "whether a reasonable Trial Chamber could have been satisfied beyond a reasonable doubt as to the finding in question"³⁴(that confers a "margin of deference" to the Trial Chamber's evaluation of the evidence), the Majority of the Appeals Chamber decided to adopt a new standard,³⁵ according to which it can "interfere with the factual findings of the first-instance chamber whenever the failure to interfere may occasion a miscarriage of justice"³⁶ in the occasions it is "able to identify findings that can reasonably be called into doubt."³⁷

It is noteworthy that in consonance with the new standard of appellate review, the Majority was entitled to review the record itself (instead of relying on the assessment of Trial Chamber, as in the usual standard of review), but decided not to assess all evidence again.³⁸

²⁹ ICC website, Central African Republic, Situation in the Central African Republic, ICC-01/05,

³⁰ ICC, Bemba case, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, 21 March 2016, p. 364; ICC, Bemba case, Trial Chamber III, Decision on Sentence pursuant to Article 76 of the Statute, 21 June 2016, pp. 43, 44, 45

³¹ ICC, Bemba case, Pre-Trial Chamber II, **Mr. Bemba's claim for compensation and damages**, Annex E "The Guardian (2018). Jean-Pierre Bemba 's war crimes conviction overturned, 19 March 2019, pp. 3-5

³² ICC, Bemba case, the Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", 8 June 2018, p. 4; ICC. Media Advisory, Bemba case: Appeals Chamber to issue appeals judgments on verdict and sentence on 8 June 2018, 18 May 2018

³³ ICC, Bemba case, the Appeals Chamber, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, 21 March 2016, p. 4

³⁴ ICC, Lubanga case, the Appeals Chamber, [Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute"](#), 1 December 2014, p. 13; ICC. Bemba case, the Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", 8 June 2018, p. 13; SÁCOUTO, S. (2018) <https://www.ijmonitor.org/2018/06/the-impact-of-the-appeals-chamber-decision-in-bemba-impunity-for-sexual-and-gender-based-crimes/>

³⁵ ICC, Lubanga case, the Appeals Chamber, [Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute"](#), 1 December 2014, p. 13; ICC, Bemba case, the Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", 8 June 2018, p. 13; SÁCOUTO, S. (2018)

³⁶ ICC, Bemba case, the Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", 8 June 2018, p. 13

³⁷ "Ibidem", p. 15

³⁸ SÁCOUTO, S. (2018) <https://www.ijmonitor.org/2018/06/the-impact-of-the-appeals-chamber-decision-in-bemba-impunity-for-sexual-and-gender-based-crimes/>

Furthermore, it decided to deviate from the ulterior jurisprudence of the ICC and international practice in relation to how criminal actions brought later in the proceedings can be considered within the scope of the charges independently of their explicit confirmation by the Pre-Trial Chamber (PTC). In fact, instead of understanding that the charges had been formulated in a broad manner, the Majority considered that the crimes added by the Prosecution after the Confirmation Decision required express confirmation by the PTC to be within the facts and circumstances described in the charges pursuant to article 74 (2) of the Statute. In these circumstances, the Majority regarded that these criminal acts were outside the reach of the case and the related proceedings were discontinued.³⁹

In what concerns the criminal acts that had been specifically confirmed by the Pre-Trial Chamber in the Confirmation Decision, the Majority of the Appeals Chamber understood that Bemba, as a commander, did not fail “to take all reasonable and necessary measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution”. As a consequence, one of the elements of command responsibility (article 28(a)(ii) of the Rome Statute) was missing and Bemba was acquitted of the charges. However, to reach this conclusion, the Majority did not conduct a thorough analysis. Apart from reviewing only part of the evidence, it did not verify if the measures that Bemba had adopted were adequate to the nature of the crimes and sufficed to stop or avoid them.⁴⁰

Consequently, upon deploying a novel standard of appellate review, the Majority of the Appeals Court regarded that the criminal acts included in the case after Confirmation Decision were not within the scope of charges and discontinued the related proceedings. Further, after a partial and limited examination, it determined that Bemba had adopted all reasonable and necessary measures within his power to prevent or repress the commission of the crimes and, for this reason, did not have command responsibility. As a result, the Majority considered that he could not be rendered guilty and overruled the conviction.

After the Bemba case, the Prosecutor released a statement affirming that it was unfortunate that both the change from the Court's previous jurisprudence on the standard of appellate review (and its substitution with uncertain standards), and the shift about the level of detail demanded from the Prosecution to bring charges in mass criminality cases had occurred “in the most serious case of sexual and gender-based violence decided upon by this Court to date”. In the same opportunity, the Prosecutor expressed that she hoped to that the novel features of the Majority's ruling would be redirected over time, including “a return to those standards of appellate review”.⁴¹

As already state, Ntaganda was found guilty on 18 counts, inclusive of rape and sexual slavery as both crimes against humanity, as an indirect co-perpetrator under Article 25(3)(a) of the Statute, and as war crimes, as an indirect co-perpetrator under Article 25(3)(a) of the Statute; and against children under

³⁹ ICC, Bemba case, the Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's “Judgment pursuant to Article 74 of the Statute”, 8 June 2018, pp. 41, 79; ICC website, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba 2018

⁴⁰ ICC, Bemba case, the Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's “Judgment pursuant to Article 74 of the Statute”, 8 June 2018, p. 14; SÁCOUTO, S. (2018) <https://www.ijmonitor.org/2018/06/the-impact-of-the-appeals-chamber-decision-in-bemba-impunity-for-sexual-and-gender-based-crimes/>

⁴¹ ICC website, Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba 2018

the age of 15 years incorporated into the UPC/FPLC. He was sentenced to 30 years in prison, the longest sentence ever imposed by the Court, within the terms of Article 77(1)(a) of the Statute.⁴²

On 30 March 2021, the Appeals Chamber confirmed, the verdict by Majority and the sentence unanimously. The AC went back to the ICC's usual standard of appellate review by stating that its role was "to ensure that, in arriving at its conclusion, the trial chamber correctly appreciated and applied the standard of beyond reasonable doubt".⁴³ It continued saying that it would not disturb a Trial Chamber's factual finding solely because it would have come to a different conclusion.⁴⁴

Hence, the criticism and disappointment over the Bemba case led to the restatement of the usual standard of appellate review by the Appeals Chamber.⁴⁵

In fact, the Bemba case exerted a negative impact on the victims and had a detrimental effect on the ICC's reputation. It tarnished the Court's reliability, by giving rise to the question if the Court was not entering final sentences against defendants based on SGBCs as a consequence of the its inefficiency to translate into practical action the Statute's groundbreaking provisions on sexual and gender-based crimes, or because it was promoting selective justice.

However, the Ntaganda case proved these doubts wrong. The confirmation of Ntaganda's conviction for the crimes rape and sexual slavery (among others) by the Appeals Chamber was important in the International Criminal Court's history. After almost 19 years of activities, it finally managed to issue a final decision holding a defendant responsible for the crimes of rape and sexual slavery, thus, translating into its practice the innovative dispositions of the Statute on SGBCs. The ICC demonstrated its capacity to prosecute and punish this kind of crimes, living up to its mandate as established in the Rome Statute.

The outcome of the Ntaganda case meant accountability, justice and reparation to victims of sexual violence. Also, this long-awaited final conviction for rape and sexual slavery can contribute to bring to an end the underlying impunity of sexual and gender-based crimes and have a deterrent effect by inhibiting their practice in future conflicts.

5 Conclusion

The Ntaganda case consists in the corollary of a long, evolving process along which the International Criminal Court advanced in the prosecution of sexual and gender-based crimes.

In the Lubanga case, the scope of the charges was limited to the crimes of conscripting and enlisting children under the age of fifteen years into the UPC/ FPLC and using them to participate

⁴² ICC, The Prosecutor v. Bosco Ntaganda, Trial Chamber VI, Judgment, 8 July 2019, pp. 1-539; ICC website, Press Release, ICC Trial Chamber VI declares Bosco Ntaganda guilty of war crimes and crimes against humanity, 2019; United Nations, ReliefWeb, International Criminal Court Upholds Landmark Conviction of Warlord for Atrocities Committed in the Democratic Republic of the Congo - Democratic Republic of the Congo; ICC website, Press Release, ICC Trial Chamber VI declares Bosco Ntaganda guilty of war crimes and crimes against humanity, 2019; Rome Statute, Art. 77(1)(a)

⁴³ ICC, The Prosecutor v. Ntaganda, the Appeals Chamber, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', 30 March 2021, p. 20

⁴⁴ ICC, The Prosecutor v. Ntaganda, the Appeals Chamber, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', 30 March 2021, p. 22

⁴⁵ "Ibidem"

actively in hostilities. However, the ICC learned from its first case that both victims and the international community were yearning for sexual and gender-based crimes to be included in the charges.

In the Katanga case, the defendant was charged with the crimes of rape and sexual slavery, circumstance that represented a progress in the trial of SGBCs by the Court. Nevertheless, Katanga could not be held responsible for these crimes since the TC II considered that they were not part of the common purpose of the militia. In spite of that, the case led the Court to apply a new approach in the Ntaganda case and consider a crime- including a SGBC- to be part of a militia's common plan if its occurrence was foreseeable with virtual certainty in the unfolding of the events.⁴⁶

In the Bemba case, the accused was charged and found guilty of rape, but the Appeals Chamber, by Majority, reversed the conviction. The decision of the Majority to acquit Bemba was heavily criticized. It was considered grounded on unsolid, unjustified basis which warranted neither a deviation from the Court's standard of appellate review nor the requirement of a higher threshold of specificity in the charging process. As a result, the ICC was aware that it should no longer recur to the method it had employed in the judgment of these appeals. In the Ntaganda case, the Appeals Chamber had the chance to go back to the usual standard of appellate review. By resorting to the commonly applied standard, the Appeals Chamber confirmed the Trial Chamber VI's finding that Ntaganda was guilty of the crimes of rape and sexual slavery.

Therefore, each of the cases constituted a further step, allowing the ICC to progress in its handling of sexual and gender-based crimes. Undoubtedly, the first cases played a crucial role. They served as empirical catalysts for the ICC training and evolution, furnishing it with practical experience and knowledge on how to address these crimes. As a consequence, they enabled the Court to lay the correct foundations to effectively try sexual violence.

The evolution process of the ICC's approach towards sexual and gender-based crimes reached its apex in the Ntaganda case. The defendants' final conviction for rape and sexual slavery was possible due to the lessons learnt by the Court along the Lubanga, Katanga and Bemba cases. Undeniably, the three initial cases were instrumental for the successful outcome of the Ntaganda case.

It seems that the International Criminal Court is in the correct path with respect to the prosecution of sexual and gender-based crimes. Ntaganda's final conviction restored the Court's reputation and trustworthiness regarding their trial and punishment. However, the Court ought to maintain its newly achieved course of action in future cases in order to further the implementation of its central objective: that sexual and gender-based crimes, being among the most serious crimes for the international community, do not remain unpunished and are effectively prosecuted.⁴⁷

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