

ICC Appeals Chamber judgments in the Ntaganda and Gbagbo/Blé Goudé cases

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Introduction

During the last week of March, the Appeals Chamber of the International Criminal Court (ICC) issued two judgments, first on March 30 in the Ntaganda case (see here) and then a day later in the Gbagbo/Blé Goudé case (see here). In both instances majorities of the Appeals Chamber upheld the judgments of the Trial Chambers (which have been discussed in this Journal here and here and which have already been subject to commentary, see here). The judgment in the Ntaganda case provides clarification on a number of substantive issues while the Gbagbo/Blé Goudé decision does the same

for some procedural questions; at the same time, both judgments are difficult to absorb due to the large number of separate, concurring and dissenting opinions.

Before discussing the two decisions, it might be useful to put them in a larger context as is not often that the Appeals Chamber of the ICC pronounces itself on important substantive and procedural issues. While the Appeals Chamber has issued decisions in a large number of interlocutory matters, its output in substantive issues has been more limited, namely only on nine occasions since December 2014, including the two cases, which are the subject of this article. There have been judgments three times regarding international crimes, namely in regards to the Lubanga conviction (see here); the Chui acquittal (see here); and the Bemba conviction (see here) (while in other such situations no appeal was launched as in the cases of Ruto/Sang (see here) and Al Mahdi (see here); or the appeal was discontinued as in Katanga (see here); or the case has not progressed far enough yet to launch an appeal as in Ongwen who has been convicted (see here for a commentary) but not sentenced). As well, appeal decisions were reached in one case with charges related to the administration of justice (Bemba at al., see here) and three cases involving reparations (Lubanga, see here; Al Madhi, see here for a commentary; and Katanga, see here for a commentary). Only in one instance in the above cases did the Appeals Chamber disagree with the Trial Chamber, namely in the Bemba substantive trial where the guilty verdict of the Trial Chamber was overturned and substituted for an acquittal.

It is unlikely that there will be other Appeal Chamber judgments on substantive issues in the near future. The Ongwen sentencing is set for a hearing later this month (see here) with likely an appeal hearing later this year but the four other cases in progress will take much longer to reach the appeal stage as one, Al Hassan (re the situation in Mali), started only last July (see here) and the other one, the Yekatom and Ngaïssona case (regarding the situation in the Central African Republic) began in February of this year (see here); even further away are the cases, which have only be scheduled for the confirmation of charges hearing later this year, namely Abd–Al-Rahman (for the situation in Sudan) in May (see here) and Kani (for the situation in the Central African Republic) in October (see here).

The Blé Goudé Case – Overview

The Gbagbo/Blé Goudé case did not address any of the substantive crime determinations by the Trial Chamber (see here for one of those issues) but confined itself to two procedural questions of interest to the ICC only, namely whether the time period between the decision by the Trial Chamber that there was no case to answer after the evidence by the prosecutor had been adduced (akin to directed verdict in Canadian criminal law, see here) and the issuance of the written reasons six months later was in accordance with article 74(5) of the *Rome Statute* (see here) and whether the standard is the same as for a trial, namely beyond reasonable doubt. The majority of the Appeals Chamber concluded that both questions should be answered in the positive (see here, paras 1-7). In addition to the main judgment, there were also four other opinions, namely:

- the Separate Concurring Opinion of Judge Eboe-Osuji (see here), providing further reasons regarding article 74(5);
- the very short Separate Concurring Opinion of Judge Howard Morrison (see here) agreeing with both the main opinion and the one by Judge Eboe-Osuji);
- another short Separate Concurring Opinion of Judge Piotr Hofma?ski (see here) agreeing with the majority just mentioned except for the fact that they considered the first decision one in writing, with which he disagreed;
- and the lengthy lone dissenting opinion of Judge Luz del Carmen Ibáñez Carranza (see here), which not only disagrees with both the conclusions of the majority but goes even a step further and is of the view that the no case to answer proceeding has no place in the ICC framework as it is an exclusively common law institution.

Given the limited relevance to general international criminal law, it will not be discussed further in this article but for a commentary (see here). While the Gbagbo/Blé Goudé case saw opinions of four out of the five appeals judges, the majority was at least fairly consistent in its views, which were only opposed by one judge.

The Ntaganda case - Overview

The other case, Ntaganda, presents a more confusing picture in the conviction judgment (see here) with respect to war crimes and a particular form of liability (the sentencing judgment was unanimous, see here). The substantive details of the conviction judgment will be discussed below but it is useful to set out the various configurations of the five opinions in addition to the main judgment. The two main disagreements centered around the parameters of article 8(2)(e)(iv) of the *Rome Statute*, see here, which makes “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives” a war crime, as well in respect to the question whether indirect co-perpetration is a form of liability within article 25(3)(a) of the *Rome Statute* (for a discussion of this concept as discussed by the Trial Chamber in the Ntaganda case, see here).

The majority of the judges are of the view that indirect co-perpetration is a form of liability in international criminal law (see main judgment here, paras 879-880) but this view is contested in two minority opinions, namely the separate opinion of Judge Howard Morrison (see here) and the partly concurring opinion of Judge Chile Eboe-Osuji (see here) but defended in the separate opinion of Judge Luz Del Carmen Ibáñez Carranza (see here) while the two other judges in the majority did not express their views on this point.

The configuration of reasons regarding the views on the war crime issue is rather confusing. It is confusing as it is discussed in the context of the prosecutor’s appeal and, while a majority of the judges would agree with the prosecutor that a broader view of this war crime is correct in law, they still reject the appeal on other grounds, namely because they would have preferred other charges for the

events in question or because the evidence regarding this particular charge was not convincing (see here, paras 1163-1165). It is also confusing when comparing this legal issue with the one above in that the two judges who agreed on a narrow interpretation for indirect co-perpetration disagreed now on the war crimes issue with Judge Morrison (together with judge Hofma?ski) taking again a narrow view (see here) and Judge Eboe-Osuji taking the broader approach (see here) together with judges Balungi Bossa (see here) and Judge Ibáñez Carranza (which is set out in a dissent in the main judgment at paras 1165-1168 rather than in her separate opinion (see here)). The remainder of this article will discuss the substantive aspects of the issues mentioned here as well as legal questions surrounding crimes against humanity.

Crimes against Humanity

Judge Ibáñez Carranza decided to take the opportunity to provide an authoritative view of the overarching elements of crimes against humanity as set out in the preamble of article 7.1 and in article 7(2)(a) of the *Rome Statute* (see here) as she writes "there seems to be a certain level of confusion on the contours of the specific elements set out in the Statute and in the Elements of Crimes" (see here, para 33). First, she discusses in detail these overarching elements, namely:

- the meaning and nature of the notion of organization with reference to previous ICC jurisprudence and academic commentary (paras 39-64);
- the meaning and nature of organizational policy with reference to ICC jurisprudence, customary international law, the jurisprudence of other international tribunals, the *travaux preparatoires* of the Rome Statute and academic commentary (paras 81-145);
- the notions of systematic and widespread attacks with reference to previous ICC jurisprudence and academic commentary (paras 170-186).

This is then followed by her conclusions, which in view of the importance of harmonizing all the existing jurisprudence and academic views, are set out in detail (para 380):
"With respect to the organisational policy to commit a widespread or systematic attack directed against a civilian population, the following final conclusions are drawn:
a. Meaning and nature of an organisation within the meaning of article 7 of the Statute:
i. Although the State generally embodies the most complete form of organisation, other entities may also qualify as an 'organisation' under article 7(2) of the Statute.
ii. In the context of crimes against humanity, an organisation consists of a group of at least three persons who are hierarchically organised and structured and pursue a particular objective.
iii. The conformation of the organisation may be formal or informal and it could be a criminal or a non-criminal organisation.
iv. The criteria that defines an organisation within the meaning of article 7 of the Statute are those features that would allow it to carry out a widespread or systematic attack directed against any civilian population. This determination is fact-sensitive.
b. Meaning and nature of the organisational policy:
i. The policy element and the systematic nature of the attack are different – while the former is the

cause, the latter is the result of its implementation.
ii. The policy need not be formalised or explicitly defined – it may be inferred from the existence of a planned, directed or organised attack that would exclude spontaneous or isolated acts of violence.
iii. Often, the policy crystallises once the attack against the civilian population is already underway and therefore sometimes it can only be defined once the acts have been committed and in light of the overall course of conduct.
iv. The organisational policy may be inferred from a variety of factors, inter alia, the level of planning, recurrent patterns of violence, the involvement of the State or organisational forces in the commission of crimes, statements attributable to the State or organisation condoning or encouraging the commission of crimes, an underlying motivation, deliberate omissions by the organisational hierarchy, the modus operandi, etc.
v. The policy element qualifies the widespread or systematic attack and not each individual underlying criminal act.
vi. It may be possible that the State or organisation is motivated by a legitimate aim but the means through which it seeks to achieve it (the policy) are criminal resulting in a widespread or systematic attack directed against the civilian population.
vii. When interpreted in light of the object and purpose of the Rome Statute, the policy element ought to be understood as imposing a minimum threshold that aims at excluding ordinary crimes from the realm of crimes against humanity.
c. Meaning and nature of a widespread or systematic attack directed against any civilian population:
i. A widespread or systematic attack directed against any civilian population is the hallmark element of crimes against humanity and is the cross-cutting element against which all individual criminal acts charged in a given case must be assessed.
ii. While attacks in the sense of international humanitarian law are linked to armed hostilities, involve acts of physical violence, and target the civilian population as a means of war and thus with a military objective, a widespread or systematic attack against the civilian population for purposes of establishing crimes against humanity need not be physically violent in nature, need not be linked to an armed conflict, and the purpose for triggering the attack is irrelevant.
iii. A widespread and systematic attack in article 7 of the Statute amounts to a campaign of serious human rights violations that materialises in the multiple commission of acts referred to in article 7(1) of the Statute.
iv. A single criminal act may constitute a crime against humanity when committed in the context of a broader campaign against the civilian population.
v. While the widespread qualifier refers to the geographical scope of the attack and/or the number of victims, the systematic character relates to the organised nature of the acts of violence and the improbability of their random occurrence."

In addition to this excellent overview of the main elements of the overarching aspects of crimes against humanity in Judge Carranza's separate opinion, the main judgment (see here) provides one additional comment to this discussion, namely the observation based on ICTY and SCSL jurisprudence that the concept of an attack on civilian population does not mean that such an attack

has to be the primary or main object of the acts in question and “an attack directed against a civilian population may also serve other objectives or motives.” (para 424). As well, Judge Eboe-Osuji adds the following observation in his partially concurring opinion: “My view is that the phrase ‘organisational policy’ as it is employed in article 7(2)(a) is nothing more than an imperfect expression of a requirement that the attack against a civilian population must have been coordinated and not spontaneous. ‘Organisational policy’ in this sense may be construed as meaning the coordinated course of action of an individual or group of individuals acting together.” (see here, para 144)

War Crimes

Two issues with respect to war crimes were discussed in the Ntaganda appeals judgment, one already referred to above concerning attacks against protected objects and another with respect to the war crime of displacement of civilians.

The first issue related to article 8(2)(e)(iv) of the *Rome Statute* where the question was whether, after the main attack had been completed, mop-up or *rattisage* operations on a hospital, involving looting, and on a church involving soldiers breaking into the church, removing furniture, digging trenches around and starting a fire inside it to prepare food (see here, paras 1146-1148) should be included in the term “attacks against buildings” as set out in this article. The Trial Chamber had rejected the argument of the Prosecutor that looting of protected objects was part of such as attack because according to the international humanitarian instrument *Additional Protocol I*, article 49 attack means “acts of violence against the adversary, whether in offence or defence” and that the pillage of the hospital as a protected object was not such an act of violence. Similarly, the activities against the church had taken place sometime after the original assault and so not during actual conduct of hostilities (paras 1149-1153).

As indicated above, the majority of judges disagreed with the Trial Chamber but rejected the prosecutor’s appeal for other reasons. On the substantive question, two judges provided a separate opinion (the separate opinion of Judge Howard Morrison and Judge Piotr Hofma?ski, see here), in which they defended the Trial Chamber’s views on the grounds that, based on the history of the protection of certain objects (paras 12-23) and the meaning of the term “attacks” as combat action in international humanitarian law (IHL) (paras 24-38) the use of this term “attacks” conveys a narrower meaning than the notion of “acts of hostility” used elsewhere in IHL instruments, resulting in the observation that “attack” only means “combat action” (para 43). The other three judges disagreed with this narrow interpretation, either because it was at odds with the object or purpose of the *Rome Statute* (Judge Ibáñez Carranza in her dissenting opinion in the main judgment at paras 1167-1168); because the mop-up operations were carried out “in a combative fashion, in the immediate aftermath of an assault with heavy weaponry as part of the military operations against the enemy”, so that both the main operation and subsequent activities constituted in fact one continuous combat action (see separate opinion of Judge Solomy Balungi Bossa, here, paras 8 and 18); or because the central object of the *Rome Statute* is to protect basic human rights and artificially separating various phases of the ultimate purpose of a combat operation to make an area more secure does not serve this overarching

object (see partly concurring opinion of Judge Chile Eboe-Osuji, here, paras 128-132 with a background leading to this conclusion in paras 109-127).

The second issue with respect to war crimes was discussed in the main judgment, which had the support of all five judges, and dealt with the question whether territorial control is a prerequisite to ordering the displacement of the civilian population as a war crime under article 8(2)(e)(viii) of the *Rome Statute* in the context of non-international armed conflicts; this article criminalizes "ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand". The Appeals Chamber was of the view that there is no such requirement primarily by contrasting the wording of this article with its equivalent for international armed conflicts, article 8(2)(b)(viii) of the *Rome Statute*, which specifically refers to territory. (see here, paras 546-564)

Indirect Co-perpetration

This was the first time that the Appeals Chamber addressed indirect co-perpetration as a form of liability in the *Rome Statute*. It was accepted as such by the majority with two dissenting judges, Morrison and Eboe-Osuji (for a commentary on their views, see here).

Judge Morrison acknowledged that there had only been two trial judges who in dissenting opinions in previous cases had objected to the addition of indirect co-perpetration to the other three forms of liability in article 25(3)(a) (see here, para 3) but still broadly agreed with their reasoning. His concerns with indirect co-perpetration were twofold. First, the theory, on which this form of liability is based, namely control of the crime in the context of organized criminality cannot be based on the text in this article as a matter of statutory interpretation and that there are other legal possibilities in article 25(3), which could be utilized to address this form of criminality (paras 4-13). Secondly, the requirement developed at the trial level to hold a person responsible as an indirect co-perpetrator such as the power of such a person in a hierarchical power structure and such as the essential contribution to the plan are very difficult to prove as a matter of practicality (paras 14-31; for an elaboration on these requirement as applied by the trial chamber in his case, see here). In his view, article 25(3)(d) dealing with common purpose is the more appropriate vehicle to hold persons liable who operate in an organizational criminal context (paras 37-40).

Judge Eboe-Osuji, after discussing the theory of criminal responsibility (see here, paras 14-28) and canvassing academic commentary and carrying out a comparative analysis of a number of countries (paras 29-61), expresses doubt about the validity of the control of the crime theory in the ICC context and comes to the conclusion that "It is thus not an aberration that the drafters of the *Rome Statute* did not make or intend a distinction between the modes of criminal responsibility set out in article 25(3), for purposes of differentiation of punishment between principals and accessories" (para 62). For that reason, he is of the view that there is no need for this theory (paras 64-76), that the theory is too complicated (paras 77-95) and that it would be better to use the forms of liability contained in articles 25(3)(b) – (d) to address involvement of persons in criminal organizations as accessories rather than

try to shoehorn them into article 25(3)(a) with the sole purpose of labelling then perpetrators (paras 96-102).

The above concerns are refuted by Judge Ibáñez Carranza in her separate opinion, presumably speaking on behalf of the other two judges of the majority as well (see here). She starts out her analysis by indicating that the *travaux preparatoires* as well as the text of article 25(3)(a) allows for a reading in of the notion of indirect co-perpetration (paras 215-222), that control over the crime is an established methodology to distinguish between perpetrators and accessories (paras 223-232) and that this form of liability is commonly used to hold persons in organized power structures responsible, especially in Germany and South America (paras 233-247). She then explains the criteria for applying this form of liability in organized power structures in some detail, referring to both the work of Roxin, the foremost theorist in this area, as well as to ICC and Peruvian jurisprudence (paras 248-277 and 297-308). Lastly, she explains the differences between indirect co-perpetration and other forms of liability in article 25(3) of the *Rome Statute* and why those are not useful substitutes for indirect co-perpetration (paras 278-283 for instigation as set out in article 25(3)(b); 284-288 for complicity as set out in article 25(3)(c); paras 289-292 for common purpose as set out in article 25(3)(d); and paras 293-296 for superior responsibility as set out in article 28). Her conclusions as to the requirements and elements of indirect co-perpetration are set out in paras 309-315, which are similar to the ones already established in earlier jurisprudence by various trial chambers, including the Ntaganda case itself (see here).

Sentencing Judgment

The sentencing judgment was unanimous in confirming the 30 years sentence imposed by the trial chamber. The judgment (see here, with a summary here, paras 66-88) is very factual and dealt with the defence argument why aggravating circumstances against Ntaganda by the Trial Chamber were taken into account erroneously and why the Trial Chamber should have applied more mitigating circumstances; all these objections raised by Ntaganda were rejected.

Conclusion

The judgment of the Appeals Chamber in the Ntaganda case provides some very useful statements with respect to international criminal law. First, the separate opinion of Judge Ibáñez Carranza provides an authoritative direction for both judicial institutions and practitioners in this field for all aspects of the overarching elements of crimes against humanity as well as the concept of indirect co-perpetration.

Her views regarding the issue of indirect co-perpetration reflect the majority in this case on this issue and as a result and has laid to rest the intense debate among scholars and some ICC judges regarding the question whether this form of liability is part of the ICC arsenal to hold to account perpetrators of international crimes. This trend to widen the circle of perpetrators under the *Rome Statute* and indirectly international criminal law can also be seen in the different majority judgment of

the appeals chamber which sought to broaden the notion of attacks in the context of the protection of certain objects, such as hospitals and places of worship. This trend was already present in an earlier interlocutory decision of the same bench with the parameters of who can be victims of war crimes (see here).

Lastly, from a procedural aspect, it is hoped that the trend at the appeals level to issue more and more complicated judgments with views by different judges on different issues will be curbed in the future. Of the four appeals judgments regarding substantive crimes since 2014, the first two were relatively homogeneous (see here for the Lubanga appeals judgment with one dissenting and one partially dissenting judgment, which are relatively short and here for the Chui appeals judgment with one relatively short joint dissenting opinion) while the third already showed a more complicated configuration of opinions (see here, paras 32-34 while in the separate opinion by Judge Christine Van den Wyngaert and Judge Howard Morrison, regret is expressed for this state of affairs, see here, para 2). But this complexity was taken to new heights in the present case of Ntaganda. This trend is especially troublesome as already six months earlier, the Independent Expert Review of the International Criminal Court and the Rome Statute System in its Final Report of 30 September 2020 had expressed concerns about this lack of consensus at the trial level (see here, page 150, paragraph 472 as well as recommendation R185). This observation, which should apply even more to the appeals chamber given its composition, the risk of more variations of opinions (and in view of the same exhortation in the Rome Statute to reach consensus in its article 83(4) and the fact that the appeals chamber should set an example for the trial chambers.

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