

## A historic moment? Assessing the Thomas Lubanga trial



Photograph: Michael Kooren/REUTERS

Only a few lines can be read here and there in this week's international newspapers. No big headlines, despite the significance of the moment, even for this summer's Arab revolts. After almost three year, 220 sittings and 63 witnesses, the Thomas Lubanga trial is finally coming to an end at the International Criminal Court (ICC). Three long, tumultuous years, during which the founder and president of the Union des Patriotes Congolais (UPC) - and its military wing the Forces Patriotiques pour la Libération du Congo (FPLD) – has always claimed his innocence. Arrested over five years ago, Lubanga is accused of enlisting and using child soldiers under the age of 15 years during the 2002-2003 conflict in the Democratic Republic of the Congo (DRC). In all, the “Africa's Great War” has led to the death of at least 5.4 million people. The recruitment of child soldiers constitutes a war crime under the Rome Statute, the law which created the ICC. This week, the three judged-Chamber officially closed the trial phase, promising to hand in the verdict "within a reasonable period of time", which, if we follow the trial's “trend” will take several months and should be delivered early next year.<sup>1</sup> If convicted Lubanga's case would be a considerable step forward for international law. On Thursday and Friday, the prosecution and the defence respectively were given the opportunity to deliver their closing statements. These two final sessions are certainly representative of the atmosphere which dominated this historic case.

*The Prosecution: “guilty beyond any possible doubt”*

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<sup>1</sup> Sesay, Alpha. “Daily report: Long proceeding in Trial of Thomas Lubanga finally reach an end”, *The Lubanga Trial*, 26 August 2011, <http://www.lubangatrial.org/2011/08/26/long-proceedings-in-trial-of-thomas-lubanga-finally-reach-end/>, accessed 28 August 2011.

On Thursday, deputy prosecutor Fatou Bensouda declared that "evidence submitted in this case show not only beyond reasonable doubt but beyond any possible doubt that Thomas Lubanga is guilty."<sup>2</sup> A video showing Lubanga at a training camp in 2003 and allegedly addressing children being trained should serve as a grand proof that they were "systematically enrolled" to kill, rape and loot civilians in Ituri, northeastern Congo. She denounced the physical and mental scars left by what she described as "the most cruel training" as children were regularly beaten and "transformed into killers".<sup>3</sup> Bensouda believes a conviction would not only bring justice to the victims but would contribute to fight against impunity by sending a clear message to those who continue to recruit children in their troops. The victims' representative, Paolina Massida, uttered similar words and regards the trial as "historic for the thousands of victims in Ituri hoping that justice will be done."<sup>4</sup> Finally, Special counsel to the prosecutor's office and remarkable US lawyer, Benjamin Ferencz, described Lubanga's case as "a plea of humanity to law" arguing that "words and figures cannot adequately portray the physical and psychological harm inflicted on vulnerable children."<sup>5</sup> As the prosecution delivered its final statement, Lubanga remained true to his attitude in the face of these accusations: he remained stoic or simply smiled in disbelief.

#### *The Defence: witnesses lied to get compensations*

Accusing the prosecution of gross incompetence, the defence's position could of course not be further at odds. The attorneys were very clear: Lubanga is not guilty; the prosecution's case does not hold. Consequently, they urged the judges to acquit the accused of all charges. The defence argues that Lubanga's guilt cannot be proven not simply due to a lack of evidence but for various legal and procedural reasons as well. For an hour, lead Defense Attorney Catherine Mabile claimed that the trial had reached an "unparalleled" level of falsehood and has been highly "dysfunctional" since the beginning.<sup>6</sup> She first insisted that eight of the nine child soldiers brought forward by the prosecution had never served with the UPC since official school records show they had been at school at the time. The ninth witness, meanwhile, is said to have lied about his age. According to Mabile, the witnesses fabricated testimonies in exchange for compensations, including financial or educational benefits. She supported these allegations by saying that the intermediaries chosen to find witnesses had close link to the prosecution.

According to Lubanga's second lawyer, Mr. Biju-Duval, the former Congolese rebel is not a war criminal or even a military leader. Shockingly (or not) they presented their client as a politician who not only fought against the inhumane conditions inflicted on Congolese people but also as someone who sought to prevent the recruitment of child soldiers by his troops. As a "mere" political representative he was not in "effective control" of the troops and was therefore

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<sup>2</sup> International Justice Desk. "Lubanga guilty 'beyond any possible doubt'", *Radio Netherlands Worldwide*, 26 August 2011, <http://www.rnw.nl/international-justice/article/lubanga-guilty-beyond-any-possible-doubt>, accessed 27 August 2011

<sup>3</sup> Ibid.

<sup>4</sup> ANP/AFP. "Lubanga guilty 'beyond any possible doubt': ICC prosecutor", *Radio Netherlands Worldwide*, 25 August 2011, <http://www.rnw.nl/africa/bulletin/dr-congo-warlord-guilty-beyond-doubt>, accessed 27 August 2011.

<sup>5</sup> Ibid.

<sup>6</sup> Sesay

unable to impose his will.<sup>7</sup> The UPC had already been set up by two other FPLC commanders, Floribert Kisembo and Mr. Bosco Ntaganda, before Lubanga became the group's leader in 2002. The former Congolese rebel is thus not depicted as violent warlord but as a human rights activist who fought for the rights Congolese people and children.

This astonishing portrait was also echoed by Lubanga in his closing speech. Declaring that "throughout the course of this trial ... it has been impossible for me to recognize myself within the context of the actions ascribed to me and the intentions attributed to me" he claimed that he became leader of the UPC "only with a view to protecting what is dearest to every man, namely life."<sup>8</sup> Whether ultimately considered guilty or not, the victims and their relatives must likely see such statements as an insult. If proven guilty, however, this image will effectively be shattered.

#### *Controversies: a tumultuous three years for a landmark case*

Handed over to the ICC in 2006, Lubanga has been sitting in jail for five years and victims have long been waiting for this moment. That the defence should call the trial "dysfunctional" is no surprise. This is the ICC's first case and the trial has naturally experienced its fair share of historic moments...and major challenges. As expected, the relationship between the judges, the defence and the prosecution during the entire trial has been more than tense. Overshadowed by delays, the trial was suspended and the accused almost released twice as a result of the chief prosecutor's refusal to implement the judges' demands. In 2008, Luis Moreno-Ocampo refused to hand over evidence which could have helped Lubanga's defense, eventually leading the judges to conclude that "the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial".<sup>9</sup> Moreno-Ocampo ultimately agreed to disclose the 200 documents to Lubanga's lawyers. In July last year, the trial again came to a standstill as the Chief prosecutor refused to reveal the identity of one of the intermediaries' used to contact witnesses. The case only continued once the prosecutor finally agreed to divulge his identity; otherwise the whole legal proceeding would have collapsed.

#### *Gender-based violence: second rank?*

Ultimately, one of the case's major setbacks is the lack of attention paid to sexual violence, which constituted an inherent feature of the UPC's conscription practices. Girls were raped and allegedly given by Lubanga to commanders as sexual slaves. Yet gender-based violence, which constitutes a crime under international law, was not included among the charges against the accused and was not even investigated in relation to child soldiers. Several NGOs contested the decision and led their own investigations. During the proceeding, one of the victim's relative rightly reasoned that the judges should consider the crime as an "aggravating circumstance" and, if proven guilty, should allow victims to play a role in determining Lubanga's sentence.<sup>10</sup> This is the minimum the court should do.

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<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> "Background", *The Lubanga Trial at the International Court*, <http://www.lubangatrial.org/background/>, accessed 28 August 2011.

<sup>10</sup> Sesay

Although it justly highlights the plight of child soldiers, the trial's sole focus on combatants is too narrow and does not give gender-based violence enough significance. One erroneous image of child soldiers is that one of a homogenous mass where all children (boys) fight with guns. Yet child soldiering is much more complex, experiences vary and girls are certainly enrolled and used as sex slaves. The definition of what constitutes a child soldier is already contested in international law and if the appropriate policies and programs are to be implemented to fight against the plight and bring reparations to the victims, greater attention should be paid to the complexity and particularly the gendered dimension of the problem. Last but not least, rape and other forms sexual crimes continue to be perpetrated in the DRC. Despite the 2003 peace agreement, militias continue to fight for power and resources in eastern Congo. As many people hopefully know by now, rape and other forms of gender-based violence are used as weapons of war by many rebel groups and the Congolese army itself. In the case of Congolese, acknowledging these crimes should have been all the more significant, not only for the victims but for the perpetrators as well.

*And yet...*

These shortcomings should not obstruct the significance of this case for the victims, their families, the fight against the use of child soldiers and for international law in general. Interestingly, the judges can ask for the parties' opinion on the appropriate punishment the accused should be given. If convicted, Lubanga is also likely to be asked to pay compensation to the numerous victims, who even though many soldiers were heard, officially amount to 108 persons. Several of the victims' relatives expressed their gratefulness to the court, saying that it highlighted the rights of the victims and contributed to truth-telling and justice. The case will hopefully act as a deterrent and may also have served as a springboard for other indictments. Indeed, several Congolese leaders are currently awaiting trial at the ICC: Germain Katanga and Mathieu Ngudjolo, two of Lubanga's former enemies, face charges of war crimes and crimes against humanity after attacking a Congolese village in 2003, while former deputy president Jean Pierre Bemba is facing similar accusations for crimes committed in the Central African Republic. The court is also dealing with cases such as Darfur and Kenya.

Many challenges remain. Although the ICC issued an arrest warrant against Sudanese President Omar Al-Bashir for genocide, war crimes and crimes against humanity committed in Darfur, he remains free as many signatories, including Britain, refuse to see an urgent need to bring him to justice. The ICC does not possess a police force and Al-Bashir only travels to countries which have not signed the Rome Statute, such as China and Russia. The US still has to ratify the Rome Statute as well and many African elites have shown open resentment to the ICC. The Kenyan parliament, for instance, threatened to withdraw from the Rome Statute if the Tribunal got involved in the prosecution of alleged perpetrators of crimes during the country's 2007 post-electoral violence.

Yet a former US prosecutor at the Nuremberg trials, Benjamin Ferencz eloquently declared, "let the voice and the verdict of this esteemed global court now speak for the awakened conscience of the world."<sup>11</sup> As someone who has seen international law evolve, his opinion

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<sup>11</sup> Bouwknecht, Thijs. "Lubanga: judges deliberate first ICC judgement", *International Justice Tribune*, 29 August 2011, <http://www.rnw.nl/international-justice/article/lubanga-judges-deliberate-first-icc-judgement>, accessed 30 August 2011.

should certainly be regarded as cardinal. Hopefully, the likes of Gaddafi and Al-Bashir will soon no longer feel immune to justice.