

Reflection: Gender Issues and Child Soldiers
the case of
Prosecutor v Thomas Lubanga Dyilo
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The Women's Initiatives for Gender Justice is an international women's human rights organisation that advocates for gender justice through the International Criminal Court (ICC) and works with women most affected by conflict situations under investigation by the Court.

The Women's Initiatives has over 700 grassroots members and partners in armed conflicts including women victims/survivors, women living in IDP camps, women's rights and development organisations, networks including transitional and criminal justice partners, parliamentarians, and members of the security sector. In addition, we network with a large number of regional and international partners and allies and have an extensive global outreach programme reaching over 100,000 supporters who regularly receive our publications, updates and e-letters.

Prosecutor v Thomas Lubanga Dyilo

The case against Thomas Lubanga Dyilo (Lubanga) is the first trial before the International Criminal Court (ICC) and arose out of the investigation into the Situation in the Democratic Republic of the Congo (DRC). Mr Lubanga has been in the custody of the ICC since 17 March 2006. He is the former President of the *Union des patriotes congolais* (UPC), and commander-in-chief of the *Forces patriotiques pour la libération du Congo* (FPLC). Mr Lubanga has been charged with war crimes relating to the enlistment and conscription of children under the age of 15 years and using children to participate actively in hostilities.¹ On 26 January 2009, Mr Lubanga became the first accused to stand trial at the ICC.

Outstanding Features

One of the outstanding features of this case is its historic nature: it is the first prosecution before the International Criminal Court, it is the first international criminal trial ever held on the conflict in eastern DRC and it is also one of the few international criminal cases in history to charge an individual

¹ Lubanga is charged with enlisting and conscripting children under the age of 15 into the FPLC and using them to participate actively in hostilities in the context of both an international and a non-international armed conflict. ICC-01/04-01/06-083-tEN.



with acts of enlistment and conscription of child soldiers.² These issues have rarely been adjudicated in international criminal law with only the Special Court for Sierra Leone previously prosecuting such crimes including in its case against Charles Taylor, the former President of Sierra Leone.³ As such, the ICC charges and prosecution strategy in the Lubanga case were an important opportunity to advance these issues.

The second outstanding feature has been the absence of charges for gender-based crimes in the case against the leader of a militia group widely known to have committed rape, sexual enslavement and other forms of sexualised violence.

Gender-based violence

The DRC has one of the highest rates of sexual violence in the world. The Ituri region, where the UPC operates, continues to experience ongoing conflict and militia attacks, and eastern DRC has been described by Margot Wallström, the United Nations Secretary-General's Special Representative on Sexual Violence in Conflict, as the 'rape capital of the world'.⁴

It was therefore shocking to many of us that the announcement in 2006 of the case against Thomas Lubanga did not include charges for such crimes and overlooked the suffering of thousands of victims of this conflict and victims of this militia. It was unimaginable to us and to our partners in eastern DRC, grassroots women's rights and peace advocates, that the Office of the Prosecutor (OTP) had not investigated these crimes in their initial strategy. It was also beyond comprehension that the OTP then decided not to undertake any specific investigations into these crimes in the 6 months between when Mr Lubanga was taken into ICC custody in March 2006 and before the Confirmation Hearing in November of that year. Still further, the OTP did not investigate these crimes between the Confirmation Hearing and the start of the trial two years later in January 2009. In fact, there was almost three years from when Mr Lubanga was taken into custody until the trial started – plenty of time in which the OTP could have conducted investigations of gender-based crimes in relation to child soldiers, thereby expanding thematically on their original charges and providing a more accurate reflection of the crime base. In our view, the OTP could have amended the document

² The other cases involving charges of the recruitment and use of child soldiers are: *Prosecutor v. Brima et al.*, Trial Judgment, SCSL-2004-16-T, 20 June 2007; *Prosecutor v. Fofana et al.*, Trial Judgment, SCSL-2004-14-T, 2 August 2007; *Prosecutor v. Sesay et al.*, Trial Judgment, SCSL-2004-15-T, 2 March 2009.

³ *Prosecutor v. Charles Ghankay Taylor*, Second Amended Indictment, SCSL-03-01-PT-263, 29 May 2007. The case against Charles Taylor is currently awaiting judgement by the Trial Chamber.

⁴ Statement by UN Special Representative of the Secretary-General, Margot Wallström, delivered at the United Nations Security Council Open Meeting on 'Women, Peace and Security: Sexual Violence in Situations of Armed Conflict', New York, 27 April 2010, available at <http://www.stoprapenow.org/uploads/features/StatementofSRSGWallstromSecurityCouncilOpenMeeting27April2010.pdf?v=h1wnEb3xrBE>.



containing the charges, sought and held a Confirmation Hearing on such charges and still have been ready for trial three years later, with the rights of the accused to prepare his defence fully observed.

Documentation of gender-based crimes

The Women's Initiatives for Gender Justice has been directly involved in the DRC Situation for the past five years. In May and July 2006, we conducted two documentation missions in Ituri, eastern DRC and interviewed victims/survivors of gender-based violence, committed by a range of militias including the UPC. We produced a dossier detailing 51 individual interviews with predominantly women victims/survivors of rape and other forms of sexual violence. Of these, 31 interviewees were victims/survivors specifically of acts of rape and sexual slavery allegedly committed by the UPC.

On 16 August 2006, the Women's Initiatives submitted our dossier and a letter to the Office of the Prosecutor⁵ describing our concerns that gender-based crimes committed by the UPC had not been adequately investigated in the case against Mr Lubanga. The dossier provided information about the commission of these crimes, indicated that sexual violence appeared to be an integral component of the attacks against the civilian population, provided material suggesting a pattern of rape, abduction, sexual slavery and torture by the UPC, and confirmed that women victims/survivors were willing to be interviewed by the ICC.

The OTP has never responded to this dossier.

Integration of gender dimensions within the charges

On 7 September 2006, the Women's Initiatives became the first NGO to file before the ICC.⁶ We filed in relation to the Lubanga case and requested Pre-Trial Chamber I to review the Prosecutor's exercise of discretion in the selection of charges and to determine whether broader charges (specifically for gender-based crimes) could be considered. We also described the impact on victims of the narrow and incomplete charge sheet and the severe limitations this imposed on the ability of victims to be recognised by the Court and to participate in the justice process. Only four victims were recognised at the time of the Lubanga Confirmation Hearing in November 2006, despite the large number of actual

⁵ The redacted version of this confidential letter submitted to the Office of the Prosecutor is available at <http://www.iccwomen.org/documents/Prosecutor_Letter_August_2006_Redacted.pdf>.

⁶ ICC-01/04-01/06-403. See also *Legal Filings submitted by the Women's Initiatives for Gender Justice to the International Criminal Court*, available at <<http://www.iccwomen.org/publications/articles/docs/LegalFilings-web-2-10.pdf>>.



victims. This has been rectified somewhat over the years and currently there are 123 victims participating in the trial and represented by six legal counsel.⁷

When it was clear the OTP would not open investigations into gender-based crimes even in relation to child soldiers, and when the Pre-Trial Chamber declined to invite the Prosecutor to consider conducting such investigations pursuant to Article 61(7)(c)(i) as argued in our filing, we redirected our advocacy towards deepening the understanding of the gender dimensions embedded within the existing charges of enlistment and conscription and forcing children to fight.

Since the beginning of 2008, we have advocated that rape and other forms of sexual violence were an integral component of the UPC conscription process for girls, particularly during the initial abduction phase and period of military training. The perpetration of sexual violence, primarily against girls, was an inherent feature of the UPC's conscription practises. This is borne out in the interviews from our documentation missions as well as our victims' participation programme involving former child soldiers.

Child Soldiers

According to our documentation, both boys and girls were abducted by the UPC. During the training period the children were deprived of sleep, forced to consume drugs, and shown how to fight. They were sometimes taught how to use a gun through the simulation of the use of sticks as if they were machine guns. The girls were regularly raped, many from the moment of abduction and throughout their time with the UPC, with the most intense period reportedly occurring during the initial abduction phase and once they were relocated to the training camps. Rape and sexual slavery were integral to induction into the militia group to the extent that rape could be considered an indicator of conscription for girls. Sexual violence was used as an effective mechanism for demonstrating control and ownership over child soldiers by the UPC and for severing attachment with their lives prior to abduction. Being raped, witnessing rape, being forced to rape were regular occurrences especially during the training phase of new conscriptees. It is clear and certain, that conscription of children by the UPC was not gender-neutral.

Once training was completed, the children were forced to fight, sometimes without weapons. Newly enlisted and conscripted children were made to walk at the front of the troops in battle to provoke gunfire, thus enabling their armed fighters to see where the other militia was located and hiding. The children were made to fight and forced to kill.

⁷ Until June 2011, the victims were represented by seven legal counsel. However, on 15 July 2011 the Registry informed the Chamber and all the parties and participants that Mr Jean-Chrysostome Mulamba Nsokoloni, one of the common legal representatives of victims in the Lubanga case, passed away on 17 June 2011 (ICC-01/04-01/06-2771).



Impact

The suffering and torment of the UPC child soldiers was and is immense. Their rights to a childhood, to safety, protection, to physical and bodily integrity, to education, to exercising their reproductive rights and health, and to sexual autonomy were denied and destroyed. Many of those raped by the UPC subsequently tested positive for HIV, suffered multiple internal and external injuries, some of the young women had unwanted pregnancies, and some were rejected by their families or communities upon their return, because they were known to have been with the UPC militia – a group recognised as a source of violence and suffering by thousands of people.

Testimony and Evidence

Although there are no charges for gender-based crimes in the Lubanga case, the gender dimensions of enlistment and conscription of children have been referenced by every actor in this trial. At least 21 out of 25 witnesses who testified during the presentation of the Prosecution's case in 2009, mentioned the presence of girl soldiers within the UPC.⁸ A significant number of prosecution witnesses, at least 15, also testified explicitly about gender-based violence, in particular the rape and sexual slavery of girl soldiers within the UPC by other combatants and commanders.⁹ On 22 May 2009, the Legal Representatives for Victims jointly requested the Trial Chamber to consider modifying the legal characterisation of the facts to include inhuman and cruel treatment, and sexual slavery to the existing charges, pursuant to Regulation 55.¹⁰ Although granted by a majority decision of the Trial Chamber,¹¹ this was overturned on Appeal.¹² The Judges themselves have at times enquired about witnesses' knowledge of girl soldiers and even a witness for the Defence testified about the rape of girl soldiers by the UPC.¹³

The UN Under-Secretary General for Children and Armed Conflict, Radhika Coomaraswamy, was recognised with *amicus curiae* status¹⁴ in this case and also provided testimony as an expert

⁸ For a detailed account of their testimony, see the *Gender Report Card 2009*, p 71-85, available at <http://www.iccwomen.org/documents/Prosecutor_Letter_August_2006_Redacted.pdf>.

⁹ *Gender Report Card 2009*, p 71-85.

¹⁰ ICC-01/04-01/06-1891-tENG.

¹¹ ICC-01/04-01/06-2049. On 27 August 2009, Trial Chamber I issued a decision clarifying the 14 July majority decision (ICC-01/04-01/06-2093). Judge Fulford's dissent was issued on 17 July 2011 (ICC-01/04-01/06-2054). Subsequent decisions were issued correcting clerical errors in paras 6, 36, 40, 42 and 49 in the dissenting opinion: ICC-01/04-01/06-2061 and ICC-01/04-01/06-2069, with the final corrected dissenting opinion as ICC-01/04-01/06-02069-Anx1.

¹² ICC-01/04-01/06-2205.

¹³ On 29 April 2010, Jean Claude Conga appeared as the thirteenth witness for the Defence. For a summary of his testimony, see the *Gender Report Card 2010*, p 134, available at <http://www.iccwomen.org/news/docs/GRC10-WEB-11-10-v4_Final-version-Dec.pdf> and the transcript of his testimony ICC-01/04-01/06-T-376-Red-ENG.

¹⁴ Following the 4 January 2008 request by Radhika Coomaraswamy for leave to submit written observations in the Lubanga case as *amicus curiae*, on 18 February 2008, the Trial Chamber granted her request (ICC-01/04-01/06-1175). She submitted a report on 17 March 2008. Upon her request, on 19 May 2009, her role in the case changed from *amicus* to an expert witness.



witness.¹⁵ In her submission the Special Representative addressed the multiple roles girl soldiers are forced to play in armed conflicts. In her testimony she described these roles as including participation in combat, scouting and portering, as well as being forced into marriages and sexual slavery.

Child soldiers were assigned a variety of non combat and combat-related duties. According to our documentation, some of the young women within the UPC were assigned as body guards; in fact several of the commanders had female body guards. As part of their duties in the service of the UPC, young women were often required to procure other civilian girls and young women for the sexual pleasure of their commander and ultimately to become his sexual property. Boy soldiers were forced to rape and were on occasion also raped.

Amongst the many activities child soldiers were forced to undertake, it appears that forced marriage and sexual enslavement were roles to which only girls were assigned by the UPC. Taken in totality, all these examples demonstrate just some of the ways in which sexual violence was a component of their conscription and active participation in hostilities.

Lessons

There are many lessons for the OTP in this, their first case. Lessons about shaping investigation hypothesis and strategy; about pursuing leads in relation to gender-based crimes early on in investigations to allow the time needed for interviews; the importance of transparency and compliance with disclosure obligations; the need for better management and oversight of intermediaries hired by the OTP and ensuring their non interference, both perceived and actual, with witnesses; the need for the OTP to exercise prudence regarding the time and place for media comment and the necessity of avoiding public commentary on issues under judicial consideration; the importance of verifying the age and testimony of prosecution witnesses particularly in a case where the age of victims/witnesses forms a key element of the crime; and of course the requirement for all parties and people, including the Prosecutor, to comply with judicial orders. Some of these issues have been raised by the Defence most notably in its abuse of process filing in December 2010 when they requested a permanent stay of proceedings.¹⁶ We note, that in March 2011, the Trial Chamber issued a decision rejecting the Defence application but stating that it would reserve its judgement on each of the factual issues raised by the Defence until the end of the trial.¹⁷

¹⁵ Radhika Coomaraswamy testified as an expert witness on 7 January 2010. For a detailed account of her testimony, see the *Gender Report Card 2010*, p 135-136 and the transcript of her testimony ICC-01/04-01/06-T-223-ENG.

¹⁶ ICC-01/04-01/06-2657-Conf.

¹⁷ ICC-01/04-01/06-2690-Red.



Some of the above lessons have already been wisely integrated by the OTP into the ongoing trials, and in new cases and investigations. Some lessons are yet to be fully absorbed and some appear bound for unfortunate repetition.

Jurisprudence

Despite the many challenges in this case, we believe that, based on the factual information before the judges – primarily the testimony from witnesses –there is every possibility important and substantive jurisprudence could emerge from this case. A decision which recognises the gender dimensions of enlistment, conscription and the forced participation of children in hostilities, could provide justice for children utilised by the UPC, transform the legal definition of child soldiers and pave the way for future prosecutions. It could also allow for reparations for individuals and communities who have suffered and it would undoubtedly deepen our collective understanding of the terror and impact on children who are forced to participate in armed conflicts.

