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### Cross-examining the past

*Transitional justice, mass atrocity trials and history in Africa*

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## 6. Cross-examining the past. ICC: Opening Pandora's box in Congo

Ituri has been described as one of the bloodiest corners of the Democratic Republic of Congo. It is an area known for its abundant gold, diamonds and oil; a place where its people should have been living their lives with their families and benefiting from the riches of their homeland. Instead, it became a place where its people were targeted, terrorized and abused. At least 5,000 civilians reportedly died in direct ethnic violence in Ituri in the seven months between July 2002 and March of 2003 alone.

- Fatou Bensouda, Prosecutor<sup>2471</sup>

### 6.1 Introduction

Both the Rwanda-tribunal (UNICTR) and the Sierra Leonean Special Court (SCSL) experiences have revealed that the international criminal trial setting lacks the capability to validate the more wide-ranging grand narratives on the Rwandan genocide and the Sierra Leonean war respectively. As shown in the chapters above, at the UNICTR, magistrates did not endorse or rubber stamp popularly held interpretations on the alleged conspiracy and long-term planning of the genocide – as was presented in the prosecutor's case scenarios - before it unfolded from 6 April 1994. It did, however, beyond any legal dispute, ascertain that genocide occurred in Rwanda. That is a highly significant finding. Yet it left more general questions as to why, how, when and by whom it was planned and conspired unanswered.<sup>2472</sup> Moreover, it left unanswered the question on who shot down the plane carrying Rwanda's President Habyarimana, the event that heralded the wide-spread atrocities. Other crucial questions remain. After 20 years of litigation, the tribunal has never convincingly established the number of victims of the genocide. Moreover, it also left unaddressed the alleged abuses by the RPF rebels, crimes that were punishable under its mandate and could have provided a more balanced picture of what had happened in Rwanda in 1994, the full calendar year under the UNICTR's temporal jurisdiction.<sup>2473</sup> Similarly, at the SCSL, prosecutors were impotent to substantiate with irrefutable evidence that Liberia's former President, Charles Taylor, from the late 1980s masterminded and conspired with others to unleash a campaign of terror in Sierra Leone in order to enrich himself with diamonds. It did nevertheless endorse that large-scale abuses were committed in Sierra Leone by different factions to the conflict and it was because of that, to some extent, more encompassing in reflecting on what transpired in Sierra Leone beyond its mandate.<sup>2474</sup>

In legal terms, both tribunals created an important legacy by, for instance, prosecuting the crime of genocide at the UNICTR as well as bringing to account heads of state or governments. In

<sup>2471</sup> ICC, TCVI, *Prosecutor v. Bosco Ntaganda: Transcript* (ICC-01/04-02/06; 2 September 2015), pp. 13-14.

<sup>2472</sup> UNSC, *Report on the completion of the mandate of the International Criminal Tribunal for Rwanda*, §55.

<sup>2473</sup> Only one RPF case file dealt with, but it was referred to Rwanda for national prosecution. It involved Brigadier General Wilson Gumusiriza, Major Wilson Ukwishaka, Captain Dieudonne Rukeba and Captain John Butera. See: *Le Tribunal Militaire Seant a Kigali, Nyamirambo Et Y Siegeant En Matiere Penale Rend, En Audience Publique, Le Jugement Suivant Au Premier Degre, Dans L'affaire No Rp 0151/08/Tm* (Kigali, 24 October 2008); The High Military Court, Sitting in Nyarugunga, In Kicukiro District, Kigali City, on Criminal Cases Rendered The Following Appeal Judgement on 25/02/2009, *Appeals Judgement No. RPA 0062/08/HCM* (Kigali, 25 February 2009).

<sup>2474</sup> In the final report the President of the SCSL sets out to reflect "upon the history of the conflict in Sierra Leone and the events that led to the Special Court's establishment." See: SCSL, *Eleventh and Final Report* (December 2013).

other areas of law, such as the prosecution of gender based violence, they were ground-breaking. But whether they have contributed to more ulterior objectives like establishing peace and forging reconciliation remains a question that has so far not been seriously, independently and empirically researched. Appearances, however, are against them. Peace was already there when the tribunals started their work. Reconciliation was on nobody's mind in Arusha. In Freetown, the idea of reconciliation through a court process was somehow overshadowed with the prosecution of the CDF war 'heroes', which made the court unbeloved. In terms of writing historical records their legacy is even much narrower. At a minimum, they established in a score of judgements some detailed facts on the micro level, about the role of individual suspects in their immediate contexts. In Arusha, for example, the UNICTR particularly managed to unravel and picture events in Kibuye, a region that was featured in a dozen trials from the very beginnings of the tribunal's investigations. At the SCSL, many details transpired on the structures of rebel forces, the use of child soldiers as well as the functioning of civil defence forces. Read in conclave with the report of the Truth and Reconciliation Commission, the SCSL trials in Freetown and The Hague at a minimum presented some explanations for the civil war, yet in terms of fact ascertainment the outcomes remain rudimentary, guesswork and sketchy. What both tribunals also elicited is the testimony of many victims or survivors of mass atrocities, thus shedding light on and putting on record the impact mass atrocity had on the individual level. Again, that is a significant extra-legal heritage, even despite the fact that many testimonies were given in private sessions and much of the content is redacted in the trial record. In terms of core fact ascertainment and establishing individual criminal responsibility however, the almost exclusive reliance on testimonial evidence – provided largely through non-legal third parties like NGOs<sup>2475</sup> - continuously proved problematic and erratic when it came to substantiating allegations and case theories. Thus, as Nancy Combs has argued, the factual foundations under the many convictions were uncertain.

Overall, the absence of clear paper trails, forensic data and “smoking-gun-type-of-evidence” has increasingly led judges, most notably at the UNICTR, to be cautious to make sweeping findings on contextual elements in general – beyond the extent necessary to prove that crimes actually took place - as well as particular details concerning defendants. Perhaps their doubts on the evidence grew more ‘reasonable’. What is true though is that their truth finding prism and applied legal standards had become much stricter. In fact, in dealing with testimonial evidence, judges have gradually become more reluctant, more careful and more nuanced in their findings. In contrast however, on the prosecutor's side it became more difficult to meet this apparent stricter and higher burden of proof and alter their indictments and investigations accordingly, particularly in volatile non-documentary African cases. *In extenso* of Rwanda and Sierra Leone, a textbook example thereof is the work of the International Criminal Court (ICC), which in many ways – in temporal, geographical and evidentiary

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<sup>2475</sup> At the ICTR this was done by Ibuka and at the SCSL particularly through the SCSL investigators, such as Corinne Dufka, who had previously worked for HRW.

terms,<sup>2476</sup> but also in relation to court staff<sup>2477</sup> - is an offspring of the UNICTR and SCSL and is equally reliant on witness testimony and the agents and methodologies typical of the UNICTR and SCSL in acquiring this type of evidence. Arguably, the first ‘African’ cases – particularly in the Democratic Republic of Congo (DRC) and to a lesser extent in Uganda - at the ICC share many parallels with the SCSL and UNICTR when it comes to the challenges of fact-ascertainment on mass violence.<sup>2478</sup> It has led to a turn in prosecution and investigatory strategies, particularly under ICC Chief Prosecutor Fatou Bensouda, who herself learned the tricks of the trade at the UNICTR<sup>2479</sup> and faced huge hurdles in the first ICC trials she led regarding the Democratic Republic of the Congo (DRC).<sup>2480</sup> After she replaced Luis Moreno-Ocampo, Bensouda, already for a couple of years, became aware that her investigators and prosecutors should adopt a more scientific approach and seek for improvement and alternatives, particularly in the field of cyber investigations, online analysis, video examinations, (smart) phone tracking and satellite imaging.<sup>2481</sup> One of the reasons for a revised prosecutorial strategy is that, at least for some international judges, there are cumulative signals of potential witness interference on various levels and thus too much reasonable doubt on the credibility and reliability of witness testimonies and on the way, in which these are gathered, produced and presented.<sup>2482</sup>

## 6.2 The ICC in Africa

As discussed earlier, in Chapter III, unlike the UNICTR and SCSL, the ICC has a long history of coming into being. It is in fact the late offspring of the International Military Tribunals in Nuremberg and Tokyo. Since the founding of the ICC, individual persons<sup>2483</sup> who allegedly committed mass atrocities - and in the future, the crime of aggression -<sup>2484</sup> committed from 1 July 2002 are potential subjects for investigation and prosecution by the ICC.<sup>2485</sup> The ICC - as a complementary body to national criminal jurisdictions - functions as a court of last resort.<sup>2486</sup> After considering elements of

<sup>2476</sup> Particularly the Great Lakes Region (Rwanda, DR Congo, Burundi, Uganda, Central African Republic and Burundi) after the 1994 genocide and West Africa (Sierra Leone, Liberia and Côte d’Ivoire) from the early 1990s. All trials in these ‘situations’ depend almost exclusively on witness testimony.

<sup>2477</sup> For example, both the Chief Prosecutor, Fatou Bensouda, and Deputy Prosecutor, James Stewart, were OTP officials at the ICTR. A variety of defence counsel that worked at the ICTR and SCSL, now represent accused persons at the ICC. Some judges, Robert Fremr for example, previously worked at the ICTR before sitting at the bench in the case of Bosco Ntaganda.

<sup>2478</sup> The ICC Prosecutor highlights six external challenges: complex security environments; State cooperation; high pace of technological evolution changes the sources of information, and the manner in which evidence is obtained and presented in court; time period between the commission of crimes and the Office’s investigation creates challenges for the preservation of evidence; limited resources; lack of full coordination of efforts amongst all relevant actors makes it difficult to close the impunity gap for atrocity crimes under the Rome Statute as well as related crimes, including transnational and organised crime and acts of terrorism. See: ICC, OTP, *Strategic Plan | 2016-2018* (16 November 2015), pp. 5-6.

<sup>2479</sup> In Arusha, she was part of the prosecution teams in the cases against Bagosora et al. (Military I) and Protais Zigiranyirazo, two cases discussed in the dissertation.

<sup>2480</sup> She was Lead Counsel in the trial.

<sup>2481</sup> ICC, Office of the Prosecutor, *Strategic Plan | 2016-2018* (16 November 2015), p. 23; Human Rights Center, School of Law, University of California, Berkeley, ‘Beyond Reasonable Doubt. Using Scientific evidence to Advance Prosecutions at the International Criminal Court. 23–24 October 2012. Workshop Report’ (2012).

<sup>2482</sup> IBA, *Witnesses before the International Criminal Court*.

<sup>2483</sup> Only if the person is a national of or acted in a State or on board of a vessels or aircraft registered in a State that is a party to the Rome Statute or State, which has accepted the court’s jurisdiction by declaration.

<sup>2484</sup> An agreement on the definition of the crime of aggression was reached at the Review Conference of the International Criminal Court in Kampala, Uganda, in June 2010. The crime is defined as “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state, of an act of aggression, which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.” The agreement only comes into force in 2017. ICC, ‘Amendments to the Rome Statute of the International Criminal Court on the crime of aggression (Annex 1), *Resolution RC/Res.6* (11 June 2010), art. 8 bis.

<sup>2485</sup> *Rome Statute*, art. 5. See for a detailed description: ICC, *Elements of Crimes*.

<sup>2486</sup> ICC, OTP, *Informal expert paper: The Principle of Complementarity* (The Hague: ICC-OTP, 2003).

case selection and prioritisation,<sup>2487</sup> the prosecutor evaluates available open source information during a preliminary examination<sup>2488</sup> and commences an investigation proper<sup>2489</sup> unless he determines there is no reasonable basis – i.e. lack of jurisdiction, inadmissible, not sufficiently grave<sup>2490</sup> and not against the interests of justice - to proceed.<sup>2491</sup> In theory, the ICC is determined to act globally, where possible within its limited reach in terms of membership of the court. Yet its caseload (up to mid-2016) exclusively concerned individuals from the African continent.<sup>2492</sup> Although the ICC’s global reach may seem to be far-reaching, the court often remains toothless as it depends on state cooperation and the tides in national, regional and international politics. Lacking international political will, at the extreme case, may even frustrate the ICC’s work and defy its legitimacy. In late December 2015, for example, Chief Prosecutor Fatou Bensouda lamented the Security Council’s “empty promises” in relation to her indictments relating to Darfur, a case that was referred to the ICC by the Council itself.<sup>2493</sup> Despite the criticism that the ICC has not accomplished much after thirteen years of work, the court has opened formal investigations in ten<sup>2494</sup> ‘situations’ [i.e. countries, territories<sup>2495</sup>] and conducts a range of preliminary examinations<sup>2496</sup> in other countries across the globe.<sup>2497</sup> Its judges have delivered four final verdicts.<sup>2498</sup> The fastest case so far, after a three day trial and a guilty plea, was concluded on 27 September 2016, with the conviction of Ahmed Al Faqi Al Mahdi from Mali.<sup>2499</sup> So far, all the cases deal with African situations. There is however ample variety in crime scenes and contexts, all with their complex socio-political realities and histories. Contrary to the *ad hoc* tribunals, the ICC divides its attention and resources over the various situations, which practically means it will hardly be able to reach to kind of sophistication in understanding the histories of all those countries. Yet, as time progresses from the ICC’s starting date of July 2002, the substance of cases may grow more historical in the future. Likewise, here it would be impossible to provide the kind of deep understanding of the conflicts as I provided in the two previous chapters. Like the ICC itself, I am bound to restrict my overview of the case-load to basic elements. Below, each of these African situations will be shortly discussed before shifting the main attention to the Congo cases of which some have been concluded. It is particularly in respect to the situation of Congo that we will see that

<sup>2487</sup> ICC, OTP, *Policy Paper on Case Selection and Prioritisation* (15 September 2016).

<sup>2488</sup> ICC, OTP, *Policy Paper on Preliminary Examinations* (November 2013).

<sup>2489</sup> ICC, OTP, *Strategic Plan. June 2012-2015* (11 October 2013).

<sup>2490</sup> *Rome Statute*, art. 53.

<sup>2491</sup> *Ibidem*, arts. 13-15.

<sup>2492</sup> The OTP has opened a formal investigation only in one non-African state, namely Georgia. See: ICC, PTC 1, *Situation in Georgia. Decision on the Prosecutor’s request for authorization of an investigation* (ICC-01/15 Date: 27 January 2016).

<sup>2493</sup> ICC, OTP, *Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)* (New York, 15 December 2015).

<sup>2494</sup> As of 1 October 2012: Uganda, Democratic Republic of the Congo, 2 investigations in the Central African Republic (CAR), Sudan (Darfur), Kenya, Libya, Côte d’Ivoire and Mali.

<sup>2495</sup> Situations “are generally defined in terms of temporal, territorial and in some cases personal parameters.” See: ICC, PTC, *Situation en République Démocratique du Congo: Décision sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6* (ICC-01/04; 17 January 2006), §65.

<sup>2496</sup> Preliminary examinations refer to the analytical process of by which the OTP assesses whether there is a reasonable basis to proceed with an investigation in a given situation. The OTP follows four steps in this procedure: (phase 1: initial review) proactively gathering and evaluating information from multiple sources, including “communications”, from individuals and parties concerned; (phase 2a jurisdiction) assessing jurisdictional, temporal, territorial and personal jurisdiction; (phase 2b jurisdiction) assessing subject matter jurisdiction; (phase 3 admissibility) assessing complementarity and gravity; and (phase 4 interest) assessing the interests of justice. See: ICC, Office of The Prosecutor (OTP) *Policy Paper on Preliminary Investigations: Draft* (4 October 2010).

<sup>2497</sup> As of December 2015: Afghanistan, Colombia, Georgia, Guinea, Iraq (II), Nigeria, Palestine and Ukraine. Earlier preliminary examinations that were closed without going into the investigation stage were: Comoros, Honduras, Venezuela and Korea. See: ICC, OTP, *Report on Preliminary Examination Activities (2015)* (November 2015); ICC, *Preliminary Examinations* ([www-text: https://www.icc-cpi.int/pages/preliminary-examinations.aspx](http://www-text: https://www.icc-cpi.int/pages/preliminary-examinations.aspx), visited: 14 December 2016).

<sup>2498</sup> See footnote 892.

<sup>2499</sup> ICC, *Al Faqi Al Mahdi Judgement*.

the problems regarding fact-seeking, fact-finding and fact ascertainment in a non-documentary context are very similar to the ones faced by the UNICTR and the SCSL.

### Uganda (Lord's Resistance Army)

In truth, the LRA thinking was very simple. It was a case of "if you're not for us, then you're against us." Any 20 civilian who was unwilling to support their struggle against the government was to be regarded as an enemy, and it was the LRA's policy to kill its enemies.

- Ben Gumpert, Prosecutor<sup>2500</sup>

“The conflict in northern Uganda is the biggest forgotten, neglected humanitarian emergency in the world today,” UN officials decried at the end of 2003.<sup>2501</sup> But Yoweri Museveni, the country's President since 1986, lamented the lack of actual international assistance to help stop the Lord's Resistance Army (LRA), even though the post-9/11 USA administration had declared it a terrorist group in 2001.<sup>2502</sup> “Having exhausted every other means of bringing an end to this terrible suffering, the Republic of Uganda now turns to the newly established ICC and its promise of global justice,” Museveni's Attorney General wrote in a 27-page letter referring the situation to the freshly appointed court's prosecutor, Luis Moreno-Ocampo.<sup>2503</sup> On 16 December 2003 Uganda requested “that investigations focus on the persons most responsible for such crimes, namely LRA members in positions of command and control, especially because a significant proportion of low-ranking perpetrators are forcibly conscripted children that have committed crimes under duress, and thus are themselves victims of the LRA leadership.”<sup>2504</sup> Kampala further pledged “its full cooperation to the Prosecutor in the investigation and prosecution of LRA crimes [...]”<sup>2505</sup> and sent along documentation on LRA atrocities. Acting on the self-referral that was solicited by Ocampo, the ICC opened its second formal investigation (after it started an investigation in the Democratic Republic of the Congo), into crimes committed in Northern Uganda, on 28 July 2004.<sup>2506</sup> It concerns crimes committed in Northern Uganda carried out by the LRA, which has carried out an insurgency against the Ugandan government since 1987.<sup>2507</sup> Until 2005, the LRA has been directing attacks against both the Ugandan Defence Forces, local civil defence units and against civilians. An internationally listed terrorist organisation, the LRA, infamously guided by the schizophrenic self-proclaimed spokesperson of God, Joseph Kony, brutalised the people it claimed to be fighting for: the Acholi in northern

<sup>2500</sup> ICC, PTC II, *Situation: Republic of Uganda. In the case of The Prosecutor v. Dominic Ongwen: Transcript* (ICC-02/04-01/15; 21 January 2016), p. 11.

<sup>2501</sup> ‘War in northern Uganda world's worst forgotten crisis: UN’, *Agence France-Presse*, 11 November 2003.

<sup>2502</sup> US Department of State, ‘Designation of 39 Organizations on the USA PATRIOT Act's "Terrorist Exclusion List"’, *Press Release*, 5 December 2001.

<sup>2503</sup> Republic of Uganda, Attorney General, *International Criminal Court. Referral of the situation concerning the Lord's Resistance Army. Submitted by the Republic of Uganda* (16 December 2003), §6.

<sup>2504</sup> Republic of Uganda, *Referral of the situation concerning the Lord's Resistance Army*, §42.

<sup>2505</sup> *Ibidem*, §6.

<sup>2506</sup> ‘Prosecutor of the International Criminal Court opens an investigation into Northern Uganda’, *ICC Press Release*, The Hague 29 July 2004. Uganda had specifically referred “the situation on the Lord's Resistance Army” to the court but Ocampo informed the Ugandan authorities that he was “analysing crimes in northern Uganda by whomever committed.” Yet, as of now, only LRA crimes have been investigated and charged. See: Letter from Luis Moreno-Ocampo to President Phillippe Kirsch, dated 17 June 2004 (annex to: ICC, *Situation of Uganda. Decision Assigning the Situation in Uganda to PTCII* (ICC-02/04; 5 July 2004). See for a detailed analysis of the investigations in Uganda: Thijs Bouwknegt, ‘Dominic Ongwen: Born at the time of the white ant, tried at the ICC’, *African Arguments*, 20 January 2015.

<sup>2507</sup> See for background on the situation: Chris Dolan, *Social Torture, The Case of Northern Uganda 1986-2006* (New York 2009); Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London 2006); Sverker Finnstrom, *Living with bad surroundings: war, history, and everyday moments in northern Uganda* (Durham: Duke University Press, 2008); Tim Allen & Koen Vlassenroot (eds.), *The Lord's Resistance Army: Myth and Reality* (New York 2010); Mathew Green, *The Wizard of the Nile. The hunt for the most wanted* (Granta Publications 2008).

Uganda. Instead of fulfilling its dream to fashion a theocracy based on the Bible's Ten Commandments and Acholi folklore, the LRA embarked on a crusade of terror. Emblematically, the LRA's ghastly initiation rituals encompassed cutting of limbs, lips and ears of civilians, kidnapping and indoctrinating thousands of kids to serve as soldiers and sex slaves.<sup>2508</sup> Today, the LRA - which by the end of 2014 consisted of approximately 150-200 armed elements, split into several highly mobile units - remains a deadly militia in central Africa, attacking civilians in the Democratic Republic of the Congo, the Central African Republic, Sudan (Darfur) and South Sudan.<sup>2509</sup> The sectarian group has, in the course of its Ugandan rebellion brutalised civilians in a cycle of murders, kidnappings, sexual enslavement, mutilations, destruction and looting.<sup>2510</sup>

Although the investigation was announced at an early stage of the ICC's life, time passed by as Moreno-Ocampo was still hiring lawyers, analysts and investigators into his newly created, but still small, Office of The Prosecutor (OTP), while also dividing labour between the Democratic Republic of Congo's war torn-Ituri region and northern Uganda and eyeballing Darfur. A so-called "Uganda joint team" - including a dozen investigators, analysts and trial lawyers, led by American prosecutor Christine Chung - was recruited in early 2004.<sup>2511</sup> There was no scarcity of sources. Uganda, as promised in its referral, was a key investigating partner and shipped piles of reports and evidence of LRA activities to The Hague, including intercepted radio and satellite phone communications. With a strong appetite to start trials, prosecutors Ocampo, Bensouda, Chung and Eric MacDonald went into overdrive. Tight deadlines left no time for thorough collection and broad analysis of existing information. But, according to case-leader Chung, in an interview with the Institute for War and Peace Reporting (IWPR) "[...] many think for too long [and] at some point you need to go to the field."<sup>2512</sup>

While the investigations were ongoing in 2004, the pressure was mounting. Moreno-Ocampo was calculating that peace talks between the LRA and Kampala were swiftly progressing and envisioned that he could contribute to a potential peace agreement with international justice. In the event that the LRA militants suddenly came out of the bush, he wanted indictments "ready-to-go." Rushing to produce arrest warrants, the OTP lawyers, by September, had already selected six local attacks carried out between July 2002 and July 2004, handpicked six specific crime types and identified several suspects for the cases they wanted to present. Under that blueprinted directive, a small multinational investigation team was sent into the field. Astonishingly enough, none of the seven on-ground investigators had a police background. They were often flanked by a couple of analysts from the office's Jurisdiction, Complementarity and Cooperation Division (JCCD) and trial lawyers Christina Chung and Eric MacDonald. As the six crime scenes in Gulu, Lira and Soroti

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<sup>2508</sup> Bouwknegt, 'Dominic Ongwen: Born at the time of the white ant, tried at the ICC'.

<sup>2509</sup> UNSC, *Report of the Secretary-General on the activities of the United Nations regional Office for Central Africa and the Lord's Resistance Army-affected areas* (S/2014/812; 13 November 2014), pp. 10-12.

<sup>2510</sup> ICC, *Situation in Uganda: Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005* (ICC-02/04-01/05; The Hague 27 September 2005), §6.

<sup>2511</sup> ICC, OTP, *Statement by Chief Prosecutor Luis Moreno-Ocampo* (14 October 2005).

<sup>2512</sup> Katie Glassborow, 'ICC Investigative Strategy Under Fire', *Institute for War and Peace Reporting (IWPR)*, 27 October 2008.

districts were already deemed too old, forensic evidence was not trailed. Instead, during over 50 missions in little more than half a year, the investigators identified, heard and collected testimonies from a wide range of witnesses: victims in refugee camps, insiders among LRA defectors within the Ugandan Army and former child soldiers as well as several overview witnesses. Amongst other things, the investigation recorded at least 2,200 and 3,200 abductions in over 850 attacks between July 2002 and June 2004.<sup>2513</sup> In contrast to the simultaneously on-going probe in eastern Congo, witnesses in the still volatile Uganda were directly accessible and recourse to the controversial use of intermediaries was unnecessary. In Uganda, the biggest challenge was to keep the number of witnesses small but of “smoking gun” quality, something that, according to former investigators, worked out rather well.<sup>2514</sup>

From the outset, the targets were clear: the quasi-military structure of the LRA’s leadership was well known. In July 2005, only ten months after the start of the investigation, and after pre-trial judges Tuiloma Neroni Slade, Mauro Politi and Fatoumata Dembele Diarra reviewed the prosecutor’s evidence and other information, the courts’ first ever arrest warrants were issued on 8 July 2005 against five senior commanders of the LRA: Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen.<sup>2515</sup> All were charged with crimes against humanity and war crimes.<sup>2516</sup> Despite international pressure on the governments of Uganda, Sudan, the Democratic Republic of the Congo and the Central African Republic – where some of the suspects were believed to be hiding - to hand them over, three of them still remain at large whereas the case against Lukwiya has been withdrawn because he died in 2006.<sup>2517</sup> Meanwhile, it has been reported that Vincent Otti and Okot Odhiambo were killed but their indictments remain.<sup>2518</sup> In early January 2015, Ongwen was captured in the Central African Republic, allegedly surrendering himself to USA peacekeeping forces. Both a victim and (alleged) perpetrator of LRA atrocities<sup>2519</sup> and facing no less than seventy counts of war crimes and crimes against humanity,<sup>2520</sup> Ongwen’s trial, which was set to start late 2016,<sup>2521</sup> promises to be one of the most complex ones in the history of modern international criminal justice.

<sup>2513</sup> ICC, OTP, ‘Presentation: The Investigation in Northern Uganda’, *Press Conference* (14 October 2005).

<sup>2514</sup> Author’s Interview (email), ICC Investigator, 14 January 2015.

<sup>2515</sup> ICC, PTC II (PTC II), *Situation in Uganda: Decision on the Prosecutor’s Application for Warrants of Arrest under Article 58* (ICC-02/04; 8 July 2005); ICC, *Situation in Uganda: Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005* (ICC-02/04-01/05; The Hague 27 September 2005); ICC, *Situation in Uganda: Warrant of Arrest for Vincent Otti* (Public Redacted Version) (ICC-02/04; The Hague 8 July 2005); ICC, *Situation in Uganda: Warrant of Arrest for Raska Lukwiya* (ICC-02/04; The Hague 8 July 2005); ICC, *Situation in Uganda: Warrant of Arrest for Okot Odhiambo* (Public Redacted Version) (ICC-02/04; The Hague 8 July 2005); ICC, *Situation in Uganda: Warrant of Arrest for Dominic Ongwen* (Public Redacted Version) (ICC-02/04; The Hague 8 July 2005).

<sup>2516</sup> Kony: Twelve counts of crimes against humanity (murder, enslavement, sexual enslavement, rape, inhumane acts of inflicting serious bodily injury and suffering) and, twenty-one counts of war crimes (murder, cruel treatment of civilians, intentionally directing an attack against a civilian population, pillaging, inducing rape and forced enlistment of children). The others face similar counts.

<sup>2517</sup> ICC, *Prosecution’s Request that the Warrant of Arrest for Raska Lukwiya Be Withdrawn and Rendered Without Effect Because of His Death* (Public Redacted Version) (ICC-02/04-01/05; The Hague 22 March 2007).

<sup>2518</sup> ‘Rebel Leader Kony’s Deputy Otti Still Wanted by International Criminal Court’, *The Monitor*, 15 April 2010; ‘Body of deputy LRA rebel chief may have been found: Uganda’, *Agence France Presse*, 2 February 2015.

<sup>2519</sup> Ongwen himself was abducted by the LRA as a child soldier, before moving up in the organisation to become commander. Mark Drumbl, ‘A former child soldier prosecuted at the International Criminal Court’, *Oxford University Press Blog (OUPblog)*, 26 September 2016 (www-text: <http://blog.oup.com/2016/09/child-soldier-prosecuted-icc-law/>, visited: 27 September 2016); Bouwknecht, ‘Dominic Ongwen: Born at the time of the white ant’.

<sup>2520</sup> ICC, PTC II, *Situation in Uganda in the Case of the Prosecutor v. Dominic Ongwen: Decision on the confirmation of charges against Dominic Ongwen* (ICC-02/04-01/15; 23 March 2016).

<sup>2521</sup> ICC, ‘Ongwen case: Trial to open on 6 December 2016’, *Press Release* (ICC-CPI-20160530-PR1216; 30 May 2016).

While serious human rights abuses on the side of the Ugandan military have been reported, the ICC has never investigated nor filed any public indictments against Ugandan officials.<sup>2522</sup>

## Sudan (Darfur)

For over 5 years, millions of civilians have been uprooted from lands they occupied for centuries, all their means of survival destroyed, their land spoiled and inhabited by new settlers. In the camps Al Bashir's forces kill the men and rape the women. He wants to end the history of the Fur, Masalit and Zaghawa people. [...] The Prosecution evidence shows that Al Bashir masterminded and implemented a plan to destroy in substantial part the Fur, Masalit and Zaghawa groups, on account of their ethnicity. [...] His motives were largely political. His alibi was a counterinsurgency. His intent was genocide.

- Luis Moreno-Ocampo, Prosecutor<sup>2523</sup>

The western regions of Darfur had been the locus of a low intensity conflict and between 1985 and 2003 the violence had been constant, although with repeated massacres of civilians by government-inspired Arab militias.<sup>2524</sup> In early 2003, the conflict exploded as Sudanese government forces and "Arab" Janjaweed militia embarked on a scorched earth campaign of ethnic cleansing, massacring and uprooting hundreds of thousands 'Africans' (mainly from the Fur, Zaghawa and Masalit groups). Ever since, the war in Darfur has taken place in slow motion and has fluctuated between periods of *genocidal* violence, ethnic cleansing and periods of counterinsurgency campaigns.<sup>2525</sup> A United Nations commission of inquiry, headed by the renowned jurist Antonio Cassese, did not find proof of genocide, but collected evidence indicating the criminal responsibility of government officials, militia and rebel group members and foreign army officers for serious violations of international human rights and humanitarian law, including crimes against humanity and war crimes.<sup>2526</sup> In the light of these findings, the commission recommended the United Nations Security Council to refer the situation to the ICC.<sup>2527</sup>

In March 2005, two years into the atrocities, the Security Council, acting under Chapter VII of the UN *Charter*<sup>2528</sup>, referred the situation to the ICC prosecutor and enclosed document archives of the commission as well as a sealed list of suspects named by the commission.<sup>2529</sup> Ocampo opened the investigation three months later<sup>2530</sup> and the first arrest warrants were issued for Ahmad Muhammad

<sup>2522</sup> Author's Interview (email), ICC Investigator, 14 January 2015; Evenson, *Unfinished Business*, pp. 24-29.

<sup>2523</sup> Statement Luis Moreno-Ocampo at press conference, The Hague, 14 July 2008.

<sup>2524</sup> Strauss, *Making and Unmaking Nations*, pp. 232-272.

<sup>2525</sup> See for detailed studies: Gérard Prunier, 'Darfur: Genocidal Theory and Practical Atrocities,' in: Rene Provost & Payam Akhavan, *Confronting Genocide* (Dordrecht 2011); Samuel Totten & Erik Markusen (eds.), *Genocide in Darfur. Investigating the Atrocities in the Sudan* (New York 2006); Eric Reeves, *A Long Day's Dying. Critical Moments in the Darfur Genocide* (Toronto 2007); Gerard Prunier, *Darfur. The Ambiguous Genocide* (London 2005); Julie Flint & Alex De Waal, *Darfur. A short history of a long conflict* (New York 2005); Amanda. F. Grzyb (ed.), *The World and Darfur. International Response to Crimes Against Humanity in Western Sudan* (2<sup>nd</sup> edition; Montreal 2010); M. W. Daly, *Darfur's Sorrow. A History of Destruction and Genocide* (New York 2007).

<sup>2526</sup> UNSC, *Report of the International Commission of Inquiry on Darfur to the Secretary-General* (S/2005/60; 1 February 2005), §4-5.

<sup>2527</sup> UNSC, *Report of the International Commission of Inquiry on Darfur*, §569-573.

<sup>2528</sup> Articles 39 of the UN Charter reads as follows: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security".

<sup>2529</sup> UNSC, *Resolution 1593* (S/RES/1593; 31 March 2005). Eleven members voted in favour while four abstained (Algeria, Brazil, China and United States of America). See: UNSC, *5158<sup>th</sup> Meeting* (S/PV/5158; 31 March 2005).

<sup>2530</sup> On 7 June 2005, one day after the ICC opened investigations into the events in the Darfur region the Sudanese authorities founded the *Special Criminal Court on the Events in Darfur (SCCED)* as a means to demonstrate the government's ability and willingness to start domestic prosecutions. The court has been criticised for not bringing serious cases and as a façade for impunity. See: *Decree Establishing the Special Criminal Court on the Events in Darfur, 7 June 2005*;

Harun, former Minister of State for the Interior in charge of the ‘Darfur-Security Desk’ and alleged *Janjaweed* militia leader Ali Muhammad Ali Abd-Al-Rahman (also known as Ali Kushayb).<sup>2531</sup> Both indictments respectively list fifty-one counts, including persecution, murder, forcible transfer, rape, pillage, destruction and torture.<sup>2532</sup> The ICC has also issued two arrest warrants for Sudan’s president Omar Hassan Ahmad Al-Bashir, one on charges of genocide<sup>2533</sup> and one on charges of war crimes and crimes against humanity.<sup>2534</sup> Bashir’s current Minister of National Defence – and former Special Representative in Darfur – Abdel Raheem Muhammad Hussein was indicted for 13 counts of war crimes and crimes against humanity.<sup>2535</sup> Sudan, which is not a party to the ICC, provided some cooperation with the OTP from 2005 until the issuance of arrests warrants in 2007.<sup>2536</sup>

In a separate case concerning a rebel attack on a military base of the joint African Union-United Nations peacekeepers in Haskanita, North Darfur, in September 2007 that killed 12 African Union peacekeepers and injured eight others, three suspects surrendered to the ICC. Darfur rebel Bahr Idriss Abu Garda came to The Hague on 18 May 2009 to deny any involvement in three counts of war crimes.<sup>2537</sup> The pre-trial chamber however, did not find that Abu Garda had to go to trial, citing a lack of evidence.<sup>2538</sup> Two other Sudanese rebel leaders surrendered to the ICC in June 2010 to answer war crimes charges over an attack that killed 12 peacekeepers. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus face three counts of war crimes.<sup>2539</sup> Proceedings in the case against Jerbo were terminated since the suspect was reportedly killed in April 2013<sup>2540</sup> and Banda’s trial has been postponed indefinitely.<sup>2541</sup> As of March 2015, it was ten years since the Security Council asked the ICC to probe the Darfur situation. However, none of the arrest warrants have been executed so far. At the Council, Prosecutor Bensouda said her office maintained to monitor the movements of suspects, including President Bashir as well as possible on-going atrocities. But she has since then clogged on ground investigations into criminalities in Darfur. She said that, faced with an environment where her office “limited resources for investigations are already overstretched, and

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reprinted in: UNSC, *Letter dated 18 June 2005 from the Chargé d'affaires a.i. of the Permanent Mission of the Sudan to the United Nations addressed to the President of the Security Council* (S/2005/403; 19 June 2005); HRW, *Lack of Conviction. The Special Criminal Court on the Events in Darfur* (June 2006); and United Nations Human Rights Committee (UNHRC), *Concluding Observations of the Human Rights Committee: Sudan: Ninetieth session, Geneva 9-27 July 2007* (CCPR/C/SDN/CO/3/CRP.1; 26 July 2007).

<sup>2531</sup> ICC, *Case Information Sheet: Situation in Darfur, Sudan. The Prosecutor versus Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)* Case no ICC-02/05-01/07 (3 July 2014).

<sup>2532</sup> See: ICC, *Situation in Darfur, Sudan in the Case of the Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Al Abd-Al-Rahman (“Au Kushayb”): Warrant of Arrest for Ahmad Harun* (ICC-02/05-01/07; The Hague 27 April 2007) & ICC, *Situation in Darfur, Sudan in the Case of the Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Al Abd-Al-Rahman (“Au Kushayb”): Warrant of Arrest for Ali Kushayb* (ICC-02/05-01/07; The Hague 27 April 2007).

<sup>2533</sup> ICC, *Situation in Darfur, in the case of the Prosecutor v. Omar Hassan Ahmad Al Bashir: warrant of arrest for Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09; 12 July 2010).

<sup>2534</sup> ICC, *Situation in Darfur, in the case of the Prosecutor v. Omar Hassan Ahmad Al Bashir: second warrant of arrest for Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09; 4 March 2009).

<sup>2535</sup> ICC, *Situation in Darfur, Sudan in the Case of the Prosecutor v. Abdel Raheem Muhammad Hussein. Warrant of Arrest for Abdel Raheem Muhammad Hussein* (ICC-02/05-01/12; The Hague 1 March 2012).

<sup>2536</sup> ICC, OTP, *Seventh Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)* (5 June 2008), §29.

<sup>2537</sup> Thijs Bouwknecht, ‘Abu Garda faces ICC’, *Radio Netherlands Worldwide*, 19 May 2009.

<sup>2538</sup> ICC, *Situation in Darfur, in the case of the Prosecutor v. Bahar Idriss Abu Garda. Decision on the Confirmation of Charges* (ICC-02/05-02/09; 8 February 2010).

<sup>2539</sup> ICC, ‘New suspects in the situation in Darfur, Sudan arrive voluntarily at the ICC: First appearance scheduled for tomorrow’, *ICC Press Release* (The Hague 16 June 2010). See also: Thijs Bouwknecht, ‘Darfur rebels want to achieve justice at ICC’, *Radio Netherlands Worldwide*, 17 June 2010.

<sup>2540</sup> ICC, *Situation in Darfur, Sudan in the Case of The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus: Decision termination the proceedings against Mr Jerbo* (ICC-02/05-03/09; 4 October 2013).

<sup>2541</sup> ICC, AC, *Situation in Darfur, Sudan in the Case of The Prosecutor v. Abdallah Banda Abakaer Nourain: Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain against Trial Chamber IV’s issuance of a warrant of arrest* (ICC-02/05-03/09 OA 5; 3 March 2015).

given this Council's lack of foresight on what should happen in Darfur, I am left with no choice but to hibernate investigative activities in Darfur as I shift resources to other urgent cases, especially those in which trial is approaching.<sup>2542</sup> Thus, overall, the Sudan case is dormant at the time of writing.

## Central African Republic

Madam President, your Honours, this trial is an opportunity. This is the first trial before the International Criminal Court that concerns command responsibility. [...] The responsibility of the superiors and the subordinates in a hierarchical organisation such as an army has been discussed all over the world since ancient times. It was referred to in the famous Sun Tzu Chinese army manual dating back 500 years before 23 Christ. It was also discussed in the Islamic law, and Hugo Grotius in 1625 referred to it in his famous "The Law of War and Peace.

- Luis Moreno-Ocampo, Prosecutor<sup>2543</sup>

What can we learn, your Honours, what can we learn from the recent history of the Democratic Republic of the Congo when it comes to the MLC? [...] In actual fact, as soon as the Rwandan and Ugandan forces overthrew these forces led by Laurent-Désiré Kabila, as soon as Marshal Mobutu was overthrown by these troops and after the father died, Kabila senior, and then after the -- you see, his son took over. [...] But since that time, since this event, there has been no legitimate government in the Congo. That is why there is this - these rebellions have come about.

- Nkwebe Liriss, Defence Counsel<sup>2544</sup>

During the 2002-2003 violent clashes that followed the coup led by Francois Bozizé, the army chief of staff of then-President Ange-Felix Patassé, many civilians were killed and raped while homes and stores were looted.<sup>2545</sup> In 2007, the OTP announced the opening of an investigation into these alleged crimes, following a referral by the Central African Republic's administration.<sup>2546</sup> The ICC investigation into international crimes in the CAR has led to one public arrest warrant, for Jean-Pierre Bemba Gombo, who is a Congolese senator and former vice President of the Democratic Republic of the Congo.<sup>2547</sup> Patassé had asked Bemba in 2002 to help fight Bozizé's rebellion. Bemba's private MLC militia left the country in March 2003. Bozizé had taken power while Patassé went into exile in Togo. Bemba was arrested in Belgium in 2008 and his trial began in The Hague in November 2010.<sup>2548</sup> He stands accused of ordering his MLC to rape, murder and plunder in the CAR.<sup>2549</sup> Until Patassé's passing in April 2011, many questioned the prosecutor's choice not to bring charges against

<sup>2542</sup> ICC, OTP, *Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)* (New York, 12 December 2014) 2; ICC, OTP, *Twentieth Report Of The Prosecutor Of The International Criminal Court To The UN Security Council Pursuant To UNSCR 1593 (2005)* (15 December 2014).

<sup>2543</sup> ICC, TC III, *Situation: Central African Republic. In the case of The Prosecutor v. Jean-Pierre Bemba Gombo: Transcript* (ICC-01/05-01/08; 22 November 2010), p. 11.

<sup>2544</sup> ICC, *Bemba Gombo Transcript* (22 November 2010), p. 56.

<sup>2545</sup> See for more information: International Federation for Human Rights (FIDH), *Report International investigative mission. War crimes in the Central African Republic: "When the elephants fight, the grass suffers"* (February 2003) & AI, *Central African: Republic Five months of war against women* (AI Index: AFR 19/001/2004; London, 10 November 2004).

<sup>2546</sup> 'Prosecutor opens investigation in the Central African Republic', *JCC Press Release* (ICC-OTP-20070522-220; The Hague 22 May 2007).

<sup>2547</sup> ICC, PTCIII, *Situation en République Centrafricaine. Affaire le Procureur c. Jean-Pierre Bemba Gombo: Mandat d'arrêt à l'encontre de Jean-Pierre Bemba Gombo* (ICC-01/05-01/08; 23 May 2008).

<sup>2548</sup> Thijs Bouwknecht, "Bemba did not come on his own", *Radio Netherlands Worldwide*, 19 November 2010.

<sup>2549</sup> ICC, PTCII, *Situation in the Central African Republic in the case of the prosecutor v. Jean-Pierre Bemba Gombo: Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo* (ICC-01/05-01/08; 15 June 2009).

him in addition to those brought against Bemba.<sup>2550</sup> During Bemba's trial and shortly before Patassé's death, the CAR Prosecutor-General Firmin Feindiro testified that a national investigation had implicated both Bemba and Patassé, although neither of the men was tried in CAR.<sup>2551</sup> Human rights watchdogs have also called it a "missed opportunity" that court prosecutors did not charge Bemba with any crimes his MLC forces allegedly committed in the DRC's Ituri region.<sup>2552</sup> Victims' representatives have requested the court to also charge him with these crimes but the court has ruled against this.<sup>2553</sup>

After a long and painstaking trial,<sup>2554</sup> in the summer of 2016, judges Sylvia Steiner (Brazil), Judge Joyce Aluoch (Kenya) and Judge Kuniko Ozaki (Japan), convicted Bemba, as military commander, for the murders, rapes and pillaging committed by his troops during house-to-house searches.<sup>2555</sup> Meanwhile in 2013, in a separate proceeding, Bemba was indicted again in his cell, this time on charges of offences against the administration of justice, in relation to his criminal case. Four others were charged and arrested alongside; including Bemba's lawyers Aimé Kilolo Musamba and Jean-Jacques Mangenda Kabongo, parliamentarian and MLC vice-Secretary General Fidèle Babala Wandu and Congolese witness Narcisse Arido.<sup>2556</sup> The allegations include presenting false or forged evidence and influencing witnesses to provide false testimony.<sup>2557</sup> The new arrests had nothing to do with the renewed violence that engulfed the Central African Republic since December 2012. At that time, a new Muslim rebel group called Séléka – a "coalition" backed by forces from Chad and Darfur - from the northeast began a military campaign against Bozizé's government.<sup>2558</sup> By March 2013, the rebels took control of Bangui and installed one of its leaders, Michel Djotodia, as interim president.<sup>2559</sup> But Séléka fighters embarked on a campaign of violence, mainly targeting civilians and former government officials whom they blamed for marginalising Muslims. Outside Bangui, villages were attacked and massacres of civilians were reported. The victims were often Christians. In retaliation, self-defence militias, known as anti-balaka ("anti-machete" in Sango) attacked and killed hundreds of Muslim civilians, often by machete.<sup>2560</sup> The politico-sectarian conflict left between 3000

<sup>2550</sup> See, for example, Katy Glassborow, 'Locals Want Patassé to Face Justice,' *Institute for War and Peace Reporting* (18 May 2009; [www-text: http://iwpr.net/report-news/locals-want-patasse-face-justice](http://iwpr.net/report-news/locals-want-patasse-face-justice), last visit 2 October 2012).

<sup>2551</sup> ICC, *Situation in the Central African Republic in the case of the prosecutor v. Jean-Pierre Bemba Gombo: Transcript* (ICC-01/05-01/08; The Hague 7 April 2011).

<sup>2552</sup> See: Evenson, *Unfinished Business*, pp. 31-33. Also see for a report on alleged crimes by the MLC in Ituri: HRW, *Ituri: "Covered in Blood": Ethnically Targeted Violence In Northeastern DR Congo* (Vol. 15, No. 11 (A) - July 2003).

<sup>2553</sup> ICC, *Situation en République Démocratique du Congo. Demande du représentant légal de VPRS 3 et 6 aux fins de mise en cause de Monsieur Jean-Pierre Bemba en sa qualité de chef militaire au sens de l'article 28-a du Statut pour les crimes dont ses troupes sont présumées coupables en Ituri* (ICC-01/04; 28 June 2010) & ICC, *Situation in the Democratic Republic of the Congo. Decision on the request of the legal representative of victims VPRS 3 and VPRS 6 to review an alleged decision of the Prosecutor not to proceed* (ICC-01/04; 25 October 2010).

<sup>2554</sup> From 22 November 2010, the Chamber sat for 330 working days and heard 77 witnesses, including 40 witnesses called by the Prosecution, 34 called by the Defence, 2 witnesses called by the Legal Representative of Victims and one witness called by the Chamber. The Chamber also permitted three victims to directly present their views and concerns. ICC, TC III, *Situation on the Central African Republic. In the case of the Prosecutor v. Jean Pierre Bemba Gombo: Judgment pursuant to Article 74 of the Statute* (ICC-01/05-01/08; 21 March 2016), §5-25.

<sup>2555</sup> ICC, TC III, *Situation: Central African Republic. In the case of The Prosecutor v. Jean-Pierre Bemba Gombo: Transcript* (ICC-01/05-01/08; 21 March 2016), pp. 23-24.

<sup>2556</sup> ICC, 'Bemba case: Four suspects arrested for corruptly influencing witnesses; same charges served on Jean-Pierre Bemba Gombo', *Press Release*, 24 November 2013.

<sup>2557</sup> ICC, *Situation in the Central African Republic in the Case of the Prosecutor v. Jean Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jaques Mangenda Kabongo, Fidele Babala Wandu & Narcisse Arido: Warrant of Arrest for Jean Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jaques Mangenda Kabongo, Fidele Babala Wandu & Narcisse Arido* (ICC-01/05-01/13; 20 November 2013).

<sup>2558</sup> 'Rebels threaten to capture capital of Central African Republic', *BBC Monitoring Africa*, 19 December 2012.

<sup>2559</sup> 'Worsening Humanitarian Situation in the Central African Republic', *UN Integrated Regional Information Networks*, 25 March 2013.

<sup>2560</sup> Lewis Mudge, 'Central African Republic Cease-fire Ignores justice. Ending Impunity for corruption and human rights abuses is key to the country's future', *Aljazeera America*, 2 August 2014.

to 6000 people dead and over half a million displaced and an estimated 300000 Muslims fled the country.<sup>2561</sup> An international commission of Inquiry concluded that the anti-Balaka had committed ethnic cleansing against the Muslim populations.<sup>2562</sup> Atrocities and massacres continued to be reported into 2015.<sup>2563</sup>

ICC Prosecutor Fatou Bensouda had issued several statements during the violence, calling upon all parties involved in the conflict to stop attacking civilians and committing crimes, or risk being investigated and prosecuted<sup>2564</sup> and opened a new preliminary investigation in the CAR situation.<sup>2565</sup> The newly-elected Interim President Catherine Samba-Panza formally asked her to open an inquiry, affirming that Central African courts are not in a position to carry out the necessary investigations.<sup>2566</sup> After an examination of the newly reported crimes<sup>2567</sup>, Fatou Bensouda began a second investigation in September 2014, stating that “the list of atrocities is endless” and that she could not “ignore these alleged crimes.”<sup>2568</sup> Meanwhile, UN-mandated investigators warned that the “situation in CAR could very much spiral into genocide” and called for a “truly international tribunal with international judges who could objectively investigate and prosecute perpetrators.”<sup>2569</sup> On the national level, the Central African Republic has pledged to work on transitional justice in the wake of the violence. On 3 June 2015, it adopted a law that created a new hybrid tribunal, the Special Criminal Court (SCC), which is designed to deal with perpetrators of international crimes.<sup>2570</sup>

## Kenya

The post-election period of 2007-2008 was one of the most violent periods of the nation’s history.

- Louis Moreno-Ocampo, Prosecutor<sup>2571</sup>

<sup>2561</sup> See for details and analysis: HRW, *Central African Republic. Materials Published by Human Rights Watch Since the March 2013 Séléka Coup* (New York: HRW, 2014); UNSC, *Report of the Panel of Experts on the Central African Republic established pursuant to Security Council resolution 2127 (2013) (S/2014/452; 1 July 2014)*; UNSC, *Preliminary Report of the International Commission of Inquiry on the Central African Republic submitted pursuant to Security Council resolution 2127 (2013) (2014/373; New York, 26 June 2014)*; AI, *Ethnic Cleansing and Sectarian Violence in the Central African Republic (AFR/19004/2014; London: Amnesty International Publications, 2014)*; ICG, ‘The Central African Republic. From Predation to Stabilisation’ *Africa Report*, No. 219 (17 June 2014); United Nations High Commissioner for Refugees (UNHCR), ‘Central African Republic’, in: *Global Appeal 2014-2015* (www-text: <http://www.unhcr.org/528a0a1f13.html>, visited: in 20 August 2014).

<sup>2562</sup> The International Commission of Inquiry on the Central African Republic, *Final Report (S/2014/928; 22 December 2014)*, pp. 93-98.

<sup>2563</sup> ‘Ex-Séléka fighters massacre ‘at least 34’ in Central Africa villages’, *Agence France Presse*, 16 August 2014.

<sup>2564</sup> ICC, OTP, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, in relation to Central African Republic* (22 March 2013); ICC, OTP, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, in relation to Central African Republic* (22 April 2013); ICC, OTP, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, in relation to Central African Republic* (7 August 2013); and ICC, OTP, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, in relation to Central African Republic* (9 December 2013).

<sup>2565</sup> ICC, OTP, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a new Preliminary Examination in Central African Republic* (7 February 2014).

<sup>2566</sup> République Centrafricaine, Présidence de la République, *Lettre de saisine de la Cour Pénale Internationale pas Madame la Présidente de la République Centrafricaine* (No. 121 MJRJDH.14.-; Bangui, 30 May 2014).

<sup>2567</sup> ICC, OTP, *Situation in the Central African Republic II. Article 53 (1) Report* (24 September 2014).

<sup>2568</sup> ICC, OTP, ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a second investigation in the Central African Republic’, *Press Release (ICC-OTP-20140924-PR1043; 24 September 2014)*.

<sup>2569</sup> ‘Central African Republic: UN investigators urge establishment of war crimes tribunal’, *UN News Centre*, 21 January 2015.

<sup>2570</sup> The UN Peacekeeping force MINUSCA has provided support for the creation of this court. While the law has been adopted, a challenge is to secure resources to establish it. Meanwhile, certain individuals accused of serious crimes, including Rodrigues Ngaibona (a.k.a. Andilo) and Aubin Yanouhe (a.k.a. Chocolat), were arrested by MINUSCA forces in line with their mandate to arrest and detain and await trial. Despite the mass escapes from the main prison in Bangui at the end of September 2015, these persons remain in detention at the Camp de Roux annex to Ngaragba Prison of Bangui. Other trials have been conducted, in which 127 accused were prosecuted, with 94 found guilty, mainly on charges of murder or illegal detention of fire arms, and 15 acquitted (other trials were suspended or judges failed to issue decisions). See: United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) & United Nations Office of the High Commissioner for Human Rights (OHCHR), *Report on the situation of human rights in the Central African Republic, 15 September 2014 - 31 May 2015* (no date).

<sup>2571</sup> Statement Luis Moreno-Ocampo at Press Briefing, ICC, 15 December 2010.

On 30 December 2007, closely contested presidential elections in Kenya resulted in a declaration by the Electoral Commission that incumbent President Mwai Kibaki of the Party of National Unity (PNU) was re-elected over the main opposition candidate Raila Odinga of the Orange Democratic Movement (ODM). This triggered a series of violent demonstrations and politico-ethnic targeted attacks throughout Kenya.<sup>2572</sup> Between 27 December 2007 to 28 February 2008 - when a power-sharing deal was struck between the two main parties<sup>2573</sup> - it is reported that between 1,133 and 1,220 people were killed, 3,561 were injured, and approximately 350,000 were displaced. Large-scale rape, destruction and looting also took place.<sup>2574</sup> In May 2010, the OTP started investigations into possible crimes against humanity committed during Kenya's post-election violence.<sup>2575</sup> The prosecutor alleges that ODM supporters were mobilised to attack ethnic Kikuyu and others perceived to have voted for Kibaki. Retaliation violence was then targeted at Kalenjin, Luo's and Luhya's, who were perceived as affiliated with the ODM. There are also allegations of police violence at this time.<sup>2576</sup>

It is the first time the prosecutor started a case on his own – *proprio motu* - as Kenya's parliament blocked legislation to deal with the violence itself.<sup>2577</sup> Six Kenyans [dubbed the Ocampo Six] were summoned to appear in The Hague to answer to the charges.<sup>2578</sup> Four of them, including William Ruto and Uhuru Kenyatta, a radio journalist and a police force commander – were committed for trial.<sup>2579</sup> Whereas the Kenyan government unsuccessfully tried to fight the jurisdiction of the court, the now vice-President Ruto and former KassFM broadcaster Sang were on trial in The Hague since September 2013 until 5 April 2016 when the trial chamber terminated the proceedings and vacated their charges for a lack of evidence.<sup>2580</sup> In the other case, only President Kenyatta was left.<sup>2581</sup>

<sup>2572</sup> Commission of Inquiry into Post-Election Violence (CIPEV), *Final Report* (16 October 2008), p. 41.

<sup>2573</sup> International mediation efforts led by former UN Secretary General Kofi Annan, Chair of the African Union Panel of Eminent African Personalities, resulted in the signing of a power-sharing agreement that established three commissions: (1) Commission of Inquiry on Post-Election Violence; (2) Truth, Justice and Reconciliation Commission (TJRC); and (3) Independent Review Commission on the General Elections held in Kenya on 27 December 2007. See: *Acting together for Kenya. Agreement on the principles of partnership of the Coalition government* (Nairobi, 28 February 2008) & Republic of Kenya, 'The National Accord and Reconciliation Bill, 2008', *Kenya Gazette Supplement* (Nairobi, 6 March 2008).

<sup>2574</sup> See for detailed reports: United Nations High Commissioner for Human Rights, *Report from OHCHR Fact-finding Mission to Kenya, 6-28 February 2008* (February 2008); ICG, 'Kenya in Crisis', *Africa Report*, No. 137 (21 February 2008); Kenyan National Commission on Human Rights (KNCHR), *On the brink of the precipice: a Human Rights account of Kenya's post 2007 election violence* (15 August 2008); Commission of Inquiry into Post - Election Violence (CIPEV), *Final Report* (16 October 2008); HRW, *From Ballots to Bullets. Organized Political Violence and Kenya's Crisis of Governance* (March 2008); ICC, *Situation in the Republic of Kenya. Request for authorisation of an investigation pursuant to Article 15* (ICC-01/09; 26 November 2009).

<sup>2575</sup> Following an authorisation by Pre-Trial Judges: ICC, PTC II, *Situation on the Republic of Kenya: Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya* (ICC-01/09-19; 31 March 2010). The author travelled along with OTP's investigation team to Nairobi and Rift Valley in May 2010.

<sup>2576</sup> ICC, OTP, *Situation in the Republic of Kenya: Request for authorization of an investigation pursuant to Article 15* (ICC-01/09; 26 November 2009).

<sup>2577</sup> 'Kenya parliament rejects bills establishing election tribunal', *Jurist*, 13 February 2009.

<sup>2578</sup> ICC, *Situation in the Republic of Kenya in the case of The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang: Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (ICC-01/09-01/11; 8 March 2011) & ICC, *Situation in the Republic of Kenya in the case of The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali: Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (ICC-01/09-02/11; 8 March 2011).

<sup>2579</sup> Charges were confirmed in the cases against Ruto, Sang, Kenyatta and Muthaura and not confirmed for Kosgey and Ali. ICC, AC, *Situation of the Republic of Kenya in the case of The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang: Decision on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of PTCII of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute"* (ICC-01/09-01/11 OA3 OA4; 24 May 2012) & ICC, AC, *Situation of the Republic of Kenya in the case of The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali: Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of PTCII of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute"* (CC-01/09-02/11 OA 4; 24 May 2012).

<sup>2580</sup> For trial monitoring reports: Open Society Justice Initiative (OSJI), *International Justice Monitor: Kenya Cases at the International Criminal Court* (www-page: <http://www.ijmonitor.org/category/kenya-cases/>, visited: 19 January 2015);

<sup>2581</sup> ICC, *Situation in the Republic of Kenya in the case of the Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta: Prosecution Notification of withdrawal of the charges against Francis Kirimi Muthaura* (ICC-01/09-02/11; 11 March 2013).

However, Kenyatta's case also collapsed, due to the fact several witnesses died, were scared to testify, withdrew or changed their accounts and the Kenyan government was alleged to block the investigations. His case was withdrawn at the end of 2014.<sup>2582</sup>

Ever since the launch of the investigations in Kenya, the Kenya cases and trials have been riddled with problems. What appears is that a campaign of intimidation of potential witnesses preceded the investigation, intensified before the trials and continued throughout the proceedings. And it did not only happen in the Kenyatta case, but also in the trial of his deputy President, William Ruto. Throughout the 157 trial days, that were characterised by fierce debates in and out of the courtroom, the chamber only heard the testimony of 30 prosecution witnesses, including two expert witnesses. Seventeen other witnesses, who had already given a statement or had agreed to testify, recanted their stories, withdrew from the case or declined any further cooperation with the Prosecution.<sup>2583</sup> As a result, the trial, and subsequently the ICC's work in Kenya, was buckled. After the prosecution had finished presenting their available witnesses at the end of 2015, the defence sought an intermediate ruling by the court that there was no case to answer and the case be terminated. In what became a controversial ruling, Judge Chile Eboe-Osuji and Judge Robert Fremr, by majority, agreed that the charges were to be vacated and the accused to be discharged.<sup>2584</sup> For Fremr, who also presides over the Ntaganda trial, the prosecution had not presented sufficient evidence on which a reasonable conviction could be based and thus considered that there was no reason to call the Defence to bring their case.<sup>2585</sup> Judge Eboe-Osuji, also vacated the charges, but on different grounds. For him, the Ruto case had been a mistrial "due to a troubling incidence of witness interference and intolerable political meddling that was reasonably likely to intimidate witnesses."<sup>2586</sup> Although the chamber did not render a Judgement of acquittal nor criticised the OTP for the weakness of their evidence, the Prosecutor lamented the Chambers refusal to preserve the evidence already collected, before key witnesses changed their account of events, and test their "competing versions of events" before chamber.<sup>2587</sup>

As a result of the alleged political interference in the cases, the OTP investigated incidents of witness intimidation or corruption and issued warrants of arrest, one month after the start of the Ruto

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<sup>2582</sup> The trial was postponed several times: ICC, *Situation in the Republic of Kenya in the case of the Prosecutor v. Uhuru Muigai Kenyatta: Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date* (ICC-01/09-02/11: 31 March 2014); ICC, OTP, *Situation in the republic of Kenya. In the case of the Prosecutor v. Uhuru Muigai Kenyatta: notice of withdrawal of the charges against Uhuru Muigai Kenyatta* (No.: ICC-01/09-02/11; 5 December 2014). Following a request by the Victims' Representatives, the Trial Chamber ordered the Prosecution to publicise the Pre-Trial Brief, which narrates the case theory: ICC, OTP, *Situation on the Republic of Kenya. In the Case of The Prosecutor v. Uhuru Muigai Kenyatta: Public Redacted Version of "Second updated Prosecution pre-trial brief"*, 26 August 2013, ICC-01/09-02/11-796-Conf-AnxA (ICC-01/09-02/11; 19 January 2015).

<sup>2583</sup> ICC, OTP, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding Trial Chamber's decision to vacate charges against Messrs William Samoei Ruto and Joshua Arap Sang without prejudice to their prosecution in the future* (6 April 2016).

<sup>2584</sup> ICC, TC V (a), *Situation in the Republic of Kenya. In the case of The Prosecutor v. William Samoei Ruto and Joshua Arap Sang: Decision on Defence Applications for Judgments of Acquittal* (No.: ICC-01/09-01/11; 5 April 2016).

<sup>2585</sup> ICC, *Ruto and Joshua Arap Sang: Decision on Defence Applications for Judgments of Acquittal*, pp. 49-54.

<sup>2586</sup> ICC, *Ruto and Joshua Arap Sang: Decision on Defence Applications for Judgments of Acquittal*, p. 254.

<sup>2587</sup> ICC, OTP, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding Trial Chamber's decision to vacate charges against Messrs William Samoei Ruto and Joshua Arap Sang without prejudice to their prosecution in the future* (6 April 2016).

trial, for ex-OTP intermediary Walter Osapiri Barasa,<sup>2588</sup> Paul Gicheru and Phillip Kipkoech Bett,<sup>2589</sup> on charges of obstructing the course of justice. So far however, none of the three suspects have yet been surrendered to the court.

## Libya

So why is Colonel Muammar Gaddafi not in the dock?

- Courtenay Griffiths, Defence Counsel<sup>2590</sup>

Just 4 months ago, the world requested justice for crimes committed in Libya and the UN Security Council unanimously asked for the intervention of the International Criminal Court. Yesterday, the Court delivered its first decision, it issued arrest warrants against Muammar Gaddafi, his son Saif Al-Islam Gaddafi and Abdullah Al Senussi for shooting civilians on the streets and persecuting alleged dissidents in their homes as crimes against humanity. The Judges considered that they have to be arrested to prevent them from using their powers to continue the commission of crimes.

- Luis Moreno-Ocampo, Prosecutor<sup>2591</sup>

Anti-government protests began in Libya on 17 February 2011, following widespread protests in Tunisia and Egypt. Muammar Gaddafi's Security Forces from that day attacked demonstrators in cities across the country. Civilians were systematically murdered, tortured or raped, while enforced disappearances have been reported as well. The *thumar* (anti-Gaddafi forces) likewise left a trail of human rights abuses.<sup>2592</sup> Nine days into the violence, the UN Security Council decided to refer Libya – not an ICC member - to the ICC prosecutor.<sup>2593</sup> After a three-month investigation, Ocampo requested ICC judges to issue arrest warrants against Muammar Abu Minya Gaddafi, his son Saif Al Islam Gaddafi and the head of the Intelligence Services Abdullah Al Sanousi.<sup>2594</sup> The warrants for crimes against humanity (murder and persecution) committed between 15 February and 28 February 2011, through the state apparatus and Security Forces, were issued late June.<sup>2595</sup> Ever since, Muammar Gaddafi was killed on 20 October 2011,<sup>2596</sup> Saif Gaddafi was arrested on 19 November 2011 in Zintan, in Libya and Al-Senussi was arrested on 17 March 2012 in Mauritania. The new Libyan government was quick to conduct its own investigations and announced it will try both man in

<sup>2588</sup> ICC, PTC II, *Situation in the Case of the Republic of Kenya. In the Case of The Prosecutor v. Walter Osapira Barasa*: Warrant of arrest for Walter Osapiri Barasa (ICC-01/09-01/13; 2 August 2013).

<sup>2589</sup> ICC, PTC II, *Situation in the Republic of Kenya. In the Case of The Prosecutor v. Paul Gicheru and Philip Kipkoech Bett: Decision on the "Prosecution's Application under Article 58(1) of the Rome Statute"* (ICC-01/09-01/15; 10 March 2015).

<sup>2590</sup> SCSL, *Taylor Transcript* (9 March 2011), p. 49390.

<sup>2591</sup> Statement of Luis Moreno-Ocampo, ICC, 28 June 2011.

<sup>2592</sup> See for details: United Nations Human Rights Council (HRC), *Report of the International Commission of Inquiry on Libya (A/HRC/19/68; 8 March 2012)*;

<sup>2593</sup> UNSC, *Resolution 1970 (S/RES/1970; 26 February 2011)*. The resolution was adopted unanimously: UNSC, *6491<sup>st</sup> Meeting (S/PV.6491; 26 February 2011)*.

<sup>2594</sup> ICC, *Situation in the Libyans Arab Jamahiriya: Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (ICC-01/11; 16 May 2011).

<sup>2595</sup> ICC, *Situation in the Libyan Arab Jamahiriya: Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi* (Case No ICC-01/11; The Hague 27 June 2011); ICC, *Situation in the Libyan Arab Jamahiriya: Warrant of Arrest for Saif Al-Islam Gaddafi* (Case No ICC-01/11; The Hague 27 June 2011); and ICC, *Situation in the Libyan Arab Jamahiriya: Warrant of Arrest for Abdullah Al-Senussi* (Case No ICC-01/11; The Hague 27 June 2011).

<sup>2596</sup> His case was terminated: ICC, *Situation in the Libyan Arab Jamahiriya in the case of the Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi & Abdullah Al-Senussi: Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi* (ICC-01/11-01/11; 22 November 2011).

Libya, without the interference of the ICC and looking at crimes committed before February 2011.<sup>2597</sup> The court ruled that it still intends to try Saif Gaddafi,<sup>2598</sup> while it found that the national proceedings against Sanousi rendered the case at the ICC inadmissible and ended the proceedings against him.<sup>2599</sup> Back in Libya, where controversial proceedings were initiated against the two men alongside 26 others, a court sentenced both men to death in the summer of 2015.<sup>2600</sup>

## Côte d'Ivoire

First, let me be clear: I have not yet opened an investigation. But, if serious crimes under my jurisdiction are committed, I will do so. For instance, if as a consequence of Mr. Charles Blé Goudé's speeches, there is massive violence, he could be prosecuted. [...] Violence is not an option. Those leaders who are planning violence will end up in the Hague.

- Luis Moreno-Ocampo, Prosecutor<sup>2601</sup>

The aftermath of the contested presidential election in Côte d'Ivoire on 28 November 2010 was violent. Losing President Laurent Gbagbo sought to retain power. Soon after the final round of elections, security forces - aided by youth leaders, militias and Liberian mercenaries - launched attacks against perceived supporters of Alassane Ouattara, who had claimed victory. Attacks were carried out in Abidjan and its suburbs, as well as in the western part of Côte d'Ivoire.<sup>2602</sup> By 25 February 2011, the country had descended into an intra-state conflict between pro-Gbagbo forces and Ouattara's *Forces Nouvelles*, the Dozo civil defence group and Burkinabe militiamen. An estimated 3,000 civilians were killed and more than 150 women were raped in a conflict waged along political, ethnic, and religious lines. With French and United Nations military assistance, Gbagbo was defeated and arrested on 11 April 2011.<sup>2603</sup> Côte d'Ivoire, which was not yet a subscriber to the Rome Statute,<sup>2604</sup> had already been under preliminary examination by the OTP since 2003 when it received an invitation from Gbagbo's government to identify, investigate and try 'the perpetrators and accomplices of acts committed on Ivorian territory since the events of 19 September 2002'.<sup>2605</sup> Ouattara reconfirmed his country's commitment to cooperate with the ICC already during the post-

<sup>2597</sup> ICC, *Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011)* (New York, 16 May 2012).

<sup>2598</sup> ICC, AC, *Situation in Libya in the case of the Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi: Judgment on the appeal of Libya against the decision of PTCI of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi"* (ICC-01/11-01/11 OA 4; 21 May 2014).

<sup>2599</sup> ICC, AC, *Situation in Libya in the case of the Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi: Judgement on the appeal of Mr Abdallah Al-Senussi against the decision of PTCI of 11 October 2013 entitled "Decision on the admissibility of the case against Abdallah Al-Senussi"* (ICC-01/11-01/11OA6; 24 July 2014).

<sup>2600</sup> Chris Stephen, 'Gaddafi's son Saif al-Islam sentenced to death by court in Libya', *The Guardian*, 28 July 2015.

<sup>2601</sup> ICC, OTP, 'Statement by ICC Prosecutor Luis Moreno-Ocampo on the situation in Côte d'Ivoire', *Press Release* (ICC-OTP-20101221-PR617; 21 December 2010).

<sup>2602</sup> United Nations Office for the Coordination of Humanitarian Affairs (OCHA), *Côte d'Ivoire: Electoral Violence and Displacement* (25 March 2011).

<sup>2603</sup> See for details on the crisis: United Nations Human Rights Council (HRC), *Rapport de la Commission d'enquête Internationale indépendante sur la Côte d'Ivoire* (A/HRC/17/48; 14 June 2011); HRW, "They Killed Them Like It Was Nothing."; ICC, *Situation in Côte d'Ivoire. Request for authorisation of an investigation pursuant to article 15* (ICC-02/11; The Hague 23 June 2011); & McGovern, *Making War in Côte d'Ivoire*.

<sup>2604</sup> Côte d'Ivoire ratified the statute on 18 February 2013. ICC, 'Côte d'Ivoire ratifies the Rome Statute', *Press Release* (18 February 2013).

<sup>2605</sup> République de Côte d'Ivoire, *Déclaration de reconnaissance de la Compétence de la Cour Pénale* (Abidjan 18 April 2003). Côte D' Ivoire also created the *Commission Dialogue, Vérité et Réconciliation*, which is mandated to identify the root causes of the conflict, the acts and patterns of violations, and ways for the country to overcome these legacies through reconciliation and recognition of those who were victimised. See: République de Côte d'Ivoire, Union-Discipline-Travail, 'Ordonnance No 2011-167 du 13 Juillet 2011 portant création, attributions, organisation et fonctionnement de la Commission, Dialogue, Vérité et Réconciliation', *Point de Presse du Porte-Parole du Président de La Commission Dialogue, Vérité et Réconciliation* (CDVR), Edition No 001, (Abidjan 21 July 2011).

election violence.<sup>2606</sup> That commitment was materialised by the fact that the West African country transferred the former president to Scheveningen prison on 30 November 2011 on the basis of a sealed indictment.<sup>2607</sup> The charges were confirmed almost two and a half years later.<sup>2608</sup> In a separate case, against Charles Blé Goudé, Abidjan chose to transfer the accused to The Hague on 22 March 2014. The former sports and youth minister is charged with the same crimes as the Gbagbo's, to whose inner circle he belonged.<sup>2609</sup> The duo is tried in a joint trial, which started in January 2016 and is discussed in the preface.<sup>2610</sup>

Laurent Gbagbo's wife, Simone, was charged as well. The court unsealed a warrant for her arrest in November 2012 for four charges of crimes against humanity.<sup>2611</sup> Despite the fact that Côte d'Ivoire transferred Laurent Gbagbo to The Hague, Abidjan challenged the admissibility of the case against his wife, who is in Ivorian preventive detention since 11 April 2011 in Odienné. The government cites that there are national investigations and proceedings on-going relating to the same crimes as listed in the ICC's charge sheet, with additional charges of genocide.<sup>2612</sup> She, alongside with 82 other defendants including her son, was convicted to 20 years imprisonment in early 2015 for undermining state security.<sup>2613</sup>

## Mali

In the 15th and 16th centuries, Timbuktu became a regional centre of economic activity and trade. More importantly, it blossomed into one of Africa's most vibrant intellectual and spiritual capitals. It played an essential role in the expansion of Islam in Africa. [...] What happened in Timbuktu is truly a dark page in the history of this city. [...] As I have mentioned in prior proceedings in this case: "history itself, whose physical embodiment is at peril through such attacks, will not be generous to our failure to care, or to act decisively.

- Fatou Bensouda, Prosecutor<sup>2614</sup>

Tuareg rebels of the National Movement for the Liberation of Azawad (MNLA) in January 2012 launched a rebellion for independence, which swiftly overwhelmed the nation's army. Two months

<sup>2606</sup> In particular, with respect to crimes and abuses committed since March 2004. See: République de Côte d'Ivoire, Le Président, *Confirmation de la Déclaration de Reconnaissance* (Abidjan 14 December 2010). République de Côte d'Ivoire, Le Président, *A Monsieur Moreno Ocampo* (Abidjan, 3 May 2011). On 3 October 2011, the PTC authorised the Prosecutor to open an investigation into the situation in Côte d'Ivoire since 28 November 2010. On 22 February 2012, PTCIII decided to expand its authorisation for the investigation in Côte d'Ivoire to include crimes within the jurisdiction of the Court allegedly committed between 19 September 2002 and 28 November 2010.

<sup>2607</sup> ICC, *Situation in Côte d'Ivoire: Warrant Of Arrest For Laurent Koudou Gbagbo* (ICC-02/11; 23 November 2011). He is accused of being an indirect co-perpetrator of four counts of crimes against humanity: murder; rape and other sexual violence; persecution; and other inhuman acts, allegedly committed between 16 December 2010 and 12 April 2011. Confirmation of charges hearings were scheduled to take place in August 2012. But because of his alleged bad health conditions, these hearings have been delayed until further notice.

<sup>2608</sup> The confirmation of charges hearing in the case *The Prosecutor v. Laurent Gbagbo* took place from 19 to 28 February 2013. On 12 June 2014, PTCI confirmed by majority four charges of crimes against humanity (murder, rape, other inhumane acts or – in the alternative – attempted murder, and persecution) against Laurent Gbagbo and committed him for trial. ICC, *Situation in the Republic of Côte d'Ivoire: Decision on the Confirmation of Charges against Laurent Gbagbo* (ICC-02/11-01/11; 12 June 2014).

<sup>2609</sup> ICC, *Situation in the Republic of Côte d'Ivoire in the case of the Prosecutor v. Charles Blé Goudé: Warrant of Arrest for Charles Blé Goudé* (ICC-02/11-02/11; 21 December 2011).

<sup>2610</sup> ICC, *Situation in the Republic of Côte d'Ivoire in the case of the Prosecutor v. Laurent Gbagbo and the Prosecutor v. Charles Blé Goudé: Decision on Prosecution requests to join the cases of The Prosecutor v. Laurent Gbagbo and The Prosecutor v. Charles Blé Goudé and related matters* (ICC-02/11-01/11 & ICC-02/11-02/11; 11 March 2015).

<sup>2611</sup> ICC, *Situation in the Republic of Côte d'Ivoire: Warrant of Arrest for Simone Gbagbo* (ICC-02/11-01/12; 29 February 2012).

<sup>2612</sup> ICC, *Situation en République de Côte D'Ivoire Affaire le Procureur c. Simone Gbagbo: "Requête de la République de Côte d'Ivoire sur la recevabilité de l'affaire, le Procureur c. Simone Gbagbo et demande de sursis à exécution en vertu des articles 17, 19 et 95 du Statut de Rome"* (ICC-02/11-01/12; Paris, 30 September 2013).

<sup>2613</sup> Maureen Grisot, 'Côte d'Ivoire: vingt ans de prison pour Simone Gbagbo', *Le Monde*, 12 March 2015.

<sup>2614</sup> ICC, *Al Faqi Al Mahdi Transcript* (22 August 2016), pp. 16; 24.

later, a group of mid-ranking soldiers launched a coup but the north became easy prey and fell to rebel groups. Jihadist groups linked to Al-Qaeda in the Islamic Maghreb (AQIM) took control over the rebellion, while they initially appeared to be fighting with the Tuareg. Sharia law was enforced and many of Mali's famous ancient shrines – including some in Timbuktu - have been destroyed.<sup>2615</sup> The Economic Community of West African States (ECOWAS) posed sanctions on Mali and prepared the deployment of the regional Mission in Mali (MICEMA),<sup>2616</sup> a mission that was later taken over by the UN's Stabilization Mission (MINUSMA).<sup>2617</sup> Soon during the violence, the ICC sent out a public statement warning that it was closely monitoring possible war crimes, crimes against humanity or genocide in Mali since the clashes had erupted.<sup>2618</sup> On two occasions, the UN's Security Council stressed that perpetrators of international crimes should be held accountable.<sup>2619</sup> When visiting Mali, Fatou Bensouda said that the destruction of historical monuments is a war crime.<sup>2620</sup> Only days later, she received a letter and documentation from Mali's Minister of Justice referring 'the situation in Mali since January 2012' to her office.<sup>2621</sup> In its preliminary examination, the OTP found reasonable basis to believe war crimes had been committed (murder, mutilation, cruel treatment, torture, passing sentences and carrying out executions without due process, destroying protected objects, pillage and rape).<sup>2622</sup> "Since the beginning of the armed conflict in January 2012, the people of Northern Mali have been living in profound turmoil. [...] I have determined that some of these deeds of brutality and destruction may constitute war crimes," said Prosecutor Bensouda when she announced to start investigation in the three northern regions of Mali.<sup>2623</sup>

On 26 September 2015, Niger surrendered the first Malian suspect to the ICC, Ahmad Al Mahdi Al Faqi (a.k.a. Abu Tourab), a former school teacher and member of the Islamic Police ("Hesbah" -"Manners' Brigade") aligned to Ansar Dine and Al-Qaeda in the Islamic Maghreb (AQIM), in Timbuktu.<sup>2624</sup> Al Mahdi is the first to be accused of the war crime of intentionally destroying historic cultural heritage, including mausoleums and a Mosque.<sup>2625</sup> In the fastest trial so far, which only lasted three days at the end of the summer of 2016, Al Mahdi pleaded guilty to attacking nine historic and religious mausoleums and a mosque in 2012. Only a month later, he was unanimously convicted of the war crime of intentionally directing attacks against religious and

<sup>2615</sup> See for more detailed reports: Peter Chilson, *We never knew exactly where. Dispatches from the lost country of Mali* (Foreign Policy Group and Pulitzer Center, 2013); ICG, 'Mali: Avoiding Escalation', *Africa Report*, No 189 (18 July 2012); Fédération Internationale des ligues des Droits de l'Homme (FIDH); Association malienne des droits de l'Homme (AMDH), *Crimes de guerre au Nord-Mali* (July 2012).

<sup>2616</sup> Economic Community of West African States (ECOWAS), 'Ecowas Council Recommends Sanctions Against Obstructive Individuals, Groups in Mali', *Press Release*, No. 256/2012 (Abidjan, 17 September 2012).

<sup>2617</sup> UNSC, *Resolution 2100* (S/RES/2100) (2013); 25 April 2013).

<sup>2618</sup> ICC, *Statement from the Office of the Prosecutor of the International Criminal Court* (24 April 2012).

<sup>2619</sup> UNSC, *Resolution 2056* (S/RES/2056) (2012); 5 July 2012), §13; UNSC, *Resolution 2071* (UN doc S/RES/2071) (2012); 12 October 2012), preamble.

<sup>2620</sup> Serge Daniel, 'Timbuktu shrine destruction a 'war crime': ICC', *Agence France Presse (AFP)*, 1 July 2012.

<sup>2621</sup> République de Mali, Ministère de la Justice, *Renvoi de la situation de Mali* (Bamako, 3 July 2012); ICC, 'ICC Prosecutor Fatou Bensouda on the Malian State referral of the situation in Mali since January 2012', *Press Release*, ICC-OTP-20120718-PR829 (18 July 2012).

<sup>2622</sup> ICC, OTP, *Situation in Mali. Article 53(1) Report* (16 January 2013), §173.

<sup>2623</sup> ICC, 'ICC Prosecutor opens investigation into war crimes in Mali: "The legal requirements have been met. We will investigate"', *Statement* (ICC-OTP-20130116-PR869; 16 January 2013).

<sup>2624</sup> ICC, *Al Faqi Al Mahdi Transcript* (30 September 2015).

<sup>2625</sup> The charges concern attacks on the following buildings: 1) the mausoleum Sidi Mahmoud Ben Omar Mohamed Aquit, 2) the mausoleum Sheikh Mohamed Mahmoud Al Arawani, 3) the mausoleum Sheikh Sidi Mokhtar Ben Sidi Muhammad Ben Sheikh Alkabar, 4) the mausoleum Alpha Moya, 5) the mausoleum Sheikh Sidi Ahmed Ben Amar Arragadi, 6) the mausoleum Sheikh Muhammad El Micky, 7) the mausoleum Cheick Abdoul Kassim Attouaty, 8) the mausoleum Ahamed Fulane, 9) the mausoleum Bahaber Babadié, and 10) Sidi Yahia mosque. ICC, PTCI, *Mandat d'arrêt à l'encontre d'Ahmad AL FAQI AL MAHDI* (ICC-01/12-01/15; 18 September 2015).

historic buildings and sentenced to nine years' imprisonment. Himself a rather low-level perpetrator, Al Mahdi from the day investigators encountered him cooperated with the prosecution.<sup>2626</sup> From his interviews and statements, as well as from video recordings, it has transpired who were the most responsible. The court was explicit about it:

Mr Al Mahdi was in direct contact with the leaders of Ansar Dine and AQIM, including Iyad Ag Ghaly, the leader of Ansar Dine, Abou Zeid, the 'Governor' of Timbuktu under the armed groups, Yahia Abou Al Hammam, an AQIM chief, and Abdallah Al Chinguetti, a religious scholar within AQIM. [...] In late June 2012, the leader of Ansar Dine, Ag Ghaly, made the decision to destroy the mausoleums, in consultation with two prominent AQIM members, Al Chinguetti and Al Hammam. Mr Al Mahdi was also consulted by Abou Zeid before this decision was made. Mr Al Mahdi expressed his opinion that all Islamic jurists agree on the prohibition of any construction over a tomb, but recommended not destroying the mausoleums so as to maintain relations between the population and the occupying groups. Nevertheless, Ag Ghaly gave the instruction to proceed to Abou Zeid, who in turn transmitted it to Mr Al Mahdi in his capacity as the chief of the Hesbah.<sup>2627</sup>

Distinct from the other ICC trials, the OTP strategy has appeared to have emerged from luck. Arrested by French soldiers, Al Mahdi was an available suspect, who subsequently wanted to come clean and provide a detailed account of his acts, the context and other potential suspects. Although the OTP has always said it was to follow up on its investigations, also to include violence against people, no public arrest warrants had been issued at the time of writing. From the judgement, however, we may have some indication of who is potentially under investigation.

### **Guinea Conakry, Nigeria and Burundi**

Besides the formal investigations, the OTP respectively started two preliminary examinations in Africa. This first concerns possible crimes against humanity in Guinea.<sup>2628</sup> In December 2008, after the death of President Lansana Conté, Captain Moussa Dadis Camara seized power in a military coup. He established a military junta, the Conseil National pour la Démocratie et le Développement (CNDD) and promised to transfer power after holding presidential and parliamentary elections. However, subsequent statements suggested that he might run for another term led to renewed protests by opposition and civil society groups. On Guinea's Independence Day - 28 September 2009 – an opposition rally at the national stadium in Conakry was violently suppressed by security forces. At least 156 people were killed, 109 women raped and many others were tortured during the '28 September massacre'.<sup>2629</sup> The OTP opened a preliminary investigation into possible crimes against

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<sup>2626</sup> ICC, *Al Faqi Al Mahdi Transcript* (23 August 2016), pp. 16-19.

<sup>2627</sup> ICC, *Al Faqi Al Mahdi Transcript* (27 September 2016), pp. 4-6.

<sup>2628</sup> 'ICC: Guinea Junta probe will continue', *International Justice Tribune*, No. 100 (24 February 2010), p. 4; Bram Posthumus, 'Guinea: court action, but when?', *International Justice Tribune*, No. 128 (11 May 2011), p. 3; Bouwknecht, 'Fatou Bensouda: ICC crimes monitor', p. 6.

<sup>2629</sup> ICC, OTP, *Report on Preliminary Examination Activities 2014* (2 December 2014) 38; UNSC, *Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea* (S/2009/693; 18 December 2019); HRW, *Bloody Monday. The September 28 Massacre and Rapes by Security Forces in Guinea* (New York 2009).

humanity in October 2009<sup>2630</sup> and is currently assessing if national criminal investigations alongside the work of a truth commission sufficiently address this violent episode.<sup>2631</sup>

Next to Guinea, the ICC started a preliminary examination in Nigeria,<sup>2632</sup> an enormous and densely populated country with approximately 168 million inhabitants and over 250 ethnic groups. Different groups allegedly committed atrocities at different times in different regions. The Middle-Belt States in Central Nigeria<sup>2633</sup> have been affected by communal and sectarian violence, the Niger Delta states<sup>2634</sup> saw violence over control and impact of the oil production in the region and access to resources and the Northern States have been the scene of communal and electoral violence as well as attacks by the Islamist jihadi movement Boko Haram.<sup>2635</sup> Both the Central and northern parts of Nigeria have been affected by inter-communal, political and sectarian violence. More than 13,500 people have died in clashes since the end of military rule in 1999.<sup>2636</sup> Nigeria's Plateau state, where Jos is located, lies in the so-called middle belt between the predominantly Muslim north and the mainly Christian south. Since 2010, the OTP probed whether crimes against humanity were committed in Plateau State.<sup>2637</sup> The preliminary examination was a response to a massacre that killed over 300 people in January that year. Mass killings took place some 30 kilometres south of the city of Jos, where Christian and Muslim mobs went on a rampage with guns, knives and machetes.<sup>2638</sup> Included in the probe was also the violence in the Northern Kaduna State, which is deeply rooted in ethnic and religious division between indigenous Hausa-Fulani and the largely Christian Igbo and Yoruba communities.<sup>2639</sup> Violence occurred in particular around the 2011 elections, during which hundreds of civilians were allegedly killed.<sup>2640</sup>

The second area, where the ICC focused its attention, concerned the oil-rich Niger Delta Region, which has seen violence among ethnically based gangs, military groups and federal forces. Among the root causes of the violence in the Delta region are the struggle over control and impact of the oil production in the region and access to resources.<sup>2641</sup> More recently, the probe has focused on Boko Haram.<sup>2642</sup> The Islamist movement came to prominence in 2009. Through subtle and open harassment, Boko Haram was goaded into an open confrontation with the Nigerian state and violently

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<sup>2630</sup> ICC, 'ICC Prosecutor confirms situation in Guinea is under examination', *Press Release* (ICC-OTP-20091014-PR464; 14 October 2009).

<sup>2631</sup> 'Investigations in Guinea: with or without the ICC', *International Justice Tribune*, No. 145 (15 February 2012), p. 2. The examination is currently in phase 3 (see note 147) ICC, OTP, *OTP Briefing*, Issue 131 (12 September – 1 October 2012).

<sup>2632</sup> Between 10 November 2005 to 30 September 2012, the ICC's OTP received 59 communications in relation to the situation in Nigeria, 26 of which were outside the jurisdiction of the Court. The preliminary examination of the situation in Nigeria was made public on 18 November 2010.

<sup>2633</sup> The Middle-Belt States include Kwara State, Kogi State, Benue State, Plateau State, Nasarawa State, Niger State, Adamawa State and Taraba State.

<sup>2634</sup> Niger Delta region includes the following states: Cross River, Akwa Ibom, Rivers, Bayelsa, Delta and Edo; sometimes it further includes Imo, Abia and Ondo States as they are also oil producers.

<sup>2635</sup> For a recent study on Boko Haram: Manon Stravens, *De Opstand Van Boko Haram. Hoe een lokale ideologische revolte kon uitgroeien tot een oorlogsmachine* (Groet: Conserve, 2015).

<sup>2636</sup> HRW, "Leave Everything to God." *Accountability for Inter-Communal Violence in Plateau and Kaduna States, Nigeria* (HRW: New York, December 2013).

<sup>2637</sup> ICC, OTP, *Letter from M.P. Dillon, Head of the Information & Evidence Unit Office of the Prosecutor* (OTP-CR-58/10; 5 November 2010).

<sup>2638</sup> HRW, *Nigeria: Investigate Massacre, Step up Patrols. Hundreds Killed by Mobs in Villages in Central Nigeria* (8 March 2010); ICC, OTP, *OTP Briefing*, Issue 131 (12 September – 1 October 2012).

<sup>2639</sup> HRW, *They Do Not Own This Place. Government Discrimination Against 'Non-Indigenes' in Nigeria* (HRW: New York, April 2006) 48-49.

<sup>2640</sup> HRW, *Nigeria: Post-Election Violence Killed 800. Promptly Prosecute Offenders, Address Underlying Causes*, 17 May 2011.

<sup>2641</sup> ICC, OTP, *Situation in Nigeria: Article 5 Report* (5 August 2013).

<sup>2642</sup> The group is officially known as "People Committed to the Propagation of the Prophet's Teachings and Jihad" (*Jama'atu Ahlis-Sunnah Lidda'awati Wal Jihad*). Often it is popularly translated as "Western education is a sin". Marc-Antoine Pérouse de Montclos, 'Introduction and overview', in: Marc-Antoine Pérouse de Montclos (ed.), *Boko Haram. Islamism, politics, security and the state in Nigeria* (Enschede: African Studies Centre & Institut Français de Recherche en Afrique, 2014) 1-8: 2-3.

suppressed in July 2009. Thereafter, it went underground, rebuilt, and resurfaced in October 2010 and has since changed its tactics to targeted assassinations, drive-by shootings, suicide bombings, kidnapping and hostage taking – most famously the April 2014 abduction of around 200 school girls in Chibok.<sup>2643</sup> Boko Haram has tried to mimic and adopt the tactics and strategies of global Salafist movements such as Al-Qaeda<sup>2644</sup> and has sworn alliance to ISIL.<sup>2645</sup> It rose to notoriety between 3 and 7 January 2015, when it carried out the largest terrorist attack since the ‘9/11’ assault in the USA, infecting – almost on a daily basis – the area surrounding Baga. Isolated from the international media and out of reach of Nigerian government forces, the fishing settlement on the shores of Lake Chad in Borno State saw large scale massacres and burning down of houses.<sup>2646</sup> Death tolls in the Baga and 16 surrounding villages range between dozens to 2000 or more. “No one stayed back to count bodies,” a local resident told Human Rights Watch.<sup>2647</sup> Before, the ICC reported on the basis of information gathered up to December 2012, that the group has allegedly attacked religious clerics, Christians, political leaders, Muslims opposing the group, members of the police and security forces, “westerners”, journalists, as well as UN personnel. These acts of murder and persecution may be crimes against humanity, Bensouda’s office said.<sup>2648</sup>

Next to Guinea and Nigeria, Bensouda opened a preliminary investigation into the situation in Burundi. It follows the political turmoil and subsequent violence as a result of President Pierre Nkurunziza’s March 2015 bid to change to constitution and run for a third turn. In the course of the on-going crisis, more than 430 persons were reportedly killed, at least 3,400 people have been arrested and over 230,000 Burundians forced to seek refuge in neighbouring countries. Bensouda’s office received a number of communications and reports detailing acts of killing, imprisonment, torture, rape and other forms of sexual violence, as well as cases of enforced disappearances. All these acts appear to fall within the jurisdiction of the ICC.<sup>2649</sup>

Africa, as seen above, has in the first years been the ICC’s prime area of work, both in terms of investigations and trials. As noted earlier, this had led to much criticism from outside observers who claim the court should be more global and address other conflict situations as well. Imaginably, bearing in mind the various wars and serious violations of human rights elsewhere, the debate is heated, emotional and political. In many respects it is badly informed as well, particularly if one is aware that the ‘anti-ICC’ wave was carefully set into motion by people like Gaddafi, Bashir and Kenyatta – leaders who themselves were suspects in The Hague. Yet, their operationalized words such as ‘biased’, ‘targeted’, ‘politicised’, ‘racist’ and ‘neo-colonial’ have for long dominated the public

<sup>2643</sup> ICC, OTP, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the abduction of schoolgirls in Nigeria*, 8 May 2014.

<sup>2644</sup> Kyari Mohammed, ‘The message and methods of Boko Haram’, in: Marc-Antoine Pérouse de Montclos (ed.), *Boko Haram. Islamism, politics, security and the state in Nigeria* (Enschede: African Studies Centre & Institut Français de Recherche en Afrique, 2014) 9-33: 10-11.

<sup>2645</sup> Eric Schmitt, ‘Urgency seen as group Embraces ISIS’, *New York Times*, 8 March 2015.

<sup>2646</sup> ‘Security Council strongly condemns escalating Boko Haram attacks, warns of ‘crimes against humanity’, *UN News Centre*, 19 January 2015.

<sup>2647</sup> Mausi Segun, ‘What really happened in Baga, Nigeria?’, *Dispatches* (HRW, 14 January 2015); Adam Nossiter, ‘Satellite Images Show Ruin Left by Boko Haram, Groups Say’, *The New York Times*, 15 January 2015.

<sup>2648</sup> ICC, OTP, *Situation in Nigeria: Article 5 Report* (5 August 2013).

<sup>2649</sup> ICC, OTP, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a Preliminary Examination into the situation in Burundi*, 25 April 2016.

and media narrative, in Africa but also in African Diaspora's. But these political, dramatic and yet fashionable headlines that dominate the debate has largely distorted the public understanding of what the court really does and for whom. First of all, the ICC is not a panacea as many want to believe. It is just a court of law, without superpowers. Moreover, it is a court of the ultimate last resort. It only addresses the injustices that fall through the gaps when national courts cannot or will not step in. Secondly, the ICC is not there to appease statesman but to address crimes that have cost the lives of thousands of African victims, crimes that were allegedly caused by the acts and omissions of the very political agents that oppose the ICC.

But there is more, on another level. Africa is not a country. Out of 54 sovereign nations, the discontent stems only from a handful of countries on the continent. History also tells a different story. Not only were African leaders, civil society and other stakeholders the most passionate supporters of the ICC when it was set up seventeen years ago, African countries still represent the largest regional bloc of states which have ratified the Rome Statute of the ICC, Senegal being the very first. Likewise, after the court opened its doors in July 2002 many serious large scale international crimes were committed. African countries were also the first to call on the ICC by referring situations of mass atrocities for investigation, by cooperating with investigations, by arresting and surrendering individuals and by protecting victims and witnesses. A footnote must be added in this respect since these so-called 'self-referrals' were often solicited through intensive lobbying of court officials. On yet another level and contrary to the myth that the ICC is focused exclusively on Africa, the court's focus is increasingly projected on other situations. For instance, by the end of 2015, the OTP had either concluded or was still busy conducting preliminary examinations in four Asian states (Afghanistan, Iraq, Palestine, Korea), three in Latin America (Colombia, Honduras and Venezuela) and two in Europe (Ukraine and Georgia).<sup>2650</sup> In all, the workspace of the ICC has increased a lot in the 14 years it is operational and meanwhile, in some situations, it has almost finished its work, particularly in the Democratic Republic of the Congo (DRC). In the following sections, these cases will be highlighted in order to demonstrate that similar to the UNICTR and SCSL, serious fact-ascertainment problems existed as to what happened and why in the volatile region of Ituri in the east of Congo.

### **6.3 The Democratic Republic of the Congo (DRC)**

Q: [Mr. Biju-Duval, Defence] “[...] Can you tell us precisely on the basis of which document or what other source you can make such a claim?”

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<sup>2650</sup> Out of the preliminary examinations, the first formal investigation may start in Georgia, a situation wherein the prosecutor has requested the PTC to do so. ICC, PTCI, *Situation in Georgia: Corrected Version of "Request for authorisation of an investigation pursuant to article 15"*, 16 October 2015, ICC-01/15-4-Corr (ICC-01/15; 17 November 2015); ICC, OTP, *Summary of the Prosecution's Request for authorisation of an investigation pursuant to article 15* (13 October 2015).

A: [Gérard Prunier, Expert Witness] “Well, sir, we're dealing with Africa. Pity, please, a little common sense. This isn't how things work there.”<sup>2651</sup>

While the genocide against Rwandan Tutsi received unprecedented judicial attention and the atrocities in Sierra Leone have been addressed legally and were ‘truth commissioned’, the many cyclical episodes of mass violence in the Democratic Republic of Congo (DRC) were only addressed relatively marginally. It goes too far back to outline the entirety of conflicts and episodes of mass violence in Congo. This chapter therefore does not deal with the imprescriptible historical injustices in pre-colonial times (slavery) and the deadly reign of King Leopold (genocide), partly because these are discussed in chapter III. Also, it goes beyond the scope of this chapter to detail and do justice to world historical events, like the murder of Patrice Lumumba in 1961 or the full scope of the first and second Congo wars, which may have been determinate to course of Congolese history. Unlike Rwanda and Sierra Leone, which are relatively small states with relatively comprehensible histories, the Democratic Republic of the Congo is amazingly vast in all aspects conceivable. For this reasons, this chapter has a different composition than those on Rwanda and Sierra and will restrict drastically itself in terms of space and time. Also, rather than discussing historical antecedents, which at the UNICTR, SCSL or Gbagbo trial, were crucial in understanding the type of crimes prosecuted, in the ICC’s Congo prosecutions these turned out not to be vital. When necessary, however, it will highlight contextual connections with Rwanda, which not only borders Congo but also shares the ethnic lineages and above all is heavily involved in Congolese affairs.<sup>2652</sup>

Since March 1993,<sup>2653</sup> particularly the eastern provinces<sup>2654</sup> of Congo – the continent’s second largest, central African, highly populated, mineral-rich, yet deprived, ex-Belgian country – saw ethnic violence, acts of genocide, refugee crises, insurgency, two full-scale international wars, internal rebellion, civil war and plunder of natural resources. Congolese government forces, para-military groups, [foreign] militias, rebel groups, civil defence forces, an array of foreign armies [most notably Rwandan and Ugandan] and UN peacekeepers violated human rights.<sup>2655</sup> Violence is ever continuing<sup>2656</sup> and since 2013, the UN created an ‘Intervention Brigade’ to take offensive action against militias<sup>2657</sup> and permitted the use of unmanned aerial vehicles (UAV’s), known as drones, by the United Nations Organisation Stabilisation Mission in the Democratic Republic of Congo

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<sup>2651</sup> ICC, *Lubanga Dyilo Transcript* (26 March 2009), pp. 94-95. Historian Prunier testified on behalf of the prosecution.

<sup>2652</sup> Also see: Gérard Prunier, *From Genocide to Continental War*; Stearns, *Dancing in the Glory of Monsters*.

<sup>2653</sup> Violence in Zaire/DRC can be traced back to much earlier times and many other instances. Yet, for the sake of clarity, I choose March 1993, analogous to the two so-called *UN Mapping Report*. March 1993 corresponds with the Ntoto market massacre of Banyarwanda (‘People from Rwanda’) peasants and Hutu civilians in North Kivu, which triggered wider ethnic conflict. See: OHCHR, *Report of the Mapping Exercise*, p. 2, notes 3 and 58. The Congolese Truth and Reconciliation Commission divides it mandated period in two: 1960 to 1992 and 1993-2006. The latter period corresponds with the democratisation process under Joseph Mobutu Sese Seko.

<sup>2654</sup> Province Orientale, Nord-Kivu and Sud-Kivu.

<sup>2655</sup> See for instance: *Reybrouck, Congo*; Stearns, *Dancing in the Glory of Monsters*; OHCHR, *Report of the Mapping Exercise*; Filip Reyntjens, *The Great African War. Congo & Regional Politics 1996-2006* (Cambridge 2009); Gerard Prunier, *Africa's World War: Congo, the Rwandan genocide and the making of a catastrophe* (Oxford 2009).

<sup>2656</sup> See, *inter alia*, the subsequent reports – since 2004 - of the Group of Experts submitted through the UN Security Council Committee concerning the Democratic Republic of the Congo (www-page: <http://www.un.org/sc/committees/1533/egroup.shtml>; last visit: 5 May 2014). Established through: UNSC, *Resolution 1533* (S/RES/1533 (2004); 12 March 2004).

<sup>2657</sup> UNSC, *Resolution 2098* (S/RES/2098 (2013); 28 March 2013).

(MONUSCO).<sup>2658</sup> Omnipresent impunity, prosecutions, truth seeking, demobilisation and re-integration and amnesty were used in Congo to respond to the back-to-back outbreaks of violence. Congo's 2002 'transition' – towards peace under the new Presidency of Joseph Kabila - was blueprinted in South Africa's Sun City, at the Inter-Congolese Dialogue, comprising 362 Congolese officials, political opponents, rebel groups and *forces vives*.<sup>2659</sup> They agreed, *inter alia*, on a truth and reconciliation commission,<sup>2660</sup> which was later, enshrined in the 2003 Transitional Constitution<sup>2661</sup> and established the following year.<sup>2662</sup> A second truth commission since the one that investigated the plunder by King Leopold in 1905, the modern *Commission Vérité et Réconciliation* (CVR) was tasked with investigating political crimes and human rights abuses between Congo's independence on 30 June 1960 up to prospective "end of the transition" on 30 June 2006.<sup>2663</sup> Headed by Bishop Jean-Luc Kuye Ndongwa Mulemera and seated in Kinshasa, the heavily divided 21 CVR members never embarked on a serious truth-seeking undertaking. Instead, they were caught up with resolving on-going political disputes and sensitising the public for the 2006 polls, the first multi-party elections in the country in 41 years.<sup>2664</sup> At its end, the commission concluded that a new truth commission should be created, something that never happened.<sup>2665</sup>

Like in Rwanda and disparate from Sierra Leone, the Congolese judiciary also operated separately from international justice. Numerous military tribunals throughout Congo<sup>2666</sup> investigated, prosecuted, judged and sentenced scores of rebel fighters, government soldiers and civil defence warriors for international crimes.<sup>2667</sup> Apart from these sedentary tribunals, which for many affected communities are often more than a week's journey away, a system of mobile courts<sup>2668</sup> was introduced from October 2009. Traveling judges, prosecutors, and defence counsel resolved disputes and dispensed justice particularly in relation to sexual offences but also to murder and theft. Developed by the American Bar Association (ABA) and Open Society Justice Initiative (OSJI) but

<sup>2658</sup> Michelle Nichols, 'U.N. Security Council allows drones for eastern Congo', *Reuters*, 24 January 2013.

<sup>2659</sup> A detailed account on the negotiations can be found in: ICG, 'Storm Clouds over Sun City'.

<sup>2660</sup> Dialogue Intercongolais, *Négociations Politiques sur les Processus de Paix et sur la Transition en RDC, Accord Global et Inclusif sur la Transition en République Démocratique de Congo* (Pretoria, 16 December 2002), art. V & D (4)(a). The Truth and Reconciliation Commission was established alongside an independent electoral commission, a national observatory for human rights, a higher authority for media and an ethical commission to fight corruption.

<sup>2661</sup> Cabinet de Président de la République, 'Constitution de la Transition', *Journal Officiel de la République Démocratique du Congo*, 44eme Année, Numéro Spécial (5 April 2003), art. 154-160.

<sup>2662</sup> *Loi N°04/018 de 30 juillet 2004 portant organisation, attributions et fonctionnement de la commission vérité et réconciliation* (Kinshasa, 30 July 2004).

<sup>2663</sup> It was fully mandated to (a) consolidate national unity and cohesion and social justice; (b) re-establish truth about political and socio-economic events; (c) reconcile political and military actors with civilians; (d) contribute to the Rule of Law; (e) revive a new national and patriotic consciousness; (f) bring together leaders; (g) restore climate of trust between communities and encourage inter-ethnic cohabitation; (h) recognise crimes committed against the Republic; (i) recognize individual and collective responsibilities and see redress; and (j) eradicate tribalism, regionalism, intolerance, exclusion and hatred in all forms. *Loi N°04/018 de 30 juillet 2004 portant organisation, attributions et fonctionnement de la commission vérité et réconciliation* (Kinshasa, 30 July 2004), art. 7.

<sup>2664</sup> Hayner, *Unspeakable Truths*, pp. 253-255; and Scott Baldauf, 'A bishop prepares volatile Congo for peace', *Christian Science Monitor*, 14 November 2006.

<sup>2665</sup> Priscilla Hayner writes that only an administrative report - *Rapport final des activités de juillet 2003 à février 2007* - was submitted to the government in February 2007 but that no public version was published. It lists meetings but provides no substantive conclusions or commentary about human rights abuses. Hayner, *Unspeakable Truths*, p. 337, note 55.

<sup>2666</sup> The military court structure consists of the *Tribunaux Militaires de Garnison* (Military Garrison Tribunals, MTG), at first instance, the *Cours Militaire* (Military Courts MC) and the *Haute Cour Militaire* (Military High Court, MHC) as the final court of appeal. These tribunals replaced the Military Order Court, which had operated between 1997 and 2003: OHCHR, *Report of the Mapping Exercise*, p. 394.

<sup>2667</sup> By 2008, according to HRW researchers, trials involving grave violations of international humanitarian law had been conducted before the following courts: military tribunal of Bunia, military tribunal of Songo Mboyo, military tribunal of Mbandaka, military tribunal of Gbadolite, military tribunal of Beni and the military tribunal of Katanga. Geraldine Mattioli & Anneke van Woudenberg, 'Global Catalyst for National Prosecutions? The ICC in the Democratic Republic of the Congo', in: Nicholas Waddell and Phil Clark (eds.), *Courting Conflict. Justice, Peace and the ICC in Africa* (London: Royal African Society, 2008) 55-64. See for several case studies, including Bunia and Bakavu in the east of the country: Avocats Sans Frontiers (ASF), *Case Study. The Application of the Rome Statute of the International Criminal Court by the Courts in the Democratic Republic of the Congo* (Brussels/Kinshasa: ASF, 2009) 99-112. For other cases in Équateur Province, Katanga Province, Maniema Province, Orientale Province and North Kivu and South Kivu Provinces: OHCHR, *Report of the Mapping Exercise*, pp. 398-410.

<sup>2668</sup> Mobile courts, which can be either civilian or military tribunals, are specifically provided for by Congolese law: République du Zaïre, Ministère de la Justice, *Arrêté d'Organisation Judiciaire 299/79 portant règlement intérieur des cours, tribunaux et parquets* (20 August 1979).

ran by Congolese staff, the courts in Maniema and South Kivu Provinces heard 382 cases, with 204 convictions for rape and 82 convictions for other offenses and 67 acquittals in three years.<sup>2669</sup>

The military courts, the ICC and mobile courts have dealt with serious crimes under international humanitarian law. However, debate about the establishment of a specialised mixed jurisdiction for Congo with a longer historical mandate has been on the agenda as well. First calls for special chambers came from civil society organisations from 2004.<sup>2670</sup> The idea was reiterated by the United Nations in 2008<sup>2671</sup> and again strappingly advocated for in the 2010 *Mapping Report* – alongside a new truth commission.<sup>2672</sup> Kinshasa promised to follow up but an initial draft law<sup>2673</sup> miscarried in parliament in August 2011. A transformed sketch for a special court is under deliberation at the time of writing.<sup>2674</sup> Nonetheless, at the background of discussions on a special tribunal, amnesties have been dealt out to 271 rebel fighters, including some who have been possibly implicated in crimes under international humanitarian law.<sup>2675</sup> Meanwhile, the incorporation of international crimes into national law has progressed swiftly in 2015 and by 2016 the ICC's Rome Statute will be domesticated into the Congolese legislation. Outside Congo, a handful of universal jurisdiction cases followed. In 2000, Belgium issued an arrest warrant - on charges of crimes against humanity and war crimes - for Foreign Minister Yerodia Abdoulaye Ndombasi, but the International Court of Justice (ICJ) blocked it.<sup>2676</sup> Two years later, a court in The Netherlands convicted former Colonel Sebastien Nzapali for torture.<sup>2677</sup> Crimes in Congo were listed in the arrest warrant for 40 Rwandans by a Spanish judge in 2008<sup>2678</sup> whereas a German court in Stuttgart started a trial against two Rwandan leaders of the Forces Démocratiques de Libération du Rwanda (FDLR) in 2011.<sup>2679</sup> Arrested in January 2009 in Rwanda, the judicial faith of Laurent Nkunda Batware remains ambiguous, since Kigali has not ever acted on an extradition request from Kinshasa nor put him on

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<sup>2669</sup> Not much has been written about the mobile courts. Yet, information is available from a variety of sources, including: Open Society Justice Initiative (OSJI), *Justice in DRC. Mobile Courts Combat Rape and Impunity in Eastern Congo* (New York: OSJI, January 2013); Kelly Askin, 'Fizi mobile court: rape verdicts', *International Justice Tribune*, No. 123 (2 March 2011) 1; Lisa Clifford, 'Open air justice in DR Congo', *International Justice Tribune*, No. 124 (26 March 2011) 4; Passy Mubalala & Simon Jennings, 'Roving Courts in Eastern Congo', *Institute for War and Peace Reporting (IWPR)*, ACR Issue 339 (13 February 2013). Also see the documentary film: Femke van Velzen & Ilse van Velzen, *Justice for Sale* (IF Productions 2011).

<sup>2670</sup> HRW, *Accountability for Atrocities Committed in the Democratic Republic of the Congo*; OHCHR, *Report of the Mapping Exercise*, p. 432.

<sup>2671</sup> United Nations Human Rights Council (UNHC), *Report of the Special Rapporteur on the independence of judges and lawyers*, Leandro Despouy. Addendum: Mission to the Democratic Republic of the Congo (A/HRC/8/4/Add.2; 11 April 2008), §88.

<sup>2672</sup> OHCHR, *Report of the Mapping Exercise*, p. 31.

<sup>2673</sup> *Loi organique portant création, organisation et fonctionnement d'une Cour spécialisées*, May 2001.

<sup>2674</sup> HRW, *Accountability for Atrocities Committed in the Democratic Republic of the Congo*. Also see letter from 146 Congolese civil society and international human rights organisations to Congolese authorities: *Democratic Republic of the Congo: No More Delays for Justice. Establish Specialized Mixed Chambers and Adopt ICC Implementing Legislation During the Current Parliamentary Session*, Kinshasa, 1 April 2014.

<sup>2675</sup> République Démocratique du Congo, Ministère de La Justice et Droits Humains, *Arrêté Ministériel No 109/CAB/MIN/J&DH/2014 du 14 AVR 2014 Relatif à l'Exécution de la Loi No 14/006 du 11 Février 2014 Portant Amnistie pour Faits Insurrectionnels, Faits de Guerre et Infractions Politiques*, Kinshasa, 14 April 2014. And subsequently: Idem, *Arête Ministeriel No 110, 111, 112, 113, 114 & 120*.

<sup>2676</sup> International Court of Justice (ICJ), *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium): Judgment of 14 February 2002* (14 February 2002).

<sup>2677</sup> Rechtbank Rotterdam, *Vonnis* (LJN: A07178, Rechtbank Rotterdam, 10/000050-03; 7 April 2004); Hoge Raad der Nederlanden, *Arrest* (LJN: BI5627, Hoge Raad, 07/12112, 1 December 2009).

<sup>2678</sup> *Juzgado Central de instrucción No. 4, Audiencia Nacional, Sumario 3/2.008 – D. Auto* (7 February 2008).

<sup>2679</sup> Ignace Murwanashyaka and Straton Musingu were arrested in November 2009 and went on trial in Stuttgart on 4 May 2011 for crimes against humanity and war allegedly committed in East Congo between 2008 and 2009. The trial was on-going at the time of writing in May 2014. See: Thijs Bouwknecht, 'FDLR - Waging war by phone and emails', *International Justice Tribune*, No. 128 (11 May 2011) 2. & European Center for Constitutional and Human Rights (ECCHR), *FDLR-Leadership Trial in Stuttgart*, ECCHR – Status Report February 2014 (February 2014) ([www-text: http://bouwknecht.files.wordpress.com/2014/03/ecchr-status-report-february-2014.pdf](http://bouwknecht.files.wordpress.com/2014/03/ecchr-status-report-february-2014.pdf); last visit: 5 May 2014). Arrested in December 2012, three other Rwandan/Germans - Bernard Twagiramungu, Felicien Barabwiriza and Jean Bosco Uwihanganye went on trial in November 2013 for alleged involvement in FDLR crimes in Congo. See: Oberlandesgericht Düsseldorf, 'Prozessbeginn gegen drei mutmaßliche Mitglieder der „Forces Démocratiques de Libération du Rwanda (FDLR)“', *Pressemitteilung*, No. 27/2013 (Düsseldorf, 11 November 2013).

trial.<sup>2680</sup> In 2014, a criminal complaint was lodged in The Netherlands and in Rwanda against Rwanda's President Paul Kagame and other officials for alleged crimes, including genocide, in Congo.<sup>2681</sup> Other examples may soon transpire and will likely be the topic for future research. Here, in the next paragraphs, however, we will take stock of what the ICC has accomplished in terms of its investigations and prosecutions of several Congolese warlords in the past decade. All of them are related to Ituri.

## Ituri

This report does not provide you with some kind of a thumbnail sketch of Congolese history, with a digest. It is on the contrary a distillate, the product of thirty-seven years' experience with the country. Events related here are not listed or offered mechanically. They are put in perspective, discussed, analysed, and reflected upon. Please take time to try to sample them before delving into the private lives and tragedies of the people involved.

- Gérard Prunier, Expert Witness<sup>2682</sup>

Whilst the CVR law was still in the making in March 2004, President Joseph Kabila invited Luis Moreno-Ocampo, the then Chief Prosecutor of the International Criminal Court (ICC), to investigate and prosecute possible offenders of crimes of genocide, war crimes or crimes against humanity.<sup>2683</sup> Ocampo's investigations<sup>2684</sup> led the arrests of several Congolese militiamen, including Thomas Lubanga Dyilo,<sup>2685</sup> Germain Katanga, Mathieu Ngudjolo Chui,<sup>2686</sup> and Bosco Ntaganda.<sup>2687</sup> As violence has been rampant in the Kivu's as well, the OTP also investigated the alleged crimes of the *Forces Démocratiques de Libération de Rwanda* (FDLR), a militia formed out of the ranks of former Rwandan *Interahamwe* militia, Rwandan military and Hutu extremists allegedly responsible for the Rwandan genocide.<sup>2688</sup> The ICC's investigations into the FDLR atrocities led to the arrest of Rwandan national Callixte Mbarushimana<sup>2689</sup> and a public arrest warrant for Rwandan national Sylvestre Mudacumura, the group's Supreme Commander.<sup>2690</sup> They were charged with war crimes and crimes

<sup>2680</sup> See: Thijs Bouwknecht, 'Laurent Nkunda's fate still unclear', *Radio Netherlands Worldwide*, 19 January 2010.

<sup>2681</sup> Prakken d'Oliveira Human Rights Lawyers, *Iyamuremye – Aangifte genocide, misdrijven tegen de menselijkheid, oorlogsmisdrijven, gedwongen verdwijning en foltering Rwanda / Congo* (20140254.MP; Amsterdam, 4 April 2014) & Prakken d'Oliveira Human Rights Lawyers, *Jean Claude Iyamuremye – Criminal Complaint against President Paul Kagame e.a. for genocide, crimes against humanity, responsibility, war crimes, enforced disappearances, torture and murder, committed in Rwanda & Congo* (20140254A.MP/ns; Amsterdam, 4 April 2014).

<sup>2682</sup> Gérard Prunier, 'The Ituri Conflict: A Background study', *A Report for the International Criminal Court in The Hague* (ICC-01/04-01/06-1505-Anx1; June 2008).

<sup>2683</sup> République Démocratique du Congo, Le Président, *A Monsieur Luis Moreno Ocampo. Procureur près Cour Pénale Internationale de La Haye à Amsterdam (Pays-Bas)*, Kinshasa, 3 March 2004 (Doc. No. ICC-01/04-01/06-39-AnxB1; The Hague 23 March 2006). See also: ICC, 'ICC – Prosecutor receives referral of the Situation on the Democratic Republic of the Congo', *Press Release* (Doc. No. ICC-OTP-20040419-50; 19 March 2004).

<sup>2684</sup> ICC, 'ICC – The Office of the Prosecutor of the International Criminal Court opens its first investigation', *Press Release* (Doc. No. ICC-OTP-20040623-59; 23 June 2006). Also see: Bouwknecht, 'How did the DRC becomes the ICC's Pandora's Box?'

<sup>2685</sup> Leader Union des Patriotes Congolais (UPC) and its military wing, Forces Patriotiques pour la Libération du Congo (FPLC). ICC, *Situation en République Démocratique du Congo Affaire le Procureur c/ Thomas Lubanga Dyilo: Mandat d'arrêt* (ICC-01/04-01/06; The Hague 10 March 2008).

<sup>2686</sup> Former leaders of – respectively - the Force de Résistance Patriotique en Ituri ("FRPI") and Front des Nationalistes et Intégrationnistes (FNI). ICC, *Situation in the Democratic Republic of the Congo: The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui: Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07; 10 March 2008).

<sup>2687</sup> ICC, *Situation in the Democratic Republic of the Congo: The Prosecutor v. Bosco Ntaganda. Warrant of Arrest* (ICC-01/04-02/06; 22 August 2006). A second extended arrest warrant and charge sheet were issued 6 years later, but do not include Ntaganda's alleged criminal record as leader of the CNDP: ICC, *Situation in the Democratic Republic of the Congo: The Prosecutor v. Bosco Ntaganda. Decision on the Prosecutor's Application under Article 58* (ICC-01/04-02/06; 13 July 2012).

<sup>2688</sup> See for background reports: HRW, *Democratic Republic of the Congo. "You Will Be Punished." Attacks on Civilians in Eastern Congo* (New York 2009); OHCHR, *Report of the Mapping Exercise*.

<sup>2689</sup> Thijs Bouwknecht, 'ICC aims at Mbarushimana', *International Justice Tribune*, No. 135 (14 September 2011), p. 3.

<sup>2690</sup> ICC, *Situation en République Démocratique du Congo: Affaire le Procureur c. Sylvestre Mudacumura. Demande d'arrestation et de remise de Sylvestre Mudacumura adressée ala République Démocratique du Congo* (ICC-01/04-01/12; 28 August 2012).

against humanity committed between 20 January 2009 and September 2010.<sup>2691</sup> From all the Congolese suspects, Thomas Lubanga and Germain Katanga were convicted, Jean-Pierre Bemba went on trial for events in the Central African Republic, Calixte Mbarushimana was released before trial, Matthieu Ngudjolo was acquitted, Bosco Ntaganda one is on trial and one remains at large.<sup>2692</sup> Three other Congolese citizens – alongside one Central African - have been arrested, not for serious crimes but for purportedly forging evidence and influencing witnesses in the trial of Bemba.<sup>2693</sup>

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<sup>2691</sup> Nine counts of war crimes, from 20 January 2009 to the end of September 2010, in the context of the conflict in the Kivus, including: attacking civilians, murder, mutilation, cruel treatment, rape, torture, destruction of property, pillaging and outrages against personal dignity. ICC, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Sylvestre Mudacumura: Decision on the Prosecutor's Application under Article 58* (ICC-01/04-01/12; 13 July 2012), p. 29.

<sup>2692</sup> ICC, *Demande d'arrestation et de remise de Sylvestre Mudacumura adressée à la République Démocratique du Congo*.

<sup>2693</sup> ICC, *Mandat d'arrêt à l'encontre Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu et Narcisse*.

## A poised investigation

On the fact that humanitarian groups are lousy investigators, I will not go that far. However, one must concede that the procedure of investigation of humanitarian groups, in my opinion, is more a sort of a general journalism rather than legal type activities of investigators.

- Bernard Lavigne, Investigator<sup>2694</sup>

In all respects, the Democratic Republic of the Congo (DRC) seemed to be the perfect case file for the newly established permanent court that was set up to prosecute génocidaires, war criminals and criminals against humanity. But the trials in The Hague show the opposite. Congo became the ICC's Pandora's Box. "Africa has the shape of a gun, and Congo is its trigger." An ambitious French human rights lawyer cited Frantz Fanon.<sup>2695</sup> His chief, Luis Moreno-Ocampo, had just announced the start of a criminal inquiry into human rights violations in Ituri. It was Wednesday, 23 June 2004,<sup>2696</sup> roughly one year after the Argentinean prosecutor took his oath in The Hague.<sup>2697</sup> The troubled Congolese province had been on his radar from the very beginning.<sup>2698</sup> Just like Iraq, Afghanistan and Colombia. But for the latest international justice experiment, Congo appeared to be a convenient and feasible pick.

In the year before Ocampo set up his Office of The Prosecutor (OTP), 499 'communications' had already been sent to PO Box 19519, the ICC's fictive address since 1 July 2002.<sup>2699</sup> Only six complaints related to Ituri were deposited there, but nonetheless, the isolated region fitted the main selection criteria.<sup>2700</sup> On or after July 2002, in a battle for control over the region between at least six militias, some 5,000 civilians were massacred, villages pillaged and women raped.<sup>2701</sup> Caught up in the politics of justice, the court's fiercest critics – the USA and Russia - would not obstruct a judicial intervention in the Congolese 'bush' like they obviously would in Iraq. There was no national resistance either. On the contrary. In March 2004, Joseph Kabila had eagerly accepted Ocampo's invitation to outsource the well-reported crimes to the world's new war crimes prosecutor.<sup>2702</sup> Undoubtedly, the Congolese President saw an open door through which he could send a handful of warlords to The Netherlands. Besides excluding the recalcitrant Iturians from power sharing, Kabila was sure Kinshasa would linger in impunity. He would merely assist the ICC's work in the rebellious eastern region of his country – a tactic he copy-pasted from Uganda's President Yoweri Museveni who had only referred LRA crimes to The Hague.<sup>2703</sup>

<sup>2694</sup> ICC, *Lubanga Dyilo Transcript* (17 November 2010), p. 47.

<sup>2695</sup> Author's Interview, Anonymous Lawyer, Arusha, 23 June 2004.

<sup>2696</sup> ICC, 'The Office of the Prosecutor of the International Criminal Court Opens Its First Investigation', *Press Release* (ICC-OTP-20040623-59; 23 June 2004).

<sup>2697</sup> ICC, OTP, *Luis Moreno Ocampo: Statement made at the ceremony for the solemn undertaking of the Chief Prosecutor of the ICC* (16 June 2003).

<sup>2698</sup> ICC, *Second Assembly of States Parties to the Rome Statute of the International Criminal Court Report of the Prosecutor of the ICC, Mr Luis Moreno-Ocampo* (8 September 2003); ICC, OTP, *Statement of the Prosecutor Luis Moreno Ocampo to Diplomatic Corps Netherlands* (12 February 2004).

<sup>2699</sup> ICC, *Second Assembly of States Parties to the Rome Statute of the International Criminal Court Report of the Prosecutor of the ICC, Mr Luis Moreno-Ocampo* (8 September 2003).

<sup>2700</sup> ICC, OTP, *Communications Received By the Prosecutor Since July 2002* (24 July 2003).

<sup>2701</sup> ICC, OTP, 'Communications Received by The Office of The Prosecutor of The ICC', *Press Release* (No. pids.009.2003-EN; 16 July 2003).

<sup>2702</sup> ICC, Presidency, *Decision assigning the Situation in the Democratic Republic of the Congo to PTCI* (ICC-01/04-1; 5 July 2004).

<sup>2703</sup> ICC, Presidency, *Decision assigning the Situation in Uganda to PTCII*.

July 2004. Kabila’s strategy bore fruits. Serge Brammertz – the then Belgian Deputy Prosecutor in charge of the Court’s investigations – told the USA embassy in Kinshasa that his probe ought not to “derail” Congo’s delicate peace process.<sup>2704</sup> It would hence only “focus on abuses committed by actors outside the transition, such as the Ituri armed groups.”<sup>2705</sup> But Brammertz also raised concerns about the work terrain: the DRC was “difficult and complex [...] for logistical and political reasons.”<sup>2706</sup> And indeed, throughout their first field mission to Bunia in September 2004, investigators heard gunshots in the regional capital. Bunians greeted them with suspicion, unsure what and who these foreigners were after. Roadblocks prevented them from leaving the city to visit crime scenes and potential witnesses.<sup>2707</sup> Amidst all these security concerns and after many other start-up issues,<sup>2708</sup> the first witness in the investigation was not heard before 2005 or mid-2005.<sup>2709</sup> Around this time, on 10 January 2005, the Congolese army appointed a number of Iturian ex-combatants to serve as generals. Former rivals Bosco Ntaganda and Germain Katanga were among those who received this ‘promotion’, to the disgust of late Human Rights Watch researcher, UNICTR expert witness and historian on Rwanda, Alison Des Forges, who said “the government needs to take these warlords to court.”<sup>2710</sup> She was surprised by the wave of arrests in late February of eight Iturian warlords, including Katanga. The 24-year-old ‘Simba’ – lion in Kiswahili – was accused of the 2002 mass killing of an estimated 1200 Hema and Bira civilians in Nyakunde and ended up in prison in Kinshasa. Just like Thomas Lubanga Dyilo, who was arrested for his purported part in the slaughter of nine Bangladeshi peacekeepers in February 2005.<sup>2711</sup> Both men faced serious charges including genocide and crimes against humanity, crimes falling under Ocampo’s Rome Statute.<sup>2712</sup>

Ntaganda – who since April 2005 also faced a Congolese arrest warrant<sup>2713</sup> – fled to Rwanda. In his home country, he was out of reach of the Congolese military courts that were trying dozens of ex-fighters for atrocity crimes.<sup>2714</sup> Ocampo’s team followed slowly, but not particularly surely. Initially, ICC investigators spent their time tracking down ‘Bosco’ and lobbying for his arrest with the UN peacekeeping force MONUC. But there were problems. Ocampo’s mood swung and investigators from one day to the other were to shift focus from one target to another. Bernard Lavigne, the lead-investigator later said, that after accumulating a lot of information about one militia, “suddenly, because of a political decision by Louis or his political committee, we were obliged to change our planning and our investigative work and concentrate on a new target. It was completely crazy. ... We

<sup>2704</sup> United States of America (USA), Embassy in Kinshasa, ‘ICC Gearing up to Start Ituri Investigation’, *Cable*, 4 August 2004 (Cable: 04KINSHASA1476; www-text: [https://wikileaks.org/plusd/cables/04KINSHASA1476\\_a.html](https://wikileaks.org/plusd/cables/04KINSHASA1476_a.html), visited: 19 November 2015).

<sup>2705</sup> ‘ICC Gearing up to Start Ituri Investigation’.

<sup>2706</sup> *Idem*.

<sup>2707</sup> See testimony of investigation team leader Bernard Lavigne: ICC, *Lubanga Dyilo Transcript* (16 November 2010).

<sup>2708</sup> ICC, *Lubanga Dyilo Judgment*, §151-168.

<sup>2709</sup> ICC, *Lubanga Dyilo Transcript* (16 November 2010), p. 43.

<sup>2710</sup> HRW, ‘DR Congo: Army Should Not Appoint War Criminals’, *News*, 13 January 2005.

<sup>2711</sup> Anneke van Woudenberg, ‘Arrest All Ituri Warlords’, *La Potentiel*, 11 March 2005.

<sup>2712</sup> HRW, *Democratic Republic of the Congo and the International Criminal Court Hearing to Confirm the Charges against Thomas Lubanga Dyilo. Questions and Answers* (no date).

<sup>2713</sup> Since 12 April 2005, he was under a DRC arrest warrant, issued by the Prosecutor of the Tribunal de Grande Instance of Bunia. The arrest warrant details charges of joint criminal enterprise, arbitrary arrest, torture and complicity of assassination pursuant to Articles 156 to 158, 67, 44 and 45 of the DRC Criminal Code. ICC, PTC I, *Situation in The Democratic Republic of the Congo: Decision on the Prosecutor’s Application for Warrants of Arrest*, Article 58 (ICC-01/04-01/07; 10 February 2006), para.34.

<sup>2714</sup> Jason Stearns, ‘Strongman of the Eastern DRC: Profile of Bosco Ntaganda’, *Rift Valley Institute Briefing*, 12 March 2003.

put in danger a lot of people.”<sup>2715</sup> Others in Ocampo’s Office, including Paul Seils, would later say the cases “barely scratched the surface of the conflict.”<sup>2716</sup> But it was exactly that very conflict that also brought along substantial hurdles for the investigators; continuing violence, no permanent office. Besides, the USA, an ICC opponent by heart at that time, restricted MONUC’s assistance to a minimum. While the security concerns dragged down the investigations, the lack of police experience affected its quality. Only two out of the twelve investigators had a police background, including Bernard Lavigne. The team’s leader testified that the others mainly included former NGO researchers, who were not up to the job. All foreigners, the enquirers were instructed to refrain from local contact with chiefs, priests or schoolteachers. It was to protect the identities of witnesses and informants, but it barred them from gaining useful ‘field knowledge’.<sup>2717</sup>

More prominently, the team’s immobility obstructed their core business: collecting information and impartially verifying prospective evidence to be used in an international court of law. Instead, the Ituri investigation was outsourced. Intelligence was borrowed from the notes of MONUC police officers and NGO researchers who had previously documented human rights violations. In fact, the very first witness was heard in The Hague “through an NGO, which acted as an intermediary,”<sup>2718</sup> a modus operandi that was soon exported to Bunia. On the advice of human rights researchers, the prosecutor’s bureau commissioned locals to liaise between investigators and potential witnesses. These ‘intermediaries’ – as they were called – carried out the ICC’s essential fact-finding mandate: selecting witnesses, recording their statements and corroborating the information. An anonymous Congolese lawyer put it this way, “investigating cases of child soldiers in Ituri is like picking a ripe mango that fell at your feet. It could not be any easier.”<sup>2719</sup> This gangrenous, dragged down and long-distance OTP methodology was soon criticised by observers as being “amateurish” and “mediocre.”<sup>2720</sup> Human Rights Watch at the times was concerned that the investigators efforts would never lay bare the full scope of the atrocities in Ituri, confirms the organisation’s senior Africa researcher Anneke van Woudenberg.<sup>2721</sup>

Based on its minimalistic, delegated and selective enquiry, Ocampo requested the ICC pre-trial chamber to issue two arrest warrants. In January 2006 Ocampo accused Thomas Lubanga Dyilo and Bosco Ntaganda of what observers called a “marginal charge”; the war crimes of enlisting, conscripting and using children younger than fifteen within the ranks of the Patriotic Force for the Liberation of the Congo (FPLC), the armed wing of their Union of Congolese Patriots (UPC) political party.<sup>2722</sup> The pre-trial chamber – presided over by the internationally experienced Claude Jorda – was

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<sup>2715</sup> Verini, ‘The Prosecutor and the President’.

<sup>2716</sup> Idem.

<sup>2717</sup> Buisman, ‘Delegating Investigations’, pp. 30-82.

<sup>2718</sup> ICC, TCI, *Prosecutor v. Thomas Lubanga Dyilo: Transcript* (ICC-01/04-01/06; 16 November 2010), p. 53.

<sup>2719</sup> Franck Petit, ‘Minimalist investigation in Lubanga’s case’, *International Justice Tribune*, No. 53 (23 September 2006), p. 1.

<sup>2720</sup> Petit, ‘Minimalist investigation in Lubanga’s case’, p. 1; Thierry Cruvellier, ‘Lessons From the Lubanga Trial’, *International Justice Tribune*, No. 147 (15 March 2012), pp. 2-3.

<sup>2721</sup> Author’s interview (telephone), Anneke van Woudenberg, 27 February 2014.

<sup>2722</sup> ICC, OTP, ‘Prosecutor’s Application for a Warrant of Arrest, Article 58 (12 January 2005).

not content with the evidence and information that Ocampo had disclosed in lieu of his application. From the rather scarce material the chamber had received, they found that Ntaganda's was not a key actor or most responsible in the DRC situation and only approved the indictment against the more senior suspect Lubanga.<sup>2723</sup> Ocampo then needed to move fast. He wanted to have a suspect in The Hague but he also knew that an ICC arrest warrant was no assurance for success. He had no police force to execute it himself like he had experienced in the second and more expedient case he had built in Uganda in the meantime. The five warrants levelled against the leadership of the Lord's Resistance Army (LRA) were already vacant for eight months.<sup>2724</sup> This time however, apprehending Lubanga – in contrast to LRA-leader Joseph Kony – was a realistic opportunity. The former UPC strongman had already been imprisoned by the local Congolese judiciary in Kinshasa on charges of genocide for almost a year and faced possible release under Congolese law.<sup>2725</sup> But just in time on 17 March 2006, Ocampo arranged Lubanga's handover, in an operation assisted by the Congolese authorities, the French military and the UN peacekeeping force MONUC, and he was flown to Scheveningen prison.<sup>2726</sup>

#### 6.4 Dieumerci

The once-flamboyant rebel leader strolled into the virgin courtroom on a rainy Monday afternoon in March 2006. The ICC-debutant uncomfortably took his place behind his Belgian lawyer, put on his headphones and switched through the channels for court translations. Judge Claude Jorda then asked the accused to introduce himself. "My name is Thomas Lubanga Dyilo [...] I am a politician by profession," the tall man replied softly.<sup>2727</sup> Throughout the next six years, he remained a silent spectator. Witnesses came and went and Lubanga attentively observed the trials and errors of his international prosecution. He had hopes of being released. It was no vain optimism. Just before the trial was finally about to start, two years after his first appearance, in July 2008, the chamber froze the proceedings and ordered Lubanga's immediate release. The judges were dismayed. Ocampo refused to – and argued he could not – disclose to them and the defence more than 200 documents he had obtained under confidentiality agreements, including from the UN. But because some of the material was believed to contain exculpatory evidence the chamber believed in these circumstances a fair trial was impossible without them seeing it. Ocampo found a first-aid solution and the appeals chamber, through legal gymnastics, saved the prosecution from total catastrophe and ordered the trial to go forward.

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<sup>2723</sup> ICC, PTC I, *Decision on the Prosecutor's Application for Warrants of Arrest, Article 58* (ICC-01/04-01/07), §87-89.

<sup>2724</sup> See for analysis of the Uganda investigation: Thijs Bouwknegt, 'Born at the time of the White Ant, tried by the ICC, *African Arguments*, 20 January 2015.

<sup>2725</sup> On 19 March 2005, Lubanga was arrested and detained by the DRC authorities together with other leaders of Ituri-based military groups. The warrant of arrest, dated 19 March 2005, issued by the competent examining magistrate in the DRC, and the provisional detention of Thomas Lubanga Dyilo are legally based on charges of genocide pursuant to Article 164 of the DRC Military Criminal Code and crimes against humanity pursuant to Articles 166 to 169 of the same code. On 29 March 2005, the DRC authorities issued another arrest warrant against Thomas Lubanga Dyilo, alleging crimes of murder, illegal detention and torture. ICC, PTC I, *Decision on the Prosecutor's Application for Warrants of Arrest, Article 58* (ICC-01/04-01/07), §33.

<sup>2726</sup> ICC, 'ICC - First arrest for the International Criminal Court', *Press Release* (ICC-CPI-20060302-125; 2 March 2006).

<sup>2727</sup> ICC, *Lubanga Dyilo Transcript* (20 March 2006), p. 3.

In the meantime, new investigations had been opened in Sudan's Darfur Provinces (2005) and the Central African Republic, respectively on the invitations of the UN Security Council and President Françoise Bozizé. And Lubanga had received company. The alleged leaders of two former UPC enemies had joined him in Scheveningen: the Patriotic Resistance Forces of Ituri (FRPI) and the National Integrated Front (FNI). Germain Katanga was transferred from his Kinshasa prison cell in October 2007 and Mathieu Ngudjolo Chui, who had not been arrested already by the Congolese judiciary, became the ICC's first "real" arrestee in February 2008. But Kabila's blood rival Jean Pierre Bemba was the most senior Congolese suspect to be detained. He was arrested in Brussels in May 2008. But despite the fact that Bemba's Movement for the Liberation of Congo (MLC) had also fought in Ituri's bloody war, the former vice-President and senator was charged with atrocities his troops allegedly committed in neighbouring Central African Republic (CAR). Of the four Congolese suspects, Lubanga was the first in the dock.

### **The trial**

The armed conflict in Ituri is connected with the 1994 genocide in Rwanda and the two Congo wars. All of them are rooted in history and colonisation. Let me summarise, Mr. President, some key aspects. After the genocide, hundreds of thousands of persons, including some leaders and perpetrators of mass killings, fled to Rwanda to the two Kivu provinces in the eastern part of the country then called Zaire. Some started to plan attacks against Rwanda, triggering the First Congo War, and this was in 1996. Uganda and Rwanda supported a Congolese rebel group led by Laurent-Désiré Kabila against Zaire's ruler Mobutu Sese Seko. They reached Kinshasa and ousted Mobutu in May of 1997. The second war started in 1998 after relations between Laurent-Désiré Kabila, the new president, and his former allies deteriorated. Rwanda and Uganda withdrew to eastern Democratic Republic of the Congo, an area that is rich in natural resources such as gold, diamonds, coltan, timber and oil. Rwanda consolidated its presence throughout the two Kivus, and Uganda did so in large parts of Province Orientale, including Ituri. At least nine African countries and many local militias involved in those wars. From 1991 onwards, the Kivus and Ituri were under the control of a political/military movement, the Rassemblement Congolais pour la Démocratie - Mouvement pour la Libération. This is supported by Uganda and Rwanda. Close to 4 million are estimated to have died in the DRC between 1998 and 2004, in particular due to starvation and disease resulting from war. This, your Honours, is considered the highest number of civilians killed as a consequence of war since the Second World War.

- Fatou Bensouda, Prosecutor<sup>2728</sup>

Rooted in this reading of history, the Lubanga trial started in January 2009. "Lubanga's armed group recruited, trained and used hundreds of young children to kill, pillage and rape,"<sup>2729</sup> said Ocampo. "They cannot forget what they suffered."<sup>2730</sup> After his brief opening statement, he passed on the torch to deputy Prosecutor Fatou Bensouda to sketch the contours and context of the case. On the second day, Ocampo was absent, leaving the trial in the hands of Bensouda. It was to the frustration of the defence, but according to the Chamber it was rather a breach of etiquette. In any case, counsels

<sup>2728</sup> ICC, *Lubanga Dyilo Transcript* (26 January 2009), pp. 19-20.

<sup>2729</sup> *Ibidem*, p. 4.

<sup>2730</sup> *Idem*.

Catherine Mabilille and Jean-Marie Biju Duval (the latter was also Nahimana's lawyer at the UNICTR) were eager to enter into “an adversarial discussion before the Bench,” or order “understand what in the Prosecutor's evidence is close to the truth and what, on the contrary, is far removed from the truth.”<sup>2731</sup>

But the OTP narrative was soon shattered, when he called a former child soldier as his first witness. Switching between public and private sessions, it was a chaotic and dramatic scene. For the time in years, he was in the same room with ‘Papa’ Lubanga – a university-trained psychologist – who stared at him intensely from the dock. From his black office chair, the timid boy, who could not remember his date of birth, whispered that as he “gave an oath in court that I would say the truth, the whole truth, and nothing but the truth, I find myself in a delicate position to answer what you have just said.”<sup>2732</sup> A thrill went through the courtroom and the witness was shortly escorted outside for the chamber to discuss what to do in a private session. Upon his return, Bensouda resumed her questioning but the boy answered that “what I said earlier was not what I intended to say. I would like to say what actually happened myself, not say what some other person intended me to say. [...] At the time there was a NGO which was helping children. My friends went there. I also went there, and they took our addresses and told us that they could help us. [...] They told me things which did not help me to remember what happened, but now that I'm here I will tell you exactly what happened.”<sup>2733</sup> At that point Judge Fulford intervened: “This morning you told the Court about a time when you were going home from school when some soldiers from the UPC came and took you and your friends away. Was that story from you true or false?”<sup>2734</sup> “That's not true,”<sup>2735</sup> replied the witness, an answer that prompted the chamber to adjourn the examination. Dubbed ‘witness 298’, the young man remained nameless.

All in all, the ICC’s first trial got off problematically. After the first testimony, the Prosecution quickly changed its order of witnesses and sparked instant delays. In order to prevent a repetition of the volatile first witness, the second witness called was a former a Rwandan-trained UPC soldier, who had seen children fight and die in active combat.<sup>2736</sup> Thereafter, for three stretched days, the father of the first witness took the stand. He told the court how his son was kidnapped on the way home from school by soldiers and taken to a training camp.<sup>2737</sup> However, with the son’s testimony in mind, Lubanga’s defence lawyers fiercely cross-examined the witness about his contacts with ICC investigators and many personal details. Himself a former bodyguard to Lubanga who had deserted the UPC, the witness became clearly agitated, dodging questions and accusing defence lawyer Marc

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<sup>2731</sup> ICC, *Lubanga Dyilo Transcript* (27 January 2009), p. 6.

<sup>2732</sup> ICC, *Lubanga Dyilo Transcript* (28 January 2009), p. 35.

<sup>2733</sup> *Ibidem*, pp. 40-41.

<sup>2734</sup> *Ibidem*, p. 41.

<sup>2735</sup> *Idem*.

<sup>2736</sup> ICC, *Lubanga Dyilo Transcript* (30 January 2009); ICC, *Lubanga Dyilo Transcript* (3 February 2009).

<sup>2737</sup> ICC, *Lubanga Dyilo Transcript* (4 February 2009).

Desalliers of “tormenting” him.<sup>2738</sup> Days later, the judges had put up a curtain in court. It was to block any possible eye contact between Lubanga and the boy who had earlier recanted his testimony. The witness returned to the stand, now under the pseudonym ‘dieumerci’ – ‘thank god’ in French. An unswerving storyteller this time,<sup>2739</sup> he narrated in a rapid, clear and chronological way how Lubanga’s militia had kidnapped him.<sup>2740</sup> When the fourth witness was brought to court on the next day, Lubanga shielded his face with his hands, rose up, dried his eyes with a handkerchief and was led out of the courtroom for a moment by security guards.<sup>2741</sup> Clearly Lubanga and the witness – who was protected under the pseudonym 41 - had known each other already for a long time. Indeed the man turned out to be a former high-ranking UPC official, who testified that Lubanga’s preferred children – some as young as 10 - as his bodyguards, because “[...] when you have a young person as your bodyguard, you look after him because you don't - he doesn't have any children or family members to look after.”<sup>2742</sup> This practice stopped and the children were demobilised at a certain moment though, testified the witness, “because we had had difficulties with human rights, and they were accusing us of using child soldiers.”<sup>2743</sup>

In the subsequent week, the Prosecution took the court through several videos taken in the UPC training camps, some of those depicting young children dressed in military fatigues.<sup>2744</sup> From 20 February onwards another 8 former *Kadogo*'s (Swahili for child soldiers) testified about their plight, daily lives in the UPC camps and structure of Lubanga’s organisation. Other Congolese witnesses followed, including a judge (), former UPC officials, a regional politician, a social worker and several victims. A total of 36 witnesses came to The Hague to testify until the prosecution rested its case in July 2009. Among them were three experts: an historian and two x-ray specialists.

In the ninth week of the trial, the Prosecution turned to the renowned historian of the Great Lakes Region Gérard Prunier to go through the details of origins of the ethnic conflicts in Ituri. Going into great depth, Prunier lectured the trial chamber at great length on the long and complex colonial and post-colonial history of Congo. Questioned by the chamber on the nature of the conflict, Prunier concluded that “I would like to say at the beginning it was an economic conflict and that ethnicity was instrumentalised [...] as a tool to fuel the conflict. [...] the blame falls on the leaders; that is, people who make use of this ethnic diversity in order to increase their political capital or to recruit soldiers

<sup>2738</sup> Ibidem, p. 44.

<sup>2739</sup> Judge Fulford at the beginning of the hearing told the boy to take his time and to “tell those of us sitting in court what happened to you [...] in your own way.” ICC, *Lubanga Dyilo Transcript* (28 January 2009), p. 4.

<sup>2740</sup> “One day when I was coming back from school we encountered UPC soldiers. There was a large number of them. I can't tell you how many. There were five of us - or in fact six, myself and five others. There was no problem. We were just going home from school. And then in Fataki market we encountered these UPC soldiers. They stopped us and said, "You children, we're going to take you for training so that you can become soldiers and ensure the security of our country." I said, "Listen, I'm a schoolboy, so it's difficult for me to go to the training because we're children." That soldier or those soldiers didn't want us to talk. If anybody tried to talk, they were beaten. They took us all to the training centre. The training centre was in Bule. I think that that is 7 kilometres away, but that's just an estimation. I'm not sure.” ICC, *Lubanga Dyilo Transcript* (10 February 2009), pp. 4- 34; 5.

<sup>2741</sup> Author’s observation, ICC, 11 February 2009.

<sup>2742</sup> ICC, *Lubanga Dyilo Transcript* (12 February 2009), p. 56.

<sup>2743</sup> Ibidem, p. 42.

<sup>2744</sup> ICC, *Lubanga Dyilo Transcript* (16 February 2009); ICC, *Lubanga Dyilo Transcript* (17 February 2009); ICC, *Lubanga Dyilo Transcript* (18 February 2009); ICC, *Lubanga Dyilo Transcript* (19 February 2009); ICC, *Lubanga Dyilo Transcript* (20 February 2009).

because they want to attain certain political ends.<sup>2745</sup> However, during his testimony, Prunier was not in a position to be precise, to produce tangible sources or to provide straight-forward answers. Throughout the cross-examination, he constantly reminded the court of the difficulties of conducting research in Africa, like he had done already for 39 years, and that for example “you wouldn't find such sources anywhere, and I cannot be more reliable than the UN for the simple reason that there are a lot of things in the history of that region that you cannot elucidate [...] sometimes you have to resign yourself to the fact that it's difficult to elucidate these things and you may not know everything.”<sup>2746</sup> The same precision was lacking also in the testimony of the prosecution's other two expert witnesses. Discussing the x-ray images taken from the 9 former UPC child soldiers who were witnesses in the trial, radiologist Catherine Adamsbaum told the chamber that age determination “is not a totally exact science.”<sup>2747</sup> Adamsbaum's testimony was reinforced by her colleague, Caroline Rey-Salmon, a paediatrician and forensic doctor. She testified that the x-ray images were of relatively bad quality, only showed hard-to-interpret jawbones and that their methodology could not always produce the exact age of a person.<sup>2748</sup> Amidst the trial and in addition to the Prosecution's specialists, the chamber also called four experts, including Psychologist Elisabeth Schauer<sup>2749</sup>; Special Rapporteur on the situation of human rights in the Democratic Republic of Congo Roberto Garretón<sup>2750</sup>; UN Special Representative of the Secretary-General on Children and Armed Conflict Radhika Coomaraswamy<sup>2751</sup>; and Congolese Historian Kambayi Bwatshia.<sup>2752</sup> The latter's testimony would never find it to the court's judgement, while Garretón's evidence was cited at length.

Within two weeks of the conclusion of the testimony of Bwatshia, it was the defence its turn. Defence counsel Catherine Mabilie laid out its strategy:

There can be no true justice if the very substance of the judicial process has been vitiated. If it is gangrenous in its most fundamental aspects, how can one ensure a fair trial when such a significant part of the trial is based on fabricated evidence? How can judges carry out their role, that is to say, seeking out and establishing the truth if the testimony that they have heard are the result of concerted efforts to deceive them? Is this not a fundamental attack on the integrity of the judicial system?<sup>2753</sup>

From 27 January 2010, the defence started presenting its counter narrative. Out of a total of 24 witnesses, the defence brought to court a range of people who told the chamber that they had never been child soldiers, that they were coached by intermediaries to produce stories that would incriminate Lubanga and that they had received money for false testimony. All these testimonies led the Trial Chamber to call to stand OTP investigators and some of their intermediaries. But during

<sup>2745</sup> ICC, *Lubanga Dyilo Transcript* (31 March 2009), p. 38.

<sup>2746</sup> *Ibidem*, p. 14.

<sup>2747</sup> ICC, *Lubanga Dyilo Transcript* (12 May 2009), p. 80.

<sup>2748</sup> ICC, *Lubanga Dyilo Transcript* (13 May 2009), pp. 26-29.

<sup>2749</sup> ICC, *Lubanga Dyilo Transcript* (7 April 2009).

<sup>2750</sup> ICC, *Lubanga Dyilo Transcript* (17 June 2009).

<sup>2751</sup> ICC, *Lubanga Dyilo Transcript* (7 January 2010).

<sup>2752</sup> *Ibidem*; ICC, *Lubanga Dyilo Transcript* (8 January 2010).

<sup>2753</sup> ICC, *Lubanga Dyilo Transcript* (27 January 2010), p. 23.

these hearings, in July 2010, the judges stayed the proceedings and for the second time ordered Lubanga's release.<sup>2754</sup> This time it was because Ocampo refused to reveal the name of an intermediary between the prosecutor's office and Congolese witnesses. The Appeals Chamber, again, reversed the release order but rebuked Ocampo for flouting court orders.<sup>2755</sup> On that notice the trial resumed with the testimony of two other former investigators and several intermediaries. Amidst many delays and subsequent irregularities, the trial forged on into 2011. What had been promised to be the pinnacle of international criminal justice and justice for child soldiers around the world, ended up being an anti-climax.

August 2011: closing arguments. 'Throughout the course of this trial [...] it has been impossible for me to recognise myself within the context of the actions ascribed to me and the intentions attributed to me,' says Lubanga.<sup>2756</sup> It was a rare moment when he expressed his thoughts since he introduced only shortly himself to the court in 2006. But it was the 92 year-old former Nuremberg prosecutor Benjamin Ferencz who had the last words speaking on behalf of the prosecutor: 'Let the voice and the verdict of this esteemed global court now speak for the awakened conscience of the world,' he uttered.<sup>2757</sup> On his right in the courtroom: Luis Moreno-Ocampo. Among the spectators in the public gallery: Angelina Jolie, who has been following the summary of the prosecution case. The heart of their scenario: 'children need mothers, not commanders.'<sup>2758</sup> One by one, the full prosecution team outlined why Lubanga was guilty of conscripting, enlisting, and using child soldiers during the ethnic conflict in the Ituri between 2002 and 2003. Then deputy Prosecutor Fatou Bensouda made it clear. She insisted that Lubanga's guilt stretched beyond the courts threshold of "beyond any reasonable doubt."<sup>2759</sup> It is "beyond any possible doubt," she ensured.<sup>2760</sup> But the next day however, Defence lawyer Catherine Mabilie casted overall doubts over that promise saying the Chamber must have seen this product of organised manipulation of witnesses. She pointed out the vital role intermediaries had played in finding witnesses for the prosecution. "The intermediaries knew exactly what story needed to be told," she said, accusing them of going to Congolese towns "recruiting children, and he would tell the children what they had to say."<sup>2761</sup>

Dressed in a white traditional babu, Lubanga sat anxious as he was listening to his judgement on 14 March 2012. But to some extent, it was also levelled against the OTP, against Ocampo who was having his last day in court before handing over the torch to his deputy, Fatou Bensouda. The British Presiding Judge, Adrian Fulford, while reading his summary, lamented the prosecution's negligence in parts of its investigation: "A series of witnesses have been called during this trial whose evidence,

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<sup>2754</sup> ICC, TCI, *Situation in the Democratic Republic of the Congo: The Prosecutor vs. Thomas Lubanga Dyilo: Oral decision on release* (ICC-01/04-01/06; 15 July 2010), pp. 14-23.

<sup>2755</sup> ICC, AC, *Prosecutor v. Lubanga: Judgement on the appeal of Prosecutor against oral decision of Trial Chamber I of 15 July 2010 to release Thomas Lubanga Dyilo* (8 October 2010).

<sup>2756</sup> ICC, *Lubanga Dyilo Transcript* (26 August 2011), pp. 48-49.

<sup>2757</sup> *Ibidem*, p. 53.

<sup>2758</sup> *Ibidem*, pp. 10, 11 & 4.

<sup>2759</sup> *Ibidem*, p. 3.

<sup>2760</sup> *Ibidem*, p. 4.

<sup>2761</sup> *Ibidem*, pp. 15; 10.

as a result of the essentially unsupervised actions of three of the principal intermediaries, cannot safely be relied on.”<sup>2762</sup> The consequence of that “lack of proper oversight of the intermediaries” he further explained, “is that they were potentially able to take advantage of the witnesses they contacted.”<sup>2763</sup> Therefore, the nine ‘child soldiers’ who had testified for the prosecution were found “unreliable”.<sup>2764</sup> Lubanga received a very limited conviction, not on the accounts of his alleged victims and neither because he had “meant to” conscript, enlist and use boys and girls in his militia but because, the Chamber said, he “was aware that, in the ordinary course of events, this would occur.”<sup>2765</sup>

Over two and a half years after he was convicted for three war crimes, the ICC’s Appeals Chamber convened on a cold Monday afternoon to rule on the appeals of the former Congolese politician-styled warlord. His trial was flawed and unfair, Lubanga had argued.<sup>2766</sup> It runs contrary to the Prosecution’s appeal. They wanted his “manifestly inadequate and disproportionate” 14-year sentence raised, without explicating with how much.<sup>2767</sup> It was an historic day for international justice. This was the first time the ICC signed off an appeals judgement. But interest has waned, as if the world has forgotten about Lubanga and the endemic conflicts in the east of the Democratic Republic of the Congo (DRC). Empty seats remained in the public gallery, not even half of it to be filled with court staff, a handful of devoted journalists and a single NGO observer. Lubanga himself did not invite his family for the occasion, like most other defendants would do on this type of day. Also shining in absence were his victims. The only Congolese present represent the diplomatic corps. “Is this justice seen to be done?” asked a journalist. “Come on, it is appeals,” replied another.<sup>2768</sup>

And indeed, 3179 days after Lubanga was brought to The Hague, the trial that dealt with child soldiers in the mass violence that plagued the Congolese Ituri region in the early 2000s, ended with an anti-climax: a sober, legalistic and collegial review of the trial chamber’s first ever verdict and sentence.<sup>2769</sup> Flanked by four colleagues, Judge Erkki Kourala monotonously read out a summary of the 193-paged appeals judgement and 50-paged sentencing judgement.<sup>2770</sup> They took a distanced view; they would not assess the evidence again, but would only intervene if the “Trial Chamber’s factual findings were unreasonable.”<sup>2771</sup> Then, after the chamber dismissed Lubanga’s request to consider three new pieces of evidence, the former UPC leader overheard the rulings on his seven grounds of appeal, alleging abuse of his fair trial rights, a prejudiced Prosecutor and the lack of clear facts underlying his prosecution. Point-by-point, Kourala listed how Lubanga had not substantiated or

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<sup>2762</sup> ICC, *Lubanga Dyilo Transcript* (12 March 2014), p. 5.

<sup>2763</sup> *Idem*.

<sup>2764</sup> ICC, *Lubanga Dyilo Judgement*, §502.

<sup>2765</sup> ICC, *Lubanga Dyilo Judgement*.

<sup>2766</sup> ICC, AC, *Situation: Democratic Republic of the Congo. In the case of The Prosecutor v. Thomas Lubanga Dyilo: Mr Thomas Lubanga’s appellate brief against the 14 March 2012 Judgment pursuant to Article 74 of the Statute* (ICC-01/04-01/06; 3 December 2012).

<sup>2767</sup> ICC, AC, *Situation: Democratic Republic of the Congo. In the case of The Prosecutor v. Thomas Lubanga Dyilo: Prosecution’s Document in Support of Appeal against the “Decision on Sentence pursuant to Article 76 of the Statute”* (ICC-01/04-01/06-2901) (ICC-01/04-01/06; 3 December 2012).

<sup>2768</sup> Bouwknecht, ‘Lubanga trial ends with (un) reasonable dissent?’, pp. 12-13.

<sup>2769</sup> ICC, *Lubanga Dyilo Appeals Judgement*.

<sup>2770</sup> ICC, AC, *Lubanga Dyilo Transcript* (1 December 2014).

<sup>2771</sup> ICC, *Lubanga Dyilo Appeals Judgement*, §56.

sufficiently argued his complaints, only to rule that the trial chamber had not acted beyond the limits of its discretion and that its findings were “not unreasonable.”<sup>2772</sup> All grounds of appeals were rejected, including those of the Prosecution, and the verdict and sentence rubber-stamped, but only by majority. Judge Sang-Hyun Song only disagreed “partly” with his colleagues, on a legal note. According to the ICC’s President, Lubanga should have been convicted and sentenced for one crime of child soldiering and not separately for three ways of committing it [conscripting, enlisting and using children].<sup>2773</sup> Only the Latvian judge dissented from the majority on fundamental grounds.<sup>2774</sup>

If it was up to Judge Anita Ušacka, Lubanga should not have been convicted at all. “In my view the evidence relied upon by the trial chamber to convict Lubanga was not sufficient to reach the threshold of beyond any reasonable doubt,” she explained.<sup>2775</sup> “In practice they have applied a lower standard,” because, according to Ušacka, “the trial chamber was motivated more by the desire to create a record of events, rather than to determine the guilt of [the] individual to the standard applicable in criminal proceedings.”<sup>2776</sup> On that note, she expressed her hope “that future prosecutions of these crimes at the Court will adduce direct and more convincing evidence and preserve the fairness of proceedings, which lies at the heart of criminal prosecutions and should not be sacrificed in favour of putting historical events on the record.”<sup>2777</sup>

Ušacka’s dissent was a sharp indictment against the court’s fact-ascertainment dilemmas. She highlighted two well-known deficiencies in this case: insufficiently detailed charges and the absence of the requisite element of crimes. Regarding the indictment, she said it was mainly based on testimony of nine alleged child soldiers – whose testimony was found to be erratic – but that the “remainder of the allegations regarding a pattern of crime did not contain reference to a single identified victim, while the dates and locations were framed in unacceptably broad terms.”<sup>2778</sup> For five years, Lubanga had “no meaningful opportunity to challenge the evidence at trial” which was based on these nine individual cases, “yet he was ultimately convicted of the unspecific charges of a pattern of crime.”<sup>2779</sup> This approach has broader implications warned Ušacka, as “ultimately, even the factual conclusions of the Trial Chamber suffered from the same level of imprecision.”<sup>2780</sup> On a similar level, Judge Ušacka, considered “that the evidence in this case was, in particular, not sufficient to establish that at least some of children in the UPC/FPLC were under the age of fifteen.”<sup>2781</sup> She lamented the Trial Chamber’s cautious approach, saying that “estimating the age of individual based solely on his or her physical appearance is very complex and prone to error, even when scientific methods are

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<sup>2772</sup> ICC, AC, *Lubanga Dyilo Transcript* (1 December 2014).

<sup>2773</sup> ICC, AC, *Situation: Democratic Republic of the Congo. In the case of The Prosecutor v. Thomas Lubanga Dyilo: Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction. Partly dissenting opinion of Judge Sang-Hyun Son* (ICC-01/04-01/06A5; 1 December 2014).

<sup>2774</sup> ICC, *Lubanga Dyilo Appeals Judgment*.

<sup>2775</sup> *Ibidem*, p. 15.

<sup>2776</sup> *Idem*.

<sup>2777</sup> ICC, AC, *Situation: Democratic Republic of the Congo. In the case of The Prosecutor v. Thomas Lubanga Dyilo: Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction. Dissenting opinion of Judge Anita Ušacka* (ICC-01/04-01/06A5; 1 December 2014) p. 38.

<sup>2778</sup> ICC, AC, *Lubanga Dyilo Transcript* (1 December 2014), p. 15.

<sup>2779</sup> *Idem*.

<sup>2780</sup> *Idem*.

<sup>2781</sup> *Ibidem*, p. 16.

used.”<sup>2782</sup> During trial, she explained, the three judges relied on age estimates given by lay witnesses, who often offered no explanations as to how they knew the age of children. Regarding video evidence, the Trial Chamber simply “found that the images spoke for themselves” while according to Ušacka, the children “are frequently only partly visible and their sizes are unclear in the absence of any objective comparator.”<sup>2783</sup>

Ušacka reminded the court of a trial-featured evidentiary video excerpt of a boy playing with an insect, which in her view was “by far the strongest in terms of quality of the lighting, the clarity of the image and the close range of relevant individual.”<sup>2784</sup> But after the March 2012 judgement, Lubanga’s defence team had located the boy, named Mbogo Malobi Augustin (a.k.a. Witness D-0040), and called him to testify during the appeals hearings in May 2014 where he indicated his “date of birth is 8 April 1983.”<sup>2785</sup> So in fact he was aged between 19 and 20 years at time that the video was filmed. Another similar defence witness, Kpadhigo Logo Justin Nembe a.k.a. Witness D-0041), also testified and said he “was born in 1984 on 2 December” and thus was between the age of seventeen and eighteen when filmed.<sup>2786</sup> In Ušacka’s view “in light of the overall weakness of the evidence establishing that some children were under the age of fifteen, the submitted additional evidence in relation to Witnesses D-0040 and D-0041 clearly has the potential to demonstrate that the approach of the Trial Chamber was flawed and thereby have an impact on conviction.”<sup>2787</sup> She hence strongly disagreed with the majority of the Appeals Chamber who dismissed the additional evidence only by saying “Lubanga could have presented this evidence at trial and is therefore not persuaded by his arguments as to why he failed to do so.”<sup>2788</sup>

With Lubanga’s appeals conviction, the feeble record of what occurred in Congo is now definite, as the majority of an appeals chamber who deemed it “not unreasonable” endorsed it. It is a dry, factual and peripheral account<sup>2789</sup> of what transpired in Congo’s Ituri Province between May 1997 and August 2002.<sup>2790</sup> Based on the Chamber’s expert Roberto Garretón, Prosecution’s expert historian Gérard Prunier, who “had addressed the DRC’s colonial past in considerable detail,” the court’s factual overview of the background to the conflict in Ituri is summarised in just 8 pages. It is at least an abridged historical record. Ušacka’s dissent, however, will soon become a footnote in the ICC’s final trial record. Moreover, it leaves a rather dubious stain on the “beyond any reasonable doubt” standard applied in international criminal trials: one doubtful judge in a panel of five seems not to be reasonable enough to question the veracity of the evidence leading to convictions. Meanwhile, the OTP has had time to rethink its selection strategy and its investigative methodologies

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<sup>2782</sup> *Idem*.

<sup>2783</sup> ICC, AC, *Lubanga Dyilo Transcript* (1 December 2014), p. 17.

<sup>2784</sup> *Ibidem*, p. 17.

<sup>2785</sup> ICC, AC, *Lubanga Dyilo Transcript* (19 May 2014), p. 7.

<sup>2786</sup> *Ibidem*, p. 29.

<sup>2787</sup> ICC, AC, *Lubanga Dyilo: Dissenting opinion of Judge Anita Ušacka*, p. 27.

<sup>2788</sup> ICC, AC, *Lubanga Dyilo Transcript* (1 December 2014), p. 5.

<sup>2789</sup> The Judges in this respect were of the opinion that “Regardless of whether the origins of the conflict the Chamber is concerned with are to be found in that history, it is essentially too remote to be of direct relevance to the present charges.” ICC, *Lubanga Dyilo Judgement*, §70.

<sup>2790</sup> ICC, *Lubanga Dyilo Judgement*, pp. 41-49.

in the African case-files that have been piling up (now also including Kenya, Libya, Côte d'Ivoire and Mali). Human Rights Watch called upon the office to look into his “unfinished business.”<sup>2791</sup> But in spite of that, sources in Bunia reported that after Lubanga’s ‘partner in crime’ Ntaganda handed himself over, OTP investigators retreated to old ‘best practices’.<sup>2792</sup> Again, intermediaries were looking for witnesses in the field and the investigators would interview them in groups in a hotel in Bunia. Are the lessons from the past so hard to learn from? Or was the Ituri investigation poised so badly that the antidote cannot be found.

## 6.5 Bogoro

Although the Ituri trials were problematic, they at least tried to pursue more parties to the conflict. Only four months after they closed their evidence in the Lubanga case, Ocampo and his deputy Bensouda rushed to Trial Chamber II to present evidence in the trial against Lubanga’s former enemies, in what became the ICC’s first murder trial.<sup>2793</sup> Katanga and Ngudjolo were tried together, for the alleged mass murder of 200 civilians. Back on 24 January 2002, their shared “plan was to wipe out Bogoro,” not only destroying Lubanga’s UPC camp “but the whole civilian village,” said Ocampo in his opening statement.<sup>2794</sup> “This is the plan and this is the position of the prosecutor’s office.”<sup>2795</sup> But with the uncertain start of Lubanga’s trial in mind, the judges in this case vigilantly selected the first witness themselves: the head of the team that had investigated the Bogoro case since May 2006. The chamber questioned her about their investigative methodologies: “Could you tell us how you assess the objectivity and credibility of intermediaries?” Presiding Judge Bruno Cotte asked. “I think it is an important question.”<sup>2796</sup> It was a query that poured salt in an open wound.

A highly anticipated judgement illustrated the OTP’s shortcomings. “Declaring that an accused person is not guilty does not necessarily mean that the Chamber has been convinced of the person’s innocence.”<sup>2797</sup> A week before Christmas 2012, Judge Cotte elucidated that “such a decision merely shows that the evidence adduced is insufficient to convince the Chamber beyond all reasonable doubt.”<sup>2798</sup> His carefully chosen words were the pretext of what many observers on the public gallery were expecting: the acquittal and release of Mathieu Ngudjolo Chui. The prosecution had alleged that ‘chief rebel commander’-turned-nurse Ngudjolo – had intended and planned to “wipe out Bogoro” during an attack that killed around 200 civilians in Bogoro, a village on the shores of Lake Albert some 23 kilometres away from Bunia.<sup>2799</sup> Out of a total of 54, the OTP relied heavily on three “key” witnesses who had themselves been taking part in the attack. The prosecutor ensured they

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<sup>2791</sup> Evanson, *Unfinished Business*.

<sup>2792</sup> Author’s Interview (email), ICC investigator, 12 February 2014.

<sup>2793</sup> Thijs Bouwknecht, ‘Bogoro Trial Opens at ICC’, *International Justice Tribune*, No. 94 (25 November 2009), p. 2.

<sup>2794</sup> ICC, *Katanga & Ngudjolo Chui Transcript* (24 November 2009), p. 23.

<sup>2795</sup> *Ibidem*, p. 23.

<sup>2796</sup> ICC, *Katanga & Ngudjolo Chui Transcript* (25 November 2009), p. 37.

<sup>2797</sup> ICC, TCI, *Prosecutor v. Mathieu Ngudjolo Chui: Transcript* (ICC-01/04-02/12; 18 December 2012), p. 6.

<sup>2798</sup> ICC, *Mathieu Ngudjolo Chui Transcript* (18 December 2012), p. 6.

<sup>2799</sup> ICC, PTCL, *Situation in Democratic Republic of the Congo. In the case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui: Decision on the confirmation of charges* (ICC-01/04-01/07; 30 September 2008); ICC, *Katanga & Ngudjolo Chui Transcript* (24 November 2009), p. 23.

had “testified as best they could and in light of their own personal situations.”<sup>2800</sup> But for the Chamber “their remarks were too contradictory or too hazy, too imprecise [...] to base itself on.”<sup>2801</sup> Again, ICC judges – although Adrian Fulford was more explicit than Bruno Cotte – levelled an indictment against the quality and credibility of the OTP’s evidence.

Ngudjolo, since his acquittal was upheld,<sup>2802</sup> was sent back to Kinshasa a free man after his application for political asylum in The Netherlands was rejected.<sup>2803</sup> Meanwhile, his former co-accused Germain Katanga was found guilty by the same judges and based on the same evidence.<sup>2804</sup> But the outcome in his case was very controversial. In his case, the judges – with Christine van den Wyngaert dissenting “in the strongest possible terms”<sup>2805</sup> - when they separated the two cases, experimented with an extraordinary power they have under the court’s rules: the so-called Regulation 55, in legal parlance.<sup>2806</sup> In its final considerations, the bench changed the contours of the jigsaw puzzle, in order to fit in the pieces at hand. In other words, after the trial has finished they allowed themselves to alter the charges and case narrative according to the evidence.<sup>2807</sup> In Lubanga’s case the chamber likewise decided that Ituri was a national conflict in contrast to the OTP’s version that it was international, thereby unilaterally dissenting historiography.<sup>2808</sup> It goes further in Katanga’s case: he was only officially informed about the exact nature of the charges on which he was found guilty at the day of his judgement. Has the balance of power shifted from the Prosecution to the Judges and have the judges taken over the role of the prosecutor?<sup>2809</sup> On the surface, it appears so. At least to the point where some judges have favoured an inquisitorial approach (in which they are the “ultimate guarantor of the trial achieving objectified goals of truth and justice) over the adversarial approach (in which the “judge is an observer and umpire”).<sup>2810</sup>

This was particularly the case in the Ngudjolo and Katanga trials, where the judges have been actively part of the Bogoro investigation. Why? First of all, it may depend on the judges’ character,

<sup>2800</sup> ICC, *Katanga & Ngudjolo Chui Transcript* (18 December 2012), p. 7.

<sup>2801</sup> *Ibidem*, p. 7.

<sup>2802</sup> ICC, AC, *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Mathieu Ngudjolo Chui: Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled “Judgment pursuant to article 74 of the Statute”* (ICC-01/04-02/12; 7 April 2015).

<sup>2803</sup> Raad van State, *Uitspraak* (201310217/1/N1; Amsterdam, 27 June 2014).

<sup>2804</sup> ICC, TCII, *Situation: Democratic Republic of the Congo. In the case of The Prosecutor v. Germain Katanga: Minority Opinion of Judge Christine Van den Wyngaert* (ICC-01/04-01/7; 7 March 2014), §32.

<sup>2805</sup> She further stated that “I am of the view that it is impermissible to fundamentally change the narrative of the charges in order to reach to a conviction on the basis of a crime or form of criminal responsibility that was not originally charged by the prosecution. Charges are not merely a loose collection of names, places, events, etc., which can be ordered and reordered at will. Instead, charges must represent a coherent description of how certain individuals are linked to certain events, defining what role they played in them and how they related to and were influenced by a particular context. Charges therefore constitute a narrative in which each material fact has a particular place. Indeed, the reason why facts are material is precisely because of how they are relevant to the narrative. Taking an isolated material fact and fundamentally changing its relevance by using it as part of a different narrative would therefore amount to a “change in the statement of facts”, something the Appeals Chamber has found to be clearly prohibited by Regulation 55(1). See: Dissenting Opinion of Judge Christine van den Wyngaert. Annex to: ICC, *Situation en République Démocratique du Congo. Affaire le Procureur c. Germain Katanga et Mathieu Ngudjolo Chui: Décision relative à la mise en œuvre de la norme 55 du Règlement de la Cour et prononçant la disjonction des charges portées contre les accusés* (ICC-01/04-01/07; 21 November 2012), pp. 33-61: §1, 19, 20.

<sup>2806</sup> ICC, TCII, *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Germain Katanga: Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons* (ICC-01/04-01/07; 21 November 2012); Jennifer Easterday, ‘A Closer Look at Regulation 55 at the ICC’, *International Justice Monitor: Germain Katanga and Mathieu Ngudjolo at the International Criminal Court*, 28 May 2013 (www-text: <http://www.ijmonitor.org/2013/05/a-closer-look-at-regulation-55-at-the-icc/>, visited: 17 December 2015).

<sup>2807</sup> The Trial Chamber, unanimously, modified the legal characterisation of the facts such that the armed conflict connected to the charges was not of an international character between August 2002 and May 2003; and, by majority, modified the legal characterisation of the mode of liability initially applied to Germain Katanga under article 25(3)(a) of the Statute (indirect co-perpetration) so as to apply to him article 25(3)(d) (accessoryship through a contribution made “in any other way to the commission of a crime by a group of persons acting with a common purpose”). See: ICC, *Katanga Judgment*, ‘XII Disposition’.

<sup>2808</sup> ICC, *Lubanga Dyilo Judgment*, §566.

<sup>2809</sup> An argument progressed by Dov Jacobs: Dov Jacobs, ‘A Shifting Scale of Power: Who is in Charge of the Charges at the International Court and the Uses of Regulation 55’, *Grotius Centre Working Paper 2013/004-ICL* (13 December 2011), n.p.

<sup>2810</sup> Dov Jacobs, ‘A Shifting Scale of Power’, n.p.

culture and legal background. Agency is thus a critical factor in the management and outcomes of international criminal trials. But there is more. In some cases, judges are in need to review the evidence beyond the scope of having it served on a platter by the Prosecutor. This was the case for Trial Chamber II. Like in Lubanga, the Ngudjolo and Katanga case was based on “witness statements and reports by MONUC investigators or representatives of various NGOs,”<sup>2811</sup> while OTP investigators had never even travelled to the home-villages of the accused or places where preparations for the very attack allegedly took place. A forensic investigation in Bogoro was only concluded in late March 2009, six years after the massacre.<sup>2812</sup> But its findings were filed too late and lacked “probative value,” the Chamber ruled.<sup>2813</sup> Although the chamber acknowledged that the OTP “would have encountered difficulties in locating witnesses with sufficiently accurate recollections of the facts and able to testify without fear, as well as in the collection of reliable documentary evidence necessary for determining the truth in the absence of infrastructure, archives and publicly available information” that “in all probability, the Prosecution’s [case] would have benefitted from a more thorough investigation of these issues, which would have resulted in a more nuanced interpretation of certain facts, a more accurate interpretation of some of the testimonies taken and, again, an amelioration of the criteria used by the Chamber to assess the credibility of various witnesses.”<sup>2814</sup> It was against this background that at the end of the trial in January 2012 – when Ngudjolo and Katanga were still believed to have acted together – the entire Trial Chamber travelled to the Iturian towns of Bogoro, Aveba, Zombe and Kambutso.<sup>2815</sup> They visited the alleged crime scenes and the accused and some witnesses’ home villages. Bruno Cotte, Fatoumata Dembele Diarra and Christine Van Den Wyngaert found it essential to “make their own findings and verify various witness accounts.”<sup>2816</sup> Perhaps, this was an even a more critical stance and act than Fulford’s slap on the wrist wrapped in almost 160 pages of the Lubanga judgement. But more so, they did not want to judge the case file from an armchair in The Hague. “It was important for us to go to these places in order to see where the events took place, and to see, with our own eyes, places from the testimonies of some of the witnesses,” said Presiding Judge Cotte.<sup>2817</sup> To see is to believe seemed to be their adage.<sup>2818</sup>

It is partly from that experience that the majority of the chamber – with Belgian Judge Christine van Den Wyngaert strongly worrying about Katanga’s fair trial rights – ‘re-characterised’ the charges versus Katanga. But they were partly also tempted to do so on the account of his own

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<sup>2811</sup> ICC, TCII, *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Matthieu Ngudjolo Chui: Judgement pursuant to article 74 of the Statute* (ICC-01/04-02/12; 18 December), §117.

<sup>2812</sup> ICC, TCII, *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Germain Katanga and Matthieu Ngudjolo Chui: Decision on the disclosure of evidentiary material relating to the Prosecutor’s sit visit to Bogoro on 28, 29 and 31 March 2009* (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456 (ICC-01/04-01/07; 9 October 2009).

<sup>2813</sup> ICC, *Decision on the disclosure of evidentiary material relating to the Prosecutor’s sit visit to Bogoro on 28, 29 and 31 March 2009*.

<sup>2814</sup> ICC, *Ngudjolo Chui: Judgement*, §115-123.

<sup>2815</sup> See the report: ICC, Registrar, *Situation in Democratic Republic of the Congo. The Prosecutor v. Germain Katanga and Matthieu Ngudjolo Chui: Enregistrement au dossier du procès-verbal du transport judiciaire en République démocratique du Congo* (ICC-01/04: 3 February 2012).

<sup>2816</sup> ICC, *Site visit in the DRC - ICC Trial Chamber II, January 2012* (video-report: <https://www.youtube.com/watch?v=0UxGSE65elo>, visited: 16 December 2015).

<sup>2817</sup> ICC, *Site visit in the DRC*.

<sup>2818</sup> “Aside from the opportunity thus afforded to the Chamber to gain a better understanding of the context of the events before it for determination, the main purpose of the site visit was to enable the Chamber to conduct the requisite verifications in situ of specific points and to evaluate the environment and geography of locations mentioned by witnesses and the Accused persons.” See: ICC, *Katanga Judgment*, §106-108.

testimony. What had happened? The OTP's original case-theory and charge is that Katanga – jointly with Ngudjolo – indirectly co-perpetrated – using their militiamen and children – crimes in order to carry out their “common plan” to “wipe out Bogoro.” But in his defence Katanga testified under oath that on the eve of the Bogoro attack he simply was a “coordinator” in Aweba, serving as a “mediator between the soldiers in the camp and the people in the town.”<sup>2819</sup> In this light, applying Regulation 55, the judges, by majority,<sup>2820</sup> found him guilty as an “accessory” to crimes against humanity and war crimes.<sup>2821</sup> Judge Cotte said that the Chamber found that the evidence before it “as a whole establish [ed] beyond reasonable doubt that Germain Katanga's contribution to the crimes of murder, attack against the civilian population, destruction and pillaging committed in Bogoro on 24 February 2003 was significant and made in the knowledge of the intention of the group to commit the crimes.”<sup>2822</sup>

Katanga did not appeal his conviction – and was brought before the Congolese judiciary for a range of other crimes against humanity –<sup>2823</sup> and therefore the ‘Bogoro dossier’ came to a close.<sup>2824</sup> But it does not put a lid on the Pandora's Box in Congo altogether. Although he was being tried for crimes in the Central African Republic, Bemba's three-year trial entered in an equally – arguably even worse - limbo.<sup>2825</sup> In November 2013, after his defence had heard its last witness testimonies on the substance of the case, the OTP arrested Bemba in his cell along with his lead lawyer, his case manager, a defence witness and a Congolese parliamentarian. Prosecutors had been tapping their phones and emails to find out that Bemba allegedly “engaged in a scheme to corruptly influence witnesses, to bribe them, to encourage or induce their false testimony, to coach their evidence illicitly and to present that false evidence to a Chamber of this Court.”<sup>2826</sup> With almost the complete defence team on trial for contempt of court as well as their defence strategy tapped by the OTP, the entire trial entered in an unprecedented evidentiary stalemate and the defence has called his prosecution a mistrial.<sup>2827</sup> A cure has not yet been found.

<sup>2819</sup> ICC, *Katanga & Ngudjolo Chui Transcript* (5 October 2011), pp. 22, 27.

<sup>2820</sup> In her dissenting opinion, Judge Van den Wyngaert challenged the change in the characterisation of Germain Katanga's mode of liability. She argued that the change in characterisation rendered the trial unfair and breached the rights of the Defence, as it did not receive proper notification of the new charges and was not afforded a reasonable opportunity to conduct investigations in order to mount a defence against them. Judge Van den Wyngaert maintained that there was no basis in the evidence for findings beyond reasonable doubt which can be relied on to establish Germain Katanga's guilt. ICC, *Katanga: Minority Opinion of Judge Christine Van den Wyngaert*.

<sup>2821</sup> The Chamber found that Mr Katanga was the intermediary of choice between the weapons and ammunition suppliers and those who physically committed the crimes using those munitions in Bogoro. He contributed to reinforcing the strike capability of the Ngiti militia who carried out the crimes committed in Bogoro on 24 February 2003. He also contributed, by virtue of his position in Aweba – the only place in the ‘collectivité’ with an airport which could accommodate aircraft transporting weapons – to equipping the militia and enabling it to operate in an organised and efficient manner. His involvement allowed the militia to avail itself of logistical means which it did not possess enabling it to secure military superiority over its adversary. However, the Chamber dismissed the mode of liability, as principal perpetrator, applied to Germain Katanga, since it was not proven beyond reasonable doubt that in respect of the collectivité he had the material ability to give orders or to ensure their implementation, or that he had the authority to punish camp commanders.

<sup>2822</sup> ICC, TCII, *Situation: Democratic Republic of the Congo. In the case of The Prosecutor v. Germain Katanga: Transcript* (ICC-01/04-01/7; 7 March 2014) p. 29.

<sup>2823</sup> Bienvenu-Marie Bakumanya, ‘DR Congo to prosecute militia leader Katanga, convicted by ICC’, *AFP*, 18 January 2016.

<sup>2824</sup> ICC, ‘Defence and Prosecution discontinue respective appeals against judgment in Katanga case’, *Press Release* (ICC-CPI-20140625-PR1021; 25 June 2014). Katanga was released on 18 January 2016. See: ICC, AC, *Situation in the Democratic Republic of the Congo: Decision on the review concerning reduction of sentence of Mr Germain Katanga* (ICC-01/04-01/07; 13 November 2015).

<sup>2825</sup> Wairagala Wakabi, ‘Overview of Bemba's Trial at the ICC’ *International Justice Monitor: Jean-Pierre Bemba Gombo at the International Criminal Court*, 7 November 2014 (www-text: <http://www.ijmonitor.org/2014/11/overview-of-bembas-trial-at-the-icc/>, visited: 17 December 2015).

<sup>2826</sup> ICC, TCVII, *Situation: Central African Republic. In the case of The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido: Transcript* (ICC-01/05-01/13; 29 September 2015) p. 25.

<sup>2827</sup> ICC, AC, *Situation in the Central African Republic. In the Case of The Prosecutor v. Jean Pierre Bemba Gombo: Public Redacted Version of Appellant's document in support of the appeal* (ICC-01/05-01/08; 28 September 2016), §13-50.

## 6.6 “Terminator Tango”

Land, your Honours, was a contested issue in Ituri. Beginning in 1999, ethnic tensions between the Hema and the Lendu and competition for land and resources escalated and turned violent. In a bid to gain territory, each side deliberately targeted the civilians of the other side.

- Nicole Samson, Prosecutor<sup>2828</sup>

Bosco was someone who would kill people easily; he was a nasty man. In the chain of command, I think he was the third person after Lubanga and Kisembo, the third highest-ranking person. He would kill people very easily. For example, if a soldier killed another soldier, he would be killed.

- ‘Dieumerci’, Witness<sup>2829</sup>

The very first witness in the first Ituri trial of Lubanga talked about one of the ICC’s key suspects: Bosco Ntaganda. Many other witnesses followed and in the video’s shown during the Lubanga trial he was seen quite some times, dressed in a purple dress and talking to his forces. For several years, the 42-year old Rwandan-born Tutsi military man spent most his days fighting as a soldier in Congo,<sup>2830</sup> defying the ICC arrest warrant against him. After chasing Ntaganda since 2004, his case file “had effectively been dormant for this many years.”<sup>2831</sup> But all of a sudden, amidst the pandemonium in the Congo proceedings, there was a surprise in 2013. And there he was, out of the blue, knocking on the doors of the USA embassy in Kigali, Rwanda. Quickly – with the smooth assistance of Dutch authorities – he was flown to The Hague.<sup>2832</sup> But it was hectic there. Three Kenyans – President Uhuru Kenyatta, his Deputy William Ruto and former radio host Joshua Sang were putting up strong defences at the court and the OTP was trying to keep its head above water as it was losing its prospected witnesses against the Kenyan threesome.<sup>2833</sup> In that situation, Ntaganda’s unexpected appearance was perhaps more an inconvenience than a present. Investigators had to go back to Ituri to trace down the old case witnesses and find new ones to support the additional charges Bensouda had levelled against him in 2012, while preparing for a trial.<sup>2834</sup>

After renewed investigations, that delayed most of the proceedings, Prosecutor Bensouda returned to court and told the pre-trial chamber that “Bosco Ntaganda, a notorious commander known as “The Terminator” is here before you because of his role in pursuing a campaign of violence and

<sup>2828</sup> ICC, *Ntaganda Transcript* (2 September 2015), p. 23.

<sup>2829</sup> ICC, *Lubanga Dyilo Transcript* (10 February 2009), p. 20.

<sup>2830</sup> Ntaganda had long military career, since he was 17 years old, and was trained by Ugandan Rwandan military experts. Amongst other things, he fought with the Rwandan Patriotic Army (RPA) that stopped the genocide and captured power in 1994, before joining a range of Congolese rebel groups. After deserting from the FPLC and the Congolese army, Ntaganda commanded the National Congress for the Defence of the People (CNDP) and the March 23 Movement (or M23). See Jason Stearns, ‘Strongman of the Eastern DRC. A Profile of General Bosco Ntaganda’, *Rift Valley Institute Briefing* (12 March 2013). Other personal details, to which he testified himself, can be traced in some trial transcripts: ICC, PTCII, *Prosecutor v. Bosco Ntaganda: Transcript* (ICC-01/04-02/06; 26 March 2013) pp. 5-6; ICC, *Ntaganda Transcript* (22 June 2016), ICC, *Ntaganda Transcript* (3 September 2015), pp. 74-75.

<sup>2831</sup> ICC, OTP, *Situation in Democratic Republic of the Congo The Prosecutor v. Bosco Ntaganda Prosecution’s Urgent Request to Postpone the Date of the Confirmation Hearing* (ICC-01/04-02/06; 23 May 2013).

<sup>2832</sup> Author’s Interview (email), Dutch Official, 22 March 2013.

<sup>2833</sup> Tom Maliti, ‘Prosecutor withdraws seven witnesses in Kenyatta case in past year’, *International Justice Monitor: Kenya Cases* (www-text: <http://www.ijmonitor.org/2014/01/prosecutor-withdraws-seven-witnesses-in-kenyatta-case-in-past-year/>, visited: 17 December 2015).

<sup>2834</sup> ICC, PTCII, *Situation in Democratic Republic of the Congo. The Prosecutor v. Bosco Ntaganda: Public redacted version - Decision on the Prosecutor’s Application under Article 58* (ICC-01/04-02/06; 13 July 2012).

terror against civilians and children.”<sup>2835</sup> Almost two years later, twelve years after the events and 9 years after he was indicted, Ntaganda finally went to trial on 2 September 2015. It was a highly anticipated trial, not just due to the gravity and number of crimes he is accused of<sup>2836</sup> but also because after he was indicted he lived openly in eastern Congo and allegedly continued to commit crimes.<sup>2837</sup> It was riddled with controversies and allegations against him of witness tampering, prompting the former rebel leader to go on hunger strike and boycott the proceedings.<sup>2838</sup> From its advent, it has already showed it was problematically complicated and likely poised by the poor investigations and strategies in the other Congo trials.<sup>2839</sup> In any case, his trial will be the last to deal with Ituri, closing the troubled chapter.

At the start of the trial, with her idiosyncratic and potent voice, ICC Chief Prosecutor Fatou Bensouda outlined the crux to the trial:

This trial is about Bosco Ntaganda's responsibility for the murder and attempted murder, persecution, forcible transfer, rape, sexual slavery, destruction of property, pillage, attacks against civilians and against protected objects committed against Lendu, Ngiti and other non-Hema civilians [...] and for the recruitment, use, rape and sexual slavery of children who were under 15 years of age. This case is about the violence that decimated Ituri, leaving hundreds of civilians dead, thousands living in the forest with nothing and a population devastated by sexual violence.”<sup>2840</sup>

Positioned on the other side of the courtroom, was Ntaganda. Also dubbed in popular media and NGO reports as Terminator Tango,<sup>2841</sup> Ntaganda attentively listened to Bensouda’s allegations that “he and other UPC leaders, including Thomas Lubanga and Floribert Kisembo, united in a plan to control Ituri and they systematically expanded their power in the region.”<sup>2842</sup> Ntaganda served as the deputy chief of staff of the Patriotic Forces for the Liberation of Congo (FPLC), the armed wing of the Union of Congolese Patriots (UPC) headed by Lubanga. Their common rationale was, according to the Gambian Prosecutor, military and political reach as well as enormous economic power to the benefit the Hema community. What they unleashed was a bloody campaign of ethnic cleansing, implied Bensouda: “The Lendu, Ngiti and non-Iturian civilian population who occupied desirable land stood

<sup>2835</sup> ICC, PTC II, *Ntaganda Transcript* (10 February 2014), p. 13.

<sup>2836</sup> Ntaganda faces 13 counts of war crimes (murder and attempted murder; attacking civilians; rape; sexual slavery of civilians; pillaging; displacement of civilians; attacking protected objects; destroying the enemy's property; and rape, sexual slavery, enlistment and conscription of child soldiers under the age of fifteen years and using them to participate actively in hostilities) and 5 counts of crimes against humanity (murder and attempted murder; rape; sexual slavery; persecution; forcible transfer of population) allegedly committed in 2002-2003 in the Ituri Province, Democratic Republic of the Congo (DRC). He is charged for individual criminal responsibility pursuant to different modes of liability, namely: direct perpetration, indirect co-perpetration; ordering, inducing; any other contribution to the commission or attempted commission of crimes; or as a military commander for crimes committed by his subordinates. See: ICC, PTCII, *Situation in the Democratic Republic of the Congo. The Prosecutor v. Bosco Ntaganda: Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda* (ICC-01/04-02/06; 9 June 2014).

<sup>2837</sup> Wairagala Wakabi, ‘Ntaganda Gets His Day in Court: Why This is a Monumental Trial’, *International Justice Monitor: Bosco Ntaganda at the International Criminal Court*, 31 August 2015 (Open Society Justice Initiative; www-text: <http://www.ijmonitor.org/2015/08/ntaganda-gets-his-day-in-court-why-this-is-a-monumental-trial/>), visited: 18 November 2015).

<sup>2838</sup> Stéphane Bourgon, ‘Bosco Ntaganda : 12 days without eating at the ICC prison’, *Press Release*, 19 September 2016.

<sup>2839</sup> Wairagala Wakabi, ‘Overview of the Ntaganda Trial’, *International Justice Monitor: Bosco Ntaganda at the International Criminal Court* (Open Society Justice Initiative, 15 December 2015; www-text: <http://www.ijmonitor.org/2015/12/overview-of-the-ntaganda-trial/>).

<sup>2840</sup> ICC, *Ntaganda Transcript* (2 September 2015), p. 13.

<sup>2841</sup> HRW, ‘DR Congo. Arrest Bosco Ntaganda for ICC Trial’, *News*, 13 April 2012.

<sup>2842</sup> ICC, *Ntaganda Transcript* (2 September 2015), p. 14.

in the way of this plan. Bosco Ntaganda and those who joined him sought to drive out the population to gain control of the territory, and he ensured that they could not and did not return.”<sup>2843</sup>

Like in any other atrocity trial before international courts and tribunals, Ntaganda’s account of events is diametrically opposed to the one progressed by the prosecution. “I have been described as The Terminator, as an infamous killer, but that is not me,” he told the judges.<sup>2844</sup> In almost inaudible Kinyarwanda, through interpreters though, he whispered that he “had that reputation not because I did any such thing, but it was because of the hatred against Rwandans. [...] I am not ashamed to tell you that I fought in many war fronts in Congo in 2002 and 2003 and, more specifically, in Ituri.”<sup>2845</sup> Yet he was never part of the plan as described by Bensouda, he explained the court. Instead, he highlighted that the ethnic conflict in Ituri was initiated by the Congolese government in August 1998 with an announcement to kill all the Tutsis or those who looked like them. “It is for this reason that I joined the UPC whose objective was to restore security and protect civilians,” Ntaganda held.<sup>2846</sup> Was Ntaganda a revolutionary rebel who fought for and not against civilians or was he a cold-blooded warlord who killed at will to enrich himself? How to diverge between the two versions of events, which took place more than a decade ago somewhere in the inhospitable Congo? Imaginably, making sense of what happened there and then and with what intention poses a huge challenge to the mixed panel of three judges from complete different historical, social and cultural backgrounds in the Czech Republic, Japan and Korea.<sup>2847</sup>

But that is not all. At its base, the ICC’s Congo ‘dossier’ is a Pandora’s Box similar to the Rwanda-cases at the UNICTR and prosecutions at the SCSL. Not much has changed. Like in Rwanda, Sierra Leone and other atrocity cases relating to Africa, the evidentiary foundations in Ntaganda’s case are mostly embedded in witness testimony.<sup>2848</sup> After Bensouda had opened the case, her senior trial lawyer, Nicole Samson – who had also litigated in the other two Congo cases - addressed the base of the case and the nature of the evidence. She told the judges they were going to:

hear from over 80 witnesses, including insiders who worked directly with Commander Ntaganda. [...] You will hear from representatives of international organisations who documented events and tried to address the commission of crimes with the UPC president and his staff to no avail. And you will hear accounts of the crimes from many of the victims themselves. [...] The Prosecution will also call a number of experts on matters such as the context of the armed conflict, the impact of trauma to a witness's account, the phenomena of sexual violence and children in armed conflict, satellite imagery analysis and exhumations.”<sup>2849</sup>

Thus, from the beginning, the ICC trials expose all the complications and virtual inabilities of the

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<sup>2843</sup> Ibidem, p. 14.

<sup>2844</sup> ICC, *Ntaganda Transcript* (3 September 2015), p. 74.

<sup>2845</sup> Idem.

<sup>2846</sup> Idem.

<sup>2847</sup> Respectively Presiding Judge Robert Fremr, Judge Kuniko Ozaki and Judge Chang-ho Chung.

<sup>2848</sup> Author’s observations of the trial.

<sup>2849</sup> ICC, *Ntaganda Transcript* (2 September 2015), pp. 26-28.

international justice enterprise to dig up the truth and ascertain even basic facts in non-documentary contexts. As in the Ntaganda trial witnesses would make the case, including testimony from experts on context already heard in another trial<sup>2850</sup> and a Congolese historian.<sup>2851</sup> Aside from this testimonial material, more general information would also be tendered, mostly in the shape of contemporaneous reports of the United Nations and non-governmental organisations as well as from local media coverage of events.<sup>2852</sup> Yet, in seeking to put more matter to the case, the prosecution promised to also tender tangible evidence in the form of documents. Samson was keen to inform that “some of the evidence in this case, your Honours, will come from the contemporaneous records of the group itself: Bosco Ntaganda’s own radio communications logbook; official UPC documents such as internal reports, requests, orders, letters, decrees and statutes; photographs; videos of training camps where children under the age of 15 were being trained; and videos taken shortly before and after UPC attacks.”<sup>2853</sup> Ntaganda’s own handwritten radio communications logbook, she opted, “attests to Commander Ntaganda’s prominent position in the UPC/FPLC.”<sup>2854</sup>

Introducing this documentary evidence seemed promising, however, from the beginning of the trial the prosecution returned to the old habit of calling witnesses, immediately faced the consequent challenges and fell back to conducting what was supposed to be a public trial in closed sessions with anonymous witnesses. As a result, only bits and pieces of the evidence and cross-examinations made it to the outside world. Public scrutiny of fact and witness credibility is obscured, very similar to the *modus operandi* at the UNICTR. For example, the first protected witness code-named DRC-OTP-P-0805 – a Lendu victim who used to be business man but became farmer –<sup>2855</sup> described ethnic massacres to the judges but was mostly heard in private session.<sup>2856</sup> Already on his second day of testimony, problems arose. DRC-OTP-P-0805 had also applied to participate in the trial as a victim. In that application he had said UPC fighters had burned down his house while in his trial testimony he had said his house “had had its metal sheeting roof removed.”<sup>2857</sup> Explaining the inconsistency, the witness said he had signed a victim’s participation request he had not filled in himself and had no opportunity to read it over. According to the farmer, the intermediary had made an error: “the person who prepared this document made a mistake because in actual fact my house was not burnt down. The roof was taken off it.”<sup>2858</sup> After a short hiatus in the proceedings, some UPC

<sup>2850</sup> Former Special Rapporteur for the United Nations Commission for Human Rights on human rights in the Democratic Republic of the Congo (DRC) Roberto Garretón. The Chilean lawyer only testified for an hour in the Ntaganda case and most of his other evidence that he gave in the trial against Lubanga was admitted. ICC, *Ntaganda Transcript* (25 September 2015); ICC, TCVI, *Situation: Democratic Republic of the Congo. In the case of The Prosecutor v. Bosco Ntaganda: Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0931* (ICC-01/04-02/06; 21 September 2015).

<sup>2851</sup> Dr. Kambayi Bwatshia. ICC, TCVI, *Situation: Democratic Republic of the Congo. In the case of The Prosecutor v. Bosco Ntaganda: Prosecution’s list of expert witnesses and request pursuant to regulation 35 to vary the time limit for disclosure of the report of one expert witness* (ICC-01/04-02/06; 16 April 2015).

<sup>2852</sup> ICC, *Ntaganda Transcript* (2 September 2015), p. 28.

<sup>2853</sup> *Idem*.

<sup>2854</sup> *Idem*.

<sup>2855</sup> Interestingly, he made the impression that he was a professional witness: “Q. So what is your ethnic origin? A. I am a Lendu person. Q. And in general terms, what is your present occupation? A. Right now I am a witness. Q. And what do you do for a living, sir? A. Before I had a number of business activities, but now I am working as a farmer.” ICC, *Ntaganda Transcript* (15 September 2015), p. 28.

<sup>2856</sup> ICC, *Ntaganda Transcript* (15 September 2015).

<sup>2857</sup> ICC, *Ntaganda Transcript* (16 September 2015), p. 43.

<sup>2858</sup> *Ibidem*, p. 50.

insiders testified, but again, mostly in closed session.<sup>2859</sup> By November 2015, the trial became a *déjà vu*, resembling problems from the ICC’s first trial, against Lubanga. In the courtroom an alleged former child soldier – whose March 2009 testimony in Lubanga’s trial had raised credibility issues<sup>2860</sup> – was physically shielded from Ntaganda. This time however, she consistently failed to answer the prosecution’s question, failing to remember anything about the Ntaganda giving her uniforms and a weapon, the names of villages where she fought, or the ethnic communities that lived in the villages where she fought.<sup>2861</sup> Ntaganda’s lawyers were quick to respond and charged that the witness’ had made new claims to regain victim’s status and implied her testimony was motivated by personal gain and sought to impeach her.<sup>2862</sup> While the matter will in the end be judged by the trial chamber, the trial continued at the time of writing, including with the testimony of Human Rights Watch researcher Anneke van Woudenberg,<sup>2863</sup> the author of a report that served as a driver behind the prosecution’s case.<sup>2864</sup> Judge Fremr, however, had reservations to admitting her report into evidence and that the chamber would “exercise really high caution in relation to this document because in fact it’s mainly based on anonymous sources. And as we already expressed in I would say similar case concerning the previous similar witness, we really see very low relevance on this kind of information coming from that kind of sources.”<sup>2865</sup>

What appears is a repetition of moves, inherited from the earlier Congo trials that were marred by controversies over the use of human rights reports, the reliability and credibility of witnesses that were produced in a most troublesome and delegated investigation. In fact, there are striking analogies to the UNICTR and SCSL. The practices at those courts, which often were carried out by the very same investigators, prosecutors, lawyers and judges, simply trickled down to the ICC. In terms of the Congo trials, however, it may not end with Ntaganda. One Congolese suspect remains at large, somewhere in the Kivu Provinces where the prosecution had also opened investigations. Supreme commander Sylvestre Mudacumura is wanted for a campaign of violence by his Hutu militia, the Democratic Forces for the Liberation of Rwanda (FDLR).<sup>2866</sup> These remnants of army soldiers and militiamen that had spearheaded the genocide in Rwanda in 1994, had this time carried out attacks against civilians during an upheaval in the Kivu wars between January 2009 and September 2010. Fighting the FDLR, Ntaganda was also implicated in atrocities in Kivu since he had left Ituri in 2005, particularly in Laurent Nkunda’s CNDP and more recently the M23. But again, due

<sup>2859</sup> ICC, *Ntaganda Transcript* (20 September 2015); ICC, *Ntaganda Transcript* (21 September 2015); ICC, *Ntaganda Transcript* (25 September 2015); ICC, *Ntaganda Transcript* (19 October 2015).

<sup>2860</sup> In the Lubanga judgment, judges found that they could not rely on “many aspects” of Witness P-010’s testimony due to contradictions between her testimony and documentary evidence regarding her age at the time of the events. They consequently withdrew her status as a victim participating in the Lubanga trial.

<sup>2861</sup> ICC, *Lubanga Dyilo Transcript* (10 November 2015).

<sup>2862</sup> ICC, *Lubanga Dyilo Transcript* (16 November 2015).

<sup>2863</sup> ICC, *Lubanga Dyilo Transcript* (17 November 2010), p. 47.

<sup>2864</sup> Bernard Lavigne, the lead investigator in Ituri testified in the Lubanga trial about the work of HRW and other organisations: “On the fact that humanitarian groups are lousy investigators, I will not go that far. However, one must concede that the procedure of investigation of humanitarian groups, in my opinion, is more a sort of a general journalism rather than legal type activities of investigators.” ICC, *Ntaganda Transcript* (22 June 2016); ICC, *Ntaganda Transcript* (23 June 2016).

<sup>2865</sup> ICC, *Ntaganda Transcript* (22 June 2016), p. 58.

<sup>2866</sup> ICC, PTCH, *Situation in Democratic Republic of the Congo. The Prosecutor v. Sylvestre Mudacumura: Decision on the Prosecutor's Application under Article 58* (ICC-01/04-01/12; 13 July 2012).

to the selective prosecution strategy – small yet illustrative and easy to prove crimes – he was not charged for any of those alleged actions. But the reasoning behind that may also be that like in Ituri, conducting investigations in Kivu were considered even more dangerous and problematic. But again, the Kivu-probe also proved to be minimalistic. That fact was painfully illustrated when the ICC had to release Callixte Mbarushimana in 2011, another Rwandan-born suspect.<sup>2867</sup> The prosecution did not make it through the test of the confirmation of charges hearings in the case of the Executive Secretary of the FDLR. Their case was almost exclusively built on NGO and UN reports, barely on its own investigations on the ground, if any. In his case, the chamber issued a damning decision citing “inconsistencies”, “lack of independent corroborating evidence” and “assumptions” from third parties.<sup>2868</sup> The Rwandan was set free and returned to Paris. Where the ICC has so far failed to deal with the Kivus, a German court has already been more successful in trying FDLR crimes. In November 2015, Mbarushimana’s alleged henchmen, Ignace Murwanashyaka and Straton Musoni, were convicted for international crimes in Stuttgart under the principal of universal jurisdiction.<sup>2869</sup> Justice seems to be operating elsewhere than in The Hague. Earlier in 2015, in Goma, even the US war crimes diplomat Stephen Rapp reintroduced the idea of a ‘specialised’ Tribunal for Congo with Congolese and international judges.<sup>2870</sup>

These alternatives are the implicit antidote to the poised legacy of the ICC’s escapade in Congo. Ituri was the false start of the permanent court that ought to punish and deter mass atrocity. It seemed attractive but soon headed towards disaster. This dramatic course has already infected other cases in The Hague, to an extent that warrants alarm. Its most high-level cases are in jeopardy, particularly because of the troubled OTP’s investigative and prosecutorial workflow and evidentiary challenges. Meanwhile, we witnessed the first trial to collapse before it even started. Kenyatta walked free because the prosecutor lost almost half of her witnesses. In his case, the evidence disappeared like snow before the sun.

## 6.7 ‘Simply an account’

In all the Congo cases, whether during the investigations, pre-trial phase or the trial, concerns have been raised with regards to what extent the Office of The Prosecutor (OTP) was able to collect sufficient and good quality evidence to support the specific charges as well as contextual elements. Therefore, it is crucial to understand, at minimum, what the prosecutor’s tasks are and what policy decisions have been made so far, particularly in relation to truth seeking and fact ascertainment. At the core, the Rome Statute places the evidentiary burden on the Prosecutor. What is special here and in comparison with the UNICTR and SCSL is that the ICC Prosecutor has the obligation - under

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<sup>2867</sup> ICC, ‘Callixte Mbarushimana is released from the ICC custody’, *Press Release* (ICC-CPI-20111223-PR760; 23 December 2011).

<sup>2868</sup> ICC, PTCL, *Situation in the Democratic Republic of the Congo. In the case of the Prosecutor v. Callixte Mbarushimana: Decision on the confirmation of charges* (ICC-01/04-01/10; 16 December 2011).

<sup>2869</sup> ‘Germany finds Rwandan rebel leaders guilty of war crimes’, *Deutsche Welle*, 28 September 2015.

<sup>2870</sup> ‘Les États-Unis souhaitent la création d’un tribunal spécialisé pour la RDC’, *Radio Okapi*, 10 February 2014.

Article 54(1)(a) of the Rome Statute - to thoroughly investigate both incriminating and exonerating circumstances equally. In fact, the Prosecutor has to collect materials *à charge* and *à decharge*. So far, the Prosecutor has had a difficult time complying with this dual obligation, which is not much of a surprise, and some practitioners have suggested that the defence is in a far better position to search for exonerating evidence than the Prosecutor.<sup>2871</sup> For reasons of limited space, this dissertation will not further elaborate on this debate. Within the scope of this research it is suffice to remark that at the ICC, like at the UNICTR and SCSL, the prosecutor is required to establish the truth. In the specific cases at the international courts, witnesses are to tell the truth and nothing but the truth, while deliberate lying is punishable.<sup>2872</sup>

When it comes to extra-legal ambitions, the ICC, like the UNICTR and SCSL, was not given an historical mandate, yet the subsequent ICC prosecutors have stressed that they want to give the victims a voice. In The Hague, the first prosecutor reiterated he had no desire to work on historical records about the conflicts he dealt with. According to Moreno-Ocampo, his mandate did not include “the production of comprehensive historical records for a given conflict.” Instead, the prosecutor opted to select a limited number of incidents to provide a sample that is reflective of the gravest incidents and the main types of victimization.<sup>2873</sup> Subsequently, he put this vision into practice. In fact, investigators reported that Moreno-Ocampo seemed to see his “shadow-court” not as a forensic body, but rather as a “naming and shaming” organisation, like Human Rights Watch or Amnesty International.<sup>2874</sup> In that vein, some say, he let prominence reign over evidence. A former court attorney is reported saying “he would see the leader of a state and say: ‘There must be evidence out there. Go get it for me.’”<sup>2875</sup> In a certain way he had radically broken the tradition of UNICTR, SCSL as well as UNICTY prosecutors and adopted an a-historical strategy and has likewise not made any promises that his work will contribute to the writing of history. Bensouda, on the other hand and as evidenced in the trial against Laurent Gbagbo en Charles Blé Goudé, has opted for a different approach, rooted in her UNICTR experience, of framing large case theories and using historically loaded discourse in litigating her cases.<sup>2876</sup>

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<sup>2871</sup> Caroline Buisman, ‘The Prosecutor’s Obligation to Investigate Incriminating and Exonerating Circumstances Equally: Illusion or Reality?’, *Leiden Journal of International Law*, Vol. 27, No. 1 (March 2014), p. 205-226.

<sup>2872</sup> *Rome Statute*, art. 69 (1) & 70 (1a).

<sup>2873</sup> ICC, OTP, *Prosecutorial Strategy 2009 - 2012* (1 February 2010), §20.

<sup>2874</sup> Verini, ‘The Prosecutor and the President’.

<sup>2875</sup> *Idem*.

<sup>2876</sup> For example, the opening statement in the trial vs. Malian suspect Ahmad Al Faqi Al Mahdi over the destruction of sites of cultural heritage in Timbuktu: “Timbuktu's name is one that is commonly associated with a rich history and culture. In the 15th and 16th centuries, Timbuktu became a regional centre of economic activity and trade. More importantly, it blossomed into one of Africa's most vibrant intellectual and spiritual capitals. It played an essential role in the expansion of Islam in Africa. It was, to be sure, the cradle of education, where enlightenment was nurtured for the benefit of generations of students, attracting scholars from far and wide. Some of these sages would be venerated as Muslim saints and mausoleums would be erected on their graves to honour their memory as well as the notable contributions they made to the lives of people of Timbuktu and beyond. These mausoleums, which survived the ravages of time, have continued to play a fundamental, even foundational role in both the life within the city gates and beyond the city's borders. These monuments, your Honours, were living testimony to Timbuktu's glorious past. These mausoleums undoubtedly also served as a unique testament to the city's urban settlements. But above all they were the embodiment of Malian history, captured in tangible form from an era long gone yet still very much vivid in the memory and pride of the people who so dearly cherished them. The mausoleums also testify to the historical role Timbuktu played in the spread of Islam in Africa and in the history of Africa itself. They are relics of a great chapter in human kind's intellectual and spiritual development on the continent, which gave Timbuktu its standing in the world. This is particularly important in a society that is partly rooted in oral tradition.” ICC, *Al Faqi Al Mahdi Transcript* (22 August 2016), p. 16-17.

As a possible result of the non-litigation of historical charge sheets in the Congo cases, the ICC's first two judgements do not delve into historical details and contexts. Only in the third judgement, judges found it necessary to do so on their own initiative, actually lamenting "that the Prosecution did not see fit to include a detailed exposition of the main events in Ituri in its Closing Brief," because according to them "such an account would, however, have greatly facilitated the Chamber's grasp and understanding, in particular of any points of divergence between the parties."<sup>2877</sup> They then sketched the "main political events and incidents," but starting "not with an account of the DRC's colonial past, but with May 1997. In that month President Mobutu fell and Laurent-Désiré Kabila seized power, marking the creation of the new "Democratic Republic of the Congo" to replace "Zaire", the name previously used to denote the same territory."<sup>2878</sup> For the judges in this case, understanding of the historical context was crucial to get understanding of the charges, but they were also careful to state that their narrative was "not limited solely to evidence undisputed by the parties and participants" and "does not constitute a body of findings of fact: it is simply an account, inevitably incomplete."<sup>2879</sup>

## 6.8 Conclusions

What transpired from the previous chapters is that both the Rwanda-tribunal (UNICTR) and the Sierra Leonean Special Court (SCSL) experiences have revealed that the international criminal trial setting lacks the capability to validate the more wide-ranging grand narratives on the Rwandan genocide and the Sierra Leonean war respectively. Nevertheless, the UNICTR established that, beyond any legal dispute, there was a genocide perpetrated in Rwanda and the SCSL endorsed that large-scale abuses were committed in Sierra Leone by different factions to the conflict. In historiographical terms, at a minimum, they established in a score of judgements some detailed facts on the micro level, about the role of individual suspects in their immediate contexts. In Arusha, for example, the UNICTR particularly managed to unravel and picture events in Kibuye, while at the SCSL, many details transpired on the structures of rebel forces, the use of child soldiers as well as the functioning of civil defence forces. What both tribunals also elicited is the testimony of many victims or survivors of mass atrocities, thus shedding light on and putting on record the impact mass atrocity had on the individual level. In terms of core fact ascertainment and establishing individual criminal responsibility however, the almost exclusive reliance on testimonial evidence – provided largely through non-legal third parties like NGOs -continuously proved problematic and erratic when it came to substantiating allegations and case theories. Overall, the absence of clear paper trails, forensic data and "smoking-

<sup>2877</sup> ICC, *Katanga Judgement*, §438.

<sup>2878</sup> *Ibidem*, §428.

<sup>2879</sup> "The Chamber's rehearsal of the main events in this section is, therefore, based on the body of the evidence on record. Thus, it is not limited solely to evidence undisputed by the parties and participants. Of note, however, is that the account which follows is not intended to pass in review the historical events which occurred in Ituri; it seeks merely to relate the main episodes as described in the case at bar by various witnesses or as recounted in the documentary evidence. Moreover, the witnesses to whom the Chamber makes reference were above all protagonists in the conflict, and their accounts can in no way be likened to that of an expert. The Chamber therefore wishes to emphasise that, with the exception of the part on methods of warfare, this section does not constitute a body of findings of fact: it is simply an account, inevitably incomplete, that seeks to facilitate understanding of some aspects of the situation in the DRC and, more particularly, of the conflict which raged in Ituri at that time." ICC, *Katanga Judgement*, §430.

gun-type-of-evidence” has increasingly led judges at the international level to be cautious to make sweeping findings on contextual elements in general – beyond the extent necessary to prove that crimes actually took place - as well as particular details concerning defendants. In fact, in dealing with testimonial evidence, judges have gradually become more reluctant, more careful and more nuanced in their findings. In contrast however, on the prosecutor’s side it became more difficult to meet this apparent stricter and higher burden of proof and alter their indictments and investigations accordingly, particularly in volatile non-documentary African cases. *In extenso* of Rwanda and Sierra Leone, a textbook example thereof is the work of the International Criminal Court (ICC), which in many ways – in temporal, geographical and evidentiary terms, but also in relation to court staff - is an offspring of the UNICTR and SCSL and is equally reliant on witness testimony and the agents and methodologies typical of the UNICTR and SCSL in acquiring this type of evidence.

After having outlined the basics of the ICC and provided an overview of its case-load, this chapter has shown that the first ‘African’ cases at the ICC share many parallels with the SCSL and UNICTR when it comes to the challenges of fact-ascertainment on mass violence. Although, the analysis is based only the cases in the Democratic Republic of the Congo, the case study really presents how Pandora’s Box was opened in terms of basic finding and its implication for the historical record in broader terms. I will discuss this chapter’s main findings below through answering the three main questions of this study: how to understand the invocations of historical narratives at the ICC, how do its judgements square with historiography and how to approach the ICC trials as historical sources?

Regarding the first question, I have shown that the invocation of historical narratives at the ICC has become rather an exception than a rule. Apart from the Gbagbo case, discussed in the preface, as well as the Al Mahdi case, most cases are not informed by broad interpretations of pre-indictment social, political and historical antecedents. There may be several reasons to explain the absence of historically framed prosecutions and case theories. First of all, the Rome Statute’s jurisdiction only commences after July 2002, meaning that the court is restricted in looking deeper into the past or in accepting out-of-the-temporal-scope-evidence. Second, the first Prosecutor, Luis Moreno Ocampo, explicitly stated he was not interested in writing histories of the potentially many conflict situations that would come before him. Rather he used the court to name and shame sitting leaders in order to scare them off, publicly indict them and possibly deter them from committing crimes. Refraining from historical explanations thus was a matter of perspective and also political decision. Third, bearing in mind that the ICC could never develop into a case-specialised tribunal, such as the UNICTR and SCSL, it opted to target its investigations on easy to prove crime and limit its prosecutions in order to represent the larger scale. In fact, the ICC prosecutor sought to simplify its cases by dehistoricizing the case theories. As a consequence, the ICC judges, particularly in the Congo cases, were not concerned with questions regarding the macro historical dimensions of the crimes

alleged or grand narratives about world historical events, basically because the prosecutor did not bring these into play. During the trials, the only protagonists who sought to introduce historical context were the defence, in order explain away their client's role in the broader scheme of things, and some judges, who themselves were interested these broader kind of questions. However, agency matters, as we also saw in the chapter on Rwanda and Sierra Leone. Moreno-Ocampo's successor, Fatou Bensouda who came from the UNICTR, has reintroduced history in her cases. The Gbagbo case is emblematic thereof, but so is the Al Mahdi case, in which the Prosecutor invoked a narrative starting in sixteenth century Mali.

Secondly, how, in the above context, do the ICC judgements square with historiography? To the extent there is any other historiography on the rather contemporaneous conflicts the ICC deals with than NGO and UN reports, this question is difficult to answer. Yet in terms of the DRC, a situation on which a respectable amount of historiography exists, particularly dealing with Rwanda and the outbreak of the two Congo wars in the Great Lakes Region, the ICC judgements are pale in comparison. Only in terms of their depiction of the Ituri conflict as a non-international conflict would suggest a larger break with academic consensus which holds that the conflict was rather international. It is mainly because of the prosecution's strategy to narrow its scope in its charges and cases that no findings on macro-historical narratives are made. Moreover, since the ICC would only deal with a maximum of a handful of suspects in each situation, the extent to which the court's knowledge and understanding, through its judgements, on the conflicts and its contexts as a whole is fundamentally limited. On the other hand, however, the ICC judgements arguably fill gaps in the existing historiography on the local, micro-historical, level, even though these are tainted by the many fact-finding deficiencies demonstrated in this chapter.

This fact-finding crisis, as exposed in this chapter, that has come to the fore during the Congo cases, subsequently led to the derailing of the Kenya cases and ultimately poses an existential epistemological challenge to the court in other cases of even larger magnitude, opens up critical insights into what actually international criminal tribunals can achieve. It once more warrants a cautionary approach when using the trials as well as the trial records as historical sources, particularly the troublesome witness testimonies that were collected, produced and heard throughout its trials. What this chapter has shown is that the trial record is ultimately tainted by a troubled process of truth-finding and that this may have, if not understood, larger implications on future historical research on ICC situations using the ICC records.