Child soldiers: The Prosecutor v. Thomas Lubanga Dyilo

- ✓ The *Union des Patriotes Congolais* ("UPC") was created on 15 September 2000; Mr. Lubanga was one of the UPC's founding members and its President from the outset. The UPC and its military wing, the *Force Patriotique pour la Libération du Congo* ("FPLC"), took power in Ituri in September 2002. The UPC/FPLC, as an organised armed group, was involved in an internal armed conflict against the *Armée Populaire Congolaise* ("APC") and other Lendu militias, including the *Force de Résistance Patriotique en Ituri* ("FRPI"), between September 2002 and 13 August 2003.

- ✓ Child soldiers were, amongst other thing, used during the conflict

- Definition of Victim according to the ICC in Lubanga: '*someone who experienced personal harm, individually or collectively with others, directly or indirectly, in a variety of different ways such as physical or mental injury, emotional suffering or economic loss* [Judgment ICC01/04-01/06-2842, T.Ch. I, 14 March 2012, para. 14 ii]
    - The definition extends to *indirect* victims, such as parents of child soldiers
    - Art. 85 Rule of procedures: to participate as victims persons must have suffered harm as a result of the crimes charged
        - The approach of the Court is more flexible: It is though difficult to investigate indirect damaged parties
        - Even the standard used to make such an evaluation: the court uses the *prima facie* criterion, rather that the criterion of 'beyond reasonable doubt [of being a victim]

- *Nature of the conflict in Ituri*
    - OTP: Non-international
    - Pre trial Ch: mixed – international (until 2003, when Uganda was present in the Ituri region)and non international afterwards
    - Chamber: non-international
        - Parallel conflict (int and non-int) taking place at the same time on the same territory (para. 540)
        - Key question: UPC/FPLC, among other armed groups, 'were used as agents or "proxies" for fighting between two or more states (namely Uganda, Rwanda, or the DRC).

Art. 8(2)(b) ICC Statute / Int Conflicts	Art. 8(2)(c), and (e) ICC Statute / Non Int Conflicts
... Other serious violations of the laws and customs applicable in international armed conflict ... (xxvi) **Conscripting** or enlisting **children** under the age of **fifteen** years into the **national armed forces** or **using** them to **participate actively** in hostilities This would raise the question: can paramilitary groups be equated to 'national armed forces'?	... In the case of an armed conflict not of an international character ... ... Conscripting or enlisting children under the age of fifteen years into **armed forces or groups** or using them to **participate actively** in hostilities ...

Three conducts: each conduct stands on its own, independent from the others

- Conscripting: compulsory recruitment
- Enlisting: voluntary recruitment – agreement of the child is not possible; if the child agrees, the *actus reus* still stands
    - Children are deemed unable to give a valid consent (para. 613)
- Using them to actively participate
    - Not only combat-related activities, but also supporting role (para. 621 ff)
    - 'Direct participation' as required by Art 77(2) API is not necessary
    - Closer to 'take [direct/indirect]' part in Art. 4(3)(c) AP II

The Prosecutor v. Bosco Ntaganda

- Rape as war crime and rape as 'ordinary crime
    - Association with the conflict (No. ICC-01/04-02/06, para 52), but possibly war crimes even if they are not grave breaches of the Geneva conventions (effet util)
    - Possible also within the same group (para 53 ff)
- Article 28 ICC - Responsibility of commanders and other superiors
    - A military **commander** or person **effectively acting as a military commander** shall be criminally responsible for **crimes** within the jurisdiction of the Court committed **by forces under his or her effective command and control**, or effective authority and control as the case may be, as a result of his or her **failure to exercise control properly** over such forces, where: (i) That military commander or person eit**her knew or, owing to the circumstances at the time, should have known** that the forces were committing or about to commit such crimes; and (ii) That military commander or person **failed to take all necessary and reasonable measures within his or her power to prevent or repress** their commission or to submit the matter to the competent authorities for investigation and prosecution.

Sex and gender based crimes

- Why has it been so difficult for previous cases to deal with GSBC

- Only ICTY and ICTR express nomen iuris
- To some extent, sidelined in investigation as it is difficult to collect proof
    - ICC Policy Paper on Children 2016 "pay particular attention to sexual and gender-based crimes and crimes against children"

- The ICC has a wide range of sex-gender crimes, yet there are but few decisions on them (one is final, one was overturned on appeals, and Ongwen is under appeal)

- Lubanga: the Prosecutor had no sufficient elements, and made no changes in the indictment after having them obtained;
- Mbarushimana: sex and gender crimes were in the arrest warrant, but evidence was solely indirect, unable to stand trial;
- Bemba: sexual crimes where reversed on Appeals – stricter requirements during trial in comparison to confirmation of charges, meaning that simple listing of crimes without specific description of the facts, the times and the provisions breached does not stand in trial (para 110);
- Bemba: no new facts following confirmation if these lead to new crimes and the indictment is not changed as well (115);
- Wrong categorization of sexual crimes: Kenyatta – circumcision was not sexual conduct but cultural crime against humanity to affirm cultural superiority; still, this is not mutually exclusive.

- International law and international adjudication seems to be heteronormative in substance (as of 2020):

Tribunal	Total Number of Judges	Number of Female Judges	Percentage of Female Judges
ICJ	15	3	20 %
ECHR	47	15	32 %
IACHR	6	1	16 %
African Court	11	6	54 %
ITLOS	21	3	14 %
Iran-US Claims Tribunal	11	1	9 %

Tribunal	Total Number of Judges	Number of Female Judges	Percentage of Female Judges
ICC	18	6	33 %
ICTY	8	0	0 %
ICTR	10	2	20 %
STL	12	4	33 %
ECCC	24	2	8 %
Kosovo Specialist Chambers	18	5	28 %
IRMCT	24	6	25 %

(Sterio, Milena, "Women as Judges at International Criminal Tribunals" (2020). Law Faculty Articles and Essays. 1172).

Yet, from a legal framework point of view, the ICC acknowledges the relevance and sensitivity of gender in a number of ways:

- Rape is framed in a 'gender neutral' way – meaning victim and perpetrators may be either men or women (Elements of crime, Art 7(1)(g)-1);
- Consent may not be inferred from the victim's words or lack of resistance if there is a degree of coercion, which may also be implicit in the state of conflict or detention (Rules of procedure and evidence, Rule 70(a)-(c));
- Evidence of previous and subsequent sexual behavior of the victim may not be used to reconstruct consent to sexual activities (Rules of procedure and evidence, Rule 71);

- There is a duty to protect victims and witnesses also taking into account their gender (Art 68(1) ICC Statute;
- Obligation to appoint advisers for the OTP expert on sexual and gender violence (Art 42(2) ICC Statute);
- Obligation to take into account sex and gender based crimes during investigations (Art 54(1)(b) ICC Statute);
- State parties must appoint judges with expertise on gender and minor violence (Art 36(8) ICC Statute);
- The application and interpretation of International criminal law by the ICC must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender (as defined in article 7, paragraph 3).

Genocide	**War crimes**	**Crimes against H.**
Art 6 For the purpose of this Statute, "genocide" means any of the following acts committed with **intent to destroy**, in whole or in part, **a national, ethnical, racial or religious group, as such**: (b) Causing serious bodily or mental harm to members of the group; (d) Imposing measures intended to prevent births within the group; Conduct must be **attributed to a State**.	Art 8(2) - committed as part of a plan or **policy or** as part of a **large-scale commission** of such crimes (ICTY Tadic – private conducts related to a systematic attack fall within art 8 if they 'further' the state policy – **SIMPLE ASSOCIATION TO CONFLICT IS OK**) (a)(ii) Torture or inhuman treatment, including biological experiments; (a)(iii) Wilfully causing great suffering, or serious injury to body or health; (b)(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; (b)(xxii) Committing - **rape (when, what? Para 2708 ff Trial Judgment ongwen)**, - **sexual slavery**, - **enforced prostitution**, - **forced pregnancy**, - **enforced sterilization**, - **any other form of sexual violence**	Art 7 part of a **widespread or systematic attack** (**AGAIN STATE POLICY REQUIRED**) directed against any civilian population, with **knowledge of the attack** (1)(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (1)(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health; 7(2)(f) **"Forced pregnancy" means** the - unlawful confinement - of a woman forcibly made pregnant (**non-voluntary pregnancy**), - with the intent of affecting the ethnic composition ... **PLACEMENT OF COMMA: THE SPECIFIC INTENT MEANS SPECIAL MENS REA;** ONLY THE CONFINEMENT IS SUBJECT TO

		THIS ENHIGHTENED mental requirement – this means it is not necessary to determine the reasons underlying rape - of any population or carrying out other grave violations of international law.
		7(2)(f) This definition shall not in any way be interpreted as affecting **national laws relating to pregnancy** ICC Statute does not create a right to abortion – if national law provides state-prescribed confinement to restrict abortion, this is not a core crime. **REPRODUCTIVE AUTONOMY MUCH DEPENDS ON DOMESTIC LAW.**

Art 7(3):

For the purpose of this Statute, it is understood that the term **"gender" refers to the two sexes**, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above

- ICC policy paper – sex is interpreted in a gender neutral way
- Sex crimes can be committed both against men and women – however, in **Ongwen**: **exclusion of evidence** of sexual violence on men
- Gender still understood in an heteronormative binary way: International Law Commission 2017 proposal to define crimes against humanity, para 41, 'allowing the term to be applied for the purposes of the present draft articles based on an evolving understanding as to its meaning'.

Child soldiers: A critical appraisal

8(2)(b) xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to **participate actively** in hostilities	77(2) API The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years	4(3)(c) APII Children shall be provided with the care and aid they require, and in particular: ... (c) children who have not attained the age of fifteen years shall neither be

	do not take a **direct part** in hostilities 51(3) API Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a **direct part** in hostilities. 43(2) Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate **directly** in hostilities.	recruited in the armed forces or groups nor allowed to **take part** in hostilities 13(3) APII Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a **direct part** in hostilities Common Art 3(1) Geneva Conventions Persons taking no **active part** in the hostilities... **Les personnes qui ne participent pas directement aux hostilités**

The use of the expression "to participate actively in hostilities", as opposed to the expression "direct participation" (as found in Additional Protocol I to the Geneva Conventions) was **clearly intended to import a wide interpretation to the activities** and roles that are covered by the offence of using children under the age of 15 actively to participate in hostilities (Lubanga, para 627).

Was the ICC correct in relying distinguishing between active and direct participation? Is this reasoning grounded in IHL or does the French terminology show 'active' and 'direct' should refer to the same quality of participation?

What are the legal **consequences following the expansions** of the conduct for which there may be criminal liability under the Rome State?

- More children may be considered to the child soldiers taking active part to the conflict, thus becoming to some extent a legitimate military target even though they may not be involved at times in active military operation
- To some extent, this seems inconsistent with the ration of the decision: the decision wishes to prosecute those who put the lives of children at risk, yet it extends by so doing the cases where a child is a child-soldier-

Defences raised by Ongwen

- Early abduction and indoctrination determined a mental illness;
    - Gumpert (Prosecutor): in lack of medical evidence, assumption of full mental capacity;

- Duress – as lack of cooperation would have meant his family and village being destroyed;
    - Ramping of internal ranks demonstrates that he shared the values;
    - Requirement of imminent threat *ex* Art 31(1)(d) ICC Statute not met;

- To establish the individual criminal liability of Ongwen, the ICC must insist on his monstrosity:

- No effects of him being a previous victim to exclude criminal liability;
    - However, no jurisdiction over crimes committed by child soldiers (Art 26 ICC Statute) – strong focus on conducts after full age; Ogwen is **viewd as an adult perpetrator not as a child soldier**
    - (Previous) child soldiers often get amnesty, are released and reintegrated
        - Is ignoring this protection consistent with the protection of children under IHL?
        - Is this a challenge to the global narrative that all child soldiers should be freed from prosecution?
        - Is this a case of **conflict between restorative and retributive justice?**
    - In the confirmation of judgment decision, this ground was held unreasonable, and not deeply addressed (para. 150): *The Defence has raised several times an argument that circumstances exist that exclude Dominic Ongwen's individual criminal responsibility for the crimes that he may otherwise have committed. One side of this argument is that Dominic Ongwen, who was abducted into the LRA in 1987 at a young age and made a child soldier, should benefit from the international legal protection as child soldier up to the moment of his leaving of the LRA in January 2015, almost 30 years after his abduction, and that such protection should include, as a matter of law, an exclusion of individual criminal responsibility for the crimes under the Statute that he may have committed (Transcript T-22, p. 46; Defence Brief, paras 36-49).* ***However, this argument is entirely without legal basis, and the Chamber will not entertain it further****.*
- **Being a victim of international criminal law bear no consequences in terms of diminished responsibility**
    - This defence is not foreseen in the ICC system
    - Art 31 ICC speaks of **exclusion** of criminal liability
    - Art 31(3) opens up the list – there may be an integration under the applicable international criminal law, which does know diminished legal capacity
- Yet the sentencing takes that into account when determining the final sanction as 25 years of imprisonment, rather than the 30 requested, have been given;

- To establish Ongwen criminal liability of command, the narrative about LRA have changed:
    - Uganda Anti-Terrorism Act 2001, sch. 1. Under this law, the LRA and another rebel group called the Allied Democratic Forces (ADF) were declared terrorist organizations;
    - Yet, terrorisms might lead to lack of an organisation scheme and lack of common plan
    - Gumpert: LRA agenda is to overthrow the Government of Uganda;

- Evidence was collected by Uganda Government – the victim of the attacks; the prosecution disparages the idea that the government's being party to the conflict might in any way undermine the reliability of the evidence it collected;

The ICC as global actor: a critical appraisal

Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following the surrender and transfer of top LRA Commander Dominic Ongwen:

I welcome the news that Dominic Ongwen, a high ranking commander of the Lord's Resistance Army (LRA), has surrendered and been transferred to the custody of the International Criminal Court (ICC). ***I am grateful for the persistent efforts of the Government of Uganda, the Government of the Central African Republic, the Uganda People's Defence Force****, the African Union Regional Task Force, and generally, all who have helped realise this significant development.*

Dominic Ongwen's transfer brings us one step closer to ending the LRA's reign of terror in the African Great Lakes region. For more than a quarter of a century, the LRA under Joseph Kony and his high command, that includes Ongwen, have terrorised the people of Northern Uganda and neighbouring countries. The LRA has reportedly killed tens of thousands and displaced millions of people; terrorised civilians, abducted children and forced them to kill and serve as sex slaves. They have hacked off limbs and horribly disfigured men, women and children.

In so doing, the LRA has committed unimaginable crimes against humanity and war crimes. My investigation demonstrates that Dominic Ongwen served as a high ranking commander within the LRA and that he is amongst those who bear the greatest responsibility for crimes within the jurisdiction of the ICC. ***His transfer to the Court's custody sends a firm and unequivocal message that no matter how long it will take, the Office of the Prosecutor will not stop until the perpetrators of the most serious crimes of concern to the international community are prosecuted and face justice for their heinous crimes****.*

I urge all others that still remain within LRA ranks to abandon violence; stop committing crimes, and follow the bold steps of others before you.

I also encourage all States to renew and refocus efforts to secure the arrest of Joseph Kony as well as all other ICC fugitives. The victims of their crimes have waited far too long and deserve to see justice done.

- Compelling narrative of the triumph of international criminal law, presenting Ongwen's arrest as a apt case of international law enforcement and proof of the ICC increase in efficacy;
    - Seleka, to which Ongwen surrendered first, and which did transfer Ongwen to Uguanda, also is under investigation for criminis under the jurisdiction of the court – yet **Seleka is omitted in the statement of the Prosecutor**;
    - Ugandan troops have also been accused of looting resources and attacking civilians (*By sixteen votes to one, Finds that the Republic of Uganda, by the conduct of its armed forces,*
    - *which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict; as well as by its failure, as an occupying Power, to take*

measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian law– ICJ Armed Activities in Congo, DRC v Uganda, 2016, finding 3);

- Strong political opposition of some States against ICC: focus of the ICC on 'pure villains and pure victims conflicts'
    - Lack of focus on Afghanistan, or Iraq
    - Situations in south America observed for over 10 years without formal proceedings being opened [Colombia] (but see Venezuela end of 2018/2021);

- Necessity for cooperation of local States
    - Tacit offering immunity from investigation to States referring situations and cooperating;
    - Uganda internation in camp of civil population under the assumption that Acholi were to be protected there from LRA
        - Camps become a distinction mark for attacks;
        - Camps were not given relief aid creating a humanitarian problem
            - *The Acholi camps provide an almost textbook example of how not to mitigate the effects of forced displacement*
    - Some argue (Branch, Int J of Trans J, 2016) the ICC is a case of alignment with the powerful African State
        - This leads to ***selective justice***
    - The excessive Africa focus has led some States to leave the system - The African Union has called for the mass withdrawal of member states from the International Criminal Court

- International **criminal justice and local remedies**: these might often help transition to peace
    - *Article 23 of the Statute provides that a person convicted by the Court may be punished only in accordance with the Statute. In turn, Article 77 of the Statute specifies – exhaustively – the penalties to be imposed for the commission of crimes within the jurisdiction of the Court. Any Defence submission to incorporate traditional justice mechanisms into the sentence imposed on the convicted person under Article 76 of the Statute must therefore fail directly as a result of this principle of* ***nulla poena sine lege****. Indeed, as emphasised in this regard by the Appeals Chamber, 'the Statute and related provisions contain an exhaustive identification of the types of penalties that can be imposed against the convicted person' and '[t]he corresponding powers of a trial chamber are therefore limited to the identification of the appropriate penalty among the ones listed in the Statute and a determination of its quantum'. In light of the principle of legality, the Chamber is thus precluded from introducing 'unregulated penalties or sentencing mechanisms not otherwise foreseen in the legal framework of the Court* (Sentence, 6 May 2021, para. 26).
        - Voluntary basis for additional cultural rituals;
        - Need for evidence of social acceptance by the victims.