Looking for the child soldier.

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The judicial investigation in the case of Thomas Lubanga Dyilo

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Abstract: This article follows a criminal investigation for recruitment of child soldiers, by asking the following questions: how does one find child soldiers? How does one bring them onto the judicial stage? The article explores the different moments that marked the investigation by the Office of the Prosecutor in the first case brought before the International Criminal Court in The Hague, that of Thomas Lubanga Dyilo. After describing the successive stages of the investigation, the article analyses the conditions under which former child soldiers testified before the ICC. None of their nine testimonies was judged credible by the ICC Trial Chamber I. The different moments that marked these legal proceedings bring to light the instability of the category of child soldier and the uncertainty that regularly threatens the labour of judicial elucidation.

Keywords: armed conflict, child soldier, Democratic Republic of Congo, International Criminal Court, judicial investigation, Thomas Lubanga

Since the early 1990s, the soldiering experiences of children and youth have become a major subject of anthropological research. These studies share a concern to break with the victimist view of the 'child soldier' category perpetuated by the media, humanitarian organisations and, more recently, international criminal courts. The dominant image conveyed in these arenas is that of child victims – vulnerable, passive figures forcibly recruited into armed groups to serve as bodyguards, cooks and porters, and sometimes even trained in military discipline and weapons handling. A child carrying an AK-47 larger than himself has thus become a powerful object of indignation and mobilisation, a figure of the 'politics of pity' (Boltanski 1999) that uses suffering as a means to legitimise intervention in armed conflicts. The indignation aroused by this victim figure has led to the adoption of a series of international

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conventions since the late 1970s designed not only to protect the rights of children but also to punish those responsible for their recruitment.

Anthropological studies, conducted primarily in African conflict zones, have attempted to deconstruct the victim image associated with children at war by focusing more specifically on the different ways in which young combatants enter militias and armed groups. Countering the dominant image of the vulnerable and innocent child, these studies have highlighted the figure of the child-as-actor in settings where life itself is militarised. The work of Danny Hoffman (2011), Paul Richards (1996), Susan Shepler (2002, 2010) and Myriam Denov (2010) for Sierra Leone; of Henrik Vigh (2006) for Guinea-Bissau; and of Christopher Blattman and Jeannie Annan (2010) for Uganda all stress the ability of children and youth to make choices, enter power relations and reverse the asymmetry that defines their relationships to adults.[1] In the context of militarised life, choosing to take up arms becomes a means of protecting oneself, avenging one's loved ones or negotiating access to food and other resources that civilians have difficulty obtaining (Krijn and Richards 1998). For some, the break with civilian life reflects a refusal to be confined to camps entirely dependent on humanitarian aid, where people's mobility is carefully controlled and monitored.[2] As several studies have underscored, fighting can become a 'profession' (Debos 2016) or 'work' (Hoffman 2007), and life at war a 'social project' (Geffray 1990) for certain groups or individuals.

Analysing the paths these young combatants have followed sheds light on what Primo Lévi (1989) called the 'grey zone' – situations where it is difficult to draw the line between victim and perpetrator. The porosity of this line is evident in many of the narratives that researchers have collected, such as in Ben Mergelsberg's (2010) interviews with returnees from Joseph Kony's Lord's Resistance Army. While many of these returned fighters had been abducted at a very young age, some do not hide the pleasure they felt in killing and, conversely, the profound boredom that struck them on returning to civilian life. By reconstructing these grey areas, researchers point to the reductive and essentialising nature of the category of 'victim' conveyed by humanitarian, judicial and media discourses.[3]

Notwithstanding this rich and fertile literature, one aspect remains largely unexplored: child soldiers called to testify before international criminal courts. The few studies that exist do not draw on ethnographic research. For instance, legal scholar Mark Drumbl (2012) endeavoured to analyse the entry of the category of child soldiers into international criminal courts but, here again, in order to denounce the victimist

perspective that dominates the judicial framing of the category, and to call for the criminal responsibility of adolescents who perpetrate crimes and violence to be taken into account. Other research from the field of transitional justice, based on the analysis of trials before the International Criminal Court, highlights the difficulty judges have in accepting the testimony of witnesses in this category as evidence, given that their accounts of their abduction or participation in the conflict are often riddled with inconsistencies or vagueness (Hola and Bouwknegt 2019).

Yet a blind spot remains in the literature on the participation of child soldiers in trials: how is a child soldier produced? How is one found? How are they made to look like an ideal child soldier? These are the questions I intend to explore. What interests me here is not so much describing the conditions in which child soldiers give their testimony, which are ultimately the same for all witnesses, as capturing *what precedes* the moment of testimony in the courtroom. I aim to recount not the witnesses' trajectory, but the trajectory of a judicial investigation into the recruitment of child soldiers and the various struggles it goes through to produce witnesses at the trial. This article is based on an analysis of a judicial investigation concerning the case of Thomas Lubanga Dyilo, the very first to be tried for recruiting and enlisting child soldiers before the International Criminal Court (ICC) in The Hague. The research material consists of the transcripts of the Lubanga trial hearings, the Trial Chamber's judgement sentencing the accused to fourteen years in prison, and interviews with the legal actors involved in the case: counsel for the defence and prosecution, investigators from the ICC's forensic team and the victims' legal representatives. Between January 2016 and the present, I made several field visits to The Hague to follow proceedings in other cases concerning the recruitment of child soldiers.

The conflict in Ituri

The accused, Congolese Thomas Lubanga, was convicted of having participated 'in the widespread recruitment of young people, including children under the age of 15, on an enforced as well as a "voluntary" basis' in the Ituri district, in the Orientale province of the Democratic Republic of the Congo (DRC). The region has endured an armed conflict since the late 1990s, which is part of what is known as the Second Congo War (see e.g. Prunier 2009; Stearns 2011). Rich in gold, diamonds, oil, wood and coltan, the province borders Lake Albert and Uganda to the

Figure 1. Extract from Jean-Philippe Stassen, *I Comb Jesus et autres reportages africains* (Paris: Futuropolis, 2014), 45. Reprinted with permission.

east and North Kivu to the south. The ICC's description of the conflict is that of a clash between two ethnic communities involved in a long-standing land dispute, the Hema and the Lendu. To be sure, the Belgian colonial regime aggravated the ethnic divisions between these two communities by favouring the cattle rearing and trading Hema to the detriment of the crop-growing Lendu. Notably, the Hema had been able to obtain 'individual property rights on the land, legitimized by legal deeds, while their Lendu neighbors living in the same territory could only lay claim to their unwritten, collective, customary rights, and had to cede their land' (Claverie 2015: 163). In 1999, '75 of the 77 large farms' belonged to members of the Hema community, who aimed to appropriate the entire territory.[4] To complicate matters, neighbouring Uganda and Rwanda were heavily involved in the conflict. In its initial stages, soldiers from the Uganda People's Defence Force (UPDF) supported certain Hema landowners in attacks on Lendu villages. In return, the Lendu formed self-defence forces and began to attack Hema villages with the support of individual Ugandan officers and certain rebel movements. The Hema responded by organising their own self-defence committees. Between 1999 and 2003, a series of opposing faction leaders struggled for power in Ituri.

The conflict intensified when, in October 1999, the UPDF decided to create a new province called Kibali-Ituri. General James Kazini, who commanded the Ugandan army in the DRC, appointed Hema activist Adele Lotsove Mugisa as provisional governor of the new province. This decision exacerbated the conflict in Ituri. By November 1999, the fighting had killed seven thousand people and displaced one hundred thousand. It was against this background that Thomas Lubanga, a member of the Hema community, created the Union des Patriotes Congolais (Union of Congolese Patriots – UPC) and its armed wing, the Forces Patriotique pour la Libération du Congo (Patriotic Forces for the

Liberation of Congo – FPLC), of which he became commander-in-chief.[5] The UPC-FPLC seized power in Ituri in September 2002 and engaged in an 'internal armed conflict' with the Armée populaire congolaise (Congolese People's Army) and other Lendu militias, including the Force de Résistance Patriotique en Ituri (Front for Patriotic Resistance in Ituri).

The judicial investigation opened by the ICC Office of the Prosecutor (OTP) concerned the violence attributed to the UPC-FPLC between September 2002 and 13 August 2003. Yet the charges against the accused only concerned the enlistment and conscription as soldiers of children under the age of fifteen, which is considered a war crime. Acts of violence perpetrated against civilian populations (murders, looting, rape, forced displacement) were not included in the charges. Why did the OTP choose the sole charge of enlisting child soldiers? What is the rationale behind this decision, and on what basis was the indictment drafted?

The work of the ICC

To understand the constraints that shape a judicial investigation into war crimes, we must first look briefly at the statutes of the ICC and the its internal organisation. Unlike the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda, which were established by UN Security Council resolutions in 1993 and 1994, respectively, with a limited mandate in space and time, the ICC is a permanent criminal court established by the Rome Statute, an international treaty that entered into force in July 2002. It is funded not by the UN but by contributions from the States Parties (for an astute analysis of these institutions as 'systems, arenas and stages', see Claverie 2012). The ICC is a hybrid creation combining common and civil law and has its seat in The Hague, the Netherlands. It has jurisdiction, under certain conditions, to try four types of crime of 'international concern': genocide, crimes against humanity, war crimes and the crime of aggression (ICC 2011: 2). The ICC's jurisdiction extends only to events occurring after the statute entered into force. It tries individuals, not states or groups.

In organisational terms, the ICC is composed of four separate organs: the presidency (with its three elected judges: the president and two vice-presidents), the judicial divisions (composed of the Pre-Trial, Trial and Appeals Chambers and eighteen judges elected by an absolute majority of the Assembly of States Parties), an administrative

body (the Registry, which is in charge of administration and services to the ICC) and finally an investigation and prosecution body (the OTP). The prosecutor is elected for a nine-year term, renewable once. The Argentinian Luis Moreno Ocampo held this position at the time of the Lubanga case. Gambia's Fatou Bensouda succeeded him in 2012.

The investigation of crimes within the ICC's jurisdiction is entrusted to the OTP. An investigation begins with crime scene specialists being sent to the area under various cooperation agreements.[6] They undertake the tedious job of collecting evidence in environments that are often hostile to their presence and contexts of latent insecurity.[7] When the investigators arrive in the field, often the only contacts they have who can submit information to the prosecutor regarding the attacks and violence against civilian populations are NGOs or civil society figures. This information has no value as evidence, however, and the judicial investigation must corroborate it. As Elisabeth Claverie (2012: 75) has stressed, the investigators' first questions are 'who, when, where and how?', as they often have only a patchy, incomplete view of the nature of the conflict and the forces involved. To start with, their work consists in identifying crime scenes, exhuming bodies, determining whether they are those of civilians or combatants and interviewing eyewitnesses or direct victims of the violence. Based on this first set of clues and testimonial, forensic and documentary evidence, the investigators gradually piece together an initial judicial narrative.

If the evidence collected proves sufficient to demonstrate 'a widespread or systematic attack directed against any civilian population', the next stage is for the OTP to prepare an indictment and submit it to the judges of the ICC Pre-Trial Chamber (ICC 2011: 3). If the judges approve the indictment, then a warrant for the arrest of the alleged perpetrators is issued, publicly or under seal.[8] Once apprehended, the accused are transferred to the ICC's detention centre in The Hague. They are given the opportunity to plead guilty or not guilty to the charges against them. The suspect then appoints a lawyer. The prosecutor is required to send the indictment and evidence to the defence, which conducts its own investigation and presents its own evidence. Once both investigations are closed, a 'confirmation of charges hearing' is held before the Pre-Trial Chamber. Based on this hearing, the Pre-Trial judges decide whether there are 'substantial grounds to believe that the person committed the crimes charged' (ICC 2020). If one or more charge is confirmed, then the case is referred to a Trial Chamber, which is responsible for conducting the next phase of the proceedings: the trial.

The trial proceedings follow the adversarial system. Each party produces and examines its own witnesses, who are then cross-examined by the other party, on the same day or over several days. This moment is often described as an ordeal for witnesses, particularly during cross-examination.[9] There are, however, a series of measures in place to protect witnesses' anonymity: alteration of their voice and face, use of a pseudonym, the possibility of testifying in camera and recourse to rule 74-10, which protects witnesses involved in the events from any self-incrimination (see ICC 2019). Their testimony is recorded and posted in English and French on the ICC's website. Parts of their testimony are redacted to protect their identity. The proceedings are public, with interpretation into English, French and the vernacular languages of the witnesses and the accused. Visitors observe the trial from a public gallery next to the courtroom.

The judge's role during the proceedings is to arbitrate between the two parties. The judge is assisted by two associate judges and the Chamber's legal assistants. The judge rules on the admissibility of the testimonial and documentary evidence during the judgement-drafting phase, resulting in a judgement of six hundred pages or more. The verdict and sentence are pronounced in public, in the presence of the accused. Both parties are entitled to appeal the decision of the Trial Chamber. The Appeals Chamber may, in turn, reverse or amend the conviction, or order a retrial before a different Trial Chamber. Given these conditions, trials can last two to five years, if not more.

The early stages of the investigation

On 11 April 2002, the Democratic Republic of Congo ratified the Rome Statute and, in March 2004, referred the situation on its territory to the ICC. In doing so, it became the second State Party after neighbouring Uganda to bring a case before the ICC concerning alleged war crimes committed on its own territory. After a preliminary analysis, Prosecutor Moreno Ocampo decided to open an investigation on 21 June 2004.

Bernard Lavigne, a magistrate and former officer of the French *police judiciaire*, was assigned to head up the investigation. Before joining the ICC, Lavigne's judicial career had been exclusively French. He began as an examining magistrate (*juge d'instruction*) in Perpignan, before being appointed juvenile court judge (*juge des enfants*) in Martinique for four years and then president of the Péronne Regional Court (Tribunal de Grande Instance). He went on to teach as a lecturer at the École nationale

Figure 2. Extract from Jean-Philippe Stassen, *I Comb Jesus et autres reportages africains* (Paris: Futuropolis, 2014), 48. Reprinted with permission.

de la magistrature before joining the ICC in June 2004.[10] He stayed with the ICC only three years before returning to France to serve as deputy prosecutor at the Toulouse Regional Court. At the time Lavigne gave evidence in the Lubanga trial, he was living in Amman, Jordan, where he worked as a 'regional attaché for cooperation and justice' in a department of the Ministry of Foreign Affairs responsible for cooperation between the legal systems of the Arab countries and France.

In November 2009, Lavigne was called to testify before the ICC at the request of the Trial Chamber, to clarify for the judges the conditions under which the OTP's investigation had taken place. This request was prompted by a series of incidents that had occurred since the beginning of the trial, to which I will return in the last part of this article. Under direct examination by the prosecution and cross-examination by the defence, Lavigne went back in detail over the various stages of the investigation.

The story begins in June 2004, when the former French magistrate joined the OTP team. Plunged into unknown territory, he was confronted with a distant region, a different culture and languages he didn't speak, with a mission to investigate a conflict in which the alliances between the groups he met were far from straightforward. His unfamiliarity with the field was compounded by his unfamiliarity with his new employer. Many passages in his testimony describe the difficulty he had adapting to the practices of a common-law-inspired institution, so far removed from the civil law he was familiar with. He had to deal not only with local actors in Ituri but also with colleagues from different nationalities and legal cultures.

Lavigne's first challenge was the need to form a team. It is important to remember that this was the very first investigation conducted by the OTP, which, in the early years of its existence, essentially proceeded

by trial and error. Everything was being tested, from relations between headquarters and the field to prosecution and investigation policies. The issue of recruitment became a sensitive topic and gave rise, in Lavigne's words, to 'lively debates'. He was in favour of recruiting people with investigative expertise, such as military police, while Prosecutor Moreno Ocampo leaned instead toward candidates with different, more varied backgrounds, including from humanitarian and human rights organisations. Lavigne opposed this idea and reasserted before the ICC that he still thought, 'maybe incorrectly – that a police team should be made up of policemen to begin with'.[11] He was extremely critical of Moreno Ocampo's basic position, which he saw as an intrusion of the humanitarian sphere into the criminal justice process.

In the early months of the investigation, when the team was not yet complete, the OTP started by consulting open-source documents and 'general documentation'. Its second source of information came from 'well-known international NGOs . . . who had been appealing to the Prosecutor to investigate the situation in the DRC'.[12] Human Rights Watch and the International Federation for Human Rights were the main organisations sounding the alarm. The team also drew on reports from what was then called the United Nations Mission for the Congo (MONUC) and information provided by local NGOs and Congolese human rights activists.[13] A country expert recruited by the OTP, originally from Congo and fluent in Swahili, was in constant contact with the local NGOs. Based on this set of reports, Lavigne's team of investigators drew up an initial list of incidents 'of potential interest', that is, that the ICC could prosecute. Each province in eastern Congo was looked at to identify crime scenes. The investigators' attention quickly focused on the Ituri region, where a series of incidents had been reported.

As the investigation progressed, the information gathered from NGO reports gradually narrowed in on certain militias active in the region. The OTP's attention finally centred on three of them, including Thomas Lubanga's FPLC. NGO reports mentioned all kinds of violence, killings and looting perpetrated by these militias. The more information was compiled and expanded, the more the investigators hesitated over the type of crimes they should focus on. Should they investigate a particular militia and incident or adopt a more cross-cutting approach, targeting several militias and incidents at once? Or should they investigate a specific phenomenon such as the recruitment of child soldiers? 'Sometimes even we weren't 100 per cent sure of the nature of our investigations, and if we had to extend them, if we had to interrupt them, if we had to continue'.[14]

The decision to focus on the recruitment of child soldiers was based on information from UN officials and certain NGOs that stressed the massive scale of the problem. It was Moreno Ocampo who made it – not without eliciting some strong reactions from the investigators on the ground in Ituri. Lavigne made it clear that he did not always agree with the overall strategy pursued by Moreno Ocampo, who was more favourable to collaboration with NGOs. Lavigne attributed these disagreements to the fact that he had probably been subject to a 'casting error'. He felt his skills as an examining magistrate sometimes clashed with those required of an OTP team leader, who essentially had to manage an international team 'with extremely varied competences and skills, sometimes overarching egos, and with which you had to deal, but you had a lack of clear direction with regards to investigations'.[15]

Investigating covertly

In September 2004, Lavigne and his team arrived in Bunia, the capital of Ituri. Yet no 'evidence to justify an investigation' was found until 2005. Media coverage of the team's presence in the area meant that throughout the period in question, they worked under local and international pressure.[16] The threat of violence was still palpable in Ituri; shots could be heard near Bunia, armed militias were still present in the region and twelve soldiers from MONUC, the force tasked with the investigators'

Figure 3. Extract from Jean-Philippe Stassen, *I Comb Jesus et autres reportages africains* (Paris: Futuropolis, 2014), 49. Reprinted with permission.

security at the time, were attacked and killed shortly after the team's arrival. As in the initial information-gathering phase, witnesses too were threatened or ostracised by their communities for their cooperation with the ICC.

The atmosphere of insecurity had a significant impact on the conditions for gathering evidence and contact with witnesses. Because of the ongoing tensions in the area, the investigators struggled to make it to some villages. When they finally did manage to reach witnesses, they arranged meetings in 'neutral' places such as churches, schools, a library or rented houses. The concern to protect witnesses' identity and avoid exposing them to danger became a constant worry for the prosecutor's team. But how could they minimise the risks, how could they make themselves invisible in a setting where 'any foreigner seen in Bunia was assumed to be from the ICC'?[17] To overcome this major obstacle, the OTP decided to investigate covertly.

Recourse to intermediaries

The investigators' attempt to conceal their presence took several forms. Initially, they did not have a field office in Bunia (it opened in 2006) and chose to travel in rented vehicles rather than using 'immediately recognizable' UN vehicles. Eventually, they bought vehicles similar to those used by NGOs so as to remain 'unidentifiable'.[18] There remained the worrying matter of contact with witnesses and their protection. The OTP subsequently made a choice that would prove decisive for the rest of the case. In the summer of 2004, the OTP decided to use intermediaries (which is the official term), who can be classified into two categories.[19] The first consisted of members of MONUC and members of the armed forces of the DRC or of other countries present in the region, such as neighbouring Uganda and Rwanda. The second category, which provoked the most debate during the trial, was made up of individuals who could help the investigators meet witnesses. Those approached were mainly 'militant activists', active members of civil society, some former militiamen or people close to the Kinshasa government whom the investigators had happened upon without then checking their militant and professional past. Known to both the villagers and MONUC, their presence surprised no one, and they could go about their business in full view. The investigators called on four such intermediaries, but, Lavigne stressed, their activities were strictly supervised. They had no part in decision-making or the preliminary interviews with witnesses.

So as not to expose them to danger, they were given very little information on the substance of the case. Their role was seen primarily as providing support to the investigation. Initially, they worked on a voluntary basis. But as the investigation moved forward, employment contracts were offered to three of the intermediaries whom the investigators considered 'indispensable'.[20] This crucial step meant a change in their status. The intermediaries worked 'more in the light' and 'not so much in the dark',[21] not without risk to their safety.

Proving they are children

Once the first witnesses had been found through the intermediaries, their age had to be determined, as only the recruitment of children under fifteen years old counts as a war crime. A degree of tension arose within the OTP team. While the investigators in Congo asked for a scientific expert to be appointed immediately so they could get an approximate idea at least of the children's ages, the Executive Committee did not consider such verification necessary. This antagonism between headquarters and the field can be construed as a reflection of differences in legal cultures. As a former youth court judge, Lavigne had had to have bone age tests carried out to determine the age of unaccompanied foreign minors in France. Moreno Ocampo had been a prosecutor in Argentina before being appointed prosecutor general of the ICC. He was well known for his role as assistant prosecutor in the Trial of the Juntas, the landmark trial against the military commanders of the dictatorship in Argentina. In that case, in the absence of the bodies of the victims of the dictatorship, he had managed to convict five high-ranking officers based on mainly testimonial evidence. Given this experience, Moreno Ocampo tended to favour that type of evidence over scientific and material evidence. Under his leadership, the Forensic Unit / Forensic Science Section initially intended for the ICC was being reduced to a mere forensic coordinator position.

The forensic expert who was appointed to this post in October 2004 – another Frenchman – had served five years in the same position at the International Criminal Tribunal for the former Yugoslavia. Like Lavigne, he had had to perform numerous bone age tests while working as a forensic physician in France. Right from the start of the investigation in Ituri, he alerted investigators to the risks of working with children: 'Be careful, there's the fact of conscription on the one hand, but also the fact that they're children. We're going to have to prove that

they're children' (interview, 16 February 2016, The Hague). These warnings long went unheeded. Only a few months before the trial began in 2009 did the prosecutor realise the 'fragility' of some witnesses. The French expert was then called 'in a great hurry' to carry out bone age tests, which were unable accurately to determine the current age of the witnesses, let alone their age at the time of the events. X-rays were taken twice, in December 2007 and January 2009, but were of 'poor quality'. The equipment used was old, and even put the witnesses at risk of radiation. The evidence finally 'deteriorated' because the investigators reacted too late. 'It was a real shock for the prosecutor', the expert told me.

The OTP took no steps to make up for the lack of scientific evidence. They did not consult school records, interview the community leaders or contact the families. When civil status documents were requested, it was not the investigators but their intermediaries who went to collect them from the administrative offices. On rare occasions, voter registration cards were used to determine age. Faced with what might appear to be a mistake, Lavigne again justified himself by citing his concern for the witnesses' protection.

We can clearly see the various difficulties the team came up against while conducting the first-ever judicial investigation for the enlistment of child soldiers in a difficult-to-access territory hostile to any foreign presence. The investigators had to deal with a relentless series of constraints and unforeseen circumstances in an insecure context. Despite its hesitant if not makeshift nature, the investigation resulted in an arrest warrant being issued for Thomas Lubanga in February 2006, his arrest by the Congolese authorities and his transfer to the ICC's detention centre in The Hague in March 2006. But the choice to conduct the investigation based on NGO reports without corroborating them with scientific and material evidence had serious consequences.

The child soldier in the courtroom

The trial of Thomas Lubanga Dyilo, the first defendant to be tried by the new ICC, began before the Trial Chamber in The Hague on 26 January 2009. Two days later, the prosecution began presenting its evidence and called its first witness, a former child soldier and victim-witness who, as the judge pointed out, 'may have committed crimes himself'.[22] The hearing was public and was broadcast with a thirty-minute delay on the ICC's website. In the city of Bunia, the capital of Ituri, a giant screen had been set up so the inhabitants could follow the trial, especially the

Figure 4. Extract from Jean-Philippe Stassen, *I Comb Jesus et autres reportages africains* (Paris: Futuropolis, 2014), 57. Reprinted with permission.

opening statements. Presiding was British judge Adrian Fulford, elected judge of the ICC in 2003. Before the witness entered the courtroom, Fulford reminded the court of the series of measures designed to protect the witness's identity: facial and voice distortion, use of a pseudonym, the possibility of going into closed session and use of rule 74-10, which protects the witness from self-incrimination. The witness was assisted by legal counsel.

The witness entered the courtroom and took his place facing the judges and registrars, the prosecution to his left, the defence to his right. The presiding judge spoke first. He reassured the witness of the measures taken to protect his identity and asked him to speak slowly, with a pause between questions and answers, to facilitate the work of the simultaneous interpreters translating into English, French and Swahili. The witness, who was speaking Swahili but also speaks French, Lingala and Lendu, took the oath. The direct examination by the deputy prosecutor, Gambia's Fatou Bensouda, could begin. The first questions concerned the witness's identity: his name, his parents' names, his place of birth and the name of the school he had attended. Questions and answers followed each other at an unhurried pace; the answers were

short. The court transcripts nonetheless reveal a degree of tension. For a start, it being the first day of the trial, there were technical problems to deal with. The witness's microphone didn't work, and Judge Fulford called the deputy prosecutor to order twice for forgetting to turn hers on before asking a question. Very quickly, after only a few minutes, the witness admitted he was having difficulty answering the prosecution's questions: 'The questioning is giving me problems'.[23] Indeed, when Bensouda asked about his participation in the UPC's activities, he replied: 'Now, as I swore before God that I would tell the truth, the whole truth, your question puts me in a difficult position with regards to my truth, because I said that I must tell the truth . . . No, I did not go with them'. At this point, Judge Fulford decided to suspend the session citing rule 74-10, which protects the witness from self-incrimination. The witness withdrew to the waiting room accompanied by his lawyer who – in an exceptional measure – had warned him just before he testified and during the hearing that while the ICC could guarantee him these non-incrimination measures, the law in the DRC (to which the witness would be subject upon his return) did not fully guarantee them. This information destabilised the witness. He got scared.

The session was suspended at 12:32 p.m. and resumed at 2:55 p.m. The witness's counsel assured the court that his client was ready to resume his testimony. Yet the witness went on to dispute the first version of events he had given to the intermediaries: 'What I said previously did not come from me. It came from someone else. They taught me that over three and a half years. I don't like it. I would like to speak my mind as I swore before God and before everyone'.[24] Bensouda did not let this answer throw her and encouraged the witness to continue: 'Witness, I want you to know that we're only interested in what happened to you and the truth. So please go ahead and tell us'. The witness went on: 'I was in Ituri . . . An NGO which helps troubled children arrived and called the children. I went and my friends did too. They promised us clothing and lots of other things. They took down our addresses and our IDs. Then I went back home'. Unfazed, Bensouda continued her examination, inviting the witness to describe his life in the training camp after his enlistment: 'Thank you, Witness. Before this happened, did you go to any training camp?' The reply: 'I didn't go. They taught me those things. They really deprived me . . . I couldn't follow my mind. I told myself that I would do what they wanted, but in coming here I told myself that I would say what I know to be the truth'. Bensouda tried again, insistently: 'So, Witness, go ahead and tell us whether you attended. Now I'm not asking about what the NGO told

you. I'm asking you to tell us now whether you attend a training camp or not'. 'No', replied the witness.[25]

Given the witness's obvious difficulty in providing the answers expected of him, Bensouda asked for a ten-minute break. The witness withdrew and did not return to the courtroom. A discussion ensued between the deputy prosecutor and Judge Fulford on the protective measures granted to the witness. Bensouda was convinced that the witness's change of heart could only be explained by the fear of self-incrimination. She requested that the witness be referred to the Victims and Witnesses Unit, an organ of the ICC dependent on the Registry and tasked with providing legal and psychological assistance to individuals before and after they testify before the ICC. A few days later, the direct examination resumed. The witness went back to the initial account he had given the investigators, in which he asserted that he had been forced to join Lubanga's group.

Unstructured narratives

This incident and others that would follow were in part the result of the OTP's judicial investigation. Added to the obvious fear of self-incrimination was the vagueness surrounding most of the child soldiers' testimony before the ICC. During cross-examination by the defence, these witnesses were hard-pressed to say where and when they were born, or to give their names or those of their parents.[26] They also had trouble accurately describing the circumstances of their abduction and their involvement in the armed group of the accused. The same testimony could contain three different dates of birth: the one on the witness's voter registration card (1987), the one on their birth certificate (1991) and the one they considered to be correct (1989). Others claimed not to know their place of birth, or to have such difficulty reconstructing the chronology of certain events as to cast doubt on their participation in the attacks included in the charges.[27]

The unstructured nature of some of the accounts is partly explained by the difficulty of obtaining administrative documents in this region of Congo (birth and baptismal certificates, identity documents, voters' cards, school records). The search for papers is part and parcel of makeshift economies, and of the hundreds of witnesses heard in this and later cases, few had official identity documents.[28] The parties in the courtroom had to come to terms with the randomness and uncertainty surrounding individuals' identities.

The witnesses' credibility was also compromised by the factor that had made their selection possible, namely the use of intermediaries under the circumstances I described earlier. Some witnesses implied that the prosecutor's intermediaries had suborned them, clearly enough for the defence to demand a halt to the trial for abuse of procedure in December 2010. The Chamber rejected the request but acknowledged the prosecutor's negligence; he had not checked the professional background of his intermediaries. One of them indicated he had worked for the Congolese intelligence services, a role capable of significantly 'undermining his impartiality'. Other testimony was equally damning for the prosecutor. A defence witness said the intermediary 'would buy him drinks and . . . gave him a small amount of money in exchange for these lies, and promised him that he would go 'to the country of the white people'. Ultimately, the Chamber pronounced that 'the prosecution should not have delegated its investigative responsibilities to the intermediaries . . . notwithstanding the extensive security difficulties it faced'.[29]

When expertise adds to uncertainty

The prosecution nonetheless tried throughout the trial to present solid evidence that would stand up to criticism. Its strategy was twofold. It relied first of all on documentary evidence to demonstrate the 'systematic' nature of the UPC's recruitment of child soldiers. To support its argument, the prosecution submitted a video of Lubanga's visit to one of the training camps in which images of very young children could be seen. It also submitted a demobilisation decree signed by the accused but never respected – proof for the prosecution that Lubanga was aware of the recruitment policy – as well as registers indicating the entry and exit of child soldiers from one of the demobilisation centres in which their ages and birthplaces were recorded.

The prosecution also called on a series of expert witnesses who drew the Chamber's attention to the problems with determining the age of children. A former MONUC employee who was present in Ituri at the time of the events and had written a report on child soldiers explained the difficulty of obtaining identity documents in this region of Congo, due in part to the collapse of the State's administrative structures: 'Identity cards and documents in the Congo are not very common. Very few people have official papers, in particular, children. In fact, I never saw a child with an identity card in Ituri, so carrying

Figure 5. Extract from Jean-Philippe Stassen, *I Comb Jesus et autres reportages africains* (Paris: Futuropolis, 2014), 57. Reprinted with permission.

out such a verification on the basis of administrative documents was not possible'.[30] The prosecution also called two forensic physicians who stressed the unreliability of bone tests for determining age. These French experts explained that the validity of this type of measurement is limited, especially concerning the fifteen-to-eighteen age range for which the margin of error is high. They reminded the ICC that the assessment of bone age 'is not a precise science',[31] as the assessments of two experienced medical experts can differ by as much as one year in their reading of the bone age.

Faced with the various incidents that marred the former child soldiers' testimony, the prosecutor's team sought to reduce the suspicion surrounding the credibility of their evidence. The prosecution suggested that given the absence of state administrative services and the uncertain nature of age determination tests, only documentary evidence, or the evidence given by former UPC members who had been in charge of the training camps that many children had been through, could attest to the 'systematic policy' of recruitment. The defence, for its part, produced its own witnesses who in turn challenged the evidence presented by the prosecution.

The courtroom as critical arena

It would be simplistic to interpret the various incidents that punctuated the Lubanga trial as a failure resulting from the artifice of the 'child soldier' category. The reversals of some prosecution witnesses must be understood in light of the pressures of giving evidence amid the interplay of cross- and examination. These about-turns also occurred in the tense and uncertain context that determined the whole of the OTP's first investigation. What the reconstruction of the witnesses' trajectories during the hearings does reveal, however, is how the exchange of blows governing the rhythm of the proceedings makes the courtroom into a critical arena in which the prosecution and the defence play out their conflicting interpretations. This dynamic arena is a place of 'unprecedented legal, political and social confrontations' (Claverie 2018). It brought together a British judge and Congolese witnesses who were experiencing a courtroom for the first time, six thousand kilometres from their homes. Through this encounter, different sets of expectations were revealed and tried to adjust to each other. On the one side was a culture where 'the social space to which children are confined is that of the family and the school' and, on the other side, a culture where children do not enjoy 'the luxury of the protection offered in the West by parents, schools or the state' (De Boeck 2000: 45). Rather than denouncing the distance between witnesses and judges, as the transitional justice literature so often does (Clark 2018), an ethnography of the blows exchanged in the courtroom highlights the work that the parties engaged in to reduce that distance. When witnesses claimed not to know where they were born, or not to know their date of birth, they enlightened the judge as to the very limited importance of legal age in the dynamics of social relations in Ituri. Here, witnesses not only confirmed or contested the charges brought against the accused; they also described and explained their social and cultural environment. In ICC proceedings, the witness is the one who knows; their word exceeds the answers expected of them and the judge must interpret and analyse the local knowledge they bring to establish a legal truth.

Conclusion

The International Criminal Court has been heavily criticised since its inception. Both the media and much of the literature on transitional justice judge its record to be 'catastrophic'. The words failure,

powerlessness and weakness are often used to describe the work of the OTP and the policy of the ICC, particularly with regard to some African States Parties.[32] Meanwhile, scholars are engaged in heated discussion over which model of justice is the most appropriate for investigating these new conflicts. Some are in favour of justice being pursued as closely as possible to the people, as with the Gacaca courts in Rwanda, while others are think that only remote justice is capable of ensuring fair and impartial trials (Allen 2006).

The intention behind this study was, on the contrary, to take a step back from this imposing literature and its efforts to make a diagnosis, and instead remain as close as possible to the actors in order to understand the motivations and constraints that guide their actions. To this end, I set out to reconstruct the course taken and difficulties faced by a judicial investigation into the recruitment of child soldiers, through asking a simple question: how is a child soldier produced on a judicial stage, and how are they found? I delved into the various stages of this investigation in order to put together the puzzle of choices and decisions made by the OTP, which focused on the recruitment of child soldiers to the detriment of other crimes committed in the region, such as looting, rape or the forced displacement of people.

In view of the various problems that occurred during the judicial investigation and the trial, I could easily have concluded that the OTP had failed. Indeed, in the judgement handed down on 14 March 2012, the Trial Chamber ultimately considered none of the nine statements of former child soldiers 'reliable'.[33] The Chamber also decided to withdraw the status of victim from three of the witnesses on the grounds that there was a 'real possibility' they had stolen identities in order to obtain the benefits they expected to come with participating as victims in the proceedings. What could be simpler, then, than to conclude that the whole thing was a failure and to denounce the arbitrariness of some of the prosecutor's choices and decisions?

Yet the whole point of an anthropological investigation is to understand what individuals do, and to unpack the bundle of doubts, pressures and rules that permeate and guide their actions. I have shown that it is possible to break into the 'black box' of these investigations using the formidable material of testimony and documents freely available on the ICC's website. Rather than the failure of an institution faced with issues beyond its control, what this study reveals is the intensity of a judicial effort to elucidate reality and, at the same time, the uncertainty that regularly threatened it.

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Milena Jakšić is a French sociologist and CNRS research professor. In recent years, she has been conducting in-depth research on child soldiers who testify at the International Criminal Court in The Hague, with special focus on Thomas Lubanga, Germain Katanga and Dominic Ongwen trials. Email: mjaksic@parisnanterre.fr

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Notes

1. For a review of the history literature which, among other things, debunks the idea that the use of children in war is specific to Africa, see Jézéquel (2006). Note also David Rosen's (2005) book in which he discusses the politics of age and competing definitions of childhood at the international level.

2. The conflict in northern Uganda between the Lord's Resistance Army and the UPDF led to the confinement of more than 1.5 million northern inhabitants in camps at the turn of the 2000s. This population, which relied on the meagre rations of humanitarian aid for its survival, was also a constant target of attacks by the LRA, known for its systematic policy of kidnapping children and adolescents. Political scientist Chris Dolan (2009) described the living conditions to which the northern population was subjected as 'social torture'.

3. The category's reductive nature is highlighted in Canadian anthropologist Erin Baines's (2017) recent book on women abducted by the LRA, who manage to find small pockets of resistance in situations of extreme stress. See also Baines (2009), an article that pieces together the life and combatant career of Dominic Ongwen, currently on trial at the ICC for crimes allegedly committed as Commander of the Sinia Brigade, when he himself was kidnapped by the LRA at the age of ten.

4. See the Judgement pursuant to Article 74 of the Statute, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo, no. ICC-01/04-01/06, 14 March 2012, p. 44, https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF.

5. The situation was in fact far more complex, with military alliances being made and broken at a rapid pace. For a detailed analysis of the conflict in Ituri, see e.g. Braeckman and Vircoulon (2005); Vlassenroot and Raeymaekers (2004).

6. It should be recalled that the ICC does not have its own police force.

7. Elisabeth Claverie (2011) describes in detail the conditions in which the investigators from the ICTY Office of the Prosecutor had to work after the genocide in Srebrenica in July 1995. Arriving on the scene only a few days after the genocide, they had to investigate in the territory controlled by Serb forces when the peace agreements had not yet been signed. It took them several years to find the bodies of the victims, as Serb forces had moved them to mass graves dozens or even hundreds of miles from the site of the genocide.

8. For the conditions of issuance of a warrant of arrest or a summons to appear, see ICC (2011: 27).

9. On the techniques used to destabilise witnesses, see Claverie (2007), and Eric Stover's (2005) excellent book on witnesses and their experience at the ICTY.

10. His reasons for joining the ICC are unclear, however, and my attempts to contact him for clarification were unsuccessful.

11. Lavigne's comments are all taken from his testimony before the ICC. Transcript of Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, 16 November 2010, p. 17, https://www.legal-tools.org/doc/2f1389/pdf.

12. Ibid., 18.

13. Some NGOs refused to cooperate with the ICC, however, though I had been unable to obtain their names.

14. ICC-01/04-01/06-Rule68Deposition-Red2-ENG, 16 November 2010, p. 50.

15. Transcript of Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, 17 November 2010, p. 39, https://www.icc-cpi.int/Transcripts/CR2012_00067.PDF.

16. On average, the investigators stayed in the field ten days at a time. Lavigne made about twenty trips to Ituri during his three years as head of investigations.

17. Judgement, no. ICC-01/04-01/06, 14 March 2012, p. 75.

18. Ibid., p. 81.

19. Caroline Buisman (2013), a defence lawyer in the Katanga case, strongly criticised the use of intermediaries.

20. Their pay scale was based on the standards established by the Court. They were paid the same rate as G3 category staff in the UN system: a daily wage of $44.56 in a country where the average monthly wage was about $35 (ILO 2014).

21. Judgement, no. ICC-01/04-01/06, 14 March 2012, p. 146.

22. ICC-01/04-01/06-T-110-Red3-ENG CT WT (oral.dec.21-01-2010), 28 January 2009, p. 5.

23. Ibid., p. 36.

24. Ibid., p. 40.

25. Ibid., p. 41.

26. The prosecution therefore called on a Congolese linguist who had written a report on the use of official names in the DRC. He explained to the judges that, in some parts of the DRC, children are not always registered at birth and pointed out a series of difficulties in the registration of civil status: parents choosing several names, errors that could occur during registration, the illiteracy of the population, etc. On the multiple uses of names, see Fédry (2009); Leguy (2011).

27. This difficulty in reconstructing events chronologically is common to all those who have experienced traumatic events (see e.g. Pollak 1990).

28. Anthropologist Mariane Ferme (2001) has shown, for example, that in sub-Saharan Africa, the question of legal age is above all an importation from European colonialism and does not always make sense in African societies. On

the social life of identity documents in Africa, see the PIAF project (https://piaf.hypotheses.org).

29. Judgement, no. ICC-01/04-01/06, 14 March 2012, pp. 142, 166, 218–219.

30. ICC-01/04-01/06-T-206-Red2-ENG, 8 July 2009, p. 9.

31. ICC-01/04-01/06-T-172-Red3-ENG, 12 May 2009, p. 34

32. The Ugandan example is often cited to illustrate the Court's powerlessness to deal with certain States Parties to the Rome Statute. President Museveni was the first to refer the situation in northern Uganda to the Court. Yet, according to several Uganda specialists, his army, the UPDF, actively participated in the conflict, forcing 1.5 million northerners into refugee camps, making them entirely dependent on humanitarian aid and exposing them not only to repeated LRA attacks, but to violence perpetrated by UPDF soldiers. These commentators argue that Museveni should also have appeared before the Court, as should the LRA commanders (Branch 2007).

33. See the judgement, published in ICC-01/04-01/06-T-172-Red3-ENG, 12 May 2009.

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