

## THE INTERNATIONAL CRIMINAL COURT

# A “Big Fish Justice?”



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By Nicoletta Fagiolo

The world's first permanent international criminal court (the ICC), which came into being on 1 July 2002, was dealt a silent but solid slap on 1 February 2017 when the African Union (AU) approved a plan for a mass withdrawal. The decision (albeit non-legally binding) was held behind closed doors as the AU summit in Ethiopia's capital Addis Ababa was nearing its end. Out of the 34 African countries that are signatories to the ICC Treaty, the majority were in favour of withdrawing.

Since its inception, the ICC has been the target of fervent support, as well as harsh criticism, increasingly so. While South Africa's recent withdrawal late last year was a hard blow and an unprecedented challenge to the Court's very legitimacy, the summit decision underlined the need for scrutinising the mechanics, if not the existence, of this court.

This year marks the ICC's 15th anniversary. Its inherent mission is to bring to justice those most responsible within an event or more events – usually a situation that stems from a country at war – of the worst international crimes: war crimes, crimes against humanity and genocide.

At the review conference held in Kampala in June 2010, the member states that had ratified the Rome Statute, the 1998 treaty establishing the ICC, decided by consensus to its amendment, allowing it to exercise jurisdiction over the crime of aggression. This is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State.

Yet it is not clear when the aggression amendments will become operational and the Court may only exercise jurisdiction over aggression committed one year after 30 States Parties have accepted the amendments. The aggression amendments also carry a confusing opt-out clause. “Why would a State ratify the amendment only to opt out of jurisdiction?”, argues Public International Law Oxford University lecturer Dapo Akande<sup>1</sup>, a co-director of the Oxford Institute for Ethics.

In November 2016, Russia, a permanent United Nations Security Council (UNSC) member, made a

decision to withdraw its signature from the ICC's founding document, which it had signed, but never ratified. Now within the UNSC Permanent Five structure, only France and England are part of the ICC, while China, the United States and now Russia are not signatories.

This is a strange set up considering that these same five permanent members of the UNSC can, according to the ICC founding treaty, decide to refer a case to the ICC, as well as block it, even concerning countries which are not state parties to the Rome Treaty. This institutional structural and operational link of the ICC to the UNSC has been a major point of contention since its inception and the reason why countries, such as India, decided to opt out.

The perceived bias of the International Criminal Court, which has made Africa the focus of its work, is a point to be examined. To date, out of the official 10 ICC investigations, all except one are focused on the African continent. Thirty-two African nationals from nine African countries have been indicted.

But are these points enough to understand what is at stake? Strangely with all the talk about international criminal justice, little has been said about who exactly is being judged, and most importantly, for which wars.

One way to evaluate international criminal justice is to look at the case law it develops and the juridical codification it establishes.

### The characterisation of war

The first three trials held at the ICC concerned crimes committed in Ituri, in the eastern Democratic Republic of Congo in 2002-2003. Three individuals were indicted: Thomas Lubanga, Germain Katanga and Mathieu Ngudjolo.

A fourth person, Rwandan-born Bosco Ntaganda, indicted in 2006 and again in 2012, was transferred to the ICC in 2013 after he voluntarily surrendered himself at the American embassy in Kigali, Rwanda, in March of that same year. Unlike the first three indicted, Ntaganda is a fully-fledged, long-time rebel. More on Ntaganda later.

Germain Katanga and Mathieu Ngudjolo's trials were combined since both indictments covered a single event that occurred on 24 February 2003 in Bogoro, Ituri and both allegedly headed local defence groups largely made up of combatants from the Lendu ethnic group, the Patriotic Resistance Force in Ituri (FRPI) and the Nationalist and Integrationist Front (FNI) respectively. The event allegedly targeted the Union of Congolese Patriots (UPC), a militia largely consisting of ethnic Hema combatants that was led by Thomas Lubanga, as well as the predominantly Hema civilian population living in the village.

In December 2012, the ICC Trial Chamber II acquitted Ngudjolo of all charges. Ngudjolo unequivocally proved at Court that he was assisting

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the birth of a child at the time in the Kambutso health clinic where he worked as a nurse, and thus could not have been present where the criminal incident for which he was charged took place.

Things went differently for Germain Katanga. Who is Germain Katanga and which war was he fighting?

“Katanga's story is of a Congolese orphan, an occasional okapi hunter who in 2004, when he was just 25 years old, was suddenly called to Kinshasa to be appointed General of the Army of the Democratic Republic of the Congo”, writes Juan Branco. Branco worked under the ICC prosecutor

Luis Moreno-Ocampo and has written about the ICC.<sup>2</sup> Katanga never served as an actual general in battle.

How can we place the Ituri event in context?

Geographically the Congo is the largest state in Southern and Central Africa covering an area of 2,345,095 km<sup>2</sup> – two-thirds of the European Union. With 80 million hectares of arable land and over 1,100 minerals and precious metals identified (extensive deposits of copper, cobalt, and coltan, as well as diamonds, gold, silver, tin, iron ore, zinc and oil), the DRC has the potential to become one of the richest countries in the world. Its population is approximately 81 million.

Today, Eastern Congo is the home to what is probably the most deadly war in the world, on-going since 1996. Journalists and academics have placed the death toll at an average of 45,000 deaths per month. Well over 12 million people have died in the war since 1996.

In 2003 the region was emerging from what is known in Congolese history as the African world wars: the first (1996-1997) and second (1998-2003) Congo wars.

The First Congo War was a foreign invasion of Zaire, (today Congo) involving some eight countries led by the United States, a Ugandan and Rwandan-forged rebel group, the Alliance of Democratic Forces for the Liberation of Congo-Zaire (AFDL). The AFDL was backed by the Angolan, Ethiopian, Eritrean, Tanzanian and Zimbabwean governments. These forces attacked the Zairean army and Congolese local self-defence groups.

The AFDL invasion overthrew Congolese President Mobutu Sésé Seko and replaced him with the rebel leader Laurent-Désiré Kabila. When President Kabila took office he asked his former backers to retreat from Congolese territory with their armies. In response, Uganda and Rwanda launched the Congolese Rally for Democracy against Kabila by once again invading eastern Congo in August 1998.

This triggered the Second Congolese War, the deadliest war in modern African history. It involved eight nations, a dozen armed groups and caused the deaths of millions of

people, from violence, and also from the – disease and starvation which resulted from the turmoil of war.

The Ituri district takes its name from the Ituri River, which runs from Lake Albert in the north moving southwest through the region's heart at the Okapi Wildlife Reserve where it joins the Aruwimi River that empties into the great Congo River. Ituri is richly endowed with natural resources, including fertile land, pristine forests, and large gold deposits. Thousands of fishermen work on Lake Albert, where there are also oil reserves. Ituri, whose capital is the town of Bunia, administratively a sub-division of Orientale Province, is itself further subdivided into five territories, each of which has several villages.

From the beginning of the Second Congo War in 1998, Ituri was held by soldiers of the Ugandan national army, the Uganda People's Defence Force (UPDF) and the Ugandan-backed rebel movement Movement for Liberation faction of the Rally for Congolese Democracy (RCD-ML).

In June 1999, the commander of the UPDF forces in the DRC, General James Kazini, ignoring the protests of RCD-ML leaders, literally carved the Ituri area out of the eastern section of the DRC's Northeastern Orientale Province. This act reflected that of the Congo's colonial government, which in 1928 changed the district's boundaries to bring the Kilo and Moto goldmines together, thus creating Kibali-Ituri.

Katanga was born in April 1978 in Mambasa, in the forestlands southwest of the area's capital Bunia. Katanga's maternal uncle, a soldier under Mobutu in the Zairian Armed Forces (FAZ), and his wife cared for him from birth. His uncle was killed in the first Congo war fighting the invading AFDL forces in 1996.

After his uncle's death Katanga set out to look for his biological father and after an 18-month search, eventually found him in October 1998 in the village of Aveba in Irumu, southern Ituri. Irumu is made up of 12 villages. Among these, only one is Ngiti, the community of Walendu-Bindi, which means "community of Southern Lendu". Four other communities in this territory are Hema, while various

groups among the 18 ethnicities of Ituri populate the other communities.

His father was a protestant nurse, from the Ngiti ethnic group, who had 15 children. Germain, then 20 years old, was embraced by his father's extended family and village.

Who was fighting whom in Ituri eastern Congo at the time? A UN experts' panel report from October 2002 on the illegal exploitation of natural resources takes a closer look into it. The report, dated just four months before the event for which Katanga is indicted, reads: "The Uganda People's Defence Force (UPDF) military operations have contributed to the arming of large numbers. The UPDF have trained the militia of their Ituri commercial allies, the Hema, and provoked the need for the victims of

**“This is an obvious breach of ‘double jeopardy’ or Article 20 of the Rome Statute: ‘no person shall be tried by another court for a crime if ‘that person has already been convicted or acquitted by the ICC.’”**

Hema attacks to defend themselves. Lendu villages have mounted their own local forces, and they in turn have frequently attacked Hema villages. The creation of local self-defence groups is a familiar pattern: local ethnic groups frequently assemble armed groups to defend their villages or collectivities.”<sup>3</sup>

Another UN report that looks at events from January 2002 to December 2003 maintains: “the Ugandan army, already present in Ituri since late 1998, fuelled the conflict by initially supporting some Hema notables and allegedly bombing hundreds of Lendu villages. Some Lendu traditional authorities created self defence units.”<sup>4</sup>

Military control over highly informal networks, in an area where the state is absent, facilitated Ugandan national

army (UPDF) commanders' access to Congo's natural resources. These military shadow networks were directly linked to the inner circles of the Ugandan regime.

Key figures of the Ugandan regime that played a crucial role in this economic exploitation are James Kazini and Ugandan President Yoweri Museveni's brother General Salim Saleh. These two have been defined by researchers Vlassenroot, Perrot and Cuvelier as symbolic for the rise of a new class of “entrepreneurs of insecurity”.<sup>5</sup> Museveni's brother General Salim Saleh was also singled out in a 2001 UN panel of experts report on illegal exploitation of Congo's wealth. Uganda in 2001 set up an inquiry commission into Uganda's pillaging in eastern Congo. David Porter, presiding over the commission, recommended that Salim Saleh be tried as well as other generals and officers in the Ugandan army.

As UPDF High Commander in the DRC from 1998 to 2000, James Kazini was the link between the Ugandan national army (UPDF) officers and the Congolese leaders of armed groups. Figures such as Mbusa Nyamwisi and John Tibasiima from the Congolese Rally for Democracy - Movement for Liberation (RCD-ML), Roger Lumbala from the Congolese Rally for Democracy (RCD-National) and Jean-Pierre Bemba's Movement for the Liberation of the Congo (MLC)<sup>6</sup>, were all under his command and facilitated his illegal diamond, coltan, timber, counterfeit currency, gold and coffee dealings.

Between June 1999 and April 2000, 26 attacks were carried out by Hema militia groups against Lendu villages, of these 10 were conducted by joint Hema-Ugandan national army forces (UPDF), fourteen by Ugandan forces alone and only two by Hema militias alone, writes the think tank International Crisis Group in a 2003 report. Thus in a ten-month period the Ugandan armed forces were responsible for more than half of the attacks on Congolese soil.

On 10 April 2001, Katanga, a student at the time, saw his school destroyed by a Ugandan attack during an extremely violent massacre.

He survived the attack because he went unnoticed outside where he had gone for a cigarette during a class break. He succeeded in finding the chiefs of his village who had fled to the mountains. At a religious ceremony, the chiefs who had taken refuge asked him to defend his adopted community, the Ngiti.

In Katanga's own words: "Kagaba, Geti, Aveba villages were bombed in the same way. It led to increased contact between us. Everyone came together. Being attacked made us unite. The elders told us: we fought against the Belgians, against Mobutu, it is your turn now."

In this asymmetric war the weapons the self-defence groups had at this stage were mainly arrows: "We were ambushing, they were helping us, we were using the poison arrows the Pygmies<sup>7</sup> were giving us."<sup>8</sup>

The conflict in Irumu escalated in early January 2001, when the Ugandan army became heavily involved. Together with Hema militias, the UPDF began to attack Walendu Bindi. When Ugandan army helicopters attacked the Cooperative for the Economic Development of the Congo on 10 January 2001, self-defence groups began to organise in the villages of the Walendu-Bindi district.

The cooperative was a major Ngiti institution that played a social and economic role throughout the region. It produced a large part of the region's food and charcoal products and supplied much of the regions' capital Bunia. It was an object of great pride, an exceptional local achievement, founded under Mobutu.<sup>9</sup>

In Katanga's own words: "I never accepted the death of a person, especially by shooting. I never managed to find it natural. I still think about it, it comes back. I had to do it. My community was in danger. They had asked for my help." He continued, "The Ugandans had been there for a long time, yet there had never been a single incident. We would never have thought that they would have attacked us, the civilian population: there were no fighters in our village, we had never robbed them, there was no tension. We knew that things were going on in the north among the Lendu. But it did

not concern us."

On 31 August 2002 in a UPC attack 140 people were killed and 787 disappeared in the village of Songolo, 40 kilometres south of Bunia in Irumu district.

The ICC Chamber acknowledged that Katanga was appointed in September 2002 as a simple bodyguard by one of the principal spiritual leaders of his village, named Kasaki Bandru, a 55-year-old *féticheur* (witchdoctor) from Aveba.

"The International Criminal Court has betrayed its original mission by condemning a villager designated by the Congolese government as a war criminal," according to international attorney and lawyer Juan Branco.<sup>10</sup>

**“The ICC’s jurisprudence, once integrated into national law, could pose severe breaches in the right to a fair trial for the accused: hearsay is accepted as evidence; there is no timely line of reporting and no real-time transcripts are made available.”**

It is the external involvement in Ituri by both Uganda and Rwanda that led to the militarisation of local disputes over land, discords facilitated by absent or corrupt state authorities and enormous socio-economic inequalities.

The Court was presented with exonerating evidence that Katanga was fighting under government orders from Kinshasa to take back eastern Congo from the invading Ugandan and Rwandan armies. "The most important is a letter whose authenticity has not been challenged, dated 23 November 2002, that instructs the Chief of Staff of the Congolese army to prepare the offensive in Ituri. It is signed by Joseph Kabila's Deputy Chief of Staff, Samba Kaputo", writes Branco.<sup>11</sup>

All military operations were organised by the central government via its integrated operational headquarters set up in Bunia by the Congolese national army. It had as its scope to retake the territory lost after the end of 2002, against Rwanda in eastern Congo.

Katanga's Ngiti self-defence group, the Patriotic Resistance Force in Ituri (FRPI) took no initiative without the support and agreement of the main authorities in Kinshasa, and there was no evidence shown at trial of attacks or looting carried out by the FRPI independently.

In customary international law, one has the right to self-defence if the sovereignty of a country is breached. In the case of Katanga, the Court has indicted a village man who carried out military orders given by his own legitimate government.

The ICC chose to characterise the conflict as ethnic and local, thus a NIAC (non-international conflict) rather than an international conflict (IC). Yet all evidence points to the international nature of the conflict. A narrow focus on national dynamics that ignores the regional dimensions of a conflict risks missing the comprehension of the patterns of violence on the ground.

This characterisation on the part of the ICC also contradicts the deliberations of the International Justice Court, which in 2005 in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo vs. Uganda)* condemned Uganda for having invaded and occupied eastern Congo and ordered it to pay reparations of 10 billion dollars. That compensation was never paid.

On 17 March 2006, Thomas Lubanga<sup>12</sup>, founder of the initially Ugandan-backed and subsequently Rwandan-backed militia in Ituri, the Union of Congolese Patriots (UPC), was the first person arrested under an ICC-issued warrant.

In this case however the ICC judges insisted that the character of the gruelling war that lasted from July 2002 to June 2003 was "international". Instead the ICC judges in the Katanga trial defined the events for that time frame as part of a local, non-international conflict.<sup>13</sup>

In complete disregard for accepted international law, Katanga was condemned for having taken part in his own government's operation that was clearly ordered to fight a rebel attack – “a system of war” – on the Congolese territory, first from Ugandan forces and subsequently, after 2002, by the Rwandan army and their proxy rebel group, the UPC. Katanga's involvement, by international standards, was legitimate since the country's frontier had been crossed and there was an outright invasion.

While Katanga and Goda Sukpa from the Nationalist and Integrationist Front (FNI) went to Kinshasa in January 2005 to accept their roles as generals in the Congolese national army (FARDC), many of their comrades continued to fight on. Katanga had agreed to disarm and join the national army, yet nonetheless was arrested by authorities representing the figurehead he was fighting for.

#### Leading by proxy economic wars

A third and main level of criminal responsibility not addressed in court, beyond Uganda and Rwanda as invading states each with their proxy rebels, is the role of natural resources and international transnational corporations (TNCs).

Alain Denault in *Black Canada, Looting, Corruption and Crime in Africa*, points to the role of these corporations in Ituri: “conflicts over oil and gold were motivated by the presence on the spot of Canadian companies: AMFI, Barno, Barrick, Mindev in the gold field and other minerals and Heritage Oil in the oil field. By their presence they instigated the conflicts, when they did not actually feed them.”

“The second Congolese war was launched mainly to give Barrick Gold Inc. back mining concessions, which Laurent Desirée Kabila had rescinded”, the American investigative journalist and author of the book, *Genocide and Covert Operations in Africa 1993-1999*, Wayne Marsden, testified before the US Congressional Subcommittee on International Operations and Human Rights Committee on International Relations.

“During the first six months of 1997, something amazing happened

in Uganda. Between January and June 1997, Uganda exported 6,591 kilograms of gold, an astounding volume considering that two years before, in 1995, Uganda exported only one kilogram of gold. Yet this rise in gold exports was only half the story. What made the increase all the more astounding was that during 1997 mines in Uganda produced a total of six kilograms of gold. Where did the excess gold come from? How did it end up in Uganda to be exported?”, asks Rift Valley Institute researcher Dan Fahey in a report published in 2013, ‘Ituri Gold, land, and ethnicity in north-eastern Congo’.

In December 2000, then US Congresswoman, Cynthia McKinney, stood up in Congress and thundered: “The whole world knows that Uganda and Rwanda are allies of the United

“If the only choice for Hutus is repatriation, possible imprisonment and torture, it is difficult to understand what the international community expects.”

States and that they have been given a carte blanche for whatever reason to wreak havoc in the Congo.”

The UN Panel of Experts on the illegal exploitation of natural resources reports brushes aside the definition of the war in Ituri as an ethnic conflict, stating that Uganda and Rwanda financed local Hema businessmen so that they could control the lucrative gold mines in the region.

In both the Kilo and Moto areas of Ituri, the Zairian state company mining guards were replaced by Ugandan or Rwandan national army sentries. Individual recruits started monitoring access to the mining sites by guarding bridges and strategic roadblocks, as well as by levying taxes from local miners and traders. In addition to controlling the export of natural resources, the Ugandan and Rwandan military

controlled imports and distribution of goods.

The mining sector accounts for over 80% of the Gross Domestic Product (GDP) of the DRC. Of this mining, artisanal mining accounts for roughly 90% of the country's output and is today still the biggest contributor to the nation's GDP. According to a 2011 NGO study in the Ituri district alone, between 60,000 and 150,000 artisanal miners are thought to be involved exclusively in gold mining. Officially no conflict of interest between artisanal miners and industrial mining ventures exist, as the Congolese Mining Code (Code Minière) of 2002<sup>14</sup> allows artisanal miners to operate only up until 30 meters, leaving the rest to industrial mining. In practice, however, such agreements are difficult to enforce. Artisanal miners are worried about being displaced and robbed of their livelihood.

In some areas, military groups are actually in control of the mines and are carrying out their own digging, whilst in other areas military personnel are illegally taxing the artisanal miners, either on site or when the miners carry the minerals to the nearest town or trading point. They also perpetuate insecurity by promoting the emergence of militarised local warlords.

“In Ituri, we are engulfed in a war over oil. If you compare the map of the oil region of Lake Albert to that of the massacres, there really is a strange resemblance”, said UPC spokesperson Jean-Baptiste Dhetchuvi.<sup>15</sup>

On 6 September 2002 the Congolese and Ugandan governments signed the Luanda Agreement to put in place a UN-assisted Ituri Pacification Commission (IPC). Uganda had committed to withdrawing its troops from Bunia within 80 days of the IPC's inauguration. In the wake of this agreement, Joseph Kabila – who had become president after his father was assassinated in January 2001 – and Ugandan President Museveni began to coordinate their activities in Ituri.

Since the Hema-dominated UPC was now seeking support from Uganda's ally turned rival, Rwanda, Uganda changed sides and began to collaborate with the Congolese government – together Kampala and

Kinshasa supported the formal creation of the Lendu-dominated FNI and FRPI self-defence groups (FNI). Nonetheless, decentralisation remained a key feature of these Lendu self-defence groups.

In March 2003, together the FNI and FRPI, with the help of the Congolese and Ugandan army, forced the UPC out of Ituri's capital, Bunia. Yet following the UPDF's withdrawal from Bunia on 6 May 2003, the UPC – now supplied by Rwanda – retook the district capital.

The UPC became Rwanda's proxy. "Prior to the attack to retake Bunia on 12 May 2003, Rwanda had supplied the UPC with weapons and brought back Lubanga and Ntaganda from Kigali. Rwanda reportedly told the UPC that, in order to improve their bargaining position, they had to take back Bunia before the arrival of additional peacekeeping contingents".<sup>16</sup>

By June 2003 the fighting had worsened to such an extent that a multinational intervention force, Artémis, the first autonomous EU military mission outside Europe, was deployed to Bunia, followed by a UN mission.

### Who was keeping tabs on events?

"The main evidence used against Katanga at trial was provided by a single NGO report of an NGO researcher that spent a few hours in the village several months after the facts", wrote Branco.

Parents of some of the children allegedly kidnapped by rebel groups to serve as child soldiers testified at the ICC. Their children, they maintained, had not been conscripted. They had however been enticed to testify before the ICC about having fought as child combatants. Something their parents had no knowledge of, writes *Le Monde* journalist Stephanie Maupas in her book dedicated to the ICC, *The Joker of the Superpowers*. All of this raises the question of how intermediaries paid by the ICC garner testimonies in countries with fragile social situations and weak economies.

Katanga was not present at the scene of the attack on Bogoro 24 February 2003, yet that was the basis for his trial. At the time, there was a Ugandan military base in Bogoro.

The Trial Chamber acquitted

Katanga on all of the charges including rape, sexual slavery, and the use of child soldiers. The accusation of rape was exceptionally crushing for Katanga personally, since the local traditional rules called for strict correct behaviour while at war, and rape was the ultimate taboo. And while it convicted him of one crime against humanity (murder) and four war crimes (murder, attacking a civilian population, destruction of property and pillaging), the Trial Chamber rejected that he was responsible for those crimes as an indirect co-perpetrator. Instead the Chamber "recharacterised" the form of criminal liability and found him guilty as "an accessory."

Twenty-four year old Katanga was convicted for assisting the transit and stockpiling of arms for his government. These weapons were later used as part of an attack on a militia allied to the Ugandan army that killed 30 to 60 civilians.

The ICC Prosecutor, in short, failed to prove any of its legal claims – just as it failed with regard to Katanga's co-defendant, Mathieu Ngudjolo, who had been acquitted. "The Trial Chamber's "re-characterization" of the facts in the case, from finding him guilty as an indirect co-perpetrator to finding him guilty as "an accessory", "was motivated solely by the desire to ensure Katanga's conviction – thereby saving the Office of the Prosecutor from itself – was fundamentally inconsistent with Katanga's right to a fair trial", wrote legal expert Kevin Jon Heller, 8 March 2014, in 'Another Terrible Day for the Office of the Prosecutor', for the on-line international law and relations forum *Opinio Juris*.

At the trial, Katanga pointed out the fundamental distinction between the ranks assigned to the self-defence forces – the title of colonel or lieutenant-general was easily obtainable – and those attributed in the national army: "Mr. David at that time, even after the fall of Bunia, when you asked 20 out of 30 people asked said they were commanders. People only created names, titles ... so that one would know that one was also strong."

The Rift Valley Institute published an Oxford University researcher's report on the conflict in Ituri saying

exactly the same thing. "It was to the sound of the drums, the traditional tool to warn the neighbouring villages of imminent danger, that the Lendu self-defence groups appeared, village after village, in reaction to the activity of the Hema militia. Anyone who initiated one of these spontaneous uprisings or demonstrated his strength on the battlefield was automatically appointed commander, while the others were mere fighters," wrote Branco.<sup>17</sup>

In May 2014, after 13 years of imprisonment, Katanga was sentenced to 12 years in prison. The time spent in the Hague, seven years, was reduced from his sentence.

One of the three presiding judges, Judge Van den Wyngaert, published a virulent dissenting opinion underlying the need for evaluating the demands of justice. "...the Court's success or failure cannot be measured just in terms of "bad guys" being convicted and innocent victims receiving reparation. Success or failure is determined first and foremost by whether or not the proceedings, as a whole, have been fair and just. This raises the question by which standard fairness and justice should be evaluated. My view is that the trial must be first and foremost fair towards the accused."

Katanga decided not to appeal, mainly due to the length of the ICC legal procedures, which risked going beyond the sentence he would have to serve. This harrowing detail confirms the severe breach of the rights to a fair trial – and thus a speedy trial is a repeating theme in many other cases of the ICC.

Due to his continuous cooperation with the court and his genuine dissociation from his crimes, ICC judges reduced his sentence by three years and eight months. With credit for his time served since his arrest in 2007, Katanga was scheduled to be released on January 18, 2016.

As of today Katanga, who was transferred to the DRC to finish his sentence, has not been released.

Instead, he is being put on trial once again following a decision from the Kinshasa Military Prosecutor's Office to charge him with war crimes (enlisting and using children under 15 years of age), crimes against humanity (murders)

and for his alleged participation in an insurrectional movement known as FNI/FRPI from 2003 to 2005. “The proceedings are however currently adjourned because of the unavailability of some members of the High Military Court. The resumption of the trial has been announced in February 2017, but no hearing has been held yet,” says Catherine Denise, legal council for Lawyers without Borders, an international advocacy watchdog.

In a statement issued in The Hague by the ICC, 7 April 2016, the ICC approved the Congolese court’s decision for Katanga’s retrial. According to the Court, the allegations against Katanga in the Democratic Republic of the Congo’s proceedings are not the same as those for which he faced trial in The Hague.

This is an obvious breach of ‘double jeopardy’ or Article 20 of the Rome Statute: “no person shall be tried by another court for a crime if “that person has already been convicted or acquitted by the ICC.”

“Katanga speaks Lingala and Kingwana, a sub-dialect of Swahili, which is not the language spoken by the Ngiti ethnic group. He learned French and English while in prison. His nickname, Simba, “the Lion”, comes from Kingwana. The prosecutor took a careless jump, assuming that his nickname was a reflection of his military victories. Simba, instead, was an affectionate name given to him at birth by his parents in homage to his maternal grandfather, who had the same name,” writes Branco. Despite this, newspaper articles and essays worldwide continue to this day to repeat the trial’s erroneous attribution, insisting on calling him the “Lion of Ituri”, perpetuating a landslide of misinformation.

#### Which rules for whom?

Bosco Ntaganda was born in Kinigi, Rwanda, in 1973. When he was still a teenager, his family, which comes from the Gogwe sub-group of the Tutsi community, moved to join other family members in Ngungu, in the south of North Kivu’s Masisi territory. There he attended secondary school, but abandoned his studies at the age of 17 to join the Rwandan Patriotic

Front (RPF) in its refugee camps in southern Uganda. He then fought with the Rwandan Patriotic Front (RPF) that overthrew the Rwandan government in July 1994.

Ntaganda was known at the time as ‘the Terminator’ due to his brutality. He gained a reputation as a formidable fighter, a reputation he would solidify over his career in at least six different armed groups all backed by Rwanda – Laurent Kabila’s Alliance of Democratic Forces for the Liberation of Congo-Zaire (AFDL); the Rwandan-backed rebellion, Congolese Rally for Democracy (RCD) in 1998, that began the second Congolese war, where he became the bodyguard of its president, Ernest Wamba dia Wamba. He went on to work for Wamba when he later created a splinter group backed by

“The ICC is currently holding a trial against two non-violent and democratic pan-Africanist leaders from the West African country Côte d’Ivoire: Laurent Gbagbo and youth leader Charles Blé Goudé.”

Uganda, the Liberation Movement (RCD-ML or RCD-Kisangani). Subsequently he served as chief of operations for Thomas Lubanga’s Union of Congolese Patriots (UPC). As the UPC began to collapse in late 2005, Ntaganda eventually left Ituri to join Laurent Nkunda’s National Congress for the Defence of the people (CNDP) in North Kivu, of which he became Chief of Staff.

In 2009 a peace process established that the Rwandan soldiers from the CNDP would be integrated into the Congolese national army (FARDC). Ntaganda became the deputy commander of military operation Kima II in the Kivus, the same area in eastern Congo he brought havoc to in the previous decade as a rebel, a UN report from 2009 revealed.

“By sending his troops back into eastern Congo, under the false motive of tracking down the FDLR, Kagame regained control of the economic circuits he was beginning to loose”, says Musavuli.<sup>18</sup>

Ntaganda subsequently defected and commanded another Rwandan backed rebel movement, the M23, but was eventually elbowed out by its other leader, Sultani Makenga. In-fighting between the two factions broke out and escalated in Goma, the capital of north Kivu, in November 2012. Eventually full-blown violence erupted in late February 2013.

Ntaganda fought for two decades in eastern Congo. However, the charges against him at the ICC only focus on events in Ituri region from 2002 to 2003, where he was serving as Deputy Chief of the armed wing of the UPC, the Patriotic Forces for the Liberation of Congo (FPLC).

It is impossible to understand why the ICC prosecutor chose to limit the time frame Ntaganda was being charged for to 2002-2003 and the limited Ituri area. By doing so the ICC is avoiding the epicentre of violence in the last two decades.

For example the Rwandan-supported RCD rebel group has retained control over a vast territory comprising of various regions: North Kivu, South Kivu, Maniema, north Katanga, eastern Kasai, and Kisangani.

The eastern Congolese regions of North and South Kivu, areas scrutinised by the UN as possible genocide hot zones, are completely omitted from the ICC’s indictments.

Impunity for rebel movements that have committed serious crimes against humanity in the Kivu region has segued into further destabilisation by creating an army within an army, says legal scholar, author and human rights activist Boniface Musavuli.

This, according to the author, was in part due to the peace accord, the Global and Inclusive Agreement, that established a framework for a transitional government, the integration of security services and mandated countrywide elections. The head of the Rwandan-backed RCD rebel group, Azarias Ruberwa, was named as one of the country’s four vice-presidents,

while senior RCD officers secured high-ranking positions and the control of North Kivu and Western Kasai regions.

Impunity for those responsible for fuelling these foreign-backed rebel aggressions has only led to a continuation of the war to this day culminating in what Musavuli has called the Congolese genocides<sup>19</sup>, as the same rebel forces, under different acronyms – previously the AFDL in 1996, RCD-Goma in 1998, UPC in 2002, Mutebutsi in 2004, CNDP in 2007, M23 in 2012 – fight and occupy territory.

By not acknowledging the international war of aggression in eastern Congo in its case law the ICC only helped further fuel this impunity.

Two other indicted individuals were acquitted after going on trial: Katanga's co-accused Congolese Mathieu Ngudjolo, as well as Rwandan FDLR leader Callixte Mbarushimana.

Who are the FDLR rebels – the French acronym for the Democratic Forces for the Liberation of Rwanda? Many say, including political prisoner Victoire Ingabire and exiled opposition leader and former Rwandan Prime Minister Faustin Twagiramungu, that

they are simply Rwandan refugees willing to protect more than 100,000 survivors of the 1994 exodus from Rwanda to the eastern Democratic Republic of the Congo and their children born in exile. Former Tanzanian President Jacaya Kikwete has said the same and urged Rwandan President Paul Kagame to negotiate the refugees' safe return to Rwanda.

Confidential documents published in *Europe, Crimes and Censorship in Congo* by Great Lakes specialist and scholar Charles Onana, reveal that the European Union is aware that the FDLR rebel group is not a real threat to Rwanda's stability, at least since 2005, despite officially claiming the contrary.

The false pretext for invading eastern Congo – the fear of a backlash from the Hutu refugees of which 2 million had fled into eastern Congo in 1994 – has been used by Rwanda for two decades, since as early as 1996, underlines Alain Denault in *Black Canada, Looting, Corruption and Crime in Africa*.

Today in exile in Europe, Callixte Mbarushimana is a case example of scapegoating. Mbarushimana is a Hutu Rwandan and former United Nations

employee who allegedly participated in the Rwandan Genocide of 1994.

Mbarushimana was served an international arrest warrant by Rwandan authorities in 2001 while he was working in Kosovo. However, a UN tribunal along with two local tribunals (the supreme court of Kosovo and a panel of three judges from the Gnjilane district in former Yugoslavia), after examining the dossier, found there were no grounds for his arrest and extradition. International Criminal Tribunal for Rwanda (ICTR) Prosecutor Carla del Ponte also dismissed the charges in 2002 after closely examining the dossier.

In the meantime, Mbarushimana lost his job. After two hearings, he won the right to get his post back, as well as his salary.

In 2008, Mbarushimana was arrested at the airport in Frankfurt concerning a case opened in Germany against the President of the Democratic Forces for the Liberation of Rwanda (FDLR) Ignace Murwanashyaka and his deputy, Straton Musoni. Mbarushimana was held for months in prison before being released. The Stuttgart trial – the first such trial in Germany using the new criminal law known as *Völkerstrafgesetzbuch* (international criminal code) is an example of how the ICC's jurisprudence, once integrated into national law, could pose severe breaches in the right to a fair trial for the accused: hearsay is accepted as evidence; there is no timely line of reporting and no real-time transcripts are made available for the press; a large part of the hearings are held in closed sessions and are not available to the public. Berlin-based group, the European Centre for Constitutional and Human Rights (ECCHR), the only NGO monitoring this first German trial using the new international criminal law, says it seems to lack in analysis and rigorous research.

Despite the previous tribunals' decisions to clear him of all involvement in the 1994 Rwandan genocide, Mbarushimana was arrested once again in France for being a key leader for exiled Hutus in the Democratic Republic of Congo in October 2010.

On 28 September 2010, Mbarushimana was indicted by the

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Officials light the "flame of remembrance" at the 20th Anniversary Commemoration of Rwanda Genocide, on 11 April, 2014, in Addis Ababa, Ethiopia

International Criminal Court (ICC) in The Hague – this time for crimes against humanity and war crimes allegedly committed in the Democratic Republic of the Congo in 2009 while he was President of the FDLR. He was extradited to the ICC on 25 January 2011.

However, he was released on 23 December 2011 after the ICC found there was insufficient evidence to prosecute him. The prosecutor's evidence presented at trial would have been insufficient even for a case of defamation, as Mbarushimana has the right to criticise the Paul Kagame regime, comments Stéphanie Maupas in her book on the ICC.

Upon his arrival in Paris four days later he was again interrogated by French authorities, this time concerning another case opened in 2010 in Paris against him, for the 1994 genocide.

Spanish, non-violent activist Juan Carreo, who was accused of being a financier of the FDLR by a 2009 UN report, says that he is the target of superficial reporting and a smear campaign against him. In 1997 Carreo held a 42-day hunger strike in front of the European Parliament to alert the world of the plight of Hutu refugees in Congo. He has been key in assisting the Spanish judiciary in its investigation into the murder of Spanish missionaries in Rwanda and the Congo. "A report that considers all Hutu refugees in Congo as being genocidaires (perpetrators of genocide), when many were born after the 1994 genocide occurred, is misleading," he says. In 2008, Spanish judge Fernando Andreu Merelles issued international arrest warrants for 40 leaders from the *Rwandan Patriotic Front* (RPF), the country's ruling political party, on counts of 'acts of genocide, crimes against humanity, war crimes and acts of terrorism'. Carreo also launched the Inter-Rwandan Dialogue Initiative in hopes to build authentic reconciliation within Rwanda today.

"There is a reason that European Union policy has pinpointed the FDLR as the main culprits in eastern Congo, as its one way to avoid putting a finger on those who are really responsible for the war, namely the U.S. and U.K. backed Ugandan and Rwandan rebel forces

wreaking havoc in eastern Congo since 1996", explains Juan Carreo.

"The international community is asking these refugees to disarm, yet that would leave entire communities as prey to incurring rebel attacks in the region. International media turns a blind eye to the fact that the FDLR has repeatedly asked for dialogue with the Rwandan government to secure protection in exchange for disarmament. The Rwandan government has refused. If the only choice for Hutus is repatriation, possible imprisonment and torture, it is difficult to understand what the international community expects," says Carreo.<sup>20</sup>

The FDLR are not the aggressors, but rather the Rwandan backed rebels. Rwanda has consistently argued that its forces, while deployed along the Rwanda-DRC border, have not crossed into Congolese territory, a position supported by U.S. and United Nations officials. Congolese officials, however, argue that Rwandese soldiers were captured inside Congo.<sup>21</sup>

Not applying customary international case law on aggression when analysing conflicts not only distorts justice per se, but also has devastating consequences for the population of concern.

### A French-UN Coup d'état

When the 2010-2011 crisis in Côte d'Ivoire ended in April 2011 with a UN intervention, long-time peace-process mediator Thabo Mbeki wrote *What the world got wrong in Côte d'Ivoire*. The examination into the country's upheavals seemed to fall on deaf ears. It was never referred to nor considered in the ICC prosecutor's accusation. Former secretary general of Amnesty International Pierre Sané spoke of the "logic of the absurd" being implemented by the UN and French military intervention to oust elected President Laurent Gbagbo, the legitimate winner in the November 2010 elections. It was Gbagbo himself who had called for a recount of the votes.

In what looks increasingly like a "criminalisation of international justice", the ICC is currently holding a trial against two non-violent and democratic pan-Africanist leaders from the West African country Côte

d'Ivoire: Laurent Gbagbo and youth leader Charles Blé Goudé. It is a trial that even in its nascent, pre-trial phase, was deemed so lacking in incriminating evidence that former Mozambique president Joaquim Chissano stated that it should never have taken place.<sup>22</sup>

The ICC in this case (as analysed in detail in various articles)<sup>23</sup> has legitimised a coup d'état, which could only lead to an authoritarian regime and increased instability.

By siding with a distorted narrative and depicting an aggressor, Alassane Ouattara, as an acceptable democratic option, the Court invalidates its impartial authority. Many diplomats, politicians and journalists hesitate to openly express their appreciation of Gbagbo and Blé Goudé as symbols of a democratic, socialist and non-violent resistance movement pushing for genuine change on the African continent, because of the ICC's dominating voice.

The situation in Côte d'Ivoire remains volatile and civilians remain in precarious conditions that ensued after Gbagbo's arrest and Ouattara's appointment. On 6 January 2017, a military mutiny in Bouaké, the former headquarters of the *Forces Nouvelles* rebellion that brought Ouattara into power, quickly spread through the country, seeking their pay back for the work they had done. Many former rebels today occupy major posts in the current regime, they are either integrated into the national army or "some of them have also retained their personal militias and have a large private military arsenal. The scenario was the same everywhere: soldiers came out of their camps, fired shots into the air and blocked the main roads," wrote Fanny Pigeaud, author of *France-Côte d'Ivoire, une histoire tronquée*<sup>24</sup>. Most sectors of the economy are currently on strike and the government has been severely cracking down on trade unionists, journalists and opposition leaders.

The Ivorian constitution stipulates that no refugee should exist in time of peace, yet today there are over 100,000 Ivorian refugees in neighbouring countries and countless others escaping to Europe.

Since September 2015, in the three Ghanaian refugee assistance centres housing approximately 11,000 Ivorians, food aid has been cut, despite the total dependency on this assistance for survival, according to World Food Programme surveys. Malnutrition rates rose to 10% even before the gradual cuts in food aid. A May 2013 nutrition survey had found global acute malnutrition (GAM) in 10.9% in the Ampain camp, 6.1% in Egeikrom camp and 7.1% in Fetentaa camp. Ampain recorded a 2.2% increase in GAM – deemed “serious” according to World Health Organisation classification. Despite these statistics UNHCR phased out the nutritional program and replaced it with skills and training programmes for some refugees. Refugees, despite these dire circumstances, do not return due to news of abduction, imprisonment or the occupation of their land.

Ivorian refugees also fear they will end up as internally displaced. And rightfully so.

Six years after the 2011 crisis in Côte d’Ivoire, there are still 303,000 internally displaced people and the number has increased under the Alassane Ouattara regime (24,000 new displaced persons in 2012; 29,500 in 2013; 5,500 in 2014; and 3,200 in 2016;) according to the Centre for Internal Displacement Monitoring of the Norwegian Refugee Council Global reports.

They also fear the targeting of the Wé population in western Côte d’Ivoire, which some human rights activists are calling genocide.

Shortly after his 2011 arrest, buses full of Gbagbo supporters leaving from all around Europe began to pour into the Hague to call for his release. For six years they have not stopped coming to demonstrate in front of the ICC. The trial, which began in 2011, opened again on 6 February 2017. So far, it has produced no material evidence of criminal intent whatsoever or actions on the part of the Gbagbo government to support the prosecutor’s case. Nor has it provided tenable or credible witnesses.

As the trail reopened in 2017, the first witness called, Salifou Ouédraogo, presented the prosecutor with two

videos. One was a violent scene showing people burned alive. However, the footage, it was found, was actually filmed in Kenya in 2007 and not in the Ivorian town of Yopougon in 2011. The Gbagbo defence had pointed out the untenable fact that the tape was in a language, Swahili, not spoken in Côte d’Ivoire, as early as February 2013, yet the witness was still subpoenaed to testify.

### Worsening Chances for Peace

In 15 years the ICC has charged 32 African nationals to date,<sup>25</sup> yet only sixteen have actually come to the Hague. The other 16 have either failed to appear, are fugitives, are not handed over by the country where they reside in or have in the meantime died.

Out of the remaining 16 cases, seven were closed before going to trial either because the suspect was dismissed or acquitted for insufficient

“I have seen justice abused and manhandled by those whose primary duty it was to respect it and safeguard it at all costs.”

proof, as well as two Kenyan cases that were terminated.<sup>26</sup>

African states have argued that the ICC indictments interfere negatively with on-going peace processes to mediate conflicts.

In fact this was the case in Uganda, whose Juba peace process begun in 2006 crumbled and led to a continuation of the war, mainly owing to the ICC’s refusal to withdraw the 2005 indictment of Lord Resistance Army rebel leader Joseph Kony, a refusal it upheld even though many Ugandan government officials at the time travelled to the Hague and pleaded with it to drop the charges in the name of the peace process and the end to war. The LRA’s leader’s exact whereabouts are today unknown.<sup>27</sup>

Key foreign participants in the Ugandan peace process, such as South African Bishop Desmond Tutu and

Britain’s UN Ambassador Emyr Jones Parry, have acknowledged that the ICC’s role in Uganda has probably worsened the chances for any peaceful resolution of the Ugandan conflict.<sup>28</sup>

It could be said that the NATO intervention in Libya that started on 19 March 2011 was the result of misinformation. There were allegations in the media that Viagra was being distributed by Gaddafi to his soldiers and that he ordered the bombings targeting civilians in the city of Benghazi to quell popular uprisings.

Yet a recent investigation into the 2011 Libyan crisis by journalist Patrick Mbeko, ‘Target Gaddafi’<sup>29</sup> puts the argument that this was CIA-generated propaganda. For the three Libyan ICC indictments, of which one was against Gaddafi, no independent investigations were undertaken.

Then again, in March 2013, the ICC acquitted Kenyan Cabinet Secretary Francis Muthaura who was accused of involvement in the 2007 post-electoral violence in his country. Following the court’s decision to drop the charges, Muthaura – who as the Kenyan Ambassador to the UN, as Chair of the Fourth Committee and Chair of the Charter Review Committee of the UN – had always supported international law and worked to advance the cause of the Court – issued a personal statement explaining his “awful odyssey” at the ICC.

“I submitted to the ICC even though the case against me was always baseless and unfair. I never thought I would be a target of the ICC or any court because I have always lived my life under the law. Never did I think that false allegations uttered against me would be accepted as truth by the ICC.”

Muthaura said that he was deeply saddened. “I have seen justice abused and manhandled by those whose primary duty it was to respect it and safeguard it at all costs. It is an injustice that charges were brought by the prosecutor. It is a tragedy that safeguards to prevent abuse of the ICC mechanism so clearly and so obviously failed.”

Researcher in international criminal law at Louvain University in Belgium, Damien Scalia, in *In Hearing Tried*

*People in International Criminal Justice: Sympathy for the Devil?* argues for the need to include the point of view of the persons convicted so as to evaluate the ICC's work. Shedding more light on such experiences may bring more understanding into the on-going proceedings.

In 15 years three cases led to a prison sentence.<sup>30</sup> Yet little is known about these individuals.

The least one can say is that the ICC has been a reckless experiment in what Amartya Sen has identified in *The Idea of Justice* as a tendency derived from the school of transcendental institutionalism, namely an overpowering concentration on institutions.

Another school of thought instead embraces a realisation-focused comparison approach, namely an investigative realisation based on comparisons that focus on the advancement or retreat of justice and on the lives that people are able to lead. "The focus on actual lives in the assessment of justice has many far-reaching implications for the nature and reach of the idea of justice," writes Sen.

He points to distinct forms of justiceness for which the idea of justice has to cater to those identified in early Indian jurisprudence – between *niti* and *nyaya*. *Niti*, relates to organisational propriety as well as behavioural correctness, whereas *nyaya* is concerned with what emerges.

Early Indian jurisprudence warned, "it is crucial to make sure that the 'justice of fish', known as *matsyanyaya*, is not allowed to invade the world of human beings. The central recognition here is that the realisation of justice in the sense of *nyaya* is not just a matter of judging institutions and rules, but of judging the societies themselves".<sup>31</sup>

South Africa attributed its withdrawal from the ICC to incompatibility with the Court's vision of conflict resolution and its exclusion of peace when considering issues of justice.

"The Republic of South Africa has found that its obligations with respect to the peaceful resolution of conflicts at times are incompatible with the interpretation given by the

International Criminal Court... In complex and multi-faceted peace negotiations and sensitive post-conflict situations, peace and justice must be viewed as complementary and not mutually exclusive," reads the official declaration of South Africa's withdrawal from the body, signed on 10 October 2016 by Minister of International Relations and Cooperation Maite Nkoana-Mashabane.

South Africa's vision is a red flag. Reaching for a framework for a voice of reason that encompasses both *niti* and *nyaya* when it comes to justice is one effective way to counter the pervasiveness of unreason. ■

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