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Rights Lab

Forced Marriage Case Notes

Lubanga Case

The Prosecutor v Thomas Lubanga Dyilo

ICC-01/04-01/06

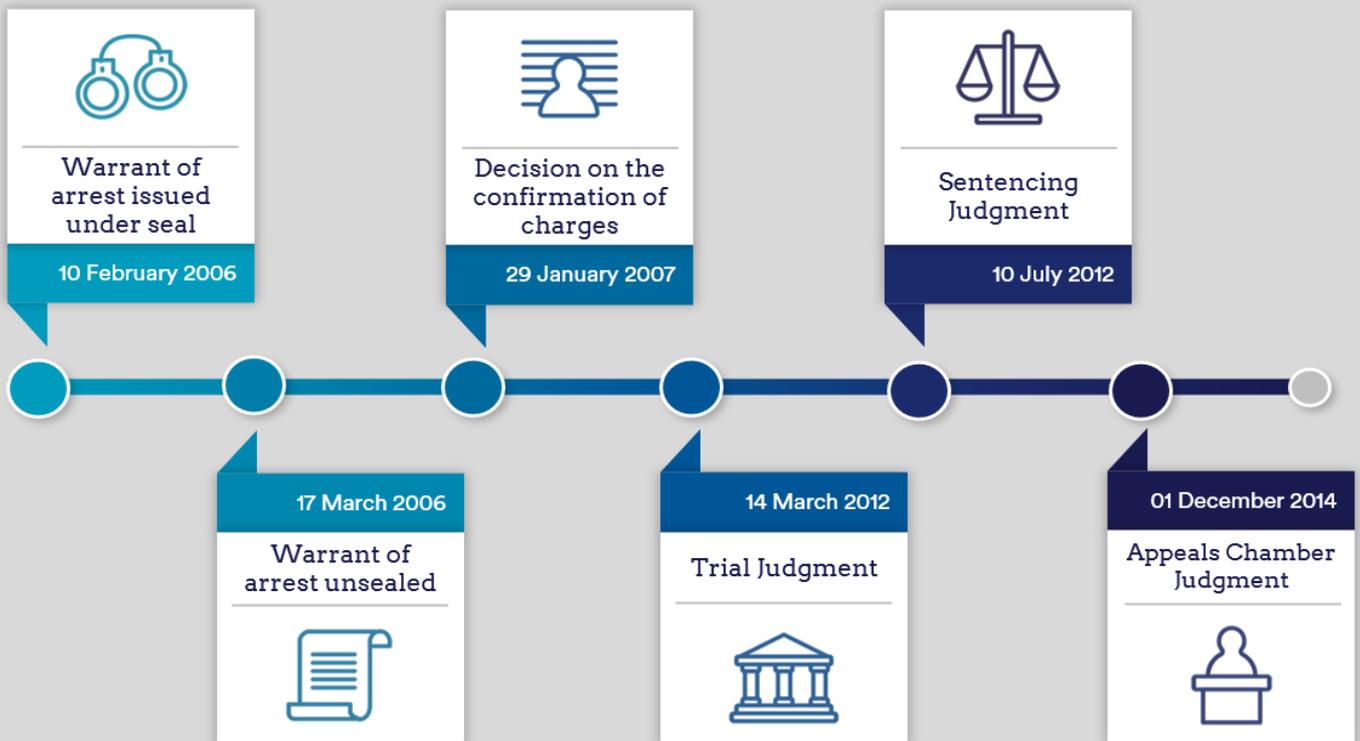
June 2021

This case note was prepared by Dr Hannah Baumeister as part of AHRC-funded project “To Have and To Hold”: Understanding the Relationship between Forced Marriage and Modern Slavery, led by Dr Helen McCabe



Arts and
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Research Council

Key dates of the case



What happened?

After over a century of imperialistic exploitation, the [Democratic Republic of the Congo \(DRC\)](#) has experienced decades of fighting between militaries and splintered ethnic militias over control over territory and natural resources amongst others in the Ituri region.

The Union des Patriotes Congolais (UPC) and its military wing, the Force Patriotique pour la Libération du Congo (FPLC), is an armed group in the Ituri region of the DRC. The UPC/FPLC has been implicated in ethnic massacres, torture, abduction, rape and forced recruitment of young people during the Ituri conflict. Fighters drugged child soldiers and subjected them to harsh training regimes and a variety of severe punishments. Child soldiers took part in fighting and intelligence gathering. They were also used as bodyguards, porters, cooks, and cleaners. In addition, girls were raped, sexually enslaved, and forced into marriage with fighters.

Thomas Lubanga was one of founding members and the President of the UPC as well as the Commander-in-Chief of the FPLC. He exercised an overall coordinating role, was involved in the planning of military operations, and played a critical role in providing logistical support. Lubanga was closely involved in making decisions on recruitment policy and he actively supported recruitment initiatives, including those of child soldiers. He also used children as his personal bodyguards.

The International Criminal Court

The [International Criminal Court \(ICC\)](#) was established in 1998 and began operations in 2002. It is headquartered in The Hague in the Netherlands with a Liaison Office to the United Nations in New York and seven Country Offices in Kinshasa and Bunia (DRC), Kampala (Uganda), Bangui (Central African Republic), Abidjan (Côte d'Ivoire), Tbilisi (Georgia), and Bamako (Mali). The ICC is the first independent, permanent international criminal court to investigate and try individuals for the most serious crimes of international concern: genocide, war crimes, crimes against humanity and the crime of aggression. The ICC can investigate and prosecute crimes committed within member states, crimes committed by nationals of member states, and crimes in situations referred to the Court by the United Nations Security Council. It is intended to complement national judicial systems. Therefore, it can exercise its jurisdiction only when national courts are unable or unwilling to prosecute alleged criminals. The Rome Statute serves as the Court's foundational document. It is a multilateral treaty and States which become party to the it become members of the ICC. As of September 2020, there are 123 ICC Member States. The Office of the Prosecutor opened official investigations in 13 countries and indicted 45 individuals, including Thomas Lubanga in the DRC. The DRC ratified the Rome Statute in 2002 and referred the situation in its territory to the ICC two years later.

The ICC charged Lubanga with, and found him guilty of, amongst other crimes, enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities. He was sentenced to 14 years imprisonment.



What does the case say about forced marriage and modern slavery?

In the case against Lubanga, the Court heard evidence that the UPC/FPLC raped, abducted, and sexually enslaved civilian women. Additionally, girl child soldiers as young as 12 were used not only as combatants, guards, scouts, and porters, performing similar tasks as boys, but they also had to cook, clean, and provide sexual services especially to higher ranking fighters. Some were forced into marriage with a commander. Girls got pregnant as a result of rape inside or outside of forced marriage. Some were forced to bear and raise the child. Some were forced or allowed to have an abortion, and sometimes more than one. Some girls had miscarriages due to poor living conditions. Some were forced to leave the UPC/FPLC when they became pregnant. Without the support of the fighting group, girls were made destitute or forced to return to their families, exposing them to stigmatisation. Girls could not refuse any order for fear of death.

Despite the availability of evidence, Lubanga was not charged with forced marriage, sexual slavery or forced pregnancy as cruel and inhuman treatment. Instead, related evidence was heard in the context of the charge of enlisting, conscripting, and using child soldiers and considered in the context of sentencing (unsuccessfully) and reparations. However, the majority of the Trial Chamber found that it could not consider this evidence because it had not been included in the confirmation of charges decision. Nevertheless, the Chamber discussed it in some detail.

The Chamber found that children actively participate in hostilities in direct and indirect ways. The underlying common feature is that the child is a (potential) target.

“The decisive factor, therefore, in deciding if an ‘indirect’ role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target.” (para 628)

The majority of the Trial Chamber left the question open whether sexual violence could or should fall within the scope of the offense. However, in her Separate and Dissenting Opinion, Judge Odio Benito agreed with the Legal Representative of the Victims and the Prosecutor and found that sexual violence such as sexual assault, sexual slavery and forced marriage was an intrinsic aspect of the use of child soldiers to participate actively in the hostilities. She emphasised that girls are often recruited for sexual purposes and the sexual violence they experience causes serious harm including unwanted pregnancies, maternal or infant deaths, sexually transmitted diseases, psychological harm and social isolation. Based on this understanding, Judge Odio Benito argued for a broader definition of the concept of risk, asserting that it can emanate from enemies as well as their own armed group. Regarding sentencing, Judge Odio Benito found that the sexual violence should be taken into consideration as an aggravating factor. While Judge Odio Benito

stressed that sexual violence is an element of the crimes of enlistment, conscription and use of child soldiers to participate actively in hostilities, she also highlighted that crimes of sexual violence are distinct and separate crimes that can be evaluated separately.

In addition to the disagreement as to whether acts of sexual violence could form part of enlisting, conscripting, or using child soldiers, the Pre-Trial Chamber determined that domestic work would fall outside its scope.



Significance and points to note

The case against Lubanga clearly demonstrates the link between conscripting, enlisting, and using child soldiers and forced marriage/sexual slavery. It highlights that young girls are coerced into armed groups for the purpose of sexual and gender-based exploitation, bringing to mind the notion of conscripted marriage tendered before the Extraordinary Chambers in the Courts of Cambodia in Case 002/02. Arguably, forced child soldiering and forced marriage/sexual slavery are two sides of the same coin and which side is showing depends on what one wants to see. Either way, as Judge Odio Benito and Expert Witness and United Nations Special Representative for the Secretary General for Children in Armed Conflict, Radhika Coomaraswamy, emphasise, it is crucial to fully recognise and address it.

While the Trial Chamber focused on the question whether sexual violence against children falls within the scope of active participation in hostilities, it is still important to also consider their non-sexual, non-combat tasks such as domestic work. Arguably it still supports a fighting group and, following Judge Odio Benito's understanding of risk as emanating from the enemy as well as one's own fighting group, potentially makes a person a target.

Learning from other institutions and decisions in the Trial Judgment

Conscripting, enlisting and using child soldiers

- Bugnion F, 'Les Enfants Soldats, le Droit International Humanitaire et la Charte Africaine des Droits et du Bien-Être de L'Enfant' (2000) 12 African Journal of International & Comparative Law: para 605
- Cohn I and Goodwin-Gill G, *Child Soldiers: The Role of Children in Armed Conflict* (Clarendon Press 2003): para 628
- Convention on the Rights of the Child (20 November 1989): para 604
- Dörmann K, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press 2003): para 568, 604, 608
- European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (04 November 1950) ETS 5 (ECHR): para 581
- International Association of Refugee and Migration Judges, 'Cape Town Declaration' (06 September 2019): para 574
- International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987): para 604, 605
- International Committee of the Red Cross, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (2008) 90 International Review of the Red Cross: para 581, 582, 585
- International Criminal Court, Situation in the Democratic Republic of the Congo (Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal) ICC-01/04-168 (24 July 2006): para 601
- Lee RS (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001): para 568, 590, 607
- Lee RS (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International 1999): para 607, 621
- Machel G, 'Impact of Armed Conflict on Children' (26 August 1996) UN Doc A/51/306: para 605, 628
- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (25 May 2000): para 604
- Oxford English Dictionary (Oxford University Press 2002): para 608
- Palomino Suárez G, *Kindersoldaten im Völkerstrafrecht* (Berliner Wissenschafts-Verlag 2009): para 605, 608, 628
- Pessino v France (Trial Judgment) Application No. 40403/02 (22 January 2001): para 581
- Prosecutor v Jean-Paul Akayesu, ICTR-96-4: para 584
- Prosecutor v Jean-Pierre Bemba Gombo (Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo Against the Decision of Trial Chamber III of 28 July 2010 Entitled "Decision on the Review of the Detention of Mr Jean-Pierre Bemba Gombo Pursuant to Rule 118(2) of the Rules of Procedure and Evidence") ICC-01/05-01/08 (24 November 2010): para 601
- Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (Trial Judgment) SCSL-04-16-T "AFRC Case" (20 June 2007): para 576, 594, 609, 624, 626
- Prosecutor v Moinina Fofana and Allieu Kondewa (Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Dissenting Opinion of Justice Robertson) SCSL-04-14-AR72(E) "CDF case" (31 May 2004): para 582, 607
- Prosecutor v Moinina Fofana and Allieu Kondewa (Trial Judgment) SCSL-04-14-T "CDF case" (02 August 2007): para 576, 616
- Prosecutor v Moinina Fofana and Allieu Kondewa (Appeals Chamber Judgment) SCSL-04-14-A "CDF case" (28 May 2008): para 573, 609, 616
- Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Judgment on the Appeal of Mr. Germain Katanga Against the Decision of Pre-Trial Chamber I Entitled "Decision on the Defence Request Concerning Languages") ICC-01/04-01/07 (27 May 2008): para 601
- Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I Entitled "Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008") ICC-01/04-01/07: para 601
- Prosecutor v Ferdinand Nahimana and others (Appeals Chamber Judgment) ICTR-99-52-A (28 November 2007): para 918
- Prosecutor v Georges Anderson Nderubumwe Rutaganda, ICTR-96-3: para 584

- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (08 June 1977) 1125 UNTS 3 (Additional Protocol I): para 604, 627
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (08 June 1977) 1125 UNTS 609 (Additional Protocol II): para 627
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- Singer PW, *Children at War* (University of California Press 2005): para 628
- Solemn Declaration on Gender Equality in Africa (2004)
- Statute of the Special Court for Sierra Leone (16 January 2002) 2178 UNTS 138, 145, 97 AJIL 295, UN Doc S/2002/246: para 569, 603
- Triffterer O (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, CH Beck 2008)): para 604, 608, 621, 627
- United Nations Children's Fund, 'The Paris Principles. Principles and Guidelines on Children Associated With Armed Forces or Armed Groups' (February 2007): para 580
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- United Nations Secretary-General, 'Operational Guidelines to the Integrated Disarmament, Demobilization and Reintegration Standards' (2014): para 574
- *Veeber v Estonia* (No. 2) (Trial Judgment) Application No. 45771/99 (21 January 2003): para 581
- Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331: para 601
- Wessells M, *Child Soldiers: From Violence to Protection* (Harvard University Press 2006): para 628



Additional reading and resources

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Inder B, 'Reflection: Gender Issues and Child Soldiers – The Case of Prosecutor v Thomas Lubanga Dyilo' (31 August 2011) accessed 14 January 2021 (available [here](#))

International Criminal Court, 'Democratic Republic of the Congo' accessed 14 January 2021 (available [here](#))

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International Justice Monitor, 'Thomas Lubanga' accessed 14 January 2021 (available [here](#))

Urban N, 'Direct and Active Participation in Hostilities: The Unintended Consequences of the ICC's Decision in Lubanga' (11 April 2012) accessed 14 January 2021 (available [here](#))

Women's Initiatives for Gender Justice, 'Trial Chamber I Issues First Trial Judgment of the -ICC: Analysis of Sexual Violence in the Judgment' (06 June 2012) accessed 14 January 2021 (available [here](#))

