

On appeal, Lubanga calls two more 'non child' soldiers

Over two days, Thomas Lubanga Dyilo's defence challenged key video footage supporting the verdict that convicted the Congolese militia leader in 2012 for using child soldiers. During an appeals hearing held last week at the International Criminal Court (ICC), two witnesses explained that although they might have looked like child soldiers, they were young adults.

All eyes in the court room are on the screens. A young Congolese man raises his hand and swears to tell the truth and nothing but the truth. He is testifying through video-link from an ICC field office in the Democratic Republic of Congo (DRC). His name is Augustin Mbogo, born on 8 April 1983. Lubanga's defence called him for the appeals hearing held in The Hague, on 19 and 20 May, to challenge the verdict that found the ex-leader of the UPC (Union des Patriotes Congolais) guilty of war crimes for enlisting and conscripting child soldiers under the age of 15 years. He was sentenced to 14 years imprisonment.

Images and video evidence

The defence appealed the judgment, claiming the evidence was not based on solid ground. During the trial it became clear that local intermediaries, who worked for the prosecution, had encouraged witnesses to lie in court and pretend they were child soldiers. In their judgment, the judges underlined that these intermediaries had committed offenses against the Court. Up until now the ICC prosecutor declined to prosecute them [IJT-159]. They found that not one of the nine witnesses who claimed to be child soldiers had been honest and reliable. To support the guilty verdict, the judges had to rely on images, including a video showing Lubanga's visit to a training camp, in

Rwampara, surrounded by soldiers. "Video evidence clearly shows recruits under the age of 15 in the Rwampara camp," the judges wrote.

Lubanga's lead counsel Catherine Mabilie tried to shoot holes in those conclusions. She pointed to the "paradoxical nature" of a case about abusing minors which brought no credible child soldier to the court. What was left from the prosecution evidence, Mabilie argued, was this footage of UPC soldiers, but "appearances alone can't prove beyond any reasonable doubt the age of an individual."

Mbogo was called "witness D40" during the trial. First Mabilie showed copies of his voter card and of his school diploma. Then she started a video, filmed when he had just joined Lubanga's presidential guard. Although Mbogo looked like a small boy, he was 19 years old, said the defence. "Not a child soldier, but a young adult." In turn, the prosecutor tried to cast doubt on the personal documents shown in court. Mbogo's card said he was born in Blukwa, while in fact he had been born in Niakunde. The witness told the court that the Congolese official who made the card had been in a hurry, and had refused to correct the mistakes.

Any "precise and verifiable example" of a child soldier?

The defence called a second witness, Justin Kpadhigo, born 2 December 1984. He is one of the very young faces in one of the videos brought in by the prosecutor as evidence. But when Kpadhigo joined Lubanga's militia in 2002, becoming one of his bodyguards, he was 18 years old. Mabilie concluded the prosecution lacked any "precise and verifiable example" of a child soldier. "It makes entire judicial trial unfair," said Mabilie, asking for the acquittal and release of her client.

Two witnesses are "incapable" of reversing the verdict, replied Fabricio Guariglia, the head of appeals division at the office of the prosecutor. For him they have "serious credibility problems" and the Rwampara video is not undermined since these witnesses do not appear in that particular footage. The judges also relied on testimonies from UN observers and insiders, he noted. During the trial, a high-ranking UPC official testified that "Lubanga used children in his own personal guard." And the judges ruled that "multiple witnesses testified credibly and reliably that children under 15 were 'voluntarily' or forcibly recruited into the UPC/FPLC." The prosecutor concluded the verdict was solid, should be upheld and, in fact, the sentence should be increased.

Nine years in preventive detention

Lubanga himself recalled he is the first defendant to be tried by the ICC. "I sometimes felt being the victim of a fledgling legal process," he said, standing in the far corner of the courtroom. "I have spent nine years in preventive detention. It is long and terrible." He said he felt "painfully" misunderstood. To him, the ICC officials had not understood the reality of the massacres, destruction and chaos in Ituri. When he started to explain how he personally had fought against enlisting minors, Guariglia protested: "The accused is giving evidence!" "This is a scandal," Mabilie replied. "Could you proceed," presiding judge Erkki Kourula asked Lubanga. The former rebel leader said he had been against the practice by militia groups of using child soldiers. "Yes, I banned enlisting minors. Yes, I acted for their demobilization." He added: "That is the reality of my acts."

The hearing was coming to an end. "We will pay attention to your personal views," promised judge Kourula.

Germain Katanga: 12 years... and a release next year?

by Tjitske Lingsma, The Hague

Last week Congolese militia leader Germain Katanga was sentenced to 12 years imprisonment by the International Criminal Court (ICC). While pronouncing a sentence that could lead to the early release, next year, of the universal court's second convict, the presiding judge Bruno Cotte stressed the gravity of the crime. On 7 March 2014, the court had found Katanga guilty as an accessory to murder as a war crimes and crimes against humanity, attacking civilians, destruction of enemy property and pillaging. These crimes were committed during the one-day attack on Bogoro in Ituri, in eastern Democratic Republic of Congo (DRC). On May 23, the court pronounced and explained the sentence. As a commander of a local militia, Katanga made a "significant contribution" to the commission of a number of crimes, says Cotte. Katanga provided his fighters with logistical means, weapons and ammunition so that they could "wipe Bogoro off the map" and eliminate the Hema population. Although not present during the attack, he "knew" what would happen.

The judges found no aggravating circumstances – the cruelty of the crimes, the vulnerability of the victims and the discriminatory nature of the attack against the Hema being part of the gravity of the crime itself. They found instead mitigating factors. A "very relative weight" attached to Katanga's young age, the fact that he is a father of six children – which could facilitate his reintegration –, his strong relationship with his community and, above all, his participation in the demobilisation process. However, the judges noted that Katanga did not show "deeply felt and sincere remorse."

At the International Tribunal for the former Yugoslavia and, more recently, before the International Tribunal for Rwanda, it is becoming the norm to grant an early release after having served 2/3 of their sentence [IJT-158]. If applied by the ICC, Katanga, who has been held since October 2007, could be released next year.

Stillborn investigations do not die in Cambodia

At the Extraordinary Chambers in the Courts of Cambodia (ECCC) – established to try the most responsible Khmer Rouge leaders for violations of international law and serious crimes – pragmatism is battling against due process over the two politically unpopular cases still on the court's docket. In a schizophrenic atmosphere, Cambodian nationals and internationals are split. Lawyers are complaining that victims' and suspects' rights are being disregarded.

In late April, the Khmer Rouge tribunal's international co-prosecutor, Nicholas Koumjian, asked investigating judges to add rape, sexual violence and forced marriage to a lengthy list of crimes and crime scenes they are looking into as part of the controversial Case 004. Simultaneously, Koumjian is seeking a rule change that would allow criminal accusations to be dropped from the seemingly endless investigations in both Case 004 and its sister case, 003, which have been dragging on for nearly five years.

Schizophrenia

The duelling requests are emblematic of a kind of schizophrenia that has seized the court regarding the two politically unpopular cases, which are fiercely opposed by Cambodian Prime Minister Hun Sen and his government, and which Cambodian court staff have refused to touch since their inception in September 2009.

With one mind, international prosecutors and judges are insisting that the cases are still tenable and are being properly investigated. Koumjian said it was new evidence on rape uncovered in the course of this investigation that led to his request. At the same time, it is abundantly clear that it will be nearly impossible for the four suspects—all Khmer Rouge military officials and mid-level cadres—to face trial in Hun Sen's Cambodia. The tribunal's international donors have little appetite for the political battle that would ensue if indictments were handed down—nor do they appear eager to fund two more costly

trials that could take years, and that would infuriate their host government. "There have been endless contortions to effectively bury these stillborn investigations while paying lip service to their vitality," said Anne Heindel, a legal adviser to the Documentation Center of Cambodia and the co-author of a recent book on the tribunal, *Hybrid Justice*.

Pro bono investigators

"The court is slashing staff to save money while acknowledging that progress in these cases would triple the number of ongoing trial proceedings," she added. In April, International Co-Investigating Judge Mark Harmon put out a call for investigators and lawyers to work for him pro bono in order to help him complete the investigation in both cases 003 and 004 before the end of the year. He has little choice but to do so, as the court's latest budget, approved by donors in March, calls for 15 positions in his office to be cut in 2015.

Heindel said it was particularly problematic that victims' and suspects' rights have been repeatedly infringed upon due to battles over the status of the two cases. None of the four suspects in the two cases (a fifth, Khmer Rouge air force commander Sou Met, died last year) was provided with a defence lawyer until 2012, and it was not until April this year that all the suspects had an international and a Cambodian defender, as is customary at the court.

No access to the case file

Even now that the lawyers have been assigned, not a single one of these lawyers has been granted access to the case file in either 003 or 004, meaning that the suspects have no ability to monitor the progress of the investigation against them—a crucial fair trial right. This will make it legally problematic for the cases to actually go to trial. Two of the suspects, former navy commander Meas Muth and a district chief, Ta An, have also been involved in years-long battles over their legal representation, after key decisions made by former investigating

Three ICC witnesses in continued legal limbo

The International Criminal Court (ICC) appeals chamber ordered last week the registrar to “immediately implement” the deportation of three Congolese witnesses detained at the ICC’s detention unit for three years. One of the men, Floribert Ndjabu, has been on hunger strike last five weeks [IJT 159], protesting against his stalled asylum bid in The Netherlands. The three men asked for asylum after they were flown in March 2011 from Democratic Republic of Congo (DRC) to The Netherlands to testify in defence of the ICC suspect Germain Katanga [see p. 2]. Meanwhile, the highest Dutch body for asylum matters has been asked by the government to lift a ban on sending the witnesses back to their country. In October last year, a district court had ruled the Dutch government “rightly” refused them asylum since it was “likely” the three men were involved in crimes against humanity. But at the same time, the court agreed that the men could not be returned to the DRC, since they risk not being given a fair trial.

AEC: start of the fourth investigative mission

The African Extraordinary Chambers (AEC) will conduct a fourth and possibly their last investigative mission in Chad, from May 24 to June 9. A mission “devoted to the analysis of human remains found in sites where mass graves have been presumably identified,” reads a press release. A team of Argentinian medical-legal anthropologists will assist the magistrates. They will, in parallel, continue to hear witnesses and examine the archives of the DDS, the former Chadian political police. But before flying to the capital N’Djamena, the AEC investigative judges rejected a request from Chad to be considered as a civil party to the trial [IJT-158]. This decision may not help a pending request, from the Dakar tribunal, to obtain the transfer of two former directors of the DDS, currently detained in Chad. To date, the AEC have only indicted the former president Hissene Habré, in July 2013, for crimes against humanity, war crimes and torture.

judge Laurent Kasper-Ansermet, who left the court in mid-2012, were invalidated by others.

Kasper-Ansermet’s stormy tenure at the Extraordinary Chambers in the Courts of Cambodia (ECCC) [IJT-142] was marred by repeated conflicts with Cambodian court staff over the two cases, and his status as a judge was never legally recognized by either the Cambodian government (whose Supreme Council of the Magistracy must confirm all judicial appointees) or his colleagues at the tribunal, who adhered to the government line that his appointment was invalid. Because of this, although he met in 2012 with each of the elderly suspects in cases 003 and 004 to inform them of their rights and charge them, there is still considerable controversy over whether they are actually “charged persons,” with all the rights the title entails.

Fair trial rights?

Along with the charges, he recognized British lawyer Richard Rogers as a defender for Ta An. However, shortly after this Kasper-Ansermet quit the court, citing his Cambodian colleagues’ efforts to stymie cases 003 and 004. The court’s Defense Support Section then refused to confirm Rogers’ appointment, a decision he has been battling in a slew of filings for nearly two years. Finally, earlier this year, his appointment was cleared, but the Ta An defence team—which includes also a Cambodian and a Dutch lawyer—has struggled to work without access to the case file. In a statement in January, the team complained that judge Harmon was acting with disregard for their client’s rights. Although Kasper-Ansermet extended access to them in 2012, Harmon reversed the decision in 2013. “Investigations in Case 004 should be conducted in a fair and transparent manner, or they should not be conducted at all,” the team concluded.

“Kafkaesque”

Another suspect, Meas Muth, chose American lawyer Michael Karnavas and Cambodian Ang Udom to defend him in 2012. They worked for over a year crafting a strategy for the suspect’s defence. But earlier this year, the current investigating judge, Harmon, invalidated the two men’s assignment. The reason, he said, was that Karnavas had also represented former Foreign Minister Ieng

Sary at the court prior to Sary’s death last year. Although Muth had long since signed a waiver over the potential conflict of interest, Harmon said he believed this conflict was overwhelming enough to merit the last-minute switch. Karnavas is vigorously appealing this decision, as well as continuing his push to gain access to the case file.

“You have international investigating judges coming and going, often issuing contradictory decisions,” Karnavas said of Harmon and Kasper-Ansermet. “The international prosecutors have access to the case file and are able to influence the investigation, yet the suspects who have been informed of the charges by the previous investigative judge and have been afforded legal representation are not given access. Seems not only unfair, but contrary to the civil law system that is applicable at the ECCC. It is a bit Kafkaesque. For now there is not much the suspects can do but wait and see how this investigation turns out.”

Victims not optimistic

Victims, who are allowed to participate in ECCC proceedings as civil parties with many concomitant rights of their own, have been equally frustrated. They struggled for years to gain access to the case files before Harmon finally granted it in mid-2013.

Huy Bopha, 57, is a party to the case because she was sent to work at the notorious Ang Trapeang Thmar dam as a teenager. Case 004 suspect Im Chaem supervised the dam building, and stands accused of presiding over slave labour that occurred in horrific conditions. Bopha said that despite her lawyers’ promises, she does not believe the cases will see much movement due to what she sees as a lack of funds. She has noticed that even the flagship Case 002, which is supported by Hun Sen, lurched along with periodic crises that required emergency appeals to donors for infusions of cash. Because of this, she doesn’t see much hope for the smaller and less politically accepted 003 and 004.

“Two months ago, we met our lawyers, who claimed the cases 003 and 004 would be sent to trial,” she said. “But it sounds not right. I am really worried that the Khmer Rouge tribunal cannot reach the trial for those two cases.”

“I am not pessimistic, but I don’t think it can get to the final stage to convict any former Khmer Rouge leaders involved in cases 003 and 004.”

Digitalization for truth in Argentina

At the end of October last year, Argentina's Defence Minister Agustín Rossi received a phone call from Mario Callejo, the head of the Argentine Air Force, to tell him important news. During a clean up of the cellar of the Condor building – the Air Force headquarters – two strongboxes and several shelves packed with dusty papers were discovered, containing 280 minutes of meetings held during the former dictatorship.

Stella Segado, the head of the Defense ministry's Human Rights office, rushed to the building along with a group of colleagues. Amazed by the find, they immediately decided to start analyzing the documents, Segado explained to IJT. This was one of the most important archive discoveries since the return of democracy to the country. Five months later, on the 38th anniversary of the last military coup, President Cristina Fernández de Kirchner's administration created a virtual platform, *archivosabiertos.com*, to make the minutes available for public consultation.

"We did not hesitate. We wanted people to have access to the documents," Segado says. "The digitalization of the files is an important step forward, but the website still needs improvement, and surfing through the archives should be more straightforward" comments Lorena Balardini, coordinator of the archival research team at the Centre for Legal and Social Studies (CELS), a prominent Argentina's human rights organization.



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Over the past decades, human rights organizations and relatives of those murdered or forcibly disappeared during the last Argentina dictatorship (1976-1983) have been demanding not only justice but truth. During the dark years, thousands of people were abducted and taken to secret detention centres, where they were tortured and then "disappeared". Human rights groups estimate that around 10,000 people were disappeared during that period and around 500 children snatched from their mothers. Only 110 of these children have recovered their real identities.

The first civilian president – Raúl Alfonsín – ordered the creation of the National Commission on the Disappearance of Persons (Conadep), only five days after his appointment. The truth commission documented part of the abductions, cases of torture, disappearances and the presence of hundreds of clandestine detention centres throughout the country, in a final report titled "Never Again". But in nine months of investigation, the commission received no information from the armed forces.

520 people sentenced

Almost 30 years on, human rights trials are still ongoing in Argentina. In 2003, Néstor Kirchner's administration abrogated two amnesty laws passed in the 80s. Since the opening of the cases in 2006 for crimes perpetrated during the last dictatorship, 520 people have been sentenced for crimes against humanity and 1,135 others have been indicted, according to a March report from the Attorney General's office. Since the return of democracy, more than 123 trials have been held.

"The appearance of these archives proves that we were right, that those archives are still there and that records have not been destroyed," says Nilda Eloy, a survivor from several clandestine detention centres located in Buenos Aires province. But in truth, the files found at the Condor building have not provided many details about those who went missing. They mainly consist of minutes of meetings held between 1976 and 1983 by the heads of the three armed forces and reports from the body that replaced Congress during the period.

However, last November, Defence Minister Rossi highlighted the discovery of thirteen minutes relating to the irregular sale of *Papel Prensa*, the country's only newspaper

manufacturer during the dictatorship. Days after the 1976 military coup, *Papel Prensa's* owners were forced to sell their company. Their president, banker David Gravier, had been accused of managing the Montoneros guerrilla's finances. After he died in a plane crash, the pressure intensified on his widow, Lidia Papaleo. In November 1976, she signed over the company to another one, which sold on its part only eight days later to *Clarín*, *La Nación* and *La Razón* – the country's most important newspapers. Papaleo was later abducted, and spent more than five years in clandestine detention centres and prisons in Buenos Aires. The controversy was revived under the Fernández de Kirchner administration in 2010, when the media conglomerate – and major government critic – *Clarín* was under pressure to divest under a new law. Last November, the Defence Ministry handed over the minutes to an investigative judge.

After last year's discovery, Minister Rossi urged the heads of the Armed Forces to look for documents in all their branches. And this year, more than 7,000 files were found within the Campo de Mayo garrison, which operated as a clandestine detention centre. Most of the files referred to political leaders imprisoned in a military jail in Magdalena, Buenos Aires province. They are still being examined and are not yet available for public consultation.

So far, only the Army and the Air Force have found archives linked to the repression. "We now want the Navy's archives," Carlos Lordkipanidse, a survivor from the Navy's ESMA detention centre told IJT. ESMA is one of the iconic clandestine detention centres [IJT-88], where around 5,000 prisoners were held and a clandestine maternity clinic linked to the kidnapped children operated. Lordkipanidse adds: "If the Navy files were turned over, we could find the children separated from their mothers." The archives are not only useful for historians or as evidence in the ongoing trials, he says, they legitimize the voices of those who suffered persecution, abductions or were disappeared. "In archive discoveries, the assistance of experts to explain what the document reveals is needed, especially during the proceedings," Balardini told IJT.

Digitalizing the archives and giving them public access is a significant step forward, but there is still much to be done in explaining their real importance.