SWITCH
ON PAPER

DEMOCRATIC REPUBLIC OF CONGO

Bogoro, inquiry-artwork by Franck Leibovici and Julien Seroussi #2

The Katanga/Ngudjolo trial: a case study

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At the crossroads of art, poetry and international justice, Switch (on Paper) is publishing a text in the form of a multi-episode investigation of a project conducted since 2014 by Franck Leibovici and Julien Seroussi at the International Criminal Court (ICC) in the context of the Katanga/Ngudjolo trial, named after the two militiamen accused of war crimes and crimes against humanity committed in 2003 in the village of Bogoro in the Democratic Republic of Congo. This second text presents the Katanga/Ngudjolo trial and the history of the ICC.

On 24 November 2009, militia leader Germain Katanga appeared before the International Criminal Court (ICC) in The Hague, which accused him and Mathieu Ngudjolo, another alleged militia leader, of war crimes and crimes against humanity, committed on 24 February 2003 during an attack on the village of Bogoro, in the Ituri region of the Democratic Republic of Congo (DRC). The Katanga/Ngudjolo trial, one of the very first cases to be heard by this young court, began six years after the events that reportedly caused the deaths of at least 200 villagers, imprisonment, mutilation and rape. The DRC is indeed the scene of a civil war that is not over. It is marked by a constellation of conflicts that evolve according to shifting alliances, involving no less than eight neighbouring countries, not to mention the commercial interests of private companies. Eleven years after the Bogoro attack, most of the documentary and testimonial evidence submitted by the prosecutor's office to support the charges against Katanga and Ngudjolo had collapsed. Ngudjolo was acquitted in 2012, while Katanga, in March 2014, was not convicted as the main perpetrator of the crimes for which he was accused but only as an accomplice, and sentenced to 12 years in prison.

The prosecution's case was based in part on the recruitment of child soldiers. In order to comply with the Rome Statute definition of crimes, the prosecutor therefore simply had to prove that the assailants were under 15 years old at the time of the attack. But the defence had no difficulty in showing that these child soldiers had several dates of birth depending on the documents consulted... Several of them indicated that, in order to obtain work or access to education according to the required age criteria, it was common to give a false date of birth. Some former soldiers admitted not knowing their exact age. Others admitted to having declared themselves to be 15 years old at the time of the attack in order to benefit from international protection and reintegration programmes for child soldiers.

During the trial, the court spent long hours trying to clarify the relationships between the accused, the witnesses and the various protagonists cited in their accounts, in order to confirm the identity and establish the responsibility of each. But the judges were confronted with the fluidity that exists in family relationships, clans, armed factions and other groups formed out of loyalty or pragmatism. In their, often contradictory, statements, witnesses described family groups that exceeded the bonds of blood and marriage, and sometimes even went beyond the world of the living... In any case, their testimony did not allow the judges to establish with certainty the chains of command at play, nor to assess the degree of responsibility of the accused. Thus, the prosecution failed to take into account the role played in the conflict by medicine-men and fetishes, nor the extent of their powers, with witnesses still fearing their effects across time, borders and international protection programmes.

The three judges - Frenchman Bruno Cotte, Belgian Christine Van den Wyngaert and Malian Fatoumata Dembele Diarra - were therefore unable to clearly trace the facts from the divergent accounts gathered during the trial. Most of the evidence (whether it was testimony or documents that themselves had to be supported by witnesses) could not be considered sufficiently credible. The prosecution's arguments, established during the pre-trial phase of the trial, did not stand up to this. On 23 May 2014, the court returned its verdict, accompanied by the following statement: " the chamber also emphasized that the fact of deciding that an accused is not guilty does not necessarily mean that the chamber finds him innocent. Such a decision simply demonstrates that, given the standard of proof, the evidence presented to support his guilt has not allowed the chamber to form a conviction "beyond reasonable doubt"."

Art and the humanities take possession of the trial

The account of this trial was first told to me in 2014 by Franck Leibovici and his friend Julien Seroussi, employed in 2009 by the ICC as legal assistant to the French judge Bruno Cotte on the Katanga/Ngudjolo case. Leibovici's work is based on the invention of devices for processing and reconfiguring large sets of documents in order to produce alternative representations of public problems. As an example, his *mini-opera for non-musicians* (2008-2016)[1] consists of ten sequences, each of which uses a specific notation system (graphic scores, choreographic notation, etc.) with the aim of re-describing the masses of materials produced by so-called "low-intensity" conflicts - these laboratories of war in the long run, where new rules are invented for ways of making war.

The PowerPoint used by American General Colin Powell to justify to the UN the presence of weapons of mass destruction in Iraq or the WikiLeaks documents are thus put back into circulation through the intermediary of amateur choirs, choreographies, conversations, conferences or projections. By becoming a co-author in writing the score of these masses of documents and then performing them, the public actively takes part in a new implementation of documents that are initially opaque, which it can thus grasp by its own means.

During the trial, Seroussi opened up to Leibovici about his experience, and the different obstacles encountered by the judges in trying to construct a reliable account from the evidence at hand. From their conversations, the intuition arose that by applying a treatment similar to that of the *mini-opera* to the materials produced by and for the trial, using tools borrowed from art and poetry, other accounts, other connections and a different understanding of the facts would emerge.

In fact, an artist, sociologist, anthropologist, lawyer or resident of Bogoro will have a very different view of a map of the village of Bogoro. They will associate different accounts with it and link it, each in their own way, with other photographs or documents related to the events discussed. By designing situations and devices that import visions and gestures other than legal ones, applicable to the materials of the trial, could we not, collectively, produce tools that are useful for future cases? To do this, it was necessary to inform the ICC and involve it in the project. Thanks to Julien Seroussi's contacts, the institution agreed and promised to facilitate access to its human and documentary resources. In 2014, they therefore began to analyse all the transcripts of the trial (accessible, almost in real time, on the ICC website), the evidence and the thousands of hours of videotaping of the trial[1].

A fragile institution

When the project came into being, the ICC was still a young institution, struggling to assert its international legitimacy so that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation". However, in 15 years, the ICC has delivered a verdict in only six cases and sentenced eight people, two others having been acquitted. The court's credibility has been damaged by the voices of international politicians or the media who criticize its ineffectiveness, or consider it a threat to their national sovereignty (for example, US President Donald Trump, whose former National Security Advisor, John Bolton, described the ICC in September 2018 as "illegitimate... for all intents and purposes the ICC is already dead"). Still others see the large number of defendants from the African continent as a sign of the court's prejudices and even racism. In May 2016, at a UN General Assembly, several African delegations accused the ICC of applying double standards.

The idea of creating an international criminal court was born after the First World War, but only became diplomatically possible after the end of the Cold War and the creation, with the support of an outraged international community, of the International Criminal Tribunal for the former Yugoslavia in 1993 and for Rwanda in 1994[2]. Unlike these two courts, created directly by the UN and for a temporary period to deal with specific situations, the ICC is permanent and has a very broad mandate. It came out of the Treaty of Rome, adopted in 1998, came into force in 2002 and has been signed and ratified to date by 123 States "Conscious that all peoples are united by common bonds, their cultures pieced together in

a shared heritage, and concerned that this delicate mosaic may be shattered at any time[3]. "However, neither the United States, China nor Russia have ratified the treaty, preventing the ICC from subpoenaing their citizens, even though they have the power to request the referral of a case to the court as members of the UN Security Council. This illustrates quite well the limitations of the ICC and the disparities it is facing.

A treaty open to interpretation

Although this may seem tedious to the layman, it is useful to describe some of the legal rules in use at the ICC, in order to better understand the Katanga/Ngudjolo trial, its outcome and the reasons that led Leibovici and Seroussi to take an interest in it. The court's founding treaty, the Rome, is based on what lawyers neatly refer to as "a constructive ambiguity" (Marianne Saracco, former legal officer to Judge Cotte at the ICC). It is a concise and open text, which leaves much to improvisation and the case-by-case elaboration of an international justice under construction (hence the great importance of case law). The Rome Statute allows judges to mobilize any of the "great legal traditions" used by signatory countries, although according to Seroussi "common law" prevails. The common law model, or "jurisprudence law", originated in England and spread as a result of British imperial expansion. Thus, the value systems and criteria on which many ICC lawyers rely to assess the "truth" and do "justice" are part of a philosophical, social and legal tradition that is sometimes irreconcilable with the wide variety of geopolitical contexts, social models and modes of communication handled by the court. Its tools have thus proved inadequate to understand the social context and decipher the chains of command at work in the Katanga/Ngudjolo case.

In addition, the Rome Statute does not confer investigative powers on judges. In order to reach a verdict, they can only go through the evidence and witnesses presented in court by the prosecution and the defence. Unlike civil law, judges are not familiar with the evidence before hearing the witnesses. If they feel the need to call on experts (NGOs, anthropologists, historians, etc.) to provide them with information on the conflict more than 6,000 kilometres away in Ituri, or on the social and power structures at stake in this area, they will have to do so in court, and the experts will be subject to cross-examination[2].

"Judge Cotte, Seroussi recalls, was placed in a situation that was completely contrary to French procedure. Unlike a President of the Cour d'Assise, who is able to fully immerse himself in the entire file compiled by the investigating judge before the trial, international judges are confronted with the double strangeness of discovering witnesses during the hearings with no prior preparation and of trying to understand their testimony despite a very different cultural background."

Finally, Seroussi recalls that it is sometimes difficult to find experts for cases tried at the ICC, and that their *ad hoc* interventions do not allow them to accompany judges effectively

during the proceedings, as he himself has had the opportunity to do. In such a context, it is difficult to establish the most objectifiable elements - from the simplest, such as river names and distances, to the most complex, such as the political history of the relations between the different ethnic groups involved in the conflict. At a round table organized by Leibovici and Seroussi at the Musée du Quai Branly - Jacques Chirac in Paris in December 2017, Judge Cotte acknowledged that the absence of experts was a considerable obstacle.

Multiple obstacles

Seroussi and Leibovici identified four kinds of obstacles that hindered the court's work during the trial:

- technological and logistical obstacles, where the, sometimes erratic, functioning of the tools used to record, translate or transcribe disrupted the proceedings;

- language barriers, where the successive degrees of translation required to move from Swahili and Lingala (witness languages) to French and English (two of the court's six official languages[5]) significantly slowed down exchanges, causing interruptions, delays and misinterpretation, that become visible for example when comparing the French and English transcripts;

cultural b- arriers, where lawyers' frames of reference affected or biased their understanding of documentary and testimonial evidence;

finally, methodological obstacles, when a (legal) method of processing documents prevents better use being made of the resources contained in the evidence, or when the transition from one stage of the trial to another involves the sudden depletion of an essential resource.

Indeed, many pieces of evidence gathered by the prosecutor did not meet the criteria required to be considered admissible and presented during the trial. Moreover, the evidence used did not establish the facts with the degree of certainty necessary to conclude "beyond a reasonable doubt" that the accused were liable and that a "common plan" existed. How could the judges have gained such a degree of certainty, when what they learned to consider as facts - geographical locations, dates of birth, family ties, or even surnames - kept fluctuating according to the witnesses' words?

Of course, the members of the court are aware of the obstacles they face, and Seroussi insists that "selective ignorance is an intrinsic characteristic of these international procedures, not an aberration to be pointed out". The epistemological limits he identified during his four years of court work do not necessarily have to be seen as pejorative, he insists. On the contrary, recognizing the inevitability of the limits of knowledge should be seen as an indispensable starting point for the work of the court, both by its employees and observers. During the round table organized by Julien Seroussi and Franck Leibovici at the Musée du Quai Branly - Jacques Chirac, Judge Cotte, now retired, said that "the ICC must

understand that it needs to adopt tools to enable the Chambers to open the field". This statement can be interpreted as an invitation to judges to look beyond the law to better understand the cases before the court. The tools, derived from art and poetry, developed by Leibovici and Seroussi thus have this ambiguous purpose: to allow judges to handle their documents differently, i.e. to apply an investigative reading to them - when they should limit themselves to a function of arbitrator listening to the versions of both parties, the prosecution and the defence. This "move", as we understand it in chess, is permitted because there are no regulations in the Court stipulating the reading or viewing rules to be applied to textual or multimedia documents.

Translation by Angela Kent

1. Franck Leibovici, low intensity conflicts – un mini-opéra pour non musiciens, ed.mf, 2019

2. This required the court to recapture the video recordings, as the in-house software For The Record, did not allow for any intervention in the files (an endless process, requiring the court to carry out months and months of work).

3. These two courts have played a pioneering role in "the establishment of a credible international criminal justice system, producing a substantial body of jurisprudence on genocide, crimes against humanity, war crimes as well as forms of individual and superior responsibility", by defending equity and impartiality, "the principle that guilt should be individualised, protecting entire communities from being labelled as 'collectively responsible'", with the aim "to deter future crimes and render justice to thousands of victims and their families, thus contributing to a lasting peace in former Yugoslavia".

4. Sources: http://unictr.irmct.org/en/tribunal and http://www.icty.org/en/about (Consulted in October 2018)

5. Historian Stéphane Audoin-Rouzeau recounts how destabilizing this experience can be for the researcher who is not familiar with his or her knowledge being received in this way. He recounts the "ordeal" of a sociologist called to testify during a trial at the ICTY, humiliated on the stand for having "failed to provide a sufficiently convincing theatrical experience" (Stéphane Audoin-Rouzeau, "Chercheurs dans le prétoire", *Grief* n°3, 2016, p. 177).

6. English, French, Arabic, Chinese, Russian, Spanish.