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Case Against Germain Katanga and Mathieu Ngudjolo

Introduction

Germain Katanga, the alleged commander and leader of the Patriotic Resistance Force in Ituri (FRPI), and Mathieu Ngudjolo, the Nationalist and Integrationist Front in Iturbi (FNI), were tried before the International Criminal Court (ICC) for crimes against humanity and war crimes committed since February 24, 2003, in Bogoro, in the Ituri district of the Democratic Republic of the Congo (DRC).

On November 21, 2012, Trial Chamber II severed the two cases. Shortly after, on December 18, 2012, Trial Chamber II acquitted Ngudjolo of all charges. On March 7, 2014, Trial Chamber II found Katanga guilty, pursuant to Article 25(3)(d) of the Rome Statute of the ICC, as an accessory to four counts of war crimes (murder, attack against a civilian population, destruction of enemy property, and pillaging) and one count of crimes against humanity (murder). The chamber acquitted him of other charges of crimes against humanity (rape and sexual slavery) and war crimes (using children under the age of 15 to participate in hostilities), while deciding that these crimes had in fact been committed. On May 23, 2014, Trial Chamber II sentenced Katanga to 12 years in prison. The decision on reparations has yet to be issued. While the prosecution and defense had initially appealed the judgment against Katanga, they both withdrew their appeals on June 25, 2014, thus rendering the decision final pursuant to Article 74 of the Trial Chamber.

This document seeks to provide an overview of the proceedings against Katanga and Ngudjolo before the ICC.

The Evidence

Katanga and Ngudjolo were key actors in the conflicts that took place in Ituri over the control of the territory and the resources as alleged leaders of the FRPI and FNI, respectively. Combatants, mostly belonging to the Lendu and Ngiti ethnic groups, joined the FRPI and FNI to fight the Union of Congolese Patriots (Union des Patriotes Congolais - UPC), led by Thomas Lubanga, whose combatants were mostly of Hema ethnicity.

Ngudjolo was initially arrested by Congolese authorities, with the assistance of the UN Mission in Democratic Republic of Congo (MONUC), in October 2003 in Bunia for war crimes committed in Tchomia in May 2003, among other charges. He was later transferred to a prison in Kinshasa. Ngudjolo subsequently helped to create another armed movement, the Congolese Revolutionary Movement (Mouvement Révolutionnaire Congolais - MRC).

The Katanga and Ngudjolo cases before the ICC concern an attack on February 24, 2003, on the village of Bogoro, which is considered to be strategic in ensuring the control of wealth in Ituri. The purpose of the attack was to secure the route to Bunia to facilitate, among other objectives, the transport of goods. The ICC prosecutor decided in this case to pursue a range of different crimes committed in the context of one single event, rather than charging fewer crimes committed during several events over a longer period of time, as he had in the Lubanga case.

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The Procedure

The Preliminary Phase

Investigation by the Prosecutor

In a letter dated March 2004, the DRC government referred the situation in the DRC to the ICC to determine if one or more persons should be accused of crimes falling within the jurisdiction of the court. In the letter, the DRC government committed itself to cooperating with the ICC.

On June 23, 2004, ICC Prosecutor Luis Moreno-Ocampo opened the first official investigation into the most serious crimes presumed to have been committed in the territory of the DRC as of July 1, 2002. The prosecutor initially focused on crimes committed in the Ituri district (Orientale Province). Shortly after, on June 25, 2007, the prosecution requested arrest warrants for Katanga¹ and Ngudjolo.²

Arrest Warrants

A sealed arrest warrant was issued against Katanga on July 2, 2007, and unsealed on October 18, 2007.³ Katanga was transferred to the ICC detention center in The Hague on October 17, 2007. Similarly, a sealed arrest warrant was issued against Ngudjolo on July 7, 2007, and unsealed on February 7, 2008.⁴

On March 10, 2008, Pre-Trial Chamber I decided to join the two cases.⁵

The prosecutor's strategy in these cases was subject to similar criticism as that of the Lubanga case regarding the narrow scope of the charges. While the charges brought forward by the prosecutor concerned only a single attack, the groups presumed to be under the leadership of Katanga and Ngudjolo had allegedly committed multiple attacks, which were largely documented by human rights organizations and United Nations agencies.

Confirmation of Charges⁶

On September 26, 2008, Pre-Trial Chamber I confirmed the charges against the two defendants, stating that, pursuant to Article 25(3)(a), there were sufficient grounds to believe that during the attack against the village of Bogoro on February 24, 2003, Katanga and Ngudjolo committed as principal perpetrators seven war crimes (willful killing, attack against a civilian population or against individual civilians not taking part in the hostilities, destruction of property, pillaging, rape, sexual slavery, and use of children under the age of 15 to participate actively in hostilities) and three crimes against humanity (murder, rape, and sexual slavery). Notably, for the first time, the chamber applied the mode of liability of indirect co-perpetration, which it considered enshrined in Article 25(3)(a).

The Trial

The trial began on November 24, 2009. From Ngudjolo's transfer to the ICC to the final judgment, the proceedings against him lasted five years and five months; while the proceedings against Katanga lasted six years and five months. Like the Lubanga trial, the volume of the evidence presented and the decisions issued as well as the intensity of the litigation were significant: Trial Chamber II issued 409 written decisions and orders, and 168 oral decisions. The parties and participants filed more than 3,300 motions before the chamber. The presentation of the evidence began on November 25, 2009. On January 18–19, 2012, the

1 ICC-01/04-348-US-Exp and ICC-01/04-350-US-Exp.

2 Ibid.

3 ICC-01/04-01/07-1.

4 ICC-01/04-01/07-260.

5 ICC-01/04-01/07-257.

6 ICC-01/04-01/07-717-Corr.

chamber conducted an *inter partes* site visit to the DRC, accompanied by the parties and participants and representatives of the Registry of the Court. The presentation of evidence concluded on February 7, 2012. The chamber sat for a total of 265 days. In the course of the proceedings, the chamber heard 54 witnesses: the prosecutor called 24; Katanga's defense called 17; Ngudjolo's defense called 11; and the legal representative of the principal group of victims called 2 victims, who were heard on February 21–25, 2011. The chamber itself called 2 witnesses. The last hearings were held on May 15–23, 2012, with the parties and participants delivering their closing statements. The prosecution tendered 132 pieces of evidence; Katanga's defense tendered 240; Ngudjolo's defense 132; and the Chamber tendered 5 and authorized the legal representatives of the victims to produce 5 pieces—representing in total 643 pieces of evidence.⁷



First appearance of Germain Katanga before the International Criminal Court, The Hague, July 10, 2009.
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It should be noted that Katanga requested that the proceedings be translated into Lingala, arguing that it was the language that he understood best. Nevertheless, when he chose to testify in French, it was apparent that he had perfect command of this language. As a result the chamber ordered the termination of translations into Lingala. The Registry complained about the amount of wasted resources.

Severance of Katanga and Ngudjolo Cases

On November 21, 2012, six months after the oral proceedings had concluded, the Trial Chamber severed Ngudjolo's case from Katanga's and notified the parties and participants that the mode of liability under which Katanga initially stood charged, namely as an indirect co-perpetrator—and principal—pursuant to Article 25(3)(a), may be subject to a legal requalification pursuant to Regulation 55 of the Regulations of the Court, so as to ultimately consider his responsibility as an accessory pursuant to Article 25(3)(d).⁸

Judgment Pursuant to Article 74 Acquitting Ngudjolo

On December 18, 2012, Trial Chamber II acquitted Ngudjolo of all charges.⁹ The chamber found that the evidence presented before it was insufficient to establish Ngudjolo's respon-

⁷ Information contained in the verdict: ICC-01/04-02/12-3.

⁸ ICC-BD/01-02-07.

⁹ ICC-01/04-02/12-3.

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sibility as head of the Lendu combatants that participated in the attack against Bogoro on February 24, 2003. The chamber indicated that even if “it cannot rule out the possibility that [Ngudjolo] led the Lendu combatants . . . during the Bunia operation,”¹⁰ the evidence provided by the prosecution was insufficient to prove this beyond a reasonable doubt.



Trial Chamber II of the International Criminal Court acquits Mathieu Ngudjolo, The Hague, December 18, 2012. © ICC-CPI

The chamber primarily questioned the paucity of evidence produced by the prosecutor, particularly the credibility of its three principal witnesses. It also criticized the quality of the prosecutor’s investigations and the delays of the prosecutor, who for over three years did not visit the site to assess the geographic context or permit verifications on certain points mentioned by victims and witnesses, nor had the office requested certain relevant pieces of evidence.

The prosecution has appealed the judgment. The victims have been authorized to participate in the appeals process.

Judgment Pursuant to Article 74 Convicting Katanga

In a judgment rendered by Trial Chamber II on March 7, 2014, the majority of the chamber, with Judge Van den Wyngaert dissenting, found that Katanga was guilty as an accomplice, pursuant to Article 25(3)(d)(ii) of the Rome Statute, of four counts of war crimes (murder, attack against a civilian population, destruction of enemy property, and pillaging) and one count of crimes against humanity (murder) committed on February 24, 2003, during the attack on Bogoro.¹¹

Presentation of Evidence

The majority found that the Ngiti militia of the Walendu-Bindi *collectivité* devised a plan to not only eliminate UPC military elements from Bogoro, but also to “erase” the Hema civil population. This plan was part of a larger plan to retake the territory. Accordingly, Bogoro was attacked very early in the morning of February 24 by a large number of organized attackers who encircled the village and pursued and killed any person who fled. They tracked and killed inhabitants

¹⁰ Ibid., para. 501.

¹¹ ICC-01/04-01/07-3436.

in their homes and places where they sought refuge. Even after the attack, they continued to pursue, kill, and rape persons who were hiding in the bush. The majority found the ethnic dimension to be essential to the attack, as the Ngiti combatants considered the majority of Hema inhabitants of Bogoro to be enemies who had to be eliminated.

The majority indicated that at least 33 people were killed (including 13 children and a significant number of women and elderly) and noted that there was a much larger number of victims, but that the evidence did not permit their identification. According to the majority, the war crimes of attacking the civilian population, murder, destruction of property, and pillaging were thus established as well as the crime against humanity of murder.

Katanga's Responsibility: Acquittal as Principal (Indirect Co-perpetrator) Under Article 25(3)(a) and Conviction as Accomplice Pursuant to Article 25(3)(d)(ii)

The majority examined the functions and role of Katanga in the Ngiti militia of the Walendu-Bindi *collectivité*, and noted that he held a position of authority and had the title of commander and leader of Aveba, "president" of the Ngiti militia, and leader of the combatants. The majority also found that he had participated in the reception and storage of arms and munitions and had made decisions regarding their distribution. Nevertheless, the majority indicated that the absence of a centralized and effective chain of command within the *collectivité* did not permit the conclusion that the Ngiti militia constituted an organized apparatus of power in February 2003 or that Katanga exercised control over the militia at that time, both requirements pursuant to Article 25(3)(a), which would have made him responsible for the commission of the crimes as a principal (as indirect co-perpetrator).

The majority further stated that in spite of Katanga's title as president, it had not been proven that he took on the functions of a hierarchical superior in all areas, with the power to give orders, ensure their execution, or impose disciplinary sanctions in the case of their noncompliance.

As a result, in the judgment the majority changed the legal qualification of the facts pursuant to Regulation 55 of the Regulations of the Court, as it had announced and found Katanga responsible as an accomplice on the basis of Article 25(3)(d)(ii). This provision defines an accomplice as a person who "in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose [. . .] in the knowledge of the intention of the group to commit the crime." The majority found that Katanga had knowledge, since December 2002, of the fact that the Ngiti militia of the Walendu-Bindi *collectivité* had the intention to commit the crimes that took place on February 24, 2003, in Bogoro, which were part of the group's common purpose. Katanga's contribution to the crimes was significant and intentional and in full knowledge of the militia's intention. The majority identified as Katanga's significant contributions, inter alia, his role in the alliances that the Ngiti militia forged, which reinforced the militia's capacity to strike, as well as his role as intermediary between the providers of weapons and the material authors of the crimes.

The majority of the chamber, against the dissenting opinion of Judge Van den Wyngaert, stated that Katanga had time to prepare his defense on the requalification of charges, which had been announced as a possibility early on, and that he had been judged within a reasonable amount of time, without excessive delays. Also against the dissenting opinion of the same judge, the majority indicated that the new legal qualification did not exceed the facts and circumstances described in the charges.

Acquittal for Crimes Against Humanity of Rape and Sexual Slavery and War Crime of Using Child Soldiers to Actively Participate in Hostilities

The chamber found that crimes of rape and sexual slavery had been committed by Ngiti combatants on February 24, 2003, and referred to the testimony of three victims who were kidnapped and brought to the attackers' camp to be raped and sexually enslaved for several

weeks. Nevertheless, the chamber found that “although the acts of rape and enslavement formed an integral part of the militia’s plan to attack the predominantly Hema civilian population of Bogoro, the Chamber cannot, however, conclude . . . that the criminal purpose pursued on February 24, 2003, necessarily encompassed the commission of the specific crimes [of rape and sexual slavery]. Accordingly, and for all of these reasons the Chamber cannot find that rape and sexual slavery fell within the common purpose.”¹² On this basis, the chamber acquitted Katanga of these crimes.

The chamber also indicated that child soldiers were present in the ranks of the Ngiti militia. Nevertheless, as Katanga had been charged as a direct perpetrator pursuant to Article 25(3) (a) (but not as an indirect co-perpetrator) for those crimes, a requalification of the facts as an accomplice pursuant to Article 25(3)(d) would thus exceed the facts and circumstances described in the charges. Consequently, Katanga was acquitted as a direct perpetrator of this war crime.

Sentencing Decision pursuant to Article 76

On May 23, 2014, the majority of Trial Chamber II, with Judge Van Wyngert dissenting, sentenced Katanga to 12 years’ imprisonment. The majority noted that the crimes committed in Bogoro were of an unspeakable gravity, not only because of the conditions in which the attack took place, but also because of the clearly discriminatory fashion in which it was conducted against Bogoro’s Hema population.

In assessing the form and degree of Katanga’s participation in the crimes, the majority noted that he held a position of influence and authority. It found not only that his significant contributions were of some months’ duration but that they were of such a nature that they materially influenced the manner in which the crimes were prepared and carried out. Without Katanga’s action in negotiating the strategic military alliance and providing arms and ammunition to ensure the military superiority of the Ngiti combatants, the attack would not have been able to take place in the way that it did.

The majority, however, did not find that any aggravating factors were established; in particular, it rejected the prosecution’s argument that Katanga abused his authority. In contrast, the majority considered Katanga’s contributions to demobilisation and disarmament as mitigating factors, and his personal circumstances—although it was observed that the latter could not be given much weight given the nature of the crimes. The majority also noted his demeanor in testifying and at the sentencing hearing, but appeared to give this no weight.

Participation of Victims in the Proceedings

A total of 366 victims participated in proceedings. The Katanga and Ngudjolo case confirms the important role of victims in trials before the ICC. In the judgment convicting Katanga, the chamber noted and praised the quality of the contribution of the victims and their legal representatives in the pursuit of truth, including by taking different positions than those of the prosecution.

Discontinuance of the Prosecution and Defense Appeals Against the Article 74 Judgment Convicting Katanga

On June 26, 2014, the prosecution¹³ and defense¹⁴ both withdrew their appeals against the Article 74 Judgment convicting Katanga. The prosecution noted Katanga’s acceptance of the conclusions reached in the Article 74 Judgment as to his role and conduct, the sentence imposed, as well as Katanga’s expression of sincere regret to all those who suffered as a result of his conduct, including the victims of Bogoro. As a result of the discontinua-

¹² ICC-01/04-01/07-3436, para.1664 (emphasis added).

¹³ ICC-01/04-01/07-3484.

¹⁴ Ibid., para. 44.

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tion, the judgment of Trial Chamber II dated March 7, 2014, convicting Katanga became the first final judgment of the ICC. It should be noted that the victims who participated in the appeal proceedings expressed disappointment about the withdrawal of the prosecution's appeal.¹⁵

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¹⁵ ICC-01/04-01/07-3499 A2 and ICC-01/04-01/07-3501 A2.

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