

Partial Conviction of Katanga by ICC
Acquittals for Sexual Violence and Use of Child Soldiers

The Prosecutor vs. Germain Katanga

7 March 2014

Today, a majority of Trial Chamber II of the International Criminal Court (ICC), convicted Germain Katanga (Katanga) as an accessory to the war crimes of directing an attack against a civilian population, pillaging, and destruction of property, as well as murder as a war crime and a crime against humanity. However, the Chamber unanimously acquitted Mr Katanga as an accessory to rape and sexual slavery as war crimes and crimes against humanity. He was also acquitted of the war crime of using child soldiers. Katanga was convicted as the commander of the Ituri-based Ngiti militia from Walendu-Bindi, which at the time of the alleged crimes was also known as the *Force de résistance patriotique en Ituri* (FRPI).

“Mr Katanga’s acquittal on charges of rape and sexual slavery is a devastating result for the victims/survivors of the Bogoro attack, as well as other victims of these crimes committed by the FRPI within the ethnically-driven conflict in Ituri,” said Brigid Inder, the Executive Director of the Women’s Initiatives for Gender Justice.

“From the early stages of this case, there were indications that some of the judges considered the evidence linking the charges of rape and sexual slavery to Mr Katanga to be insufficient. In the confirmation of charges decision, the sexual violence charges were the only crimes confirmed by a majority of judges and not by the full bench. This was an early and important indication that the evidence underpinning Mr Katanga’s role in the commission of rape and sexual slavery would need to be reinforced at trial,” said Ms Inder.

“It appears the majority of the Trial Chamber found the three witnesses who testified in relation to the charges of sexual violence credible and stated that they believed rape and sexual slavery had been committed by Ngiti combatants on the day of the Bogoro attack. The Chamber recounted in its summary that all three witnesses were raped after being dragged from their hiding places in the bush or their homes. However, the Chamber unanimously found Mr Katanga not guilty of contributing to the acts of sexual violence as they did not believe these crimes formed part of the common purpose of the attack, unlike the crimes of directing an attack against a civilian population, pillage, murder and destruction of property,” said Ms Inder.

“The reasons for the Trial Chamber declining to convict Mr Katanga of these charges were not fully explained in the summary of the decision delivered today, and until we have a chance to review the entire judgment, we are unable to assess how and why the judges reached this conclusion,” Ms Inder said.

“However, it is possible that a higher standard of evidence was expected in relation to sexual violence, including requiring a more deliberate intention to commit these crimes in the Bogoro attack, which they did not require in convicting Mr Katanga for the crimes of directing an attack against a civilian population, pillaging, murder and destruction of property. This judgment on face value appears to be inherently inconsistent. Mr Katanga was convicted on the basis of his contribution to the Bogoro attack. The majority of the judges concluded that Mr Katanga’s contribution reinforced the militia’s capacity to proceed with the attack and allowed the attack to be implemented. The Trial Chamber therefore found he contributed to all of the crimes associated with the attack as charged by the Prosecution, except for the acts of sexual violence,” said Inder.



We are extremely disappointed that the judges appeared to expect a different level of proof regarding Mr Katanga's contribution to these crimes, than they required to convict him on the basis of his contribution to the crimes of directing an attack against a civilian population, pillaging, murder, and destruction of property, which were committed at the same time as women in the village were being raped," said Ms Inder.

"This creates a challenge for the Prosecution to argue more persuasively in support of individual criminal responsibility in relation to acts of rape, taking into account the prevailing approach to these crimes and the associated evidence required by the ICC judges," Ms Inder said.

"We encourage the ICC Prosecution and the DRC authorities to continue seeking accountability for perpetrators of these crimes, and we expect that the Prosecution will appeal this acquittal" said Ms Inder.

The decision is the third trial judgement by the ICC, following the conviction of Thomas Lubanga Dyilo (Lubanga) in March 2012 and the acquittal of Mathieu Ngudjolo Chui (Ngudjolo) in December 2012. Each of these cases arose from the Situation in the Democratic Republic of Congo (DRC).

"In the Katanga case, the majority of the Trial Chamber took the unprecedented step of using Regulation 55 to recharacterise the mode of liability under which Katanga was charged," said Ms Inder. "Katanga was initially charged under Article 25(3)(a) as a co-perpetrator for the crime of using child soldiers and as an indirect co-perpetrator for all other crimes. However, the majority of the Chamber changed his mode of liability to common purpose liability under Article 25(3)(d)(ii) for all crimes apart from using child soldiers. The Appeals Chamber affirmed that this change was permissible, although there were dissenting opinions in both the Trial and Appeals Chambers," said Ms Inder.

"Together with our partners in Eastern DRC, we now look to the ICC to deliver a sentence that reflects the seriousness of the crimes for which Germain Katanga was convicted and includes the consideration of any aggravating factors and the harm caused to victims," Ms Inder said.

"It is too early to be able to digest the entire judgement and the dissenting opinion. We will carefully read and review the full text and publish our analysis in due course," said Ms Inder.

Case background

Katanga was transferred to ICC custody on 18 October 2007 from the central prison in Makala in the DRC, where he had been detained since 9 March 2007. On 10 March 2008, Pre-Trial Chamber I joined the cases against Katanga and Ngudjolo.¹ During the trial, the case centred on their alleged indirect co-perpetration in orchestrating an attack on the village of Bogoro in the region of Ituri on 24 February 2003 as commanders of the Ngiti combatants from Walendu-Bindi and the Lendu combatants from Bedu-Ezekere, respectively.² Three female witnesses, who were victims/survivors of sexual violence, testified before the Court in support of the charges of rape and sexual slavery, and

¹ ICC-01/04-01/07-257. On 30 September 2008, Pre-Trial Chamber I confirmed charges against both Katanga and Ngudjolo as indirect co-perpetrators for six counts of war crimes, including: rape, sexual slavery, directing an attack against a civilian population, wilful killings, destruction of property and pillaging. They were additionally charged with three counts of crimes against humanity, including: rape, sexual slavery and murder. They were charged as direct co-perpetrators for using children under the age of 15 to take active part in hostilities. ICC-01/04-01/07-717.

² The Prosecution had charged and the Pre-Trial Chamber had confirmed that at the time of the attack, Katanga and Ngudjolo were the alleged commanders of the *Force de résistance patriotique en Ituri* (FRPI) and the *Front de nationalistes et intégrationnistes* (FNI), respectively.



the court heard additional witness testimony about gender-based crimes.³ A total of 366 victims, of whom approximately 68% were males and 32% were females, were authorised to participate in the trial.⁴

In November 2012, during the deliberation phase at the end of the trial, a majority of Trial Chamber II severed the cases and gave notice under Regulation 55 of the Regulations of the Court⁵, Judge Van den Wyngaert dissenting, that the mode of liability under which Katanga was charged was subject to change.⁶ Following an appeal from the Defence, the Appeals Chamber, Judge Cuno Tarfusser dissenting, ruled that the use of Regulation 55 to change the mode of liability from indirect co-perpetration under Article 25(3)(a) to common purpose liability under Article 25(3)(d)(ii) was permissible.⁷

The Katanga and Ngudjolo case was the first before the Court to include charges for gender-based crimes. Katanga was acquitted of rape and sexual violence as war crimes and crimes against humanity due to the differences in the legal criteria effected by the change in the mode of liability from his role as a principal to the crimes under indirect co-perpetration to his role as an accessorial contributor to the crimes. Ngudjolo had been acquitted of all crimes, including those involving gender-based violence.⁸

Issues relating to the charges for gender-based crimes had surfaced earlier in the case. Prior to the confirmation of charges hearing, the Prosecution withdrew charges of sexual slavery, which were at that stage the only charges for gender-based crimes in the case. The Prosecution withdrew the charges due to a ruling from Pre-Trial Chamber I that the evidence of two witnesses must be excluded pending resolution of protection issues. The protection issues were later resolved and the Pre-Trial Chamber allowed the two witnesses to be included. The Prosecution then reinstated the charges of sexual slavery, together with new charges of rape and outrages upon personal dignity.⁹

In confirming the charges prior to trial, the majority of Pre-Trial Chamber I found that there was sufficient evidence to find substantial grounds to believe that Katanga and Ngudjolo were liable as indirect co-perpetrators for the charges of rape and sexual slavery.¹⁰ In a partly dissenting opinion to the Confirmation of Charges decision, Judge Anita Ušacka found that there was sufficient evidence to find substantial grounds to believe that members of the FRPI/FNI had committed rape and sexual

³ Witnesses 249, 132, 353 testified as victims/survivors of rape and sexual slavery. Witness 287 testified about being attacked, undressed, and forced to walk through town. For a detailed account of the testimony of witnesses 287, 249, 132, see *Gender Report Card 2010*, p 165-176. See also summary of the Prosecution's closing statement regarding this testimony at *Gender Report Card 2012*, p 227- 228.

⁴ Figures provided by the Victims Participation and Reparations Section (VPRS) of the Registry of the Court to the Women's Initiatives for Gender Justice by email dated 20 September 2012.

⁵ Regulation 55(1) enables the Trial Chamber to "change the legal characterisation of the facts to accord with [...] the form of participation of the accused under articles 25 and 28".

⁶ ICC-01/04-01/07-3319.

⁷ See further *Modes of Liability: A review of the International Criminal Court's current jurisprudence and practice*, Women's Initiatives for Gender Justice Expert Paper, November 2013, p 116-130.

⁸ In the Ngudjolo trial judgement, Trial Chamber II affirmed that although the crimes, including rape and sexual violence, had taken place, it could not establish beyond reasonable doubt Ngudjolo's criminal responsibility as the lead commander of the Lendu combatants from Bedu-Ezekere at the time of the Bogoro attack. ICC-01/04-02/12-3, paras 71-72, 338.

⁹ See Confirmation of Charges Hearing, Germain Katanga and Mathieu Ngudjolo Chui, June 2008, in *Making a Statement Second Edition*, Women's Initiatives for Gender Justice, February 2010. See also *Gender Report Card 2008*, p 47-48.

¹⁰ ICC-01/04-01/07-717, para 551; see also *Modes of Liability: A review of the International Criminal Court's current jurisprudence and practice*, Women's Initiatives for Gender Justice Expert Paper, November 2013, p 35-39.



slavery after the Bogoro attack, but disagreed that the Prosecution had presented sufficient evidence linking Katanga or Ngudjolo to these crimes.¹¹ The full Pre-Trial Chamber also agreed that there was not sufficient evidence to link Katanga and Ngudjolo to a charge of outrages upon personal dignity, based on militia members attacking and forcing a partly dressed woman to walk in public, and declined to confirm that charge.¹²

In 2006 and 2007, the Women's Initiatives carried out extensive documentation of gender-based crimes allegedly committed by a range of militias, including the FNI and FRPI, operating primarily in the Ituri region. As stated by Brigid Inder at the opening of the trial in November 2009,

Women we interviewed described horrific attacks, rapes, gang rapes and enslavement. Many of the women were raped in front of family members, including their children. Several we interviewed reported losing consciousness as a result of rape, and some became pregnant. Women who were pregnant prior to the rape lost their children, and many had severe physical and psychological injuries as a result of the sexual violence. Many women were attacked in their homes. Many were abducted and enslaved particularly in camps run by the FNI. Women we interviewed told us that in addition to domestic work in the camps, women were raped by militiamen and commanding officers and assigned to them as 'wives'. Those who tried to escape were killed. The FNI and FRPI attacked entire villages, where they pillaged, raped, and abducted women.¹³

At the opening of the trial, Ms Inder observed that "In some respects, this is a modest case. It is based on one incident – the attack of Bogoro village on 24 February 2003. However, the case is at least partially 'representative' of the types of attacks, types of crimes, types of violence against women, and the types of victims of the FRPI and FNI."¹⁴

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For more information about this case please see:

- *Gender Report Card 2012*, p 240-242, available at <http://www.iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2012.pdf>;
- *Gender Report Card 2011*, p 225-234, available at <http://www.iccwomen.org/documents/Gender-Report-Card-on-the-International-Criminal-Court-2011.pdf>;

¹¹ ICC-01/04-01/07-717, Partly Dissenting Opinion of Judge Anita Ušacka, paras 27-29. Judge Ušacka stated that instead of issuing the confirmation of charges decision, she would have adjourned the confirmation hearing pursuant to article 61(7)(c)(i) and requested the Prosecution to provide additional evidence on those charges.

¹² ICC-01/04-01/07-717, paras 365-377, 570-572.

¹³ Statement by the Women's Initiatives for Gender Justice on the opening of the trial against Katanga and Ngudjolo, 23 November 2009.

¹⁴ Statement by the Women's Initiatives for Gender Justice on the opening of the trial against Katanga and Ngudjolo, 23 November 2009.



- *Gender Report Card 2010*,¹⁵ p 160-178, available at http://www.iccwomen.org/news/docs/GRC10-WEB-11-10-v4_Final-version-Dec.pdf;
- *Gender Report Card 2009*, p 93-140, available at http://www.iccwomen.org/news/docs/GRC09_web-2-10.pdf;
- *Gender Report Card 2008*, p 52-91, available at http://www.iccwomen.org/news/docs/GRC08_web4-09_v3.pdf;
- For further discussion of the decisions and filings regarding the use of Regulation 55 in the Katanga case, see *Modes of Liability: A review of the International Criminal Court's current jurisprudence and practice*, Women's Initiatives for Gender Justice Expert Paper, November 2013, p 116- 130, available at <http://www.iccwomen.org/documents/Modes-of-Liability.pdf>;
- Read more about the trial judgement acquitting Mathieu Ngudjolo Chui in the Women's Initiatives' series of Special Issues of the Legal Eye on the ICC. First Special Issue available at: <http://www.iccwomen.org/news/docs/WI-LegalEye2-13-FULL/LegalEye2-13.html>; Second Special Issue available at: <http://www.iccwomen.org/news/docs/WI-LegalEye4-13-FULL/LegalEye4-13.html>; Third Special Issue available at: <http://www.iccwomen.org/news/docs/WI-LegalEye1-14/LegalEye1-14.html>
- Read the statement by the Women's Initiatives for Gender Justice on the opening of the trial against Katanga and Ngudjolo, 23 November 2009, available at <http://www.iccwomen.org/news/docs/Katanga-Statement.pdf>

¹⁵ For a description of the Prosecution's opening statements in this case, see *Gender Report Card 2010*, p 161, available at http://www.iccwomen.org/news/docs/GRC10-WEB-11-10-v4_Final-version-Dec.pdf.

