



## ***PROCEEDINGS BEFORE TRIAL IN THE CASE OF THE PROSECUTOR V. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI AT THE INTERNATIONAL CRIMINAL COURT***

This paper analyzes two major steps of the proceedings leading up the trial of Germain Katanga and Mathieu Ngudjolo Chui at the International Criminal Court (ICC), specifically the conformation of charges and an admissibility challenge. In order to move forward to trial, the Pre-Trial Chamber must examine the Prosecutor's evidence and confirm the charges. In addition, this Chamber handles preliminary questions concerning witnesses, evidence and motions, such as the motions to the admissibility of a case or the jurisdiction of the Court. This ensures that the proceedings at the trial stage will be as efficient and fair as the Rome Statute requires.

Accordingly, this paper first explains the decision on the confirmation of charges in the case *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*. It also examines the decision on the motion to challenge the admissibility of the case submitted by the Defense of Germain Katanga. It is the first time that such a motion has been made at the ICC. Since the Court has resolved these issues and confirmed the charges, the trial is scheduled to begin on November 24, 2009.

### Background

In March 2004, the government of Democratic Republic of Congo (DRC) referred the situation on its territory to the International Criminal Court (ICC). It thereby requested the Court to investigate serious crimes committed in its territory. Three months later, the Office of the Prosecutor (OTP) opened its investigation into crimes committed in the DRC since July 1, 2002.

Since late 1999 there has been an ongoing armed conflict in the Ituri region of the DRC over the allocation of land and the appropriation of its natural resources. There are three major ethnic groups involved in the conflict in Ituri: the Hema, the Lendu, and the Ngiti. These ethnic groups formed militias as part of the armed response to the conflict. The Hema formed the Union des Patriotes Congolais (UPC) under Thomas Lubanga Dyilo, now on trial at the ICC on child soldier charges. The Ngiti and some Lendu formed the Force de Résistance Patriotique en Ituri (FRPI). In 2002, Germain Katanga became the top commander of all FRPI forces. Other Lendu formed the Front des Nationalistes et Intégrationnistes (FNI) led by Mathieu Ngudjolo Chui. The FNI and the FRPI formed an alliance, known as the FNI/FRPI, in early 2003.

Despite a peace accord which officially ended the DRC conflict in July 2003, violence in Ituri continues. Human rights groups and the United Nations report continued forced displacement of people, sexual violence, killings and continued recruitment and use of child soldiers.

In June 2007, the Prosecutor submitted two separate arrest warrant applications, one for Germain Katanga and another for Mathieu Ngudjolo Chui. In these applications, the Prosecution claimed that Katanga and Ngudjolo were responsible for war crimes and crimes against humanity committed during and in the aftermath of an attack on the village of Bogoro, in the Congolese district of Ituri. In July 2007, Pre-Trial Chamber I issued two separate sealed warrants of arrest for Germain Katanga and Mathieu Ngudjolo Chui. The DRC authorities arrested and surrendered Katanga to the Court in October 2007 and Ngudjolo in February 2008.





On March 10, 2008, ICC judges decided to join the cases of Katanga and Ngudjolo because of the suspects' alleged joint criminal participation in the attack on Bogoro. Both were granted the same rights as if they were being tried individually.

## The Confirmation of Charges Hearing and Decision

Pre-Trial Chamber I held a confirmation of charges hearing for Katanga and Ngudjolo between June 27, 2008 and July 16, 2008. On September 30, 2008 the Chamber issued its decision.

In its decision, Pre-Trial Chamber I established that under Article 61(7) of the Rome Statute, the confirmation of charges hearing has a limited scope and purpose. Thus, the Prosecution only needs to present evidence that provides substantial grounds to believe that the suspects could have committed the alleged crimes. In addition, the Chamber indicated that in order to reach its decision it had assessed the Prosecution's evidence as a whole, including all the evidence in the case file submitted by the Prosecutor and not only the evidence specifically discussed during the hearing.

The Chamber also analyzed the nature of the ongoing armed conflict in the DRC. This was necessary because war crimes under the Rome Statute must be committed in the context of either an international or non-international conflict. It found that the crimes committed in Bogoro were related to the armed conflict taking place in the Ituri district. The Court determined that this conflict was of an international nature because of the organizational character and the nature of the parties involved. First, the Prosecution's evidence demonstrated that the involved armed groups were organized, acted under a responsible command, had an operative internal disciplinary system and had the capacity to plan and carry out concerted military operations. In addition, the involvement of the Ugandan People's Defence Force (UPDF) – as a main supplier of weapons and munitions and providing its assistance in military operations – rendered the conflict international. However, the Chamber considered that the Prosecution had not provided enough evidence to show that the governments of Rwanda and the DRC had intervened.

### *Crimes*

Pre-Trial Chamber I decided that the Prosecution had provided sufficient evidence to establish that there were substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui were responsible for six counts of war crimes and two of crimes against humanity.

First, the Chamber considered that the Prosecution's evidence provided substantial grounds to believe that Katanga and Ngudjolo were responsible for the war crime of using children under the age of fifteen to take active part in the hostilities. The Court explained that the perpetrators can commit these crimes against victims – child soldiers – who are on the same side of the conflict as the perpetrators. The Prosecution's evidence showed that Katanga's and Ngudjolo's militias trained children in military camps and that they provided small arms to them at the end of their training. It also showed that these child soldiers had to parade in presence of Katanga and Ngudjolo. Moreover, the evidence submitted by the Prosecutor proved that the FRPI and the FNI consistently used children in the hostilities and both Katanga and Ngudjolo used them as personal escorts or bodyguards. According to the Chamber, Katanga and Ngudjolo possessed the required intent to commit the crime because they knew or should have known that some of their soldiers were under 15.





The Chamber also confirmed the war crime of directing an attack against the civilian population of Bogoro, which is primarily composed of the Hema ethnic group. The evidence of the Prosecutor showed that, although there was an UPC camp in the center of the village, the attack was planned, executed and directed principally against the entire population, including individuals not active in the hostilities. The Court reached this decision because the Prosecution's evidence was that before the attack FRPI and FNI militias allegedly sang songs indicating they should kill the Hema people. Also, they allegedly blocked the roads to or from the village in order to kill anyone who tried to flee; attacked unarmed civilians, including children and women; and set on fire homes with people inside them. The evidence served to show that the purpose of the attack was to "wipe out" the village of Bogoro in order to secure control of the road to Bunia, an important trading route, for the Lendus and Ngitis.

In addition, the Chamber deemed that there was enough evidence to demonstrate that Katanga and Ngudjolo committed the war crime of willful killing. The Court considered that they knew that the attack on Bogoro would include the killings of unarmed persons who could not be confused with combatants. Furthermore, the Prosecution proved that the FRPI and FNI forces continued to attack the civilians continued even after these militias took over the UPC camp, looking for those civilians who had hidden in or around the village. As a result, approximately 200 civilians were killed. Pre-Trial Chamber I ruled that the killings committed in the attack on Bogoro also qualified as the crime against humanity of murder under the Rome Statute.

The Chamber also found that the Prosecution's evidence indicated that during and after the attack the FRPI and FNI militias destroyed property, a war crime, including houses and main buildings in Bogoro, such as the trade center and the high school. The Chamber concluded that this destruction was not justified by any military need and the fact that they were schools and stores demonstrates that the combatants were aware of the status of the property. Accordingly, Pre-Trial Chamber I confirmed the war crime of destruction of property.

The Chamber also found that FRPI and FNI forces appropriated the belongings of the Hema people without their consent, taking furniture and other goods, as well as vehicles, back to their military camps. Thus, the Chamber confirmed the war crime of pillaging.

Finally, based on the witnesses' testimonies that the Prosecutor submitted, the Majority of the Chamber found that Katanga and Ngudjolo were responsible for the war crime and crime against humanity of sexual slavery and rape. According to the Prosecution's application, Hema women were regularly abducted and imprisoned in FRPI and FNI military camps where they were raped and forced to marry, as well as used for domestic servitude or other forced labor which allegedly involved compulsory sexual activity. The Prosecution provided evidence that established substantial grounds to believe that FRPI and FNI combatants intended to deprive Hema women from their liberty and force them to engage in sexual acts.

However, Pre-Trial Chamber I did not confirm the charges of committing other inhumane acts to intentionally cause great suffering or serious injury to body or to mental or to physical health. The Majority considered that the Prosecution had failed to provide new evidence, apart from the evidence submitted for the charge of willful killing. The Majority further explained that each of these charges – willful killing and other inhumane acts – have a specific intentional element that the OTP has to prove separately. Accordingly, they denied the Prosecution's argument that intent to kill includes intent to commit other inhumane acts. However, Judge





Ušacka dissented from the Majority's decision because she concluded that the evidence showed that the FRPI and FNI members deliberately and indiscriminately inflicted serious injuries upon civilians, notably as a result of gunfire or machete blows. Thus, Judge Ušacka considered that the Chamber should confirm the separate charge of inflicting inhuman treatment and other outrages on personal dignity, in addition to murder.

### *Challenges of the Defense to the evidence of the Prosecution*

During the confirmation of charges hearing, Pre-Trial Chamber I also decided on the challenges made by the Defense teams to the Prosecution's evidence. The Defense for Mathieu Ngudjolo, represented by Mr. Jean-Pierre Kilenda and Ms. Maryse Alié, challenged all of the evidence presented by the Prosecution as a whole. The Chamber denied this challenge because under Article 69(4) of the Rome Statute it has to analyze every item of evidence separately and cannot deem all the evidence inadmissible as a whole. Mr. Kilenda also claimed that the Defense had dropped some evidence because it considered that it was not related to the case and the Prosecution had used it. The Chamber decided that this evidence provided a better understanding of the context in which the conduct took place and, thus, that it was admissible.

In addition, the Defense for Ngudjolo argued that the Prosecution had maintained contacts with different witnesses prior to their formal interview and, thus, this evidence should be considered inadmissible. Yet, the Chamber also denied this challenge because the OTP had disclosed the notes from these prior contacts to both Defense teams. Furthermore, the Court decided that the Prosecution duly informed Defense counsel that it was using evidence from witnesses who were simultaneously suspects. Accordingly, the Court admitted this evidence. Pre-Trial Chamber I also explained that the OTP is entitled to relocate witnesses under exceptional circumstances, such as the existence of a risk to the security of witnesses. The Chamber ruled that this does not render the Prosecution's evidence unreliable and, thus, inadmissible.

The Defense of Germain Katanga, represented by Mr. David Hooper and Ms. Caroline Buisman, claimed that the Prosecution had used as evidence the court records for a hearing held in the DRC in which Katanga was not represented by counsel. The DRC laws follow the jurisprudence of the European Court of Human Rights that establishes that the presence of a defense counsel at the preliminary stages of the proceedings is not mandatory and, thus, do not infringe the requirements of a fair trial. Therefore, the Chamber considered that this evidence was admissible for the confirmation of charges.

Both Defense teams challenged the admissibility of evidence collected from different witnesses for different reasons. On the admissibility of evidence obtained from minors, the Chamber ruled that there is no obligation under the Rome Statute to obtain the guardian's consent. The Chamber also decided that the death of a witness did not render the evidence inadmissible; even if there were some inconsistencies and it was based on hearsay, the Chamber found that the evidence in question was credible and reliable. Concerning the statements by anonymous witnesses and some photographs, the Chamber decided that they were admissible because there was other evidence in the case file that supported these statements and photographs.

Finally, Pre-Trial Chamber I did not admit into evidence a video identifying the suspects because it was not translated into one of the working languages of the Court. In addition, the Chamber agreed with the Defense that victims' applications were not to be considered as evidence.





## *Criminal responsibility*

In its Amended Charging Document, the OTP argued two alternative theories of criminal responsibility. It alleged that Katanga and Ngudjolo were co-perpetrators acting together in the attack on the Bogoro village as established by Article 25(3)(a) of the Rome Statute. As an alternative, the Prosecutor proposed that the Chamber consider that Katanga and Ngudjolo were accessories in the commission of the crimes as established by Article 25(3)(b). The Chamber found that sufficient evidence was submitted to determine that Katanga and Ngudjolo had jointly committed war crimes and crimes against humanity as principals in the attack on Bogoro.

The Court explained that a perpetrator can commit crimes individually, jointly with others or through others. In the present case, the judges found sufficient evidence that Katanga and Ngudjolo had direct responsibility for the use of children under the age of 15 in hostilities, and had committed the rest of the crimes through their respective organizations, the FRPI and the FNI. The evidence showed that the defendants had control over their respective organizations because they were their commanders and had the ability to discipline and jail their subordinates. Furthermore, the combatants automatically complied with their orders because the organizations were hierarchically organized, there were many subordinates and there was an ethnic allegiance between the combatants, especially young ones, and their leaders.

Pre-Trial Chamber I found that the Prosecution had submitted sufficient evidence to establish that Katanga and Ngudjolo had a common plan to “wipe out” Bogoro and agreed upon the use of children to actively participate in hostilities. First, the Prosecution alleged that there are traditional links between the Lendu and Ngiti ethnic groups, which Katanga and Ngudjolo represent. Also, the Prosecution claimed that Katanga and Ngudjolo knew each other and had worked together since the creation of the two militias in 2002. In addition, and more importantly, they allegedly met in different military camps before the attack on Bogoro and put in writing the final plan that was then distributed to other commanders. Moreover, some witnesses testified that they saw Katanga before the attack in the surroundings and others testified that during the attack Ngudjolo was communicating with his soldiers and giving them orders by telephone. Further, Katanga and Ngudjolo allegedly met after the attack on a military camp and celebrated their success with other commanders. Neither of them took any punitive action against those who had allegedly committed crimes.

Although the Majority of judges considered there was not sufficient evidence to establish a plan to specifically pillage the village and to rape and force the Hema into sexual slavery, they did find that Katanga and Ngudjolo knew that the implementation of their common plan would inevitably result in the commission of these crimes. However, in a dissenting decision, Judge Anita Ušacka was not convinced that the Prosecutor had provided direct evidence to establish that Katanga and Ngudjolo directly ordered, suggested or induced members of the FNI/FRPI to commit rape or sexual slavery. She also considered that the Prosecutor had not presented evidence proving that the suspects agreed that these crimes would be committed during or after the attack on Bogoro.

In sum, the Court found that the crimes would not have been committed without the coordinated essential contribution by each co-perpetrator. Thus, the Court decided that Katanga and Ngudjolo had direct responsibility for the implementation of the plan of attack and played an overall coordinating role in it. Therefore, for the purpose of confirming the charges, Pre-Trial Chamber I found that Katanga and Ngudjolo were criminally responsible as co-perpetrators for war crimes and crimes against humanity committed in the attack on Bogoro in February, 2003.





## Trial Chamber II's Decision on the Defense's Challenge to the Admissibility of the Case

Following the confirmation of charges decision, on March 11, 2009 the Defense of Germain Katanga filed an application challenging the admissibility of the case. Cases are generally admissible unless the suspect or defendant has already been investigated or tried, or will be, or if the alleged crimes are not sufficiently grave. On June 12, 2009, Trial Chamber II dismissed the challenge to admissibility raised by the Defense.

Under Article 19(2) of the Rome Statute, an accused can make challenges to the admissibility of a case. During a hearing on the status of the proceedings held on November 28, 2008, the Defense for Katanga claimed that the case was inadmissible. Article 17(1)(a) establishes one of the grounds for inadmissibility: when it is being investigated or prosecuted by a State that has jurisdiction over it. Thus, the Defense argued that there had already been legal proceedings brought against Katanga in the courts of the DRC for similar charges as the ones claimed by the Prosecution at the ICC. However, the Prosecutor argued that the conditions of complementarity require that the national proceedings and those at the ICC be for the same criminal conduct and not for similar conduct, as asserted by the Defense.

In addition, the Defense indicated that Pre-Trial Chamber I did not examine whether the DRC was unable or unwilling to prosecute or investigate because the DRC authorities referred the case to the Court. Further, the Defense maintained that the self-referral of a case to the Court does not render it automatically admissible. On the other hand, the Prosecution indicated that the Pre-Trial Chamber had not reviewed this issue because at the time of the events, the President of the DRC stated in a letter to the Court that the DRC authorities were incapable of conducting judicial proceedings.

In its decision of June 12, Trial Chamber II examined three issues: first, the admissibility of the challenge; second, whether there was a defect in the arrest warrant; and, finally, the willingness of the DRC authorities to try Germain Katanga.

Under Article 19(3) of the Rome Statute states that, subject to objections, a challenge to the admissibility of a case has to take place before or at the start of the proceedings. Accordingly, Trial Chamber II determined that the parties can challenge the admissibility of a case on three different occasions during the proceedings: first, until the filing of the confirmation of charges decision with the Registrar, though governments must make such challenges as early as possible; second, until the constitution of the Trial Chamber, based on the principle of complementarity, meaning that the suspect's conduct has been dealt with, or will be, by a domestic court; or third, after the constitution of this Trial Chamber, only under exceptional circumstances and with the authorization of the Trial Chamber.

Based on these considerations, Trial Chamber II dismissed the challenge to admissibility made by the Defense of Katanga because it was based on the principle of complementarity. Accordingly, it should have been submitted before the constitution of the Trial Chamber and therefore was not in time. The Defense claimed that it had attempted on different occasions to challenge the admissibility of the case but had finally filed it in writing on February 10, 2009 because it had gathered the appropriate evidence. However, Trial Chamber II decided that the strategic procedural considerations of the parties cannot justify delays in filing documents.





The Defense for Katanga also claimed that if the Prosecution had provided the Pre-Trial Chamber with the appropriate documents, the Pre-Trial Chamber would have declared the case inadmissible. However, the Appeals Chamber, in a decision on June 13, 2006, established that under Article 58(2) of the Rome Statute the Prosecution does not have to submit evidence or information on the admissibility of a case. In fact, the admissibility of a case is not a prerequisite for the issuance of a warrant of arrest. Furthermore, the Rome Statute grants the Prosecution discretionary powers and the Pre-Trial Chamber the power to examine whether the Prosecutor has correctly assessed the nature of the evidence. In its application for an arrest warrant the Prosecution informed Pre-Trial Chamber that the documents to which the Defense referred concerned the attacks on Bogoro but that the DRC authorities confirmed that they did not investigate them. Thus, Trial Chamber II deemed that the document did not have decisive information on the circumstances of the case and that Pre-Trial Chamber had acted accordingly when it decided not to examine the admissibility of the case.

Finally, Trial Chamber II examined the willingness of the DRC authorities to start proceedings against Germain Katanga for the attacks on the village of Bogoro. It sought to determine whether the Court was violating the rights of the accused by attempting to try him a second time for the same crime. First, the Defense argued that the Court's exercise of jurisdiction deprived the accused from his "natural" jurisdiction. The Defense alleged that if the proceedings had taken place in the country of which the defendant is a national, there would have been less delays and length of the proceedings would have been shorter. The Defense also highlighted that the defendant was also deprived from his right to "live in family" because he was transferred to The Hague and thus he also faced linguistic and cultural difficulties. However, Trial Chamber II affirmed that the violation of the fundamental rights of the accused was a different issue from that of the admissibility of the case. Therefore, the Chamber indicated that there are other instruments that the Defense can use for appeals concerning the violation of the fundamental rights of the accused. Moreover, the Court pointed out that by ratifying the Rome Statute, the States Parties are aware of and implicitly accept that such difficulties can arouse. The Defense also maintained that the DRC's referral of the case deprived Katanga of his right to respond to the challenge to admissibility. Trial Chamber II explained that the referral of a case implies that the State will waive its right to investigate or prosecute but does not affect the rights of the accused to make challenges.

The willingness of a State to prosecute must be determined in each specific case. First, the Chamber has to take into account the declarations made by the authorities of the country. Accordingly, in a document dated March 14, 2009, the military judicial authorities of the DRC declared that they had not opened any investigations on the involvement of Katanga in the attacks on Bogoro. In addition, on a hearing on June 1, 2009, the DRC authorities affirmed that the Court should dismiss the challenge to admissibility in order to fairly try the crimes committed in the DRC and, ultimately, end impunity. Therefore, there is an unmistakable willingness of the DRC not to try the case and to allow the Court exercise its jurisdiction.

In conclusion, Trial Chamber II dismissed the challenge to admissibility submitted by the Defense of Germain Katanga. In addition, the Chamber decided that the accused will continue in the Court's custody. Though the charges have been confirmed, on August 31, 2009 Trial Chamber II issued a decision to postpone the commencement of the trial from September 24 to November 24, 2009 due to outstanding procedural issues.

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