



THE ACQUITTAL OF MATHIEU NGUDJOLO CHUI BY THE INTERNATIONAL CRIMINAL COURT

The International Criminal Court (ICC) handed down its second-ever verdict in the case against Mathieu Ngudjolo Chui, signaling the maturation of the young court completing its first set of cases. Ngudjolo was charged for crimes allegedly committed in the Democratic Republic of the Congo (DR Congo). On December 18, 2012 the Court acquitted Mathieu Ngudjolo Chui, an alleged rebel leader, of war crimes and crimes against humanity. Trial Chamber II found that the Office of the Prosecutor (OTP) supplied insufficient evidence, and therefore not met the burden of proof required by the Court to prove the case.

Background on the Case of the Prosecutor vs. Mathieu Ngudjolo Chui

The DR Congo ratified the Rome Statute in April of 2002, thereby becoming an ICC State Party. The government referred the situation to the ICC in April 2004, triggering the Court's jurisdiction and thus permitting the OTP to begin a preliminary examination of events in the DR Congo. After finding the alleged crimes to be within the jurisdiction of the Court and admissible, the OTP opened a formal investigation into crimes committed in the DR Congo since July 2002.

The conflict in the DR Congo began in 1997 when the sitting president was deposed. The country dissolved into fighting for power between rebel groups supported by forces from both Uganda and Rwanda. As the conflict worsened, three main rebel groups formed: Front for National Integration (FNI), Patriotic Force of Resistance in Ituri (FPRI), and the Union of Congolese Patriots (UPC). Each group used violent tactics to gain power over geographic regions of the DR Congo. Rape, sexual slavery, child soldiers, and mutilation were all used to pursue the conflict.

In 2004, the town of Bogoro, located in the Ituri district in northeastern Congo, was reportedly wiped out by FNI and FPRI rebels. The Ituri region had been previously controlled by the UPC, Thomas Lubanga's militia. Lubanga, in the Court's first case, was convicted in March 2012 of war crimes related to the enlistment and use of child soldiers. The Prosecutor believed that Mathieu Ngudjolo Chui and Germain Katanga had led the FPRI and FNI rebels, respectively, at the time of the Bogoro attack and thus should be held to account for it. At least 200 civilians were murdered during the raid, the village was destroyed, and many surviving residents were enslaved. The ICC Prosecutor originally charged the two men together for the massacre at Bogoro. Their trial at the ICC began in November 2009.

Charges and Theories of Criminal Responsibility

Ngudjolo is a native of the DR Congo and is a trained nurse. The OTP charged Ngudjolo with "seven counts of war crimes (using children under the age of fifteen to take active part in hostilities; directing an attack against civilians; willful killing; destruction of property; pillaging; sexual slavery; and rape) and three counts of crimes against humanity (murder, rape and sexual slavery) allegedly committed during

an attack on the village of Bogoro on February 24, 2003.”¹ The prosecution’s charges against Ngudjolo relied upon its claim that Ngudjolo was the leader of the FNI militia when it carried out the attack on Bogoro. Ngudjolo was charged under Article 25 (3)(a), guilty by “indirect co-perpetration.” In other words, he directed others to commit the assault in Bogoro, and is therefore ultimately responsible. This determination of responsibility is a basic characteristic of the work of the ICC. The Court prosecutes the most senior persons responsible for the most serious crimes against humanity, war crimes and genocide, even if they did not directly commit the crimes. The Court does not exist to prosecute foot soldiers, but their superiors. As a result, it was imperative for the Prosecutor to establish that Ngudjolo was the commander-in-chief, or leader, of the FNI militia at the time of the attack, therefore ultimately in charge of the attack.

On November 12, 2012, after hearing all witnesses, the Chamber decided to sever the cases of Ngudjolo and Katanga. Each man would be subject to separate verdicts, on separate charges, and sentenced at different times. The Chamber decided this based on the decision of the majority of the judges that “Mr Katanga’s liability must henceforth be considered on the basis of article 25 (3)(d) of the Statute (complicity in the commission of a crime by a group of persons acting with a common purpose) and no longer solely on the basis of article 25 (3)(a) of the Statute (commission of a crime in the form of indirect co-perpetration).”² The modes of liability, or the theories under which a defendant can be criminally responsible, is detailed in Article 25 of the Rome Statute. Trial Chamber II announced that the verdict for Ngudjolo’s case would be delivered first, as he was still being charged on the basis of Article 25 (3)(a). Katanga is still awaiting a verdict in his case.

Interpretation of the Rome Statute, specifically Article 25, came into focus in this case. Judge Van den Wyngaert wrote a concurring opinion that showed disagreement among ICC judges, which could signal future interpretations on modes of liability. Judge Van den Wyngaert reflected on the differing understandings of Article 25 between the Pre-Trial Chamber and Trial Chamber II during Ngudjolo’s trial, as well as the difference in interpretation of Article 25 between Ngudjolo’s trial and Thomas Lubanga’s case. Article 22 states that crimes should be strictly construed, and she believes this should carry over into the definition of criminal responsibility.³ Judge Van den Wyngaert discussed the need to look at each case on a factual basis and how they fit into the “plain text”⁴ of the Statute, not that these should be applied to each case in the perceived hierarchy of criminal responsibility some had seen in Article 25. The resolution of such disagreements among ICC judges should strengthen the jurisprudence of the Court as it moves into its second decade of existence.

Insufficient Evidence to Convict

Ngudjolo was ultimately found not guilty on December 18, 2012. Trial Chamber II found that the prosecution had not proven beyond a reasonable doubt that Ngudjolo was the leader of FNI during the

¹ International Criminal Court, *The Court Today*, p. 2, January 2013, available at <http://www.icc-cpi.int/iccdocs/PIDS/publications/TheCourtTodayEng.pdf>.

² ICC Trial Chamber II, *Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons*, p. 7, November 21, 2013, available at <http://icc-cpi.int/iccdocs/doc/doc1529337.pdf>.

³ ICC Trial Chamber II, *Judgment pursuant to Article 74 of the Statute: Concurring Opinion of Judge Christine Van den Wyngaert*, p. 12, December 18, 2012, available at <http://icc-cpi.int/iccdocs/doc/doc1529537.pdf>.

⁴ *Id.* at 18.

Bogoro attack. The judges' verdict made clear that "this does not in any manner mean that the Chamber was of the opinion that no crimes were committed in Bogoro on 24 February 2003, and this does not in any way put to question what befell the people of that area on that day."⁵ The Court is clear that the attack on Bogoro occurred, but not that Ngudjolo was responsible for it. However, though he was not judged to have been the leader of FNI at the time, the judges also clarified that "declaring that an accused person is not guilty does not necessarily mean that the Chamber has been convinced of the person's innocence. Such a decision merely shows that the evidence adduced is insufficient to convince the Chamber beyond all reasonable doubt."⁶ Ngudjolo was established as being the leader of the FNI, but at a later date than the attack on Bogoro occurred. Therefore, Trial Chamber II could not convict him. The Court recognized his alleged involvement in the conflict in the DR Congo, but could not find that the prosecution had met the burden of proof with the specific charges brought against Ngudjolo.

The primary critique of the OTP's case, and specifically the leadership evidence, was the credibility of the witnesses produced. The prosecution and defense both used witnesses during trial. Three witnesses were used by both sides to try and prove, or discredit, that Ngudjolo was the leader of the FNI militia at the time of the attack on Bogoro. Ngudjolo also testified himself during the hearings. Of the 24 witnesses called by the prosecution, Trial Chamber II found that "their remarks were too contradictory or too hazy, too imprecise, and thus it was not possible to base ourselves on all their testimony."⁷ Ultimately, the witnesses were found not to be credible sources of evidence that Ngudjolo was the commander-in-chief of FNI during the Bogoro attack. In fact, only two of the witnesses from the prosecution were believed by the judges to have been members of the militia who took part in the attack on Bogoro: "Regarding Mathieu Ngudjolo's functions, the functions he actually held before the Bogoro attack, the Chamber found that although some witnesses in substance confirmed that the accused person was the leader of the Bedu-Ezekere militia, all witnesses except Witness P-28, whom by the way the Chamber did not find credible on this point, and Witness P-317, all these witnesses only testified on hearsay and none of them was present in the Bedu-Ezekere group before 24 February 2003."⁸

During trial the reliability of these witnesses present in the FNI militia at the time of the attack on Bogoro specifically came under attack by the defense team. In addition, the other witnesses provided were not actually members of the militia at the time of the Bogoro attack and thus their testimony was hearsay evidence. Trial Chamber II noted "that hearsay evidence must be treated with utmost caution."⁹ The lack of reliability of the prosecution's witnesses was the main contributor to Trial Chamber II's finding of reasonable doubt in Ngudjolo's involvement.

Reaction to Acquittal and Release

The OTP asked for Ngudjolo to be kept at the ICC while awaiting appeal, however the request was denied and the arrangements for Ngudjolo's release began. Though he originally asked to be released back to the DR Congo, Ngudjolo has since requested asylum status in Belgium. This verdict has not only

⁵ ICC Trial Chamber II, Transcript, Hearing to deliver the decision pursuant to Article 74, p. 16, December 18, 2012, available at <http://icc-cpi.int/iccdocs/doc/doc1529751.pdf>.

⁶ *Id.* at 6.

⁷ *Id.* at 7.

⁸ *Id.* at 12.

⁹ *Id.*

affected Ngudjolo's life, but also those of citizens in the DR Congo. Some agreed with the ICC's release of Ngudjolo such as a taxi driver in Bunia: "For me, it is the ICC that has all the power - to arrest, convict, set free. If Ngudjolo is being released, I applaud that."¹⁰ However, others saw Ngudjolo's release as leaving something lacking in the justice process for the DR Congo: "I think this decision is unfair because he destroyed our region. He should remain in prison. His name was mentioned a lot in the massacres of 2002 and 2003."¹¹ These statements reflect the belief of the Court that Ngudjolo was responsible for violence in the DR Congo, but also the inability for him to be connected to the specific charges of planning and executing the attack on Bogoro, thus requiring his acquittal and immediate release.

There was a similar mix of reactions to Ngudjolo's acquittal. Some believed the Court acted appropriately due to the case brought by the OTP. Many discussed the hearsay aspect of the evidence provided in court: "There is no evidence against him, so he's right. This judgment is valid,"¹² said a resident of Bunia, a city in Ituri. However, the lingering feeling of needing to hold someone responsible for the atrocities committed is clear as well. A representative of Ituri human rights group Equitas explained: "After this decision, for those who were victims of this, there is a feeling of disappointment. The victims feel forgotten, abandoned by international justice."¹³ These reactions echo the common worldwide reaction to the Court's verdict of frustration with a lack of accountability for the atrocities that occurred in the DR Congo. However, all defendants brought to trial at the ICC are deemed innocent until proven guilty. The Court takes the burden of proof and standard of evidence seriously, and has demonstrated that it will not find all defendants guilty unless there is sufficient proof.

Looking Forward

The ICC and OTP have come under fire for the amount of time it takes to investigate and bring cases to trial. Mathieu Ngudjolo Chui is only the second case to be completed in the Court's ten years of existence. However, this verdict shows the necessity that the OTP be meticulous when bringing charges. A lack of reliable evidence is directly linked to the prosecutors and their preparation. The judges in Trial Chamber II have made it clear that the ICC strictly follows the legal guidelines set out in the Rome Statute. It is a court that assumes innocence until guilt of the accused is proven. The Court does not deny the occurrence of terrible crimes, but has made clear that it will not convict any individual seemingly connected with the crime without adequate proof. This verdict, though seemingly frustrating to many, reinforces the faith the international community should have in the value of the ICC.

*Researched and drafted by Catherine Mullin
Updated February 8, 2013*

¹⁰ IRIN, *Reactions from the DRC to ICC Acquittal of Militia Leaders*, December 19, 2012, available at <http://www.irinnews.org/Report/97079/Reactions-from-the-DRC-to-ICC-acquittal-of-militia-leader>.

¹¹ *Id.*

¹² *Id.*

¹³ Thomas Escritt, *In second verdict, war crimes court acquits Congolese*, December 18, 2012, available at <http://in.reuters.com/article/2012/12/18/icc-congo-ngudjolo-idINDEE8BH0C520121218>.