



Original: **English**

No.: ICC-01/04-01/07

Date: 1 May 2012

TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Public Document

**Defence Observations Pursuant to Regulation 55(3)(b) of the Regulations of the
Court**

Source: Defence for Mr Germain Katanga

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

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Mr Eric Macdonald, Senior Trial Lawyer

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Legal Representatives of Victims

Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

1. The Defence for Mr. Katanga (“Defence”) hereby files its observations on Regulation 55(3)(b) of the Regulations of the Court, pursuant to *Ordonnance relative aux modalités de presentation des conclusions orales*¹, dated 20 April 2012, in which the trial chamber invites the defence to make any request it deemed necessary in light of a possible re-qualification by the trial chamber in its Article 74 Decision, of the armed conflict to one not of an international character.
2. The pre-trial chamber in the present case confirmed the charges for crimes committed during an international armed conflict.² For reasons not disclosed to the defence or to the trial chamber, but presumably, because of prosecutorial strategy, the prosecution in its Closing Brief – for the first time in the present case, no less – argues that the conflict *in casu*, is to instead be qualified as a non-international one.³
3. Under the Rome Statute, and for the purposes of the present case, it is for the prosecution to prove beyond reasonable doubt that the alleged war crimes at Bogoro were committed either in an international armed conflict, if it relies on articles 8(2)(a) and 8(2)(b), or in a non-international armed conflict, if it relies on articles 8(2)(e) and 8(2)(c). Because the burden to establish the foregoing rests – and indeed remains – with the prosecution, it is for the prosecution to have called that evidence.
4. The Defence therefore sees no reason, at this stage of the proceedings, to recall any witnesses, to present other evidence, or to call new evidence pursuant to Regulation 55(3)(b) of the Regulations of the Court. If the prosecution at this stage has not established beyond reasonable doubt the existence of an international or a non-international armed conflict at Bogoro, the calling of such evidence by the Defence would, under the current circumstances, effectively reverse the burden of proof, and only give the prosecution the opportunity to rectify its earlier mistake of failing to prove its case beyond reasonable doubt.
5. Having said this, the Defence otherwise reserves the guarantees available to it pursuant to the said Regulation, to seek to invoke them at a later stage of the proceedings, if need be.

¹ See ICC-01/04-01/07-3274, *Ordonnance relative aux modalités de presentation des conclusions orales*, 20 April 2012, paras 13-14.

² See ICC-01/04-01/07-716-Conf, Decision on the confirmation of charges, 26 September 2008, paras 238-240.

³ See e.g., ICC-01/04-01/07-3251-Conf, *Mémoire final*, 24 February 2012, sections 9.1.7 and 9.1.8.

Respectfully submitted,



David HOOPER Q.C.

Dated this 1st May 2012

At London