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TRIAL CHAMBER II

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. GERMAIN KATANGA

Public

**Prosecution response to the “Defence Application for Leave to Appeal the
Decision 3319”**

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Introduction

1. On 21 November 2012, the Majority of the Trial Chamber (“Majority”) issued the “Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused person” (“Decision”).¹ The Majority decided to “trigger regulation 55 of the regulations of the Court and [notified] the parties and participants that the mode of liability under which Germain Katanga stands charged is subject to legal recharacterisation on the basis of article 25(3)(d) of the Statute”.²
2. On 21 December 2012,³ the Defence filed an application for leave to appeal the Decision (“Defence Application”),⁴ raising the following issue: “Is the Chamber’s decision to give notice, informing the parties and participants that the legal characterisation of the facts relating to Germain Katanga’s mode of participation is likely to be changed, lawful and appropriate in the circumstances of the case?” (“Issue”).⁵ According to the Defence Application, the unlawfulness and the inappropriateness of the Decision is demonstrated by the following facts:⁶
 - A. The proposed modification of the mode of liability from Article 25(3)(a) to Article 25(3)(d) falls outside the scope of Regulation 55 and Article 74(2) of the Statute;
 - B. The Notice Decision is rendered at an inappropriate time in the proceedings and is consequently incompatible with Regulation 55 and the minimum fair trial guarantees contained in Article 67(1) of the Statute;
 - C. The Notice of the possible re-characterization of the mode of liability to that contemplated in Article 25(3)(d) was not reasonably foreseeable to the defence and directly impacts on the accused’s right under Article 67(1)(a)

¹ ICC-01/04-01/07-3319; ICC-01/04-01/07-3319-tENG/FRA.

² Decision, Disposition, para.1.

³ On 23 November 2012, the Trial Chamber informed the Prosecution and the Defence that the parties may file any request for leave to appeal against the Decision within three days after receiving an English translation of the Decision. The parties and participants were notified of the translated version of the Decision on 17 December 2012.

⁴ ICC-01/04-01/07-3323.

⁵ Defence Application, para.14.

⁶ Defence Application, para.15.

and, in respect of Article 67(1)(g), on his ability to make an informed decision as to whether or not to give evidence;

- D. The proposed re-characterisation will cause the accused to be confronted, at this late stage, with a mode of liability that is unclear and with unsettled law. The accused is left in doubt as to the nature and extent of the charge it is proposed he faces;
- E. The Notice Decision is defective as it fails to provide sufficient detail to the accused as to the facts and circumstances that may be relied upon for the proposed re-characterisation of the charges. It is in marked contrast to the particulars of the charges provided to the accused by the Confirmation Decision, which ran to 98 pages of law and fact, which underscores the prejudicial nature of the exercise;
- F. The Notice Decision is rendered so late in the process as to be in violation of the Chamber's duty to conduct the trial in an expeditious manner; and
- G. Article 67(1) entitles the accused to a fair hearing conducted impartially. The circumstances in which the Notice Decision is made gives rise to an inevitable appearance of bias.

3. The Prosecution opposes the Defence Application. The Application is premature and fails to meet the requirements for leave to appeal pursuant to Article 82(1)(d). Whether the Issue has an impact on the fair and expeditious conduct of the proceedings as well as on the outcome of the trial will depend on what measures the Trial Chamber takes pursuant to Regulations 55(2) and (3) to ensure the protection of the rights of the accused after hearing the submissions from the parties and participants. It will also depend to a large extent on the final decision of the Trial Chamber pursuant to Article 74. At this stage, the arguments regarding the impact of the Issue are made in the abstract and are speculative. Moreover, granting leave to appeal at this late stage of the proceedings would not materially advance the proceedings. Rather, any issue concerning the process and decision on the legal reclassification of facts should be raised as part of the final

appeal against the judgement pursuant to Article 81, should these issues remain relevant at that time.

Submissions

(i) *The Issue does not affect the fairness of the proceedings*

Limited scope of the Decision

4. The Decision has a limited scope. It merely “triggers”⁷ the process enshrined in Regulation 55 by giving notice to the parties and participants as to the possibility of a re-characterization and invites the parties and participants to make submissions. The Decision does not implement any further steps. In particular, it does not decide on any concrete measures under Regulations 55(2) and (3) to be taken to ensure that the process will be conducted with the full respect of the rights of the Accused. Any such decision will only be taken after the parties have made their submissions and will depend on the content of those submissions.⁸
5. Moreover, the Decision also does not anticipate any findings with respect to the Accused’s responsibility pursuant to the mode of liability enshrined in Article 25(3)(d), which will only entered as part of the Trial Chamber’s judgment under Article 74. The Majority made it clear that “the ongoing deliberations have not, to date, focused on the specific issue of Germain Katanga’s potential liability under article 25(3)(d) of the Statute. This issue is now open to discussion and the submissions of the parties and participants in this respect will be decisive.”⁹
6. To argue that this Decision affects the fairness of the proceedings, as the Defence does, is to suggest that the recourse to Regulation 55 is in and of itself unfair no matter how it is handled in practice¹⁰ and that per se such recourse indicates that the Chamber is biased and has prejudged the case.¹¹

⁷ Decision, paras.15, 20, 43, 44, 46, 47, 61, Disposition, para.1.

⁸ See Decision, paras.55, 57. See also the Bemba case where the Trial Chamber first gave notice to the parties of its intention to trigger the process of Regulation 55 (ICC-01/05-01/08-2324) and then, after hearing the submissions from the parties and participants put in place measures to ensure the fairness of the proceedings, including a temporary stay of the proceedings (ICC-01/05-01/08-2480).

⁹ Decision, para.19; see also para.42.

¹⁰ See Defence Application, paras.18, 20, 32.

¹¹ See Defence Application, paras.15(G), 40-45.

Fairness depends on appropriate measures under Regulation 55(2) and (3)

7. The Prosecution submits that whether the process triggered by the Decision affects the fairness of the proceedings will depend on the manner in which it is applied in practice. As stated by the Majority, it cannot be said that *triggering* Regulation 55 would automatically infringe the rights of Mr Katanga.¹² Rather this will depend on any measures that the Chamber will order in the course of the proceedings pursuant to Regulations 55(2) and (3) after hearing the submission of the parties and participants. The Defence is entitled to raise any concerns regarding the fairness of these proceedings in its upcoming submissions, and the Chamber will then ensure in its rulings, including its judgment under Article 74, that the rights of the Accused under Article 67(1) are fully respected.

8. The Defence argues that the Decision gave notice under Regulation 55 at an inappropriate time, which, in the circumstances of this case, causes prejudice to the Accused.¹³ The Defence does not suggest that the Chamber is legally barred from giving notice at this stage. Rather, it argues that notice under Regulation 55 at this stage of the proceedings prevents the Defence from properly exercising its rights under Article 67(1).¹⁴ The Prosecution submits that it is premature to conclude whether the Regulation 55 process causes any unfairness to the Accused in the circumstances of this case. The Chamber may give the Defence an opportunity to present additional evidence,¹⁵ or it may allow the Defence to examine again evidence that has previously been presented; it may also weigh evidence that has been presented in a manner that is fair or it may take other measures that ensure that in the circumstances of this case no unfair prejudice is caused to the Accused.

9. The Defence further argues that the Decision is defective as it fails to provide sufficient detail to the accused as to the facts and circumstances that may be relied

¹² Decision, para. 44 (emphasis added); see also paras.20, 34, 41.

¹³ Defence Application, paras.15(B), 15(F), 26-29.

¹⁴ Defence Application, paras.15(C), 30.

¹⁵ See Defence Application, para.35.

upon for the proposed re-characterisation of the charges.¹⁶ The Defence contends that “the Majority now relies on facts [...] that were not expressly or clearly accepted by the Pre-Trial Chamber in the Confirmation Decision”,¹⁷ and that the Decision therefore changes the narrative of the charging document.¹⁸ This submission is misleading. The Decision clearly states that the notice is limited to the facts and circumstances as described in the document containing the charges, in conformity with the letter of Article 74(2) and Regulation 55(1).¹⁹ The Decision further gives notice that the Chamber no longer relies on some facts and some evidence.²⁰ However, contrary to the contention of the Defence,²¹ this does not affect the fairness of the proceedings; rather, it assists the Defence during the Regulation 55 process, by *narrowing* the factual basis of the charges and the amount of evidence which the Defence is requested to address. Similarly, the assessment that the Chamber made in its judgment against the co-accused further provides the Defence with notice of what facts and evidence it may focus on during the Regulation 55 process.²²

Fairness depends on the final decision under Article 74

10. The fairness of the proceedings under Regulation 55 will also depend on how the Chamber ultimately decides on the issue of the applicable mode of liability in its judgment under Article 74. According to Regulation 55(1), a decision to change the legal characterisation of the facts will effectively only be taken “in [the Chamber’s] decision under article 74”.²³ Therefore, the fairness of the proceedings under Regulation 55 will depend on its outcome, firstly whether the Chamber enters a conviction against the Accused based on the mode of liability under Article 25(3)(d). If the Chamber enters such a conviction, the fairness of the proceedings will further depend, among other matters, on the factual findings

¹⁶ Defence Application, para.15(E).

¹⁷ Defence Application, para.24.

¹⁸ Defence Application, paras.25, 33-34, 38.

¹⁹ Decision, paras.10, 21 and footnote 53.

²⁰ Decision, para.39.

²¹ Defence Application, para.34.

²² Defence Application, paras.35-36.

²³ Regulation 55(1).

entered by the Chamber, the evidence that it relies on, as well as the manner in which the Chamber assesses the weight of the evidence. All this, which will be an integral part of the Trial Chamber's judgment under Article 74, can be done in a manner that fully respects the rights of the Accused under Article 67(1). In so doing, the Trial Chamber will take into account any submissions of the parties and participants. If the Defence is of the view that the Trial Chamber's judgement has not adequately addressed its concerns regarding the fairness of the proceedings resulting from the process under Regulation 55, it can raise these issues in an appeal against that judgment pursuant to Article 81.

11. The Defence argues that the proposed modification of the mode of liability from 25(3)(a) to 25(3)(d) falls outside the scope of Regulation 55 and Article 74(2) of the Statute.²⁴ This argument assumes that the Trial Chamber will exceed the facts and circumstances as described in the charges. At this stage, where no such findings have been made, the Appeals Chamber is not in a position to rule on whether the modification, of which the Decision merely gives notice, falls outside the scope of Regulation 55. The Appeals Chamber can only examine this question *after* the Trial Chamber has issued its judgment. Therefore, the submissions of the Defence are made in the abstract, which is insufficient to show any impact of the Decision on the fairness of the proceedings.

12. The Defence further argues that the proposed re-characterisation will cause the Accused to be confronted with a mode of liability that is unclear and unsettled law.²⁵ Uncertainty as to a future legal finding by the Trial Chamber does not cause any prejudice to the Accused. It is instead assumed that the Chamber will enter findings as to the applicable law at the end of the trial as part of its judgment, and not at the beginning. Therefore, a degree of uncertainty as to the manner in which the applicable law will be interpreted and applied to the facts of the case is an ordinary feature of any criminal trial. The proposed legal re-characterisation also does not increase the degree of uncertainty in this case. As the Defence has

²⁴ Defence Application, para.15(A).

²⁵ Defence Application, para.15(D).

argued, it has previously challenged the law on the mode of liability of indirect co-perpetration under Article 25(3)(a) as found by the Pre-Trial Chamber on two occasions, and the Trial Chamber has not yet ruled on its second challenge.²⁶ For that reason, the Trial Chamber will ultimately decide in its judgment also whether Article 25(3)(d)(ii) constitutes a lesser form of criminal liability that is included in indirect co-perpetration under Article 25(3)(a)²⁷ and what impact that question has on the fairness of the proceedings.

13. Finally, the Defence contends that in the circumstances of this case, the Decision giving notice under Regulation 55 indicates that the Majority is prejudging the case and “gives rise to an inevitable appearance of bias as it appears to be motivated by a wish to ensure the conviction of the accused”.²⁸ This argument is wholly unsupported. The Decision expressly pre-empts any argument to that effect and states that the Majority has not prejudged the case, as it has not yet deliberated on any issues regarding Article 25(3)(d)(ii).²⁹ The fact that the dissenting judge³⁰ and some authors³¹ disagree with the Decision does not create an appearance of bias. Furthermore, if the Defence’s arguments were to be accepted, any notice provided under Regulation 55 would automatically trigger this objection, thereby rendering its application void.

(ii) *The Issue does not affect the expeditious conduct of the proceedings*

14. The Decision acknowledges that “triggering regulation 55 at this stage of the proceedings will prolong the proceedings against Germain Katanga”.³² The Prosecution agrees Regulation 55 proceedings will delay the judgment of the Trial Chamber pursuant to Article 74 against the Accused. But so will an appeal against the Decision. The Defence’s arguments regarding the impact of the Issue

²⁶ Defence Application, paras.27, 29.

²⁷ Defence Application, para.37.

²⁸ Defence Application, paras.15(G), 40-45.

²⁹ Decision, para.19; see also para.42.

³⁰ Defence Application, para.43, 45.

³¹ Defence Application, para.44.

³² Decision, para.44; see also para.61.

on the expeditious conduct of the proceedings are speculative.³³ At this stage, it is impossible to predict that the delay caused by the Regulation 55 proceedings will exceed any delay that will be the result of appeals proceedings against the Decision. Until the parties have made their submissions invited by the Decision and the Chamber has ruled on any measures to be taken pursuant to Regulation 55(2) and (3), no assessment can be made as to the impact that Regulation 55 proceedings will have on the expeditious conduct of the proceedings.

15. While the Defence argues that measures to be taken pursuant to Regulation 55(2) and (3) will necessarily cause undue delay,³⁴ it omits to mention that any such measures will be taken to ensure that the envisaged reclassification will not unfairly impact on the Accused. Therefore, if the Issue has an impact on the expeditious conduct of the proceedings, it is to neutralize any prejudicial impact on the fair conduct of the proceedings.

(iii) *The Issue does not affect the outcome of the trial*

16. The Defence argues that the Issue affects the outcome of the trial because the obvious alternative to the Decision would have been an acquittal.³⁵ This argument is speculative and premature. Just as the obvious result of the Decision is not a conviction of the Accused, neither is the alternative necessarily an acquittal.
17. Although the Decision provides the parties and participants with notice that “the mode of liability under which Germain Katanga stands charged is subject to legal recharacterisation on the basis of article 25(3)(d) of the Statute”,³⁶ the Majority made it clear that “the ongoing deliberations have not, to date, focused on the specific issue of Germain Katanga’s potential liability under article 25(3)(d)”. It emphasized that “this issue is now open to discussion and the submissions of the parties and participants in this respect will be decisive”.³⁷

³³ Defence Application, paras.46-51.

³⁴ Defence Application, para.50.

³⁵ Defence Application, para.52.

³⁶ Decision, Disposition, para.1.

³⁷ Decision, para.19; see also para.42.

18. As a result, the Decision triggering the Regulation 55 process does not have an automatic impact on the outcome of the Trial. Whether the implementation of that process through future decisions will have an impact on the outcome of the trial can only be determined at the time the Trial Chamber renders its decision under Article 74. At that stage, any unfairness may be raised as part of the Defence's final appeal pursuant to Article 81.

(iv) *The immediate resolution by the Appeals Chamber of the Issue will not materially advance the proceedings*

19. The bulk of the Defence's arguments that the immediate resolution by the Appeals Chamber of the Issue materially advances the proceedings are a repetition of its arguments regarding the alleged impact of the Issue on the expeditious conduct of the proceedings.³⁸ For the reasons set out above, these arguments are speculative and should be dismissed.

20. Moreover, the Prosecution submits that interlocutory intervention by the Appeals Chamber at this highly advanced stage of the proceedings – where the Trial Chamber has already heard the closing arguments from the parties and participants and the deliberations of the Trial Chamber “are well underway”³⁹ – would not materially advance the proceedings. On the contrary, barring exceptional circumstances, when a case has reached such an advanced stage, issues concerning the proceedings raised by the parties can and should be dealt with in the context of a final appeal. It would indeed be detrimental to the efficient conduct of the proceedings to cause unnecessary delay by allowing an interlocutory appeal at this stage, when an adequate remedy will become available in the near future, i.e. as soon as the Regulation 55 proceedings are completed and the Trial Chamber hands down its judgment under Article 74.⁴⁰

³⁸ Defence Application, para.53.

³⁹ Decision, para.19.

⁴⁰ In the ICTY *Strugar* case, for instance, the Trial Chamber denied certification under Rule 73 (B) to appeal a decision finding the accused fit to stand trial, noting that, should the accused be found guilty at the end of the trial, he was entitled to raise the issue as part of his final appeal (*Prosecutor v. Strugar*, IT-02-54-T, Decision on Defence Motion for Certification, 17 June 2004, para. 6); in Halilovic, certification to appeal a decision denying

21. Further, since, as already argued, the Defence cannot demonstrate any concrete prejudice arising out of this Decision, and accordingly the Defence Application is premature. An appeal brought by the Defence at this stage will therefore necessarily deal with abstract or hypothetical issues. It is only in its final judgment under Article 74 that it can be determined whether the Regulation 55 proceedings triggered by this Decision adversely affected the Accused's rights. If the Accused is convicted the Defence can launch a direct appeal pursuant to Article 81 to challenge whatever prejudice that the Regulation 55 proceedings may have caused. In that final appeal, the Appeals Chamber can also rule on such matters that have implications for other cases in the future.⁴¹ Therefore, in order to achieve that effect, it is not necessary for the Issue to be resolved by the Appeals Chamber immediately.

Relief Sought

22. For the reasons set out above, the Prosecution requests that the Trial Chamber reject the Defence Application.



Fatou Bensouda, Prosecutor

Dated this 27th day of December 2012

At The Hague, The Netherlands

the Prosecution leave to amend charges was rejected due to, inter alia, considerations as to the further delay that an interlocutory appeal could cause to the proceedings; it was simultaneously noted that if the accused were acquitted of the charges, the Prosecution could appeal the judgement (see Prosecutor v. Halilovic, IT-01-48-PT, Decision on Prosecution Request for Certification for Interlocutory Appeal of 'Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment,' 12 January 2005, and also Prosecutor v. Halilovic, IT-01-48-PT, Separate and Concurring Opinion of Judge O-Gon Kwon Appended to Trial Chamber Decision Dated 12 January 2005 on Prosecution Request for Certification for Interlocutory Appeal of 'Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment,' 14 January 2005, para. 6).

⁴¹ Defence Application, para.55