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Original: **English**

No.: **ICC-01/04-01/07**
Date: **30 January 2013**

IN THE APPEALS CHAMBER

Before: **Judge Sang-Hyun Song, Presiding Judge**
Judge Sanji Mmasenono Monageng
Judge Cuno Tarfusser
Judge Erkki Kourula
Judge Ekaterina Trendafilova

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

IN THE CASE OF THE PROSECUTOR v. GERMAIN KATANGA

Public Document

Defence Reply to the Legal Representatives' Observations on the Defence's Document in Support of Appeal against the Decision on the Implementation of Regulation 55

Source: **Defence for Mr Germain Katanga**

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

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A. Introduction

1. On the 10th January 2013, the defence filed the *Defence's Document in Support of Appeal against the Decision on the Implementation of Regulation 55 of the Regulations of the Court and severing the charges against the accused persons*[1] (the "appeal document"). On the 21st January 2013 the Prosecutor responded to this appeal. On the 25th January 2013, the Legal Representatives of Victims respectively filed their responses to this appeal.[2]

2. The defence now replies to selected points in their response.

B. Tenets of interpretation

3. Maître Nsita argues that regulation 55 need not be interpreted restrictively but must respect the rights of the accused.[3] Citing the Appeals Chamber's analysis in support of his argument, he pretends that the question of the status of regulation 55, and in particular the Defence's reliance on the status of the regulations as provisions for the 'routine functioning' of the court, is not a relevant consideration.[4] This because the Appeals Chamber has acknowledged the term to be wide and capable of covering matters touching on the rights of the accused, and because the real question is that of the fairness of the trial.[5]

4. The question of the fairness of the trial is the central issue and the status of the regulation is accordingly relevant to the analysis of that issue. Without due attention being paid to the context of Regulation 55 it risks being interpreted in a manner that steps over the rights of the accused expressly contained in the Statute and the Rules. It should therefore be interpreted narrowly and with caution and with the utmost resistance to any undermining of a fair trial.

5. The words 'routine functioning' clearly indicate a distinction to be drawn on the one hand between the regulations, which address the general administration of a trial and, on the

[1] ICC-01/04-01/07-3339.
[2] ICC-01/04-01/07-3348, Observations du Représentant légal des victimes enfants soldats sur le mémoire de la Défense à l'appui de l'appel de la « Décision relative à la mise en oeuvre de la norme 55 du Règlement de la Cour et prononçant la disjonction des charges contre les accusés », 25 January 2013 (hereinafter « Legal representative Me Gilissen's submission »); ICC-01/04-01/07-3349, Observations du représentant légal sur le document déposé par la Défense à l'appui de son appel contre la Décision de la Chambre de première instance II n° 3319 (mise en oeuvre de la Norme 55 du Règlement de la Cour) , 25 January 2013 (hereinafter « Legal representative Me Nsita's submission »).
[3] Legal representative Me Nsita's submission, Title II
[4] Legal representative Me Nsita's submission, par 9
[5] Legal representative Me Nsita's submission, par 10-11

other hand, the fundamental elements of a trial. The latter must be deemed to be enshrined in the Statute and Rules which thereby defines the proper import of the regulations.

6. It follows that over-emphasis of the words 'at any time',[6] by the legal representatives is misguided because it ignores the realities of a trial in an attempt to promote a literal interpretation of the provision. As previously argued in the appeal, this literal interpretation is also partial because of the references to 'having heard the evidence' and 'at an appropriate stage of the proceedings'. Mr Nsita argues that the use of the conjunction 'and' shows that these subsequent words must be taken to relate exclusively to the phrase which follows.[7] This does not necessarily follow. While the use of the word 'and' makes it possible to interpret the provision as not requiring that notice precede the conclusion of the evidence, the words, read as a whole, are clearly capable of being interpreted to suggest that notice should precede the conclusion of the hearing of the evidence, while the opportunity to be heard should follow the hearing of the evidence. The words must also be looked at in the light of the object of conducting an expeditious trial and the right to prompt notification of the charges. Applying the principle of in *dubrio pro reo,* the interpretation favourable to the accused should be adopted. 'At any time' is a phrase latent with unfairness that should be restrained by having regard to the effect that a significant change in the charges must have on an accused in a trial of this sort and after the process has run its course.

C. The appropriate time for notice

Is any time too late?

7. In arguing that regulation 55 is not limited in time, Maître Nsita argues that there is a problem with the notion that notice must be given before the close of the evidence because the Trial Chamber could simply move the date it closes the evidence in order to accommodate its wish to give notice under regulation 55.[8] This hypothetical argument assumes bad faith on the part of a Trial Chamber and does not merit consideration.

8. The important principle is that notice of re-characterisation must be given in good time. It is of note that the prosecution, in its filing in the *Ruto* and *Sang* case, requesting that notice of Regulation 55 be given before the outset of the trial (!), submitted the following;

> 36. [...] Notice should be given as soon as feasible, to protect the fair trial rights of the parties. It thus is wholly illogical to delay notice. Prompt consideration and notice will enable the parties to fairly prepare and present their cases, without the risk of being taken by surprise at the end of trial by an unexpected change in the legal framework of the case.
> 41. In this case, giving early notice of the possibility of a recharacterisation will "ensure that the trial is

[6] Legal representative Me Nsita's submission, par 15; Legal representative Me Gilissen's submission, par 25
[7] Legal representative Me Nsita's submission, par 18
[8] Legal representative Me Nsita's submission, par 21

> fair"83 because it will enable the parties to present their evidence and examine witnesses with all possibilities in mind. Advance knowledge can only help the accused and advance the interests of a fair trial. It will avoid delays and adjournments (envisaged in Regulation 55(3)(a)), the recall of witnesses (envisaged in Regulation 55(3)(b)), and will enable the accused to prepare his defence with full knowledge of the possible statutory provisions under consideration by the Chamber.84 It will also ensure respect for the accused's Article 67(1)(a) right to be informed "in detail of the nature, cause and content of the charge[s]" against him. Giving notice at the start of trial is also appropriate because the possibility of a legal recharacterisation in this case is self-evident from the outset due to the breadth of the accused's alleged contributions.
> 43. [...] In the present case, early notice under Regulation 55(2) will similarly ensure that there is no possibility of unfair surprise, should the Chamber ultimately opt to re-characterize the accuseds' individual criminal responsibility.[9]

See also the prosecutions submissions in the *Lubanga* case, footnoted below[10].

9. This means, it is submitted, that notice ought usually be given before the beginning of the defence case in order to allow the accused full opportunity to deal with it effectively. The accused concedes that there may be circumstances where notice could lawfully be given after the commencement of the defence case but the delay would have to be justified and this should be unusual. The more advanced the stage that a case progresses the less justified such notice can be, other than for narrow, purely technical matters.

10. A change in this case, at this stage essentially deprived the accused of the opportunity to deal with the notice effectively and without prejudice. The safeguards under subparagraphs 2 and 3 would rarely compensate since the defendant would have made all his choices with regard to the presentation of his defence and committed himself to those choices. Given that there is ample scope for interpreting regulation 55 so as to exclude the risk of unfairness and to preserve the necessary rights of an accused, this is the interpretation which ought be applied.

Relevance of the ICC confirmation process to issue of timing

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[9] Excerpts from ICC-01/09-01/11-433, Prosecution's Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to William Samoei Ruto's individual criminal responsibility, 3 July 2012

[10] In addition to the Prosecution's submissions in Ruto the Pros in Lubanga, invited the Chamber to modify the legal characterisation of facts prior to the commencement of trial. These submissions by the Prosecution were made following the Confirmation Decision, in which the PTC introduced new charges for child soldier offences under international armed conflict (whilst the Pros only charged under the same charges non-international armed conflict):

This resulted in the submission of the prosecution, in the introduction into the proceedings of serious factual uncertainties that will have a propensity to undermine "the goals of fair, expeditious and focussed trial proceedings and will cause prejudice to the Defence and the Prosecution in the preparation and conduct of the trial." In remedying this "anomaly capable of adversely affecting the trial proceedings", the prosecution invited the trial chamber to modify the legal characterisation of the facts, pursuant to Regulation 55(2).

Prosecutor v. Lubanga, ICC-01/04-01/06-1084, Decision on the Status before the Trial Chamber of the Evidence Heard by the Pre-Trial Chamber and the Decisions of the Pre-Trial Chamber in Trial Proceedings, and the manner in which Evidence Shall be Submitted, 13 December 2007, para. 21.

11. Maître Gilissen, acting for child soldier victims, suggests that since the procedure for confirmation of charges leads to a crystallisation of the charges and is unique to the International Criminal Court, this justifies late notice of re-characterisation of the charges.[11]

12. This expansive approach is inappropriate precisely because of the structure of the Court. The putting in place of a Pre-Trial Chamber to confirm charges suggests a concern on the part of the drafters to ensure that the accused is not only tried on charges which are objectively justified but with full notice of the charges he faces. It removes the prerogative from the prosecutor, as it exists in ad hoc tribunals, thus turning the determination of charges into a judicial consideration from the inception of the process. This more elaborate process, far from justifying a more expansive approach, suggests an intention to ensure that the charges are settled at an early stage in the proceedings. Any change must be done with adequate notice. It evinces an intention to set a high standard of fairness. It would be an affront to this aspiration to allow less certainty for the accused than he would benefit from in the regime set by the ad hoc tribunals.

The principle of legal certainty: relevant to the issue of lateness

13. Maître Nsita takes issue with the accused's reference to the fledgling state of the law relating to responsibility under article 25(3)(d), but does so out of context. He states that there is always a degree of uncertainty in the law. [12] While it is true that the law is always subject to definition and refinement, it is in the context of notice being given six months into the deliberations that the accused raises the issue. The accused submits that the Trial Chamber's notice is too late in the circumstances of this case and therefore inconsistent with a fair trial. The fact that the accused has, at this juncture in the development of the ICC, been confronted with such late notice involving an ill-defined mode of responsibility compounds the unfairness.

14. According to the legal representative's submission, the accused must be prepared to confront a possible re-characterisation at all times. It would become a sort of 'buffet' justice, with a change of meal at any stage in the proceedings. This stance seriously undermines the aspirations of the drafters of the ICC Statute to provide for the highest standards of fairness.

D. The issue of whether the Notice Decision proposes a re-characterisation which would exceed the facts and circumstances

[11] Legal representative Me Gilissen's submission, par 30
[12] Legal representative Me Nsita's submission, par 36

Assertion that it is not possible to determine and is premature

15. M. Nsita argues that it is not possible to determine that the re-characterisation would exceed the facts and circumstances, and be unfair, until such re-characterisation has taken place. He asserts that the defence argument on this is premature.[13] This sentiment is echoed by M. Gillissen.[14]

16. The question as to when the appropriate moment to challenge a notice decision by appeal arises has been addressed in the appeal document and includes reference to other cases. However, since it forms such a central part of the argument of the legal representatives, the defence will revisit the issue. There are two important reasons why the legality of the proposed requalification needs to be determined now.

17. Firstly, the Trial Chamber itself ruled in its Notice Decision that it was the appropriate moment for it to determine the legality of its own course of action. Further, in its decision on leave it stated:

> 14. There can also be little doubt that the Impugned Decision has the clear potential to significantly affect the expeditiousness of the proceedings as well. That the impact of the Impugned Decision in this regard cannot be determined with absolute certainty, as is argued by the prosecution, is not a sufficient reason to refuse leave to appeal. Absolute certainty about how a decision will affect the expeditiousness of the proceedings is not a precondition under Article 82(l)(d). Moreover, it is not a precondition that the Impugned Decision causes an undue delay, only that the expeditiousness of the proceedings be significantly affected.
> 15. Although it is too early to say, at this stage, how long the trial proceedings may continue as a consequence of the Impugned Decision, it is clear that a swift intervention by the Appeals Chamber, indicating whether or not the activation of Regulation 55 of the Regulations of the Court was permissible under the present circumstances, could materially advance the proceedings.
> 16. While it is true that the Defence could also raise its objections against the Impugned Decision after the Chamber has rendered its judgment under Article 74 of the Statute, it is clear that waiting until then may create the undesirable situation in which the Chamber would have pronounced itself on the guilt or innocence of the accused and may have passed sentence and awarded reparations, even though the legality of the Impugned Decision is still unresolved.[15]

The Trial Chamber has created the circumstances within which the accused must now challenge the proposed course of action. Otherwise, he may be barred from doing so at a later stage due to not having appealed the decision at the appropriate time.

18. Secondly, as noted by the Trial Chamber, "the Impugned Decision has the clear potential to significantly affect the expeditiousness of the proceedings" and the question which is the object of the appeal, *ie* "whether the activation of Regulation 55 of the Regulations of the Court at the deliberation stage violates the rights of the accused", "clearly raises an issue that affects the fairness of the proceedings".[16] The trial has reached a stage when, absent this decision, the Trial Chamber would have rendered judgment. In order to

[13] Legal representative Me Nsita's submission, pars 25-6
[14] Legal representative Me Gilissen's submission, par 21
[15] ICC-01/04-01/07-3327, Decision on the "Defence Request for Leave to Appeal the Decision 3319", 28 December 2012.
[16] ICC-01/04-01/07-3327, Decision on the "Defence Request for Leave to Appeal the Decision 3319", 28 December 2012, pars 14, 13.

preserve the expeditiousness of the trial, the issue should be determined now as far as possible. To wait for the Article 74 judgment would lead to an irremediable violation of Mr Katanga's rights to a fair and expeditious trial.

19. The argument that it is not possible to determine the issue of whether the requalification goes beyond the facts and circumstances contained in the charges brushes aside the arguments as to why it does so that are provided by the accused. It further overlooks the nature of the details provided by the Trial Chamber.

20. The accused has argued that the facts and circumstances in the charges would necessarily be exceeded on the basis of the proposed requalification. As submitted in the appeal document, the Trial Chamber has not provided the defence with adequate notice of the facts upon which it relies for the purpose of enabling effective input from the defence. This in itself undermines the legitimacy of the Notice Decision because it forces the accused to speculate.

21. It is submitted that in providing notice the Chamber has a duty to provide the accused with a detailed analysis of the facts upon which it intends to rely for its proposed requalification. This is in order to provide the accused with the ability to make appropriate observations or, alternatively, challenge the legality of the proposal in the light of the rights of the accused. Had it done so, the accused would have been fully placed to demonstrate the extent that the facts and circumstances have been exceeded. It is submitted that given the stage of the proceedings, the appropriate remedy for this error on the part of the Trial Chamber is not to state that the issue is premature or to allow the Trial Chamber to give further precision, but to overturn the Notice Decision.

22. This notwithstanding, the Trial Chamber has provided some details of the nature of its proposed course of action sufficient to allow the defence, even with that limited information, to illustrate how the facts and circumstances would necessarily be exceeded. This is done at paragraphs 67-94 of the appeal document.

23. M. Nsita also argues that the appeal is premature because it is not established that the Chamber will proceed with the requalification.[17] Again, the accused's right to a trial without undue delay militates against waiting for an eventual violation of the right when the difficulty is apparent and can be addressed.

Distinction between material and collateral facts

[17] Legal representative Me Nsita's submission at Par 30

24. The legal representative argues that the distinction which the defence makes between material and collateral facts is without legal foundation.[18] Yet, this is a distinction which is well recognised.[19] The legal Representative relies on the prosecution Document Summarising the Charges.[20] However, it is a matter of objective assessment as to what are the material facts underlying the charges, not a question of definition by the prosecution. This is a matter which ought to have been, but was not, analysed by the Pre-Trial Chamber. A material fact is one which is necessary to explain the crime charged, not every factual assertion put forward by the prosecution.

25. The legal representative goes on to suggest that if the defence argument were accepted, then regulation 55 could never apply. This is incorrect. The defence recognises the power provided by Regulation 55, as established by the Appeals Chamber, but the issue is whether it can be exercised fairly in the particular circumstances of this case and in particular whether the issue of re-characterisation has been raised at an appropriate stage of the proceedings to be consistent with a fair trial.

E. Do subparagraphs 2 and 3 of regulation 55 cure any prejudice?

26. Reference is made to the Appeals Chamber's observation that Regulation 55's paragraphs 2 and 3 incorporate strict safeguards for the protection of the rights of the accused and that it is not yet clear how these will be applied.

27. The fact that regulation 55 contains these safeguards is testament to the recognition of the dangers inherent in its application. However, it does not mean that these safeguards will necessarily provide a solution. Notice of requalification may be given so late that there are no safeguards adequate to remedy the prejudice caused to the accused. Also, there may be no reasonable justification for notice being given so late. In such circumstances, it is submitted that it is inconsistent with a fair trial to allow the Trial Chamber to proceed with requalification of charges. The accused submits that these are the circumstances in this case.

28. The legal representative argues that the accused can indicate in his future observations as which evidence he relies on, and in particular he could give his views regarding the use of his testimony for a requalification at this stage of the proceeding.[21] There is a degree of artificiality around the proposition that paragraphs 2 and 3 can cure the defects of excessively late notice. During the trial, it is the prosecution who tender the witnesses to support its case.

[18] Legal representative Me Nsita's submission at par 35
[19] See ICC-01/04-01/07-3319, Dissenting opinion of Judge Christine Van Den Wyngaert, pars 18-22
[20] Legal representative Me Nsita's submission at par 36
[21] Legal representative Me Nsita's submission, pars 48-49

The proposal that the accused decide upon which witnesses he wishes to recall places him in a position of making decisions which carry substantial risks. These decisions are all the more complicated when, as here, there is a lack of clarity as to the facts and law relied upon.

29. In the event that the legal provision to be applied is markedly different than the one applied during the trial, as is the case with articles 25(3)(a) and 25(3)(d), the application of subparagraphs 2 and 3 could lead to what is effectively a retrial, carrying with it a serious challenge to the right to an expeditious trial.

30. With respect to investigations, it can be assumed that the Prosecutor, in conducting his lengthy investigation into the situation of the DRC and the case of Katanga, considered the possible application of article 25(3)(d) both in law and fact. The defence, on the other hand, is now constrained in its ability to conduct investigations by the difficulties inherent in re-opening an investigation and the recent adverse developments in the security situation in Ituri.

31. The legal representative draws attention to the fact that the defence states that it will need to conduct further investigations, without giving any details.[22] The defence submits that the Appeals Chamber may presume that further investigations may be necessary when the emphasis on particular facts concerning a common plan by two accused, is replaced by facts concerning a common purpose by others. Given the existing lack of clarity as to the facts upon which the new mode of responsibility may be based, the extent of future defence investigations is difficult to finalise. In any event, this appeal is not the proper forum for the accused to enter into such details, though the accused can provide them, on an *ex parte* basis, if called upon to do so by the Appeals Chamber.

F. Question of prejudice

32. The legal representatives contend that the accused has largely defended himself on any facts relevant to the application of article 25(3)(d). Mr Nsita cites, *inter alia*, the defence proposition that the Bogoro attack was planned, not by the combatants, but by another coalition.[23] However, in order to investigate the charges, identify and select evidence, the accused must know who the alleged planners are. If he had been confronted with a different factual allegation, that is that local combatants, and not he and Ngudjolo, formulated the plan, his investigations would have centred around those specific individuals.

[22] Legal representative Me Nsita's submission, par 53
[23] Legal representative Me Nsita's submission, par 43

G. Situation with respect to the team

33. It is contended that the situation with the defence team is irrelevant. However, it is a question of equality of arms. The prosecution team has remained intact throughout the period of deliberations. During the period of deliberations the associate counsel was unremunerated and disengaged from the case. The resources for the legal assistants was significantly reduced. Team members have been forced to consider other commitments. The ability of the team to operate at the same level of efficiency as the prosecution has therefore been further curtailed. This is relevant to the determination of the fairness of the notice being given at this juncture of the proceedings, when the team's capacity has been undermined.

Respectfully submitted,

David HOOPER Q.C.

Andreas O'Shea

Dated this 30 January 2013
At The Hague