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No.: **ICC-01/04-01/07**
Date: **25 January 2013**

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 THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA***

Public Document

**Observations of the Legal Representative on the Defence's document in support of
appeal against Trial Chamber II's decision No. 3319 (implementation of regulation
55 of the Regulations of the Court)**

Source: Common legal representative of the main group of victims

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

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BACKGROUND

1. The present trial commenced on 25 November 2009 before Trial Chamber II. It was initially a joint trial of G. Katanga and M. Ngudjolo, who were accused of jointly perpetrating crimes within the purview of the Statute.¹ On 7 February 2012, Trial Chamber II closed the evidentiary hearings.² Final oral submissions were made by each party from 15 to 23 May 2012, and the Chamber thereafter went into deliberations.

2. On 21 November 2012, the Majority of Trial Chamber II issued a decision whereby it informed the participants that pursuant to Regulation 55 of the Regulations of the Court (“regulation 55”) it was contemplating the recharacterisation of the mode of liability under which G. Katanga was charged. The Chamber also stated that it was contemplating the possibility of considering his liability under article 25(3)(d) of the Statute (contribution to a crime committed by a group), aside from the characterisation set forth in the *Decision on the confirmation of charges* on the basis of article 25(3)(a) of the Statute. Furthermore, the Chamber unanimously decided to sever the charges against M. Ngudjolo.³ On 18 December 2012, the Chamber acquitted M. Ngudjolo of all charges against him and ordered his immediate release.⁴

3. On 28 December 2012, Trial Chamber II granted G. Katanga’s Defence leave to appeal its decision of 21 November 2012⁵ (“Impugned Decision”). On 10 January 2013, the Defence filed the document in support of its appeal, in which it prayed the

¹ *Decision on the confirmation of charges*, ICC-01/04-01/07-717, 30 September 2008.

² *Declaration of closure of submission of evidence*, ICC-01/04-01/07-3235-tENG, 7 February 2012.

³ *Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons and Dissenting Opinion of Judge Christine Van den Wyngaert*, ICC-01/04-01/07-3319-tENG.

⁴ ICC-01/04-02/12-T-1 ENG and *Jugement rendu en application de l’article 74 du Statut*, 18 December 2012, ICC-01/04-02/12-3; ICC-01/04-02/12-T-3 ENG.

⁵ *Decision on the “Defence Request for Leave to Appeal the Decision 3319”*, ICC-01/04-01/07-3327.

Appeals Chamber to set aside the Impugned Decision.⁶ On 21 January 2013, the Prosecution filed its reply to the Defence motion requesting the Appeals Chamber to dismiss the appeal.⁷

4. On 16 January 2013, upon application by the Defence, the Appeals Chamber decided to suspend the Impugned Decision.⁸ On 17 January 2013, the Appeals Chamber authorised the Legal Representatives, at their request, to participate in the present proceedings and granted the other parties the opportunity to respond to the present observations.⁹

5. The Defence raised the following issue, for which the Trial Chamber granted leave to appeal: **is the Impugned Decision lawful and appropriate in the circumstances of the case?**¹⁰

6. The Legal Representative contends that the answer to that question is in the affirmative and therefore prays the Appeals Chamber to dismiss the Defence motion and uphold the Impugned Decision. As explained in his application to participate in these proceedings, the Legal Representative is of the view that this matter goes directly to the interests of the victims who have been authorised to participate in the proceedings.¹¹ These observations therefore are consonant with the instructions of the Appeals Chamber.¹²

⁶ "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", ICC-01/04-01/07-3339.

⁷ "Prosecution Response to Defence 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", ICC-01/04-01/07-3347.

⁸ "Prosecution response to the Defence request for suspensive effect", ICC-01/04-01/07-3343, 15 January 2013; *Decision on the request for suspensive effect of the appeal against Trial Chamber II's decision on the implementation of regulation 55 of the Regulations of the Court*, ICC-01/04-01/07-3344.

⁹ *Decision on the application of victims to participate in the appeal against Trial Chamber II's decision on the implementation of regulation 55 of the Regulations of the Court*, ICC-01/04-01/07-3346, 17 January 2013.

¹⁰ ICC-01/04-01/07-3327, para. 12; ICC-01/04-01/07-3339, para. 11.

¹¹ ICC-01/04-01/07-3329 (OA 13).

¹² ICC-01/04-01/07-3346, para. 10.

I. DEFENCE SUBMISSIONS

7. The Defence argues that Trial Chamber II erred in issuing notification to participants under regulation 55 of its intention to recharacterise the mode of liability under which Mr G. Katanga stands accused at this stage of the proceedings and that the proposed modification and its timing fall outside the scope of regulation 55 and are violative of the protections and guarantees enshrined in the Statute.¹³

More specifically, the Defence submits that:

- (1) Regulation 55, having been challenged, must be restrictively interpreted as solely intended to foster the “routine functioning” of the Court,¹⁴ and that it appears not to be so in the present case;
- (2) Regulation 55 cannot be triggered at any time in the proceedings and that the Chamber should have given notice of a possible recharacterisation at the latest before the conclusion of the evidence,¹⁵ which did not happen in the present case;
- (3) The Impugned Decision exceeds the scope of the “facts and circumstances” described in the charges;¹⁶ and
- (4) The Impugned Decision is prejudicial to rights of the Accused.¹⁷

II. REGULATION 55 SHOULD NOT BE RESTRICTIVELY INTERPRETED BUT SHOULD BE APPLIED WITH FULL REGARD TO THE RIGHTS OF THE ACCUSED

8. In its submission, the Defence attempts to limit application of Regulation 55 to the “routine functioning” of the Court, arguing that this view restricts the Chamber’s ability to apply it. The Defence submits that had the intention been to grant such far-

¹³ ICC-01/04-01/07-3339, para. 13.

¹⁴ ICC-01/04-01/07-3339, paras. 15-21.

¹⁵ ICC-01/04-01/07-3339, paras. 22-29 and part. para. 27: “[...] *while the Chamber can seek observations once the evidence is concluded, the giving of the notice of the possibility of such change should be prior to the conclusion of the evidence*” [emphasis added].

¹⁶ ICC-01/04-01/07-3339, paras. 67-94.

¹⁷ ICC-01/04-01/07-3339, paras. 14, 30-51 and 63-66.

reaching powers as those sought in the present case to the Trial Chambers; such would have been set forth in the Statute or Rules of Procedure and Evidence.

9. In fact, the Defence is attempting to shift the focus of the debate to an irrelevant issue. Clearly, regulation 55 must be interpreted in conformity with the Statute, as stated both in the Regulations of the Court (regulation 1(1))¹⁸ and in the Statute itself (article 21).¹⁹ Moreover, the Appeals Chamber has already ruled on these matters.

10. In fact, in judgment ICC-01-04/01-01/06-2205, the Appeals Chamber reaffirms the legality of regulation 55 having regard to article 52(1) of the Statute.²⁰ Furthermore, the Appeals Chamber has emphasised that the “routine functioning” referred to in article 52(1) of the Statute is a “broad concept”. It found that the Regulations of the Court contain several important provisions relating to the rights of the accused. It also recalled the historical underpinnings of the inclusion of this provision in the Regulations of the Court (exclusively, difficult diplomatic negotiations) whereas it was initially envisaged as forming part of the Rules of Procedure and Evidence.²¹

11. The Appeals Chamber further held that the rights of an accused person under article 67(1) of the Statute do not preclude the possibility of modifying the legal characterisation of facts in the course of the trial.²² It however specified that such a modification of the legal characterisation of facts in the course of the trial must not be prejudicial to its fairness and that the issue should be determined on a case-by-case basis, depending on the circumstances of the case.²³

¹⁸“These Regulations [...] shall be read subject to the Statute and the Rules”.

¹⁹ The Court shall first apply the Statute.

²⁰Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06-2205, 8 December 2009, para. 69 *et seq.*

²¹ ICC-01/04-01/06-2205, 8 December 2009, para. 6 and paras. 68-72.

²² ICC-01/04-01/06-2205, para. 83 *et seq.*

²³ ICC-01/04-01/06-2205, paras. 85-86 and 100.

12. The issue at stake therefore is not whether the Trial Chamber's Impugned Decision falls within the scope of the "routine functioning" of the Court, but rather whether the triggering of regulation 55 in the Impugned Decision does lead to an unfair trial. This question is addressed at point IV below.

III.THE APPLICATION OF REGULATION 55 IS NOT LIMITED IN TIME

13. The main thrust of the Defence submissions is on the Trial Chamber's timing of the notification to trigger regulation 55.²⁴ The Defence contends that such notification cannot be given at any time during the trial and, in any event, "while the Chamber can seek observations once the evidence is concluded, the giving of the notice of the possibility of such change [of characterisation] should be prior to the conclusion of the evidence".²⁵

14. However, this interpretation is at variance with a wholistic and contextual reading of the provision based on the ordinary meaning of its wording²⁶. In fact, regulation 55 provides:

2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change" [emphasis added].

15. The opening words of regulation 55(2) ("at any time during the trial")²⁷ stipulate that the Chamber may at any time consider a change to the legal characterisation of facts and so notify the participants provided it does so during the trial.

²⁴ ICC-01/04-01/07-3339, para. 27: "This appeal especially concerns the timing of the notice".

²⁵ ICC-01/04-01/07-3339, para. 22-29 and in particular para. 27 [emphasis added].

²⁶ The Vienna Convention on the Law of Treaties, 23 May 1969, art. 31.

²⁷ Couched in English as follows ("at any time during the trial") having the same meaning as in the French version of the Regulations and is not liable to any other possible interpretation.

16. The concept of “trial” is defined in the Statute. Part IV of the Statute (articles 62 to 76), entitled “The Trial”, describes the main stages of a trial. To be specific, a “trial” commences when a matter is referred to a Trial Chamber and ends when the Trial Chamber hands down its judgment pursuant to article 74 of the Statute for acquittal, or with sentencing and awards for reparations pursuant to articles 75 and 76 in case of conviction.²⁸

17. Therefore, contrary to Defence contention, regulation 55(2) does not require the Chamber to give notice to the participants of the possibility of a recharacterisation *before the conclusion of the evidence*. The sole requirement of the provision is for the Chamber to inform the parties that it is considering a recharacterisation of the facts during the trial, in other words, before rendering judgment under article 74 of the Statute.

18. The expressions “having heard the evidence” and “at an appropriate stage” on which the Defence hinges its submissions must be read within the context of the sentence in which they are embedded. The conjunction “and” which introduces the second part of the sentence indicates that these expressions only relate to *the time* at which the Chamber offers the participants the opportunity to make submissions relating to the recharacterisation being contemplated (“and, having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions”).²⁹

19. When considering a modification to the legal characterisation of the facts, the Chamber must indeed determine, in light of the circumstances of the case, *the most appropriate moment at which to hear the parties on this issue*. Since the second sentence of regulation 55(2) empowers the Chamber to suspend the hearing or order another

²⁸ See: Trial Chamber I, *The Prosecutor v. Thomas Lubanga*, Decision reviewing the Registry’s decision on legal assistance of Mr Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry, ICC-01/04-01/06-2800, 30 August 2011, paras. 45-47.

²⁹ Emphasis added.

hearing,³⁰ it may be taken that the Chamber should be able to determine the most appropriate time (and the most appropriate means) to hear the parties depending on when it notifies the participants of a possible recharacterisation of the facts.

20. However, this has no bearing on the first part of the first sentence of regulation 55(2), which states that the Chamber shall, at an appropriate stage, as long as this occurs at the trial stage (meaning, before judgment is delivered pursuant to article 74 of the Statute) give notice to the participants of the possibility of recharacterisation. The Chamber then determines the timing and the manner in which participants shall make their observations on the proposed modification.

21. According to the Defence's interpretation of regulation 55(2), a Trial Chamber may, after hearing all the evidence, but just before the conclusion of the evidence, give notice to the participants that it is considering a possible modification of the legal characterisation of the facts. However, once the hearing of the evidence is officially closed, the Chamber shall be barred from introducing a recharacterisation. Such an interpretation is at variance with the wording of regulation 55, finds no basis in the provisions of any other instruments of the Court and is entirely illogical. A practical application of the Defence's position would mean that Chambers could simply postpone the date for concluding the evidence in order to be able to trigger regulation 55.

22. This *in abstracto* interpretation suggested by the Defence is also contrary to the object and purpose of the regulation itself. It would lead to acquittals simply because the legal characterisations confirmed at the pre-trial stage subsequently appeared to be baseless, particularly in light of the evidence adduced at trial. Such an interpretation would be at odds with the purpose of the Statute, which is to "put an end to impunity" for the perpetrators of the most serious crimes.³¹

³⁰ Regulation 55(2), second sentence: "The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change."

³¹ See ICC-01/04-01/06-2205, para. 77.

23. Hence, regulation 55(2) does not stipulate a time limit for giving notice of the possibility of recharacterisation. In seeking to impose a non-existent *ratione temporis* condition, the Defence is attempting to conflate the issue with that of whether implementing this provision is consistent with fair trial requirements.

IV. IRRELEVANCE OF THE “FACTS AND CIRCUMSTANCES DESCRIBED IN THE CHARGES” CRITERION

24. Article 74(2) of the Statute provides that the Trial Chamber’s final decision “shall not exceed the facts and circumstances described in the charges and any amendments to the charges”. Regulation 55(1) expressly restricts the Trial Chamber to modifying to legal characterisation of the facts only in respect of “the facts and circumstances described in the charges and any amendments to the charges”. The Appeals Chamber has also ruled that “article 74 (2) of the Statute confines the scope of Regulation 55 to the facts and circumstances described in the charges and any amendment thereto”.³²

25. In the present case, whether the Trial Chamber exceeded “the facts and circumstances described in the charges” in proposing a recharacterisation evidently becomes relevant only once the Trial Chamber has actually effected the said recharacterisation. It is not possible to determine, in advance of such, whether or not the Trial Chamber exceeded the facts and circumstances described in the charges.

26. The Defence’s argument is therefore premature. Furthermore, the Appeals Chamber has ruled elsewhere that it considers it inappropriate to pronounce itself on this matter *obiter dicta*.³³ The Appeals Chamber will only pronounce itself on the

³² ICC-01/04-01/06-2205, para. 93.

³³ Appeals Chamber, *The Prosecutor v. C. Mbarushimana, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled “Decision on the confirmation of charges”*, ICC-01/04-01/10-514, 30 May 2012, para. 68: “The Appeals Chamber has previously not addressed alleged errors that do not materially affect the Impugned Decision. As the Appeals Chamber has

matter when, as the case may be, it is seized of the Trial Chamber's decision to implement the recharacterisation being contemplated.

27. Similarly, the Defence's assertion that Trial Chamber II assumed the role of the Prosecutor is utterly baseless and premature. It is only when and if Trial Chamber II effectively implements the proposed recharacterisation, and it is established that it exceeded "the facts and circumstances" of the case, that the Appeals Chamber may consider whether or not Trial Chamber II acted *ultra vires*.³⁴

V. THE IMPUGNED DECISION DOES NOT VIOLATE THE RIGHTS OF THE DEFENCE

28. The Defence argues that the Impugned Decision violates the rights of the Accused as set out in article 67(1) of the Statute.³⁵ However, this argument is premature in that the violations alleged by the Defence depend on the effective implementation of the recharacterisation by the Trial Chamber. The Impugned Decision *merely gives notice* to the parties of the possibility of a recharacterisation. Indeed, under regulation 55(3), the Chamber may adopt measures specifically designed to safeguard the rights of the Accused. Lastly, even if the Chamber eventually implements the proposed recharacterisation, the arguments of the Defence would still lack factual basis since they were not substantiated.

stated, it 'considers it inappropriate to pronounce itself on obiter dicta. To do so would be tantamount to rendering advisory opinions on issues that are not properly before it' [footnote omitted]".

³⁴ The Appeals Chamber recalled that pursuant to articles 54(1) and 61(1) and (3) of the Statute, the onus is solely on the Prosecutor to investigate crimes and proffer charges against suspects. Therefore, "[t]o give the Trial Chamber the power to extend proprio motu the scope of a trial to facts and circumstances not alleged by the Prosecutor would be contrary to the distribution of powers under the Statute" (ICC-01/04-01/06-2205, para. 94, emphasis added).

³⁵ ICC-01/04-01/07-3339, para. 14, paras. 30-51 and paras. 63-66.

(a) Alleged violation of the Accused's right to be informed promptly and in detail of the charges against him.

29. The Accused argues that the Impugned Decision violates his right to be informed promptly and in detail of the charges against him. According to him, he is at present confronted with a totally different case from that for which he was initially being prosecuted, in addition to the fact that the proposed recharacterisation by the Chamber was not reasonably foreseeable.

30. However, the Impugned Decision merely gives notice to the parties of a possible legal recharacterisation of the facts. It would therefore be premature to allege that the right of the Accused to be informed of the charges against him has been violated when the Chamber has not yet decided to proceed with the proposed recharacterisation.

31. The Defence argument could conceivably have been entertained with a view to determining whether the notice decision may have been issued at a time when recharacterisation was no longer possible, in which case the right of the Accused to be informed would have been definitely affected.

32. Under article 67(1)(a) of the Statute, the Accused has the right "[t]o be informed promptly and in detail of the nature, cause and content of the charges" against him. This provision imposes an obligation that is applicable not only to the disclosure of the content of the charges to the Accused, but also to the timing of such disclosure.

33. The Statute does not define the notion of "charges". Regulation 52 of the Regulations of the Court stipulates that "the document containing the charges shall include both "a statement of the facts" and "a legal characterisation of the facts". The same regulation further states that the statement of facts must provide "a sufficient legal and factual basis to bring the person or persons to trial". As to the legal characterisation of the facts, it must, *inter alia*, "accord with [...] the precise form of participation under articles 25 and 28".

34. In the present case, the Accused was informed promptly and in detail of the charges against him by the *Decision on the confirmation of charges*, which expressly mentions G. Katanga's role in the supply of weapons – he personally traveled to Beni for the purpose of obtaining weapons and ammunition, and thereafter distributed them. Similarly, the confirmation decision describes the common plan to “wipe out Bogoro”, and eliminate its civilian population. The mental elements are equally described at length.³⁶

35. The Defence contends that Trial Chamber II intends to rely on “subsidiary facts” which do not form part of the charges against the Accused. This argument has no legal basis, in light of the fact that no provision applicable to proceedings before the Court makes any such distinction. According to the Appeals Chamber,

[The] term “facts” refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be different from the evidence put forward by the Prosecutor at a confirmation hearing to support a charge (article 61(5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crimes charged.³⁷

36. However, in this case, the facts underpinning the modification of the legal characterisation of the mode of liability under which the Accused is charged are factual allegations which had already been described in the charges. The Defence actually received “double” notice of the facts in question considering that, aside from the confirmation decision, Trial Chamber II ordered the Prosecutor to file a summary of the confirmed charges. The Chamber further asked that the Prosecutor not merely restate the finding of the Pre-Trial Chamber at the conclusion of each charge it examined, but also to specify the “factual findings on which that Chamber relied in order to reach its decision”.³⁸ In document no. 1588 filed in implementation of the said decision, the Prosecutor included “contextual” elements in paragraphs 7 to 10, which cannot be considered as facts within the meaning of article 74(2) of the Statute,

³⁶ Pre-Trial Chamber I, *Decision on the confirmation of charges*, 26 September 2008, ICC-01/04-01/06-1547, paras. 555; 562 *et seq.*

³⁷ ICC-01/04-01/06-2205, footnote 163.

³⁸ *Decision on the filing of a Summary of the Charges by the Prosecutor*, 21 October 2009, ICC-01/04-01/07-1547, para. 29.

as well as a whole series of factual allegations in support of the charges against the Accused which would be relevant in the event of a recharacterisation.

37. Furthermore, and contrary to the Defence's allegation, the Impugned Decision does not lack clarity in respect of the facts that would be retained in the event of a recharacterisation. The Chamber noted that it relied on the confirmation decision, and also described how it would proceed with the proposed recharacterisation, if necessary:

The recharacterisation contemplated by the Majority under article 25(3)(d)(ii) of the Statute considers that Germain Katanga contributed in another way to the commission of crimes by a group of Walendu-Bindi commanders and combatants acting with a common purpose to attack Bogoro on 24 February 2003. The recharacterisation further considers that the Accused's contribution was intentional and made with full knowledge of the group's intention to commit the crimes.³⁹

38. Lastly, regulation 55 forms an integral part of the Court's rules and regulations. The Defence was fully aware, or should have been, that a modification of the legal characterisation of the facts was always possible right up to the end of the trial. Furthermore, from the very outset of the present case and specifically during the discussions on the contents of the charges against the Accused, Trial Chamber II repeatedly recalled its power to modify the legal characterisation of the facts charged against the Accused.⁴⁰

39. It is worth recalling that the Appeals Chamber acknowledged that the Accused's right to be informed of the charges against him "does not preclude the possibility that there may be a change in the legal characterisation of facts in the course of trial and without a formal amendment to the charges".⁴¹ If the Defence argument were to prevail, there would never be any possibility of activating regulation 55.

³⁹ Impugned Decision, paras. 27-30.

⁴⁰ The Chamber underscored this point repeatedly in its decision no. ICC-01/04-01/07-1547, paras. 17, 19, 21 and 28.

⁴¹ ICC-01/04-01/06-2205, para. 84 [emphasis added].

(b) Alleged violation of the Accused's right to have adequate time and facilities for the preparation of his defence

40. The Defence submits that the Accused's right to adequate time and facilities for the preparation of his case requires that he should have the opportunity to confront all the evidence against him in full knowledge of the legal and factual framework.⁴² The Defence further invokes a close link between this right and the Accused's right to be informed promptly of the charges against him.⁴³

41. As illustrated above, the right of the Accused to be promptly informed of the charges against him has not been infringed in this case. Furthermore, as emphasised by the Appeals Chamber, it is "to avoid violations of this right [of the Accused to adequate time and facilities for the preparation of his defence] that Regulation 55(2) and (3) set out stringent safeguards for the protection of the rights of the accused".⁴⁴ The manner in which the safeguards should be applied to ensure full protection of those rights, and the possible need for additional safeguards, depend on the circumstances of each case.⁴⁵

42. In the present case, Trial Chamber II is yet to state whether and how it intended to implement the safeguards set out in regulation 55, especially since the Defence has not submitted its opinion on the issue. Consequently, the Defence argument is premature.

43. In addition, the factual basis of the Accused's argument is questionable. The case record clearly shows that the Accused was able to mount an adequate defence (through investigations, cross-examining Prosecution witnesses, and calling his own witnesses) on points directly linked to the recharacterisation of the mode of liability under which he is charged. Thus, the Accused devoted a substantial part of his defence to establishing the absence of a structured organisation of the Walendu-Bindi

⁴² ICC-01/04-01/07-3339, para. 40.

⁴³ ICC-01/04-01/07-3339, paras. 40-43.

⁴⁴ ICC-01/04-01/06-2205, para. 85.

⁴⁵ *Ibidem*.

combatants, the disputes among them, and the lack of any coordinated action.⁴⁶ He also called several witnesses, and cross-examined others, in a bid to prove that the local combatants had never had any plan to attack Bogoro, instead seeking to show that the plan had been prepared by another coalition and, in any case, had not been criminal.⁴⁷ With regard to G. Katanga's role in the supply of weapons to the local combatants, the Defence was able to cross-examine exhaustively the witnesses who testified on this issue.⁴⁸

44. Lastly, it should be recalled that the burden of proof rests with the Prosecutor, and that Trial Chamber II has already stated that it will not admit any further evidence from the Prosecutor. In other words, the Accused should be prepared to defend himself solely *in respect of the evidence already admitted in the case*, which strictly limits the scope of the proceedings, as well as any potential infringement of his rights. The situation is therefore a far cry from that of an accused person whose trial is about to commence.

45. The Accused further argues that his right to adequate time and facilities for the preparation of his defence would be violated because he would be confronted at such a late stage of the proceedings with an unclear and undefined mode of liability.⁴⁹ Once again, this argument has no factual or legal basis.

46. The Court has already set out the criteria applicable to article 25(3)(d),⁵⁰ notably in a case in which the Accused's Counsel is also a counsel. Furthermore, in every criminal case, there is always a degree of uncertainty as to how the law will be interpreted and applied by the bench. It should be recalled that in the present case, the Defence itself acknowledged this principle when it argued that Trial Chamber II

⁴⁶ "Defence Closing Brief", ICC-01/04-01/07-3266-Conf-Corr, 3 April 2012, pp. 144-194.

⁴⁷ ICC-01/04-01/07-3266-Conf-Corr, in particular pp. 309 *et seq.* See also the testimonies of Defence witnesses called by G. Katanga, including D03-0011.

⁴⁸ See the testimonies of P-28 and D03-88.

⁴⁹ ICC-01/04-01/07-3339, para. 50.

⁵⁰ Pre-Trial Chamber I, *The Prosecutor v. C. Mbarushiman*, Decision on the confirmation of charges, ICC-01/04-01/10-465-Red, 16 December 2011; Pre-Trial Chamber II, *The Prosecutor v. W. Samoei Ruto, H. Kiprono Kosgey and J. Arap Sang*, Decision on the Confirmation of Charges pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, 23 January 2012.

was not bound by the criteria defined by the Pre-Trial Chamber in respect of article 25(3)(a).⁵¹ In fact, the Defence has never requested Trial Chamber II to rule on the observations that the participants had been invited to make at the beginning of the trial in connection with article 25(3)(a). At no time during the trial did the Accused complain that his rights had been violated because of the absence of a decision on this issue, although the precise meaning of the provision in question was still a matter of dispute between the parties.

(c) Alleged violation of the Accused's right to remain silent

47. The Defence submits that the Impugned Decision violates the Accused's right to remain silent. More specifically, the Defence is suggesting that had it been aware, at the very beginning of the trial, of a possible recharacterisation as contemplated in the present case, the testimony of the Accused would have been different.

48. This Defence argument is baseless, considering that, as has been stated above, the Accused was duly informed of the charges against him and of the possibility of a legal recharacterisation of the facts. Moreover, even without considering the validity of the Defence argument, it should be noted that Trial Chamber II has not yet indicated the evidence on which it intends to rely to render its judgment, in the event that it proceeds with a modification of the legal characterisation. Moreover, the Chamber has invited all the participants, including the Defence, to file their observations, specifically on the issue of evidence that might be invoked in connection with the proposed recharacterisation.

49. Nothing prevents the Defence from including, in its observations, arguments relating to the use of the Accused's testimony. In fact, pursuant to regulations 1 and 55, Trial Chamber II must ensure that the recharacterisation contemplated does not violate the rights of the Accused, including the right to remain silent, as set out in article 67(1) of the Statute. This matter will thus need to be resolved only if and when the recharacterisation actually occurs.

⁵¹ ICC-01/04-01/07-1578-Corr, 2 November 2009.

(d) Alleged violation of the Accused's right to be tried without undue delay

50. According to the Defence, the Impugned Decision did not give sufficient consideration to the impact of the notice on the duration of the trial. The Defence adds that without the notice decision, G. Katanga would have received judgment on 18 December 2012 (when a verdict was delivered in the case of his former co-accused, M. Ngudjolo), and that the judgment would probably have been an acquittal. Furthermore, at this stage of the proceedings, the Defence cannot be reasonably expected to recall witnesses, particularly in light of the security situation in the region, which would make it extremely difficult to conduct missions and find witnesses. As such, any further investigations would cause further delay. Lastly, according to the Defence, it cannot be guaranteed that the members of the Defence team would necessarily be available to continue in a re-opened case.⁵²

51. The Defence arguments lack any factual or legal basis. The Defence is attempting to establish the existence of a delay without, however, establishing that such a delay would be “undue” in light of the circumstances of the case in point. Article 67(1)(a) of the Statute, which reflects settled international law,⁵³ enshrines not the right to be tried without any delay, but instead the right to be tried “without undue delay”. Any delay should be evaluated taking into account the specific circumstances of the case,⁵⁴ as well as its complexity, and the attitude of the Appellant and the authorities. Merely affirming the existence of a delay is not sufficient to establish that the Accused's rights have been violated.

⁵² ICC-01/04-01/07-3339, para. 45-51.

⁵³ See article 14(3)(a) of the International Covenant on Civil and Political Rights, which was signed on 16 December 1966, and entered into force on 23 March 1976; United Nations Treaty Series, Volume 999, no. 14668; article 7(1) of the African Charter on Human and Peoples' Rights, which was signed on 27 June 1981, and entered into force on 21 October 1986; United Nations Treaty Series, Volume 1520, no. 26363; article 8(2)(b) of the American Convention on Human Rights, which was signed on 22 November 1969, and entered into force on 18 July 1978; United Nations Treaty Series, Volume 1144, no. 17955; article 6(3)(a) of the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, which entered into force on 3 September 1953, United Nations Treaty Series, Volume 213, No. 2889. See also ICC-01/04-01/06-2205, para. 82.

⁵⁴ ICC-01/04-01/06-2205, para. 86.

52. Furthermore, as the Appeals Chamber has ruled, a change of the legal characterisation of the facts pursuant to regulation 55 will not automatically lead to undue delay of the trial.⁵⁵ This ruling is all the more relevant where, *as in the present case, the recharacterisation has not yet been effected.*

53. In actual fact, the Defence has failed to establish that any delay would be caused by the Impugned Decision. The Defence suggests that the Accused would have been acquitted by now, and that it would be obliged to carry out further investigations and meet witnesses, without however showing the need to adduce new evidence, nor the volume of fresh evidence it intends to produce in light of the recharacterisation contemplated. It also argues the ever-changing security situation on the ground. In fact, the possibility of calling witnesses or adducing further evidence is always an option, depending on the circumstances of each case, and the need to do so will be determined by the Trial Chamber, *as the case may be, if it indeed decides in favour of a recharacterisation.*⁵⁶ In other words, the Defence argument on this point is particularly premature given that the Chamber has not yet decided to effect a recharacterisation. Lastly, the situation of the members of the Defence team is equally irrelevant, as it has not yet crystallised and, in any case, may not be taken into account when assessing reasonableness.

54. In conclusion, it is impossible at this stage to assess the delay to the rest of the proceedings that would result from the Impugned Decision, let alone to determine whether such delay would have been unreasonable in light of the circumstances of the case. It is equally impossible to determine the existence of an undue delay resulting from a legal recharacterisation of the facts insofar as such recharacterisation has not yet occurred.

55. Furthermore, if the Chamber were to opt for a recharacterisation of the facts, it could then decide, pursuant to regulation 55(3), to adopt measures specifically designed to ensure that any delay is limited to the strictest minimum.

⁵⁵ ICC-01/04-01/06-2205, para. 86.

⁵⁶ Regulation 55(3)(b).

FOR THESE REASONS,

MAY IT PLEASE THE CHAMBER

- a. **TO DISMISS** the Defence appeal against Decision 3319 of Trial Chamber II;
- b. Pursuant to article 82(1)(d) of the Statute and rule 158 of the Rules of Procedure and Evidence, **TO UPHOLD** the Impugned Decision.

[signed]

Fidel Nsita Luvengika
Legal Representative of the main group of victims

Dated this 25 January 2013

At Brussels