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

Public

Defence Request for a Permanent Stay of Proceedings

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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Introduction

1. Following the recent decisions and observations made by the majority of the Trial Chamber, it now appears to the defence for Mr Katanga (“defence”) that the Majority may be minded to move to judgment under Article 74 on the basis of requalified charges without providing the accused with a further opportunity to make effective investigations. The defence submits that to do so would be a manifest unfairness to the accused. The Trial Chamber has stated that the defence will not be informed of the extent and nature of the Chamber’s decision until the Article 74 judgment. In the event that the Chamber becomes minded to requalify the charges and to render a decision, other than an acquittal in respect of all those charges, the defence requests a stay of the proceedings. Such a stay should, given the circumstances of the case, be a permanent stay.

Procedural background

2. On 25 June 2007, the Prosecutor sought Mr. Katanga’s arrest on the basis of the mode of liability of “ordering” pursuant to Article 25(3)(b) of the Statute.¹ On 2 July 2007, the Pre-Trial Chamber granted the Prosecutor’s request but added the liability of “co-perpetration” pursuant to Article 25(3)(a) of the Statute.²
3. The Pre-Trial Chamber confirmed the charges on the basis of co-perpetration pursuant to Article 25(3)(a). The Chamber did not address the mode of liability of ordering pursuant to Article 25(3)(b), having considered that its finding on co-perpetration rendered moot further questions of accessory liability.³

¹ ICC-01/04-348-US-Exp and ICC-01/04-350-US-Exp, Application for a warrant of arrest for Germain Katanga; see also ICC-01/04-01/07-4-US, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, dated 6 July 2007, reclassified public on 12 February 2008, para. 54.

² ICC-01/04-01/07-1-US-tENG, URGENT WARRANT OF ARREST FOR GERMAIN KATANGA, dated 27 September 2007, reclassified public on 18 October 2007; see also ICC-01/04-01/07-4-US, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, dated 6 July 2007, reclassified public on 12 February 2008, para. 60.

³ ICC-01/04-01/07-716-Conf, Decision on the confirmation of charges, para. 471. Cf. the public redacted version, ICC-01/04-01/07-717, notified on the 1st of October 2008. See also *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 284, referring to *Prosecutor v. Ruto et al.*, Pre-Trial Chamber II, Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-01/11-1, para. 36; *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Judgment, Separate Opinion of Judge Shahabuddeen (“Separate Opinion of Judge Shahabuddeen (Gacumbitsi)”), paras 44, 45, referring to G. P. Fletcher, *Rethinking Criminal Law* (Oxford, 2000), p. 642, and Andrew Ashworth, *Principles of Criminal Law*, 2nd ed. (Oxford, 1995), pp. 410, 415, 439 and 441; Separate Opinion of Judge Shahabuddeen (Gacumbitsi), para. 50, referring to *Electricity Company of Sofia and Bulgaria, P.C.I.J., Series A/B, No. 77*, p. 90, and see, *ibid.*, at p. 105 per Judge Urrutia, also dissenting. See also Judge Abi-Saab in

4. The defence challenged this mode of liability at the confirmation hearing.⁴ On the request of the Chamber, it made similar submissions on this mode of liability before the Chamber prior to the commencement of the trial.⁵ The Chamber never issued a decision on this issue.
5. The trial commenced on 24th November 2009⁶ and its evidential stage was concluded in November 2011.⁷ Closing submissions were made in May 2012⁸ and subsequently, the Chamber retired to deliberate on its judgement under article 74 of the Rome Statute.
6. On 21st November 2011, the Trial Chamber, by a majority, gave notice under Regulation 55 “that the mode of liability under which Germain Katanga was initially charged might be subject to legal recharacterisation on the basis of article 25(3)(d)(ii) of the Statute”.⁹ That notice made plain that the Chamber had not reached a final decision as to altering the mode of liability. The Chamber stated that “The Majority will not examine the crime of using children under the age of fifteen years to participate actively in hostilities (direct co-perpetration) in the light of article 25(3)(d).”
7. The defence appealed the decision as to possible recharacterisation,¹⁰ with leave.¹¹ The Appeals Chamber subsequently dismissed the appeal on 27 March 2012.¹² In doing so the Appeals Chamber made clear that it was for the Trial Chamber to ensure that the proceedings, taken as a whole, are fair and expeditious.¹³

Prosecutor v. Tadić, (1994-1995) 1 ICTY JR 529, where he took a position similar to that taken by Judge Anzilotti.

⁴ ICC-01/04-01/07-T-46-ENG ET WT 11-07-2008, pp. 28-43. See also ICC-01/04-01/07-698, Defence Written Observations Addressing Matters that Were Discussed at the Confirmation Hearing, 28 July 2008, paras 13-32.

⁵ ICC-01/04-01/07-1578, Defence for Germain Katanga's Pre-Trial Brief on the Interpretation of Article 25(3)(a) of the Rome Statute; Cf. its corrigendum ICC-01/04-01/07-1578-Corr notified on 2 November 2009.

⁶ ICC-01/04-01/07-T-80-ENG ET WT 24-11-2009.

⁷ ICC-01/04-01/07-T-333-Red2-ENG CT2 WT 11-11-2011.

⁸ ICC-01/04-01/07-T-336-ENG ET WT 15-05-2012 to ICC-01/04-01/07-T-340-ENG CT WT 23-05-2012.

⁹ ICC-01/04-01/07-3319-tENG/FRA, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, 21 November 2012, p. 29.

¹⁰ ICC-01/04-01/07-3339, 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, 10 January 2013.

¹¹ ICC-01/04-01/07-3327, Decision on the "Defence Request for Leave to Appeal the Decision 3319", 28 December 2012.

¹² ICC-01/04-01/07-3363, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons", 27 March 2013.

¹³ See, in particular, paras. 91, 95, 96.

8. Thereafter the defence filed its '*Defence Observations on Article 25(3)(d)*' on 15 April 2013, in which it addressed a range of issues, including the need to conduct further investigations.¹⁴
9. The Trial Chamber consequently issued its decision of 15th May 2013 'transmitting additional legal and factual material' in an effort to clarify matters for the benefit of the defence.¹⁵ The defence filed further observations on June 3rd in which it requested further and better notice of the facts and circumstances that may be relied upon, based on the testimony of witnesses not withdrawn or found unreliable.¹⁶ The defence also made plain that an additional problem was the deterioration in the security situation in Ituri and North Kivu, areas the defence intended to re-visit if permitted to do so. The defence submitted that "In light of recent developments, such a mission would have to be postponed. Ituri is unstable and missions outside Bunia require special permission of the Registrar. Recent news also speaks of extensive Mai-Mai and other faction activity in North Kivu, and the introduction in the area of a 3,000 strong U.N. intervention brigade with an 'offensive mandate'".¹⁷ The defence asked for six months to complete its investigations.¹⁸
10. On June 17th the defence filed its observations in respect of existing prosecution witnesses.¹⁹
11. On 26 June 2013, the Trial Chamber issued its Decision on the Defence requests set forth in observations 3379 and 3386 of 3 and 17 June 2013,²⁰ which, by a majority²¹, authorised the defence to conduct further investigations on the new mode of liability, identifying several topics of investigation. It ordered the defence to provide a list of witnesses and evidence by 29 July and 17 September 2013.²²

¹⁴ ICC-01/04-01/07-3369, Defence Observations on Article 25(3)(d), 15 April 2013.

¹⁵ ICC-01/04-01/07-3371-tENG, Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court), 15 May 2013.

¹⁶ Corrigendum to the Defence Observations on the Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court) ICC-01/04-01/07-3379-Conf-Corr 04-06-2013

¹⁷ ICC-01/04-01/07-3379-Conf-Corr 04-06-2013 paragraph 55.

¹⁸ Ibid paragraph 57.

¹⁹ Defence Reply to 'Réplique de l'Accusation aux "Defence Observations on the Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court)"' ICC-01/04-01/07-3386-Red 17-06-2013

²⁰ ICC-01/04-01/07-3388.

²¹ In a dissenting opinion, Judge Christine Van den Wyngaert argued that, consistent with her earlier expressed opinions, "the Chamber should immediately render its decision under Article 74 of the Statute on the basis of the legal characterisations set out in the confirmation decision". Cf. ICC-01/04-01/07-3388-Anx.

²² ICC-01/04-01/07-3388-tENG.

12. On 5 August 2013, the defence submitted a report on the current status of its investigations, stressing that no investigations could be conducted in or around Walendu Bindi, Beni, or Goma at the time.²³
13. On 17 September 2013, the defence filed its observations following its investigatory missions,²⁴ (namely, those conducted by Mr Logo in Ituri from 12th to 31st July 2013, by Ms Menegon at the end of July, and by Ms Buisman, Ms Menegon and Mr Logo from the 21st of August to 6th of September 2013) in the course of which it drew the Chamber's attention to the fact that no investigations could be conducted in or around Walendu Bindi, Beni, or Goma due to security problems.²⁵ The defence set out at length the difficulties that had frustrated the mission, and in particular the danger and insecurity brought about by militia and army activity, observations extensively supported by the various security reports provided to the defence on mission. Given the difficulties set out, the defence submitted that: "On balance, given the length of the proceedings, only one course of action remains fair. It is respectfully submitted that the Chamber should dismiss any idea of requalification and proceed to judgment on the basis of article 25(3)(a) alone. If the Chamber nonetheless determines that it wishes to pursue the application of article 25(3)(d), then the defence will require an extension of time to conduct investigations. However, this would not, in the defence submission, be consistent with the right to a trial without undue delay."
14. On 23 September 2013, at the Chamber's request,²⁶ the Registry filed observations on the security situation in the DRC and on the defence missions, confirming the observations submitted by the defence.²⁷ The prosecution and the legal representatives also filed observations.²⁸

²³ ICC-01/04-01/07-3394-Conf, Defence Observations following the Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013.

²⁴ ICC-01/04-01/07-3397-Conf, Defence Second Observations following the Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013.

²⁵ ICC-01/04-01/07-3394-Conf, Defence Observations following the Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013.

²⁶ ICC-01/04-01/07-3398, *Demande d'observations adressée au Greffier de la Cour sur de la Défense de Germain Katanga*, 18 Septembre 2013.

²⁷ ICC-01/04-01/07-3400-Conf, *Observations du Greffe en application de la Décision ICC-01/04-01/07-3398*.

²⁸ ICC-01/04-01/07-3402-Conf, *Réponse de l'Accusation aux "Defence Second Observations following the Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013)"* ICC-01/04-01/07-3397-Conf, 25 September 2013 ; ICC-01/04-01/07-3401-Conf, *Observations sur le document intitulé « Defence second Observations following the Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 7 juin 2013 »* (ICC-01/04-01/07-3397-Conf), 25 September 2013.

15. On 2 October 2013, the Chamber, in its *Décision relative aux observations de la Défense (document 3397-Conf du 17 septembre 2013)* (« Decision of 2 October 2013 »),²⁹ noted that:

14. Rappelant que la Chambre d'appel lui a expressément demandé de veiller au respect des droits de la Défense mais aussi à ce que la procédure soit conduite à son terme dans un délai raisonnable, la Chambre, en l'état, estime devoir se borner à prendre acte de la position qu'exprime la Défense. Tout comme sur la question de savoir si tel ou tel des éléments permettant de se fonder sur l'article 25-3-d du Statut pour apprécier la responsabilité pénale de Germain Katanga dépasse ou non les faits et les circonstances contenus dans les charges elle entend, sur la réalité des difficultés de différents ordres invoquées par la Défense comme sur la compatibilité de la procédure de requalification avec les droits de l'accusé, ne se prononcer que dans le jugement qu'elle rendra sur le fondement de l'article 74 du Statut. [...]

The Chamber further ordered the defence to submit additional observations on the topics identified in its decision of 26 June 2013, relevant to the new mode of liability.

16. On 4 October 2013, the defence submitted its *Observations on the Registry, Prosecution and Victim Representatives' Observations on its investigations*.³⁰
17. On 10 October 2013, the Chamber, in its response to these defence observations, stated that “*elle ne se prononcera sur la pertinence de l'ensemble des écritures de la Défense relatives aux investigations qu'elle entendait conduire en RDC que dans le jugement qu'elle rendra sur le fondement de l'article 74 du Statut.*”³¹ It decided that it was not necessary to convene a status conference on the issue.
18. On 25 October 2013, the defence filed additional observations on Article 25(3)(d) of the Rome Statute,³² noting that “it has done its utmost in its previous and extensive filings to address such issues, albeit within the limits of the material then available to the defence and without the benefit of further investigations to meet the new charge. The defence position has not materially altered since those submissions were made, other than in its inability to investigate the new suggested form of participation.”³³ The defence requested the Chamber to render judgment on the basis of article 25(3)(a) and to acquit Mr. Katanga on that basis. In the alternative, the defence requested that: (a) it be given additional time and resources to conduct further investigations to prepare an

²⁹ ICC-01/04-01/07-3406, *Décision relative aux observations de la Défense (document 3397-Conf du 17 septembre 2013)*, 2 October 2013.

³⁰ ICC-01/04-01/07-3407-Conf, *Defence Observations on the Registry, Prosecution and Victim Representatives' Observations*, 4 October 2013.

³¹ ICC-01/04-01/07-3412, *Ordonnance relative aux Observations de la Défense sur les Observations du Greffier, du Procureur et des Représentants légaux (document 3407-Conf du 4 octobre 2013)* (« Order of 10 October 2013 »), para. 5.

³² ICC-01/04-01/07-3417, *Defence Observations on Article 25(3)(d) of the Rome Statute*.

³³ *Ibid*, para. 1.

adequate defence under article 25(3)(d); (b) the testimony of Mr. Katanga be excluded from the Chamber's deliberation under article 25(3)(d); (c) the defence requested that Mr. Katanga be acquitted under article 25(3)(d) due to insufficient evidence to prove his guilt beyond a reasonable doubt.

19. On 19 November 2013, the Chamber issued its *Décision portant rappel des termes de la décision n° 3406 du 2 octobre 2013 et de l'Ordonnance n° 3412 du 10 octobre 2013*,³⁴ by which it stated that:

12. [...] eu égard à l'obligation qui lui est faite de statuer avec diligence, c'est dans le jugement qu'elle rendra en application de l'article 74 du Statut qu'elle se prononcera sur les difficultés qu'a pu rencontrer la Défense pour accomplir les enquêtes qu'elle estimait indispensable d'effectuer et, plus généralement, sur la compatibilité de la procédure de requalification avec les droits de l'accusé. La Chambre ne peut dès lors que confirmer qu'elle n'envisage pas, à ce stade, l'accomplissement de nouvelles enquêtes. S'il lui apparaissait que la procédure de requalification envisagée ne garantit pas les droits de l'accusé, elle s'abstiendrait d'y procéder et elle statuerait alors sur le seul fondement du mode de responsabilité initial, c'est-à-dire de l'article 25-3-a du Statut.

14. Enfin, c'est également dans le jugement que la Chambre statuerait sur la demande de la Défense tendant à ce que soit exclues certaines parties du témoignage fait en audience par l'accusé.

20. On the same day, the Chamber issued its order setting the date for rendering its judgement under Article 74 of the Statute.³⁵

The Law

21. While neither the Rome Statute nor the Rules of Procedure and Evidence explicitly provide the power to stay proceedings, the Appeals Chamber has plainly recognised that the Court possesses that power,³⁶ observing that the power to stay proceedings arises from a proper interpretation of the Statute in the light of generally accepted Human Rights norms in that:

“The Statute safeguards the rights of the accused as well as those of the individual under interrogation and of the person charged. Such rights are entrenched in articles 55 and 67 of the Statute. More importantly, article 21 (3) of the Statute makes the interpretation as well as the application of the law applicable under the Statute subject to internationally recognised human rights. It requires the exercise of the jurisdiction of the Court in accordance with internationally recognized human rights norms.”³⁷

.....

³⁴ ICC-01/04-01/07-3419.

³⁵ ICC-01/04-01/07-3420, *Ordonnance fixant la date de l'audience de prononcé du jugement*.

³⁶ ICC-01/04-01/06-772, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006.

³⁷ *Ibid.*, para. 36.

“Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and must be stopped.”³⁸

“Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed. To borrow an expression from the decision of the English Court of Appeal in *Huang v. Secretary of State*, it is the duty of a court: “to see to the protection of individual fundamental rights which is the particular territory of the courts [...]” Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial.”³⁹

22. In the particular circumstances of the case then under consideration, where the accused was alleging that the Prosecutor had colluded in his unlawful detention and ill-treatment by the Congolese authorities, the Appeals Chamber judgement accepted that such matters were capable of giving rise to a stay of proceedings that would be absolute and permanent.
23. This is to be distinguished from, though analogous to, the Common Law doctrine of stay for abuse of process which the Appeals Chamber found was not of universal application and was not supported by the Statute or jurisprudence of the Court:

“The power to stay proceedings for abuse of process, as indicated, is not generally recognised as an indispensable power of a court of law, an inseparable attribute of the judicial power. The conclusion to which the Appeals Chamber is driven is that the Statute does not provide for stay of proceedings for abuse of process as such.”⁴⁰

24. In a later appeal brought before it in the *Lubanga* case, concerning non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements, the Appeals Chamber confirmed the power of the Trial Chamber to order a stay of proceedings:

“The Appeals Chamber agrees with the finding of the Trial Chamber at paragraph 91 of the Impugned Decision that “[i]f, at the outset, it is clear that the essential preconditions of a fair trial are missing and there is no sufficient indication that this will be resolved during the trial process, it is necessary ... that the proceedings should be stayed.”⁴¹

25. In the particular circumstances of that case the appropriate form of stay was not a permanent stay but a conditional stay. The Appeals Chamber observed that its earlier decision:

³⁸ *Ibid.*, para. 37.

³⁹ *Ibid.*, para. 39.

⁴⁰ *Ibid.*, para. 35.

⁴¹ ICC-01/04-01/06-1486, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 21 October 2008, para. 76.

“...did not rule out the imposition of a conditional stay of proceedings in suitable circumstances. If the unfairness to the accused person is of such nature that - at least theoretically - a fair trial might become possible at a later stage because of a change in the situation that led to the stay, a conditional stay of the proceedings may be the appropriate remedy. Such a conditional stay is not entirely irreversible: if the obstacles that led to the stay of the proceedings fall away, the Chamber that imposed the stay may decide to lift it in appropriate circumstances and if this would not occasion unfairness to the accused person for other reasons, in particular in light of his or her right to be tried without undue delay (see article 67 (1) (c) of the Statute). If a trial that is fair in all respects becomes possible as a result of changed circumstances, there would be no reason not to put on trial a person who is accused of genocide, crimes against humanity or war crimes - deeds which must not go unpunished and for which there should be no impunity (see paragraphs 4 and 5 of the Preamble to the Statute).”⁴²

26. Before ordering a stay, alternatives may also be considered.⁴³ It was also observed that:

“A Trial Chamber ordering a stay of the proceedings enjoys a margin of appreciation, based on its intimate understanding of the process thus far, as to whether and when the threshold meriting a stay of proceedings has been reached which may be a permanent stay or a conditional stay.”⁴⁴

27. Stay of Proceedings was later considered by the Trial Chamber (not the Appeals Chamber) in *Jerbo and Banda*,⁴⁵ where the request for a stay was made prior to the commencement of trial and for that reason distinguishable from the present case. The Trial Chamber noted that a stay was an exceptional remedy that, with reference to the Appeals Chamber decision; “[...] is the necessary remedy only if (i) the “essential preconditions of a fair trial are missing”, and (ii) there is “no sufficient indication that this will be resolved during the trial process”.⁴⁶

28. The request was based on the inability of the defence to access Sudan in order to conduct investigations. The Trial Chamber disposed of the Request for stay on the basis that “the defence has not shown any prejudice that, in the Chamber's view, cannot be remedied in the course of trial” and “...was unwilling to stay the proceedings at such an early stage” and concluded: “In light of the reasoning set out above, the Chamber concludes that the better approach is for the case to go to trial. If need be, the defendant's complaint will be kept in mind in the course of the trial. At trial, the Chamber, the parties and the participants will be in a position to better assess the evidence adduced to see whether the complaints about fair trial are founded.”⁴⁷

⁴² *Ibid.*, para. 80.

⁴³ *Ibid.*, para. 98.

⁴⁴ *Ibid.*, para. 84.

⁴⁵ ICC-02/05-03/09-410, Decision on the defence request for a temporary stay of proceedings, para. 79.

⁴⁶ *Ibid.*, para. 79.

⁴⁷ *Ibid.*, para. 159.

29. In contrast, in the present case we are at the very end of the trial. The problem arising is not a speculative one that may or may not effect a future trial. The change in mode of participation merits investigations being done which cannot presently be done, while a further adjournment is difficult to justify given its uncertainties and when the trial has taken so long.
30. In contrast to the *Jerbo and Banda* case the defence in the present case can not be said to have sought to conduct investigations that are not deemed relevant to the ‘new’ contested issues. The defence has provided sufficient specificity, if that be an element to be considered, in its previous submissions. Clearly these are areas that merit further investigation. Indeed three areas were identified or recognised by the Trial Chamber. Further, the defence has identified issues and indeed even witnesses that it has reason to believe can assist. The investigations, though not possible now were possible throughout the greater, substantial length of the case and may become possible in the not too distance future, albeit not within a clear time frame sufficient to justify an uncertain period of adjournment. It is the timing of the Notice that has given rise to these defence difficulties – a factor that must be taken into account.
31. In the present case the defence submits that:
- (a) the necessity for the Chamber to exercise its power to stay the proceedings arises as a necessary means to preserve the overall fairness of the trial, with particular reference to the impossibility of the accused to make effective investigations so as to address fully the issues arising from any change in the mode of liability.
 - (b) Such a stay should be a permanent stay given the particular circumstances of the case, the need for fairness to the accused, the length of the trial to date, and the need to secure the right for expeditious trial.
- (a) The necessity for the Chamber to exercise its power to stay the proceedings**
32. The key determinate as to the appropriateness of effecting a change in the form of participation of the accused will rest largely on whether the trial as a whole remains fair.⁴⁸

⁴⁸ ICC-01/04-01/07-3363, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons", para. 99.

33. The defence has previously submitted in several filings the need for the accused to be able to conduct effective investigations relevant to any change in the form of participation of the accused.⁴⁹ The necessity for such investigations is particularly acute in the present case because of the nature and extent of the proposed change and the extremely late notice of possible change, coming six months after the Trial Chamber retired to consider its decision and over a year after the close of the evidential stage of the trial.
34. The defence was not in a position to obtain further investigatory resources until such time as the Chamber ordered or permitted further defence investigations. On 26th June 2013, the Chamber authorised the defence to travel to the DRC to conduct investigations.⁵⁰
35. The defence made plain its difficulties in responding to the proposed change when the factual basis of the new mode of liability remained so unclear and requested further details.⁵¹ The Chamber provided the defence with some further details in its decisions of 15th May and 26th June 2013. By its decision of 26th June 2013 the Trial Chamber provided guidance and time limits for such investigations and acknowledged the difficulties confronting the accused, stating:

As previously stated in the 15 May 2013 Decision, the Chamber accepts that, although treated during the hearings, some topics are evidently of particular importance in the analysis of Germain Katanga's liability on the basis of article 25(3)(d)(ii) of the Statute. The Chamber considers this to be true in particular for (1) the attack on Nyankunde and/or other attacks prior to the attack on Bogoro; (2) the identification of the perpetrators of the crimes; and (3) the nexus between the weapons delivered to the Ngiti combatants and the crimes committed in Bogoro.⁵²

36. It was fair and reasonable that the defence be permitted to make such further investigations and the Chamber, as can be seen above, gave every indication that it recognised this to be the case. The defence reopened its investigations with the object of

⁴⁹ ICC-01/04-01/07-3339, 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, 10 January 2013, paras 49, 51, 87; ICC-01/04-01/07-3369, Defence Observations on Article 25(3)(d), 15 April 2013, paras 51, 177, 181-189, 194; ICC-01/04-01/07-3379-Conf-Corr, Corrigendum to the Defence Observations on the Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court), 3 June 2013, paras 47-57, 59; ICC-01/04-01/07-3397-Conf, Defence Second Observations following the *Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013*, paras 42, 45, and Annex A; ICC-01/04-01/07-3417, Defence Observations on Article 25(3)(d) of the Rome Statute, paras 7-8, 12-13, 18, 28-30, 35, 51, 64, 89, 91, 93.

⁵⁰ And see ICC-01/04-01/07-3419, *Décision portant rappel des termes de la décision n° 3406 du 2 octobre 2013 et de l'Ordonnance n° 3412 du 10 octobre 2013*, para. 11.

⁵¹ ICC-01/04-01/07-3369, paras 181, 189, 194.

⁵² ICC-01/04-01/07-3388, *Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013*.

addressing the case from the fresh perspective of an allegation under article 25(3)(d), namely that Germain Katanga made a significant contribution to the common criminal purpose of a group of Ngiti commanders and combatants, and in the hope of addressing that case effectively.

37. Following the decision of 26th June, and as previously set out at length in its previous reports and filings,⁵³ the defence set out to conduct the necessary investigations. It did so with appropriate diligence but found its efforts frustrated by intervening events, the main and overriding difficulty being the unexpected military activity and consequent insecurity in Walendu Bindi and the North and South Kivus. As the Chamber appreciates, the area became a war zone. Those difficulties were set out in the defence filing 3397 of 17th September together with Security Reports in support dating from early July 2013.⁵⁴ The defence report as to those difficulties was fully supported by the Registrar's report,⁵⁵ filed at the request of the Chamber. The defence provided further observations in response to those made by the prosecution and victims's representatives.⁵⁶ In light of all those matters referred to in the various filings, the only reasonable conclusion is that the defence was prevented from making effective investigations due to circumstances beyond its control.
38. While it seems probable that the situation will change for the better in the course of 2014 there was no prospect of it doing so in 2013. Even now, in mid December 2013,⁵⁷ there is militia and army activity in Walendu Bindi such as to make investigations impossible. The population has been widely dispersed. Nor is there a reasonable prospect of renewing investigations in the next several months, a circumstance recognised by the Registrar in his observations.⁵⁸ It was in these circumstances that the

⁵³ ICC-01/04-01/07-3394-Conf, Defence Observations following the *Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013*, 5 August 2013, paras 9 & seq. ; ICC-01/04-01/07-3397-Conf, Defence Second Observations following the *Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013*, paras 10 & seq. and Annex A; ICC-01/04-01/07-3407-Conf, Defence Observations on the Registry, Prosecution and Victim Representatives' Observations. 4 October 2013, paras 8 & seq., and Annex B; ICC-01/04-01/07-3417, Defence Observations on Article 25(3)(d) of the Rome Statute, paras 18-20.

⁵⁴ ICC-01/04-01/07-3397-Conf, Defence Second Observations following the *Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013*.

⁵⁵ ICC-01/04-01/07-3398, *Observations du Greffe en application de la Décision*.

⁵⁶ ICC-01/04-01/07-3407-Conf, Defence Observations on the Registry, Prosecution and Victim Representatives' Observations.

⁵⁷ The defence received a report last week from Jean Logo confirming the continued difficulties in Walendu Bindi.

⁵⁸ ICC-01/04-01/07-3400-Conf, *Observations du Greffe en application de la Décision ICC-01/04-01/07-3398*, para. 15.

defence submitted, given the length of the proceedings to date, that “the only fair course is to proceed to judgement on the basis of Article 25(3)(a).”⁵⁹

39. The Chamber has not as yet ruled on that submission, nor on the alternative submissions made by the defence in its recent filings,⁶⁰ and has indicated its intention to do so only in its Article 74 decision.⁶¹ To date the Majority has not expressly indicated that it will reformulate the charges, but rather that the legal characterisation of facts may be subject to change. In its recent Decision of 19th November 2013, the Chamber stated that, “[s]hould it consider that the envisaged requalification procedure does not guarantee the rights of the Accused, it shall refrain from such requalification and will then render judgment on the sole basis of the original mode of liability, namely, that under article 25(3)(a) of the Statute.”⁶²
40. However, the Majority also indicated that ‘[...] it does not at this stage envisage any new investigations.’⁶³ It therefore appears that the Majority is or may be minded to move to judgement on the basis of requalified charges without providing the accused with a further opportunity to make effective investigations. The defence submits that if that were to include a finding other than an acquittal, it would constitute a manifest unfairness to the accused, given that further investigations are a central element to the overall fairness of the procedure. Without such investigations being made, the defence is unable to address the several issues raised by the proposed change fairly and fully. The accused will be deprived of his several rights under Article 67 (b) and (e), as further protected by Regulation 55(3).
41. The accused would have been in a position to investigate the issues particular to the proposed change in liability had he been provided with timely notice at the outset or in

⁵⁹ ICC-01/04-01/07-3407-Conf, Defence Observations on the Registry, Prosecution and Victim Representatives’ Observations, para. 43.

See also ICC-01/04-01/07-3369, Defence Observations on Article 25(3)(d), 15 April 2013, para. 192; ICC-01/04-01/07-3379-Conf-Corr, Corrigendum to the Defence Observations on the Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court), 3 June 2013, para. 59; ICC-01/04-01/07-3397-Conf, Defence Second Observations following the *Décision relative aux requêtes résentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013*, para. 46; ICC-01/04-01/07-3417, Defence Observations on Article 25(3)(d) of the Rome Statute, para. 93.

⁶⁰ ICC-01/04-01/07-3369, Defence Observations on Article 25(3)(d), 15 April 2013, paras 193-194; ICC-01/04-01/07-3379-Conf-Corr, Corrigendum to the Defence Observations on the Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court), 3 June 2013, para. 60; ICC-01/04-01/07-3397-Conf, Defence Second Observations following the *Décision relative aux requêtes résentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013*, para. 45; ICC-01/04-01/07-3417, Defence Observations on Article 25(3)(d) of the Rome Statute, para. 93.

⁶¹ ICC-01/04-01/07-3419, *Décision portant rappel des termes de la décision n° 3406 du 2 octobre 2013 et de l’Ordonnance n° 3412 du 10 octobre 2013*.

⁶² ICC-01/04-01/07-3419, para. 12.

⁶³ *Ibid.* para. 12.

the course of the evidential portion of the trial. It is not the accused's fault that notice was given so late, nor his fault that investigations were frustrated by events. It must be emphasised that the difficulties that face the defence arose only after 2012. Had notice of the change in the mode of participation been raised at an earlier point in the trial then the defence would not now be facing these difficulties. Nor can the defence accept the suggestion advanced in the most recent decisions by the Majority that revisiting the existing record for material⁶⁴ can provide a satisfactory alternative to the lost opportunity to investigate. Indeed, the defence has already done its utmost, insofar as it understands the possible basis for recharacterisation, to glean from the record all the material that may assist the accused.

42. In its *Judgment on the appeal of Mr Germain Katanga*,⁶⁵ the Appeals Chamber instructed the Trial Chamber as follows:⁶⁶

“The Trial Chamber thereafter will need to assess whether it remains possible for Mr Katanga effectively to prepare his defence in light of both the manner in which the trial has been conducted to date and the re-characterisation that is now proposed. The Trial Chamber will also need to consider what measures may need to be implemented to ensure that the trial as a whole remains fair. Such consideration could include an assessment by the Trial Chamber of whether Mr Katanga has, in fact, been prejudiced by a re-characterisation made at this stage, including in particular whether he has been deprived of mounting the defence in relation to article 25 (3) (d) of the Statute that he otherwise would have wished to present.”

43. The Appeals Chamber stated that it could not, at that time, conclusively determine “whether the trial as a whole will remain fair if the re-characterisation proceeds”,⁶⁷ and whether “proceeding with the proposed re-characterisation would result in a violation of his right to an effective defence.”⁶⁸ The Appeals Chamber held any such determination to be premature.⁶⁹ The Appeals Chamber further noted:

“Whether it will depends to a large extent upon how the Trial Chamber conducts the further proceedings and, in particular, on the measures it will take to protect Mr Katanga's rights. Nevertheless, the Appeals Chamber will briefly address the arguments of Mr Katanga that the Impugned Decision has rendered the trial unfair. Any such assessment is without prejudice to any ruling that it may be called upon to make in the future as to whether the trial in fact remained fair, should the Trial Chamber proceed to re-characterise the facts in this case in its

⁶⁴ ICC-01/04-01/07-3406, *Décision relative aux observations de la Défense (document 3397-Conf du 17 septembre 2013)*.

⁶⁵ Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons ICC-01/04-01/07-3363, 27 March 2013.

⁶⁶ *Ibid*, para. 95.

⁶⁷ *Ibid*, para. 91.

⁶⁸ *Ibid*, para. 96.

⁶⁹ *Ibid*, para. 96.

decision under article 74 of the Statute.”⁷⁰

44. The Trial Chamber is well aware of its obligation to guarantee the fairness of the trial and has stated that, “[s]hould it consider that the envisaged requalification procedure does not guarantee the rights of the Accused, it shall refrain from such requalification.”⁷¹ However, the defence submits that it cannot be fair to requalify the charges in this case without having given the defence an opportunity to conduct further investigations and that if the Trial Chamber comes to the point when it considers doing so then that would be a grave error.
45. A potential error is not an appealable error. The defence cannot assume that the Trial Chamber will even proceed to requalify the charges. Even if a potential error was capable of appeal at this stage such appeal would result in further, significant delay and would, even if entertained, almost certainly meet with the Appeals Chamber repeating its earlier position – that it was for the Trial Chamber to determine what measures it may need to implement to ensure that the trial as a whole would remain fair⁷².
46. In these circumstances the defence, in seeking to protect the rights of the accused, submits that the appropriate course, absent acquittal, is for the Trial Chamber to stay the proceedings. Without effective investigations the accused is unlikely to be able to address the proposed re-categorisation as fully as he would if exercising his rights to the full. Also, this situation is inextricably linked to the lateness in giving notice.
47. Such a situation will arise in the present case the moment the Trial Chamber comes to the point where it reviews the evidence in the light of any proposed change with a view to assessing whether there is a sufficiency of evidence to convict but without providing the accused with the further opportunity to investigate the new form of the charges.
48. Accordingly, and in light of his legitimate fair trial complaints, the defence submits that the proceedings initiated against Mr. Katanga, absent an acquittal, should be stayed at this moment, unless the Chamber renders its Article 74 judgment on the basis of the original mode of liability under Article 25(3)(a).

(b) Such a stay should be a permanent stay

⁷⁰ *Ibid*, para. 91.

⁷¹ ICC-01/04-01/07-3419, para. 12.

⁷² ICC-01/04-01/07-3363 paragraph 91

49. While the Trial Chamber has a discretion to determine as to whether the stay should be conditional or permanent, it is submitted that any stay should be permanent. This because of the right of the accused to be tried without undue delay under Article 67(i)(c) of the Statute and the fact that there is ‘no sufficient indication’ that inability to investigate ‘will be resolved during the trial process.’ The inability to investigate does not require further review here as that history is well known.

Undue Delay

50. As to undue delay, the long history of the process is known. The Trial Chamber has been consistent in its concern as to the length of the trial, particularly over the past year of discussion on the present issue. While at the outset of the current procedure, in November 2012, the Majority observed that “it should be borne in mind that [...] any potential delay engendered by recharacterisation must be limited”,⁷³ it did not seem to the Chamber that at that stage of the proceedings it inevitably entailed a violation of the right to be tried without undue delay. The Chamber also stated that “if it considered the duration of the proceedings to have become excessive, for reasons it had not anticipated, it would fall to the Chamber hearing the case to reconsider its assessment as to the rights which the Accused must be afforded.”⁷⁴ Since then the Chamber has grown increasingly anxious as to the delay and rightly so.
51. The Appeals Chamber in March 2013 stated that it was premature to determine whether Mr Katanga’s right to be tried without undue delay had been infringed, because it was unable to judge how much time would be added to the trial proceedings as a result of the re-characterisation. The Appeals Chamber expressed its concern;
- [...] that the Impugned Decision was rendered almost six months into the deliberations of the Trial Chamber. Nevertheless, at the present time it is not clear that "undue delay" will be caused as a result of the Impugned Decision. However, given that notice under regulation 55 (2) of the Regulations of the Court was given at the deliberations stage, the Trial Chamber will need to be particularly vigilant in ensuring Mr Katanga's right to be tried without undue delay. Recalling article 64 (2) of the Statute, the Appeals Chamber emphasises that the Trial Chamber will have to ensure that the proceedings, taken as a whole, are fair and expeditious.⁷⁵
52. At this stage, a year on from the Chamber’s Notice decision and acquittal of the co-accused and two years on from the close of the evidential part of the trial, the position has decidedly changed. Certainly the stress and strain on the accused has had the effect of narrowing the range of defence options by excluding any that may lead to a further

⁷³ ICC-01/04-01/07-3319, para. 45.

⁷⁴ ICC-01/04-01/07-3319, para. 44.

⁷⁵ ICC-01/04-01/07-3363, para. 99.

delay in the conclusion of this trial. Trial within a reasonable time is interpreted by the ECHR as designed to prevent a person charged from remaining “too long in a state of uncertainty about his fate”⁷⁶ and runs from the time he is first effected by proceedings – in this case at least six years – and will include any later period of appeal. In February 2014, when the Article 74 decision is scheduled to be rendered, it will be nine years since Mr. Katanga was first arrested in DRC. In the present case any further extension of time, for example by a conditional stay, would only serve to aggravate the position and without a clear advantage in sight.

53. Nor is a conditional stay appropriate at this stage of the process. The Appeals Chamber observed that:

“.... the right of any accused person to be tried without undue delay (article 67 (1) (c) of the Statute) demands that a conditional stay cannot be imposed indefinitely. A Chamber that has imposed a conditional stay must, from time to time, review its decision and determine whether a fair trial has become possible or whether, in particular because of the time that has elapsed, a fair trial may have become permanently and incurably impossible. In the latter case, the Chamber may have to modify its decision and permanently stay the proceedings.”⁷⁷

54. However the facts and circumstances of the *Lubanga* case, with the stay ordered in the course of the evidential portion of the trial, and not two years after its conclusion, is significantly different to the present case. Here the trial’s course is run and further delay, based on the uncertainties of peace returning to Eastern Congo, too speculative to justify.
55. It has been suggested that delayed trial alone may have substantial effects on a detainee: “the psychological effects of delay on a defendant may constitute a strong argument that the delay is unreasonable, even if a fair trial could still be held”.⁷⁸
56. It is the process *per se* which stands to be considered, as observed by Judge Blattman in the ‘Decision on opening and closing statements’;⁷⁹ “while it may seem harmless to make small concessions which erode the rights of the accused, there can be a cumulative effect which does, in fact, put in grave jeopardy the right of the accused to a fair trial ...”.⁸⁰ While in this case the inability to investigate and the delay of the

⁷⁶ E.C.H.R., *Stogmuller v Austria*, 10 November 1989, n° 1602/62, para. 5.

⁷⁷ ICC-01/04-01/06-1486, 21 October 2008, para. 101.

⁷⁸ Emerson and Ashworth, *Human Rights and Criminal Justice* (Sweet and Maxwell, 2001) at pages 353 – 357, referring in particular to New Zealand and Canadian jurisprudence.

⁷⁹ ICC-01/04-01/06-1346, 22 May 2008.

⁸⁰ Para. 3 of Separate Opinion. Judge Blattman refers to the decision of the Appeals Chamber (ICC-01/04-01/06-772), and to the ICTR Appeals Judgement on *Barayagwiza* (3 November 1999), where the Appeals Chamber took into consideration the following issues: “1) the right to be promptly informed of the charges during the first period of detention; 2) the alleged failure of the Trial Chamber to resolve the *writ of habeas*

proceedings individually and cumulatively erode the rights of the accused they need not be seen in isolation from other factors, such as the lack of an amended document containing the charges, or lack of clarity as to what evidence is said to support a conviction, which may also contribute to a cumulative effect that “put in grave jeopardy the right of the accused to a fair trial”.

Conclusion

57. For the above reasons, the defence respectfully asks the Trial Chamber, in respect of those charges subject to recharacterisation, and absent an acquittal, to order a permanent stay of proceedings against Mr Germain Katanga.

Respectfully submitted,



David HOOPER Q.C.

Dated: 11th December 2013

At London

corpus filed by the Appellant; and 3) the Appellant’s assertions that the Prosecutor did not diligently prosecute her case against him” (at para 73). The Chamber subsequently emphasised that “the circumstances set forth in this analysis must be read as a whole.[...] none of the findings made in this sub-section of the Decision, in isolation, are necessarily dispositive of this issue. That is, it is the combination of these factors and not any single finding herein that leads us to the conclusion we reach in this subsection. In other words, the application of the abuse of process doctrine is case specific and is limited to the egregious circumstances presented by this case” (at para 73). He also referred to the ECHR case *Barbera, Messegue and Jabardo v Spain*, Applicn 10588/83 where a decision was set aside due to “the cumulative effect of a series of procedural shortcomings, which individually may be of minor significance, [but which] may compromise the person’s right to a fair trial”. (Cited in *Right to a Fair Trial in Criminal Matters Under Article 6 E.C.H.R.*, Mahoney, Paul, 2004, page 111).