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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 and MATHIEU NGUDJOLO CHUI***

Public Document

Defence Request for Leave to Appeal the Decision 3319

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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1. The defence for Germain Katanga (the “defence”) hereby submits grounds in support of its application for leave to appeal the Trial Chamber’s *Décision relative à la mise en œuvre de la norme 55 du Règlement de la Cour et prononçant la disjonction des charges portées contre les accusés*’ (the “Notice Decision”).¹ The application (“Defence Application”) is made pursuant to Article 82(1)(d) of the Rome Statute, Rule 155 of the Rules of Procedure and Evidence, and Regulation 65 of the Regulations of the Court.
2. The Notice Decision invokes Regulation 55 of the Regulations of the Court and places Germain Katanga (the ‘accused’) on notice that the legal characterisation of facts upon which the charges are based may be changed to accord with Article 25(3)(d)(ii).

Procedural Background

3. On 25 June 2007, the Prosecutor sought Mr. Katanga’s warrant of arrest on the basis of the mode of liability of “ordering” pursuant to Article 25(3)(b) of the Statute.²
4. On 2 July 2007, the Pre-Trial Chamber granted the Prosecutor’s request but added the mode of liability of “co-perpetration” pursuant to Article 25(3)(a) of the Statute.³
5. At the confirmation hearing, the defence challenged the theory of joint control as a notion of co-perpetration under Article 25(3)(a), developed by the *Lubanga* Pre-Trial Chamber.⁴
6. On 26 September 2008, 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

¹ ICC-01/04-01/07-3319, 21 November 2012.

² 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: “The Prosecution alleges that Germain Katanga is criminally responsible under article 25(3)(b) of the Statute for ordering the commission of crimes committed by the forces under his command during and in the aftermath of the joint FRPI and FNI attack on Bogoro on or about 24 February 2003”.

³ 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: “Consequently, the Chamber finds that there are reasonable grounds to believe that Germain Katanga is criminally responsible under article 25(3)(a) of the Statute, as a principal to the crimes committed by members of the FRPI and the FNI during and in the aftermath of the joint indiscriminate attack by the FRPI and the FNI on the village of Bogoro on or about 24 February 2003. In the alternative, the Chamber finds that there are reasonable grounds to believe that Germain Katanga is criminally responsible under article 25(3)(b) of the Statute, as an accessory to the crimes committed by his subordinates during and in the aftermath of the attack.”

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, para. 13-32.

liability of ordering pursuant to Article 25(3)(b), having considered that its finding on co-perpetration rendered moot further questions of accessory liability.⁵

7. On 1st October 2009, the Trial Chamber ordered the parties to give their views on whether the interpretation given by the Pre-Trial Chamber of Article 25(3)(a) should be retained or discarded.⁶ The defence submitted its views on 30th October 2009, and requested the Trial Chamber not to adopt the interpretation given to Article 25(3)(a) by the Pre-Trial Chamber but to read this provision as it states: jointly with another or through another person.⁷ The Chamber never ruled on the submission.⁸
8. The trial commenced on 24 November 2009.⁹ The accused testified between 27 September and 19 October 2011.¹⁰ The last evidence was presented on 11th November 2011.¹¹ The prosecution filed its closing brief on 24th February 2012,¹² the defence on 30 March,¹³ followed by oral submissions from 15 to 23 May 2012.¹⁴
9. On 21 November 2012, six months after closing submissions, the Chamber issued the Notice Decision, subject of this request.¹⁵
10. On 23 November 2012 the defence filed a Notice that it would request leave to appeal¹⁶ the Chamber's Notice Decision. The Chamber agreed that the defence be allowed to submit its grounds after the Notice Decision had been translated.¹⁷ On December 17th the translation of the impugned Decision was delivered to the accused. The defence now submits the grounds for seeking leave to appeal.

⁵ ICC-01/04-01/07-716-Conf, Decision on the confirmation of charges, para. 471: "If the Chamber finds that there is sufficient evidence to establish substantial grounds to believe that Germain Katanga and Mathieu Ngudjolo Chui are jointly responsible as principals for having committed the crimes listed in the Amended Document Containing the Charges through their subordinates, such a finding renders moot further questions of accessorial liability. This means that the Chamber will not consider other forms of accessorial liability provided for in article 25(3) (b) to (d) of the Statute or the alleged superior responsibility of the two suspects provided for in article 28 of the Statute." Cf. the public redacted version, ICC-01/04-01/07-717, notified on the 1st of October 2008.

⁶ ICC-01/04-01/07-T-71-Red-ENG WT 01-10-2009, 1-10-2009, pages 7-8.

⁷ 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.

⁸ See also Dissenting Opinion, para. 38.

⁹ ICC-01/04-01/07-T-80-ENG ET WT 24-11-2009.

¹⁰ ICC-01/04-01/07-T-314-ENG CT2 WT 27-09-2011 to ICC-01/04-01/07-T-325-ENG CT WT 19-10-2011.

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

¹² ICC-01/04-01/07-3251-Conf, *Mémoire final*; see its corrigendum ICC-01/04-01/07-3251-Conf-Corr and its public redacted version ICC-01/04-01/07-3251-Corr-Red.

¹³ ICC-01/04-01/07-3266-Conf, Defence Closing Brief; Cf. its corrigendum ICC-01/04-01/07-3266-Conf-Corr2 and its public redacted version ICC-01/04-01/07-3266-Corr2-Red.

¹⁴ 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.

¹⁵ ICC-01/04-01/07-3319, *Décision relative à la mise en œuvre de la norme 55 du Règlement de la Cour et prononçant la disjonction des charges portées contre les accusés*.

¹⁶ ICC-01/04-01/07-3321, Defence Notice That It Will Request Leave to Appeal the Decision 3319, dated 23 November 2012, notified on 26 November 2012.

¹⁷ Email from Mr Simon De Smet entitled "RE: Request regarding the decision 3319".

11. Though the Chamber states that no final decision has yet been taken as to changing the legal characterisation of the charges, and requests further submissions on the issue, a Notice Decision is itself susceptible of appeal. This was specifically stated to be the case in the *Bemba* case, in the ‘Decision requesting the defence to provide further information on the impact of the Chamber’s notification pursuant to Regulation 55(2) of the Regulations of the Court’, where the Chamber noted that ‘No request for leave to appeal this decision was lodged by the parties or participants’.¹⁸
12. On 18th December the co-accused, Mathieu Ngudjolo, was acquitted of all counts by the unanimous judgment of the Trial Chamber.¹⁹ The Trial Chamber ordered his release and on the 20th December 2012, the Appeals Chamber dismissed the Prosecutor’s application to have the order for his release suspended.²⁰

The issues that the defence seek to have reviewed by the Appeals Chamber

13. The defence submits that the Chamber erred in issuing a notification under Regulation 55, at this stage of the proceedings, relating to the modification of the mode of liability of Mr Katanga, from Article 25(3)(a) to 25(3)(d)(ii) of the Rome Statute. Such modification, in the particular circumstances of the case, amounts to an abrogation of the principles and protections enshrined in the Rome Statute and falls outside the scope of Regulation 55.
14. The issue which the defence seeks to have addressed by the Appeal Chamber can be expressed in the following manner: Is the Chamber’s decision to give notice, informing the parties and participants that the legal characterisation of the facts relating to Germain Katanga’s mode of participation is likely to be changed, lawful and appropriate in the circumstances of the case?
15. The defence submits it is unlawful and inappropriate to issue the notice because:

A. The proposed modification of the mode of liability from 25(3)(a) to 25(3)(d) falls outside the scope of Regulation 55 and Article 74(2) of the Statute in that:

¹⁸ ‘Decision requesting the defence to provide further information on the impact of the Chamber’s notification pursuant to Regulation 55(2) of the Regulations of the Court’ ICC-01/05-01/-8-2419 paragraph 1; see also ICC-01/04-01/06-2107, Decision on the prosecution and the defence applications for leave to appeal the "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", para. 29.

¹⁹ *Prosecutor v. Ngudjolo*, ICC-01/04-02/12-3, *Jugement rendu en application de l'article 74 du Statut*, 18 December 2012.

²⁰ ICC-01/04-02/12 OA, Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect

(i) The proposed re-characterization changes the narrative of the charges so fundamentally that it exceeds the facts and circumstances described in the charges as set out in the decision confirming the charges.²¹

(ii) The Majority exceeds the boundaries of Regulation 55 by relying on subsidiary facts in the Notice Decision.

B. The Notice Decision is rendered at an inappropriate time in the proceedings so as to be incompatible with Regulation 55 and the minimum fair trial guarantees contained in Article 67(1) of the Statute, and in particular:

(i) “To be informed promptly and in detail of the nature, cause and content of the charge” (Article 67 (1)(a)).

(ii) “To have adequate time and facilities for the preparation of the defence” (Article 67(1)(b) and Regulation 55(3));

(iii) “To be tried without undue delay” (Article 67(1)(c));

(iv) “Not to be compelled to testify or to confess guilt and to remain silent” (Article 67(1)(g));

(v) “Not to have imposed on him [...] any reversal of the burden of proof or any onus of rebuttal” (Article 67(1)(i)).

C. The Notice to re-characterise the charges to Article 25(3)(d) was not reasonably foreseeable to the defence and directly impacts on the accused’s right under Article 67(1)(a) and, in respect of Article 67(1)(g), his making an informed decision as to whether or not to give evidence.

D. The proposed re-characterisation sought to be introduced by the Notice Decision will cause the accused to be confronted, at this late stage, with a mode of liability that is unclear and unsettled law. The accused is left in doubt as to the nature and extent of the charge it is proposed he faces.

E. The Notice Decision is defective as it fails to provide sufficient detail to the accused as to the facts and circumstances that may be relied upon for the proposed re-characterisation of the charges.²² It is in marked contrast to the particulars of the

²¹ ICC-01/04-01/07-717, Decision on the confirmation of charges

²² See, for instance, ICC-01/04-01/06-2205, Judgment 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”, 8 December 2009, para. 109 (“The Trial Chamber’s explanations in the Impugned Decision and the Clarification regarding the facts and circumstances that it would take into account for the change in the legal characterisation are extremely thin. The Trial Chamber neither provided any details as to the elements of the offences the inclusion of which it contemplated, nor did it consider how these elements were covered by the facts and circumstances described in the charges”).

charges provided to the accused by the Confirmation Decision, which ran to 98 pages of law and fact, which contrast goes to underscore the prejudicial nature of the exercise.

F. The Notice Decision is rendered so late in the process as to be in violation of the Chamber's duty to conduct the trial in an expeditious manner.²³

G. Article 67(1) entitles the accused to a fair hearing conducted impartially. The circumstances in which the Notice Decision is made gives rise to an inevitable appearance of bias in the following ways:

(i) The proposed modification of the mode of liability at this late stage and one week before announcing the acquittal of Mr Katanga's co-defendant for the unchanged mode of liability creates the appearance of the Majority seeking to ensure the conviction of the accused;

(ii) In proposing this change of modes of liability, the Chamber takes over the role of the Prosecutor, who did not, at any stage, propose a re-characterisation of the law or facts.

Threshold criteria for leave to appeal.

16. The Chambers have repeatedly stated that leave to appeal pursuant to Article 82(1)(d) will be granted only if the party submitting the application has identified at least one issue of appeal that has been addressed in the impugned Decision and which meets the following two cumulative criteria:

a. It must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and

b. It must be an issue for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.²⁴

The issues of appeal significantly affect the fair and expeditious conduct of the Proceeding

17. Fairness is at the heart of the defence submissions, and the grounds of appeal inevitably overlap given its importance to all the issues. The core issue is whether it is both lawful and appropriate to issue a notice decision to re-qualify the charges in the circumstances of the present case. The Notice Decision may, of all the many decisions reached in the course

²³ See Article 64(2) and (3)(a) of the Statute and, for instance, ICC-01/04-01/07-2731, Decision on the Prosecution's renunciation of the testimony of witness P-159, 24 February 2011, para. 15.

²⁴ ICC-01/04-01/07-108, *Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions*, 14 December 2007, p. 3; ICC-01/04-01/07-116, *Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions*, 19 December 2007, p. 4.

of these proceedings, have the profoundest impact on the fairness and outcome of the trial, particularly given that the decision is made at such a very late stage. Such an intervention at this stage of proceedings is unprecedented in international criminal jurisprudence.

18. It is to be borne in mind that Regulation 55 remains a contentious matter in the mind of many observers, who point to its somewhat irregular birth.²⁵ It was a highly contested matter when first raised, did not make its way into the Statute or Rules of Procedure,²⁶ but was then adopted in the Regulations. Its lawfulness has been upheld by the Appeal Chamber in *Lubanga*.²⁷ However, it is of significance that it is part only of the Regulations and must, of course, be viewed in light of the Statute and basic principles such as the principle of legality and the principle of strict interpretation of a rule of criminal law –with the benefit of any doubt going to the Accused.²⁸
19. It goes without saying that Regulation 55 must be interpreted in conformity with these statutory fair trial rights. Pursuant to Article 52(i), the adoption of the regulations merely serves the purpose of the Court’s “routine functioning”. Accordingly, Judge Fulford pointed out that the Regulations must be read “subject to the [Rome] Statute and [ICC Rules of Procedure and Evidence]”, which means that no Regulation cannot contradict either a provision of the Statute or of the Rules.²⁹ Triffterer similarly states that the Regulations “must be interpreted in conformity with the Statute and the Rules - Additional authority granted to the Chambers of the Court by virtue of the Regulations should be interpreted in a restrictive manner and always with the objective of fostering the Court's routine functioning.”³⁰
20. The Notice Decision was rendered by a Majority.³¹ The defence adopts the arguments set out in the dissenting opinion. Such a strongly argued dissent by an experienced and respected member of the Court is highly supportive of the appropriateness of leave being

25 See, for instance, Dov Jacobs, Lubanga Decision Roundtable: Lubanga, Sexual Violence and the Legal Re-Characterization of Facts, 18 March 2012, <http://opiniojuris.org/2012/03/18/lubanga-decision-roundtable-lubanga-sexual-violence-and-the-legal-re-characterization-of-facts/>; Dov Jacobs, Shifting Scale of Power: Who is in Charge of the Charges at the International Criminal Court?, 13 December 2011, pages 11-22 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1971821.

26 Carsten Stahn, Modification of the legal characterization of facts in the ICC system: a portrayal of Regulation 55, *Criminal Law Forum* (2005), pp. 10-11; ICC-01/04-01/06-2205, Judgment 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", 8 December 2009, para. 70.

27 ICC-01/04-01/06-2205, paras 66-87.

28 See Article 22(2) of the Statute.

29 ICC-01/04-01/06-2069, Decision issuing a second corrigendum to the “Minority opinion of the ‘Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’, Annex 1, 31 July 2009, para. 6.

30 Triffterer, 114.

31 Notice Decision, page 31.

granted so as to permit, before the matter further advances, a review of such significant and contentious findings.

21. The defence arguments concern the basic rights of the accused. The issue for prospective appeal therefore itself revolves around the fairness of the proceedings and therefore its resolution by the Appeals Chamber will have an impact on that fairness.
22. **Firstly**, one of the essential issues to be addressed is whether the re-qualification is unlawful as it exceeds the facts and circumstances forming the basis of the charges. The restraints placed on the exercise of Regulation 55 essentially concern the right of the accused to clear notice of the charges he faces pursuant to Article 67(1)(a) and are therefore inextricably linked with the fairness of the trial.
23. In its previous observations this Trial Chamber has been firm as to the significance of the confirmation decision:

In the Chamber's view, the decision on the confirmation of the charges crystallises the facts and circumstances accepted in that decision in support of the charges it has confirmed. This is one of the fundamental reasons for the existence of the Pre-Trial Chamber, the purpose of which is to enable the trial to be conducted, as expeditiously as possible, on factual bases that are clear and certain, and accessible to the accused. [...] ³²

24. Notwithstanding the clear principles set out by this Trial Chamber, the Majority now relies on facts, where such can be identified, that were not expressly or clearly accepted by the Pre-Trial Chamber in the Confirmation Decision. It also relies on subsidiary facts, as was commented upon in the Dissenting Opinion ³³. Among other interventions, the Chamber shifts the level of contribution from essential – Katanga being the ‘mastermind’ of the criminal plan – to a contribution “in another way”. ³⁴
25. As pointed out in the Dissenting Opinion, ³⁵ these changes alter the narrative to such an extent that they change the “statement of facts”, which the Appeals Chamber has held to

³² *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1547-tENG, Decision on the Filing of a Summary of the Charges by the Prosecutor, 21 October 2009, para. 22. See also *ibid.*, paras 10, 16-17, 19, 20, 21, 31; ICC-01/04-01/07-T-79-Red-FRA WT, dated 23 November 2009, p. 2; *Prosecutor v. Bemba*, ICC-01/05-01/08-836, Decision on the defence application for corrections to the Document Containing the Charges and for the prosecution to file a Second Amended Document Containing the Charges, 20 July 2010, para 35; ICC-01/04-01/06-2205, Judgment 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”, 8 December 2012, paras 90-93; *Prosecutor v. Lubanga*, ICC-01/04-01/06-1432, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, paras 62-63.

³³ See Dissent, paras 14-17.

³⁴ Majority Decision, paras. 26, 28.

³⁵ See Dissent, paras. 18-23.

be impermissible under Regulation 55(1).³⁶ In doing so, the Chamber exceeds the facts and circumstances as defined in the confirmation decision.

26. **Secondly**, in exercising the discretion under Regulation 55, the Majority failed to take properly into account that Regulation 55 is limited to being exercised at an ‘appropriate’ time. There is, therefore, a temporal limit to when it may be exercised and remain in conformity with the Statute and Rules, albeit not one that is specified. It is submitted that no reasonable tribunal could, in the circumstances of this case, consider service of notice to re-characterise offences at such a late stage to be fair. The trial is run. The last witness gave evidence over a year ago and the Judges retired to consider the evidence over six months ago. The co-accused was acquitted three days ago.
27. Inappropriate notice has a significant impact on the fairness of the proceedings. This is all the more so in light of the several defence submissions in respect of the mode of liability under which the accused was charged. The defence challenged the mode of liability both at the confirmation stage and before this Chamber back in 2009, as reiterated in the Defence final brief.³⁷ Although the 2009 challenge was filed at the Chamber’s own request, it never ruled on it. The decision to alter the legal parameters of the case at such a late stage must be considered by reference to the parameters established by the Statute and in particular the accused’s rights to meaningful notice of the case he faces.
28. The Majority seems to consider that the accused should have anticipated such a requalification. Logically this would have the effect that all modes of liability are available at all times. If so, the accused was never given notice that that was the case. In other cases, notice of changes has consistently been provided earlier.³⁸ And, as was pointed out in the Dissenting Opinion, if such anticipation was reasonable to expect of the defence it must also have been reasonable on the part of the Majority who could or should

³⁶ ICC-01/04-01/06-2205, para. 97. See also Dissent, paras. 12, 20.

³⁷ See above, procedural background.

³⁸ *Lubanga* issued its Regulation 55 notice on the re-characterisation of the nature of the armed conflict thirteen months prior to the start of trial. Notice of re-characterisation re sexual offences, was given the day the Prosecution closed its case. See 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; ICC-01/04-01/06-2049, 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, 14 July 2009. A similar issue is also before the *Ruto and Sang*: notice of possible re-characterisation has been given prior to the commencement of trial. See ICC-01/09-01/11-T-15-ENG ET page 25, line 16 to page 30, line 18; ICC-01/09-01/11-413, Order scheduling a status conference, 14 May 2012, para. 5; ICC-01/09-01/11-426, Order Setting the Deadline for Submissions on Regulation 55 and Article 25(3), 15 June 2012.

have then given notice under Regulation 55 and in compliance with its duty to conduct an expeditious trial.³⁹

29. The delay in providing notice of re-characterisation is all the more surprising given that the defence, from the outset not only challenged the mode of liability but, by its submissions and questions, made the defence case position abundantly clear.⁴⁰ By the end of the prosecution case the Court had had the opportunity of seeing all the incriminating prosecution witnesses. It was against that background that the accused gave evidence. At no time was there any issue raised by the Prosecutor, the co-accused, the victim's representatives or the Chamber relating to an alternative form of personal liability.
30. **Thirdly**, the lateness and the scope of the proposed modification of the mode of liability together combine to impact on the fair conduct of the proceedings. More specifically, the impugned decision impinges on the accused's fair trial rights, listed above, "to a fair hearing conducted impartially" (Article 67(1) Rome Statute); "[t]o be informed promptly and in detail of the nature, cause and content of the charge" (Article 67(1)(a) Rome Statute); "not to be compelled to testify or to confess guilt and to remain silent" (Article 67(1)(g) Rome Statute); "to be tried without undue delay" (Article 67(1)(c)); and "[t]o have adequate time and facilities for the preparation of the defense" (Article 67(1)(b)).
31. In particular, the accused has the right to know, in detail, the case he has to face. The defence submits that the accused should be in that position no later than the close of the prosecution case so as to preserve, in a meaningful way, the guaranteed rights under the Rome Statute. In particular, in order to allow the defence to advise the accused, in an informed manner, as to his defence strategy, and in particular, as to whether to testify, and whether or not to call any evidence at all.
32. The importance of the confirmation process in providing clear notice of the charges to an accused is both a characteristic and an achievement of the ICC procedure, and should not be weakened or subverted by recourse to Regulation 55 in a manner such as that presently proposed. Indeed, the defence was led to believe that the Chamber strongly adhered to the

³⁹ See Dissenting Opinion, paras 40-41.

⁴⁰ It was even clearer by the 7th of March 2011, *ie* more than one year and a half before the Notice Decision, through the disclosure of the Summary of Defence Witnesses (ICC-01/04-01/07-2760-Conf-Anx2), which showed that the Defence intended to argue, and to prove, *inter alia*, that, Mr Katanga was not president of the FRPI at the time of the effective control over the Ngiti fighters at the time of the Bogoro attack; there was no hierarchy in the FRPI at the time of the Bogoro attack; Mr Katanga did not attend the Bogoro attack; Yuda and Dark's group attended the Bogoro attack; EMOI attended the Bogoro attack; Mr Katanga went to Beni to collect weapons; Weapons were sent from Beni to Aveba, etc. Further details were given by the disclosure of the statements of defence witnesses between March and June 2011. Bogoro attack; he was only the chief of combatants at Aveba at the time of the Bogoro attack; he did not have

view that the trial concerned the charges as established by the Confirmation Decision and did not anticipate that they would be changed in this manner.⁴¹

33. The proposed re-characterisation is, contrary to the view expressed by the Majority of being ‘only a limited step’, a significant departure from the charges faced to date. Had the defence known that such a requalification would occur, its strategy would have been different.⁴² The case it has contested was one based entirely on a narrative of planning to ‘wipe out’ Bogoro with Ngudjolo, and having control over that plan in the detailed manner set out in Confirmation Decision.⁴³ It would appear that the defence has been successful in contesting that narrative.
34. It is unclear what the narrative underlying liability based on 25(3)(d)(ii) of the Statute may be. If that had been the charge then the defence would not have focused on the relationship between Mr Katanga and Mr Ngudjolo as it did, nor on EMOI, but rather more on the accused’s relations with the Ngiti commanders and combatants in Walendu Bindi. Among issues that would have been addressed in more detail is the probability of occurrence of crimes in Ituri and the degree of knowledge by the accused of the role of various persons in any such violence prior to Bogoro. Also, which group or persons committed the excesses there and which went beyond any anticipated behaviour. That is an area that is not only relevant to the issues raised by the re-characterisation but which would also be addressed in the context of a severed trial where the co-accused has been acquitted.
35. The witnesses called would have been different; in particular, it is unlikely that the accused would have testified. Indeed, the unfairness of the Notice decision extends to the fact that the re-characterisation of the liability of the accused appears based upon his own testimony.⁴⁴ The extent of that reliance is at present unknown to the defence, as are the substantive facts on which the new charge may be based, particularly given that the core incriminating prosecution witnesses appear to have been found not credible.
36. The core witnesses against Mr Ngudjolo, which are also core witnesses against Mr Katanga, *ie* P-250, P-279, P-280, P-219, have been found not reliable by the Trial

⁴¹ At a late stage reclassification of the nature of the armed conflict was raised. However this was an issue without discernable prejudice to the accused and consequently was of a wholly different nature to the present proposals.

⁴² See Dissenting Opinion, paras. 39, 44.

⁴³ ICC-01/04-01/07-716-Conf.

⁴⁴ Dissenting Opinion, paras 45-46; William A. Schabas, Serious Fairness Issues Raised by New Ruling in Katanga Case, 2 December 2012, <http://humanrightsdoctorate.blogspot.nl/>.

Chamber;⁴⁵ other core witnesses against Mr Katanga - P-28, P-160 and P-12 - will probably see their testimony be given a low probative value.⁴⁶ The status of P 28 remains unclear, though so much of his evidence has been rejected by the Chamber that it is difficult to see what is left that can, with safety, be viewed as reliable. This brief, uncertain overview by the defence of its position as it appears to stand at the present moment provides some indication of the difficulties confronting the defence in making meaningful decisions in relation to any reclassification. The view of the Majority that ‘all the facts were discussed at the trial’ and that some indications made in the Judgement for Ngudjolo help ‘to indentify more quickly the evidence to which it does not need to refer’ does not sufficiently identify the issues that the accused does need to refer.

37. The proposed reclassification of the mode of liability impacts on the basic factual framework, including, in particular, the nature and extent of the contribution of the accused to the crime and his state of mind with respect to the criminality of the purpose. It is significant that the Majority appears to consider that elements of Article 25(3)(d) are necessarily subsumed by the elements of Article 25(3)(a).⁴⁷ This is, however, an erroneous consideration. As underlined by the Dissenting Opinion, Article 25(3)(d) is not a lesser included mode of liability because, according to the jurisprudence, Article 25(3)(a) requires an essential contribution to the common plan,⁴⁸ while Article 25(3)(d) requires a significant contribution to the crime itself,⁴⁹ and proof of an essential contribution to a common plan does not necessarily mean proof of a non-essential contribution to a crime.⁵⁰ Thus, Article 25(3)(a) liability can be proven without proving Article 25(3)(d)(ii) liability.⁵¹

38. In addition, the Notice Decision fails to identify with sufficient clarity the factual basis upon which the reclassification may be made and thus fails to provide the accused with a

⁴⁵ ICC-01/04-02/12-T-1-ENG ET WT 18-12-2012, pages 7-8.

⁴⁶ ICC-01/04-02/12-T-1-ENG ET WT 18-12-2012, page 8, l. 5-7 for P-28 ; ICC-01/04-02/12-T-1-ENG ET WT 18-12-2012, para. 441 for P-12 and P-160.

⁴⁷ Notice Decision, para. 33.

⁴⁸ ICC-01/04-01/07-717, paras. 525-526; *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, 14 March 2012, paras 1000, 1018(ii); *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 350.

⁴⁹ *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-1, Decision on the Prosecutor's Application for a Warrant of Arrest Mbarushimana, 11 October 2010, para. 39; *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, 16 December 2011, paras 283, 285.

⁵⁰ The *Lubanga* Trial Chamber found that, in the framework of Article 25(3)(a), ‘the prosecution does not need to demonstrate that the contribution of the accused, taken alone, caused the crime’: *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 994.

⁵¹ Dissenting Opinion, paras 42-43.

sufficient opportunity to address the new case against him.⁵² It constitutes a failure to provide, in detail, the nature of the charge he faces, which affects the fairness of the proceedings.

39. Therefore, the appeal issues lead to a significant violation of fundamental rights basic to a fair trial. As such, the impugned decision and the identified issues clearly and significantly affect the fair conduct of the proceedings

40. **Fourthly**, the impugned decision raises issues in respect to the accused's right to be tried impartially pursuant to Article 67(1) of the ICC Statute. The proposition to modify the mode of liability creates an appearance of bias as it appears to be motivated by a wish to ensure the conviction of the accused.

41. Any future hearing or submissions made on behalf of the accused will be made in circumstances where the Majority have given the appearance of having already made the decision to alter the characterisation of the charges and to do so in order to reach a conviction. Indeed the language employed in the decision⁵³ would lead any neutral observer to the conclusion that the Majority has largely decided the issue. The defence stresses that actual bias is not the issue here, it is the appearance of bias. Indeed the Majority observes;

‘Indubitably, legal recharacterisation of the facts at the deliberation stage may raise concerns about an appearance of partiality on the part of the judges who may be thought to be already convinced of the accused's guilt, or to be seeking to establish it at all costs’.⁵⁴

42. The subsequent disavowing of that impression is, in the circumstances, insufficient to overcome the appearance recognised by the Majority themselves. There is no sufficient antidote to that appearance. The appearance of bias exists because of the circumstances in

⁵² For example, as discussed in the Dissent⁵², the Majority fails to identify clearly the members of the group of Ngiti commanders and combatants to whose crimes Katanga allegedly contributed in a manner other than essential. No reference to the identity of the members of the group, is made.⁵² It is noteworthy that, prior to the confirmation hearing, the defence sought additional information regarding the identities, role and contributions of other combatants and commanders in the alleged common plan. The Single Judge of Pre-Trial Chamber I dismissed this request, noting that Germain Katanga and Mathieu Ngudjolo “are the only co-perpetrators of the crimes in the Prosecution's Amended Charging Document, insofar as they were the only members of the common plan “whose role and contribution give them control over the commission of the crime[s]”.”⁵² Decision on the Three Defences' Requests Regarding the Prosecution's Amended Charging Document, ICC-01/04-01/07-648, para. 23. See also ICC-01/04-01/07-692, Prosecution's Observations Addressing Matters that Were Discussed at the Confirmation Hearing, para. 40. See also, ICC-01/04-01/07-1653, Defence Observations on the Document Summarising the Charges, 19 November 2009, paras. 29, 32, as well as footnote 22 of the Dissenting Opinion.

⁵³ Notice decision - paragraph 6 ‘the Majority hereby informs the parties and participants that the legal characterisation of facts relating to Germain Katanga's mode of participation is likely to be changed’ para 8 ‘...the Majority has objectively examined all evidence relating to Germain Katanga's role and taken the view that it is appropriate to propose a re-characterisation in the instant case’

⁵⁴ Notice Decision, para. 19.

which the Notice is made and, in particular, that it is made at such a late stage of the deliberations, just a week or so before the acquittal of the co-accused who was the alleged co-planner.

43. Nor should the comments of the dissenting Judge, who had a duty to be present throughout the deliberations,⁵⁵ be overlooked when assessing the impression created overall.⁵⁶
44. Of further concern is that at no time did the prosecution seek to advance such a recharacterisation. That the Chamber does so at this stage will risk it being seen as performing a prosecutorial function at an inappropriate stage of the proceedings. It is clearly the Prosecutor's task to charge and prosecute the accused. The Prosecutor would not have been allowed to propose a change in the mode of liability at this late stage and it is submitted that it is inappropriate for the Chamber to be seen to be doing so. This concern is reflected in a number of commentaries already generated by the Decision Notice.⁵⁷
45. It is therefore submitted that the issue of appearance of bias constitutes an issue which would have a significant impact on the fairness of the proceedings and warrants the Appeals Chamber's consideration. That the Dissenting Opinion is itself objectively sensitive to this perception of bias should lead the Chamber to err on the side of caution in considering this issue, which has a significant impact upon the fairness of the proceedings.

Impact on the Expeditionness of the Proceedings

46. The majority have failed to take sufficiently into account the fact that service of Notice at this late a stage is likely to prolong the trial. The process has already taken over five years. Given that it concerns one attack on one day against one village, and that the accused has cooperated fully in the process, it is reasonable for judgment to be rendered now and not

⁵⁵ Per Article 74 (1)

⁵⁶ See, for example, paras 28-32 of the Dissenting Opinion of Judge Christine Van Den Wyngaert, and in particular para. 31: 'The Majority's decision creates the perception that: (i) they would have had to acquit Germain Katanga on the indirect co-perpetration charges which he is facing and (ii) that Article 25(3)(d)(ii) is seen as a provision which could sustain a conviction. This perception is created because, had the Majority been prepared to convict the accused under Article 25(3)(a), then it stands to reason that they would have just convicted on that basis, rather than resorting to a Regulation 55(2) notice decision.'

⁵⁷ See, for instance, William A. Schabas, Serious Fairness Issues Raised by New Ruling in Katanga Case, 2 December 2012, <http://humanrightsdoctorate.blogspot.nl/>: 'Reading between the lines, one may see that the majority judges concur that the mode of liability upon which both prosecutor and defendant have based their case, and on which evidence was led, is likely to lead to an acquittal. So they have found another mode of liability that they find more suitable and that will, presumably, result in a conviction.' Or forthcoming lecture 'When Judges Violate the Rome Statute: regulation 55 and the Legal Recharacterization of Facts of the ICC - 6 February 2013 - scl-lectures@wihl.nl

at some uncertain time in the future. This is all the more so because at no time can it be claimed that the defence acted other than in an appropriate and diligent manner.

47. The extent of future delay is unknown. What is known is that without the Notice Decision, Mr Katanga would have received judgement on 18th of December and from comments that have been made it is probable that that would have been an acquittal.⁵⁸ To speak of compensating the accused by a reduction of sentence⁵⁹ only serves to increase the impression of bias. The issues therefore have a significant impact on the expeditiousness of the proceedings.
48. The Chamber's comparison with the ICTR case of *Bagosora et al*, lasting several years is unconvincing.⁶⁰ First, the ICTR is no exemplar for expedition, quite the contrary. In one recent case the Judges took three years just to write their judgment!⁶¹ The Bagosora case concerned a strikingly different and more extensive factual matrix.⁶² Both in terms of geographical and temporal scope, as well as the scale of the allegations and the number of co-defendants, no helpful comparison can be drawn from from Bagosora, nor indeed from any of the other lengthy ICTR cases.
49. Mr Katanga now potentially faces a new mode of liability with different elements to consider. Though the Trial Chamber seeks to mitigate the fundamental unfairness that arises from its decision, by allowing the defence to introduce new evidence or recall witnesses, that does not adequately balance the situation.
50. An added difficulty is that security in the Ituri region has significantly deteriorated over the last months. The current advice of ICC Field Security Analysis Office is not to travel to the region at all. It will be difficult to address evidential issues both from the point of view of conducting missions and/or of finding witnesses and obtaining their cooperation, even witnesses who have already testified. Any further investigations, though necessary, will cause further delay.
51. In addition, the mode of liability itself is still subject to debate. The defence will not have the advantage provided by having such issues raised, discussed and if necessary, reviewed

⁵⁸ See Dissenting Opinion, para. 31 and William A. Schabas, Serious Fairness Issues Raised by New Ruling in Katanga Case, 2 December 2012, <http://humanrightsdoctorate.blogspot.nl/>, quoted above.

⁵⁹ Notice Decision, para. 43.

⁶⁰ Notice Decision, para. 43.

⁶¹ *Prosecutor v. Bizimungu et al*, Case No. ICTR-99-50-T, Judgement and Sentence, 30 September 2011.

⁶² The *Bagosora* case (*Théonestre Bagosora and al. v. The Prosecutor*, Case No ICTR-98-41) concerned four defendants, all charged with crimes of genocide committed throughout the entire country over a period of 100 days, as well as conspiracy to commit genocide, which allegedly started in 1990. The genocide resulted in nearly a million deaths for which each of them was alleged to be individually responsible.

in the Confirmation process. The Chamber will need to address the scope and definition of the 25(3)(d)(ii) mode of liability, following submissions from the parties and participants. This will further impact on the expeditiousness of the proceedings.⁶³

Impact on the Outcome of the Trial

52. It is apparent both from the Majority decision and the Dissenting Opinion that the alternative to invoking Regulation 55 would have been an acquittal, as the conduct described does not fit the mode of liability under which Katanga has been charged. Accordingly, the impugned decision has a clear and direct impact on the outcome of the trial.

An Immediate Resolution may materially advance the Proceedings

53. The impugned decision clearly warrants an immediate resolution. The identified issues should be resolved now, before further time is lost. If the defence appeal succeeds, there will be no need to review the nature of the new mode of liability, to return to the evidence, to submit what in effect would be a further final brief. Furthermore, a judgment on the basis of Article 25(3)(a) could be issued quickly.

54. If there is no appeal, then on the contrary, further time will be incurred on substantial issues. The Notice Decision, as noted by the Dissenting Opinion, 'may have the effect of triggering an entirely new trial'.⁶⁴ There may be a need for further investigations, justifying a stay of proceedings such as the stay of almost three months granted recently to the defence in the *Bemba* case.⁶⁵ There may be need for the calling or recalling of witnesses, including the accused, as well as discussion and argument on the legal ingredients of the novel and untested mode of liability. As stressed by the Dissenting Opinion, 'this would entail lengthy additional proceedings at a point in time where the trial should already have come to an end'.⁶⁶ Besides, the defence would surely be entitled to request the submission of a new document containing the charges and a new table of incriminating evidence, linking the new mode of liability to the evidence, which would cause further delay. If leave is not granted now, then there may be an appeal, after a

⁶³ See ICC-01/04-01/06-2107, Decision on the prosecution and the defence applications for leave to appeal the "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", 3 September 2009, paras 29, 33.

⁶⁴ Dissenting Opinion, para. 49.

⁶⁵ *Prosecutor v. Bemba*, ICC-01/05-01/08-2480, Decision on the temporary suspension of the proceedings pursuant to Regulation 55(2) of the Regulations of the Court and related procedural deadlines, 13 December 2012, para. 22.

⁶⁶ Dissenting Opinion, para. 49.

judgment, based solely on this issue. Thus, an immediate resolution of the issues of appeal would materially advance the proceedings.⁶⁷

55. This Impugned Decision does not have striking implications for this accused only, but also for future cases. No future defence team will be inclined to present its own narrative to assist a Chamber in its investigation of the truth. A decision to invoke Regulation 55 at such a late stage in an adversarial process will silence the defence. Future defendants would have to anticipate a potential requalification in any mode of liability after the submission of their final brief, up until the judgement itself.⁶⁸ It would make it less likely that an accused would testify in a trial, or even call any evidence. Such a modification of charge at a late and inappropriate stage of the process can impact on the reputation of the ICC and its ability to present itself as a fair and impartial court.

Relief sought

56. For all these reasons, the defence respectfully requests the Trial Chamber to grant leave to appeal the Notice Decision.

57. If leave is granted, the defence requests the Trial Chamber to relieve the defence of the obligation of submitting its observations on the proposed re-categorisation by 21st January 2013⁶⁹ and to extend the time for filing such observations until fourteen days after the appeal decision is made.

58. In the alternative, if the request for leave is dismissed, it is requested that the defence be granted additional time to reply to the prosecution and victims' representatives' observations on the requalification of the mode of liability, in the light of the time which has been necessary to devote to the issue of appealing its decision, which, it is submitted, was justified, given the unusual nature and potential impact of the Chamber's Notice Decision. A delay will be further justified given the novelty of the issue and the fact that the defence does not know precisely which facts support the suggested new mode of liability.

⁶⁷ See ICC-01/04-01/06-2107, Decision on the prosecution and the defence applications for leave to appeal the "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", 3 September 2009, paras 29, 33.

⁶⁸ See Dissenting Opinion, para. 47, and William A. Schabas, Serious Fairness Issues Raised by New Ruling in Katanga Case, 2 December 2012, <http://humanrightsdoctorate.blogspot.nl/>: 'If this decision is allowed to stand, it will have a very significant impact upon defence strategies in future trials. Defence counsel will have to advise their clients that should they choose to testify, the evidence they give may be used not only in defence to the charges but also in what amounts to a new trial, on a new charge.'

⁶⁹ Notice Decision, page 31.

Respectfully submitted,



David HOOPER Q.C.

Dated this 21 December 2012

At London