Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/04-01/07**
Date: **10 January 2013**

IN THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

IN THE CASE OF THE PROSECUTOR v. GERMAIN KATANGA

Public Document

Defence'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

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 its appeal against the Decision of the Trial Chamber to give notice that it may re-qualify the charges (the 'Notice Decision'),[1] leave to appeal having been granted by the Trial Chamber.[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).[3]
2. Though the Chamber stated that no final decision has yet been taken as to changing the legal characterisation of the charges, and requests further submissions on the issue by January 21st 2013, the Notice Decision is itself susceptible of appeal[4] and, as found by the Chamber in granting leave, satisfies the criteria for leave.
3. The defence also seeks suspensive relief.

The procedural background

4. 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.[5] 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.[6]

[1] 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, 21 November 2012.

[2] ICC-01/04-01/07-3327, Decision on the "Defence Request for Leave to Appeal the Decision 3319.

[3] Notice Decision, para. 23.

[4] See, for example -'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 para. 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.

[5] 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".

[6] 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."

5. At the confirmation hearing, the defence challenged the theory of joint control as a notion of co-perpetration under Article 25(3)(a) as developed by the *Lubanga* Pre-Trial Chamber.[7] 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.[8]
6. 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.[9] The defence 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.[10] The Chamber never ruled on the submissions.[11]
7. The trial commenced on 24th November 2009.[12] The accused testified between 27th September and 19th October 2011.[13] The last evidence was presented on 11th

[7] 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.

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

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

[10] 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.

[11] See also Dissenting Opinion, para. 38.

[12] ICC-01/04-01/07-T-80-ENG ET WT 24-11-2009.

[13] 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.

November 2011.[14] The prosecution filed its closing brief on 24th February 2012,[15] the defence on 30 March,[16] followed by oral submissions from 15 to 23 May 2012.[17]

8. The Chamber issued the impugned decision, the 'Notice Decision'[18] on 21 November 2012, six months after the closing submissions. On 23 November 2012 the defence filed a Notice that it would request leave to appeal.[19] Leave was granted to delay the submission of the grounds until a translation of the decision was received.

9. On 18th December 2012, the co-accused was acquitted of all counts.[20] The Trial Chamber ordered his release.[21]

10. The defence submitted grounds for leave to appeal on 21 December.[22] Leave to appeal was granted on 28th December 2012.[23]

11. The issue for appeal is, and as submitted to[24] and considered by the Trial Chamber; **Is the Notice Decision lawful and appropriate in the circumstances of the case?** [25]

12. In its request for leave the defence indentified several reasons why the Notice Decision is unlawful and inappropriate.[26] These are repeated below and are, to some extent, mutually supportive. The Chamber found that; 'the issue as defined by the Defence, especially when read in the light of the several reasons that are invoked by the Defence to claim that the Impugned Decision is unlawful and/or inappropriate, qualifies as an appealable issue'. The Chamber also acknowledged that 'the Impugned Decision has an

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

[15] 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.

[16] 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.

[17] 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.

[18] Notice Decision.

[19] 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.

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

[21] On 20th December 2012, the Appeals Chamber dismissed the Prosecutor's application to have the order for his release suspended ICC-01/04-02/12 OA, Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect.

[22] ICC-01/04-01/07-3323, Defence Request for Leave to Appeal the Decision 3319, 21 December 2012.

[23] ICC-01/04-01/07-3327, Decision on the "Defence Request for Leave to Appeal the Decision 3319.

[24] *Ibid.*, para. 14.

[25] *Ibid.*, para. 4.

[26] *Ibid.*, para. 5.

important impact on the conduct of the proceedings against Mr Katanga. In fact, the point on which the Defence wishes to appeal….clearly raises an issue that affects the fairness of the proceedings' [and] 'has the clear potential to significantly affect the expeditiousness of the proceedings… swift intervention by the Appeals Chamber, indicating whether or not the activation of Regulation 55 of the Regulations of the Court was permissible under the present circumstances could materially advance the proceedings'.

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. The modification and its timing, in the 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. It is the Defence submission that, given the particular circumstances, the Trial Chamber lacks the discretion to give notice to re-qualify the charges. Alternatively, no reasonable tribunal would exercise that discretion.

14. The defence submits it is unlawful and inappropriate to issue the notice at this late stage because:

A. The Notice Decision was 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)).

B. 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:

(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.[27]

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

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.[28] 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.[29] It is in marked contrast to the particulars of the charges provided to the accused by the Confirmation Decision, which ran to 98 pages of law and fact, which 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.[30]

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:

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[27] ICC-01/04-01/07-717, Decision on the confirmation of charges

[28] See *Prosecutor v. Mbarushimana*, Decision on the Prosecutor's Application for a Warrant of Arrest against Calixte Mbarushimana, ICC-01/04-01/10-1-US, 28 September 2010, para. 39 and fn. 66; *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. 354, 353-367; *Prosecutor v. Mbarushimana*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges", 30 May 2012, paras 64-69.

[29] 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").

[30] 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.

(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 mode of liability the Chamber assumes the role of the Prosecutor, who did not, at any stage, propose a re-characterisation of the law or facts.

The general scope of Regulation 55

15. The appropriate scope of regulation 55 must be viewed in the light of its founding documents and the fundamental principles which they enshrine.[31]. Regulation 55 was[32] and remains contentious.[33] While the Appeal Chamber has confirmed its legality[34] the scope of the discretion is undecided.

16. The framework created by the Rome Statute in respect of charges is clear. Once the trial has commenced, the Trial Chamber has very limited power to alter the charges. As stated by Judge Fulford, 'the Statute, in explicit terms, left control over framing and effecting any changes to the charges (under Article 61(9) of the Statute) exclusively to the Pre-Trial Chamber. The scheme was clearly designed to ensure that once the trial has begun the charges are not subject to any further amendment, addition or substitution……Critically, the statutory scheme has provided an accused with a high degree of certainty as to charges that he or she will face once the trial has commenced[35]'.

17. The adoption of the Regulations merely serves the purpose of the Court's "routine functioning.[36]." This is supported by the fact that all other provisions of the Regulations

[31] See Article 22(2) of the Statute.

[32] 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.

33 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.

[34] ICC-01/04-01/06-2205, paras 66-87.

[35] Minority opinion on 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"ICC-01/04-01/06-2054 para. 16

[36] Lubanga AC ICC-01/04-01/06-2205 para. 69 '….while the Appeals Chamber acknowledges that the question of modification of the legal characterisation of facts is an important question that directly impacts on the trial, it is not persuaded that for that reason alone, it cannot be part of the routine functioning of the Court.'

are addressing routine matters including routine aspects of legal aid and detention. No Regulation can undermine a provision of the Statute or the Rules.[37] The commentary in Triffterer on Regulation 55 reads; "it 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."[38]

18. The Notice in this case is of radical effect. As said in the Dissenting Opinion; 'This mode of liability differs noticeably from the one under which the charges in this trial have been brought and on the basis of which the entire trial has proceeded. As a result, Germain Katanga can now be potentially convicted under Article 25(3)(d)(ii), even if he were to be acquitted under Article 25(3)(a) on all charges[39]. …. The Majority's decision potentially leads to a reopening of the trial, more than a year after the evidentiary hearings have come to an end (11 November 2011) and well after the formal closing of the evidence (7 February 2012) and the closing arguments of the parties and the participants (15-16 and 21-23 May 2012)'[40].

19. The defence submits that if it was intended to grant the Trial Chamber such a far-reaching power this would have been provided for in the enabling Statute and Rules. The Appeals Chamber has ruled on the legality of Regulation 55 and determined[41] that, *inter alia*, it can only operate where it does not lead to an unfair trial[42]. The Regulations are not there to extend the powers of the Trial Chamber in a radical manner but merely to give expression to them through providing for its 'routine functioning'. It must be assumed that the exercise of a discretion to such radical effect, not expressly set out in the Statute or the Rules, was not intended and should not be deemed to fall within the purview of the Regulation.

20. The defence takes note of the Appeals Chamber's concern, expressed in the Lubanga Case, that an over restrictive view of Regulation 55 poses; 'the risk of acquittals that are

[37] ICC-01/04-01/06-2069, Se Judge Fulford - 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.

[38] Triffterer, 114.

[39] Dissenting Opinion, para. 2

[40] Dissenting Opinion, para. 3

[41] 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" ICC-01/04-01/06-2205

[42] Ibid?, para 100

merely the result of legal qualifications confirmed in the pre-trial phase that turn out to be incorrect, in particular based on the evidence presented at the trial. This would be contrary to the aim of the Statute to "put an end to impunity" (fifth paragraph of the Preamble). The Appeals Chamber is of the view that a principal purpose of Regulation 55 is to close accountability gaps…'[43]

21. However, as stated in the Dissenting Opinion; 'Any appeal to "fair-labelling' to justify activating Regulation 55 at the current stage of the proceedings against Germain Katanga would be totally unacceptable for the reasons explained in this opinion.'[44] Later, in the same opinion it was fairly stated that; 'Regulation 55 is not a licence for trial chambers to find at all costs a stick to hit the accused …. Nowhere has the Appeals Chamber stated that the fight against impunity provides a justification for infringing upon the rights of the accused.' The defence respectfully adopts the arguments contained in that opinion.

The specific requirements and scope of Regulation 55 Too much – Too late.

22. The defence's primary submission is that invoking Regulation 55 at such a late stage in this case, and to the extent proposed, is inherently unfair and far exceeds the reasonable limits for the exercise of the discretion afforded by the Regulation. As trenchantly stated in the Dissenting Opinion of Judge Van Den Wyngaert, "the present decision under Regulation 55(2) goes well beyond any reasonable application of the provision and fundamentally encroaches upon the accused's right to a fair trial."[45] "[T]he 25(3)(d) Notice Decision in the present case [is] entirely inconsistent with the rights of the accused and [I] strongly believe that this decision is in violation of Regulation 55 itself and Articles 64(2) and 67(1) of the Statute".[46]

23. It is submitted that appropriate timing of such a Notice is essential for the effective preservation of the interests of the accused and a fair trial. Where the proposed re-characterisation is, as here, of more than a mere technical nature, then giving notice at such a late stage is inadequate and unlawful.

24. Regulation 55 (2) provides:

> If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence,

[43] ICC-01/04-01/06-2205, para. 77

[44] Para. 5

[45] Dissenting Opinion, para. 1.

[46] Dissenting Opinion, para. 11.

> shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions.

25. The Chamber, if the legal characterisation may be subject to change, shall give notice of the 'possibility' – not 'probability'. The Regulation imposes a clear duty of diligence on the Chamber to be alert to the possibility of change and to put the participants on notice.
26. The Majority found that, in respect of the words 'at any time during the trial', 'the wording implies that there is no temporal limitation to "triggering" this provision since the rights of the accused, set forth in paragraphs 2 and 3(a) and (b) of the Regulations, are effectively guaranteed'.[47] The Majority failed to take fully into account that Regulation 55 is limited to being exercised at an 'appropriate stage'. There is a temporal limit, albeit unspecified, as to when Notice may be given while remaining in conformity with the Statute and Rules, It is submitted that no reasonable tribunal could, in the circumstances of this case, order service of notice to re-characterise offences to the proposed extent at such a late stage. The trial is run, the last witness gave evidence over a year ago and the Judges retired to consider the evidence last May, and the co-accused was acquitted a month ago.
27. The Regulation specifies that '*the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall' etc.* This indicates an intention on the part of the drafters that while the Chamber can seek observations once the evidence is concluded, the giving of the notice of the possibility of such change should be prior to the conclusion of the evidence. This appeal essentially concerns the timing of the notice.
28. In its one previous consideration of Regulation 55, the Appeals Chamber noted that "in any event, the particular circumstances of the case will have to be taken into account. In addition…..the modification of the legal characterisation is limited by the facts and circumstances described in the charges or any amendment thereto. Furthermore, Regulation 55 (2) and (3) must be respected in order to safeguard the rights of the accused, and the change in the re-characterisation must not lead to an unfair trial'.[48] That final clause is significant. Plainly, Regulation 55(2) and (3) do not of themselves avoid unfair trial[49]and the defence submits that, in the particular circumstances of this case, the two sub-sections are insufficient to ensure it.

[47] Notice Decision, para. 15.

[48] Lubanga AC para 100

[49] A view supported by the Dissenting Opinion para. 8 'The Appeals Chamber has made it very clear that "how these safeguards will have to be applied to protect the rights of the accused fully and whether additional safeguards must be implemented [...]will depend on the circumstances of the case".^° This means that the mere formal application of the guarantees in paragraphs (2) and (3) of - Regulation 55 is not, in and of itself, a sufficient guarantee that the rights of the accused are respected.'

29. As noted in the Dissenting Opinion, the Notice 'is rendered at a point in the proceedings when the defence is unable to effectively respond to it'.[50] The defence will first address the effect of Regulation 55 on fair trial and then consider the restriction that the modification of the legal characterisation must be limited by the facts and circumstances described in the charges.

The Prejudice caused.

Prompt notification of the charges - adequate time and facilities.

30. Article 64(2) directs the Trial Chamber to ensure fairness and expeditiousness. These principles are enshrined in the rudimentary rights - to prompt notification of the charges, an expeditious trial, adequate time and facilities for the preparation of one's case, and the right not to be compelled to testify, among others contained in Article 67.
31. In particular, the accused has the right to know, in detail, the case he has to face. As Judge Fulford noted, the framework established by the Statute, and particularly the role of the pre-trial chamber in establishing the charges, 'strongly tend towards finality and certainty as regards the charges, rather than to flexibility, particularly if this leads to a significant change[51]' and that, 'Critically, the statutory scheme has provided an accused with a high degree of certainty as to charges that he or she will face once the trial has commenced.[52]'
32. The importance of the confirmation process in providing clear notice of the charges to all the parties is both a characteristic and an achievement of the ICC. It should not be weakened or subverted by recourse to Regulation 55 to the extent and in the manner proposed.
33. As Judge Fulford stated …'changes to the legal characterisation of the facts made at the very end of the case *(viz.* in the final Decision) will inevitably infringe certain central safeguards provided for the accused in the Rome Statute (as reflected in other international provisions), and it will run counter to the approach taken in key human rights jurisprudence. Article 21(3) places an obligation on the Chamber to apply the law in accordance with internationally recognised human rights. The accused has a fundamental right under the Rome Statute "to be informed promptly and in detail of the nature, cause and content of the charge [...]" and this right is reflected in other key international instruments'

[50] ICC-01/04-01/07-3319, Dissenting Opinion of Judge Christine Van Den Wyngaert, para. 36

[51] Lubanga TC decision – Judge Fulford para. 28

[52] Lubanga TC decision – Judge Fulford para. 16

34. It is only when provided with early notice of the charges that an accused is in a position to exercise his rights in an effective manner. It determines his defence - what evidence to challenge, whether to call any evidence and, in particular, whether to testify. These are essential decisions in an adversarial trial.

35. A charge for an identified accused is, in essence, a combination of a "statement of facts" and the "legal characterisation" of those facts.The accused is entitled to adequate notice of the legal as well as factual content of the charges. As acknowledged by the Trial Chamber,[53] both the European and Inter-American Courts of Human Rights hold that the right incorporates the right to be informed of the legal qualification of the charges[54]. The accused is entitled to prompt notification both of the legal qualification of the charges and the facts underlying them. The question is, what is considered to be 'prompt'? In the particular circumstances of this case, the notification provided cannot be considered to be prompt, coming six months after the end of the closing arguments and a substantial way through the deliberations.

36. There was ample opportunity during the years of trial to provide the accused with reasonable notice that the charges 'may' be subject to change. The delay in providing notice of re-characterisation is inexplicable, given that the defence from the outset not only requested several times further clarifications in the Document containing the Charges, in particular regarding the alleged co-perpetrators of Mr Katanga, without success,[55] challenged the mode of liability[56] but also, by its statements, submissions and questions, made clear the defence case position.[57] By the close of the prosecution case

[53] Majority Notice Decision, para. 22

[54] CEDH, *Kamasinski v. Autriche*, no. 9783/82, Arrêt, 19 décembre 1989, par. 79 ; CEDH (Grande Chambre), *Pélissier et Sassi v. France*, no. 25444/94, Arrêt, 25 mars 1999, par. 51 ; Cour interaméricaine des droits de l'Homme, *Barreto Leiva v. Venezuela, Fondo*, reparaciones y costas, série C, no. 206, 17 novembre 2009, par. 28

[55] ICC-01/04-01/07-574, Defence Motion seeking the Amendment of the Document containing the Charges, 9 June 2008; ICC-01/04-01/07-620, Defence Reply to Prosecution's Consolidated Response to the Defences' Motions Regarding the Document Containing the Charges, 20 June 2008; ICC-01/04-01/07-954, Defence Application for an Amended Document Containing the Charges, 12 March 2009; ICC-01/04-01/07-1310, Renewed Application by the Defence for Germain Katanga for a New Amended Document Containing the Charges, 17 July 2009; ICC-01/04-01/07-1509, Defence Observations on a 'Summary Document Reflecting the Charges', 6 October 2009; ICC-01/04-01/07-1547, Décision relative au dépôt d'un résumé des charges par le Procureur, 21 October 2009; ICC-01/04-01/07-1601, DEFENCE OBSERVATIONS ON THE SUMMARY OF CHARGES AND REQUEST FOR CLARIFICATION AND OR AN EXTENTION OF TIME, 5 November 2009; ICC-01/04-01/07-1653, Defence Observations on the Document Summarising the Charges, 19 November 2009; ICC-01/04-01/07-1690, Defence Request for Leave to Appeal the Trial Chamber's Oral Decision of 23 November 2009 on the Defence Request for Clarification of the Charges, 30 November 2009; ICC-01/04-01/07-2213, Décision relative à la demande d'autorisation d'appel contre la décision orale de la Chambre de première instance II du 23 novembre 2009 relative à la notification des charges, 23 June 2010.

[56] See above, procedural background.

[57] 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

the Court had had the opportunity of seeing all the incriminating, prosecution witnesses. Several among those the Chamber found not credible such that little or no evidence remained against Ngudjolo – the key factor in his acquittal and his absence from 'common plan'. It was against that background that the defence witnesses and the accused gave evidence, followed by the co-accused. At no time was there any issue raised by the Prosecutor, the co-accused, the victim's representatives, nor the Chamber, relating to an alternative form of personal liability. This despite the several defence submissions in respect of the mode of liability, as referred to in detail in the Dissenting opinion, at paragraph 38 and footnote 54.

37. The defence challenged the mode of liability both at the confirmation stage and before the Trial Chamber in 2009, as set out in the Defence's final brief.[58] Although the 2009 challenge was filed at the Chamber's own request, the Chamber did not rule upon it. Indeed, from statements emanating from the bench the defence was led to believe that the the Chamber strongly adhered to the view that the trial was focused on the charges as established by the Confirmation Decision. The accused did not anticipate that they would be changed in this manner.[59]

38. The Majority appear to consider that the accused should have anticipated such a requalification.[60] The Dissenting Opinion, on the contrary, opines that the Notice Decision was "entirely unforeseeable to the defence. Moreover, it is rendered at a point in the proceedings when the defence is unable to effectively respond to it." [61] Logically. the Majority's view would mean that an accused at the ICC is to consider him or herself confronted at all times with all the modes of liability contained in Article 25 and 28, each effected by Article 30, which clearly can not be the case. Regulation 55 was never intended to have such an effect, nor is it is framed in such an over-arching manner. And if it were to be the case then the accused was not given notice of it, and no precedent informed him of it. If, as was pointed out in the Dissenting Opinion, it was reasonable to expect the defence to have anticipated the recharacterisation, then it must follow that it

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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 Bogoro attack; there was no hierarchy in the FRPI at the time of the Bogoro attack; Mr Katanga did not at the time have effective control over the Ngiti fighters and 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.

[58] See above, procedural background.

[59] See also the Dissenting Opinion para. 36 'I consider the 25(3)(d) Notice Decision to have been entirely unforeseeable to the defence….'

[60] Majority Notice Decision, para. 52.

[61] Dissenting Opinion, para. 36.

was reasonable for the Majority to have been aware of it too, triggering the duty to give notice under Regulation 55.[62]

39. Obviously there is a dearth of precedent at the ICC, but notice of possible recharactersisation has consistently been provided to the accused at a much earlier stage of the process, allowing the accused to adjust to the new charge in an effective manner.[63] Early notice, it is submitted, is essential to fair trial in all but the most technical of changes.

40. Similarly, the right to adequate time and facilities for the preparation of the defence is premised on the notion that the defendant will have the opportunity to confront all the evidence against him in full knowledge of the legal, as well as factual, framework. The Trial Chamber stated that the accused does not need to receive immediate notice of the legal re-qualification of charges and noted that, apart from the observations, the protection provided is that the facts must remain unchanged.[64] However, this is a re-statement of the express minimum requirements of regulation 55 rather than a proper statement of the position with respect to the right to prompt notification of the charges protected under article 67 of the Statute.

41. The basic rights must be understood within the context of an adversarial process. There is not, as in the inquisitorial system, a central, judicially prepared dossier containing the bulk of the evidence to be relied on, fully accessible to both parties on equal terms. Rather, both parties present and manage their particular cases. At the ICC the cases are complex in fact and law and prepared and presented over several years - five or six years in the present case. The system is weighted against an accused in very many ways and requires strong, fair rules so that he is not overwhelmed. It is unreasonable to expect a defendant to prepare and conduct a defence on one basis, and then to confront him with charges formulated on a different basis and to do so without adequate and timely notice.

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[62] See Dissenting Opinion, paras 40-41.

[63] In *Lubanga* Regulation 55 notice on the re-characterisation of the nature of the armed conflict given 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. In Bemba notice given at outset of defence case, though this the defence in the case argue is too late and unfair.

[64] Majority Notice Decision para. 22.

42. Early notice would have made a significant difference to the manner in which the accused conducted his case. In the case of Mr Katanga, it would be onerous to expect him to set out in detail all that would have been done differently but, as noted by the European court, it is reasonable to assume it would have been different.[65] This issue is further addressed at paragraphs 91 to 93 below.

43. The Chamber asserts that Katanga has had the opportunity to defend himself on each one of the facts, considering that the *actus reus* of participation in a crime within the meaning of article 25(3)(d) are in this case an integral part of the material elements characterising the commission of a crime within the meaning of article 25(3)(a).[66] The Chamber seems to consider that elements of Article 25(3)(d) are necessarily subsumed by the elements of Article 25(3)(a).[67] 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 current jurisprudence, Article 25(3)(a) requires an essential contribution to the common plan,[68] while Article 25(3)(d) requires a contribution which is less than essential to the crime itself, though the exact level is still to be determined by a Trial Chamber or the Appeals Chamber.[69] Proof of an essential contribution to a common plan does not necessarily mean proof of a non-essential contribution to a crime.[70] Article 25(3)(a) liability can be proven without proving Article 25(3)(d)(ii) liability.[71]

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[65] ECHR (Grand Chamber), Pélissier and Sassi v. France, no. 25444/94, Judgment, 25 March 1999, para. 60; ECHR, Drassich v. Italy, no. 25575/04, Judgment, 11 December 2007, para. 40; ECHR, Mattei v. France, no. 34043/02, Judgment, 19 December 2006, paras. 41

[66] Decision, para. 23, 33.

[67] Notice Decision, para. 33.

[68] 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.

[69] *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. The Appeals Chamber, in the *Mbarushimana* case, refused to consider the merits of the ground of appeal of the Prosecution, according to which the Pre-Trial Chamber erred when finding that, under article 25 (3) (d) of the Statute, the contribution of the person must be "significant", because one critical constitutive element of the form of responsibility enshrined under article 25(3)(d) was not met according to the Pre-Trial Chamber, ie there were no "substantial grounds to believe that the FDLR leadership constituted a 'group of persons acting with a common purpose' within the meaning of article 25(3)(d)". Therefore the alleged error would not have materially affect the outcome of the appeal and the Appeals Chamber dismissed this ground. See ICC-01/04-01/10-514 30-05-2012, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges", para. 50, 65-66, 68-69.

[70] 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.

[71] Dissenting Opinion, paras 42-43.

44. It is submitted that the only reasonable interpretation of the scope of regulation 55, in the light of the Statute, Rules and protected rights, is to require that notice of possible re-qualification of the charges must be given before the defence case. In the alternative, it is submitted that regulation 55 must be interpreted so as to acknowledge a duty of diligence[72] on the part of the Trial Chamber to provide timely notice such that, on the facts of this case, it is not possible to uphold the legality of the notice.

Delay

45. The majority have failed to take sufficiently into account the fact that Notice at this late a stage must 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, judgment should be rendered now and not 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.

46. 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 it is probable that that would have been an acquittal.[73] To speak of compensating the accused by a reduction of sentence[74] only serves to increase the impression of bias. The issues therefore have a significant impact on the expeditiousness of the proceedings.

47. The Majority's comparison between the present case and the ICTR case of *Bagosora et al* is not apposite.[75] First, the ICTR is no exemplar for expedition. Quite the contrary, in one recent case the Judges took three years just to write the judgment.[76] The Bagosora case was of a strikingly different geographic and temporal character,[77] as well as in the scale of the allegations and the number of co-defendants.

48. Mr Katanga now faces a new mode of liability with different elements. Though the Trial Chamber seeks, in compliance with Regulation 55 (3), to mitigate the fundamental

[72] And see paragraph 40 of Judge Van den Wyngaert ;'..though the Chamber's decision to give notice under Regulation 55(2) is discretionary, the Chamber is under an ongoing obligation to remain vigilant in considering whether to trigger Regulation 55".

[73] See Dissenting Opinion, para. 31 and William A. Schabas, Serious fairness issues raised by New Ruling in Katanga Case 2 December 2012, http://humanrghtsdoctorate.blogspot.nl/, quoted above.

[74] Notice Decision, para. 43.

[75] Notice Decision, para. 43.

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

[77] The *Bagasora* 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.

unfairness that arises from its decision, it can not sufficiently remedy that unfairness given the stage of the proceedings. The defence cannot truly be expected to re-open the case or to recall witnesses at this stage and to do so in an effective manner.

49. Even if it were to do so, 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.

50. It should be stressed that article 25(3)(d) mode of liability has not been defined by any Trial Chamber. Several authors have highlighted the "lack of clarity" of the section,[78] being uncertain as to which intentional criteria is required,[79] or as to whether 25(3)(d) corresponds to the concept of JCE used before the ad hoc tribunals),[80] etc. One author even affirms "I am completely confident that no one can be completely confident that his or her interpretation [of this article] is 100 percent correct";[81] considering that "it is impossible to construct a coherent and non-redundant interpretation of Article 25(3)(d) on group complicity", and argues for amendment,[82] and others underline the danger of its vagueness.[83] Therefore, the Defence submits that it would be unfair and a violation of the accused's right to adequate time and facilities to allow the Trial Chamber to confront the defence at this late stage of the proceedings to this unclear, undefined, 'catch all'[84] mode of liability. The defence will not have the advantage provided by having such issues raised, discussed and if necessary, reviewed in the Confirmation

[78] Deborah Bayleh, Six Degrees of Separation-Canadian Accessory Liability in Afghan War Crimes, Dalhousie Journal of Legal Studies, Vol. 20, 2011, p. 88.

[79] Deborah Bayleh, Six Degrees of Separation-Canadian Accessory Liability in Afghan War Crimes, Dalhousie Journal of Legal Studies, Vol. 20, 2011, p. 88-91; Jens David Ohlin, JOINT CRIMINAL CONFUSION, *New Criminal Law Review*, Vol. 12, Number 3, p. 417-418; Gunel Guhiyeva, 'THE CONCEPT OF JOINT CRIMINAL ENTERPRISE AND ICC JURISDICTION, p. 81

[80] Deborah Bayleh, Six Degrees of Separation-Canadian Accessory Liability in Afghan War Crimes, Dalhousie Journal of Legal Studies, Vol. 20, 2011, p. 88-91; Gunel Guhiyeva, 'THE CONCEPT OF JOINT CRIMINAL ENTERPRISE AND ICC JURISDICTION, p. 80-84; Jens David Ohlin, JOINT CRIMINAL CONFUSION, *New Criminal Law Review*, Vol. 12, Number 3, p. 410-415; Linda Engvall, The Future of Extended Joint Criminal Enterprise-Will the ICTY's Innovation Meet the Standards of the ICC?, p. 247, 257.

[81] Jens David Ohlin, ICC Decision on Complicity for Collective Crimes, 21 December 2011, http://www.liebercode.org/2011/12/icc-decision-on-complicity-for.html.

[82] Jens David Ohlin, JOINT CRIMINAL CONFUSION, *New Criminal Law Review*, Vol. 12, Number 3, p. 406.

[83] See Jens David Ohlin, Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise, 5 J. Int'l Crim. Just. 69 2007, p. 78.

[84] Expression used by Gerhard Werle, in Individual Criminal Responsibility in Article 25 ICC Statute, 5 J. Int'l Crim. Just. 953 2007, p. 970.

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 fairness and expeditiousness of the proceedings.[85]

51. The accused is further prejudiced by the fact that it can not be guaranteed that his counsel or legal assistants will necessarily be available to continue in a re-opened case. The foreseeable Post Article 74 Decision commitments to the case do not involve all the commensurate commitments and investigations that re-opening the case portends. Also, the cut in available assets resulting from recent budgetary restrictions imposed by the State Parties which led to significant cuts in the composition of the team from May 2012, and the consequent uncertainties, necessary resulted in defence members having had to seek other commitments.

The Trial Chamber's reliance on the case law of the European Court of Human Rights

52. The Trial Chamber relies on jurisprudence of the European Court of Human Rights to support its proposition that it would not be unfair to apply regulation 55 at this stage of the proceedings. While that international jurisdiction does not exclude the possibility of national courts re-characterising charges very late in the proceedings, the context of that court must be borne in mind. Firstly, this does not necessarily reflect the general practice in the laws of member states of the Council of Europe. The European Court of Human Rights is not a supreme court of criminal jurisdiction but a final court for the determination of the outer limits of what is permitted in order to comply with the European Convention on Human Rights and Fundamental Freedoms. It is not the function of the European Court to interpret or apply the laws of the state, but simply considers the compatibility of such laws with treaty undertakings. The European Court is not required to determine which laws best reflect the need to ensure a fair trial, but whether an individual law and its application fall foul of the minimum standards set by the treaty. So while one State may permit very late re-characterisation, other states do not. The International Criminal Court, on the other hand, is concerned with the application of one single legal regime, and must determine how its application best reflects the intentions of the drafters of the Statute.

53. Secondly, in the European Convention context states parties are afforded a wide margin of appreciation. This is defined as the degree of latitude accorded to the national authorities and courts in recognition of the fact that 'by reason of their direct and

[85] 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.

continuous contact with the vital forces of their countries, the national courts are in principle better placed than the international court to evaluate local needs and conditions.'[86] The Trial Chamber and Appeals Chamber of the International Criminal Court, on the other hand, must determine what is the correct determination and application of the provisions of the Statute and its subsidiary instruments. In determining the applicable law it is not a question of deciding whether a particular interpretation or application of regulation 55 could be consistent with the Statute in order to determine legality, but rather a question of determining what is the proper interpretation of its provisions, while affording the benefit of the doubt to the accused.

54. Finally, one cannot lose sight of the facts of the cases which come before the European Court of Human Rights. The cases have been decided on the basis that the Court must have regard to the proceedings as a whole in considering the question of fairness.[87] Especially in those jurisdictions where late requalification of the charges is permitted, the trials relate to a less complex array of charges and much shorter trials. Evidential hearings and closing arguments extending over two and a half years are virtually unheard of in these jurisdictions and certainly do not form the basis of the discussions on the particular facts referred to in the European court decisions referred to by this trial chamber. The relevant jurisdictions where the question has arisen are also inquisitorial in nature, where the parties and participants have access to a dossier judicially prepared pre-trial. In the adversarial process applied before this court, decisions on the presentation of evidence are made by the parties based upon the way the charges have been presented by the prosecution and confirmed by the Pre-Trial Chamber.

55. Viewing the ECHR case law in its proper context, it is worth extracting the principles enshrined and considering to what extent they actually support or undermine the Trial Chamber's stance on this issue. It is submitted, that while the cases indicate instances where very late re-characterisation was not considered impermissible, on the issue of proper notice in terms of regulation 55, the ECHR case law does not support the Chamber's conclusion.

56. The basic principal is that 'in criminal matters the provision of full, detailed information to the defendant concerning the charges against him – and consequently the legal characterisation that the court might adopt in the matter – is an essential prerequisite for

[86] Handyside v The United Kingdom (1976) 1 EHRR 737, pars 48-49; Buckley v The United Kingdom (1996) 23 EHRR 101, pars 74-75

[87] *Dallos v. Hungary*, no. 29082/95, Judgment, 1 March 2001, citing *Miailhe v. France (no. 2)*, judgment of 26 September 1996, *Reports* 1996-IV, p. 1338

ensuring that the proceedings are fair'.[88] A critical issue to be determined by the European Court of Human Rights, when considering the extent to which a defendant's rights have been violated by late re-characterisation, is whether he has been given the possibility to exercise his defence rights 'in a practical and effective manner, and in good time'.[89]

57. What is practical and effective and in good time must depend on the context. The Trial Chamber's reliance on finding's of non-violation by the European Court[90] where recharacterisation occurred in a late stage in the proceedings is misplaced because of the general context of European Human Rights obligations for the state, as discussed above, but also because of the different facts of those cases and the distinct regulatory framework of the ICC.

58. With regard to the facts of the cases cited, the Trial Chamber refers to *Dallos v Hungary.* This case is quite different from the present, in that the requalification in the Supreme Court was accompanied by a proper opportunity to respond in that higher court. Although, this is a later stage in the proceedings than in the presence case, the Supreme Court's role was to rectify the errors committed in the lower court. In the Katanga case, the Trial Chamber is rectifying its own position having heard all the evidence at first instance, when it clearly could have provided much earlier notice of the possibility of reliance on a different mode of responsibility. *Sipavicious v Lithuania* was a similar case of the opportunity to defend the charge being given before an appeal jurisdiction, not the court of first instance itself, having failed to give proper notice of its own requalification. Again, the same applies in respect of the case of *Vesque v France*. In both cases, fairness was reviewed on the basis of the proceedings as a whole. *Backstrom and Andersson v Sweden* was a decision on admissibility, not a decision on the merits.

59. With respect to the regulatory framework, the national laws of each of the states in question permitted requalification at the appeal stage. The regulatory framework before the International Criminal Court has its own requirements. The separation of notice of re-characterisation from the re-characterisation itself is something which emerges to the forefront in regulation 55. Since the European Court was not addressing an express

[88] ECHR (Grand Chamber), *Pélissier and Sassi v. France*, no. 25444/94, Judgment, 25 March 1999, para. 52

[89] Ibid., at para. 62.

[90] Cited as: CEDH, *Dallos c. Hongrie*, no. 29082/95, Arrêt, 1er mars 2001, par. 52 à 53 ; CEDH, *Sipavicius c. Lithuanie*, no. 49093/99, Arrêt, 21 février 2002, par. 26, 31 à 32 ; CEDH,*Vesque c. France*, no. 3774/02, Arrêt, 7 mars 2006, par. 42 à 43 ; CEDH, *Pierre Bäckström et Mattias Andersson c. Suède*, no. 67930/01, Décision sur l'admissibilité, 5 septembre 2006

legal requirement of notice, its emphasis has been on the broader issue of whether the accused could reasonably foresee[91] or was aware of possibility[92] of the legal requalification. Since regulation 55 specifically requires notice of 'the possibility' to be given by the Chamber, the wider issue of foreseeability has less importance to the determination of the issue of fairness. As states are permitted to set higher standards than the minimum requirements of the European Convention, likewise the International Criminal Court has set a higher standard by requiring express notice. Accordingly, it is not appropriate to consider an application of regulation 55 to be fair in the circumstances based on an analysis of foreseeability. This notwithstanding, it has been argued above that in the Katanga case the recharacterisation in question was not reasonably foreseeable, contrary to the finding of the Trial Chamber, and that specific and timely notice is necessary.

60. In its determination of the question of foreseeability, the European Court looks at whether the new charge constitutes an element intrinsic to the initial charge and whether one mode of liability differs from the other only in degree of participation. With regard to the former question, article 25(3)(a) and article 25(3)(d) address different modes of liability. One is not intrinsic to the other. With regard to the latter question, the modes of liability do not differ solely in terms of the degree of participation but also in the nature of participation. The European Court considers whether the constitutive elements differ.[93] It is noteworthy that in *Pélissier and Sassi v. France*, it was held that aiding and abetting criminal bankruptcy did not merely differ from the crime of criminal bankruptcy in the degree of participation, since there was a different factual element in the requirement of the commission of a specific act and a different mental element in the requirement of knowledge of commission for aiding and abetting. In this case the two modes of liability are not defined in terms of degrees of participation as such, but are rather distinctly defined forms of liability, even if they may bear some similarities. In their application to the present facts, article 25(3)(d) addresses participation in the plan forming the basis of crimes committed by others while article 25(3)(a) targets participation in the crime itself, individually or through others. The mental elements also differ, the one requiring intention as defined in article 30 and with the other only

[91] ECHR, *Sadak* et al. *v. Turkey (No. 1*), nos. 29900/96, 29901/96, 29902/96 and 29903/96, Judgment, 17 July 2001,

[92] ECHR , *Dallos v. Hungary*, no. 29082/95, Judgment, 1 March 2001, para. 48

[93] ECHR, *Drassich v. Italy*, no. 25575/04, Judgment, 11 December 2007, para. 39

the contribution need be intentional, not the crime, it being sufficient only to have knowledge of the intention of the group committing the crime.

61. In *Drassich v Italy* it was considered that the accused had not been alerted to the possibility of recharacterisation of the charges in circumstances where the issue arose during deliberations of the Cour de Cassation and that neither the public minister nor the magistrates in the lower court had sought to requalify the charges.[94] If one views this case in the context of shorter more simple proceedings in a civil law jurisdiction where the available evidence is equally accessible to all parties and the court, it is equally relevant to the question of foreseeability in this case that neither the Prosecutor nor the Trial Chamber raised the issue at any stage during the years of pre-trial or trial proceedings.

62. Even in the context of the European case law, the recharacterisation itself may be late, but where the accused must be deemed not to have been aware of the proposed recharacterisation, in order to afford the accused a possibility to exercise his defence rights in a practical and effective manner, and in good time, it is important that he is given adequate notice. The European Court emphasised in *Mattei v France* the 'nécessité de mettre un soin extrême à notifier l'accusation à l'intéressé'.[95] So in *Sadak v Turkey* the accused had not been informed of the new charges until the last day of the trial and before sentence was passed. That case differs from the present one because the accused was not given the opportunity to address the new charge in that case. Nonetheless, what is important to note is that the stage at which the accused was informed was held to be 'patently too late'.

Appearance of Bias

63. It is well established that an accused has the right to be tried by an impartial tribunal. For this principle to be violated the defence emphasises that it is not necessary to demonstrate actual bias on the part of the decision makers, but only an appearance of bias. The timing and nature of this intervention, in the particular circumstances of the case, creates the appearance of bias.

64. 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

[94] Idem., para. 36

[95] ECHR, *Mattei v. France*, no. 34043/02, Judgment, 19 December 2006

conviction. The language employed in the decision[96] would lead a 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 observed;

> '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'.[97]

65. The subsequent disavowing by the Majority in the Notice Decision 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 which the Notice is made and, in particular, that it is made six months into deliberations and just a week or so before the acquittal of the alleged co-planner. Nor should the comments of the dissenting Judge, who had a duty to be present throughout the deliberations,[98] be overlooked when assessing the overall impression [99] that the circumstances of the decision would have on a neutral observer of the process. [100]

66. In addition, at no time did the prosecution seek recharacterisation. That the Chamber does so at this stage will risk it being seen as performing a prosecutorial function. 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

[96] Notice Decision - para. 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'

[97] Notice Decision, para. 19.

[98] Per Article 74 (1)

[99] 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.'

[100] Dissenting Opinion para 28. "No mention was made of the possibility of applying Article 25(3)(d)(ii) --- the unpalatable suspicion that the Chamber is intervening to ensure the conviction of Germain Katanga Ibid., para 30. The suspicion that the Majority has already - at least provisionally - made up its mind is further strengthened by the fact that the prosecution, whose role it is to provide the charges,^^ made no efforts to incorporate Article 25(3)(d) into its charges.

Notice.[101] In doing so, the Chamber is doing that which the Appeals Chamber in the ICTY case of *Kupreskic* and the ICTR case of *Muvunyi* prohibited the Prosecutor from doing, namely to "mould the case against the accused in the course of the trial depending on how the evidence unfolds".[102]

'Exceeding the facts and circumstances'

67. The 'modification of the legal characterisation is limited by the **facts and circumstances** described in the charges or any amendment thereto'.[103] The word 'circumstances' has its own connotation and should not be taken as synonymous with 'facts'. The Trial Chamber should not be permitted to take part of the surrounding circumstances and turn them into facts when they were not previously considered as such.

68. In this regard, the Appeals Chamber held in *Lubanga*:

> In the view of the Appeals Chamber, the term 'facts' refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61 (5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged. The Appeals Chamber emphasises that in the confirmation process, the facts, as defined above, must be identified with sufficient clarity and detail, meeting the standard in article 67 (I) (a) of the Statute.[104]

69. Further, as expressed in the Dissenting Opinion:

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[101] 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

[102] Prosecutor v. Muvunyi, Appeal judgment, August 29, 2008, para. 18; Prosecutor v. Kupreskic et al, Appeal judgment, October 23, 2001, para. 92. See also: Prosecutor v. Kvo~ka et al. Appeals Chamber Judgement, February 28, 2005, paras. 30-31, 33; Prosecutor v. Seromba, Appeals Chamber Judgement, March 12, 2008, paras. 27, 100; Prosecutor v. Simba, Appeals Chamber Judgement, November 27, 2007, para. 63; Prosecutor v. Muhimana, Appeals Chamber Judgement, May 21, 2007, paras. 76, 167, 195; Prosecutor v. Gacumbitsi, Appeals Chamber Judgement, July 7, 2006, para. 49; Prosecutor v. Ndindabahizi, Appeals Chamber Judgement, January 16, 2007, para. 16, Prosecutor v. Ntagerura et al. Appeals Chamber Judgement, July 7, 2006, paras. 27-28; Prosecutor v. Niyitegeka, Appeal judgment, July 9, 2004, para. 194; Prosecutor v. Nahimana et al. Appeals Chamber Judgement, November 28, 2007, para. 326.

[103] Lubanga Regulation 55 Appeals Judgment, para. 97

[104] 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, fn. 163.

> The question therefore arises whether the facts, which the Majority proposes to rely upon for a potential conviction under Article 25(3)(d)(ii), are indeed part of the facts and circumstances described in the charges. There are, in my view, two aspects to this question. First, the Majority cannot rely on allegations, which, although mentioned in the Confirmation Decision, do not constitute factual allegations that support the legal elements of the crimes charged. Second, the Majority may not change the narrative of the facts underlying the charges so fundamentally that it exceeds the facts and circumstances described in the charges. I think the Majority erred on both points.[105]

70. The defence respectfully agrees. The Majority are changing the members of the criminal enterprise, or their legal status within that enterprise, as well as the nature of the accused's contribution to the crime which gives rise to his legal responsibility.[106] This goes beyond changing his title of legal responsibility to match the structure of the criminal enterprise and the accused's contribution *as charged*.

71. A distinction must be drawn between material facts and subsidiary or collateral facts. It is only the facts, which underlie the charges that can be the subject of requalification.[107] Under the Statute it is for the Prosecutor to formulate the charges and for the Pre-Trial Chamber to confirm the charges. There may be facts referred to during the course of the confirmation hearing, or in the analysis of the Pre-Trial Chamber, which do not form part of the factual basis upon which the prosecution relies. Such facts are not material facts and therefore not 'facts contained in the charges'. There may also be facts which, while relied upon, are still not essential to understanding the charges. Such facts do not form part of the 'facts contained in the charges'.

72. As expressed in the Dissenting Opinion, relying on the ruling in *Lubanga*, "the Majority cannot rely on allegations, which, although mentioned in the Confirmation Decision, do not constitute factual allegations that support the legal elements of the crimes charged."[108] The learned judge in that Opinion observes that neither the prosecution nor the Pre-Trial Chamber made the effort to separate the material from the non-material facts, though notes that this does not prevent the Trial Chamber from undertaking this exercise and that in the event of doubt the matter should be resolved in favour of the accused.[109]

73. In this respect, as observed by Judge Van den Wyngaert, 'It is worth recalling that the Defence for Mr Katanga raised the issue of there being insufficient clarity about the

[105] Dissenting Opinion para. 13

[106] Notice Decision, paras. 25-27.

[107] *Lubanga* Regulation 55 Appeals Judgment, para. 90.

[108] Dissenting Opinion, para. 13, referring to Lubanga Regulation 55 Appeals Judgment, para. 90, note 16.

[109] *Ibid.*, para. 16.

material facts underlying the charges before the trial commenced. However, the Chamber decided not to accede to these repeated requests for clarification and ultimately refused to grant leave to appeal on this very issue[110]".

74. Nonetheless, the Dissenting Opinion expressed confidence that despite this non-disclosure the conclusion could be drawn that the Majority was fundamentally changing the narrative: "I am in no doubt that the Majority's proposed migration to Article 25(3)(d)(ii) inevitably forces it to engage in extensive factual acrobatics in order to find sufficient factual support in the Confirmation Decision to meet the elements of this new form of criminal responsibility."[111]

75. In fact, on the basis of the information provided by the majority of the Trial Chamber, there is a sufficient indication that the facts and circumstances underlying the charges would in fact be exceeded. The Trial Chamber points to one aspect of Katanga's evidence in explaining its sudden turn. This is his emphasis on his alleged role as coordinator, in the preparation of the attack on Bogoro, while stressing the objective of dislodging the UPC.[112] The defence submits that Germain Katanga's role and his contribution to the plan to attack Bogoro by permitting Aveba to be used for the transmission of weapons and troops, as referred to in the confirmation decision,[113] are clearly secondary to his alleged joint planning with Ngudjolo of this attack and his direct responsibility for its implementation.[114] The former contribution is secondary and non-essential. The latter is primary and substantial. These are significantly different roles, the latter being the material role for the purposes of the existing charges.

76. The position of those who execute the crimes on the ground has also changed from being individuals through whom Katanga acts and are subject to automatic compliance to the orders of Germain Katanga, to individuals who themselves harbour a common criminal plan to wipe out Bogoro, to which Germain Katanga indirectly contributes by facilitating the preparations of the attack. From the perspective of legal analysis, while it is not clear whether the individuals are those referred to in the prosecution version of events, or are those referred to in Katanga's account, they are perpetrators with a cogently different status and correlation to Katanga in the planning and execution of the crimes.

[110] *Ibid.*, para 17 and see footnote 22 of that opinion where reference is made to various defence submissions on that issue.

[111] Dissenting Opinion para. 21.

[112] Notice Decision, para. 5.

[113] Confirmation Decision, para. 555 (ii).

[114] Confirmation Decision, paras. 548, 555 (i)).

77. As stated in the Dissenting Opinion,

> "All of a sudden, these individuals - who are not identified are thus transformed by the Majority from a legion of blindly obedient and 'fungible' executants, who automatically complied with Germain Katanga's orders (and whose personal intentions were therefore irrelevant in the sense of Article 25(3)(a)) to a 'group of persons acting with a common purpose' (in the sense of Article 25(3)(d)). At the same time, Germain Katanga is demoted from a leader with almost total control (in the sense of Article 25(3)(a)) to an accomplice who is now supporting the criminal common purpose of an unidentified subsection of his former subordinates (in the sense of Article 25(3)(d)). Needless to say, the purported 'common purpose' of this undetermined criminal group is nowhere to be found in the Confirmation Decision."[115]

78. Without having to analyse the details of the factual findings envisaged by the Chamber, which is inadequately disclosed, it suffices to observe that the nature of the role of the accused, and that of the actual perpetrators of crimes, is central to the factual narrative underlying the charges. We are plainly dealing with an attempt on the part of the Trial Chamber to alter, in a fundamental way, the fabric of the story. It follows that the Notice and envisaged requalification exceed the facts and circumstances contained in the charges contrary to regulation 55. This is also the opinion of the dissenting judge.[116]

79. Since Katanga is charged with joint commission through others, Katanga's alleged role in *facilitation of the attack by others* could not be considered a collateral factual aspect, let a alone a central aspect, for the purpose of the allegation actually charged. It is inconsistent with the factual allegations as presented by the prosecution and confirmed by the Pre-Trial Chamber. The allegations in the form of the confirmation decision are not expressed in a manner which would suggest that a peripheral role could engage criminal responsibility.

80. In so far as some form of facilitation is alluded to in the Confirmation Decision, it is not this aspect of his role which forms the basis of the allegation of joint commission. According to the confirmation decision, Katanga acted as the head of a structured organisation called the FRPI and decided on a plan with the head of the FNI, another structured group.[117] Moving this facilitative role to the centre of the charge amounts to altering the narrative fundamentally.

81. As observed in the Dissenting Opinion:

> Charges are not merely a loose collection of names, places, events, etc., which can be ordered and reordered at will. Instead, charges must represent a coherent description of how certain individuals are linked to certain events,

[115] Dissenting Opinion, para. Xx.

[116] Dissenting Opinion of Christine Van Den Wyngaert, pars 21-22

[117] Confirmation decision paras. 540-549.

> defining what role they played in them and how they related to and were influenced by a particular context. Charges therefore constitute a narrative in which each material fact has a particular place.[118]

82. It is impermissible to ignore the description in the confirmation decision of Germain Katanga's role as an essential contribution to the commission of a crime. The Pre-Trial Chamber expressly defined his contribution as essential to the commission of the crimes charged.[119] The Trial Chamber notes this express reference and records that it falls within the logic of article 25(3)(a).[120] That as may be, that description constitutes one of the circumstances outlined in the charges. While the notion of an essential contribution may embrace that of a significant contribution, the reverse does not apply. Accordingly, to convert the description of his role from that of an essential contribution to that of a significant but not necessarily essential contribution is to alter the circumstances contained in the charges.

83. Apart from the fact that the facts need to be reconstructed in order to achieve the shift envisaged by the Trial Chamber, a recharacterisation of the charges would necessarily exceed the facts and circumstances because crucial facts are missing for the new qualification. In terms of article 25(3)(d) Katanga would be contributing to the common purpose of a group. Not only is the group unidentified but nowhere in the prosecution summaries of the charges or the Confirmation Decision is the common purpose of this other group identified.[121]

84. The common purpose identified in the charges is that of Germain Katanga and Mathieu Ngudjolo acting jointly to wipe out Bogoro by attacking its civilian population. The Confirmation decision is clear in describing the nature of this common purpose and how the common plan giving expression to it is formulated. The plan was to 'wipe out' Bogoro, by directing the attack against the civilian population, killing and murdering the predominantly Hema population and destroying their properties. It has a clear criminal element. It is formulated by Germain Katanga and Mathieu Ngudjolo together. As set out in the confirmation decision; in early 2003 Mathieu Ngudjolo sent Commander Boba Boba and others under his command to Aveba to meet with Germain Katanga to plan the attack on Bogoro.[122] The plan was then written down and given to

[118] Dissenting Opinion of Christine Van Den Wyngaert, para. 20

[119] Confirmation decision paras 555-561.

[120] Decision, para 28

[121] See also Dissenting Opinion of Christine Van Den Wyngaert, para. 22

[122] Confirmation decision paras. 548(iii), 555 (iv)(c).

Mathieu Ngudjolo.[123] It was then distributed to commanders by Germain Katanga and Ngudjolo. Germain Katanga then went to Zumbe to meet with Ngudjolo a few days before the attack. The day before the attack Katanga and Ngudjolo met at Bavi before moving to implement their plan.[124]

85. The confirmation decision does not specify the common purpose of the reconstituted group. It is not stated, nor could it be stated, in such a different factual framework. It would be wrong to transmute the common purpose described in the confirmation decision to the reconstituted group, when the confirmation decision is plain in its precise formulation of the nature and emergence of the plan. Germain Katanga and Mathieu Ngudjolo are central to the story of how this plan and purpose came into being. Remove them and it changes the factual narrative.

86. It then becomes necessary to formulate a common purpose held by others and describe what it is. Without the ability to do that, one cannot re-qualify the charges without exceeding the facts and circumstances described in the confirmation decision. While there could have been a common purpose like that described in the confirmation decision, formulated by others, it has to be attached to a different narrative to that outlined above in order to be sustained. There may have been other meetings, between other people, with different or similar conclusions as to what constituted the plan. Yet such a narrative does not emerge in the findings of the Pre-Trial Chamber. The plan is decided on by the co-accused and distributed by the co-accused. If this criminal plan of 'Katanga and Ngudjolo' did not exist then what was the plan, or what was the purpose?

87. This is not as the Trial Chamber describes it,[125] a re-emphasis on certain facts rather than others. It is not a small step. It is a categorical change to fit the needs of article 25(3)(d). One must consider for a moment what impact it would have on defence investigations to recast the facts as set out by the Pre-Trial Chamber in the way the Trial Chamber would now propose. The defence would have to move its focus from the two accused – where they were, what they were doing, who they were associated with, whether there were meetings in Aveba on certain dates, with the accused, or visits to Zumbe or meetings in Bavi etc – to, were there meetings between other groups in other places, who were there and what was discussed etc. The defence will have to investigate the existence of any plan formulated in Bedu Ezekere/Zumbe, something which was not necessary for his defence on the confirmed charges.

[123] Confirmation decision, para. 548(iv).

[124] Confirmation decision para. 548(iv).

[125] Notice Decision.

88. It is submitted that the proposed re-qualification, relying upon the contribution as pronounced by Germain Katanga himself during the proceedings as opposed to the more substantial and quite different contribution suggested in the original formulation of the charges, exceeds the facts underlying the charges.

89. There is a risk of having to restart the whole trial process, which must be part of the rationale for not permitting a Trial Chamber to exceed the facts and circumstances in the charges when giving notice under regulation 55.

90. The Chamber asserts that Katanga has had the opportunity to defend himself on each one of the facts.[126] However, one cannot divorce the facts from the law when conducting a defence. The Appeals Chamber has defined facts to mean those factual allegations which support each of the legal elements of the crime forming the basis of the charges.[127] The facts are viewed from the perspective of the alleged criminal behaviour. The Defence must decide on the allocation of limited resources and which issues to contest, which very much depends on the legal as well as factual nature of the allegation. Therefore, it would be fairer to say that Katanga has had the opportunity to defend himself on each of the facts as narrated in relation to the legal elements of the crimes charged against him under article 25(3)(a), but not under 25(3)(d).

91. Had the defence known that such a requalification would occur, its strategy would invariably have been different as it would have then been contesting a different case.[128]

92. The defence may have adopted a less active strategy, a more 'silent' defence –such as calling witnesses only as to the credibility of prosecution witnesses and not putting forward a positive and instructive defence case. It is unlikely Germain Katanga would have been called as a witness had he been charged under the proposed mode of liability or had notice he might be[129].

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[126] Decision, para. 23

[127] Appeals Chamber, *Prosecutor v. Lubanga*, 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, ICC-01/04-01/06-2205, OA 15 OA 16 ("Lubanga Regulation 55 Appeals Judgment"), p. 163, footnote.

[128] See Dissenting Opinion, paras. 39, 44.

[129] See Dissenting Opinion in support of the latter contention "Had the Katanga Defence been able to reasonably foresee the possibility that the charges would be recharacterised under Article 25(3)(d)(ii), it may well have adopted a different defence strategy". And –"45 Germain Katanga testified in the context of an indirect co-perpetration case, and it was reasonable for the accused to not have contemplated Article 25(3)(d)(ii) when he chose to testify….had he known he had to defend himself against Article 25(3)(d)(ii) as well, then it cannot be discounted that he may not have testified." Para. 43

93. The focus could have been different, focusing not on the relationship between two common planners but on relationships between the accused and commanders and combatants, their intentions and plans and the extent that any conduct went beyond what was anticipated. Among issues that may 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 such violence prior to Bogoro. Also, which group or persons committed excesses which went beyond anticipated behaviour. That is an area that is not only relevant to the issues raised by the re-characterisation but which would now be addressed in the context of a severed trial where the co-accused has been acquitted.

94. The Chamber's Notice Decision is defective as it fails to indicate clearly the material facts upon which it relies for the proposed recharacterisation.[130] For example, the defence has little information about the group of persons acting with a common purpose. Nobody in the group of Ngiti commanders and combatants has been identified by name,[131] an observation made in the Dissenting Onion.[132] It is in marked contrast to the particulars of the charges provided to the accused by the Confirmation Decision which ran to 98 pages of law and fact. The defence is thereby handicapped in challenging the decision. It is submitted that in these circumstances, the Appeals Chamber can only err on the side of caution and conclude that the failure to provide that analysis renders the Notice Decision unlawful.

Request for Suspensive Effect

95. When the Trial Chamber delivered the Notice Decision, the Majority invited the defence to make submissions on Regulation 55 as to the law, the interpretation of the facts of the case in light of the recharacterisation being considered, and to state, by "providing all appropriate justification", whether it intends to seek application of the measures described at regulation 55(3)(b) and to do so by 21st January 2013.[133]

[130] 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 Notice 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").

[131] See Notice Decision, para. 26.

[132] See Dissent, para. 17 and fn. 23.

[133] Notice Decision, para. 57, p. 31.

96. In its application for leave to appeal the Notice Decision, the defence requested the Trial Chamber to grant the defence a delay so that the deadline for its submissions be extended from 21st January until fourteen days after the appeals decision is made.[134]

97. The Trial Chamber rejected that request on the basis that the defence had not advanced sufficiency of reasons in its application but in particular because it "effectively amounts to a request for suspensive effect of the Impugned Decision. As is well-known to the Defence, the authority to grant suspensive effect in cases of interlocutory appeals rests with the Appeals Chamber pursuant to Article 82(3) of the Statute."[135]

98. The defence requests the Appeals Chamber for suspensive effect of the Notice Decision, pursuant to article 82(3) of the Statute and rule 156(5) of the Rules of Procedure and Evidence, to the extent that the defence not be obliged to provide its submissions on the proposed re-characterisation until 14 days after the decision of the Appeals Chamber on this matter.

99. A decision on suspensive effect is within the discretion of the Appeals Chamber taking into account the specific circumstances of the case, as well as the factors that the Appeals Chamber considers "[…] relevant for the exercise of its discretion under the circumstances".[136] Three additional circumstances in which the Appeals Chamber has exercised its discretion to grant suspensive effect have been developed: it has considered "whether the implementation of the decision under appeal (i) "would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant", (ii) would lead to consequences that "would be very difficult to correct and may be irreversible", or (iii) "could potentially defeat the purpose of the appeal".[137]

100. The defence notes, however, that the context of the present request for suspensive effect is markedly different from the requests ruled upon in *Lubanga*, *Bemba*, and in *Ngudjolo*. In those cases, requests for suspensive effect were made in respect of decisions to release the accused following a stay of the proceedings, in relation to

[134] ICC-01/04-01/07-3323, Defence Request for Leave to Appeal the Decision 3319, para. 57.

[135] ICC-01/04-01/07-3327, Decision on the "Defence Request for Leave to Appeal the Decision 3319", para. 20.

[136] *Prosecutor v. Ngudjolo*, "Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect, 20 December 2012", ICC-01/04-02/12-12, para. 18 [footnote omitted]; ICC-01/04-01/06-1444, Reasons for the decision on the request of the Prosecutor for suspensive effect of his appeal against the "Decision on the release of Thomas Lubanga Dyilo", 22 July 2008, para. 8; ICC-01/04-01/06-2536, Decision on the Prosecutor's request to give suspensive effect to the appeal against Trial Chamber I's oral decision to release Mr Thomas Lubanga Dyilo, 23 July 2010, para. 7.

[137] ICC-01/05-01/08-817, Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the "Decision on the Admissibility and Abuse of Process Challenges", 9 July 2010, para. 11; ICC-01/04-02/12-12, Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect, 20 December 2012.

interim release pending trial, or in relation to release following a judgment of acquittal under article 74 of the Statute.[138] The circumstances developed in the context of these cases are whether the implementation of the decision under appeal "[…] could potentially defeat the purposes of the appeal."[139]

101. The two other circumstances were developed in *Lubanga*, first in respect of a decision on redactions and disclosure, where the Appeals Chamber considered whether the implementation of the decision under appeal "would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant."[140] And second, in respect of a decision on victim's participation, whereby in considering whether implementation of the decision under appeal, "[…] would lead to consequences that 'would be very difficult to correct and may be irreversible.'"[141] The context of the present request also differs from these two requests.

102. Furthermore, the defence recalls, as emphasised by the Appeals Chamber in *Ngudjolo*, that "[…] notwithstanding [the decisions in *Lubanga* and in *Bemba* concerning the release of the accused], the decision as to whether or not to grant suspensive effect is always discretionary and depends upon the individual circumstances of the case."[142] In the context of the present appeal, and were the Appeals Chamber to require nevertheless that one of the three circumstances be met, the defence submits that the two latter circumstances are satisfied.

103. The Appeal decision and the defence's response to the Notice Decision are so linked that the defence must be entitled to know the nature and content of the appeal decision before having to make any response to the Trial Chamber. The Appeals Chamber decision may relate to any of a wide number of issues. The accused will be prejudiced if submissions made now are later overtaken or adversely affected by the appeal decision. The defence might file its submissions on the basis of an incorrect legal and/or factual framework, only to have to re-formulate its submissions, if permitted to do so.

[138] See Prosecutor v. Ngudjolo, supra. para. 21.

[139] See Prosecutor v. Bemba, "Decision on Request of Mr Bemba to Give Suspensive Effect on the Appeal Against the 'Decision on the Admissibility and Abuse of Process Challenges'", 9 July 2010, ICC-01/05-01/08 (OA 3), para. 11 and fn. 27 [footnote omitted].

[140] Ibid para. 11 and fn. 25 [footnote omitted].

[141] Ibid para. 11 and fn. 26 [footnote omitted].

[142] See Prosecutor v. Ngudjolo, supra. para. 20.

104. The Notice Decision effectively obliges the accused to indicate its future lines of defence[143] - paragraph 57 and in the Disposition.[144] Even if those matters were to be submitted *ex parte*, to the Chamber only, the accused could still be prejudiced. Further, disclosure by the defence of its strategy prior to the issuance of the judgment of appeal could lead the Trial Chamber to consider additional material in any re-trial. Such circumstances could create an irreversible situation.[145] If the present appeal and the request for suspensive effect were to be rejected, disclosure by the defence of its response to any re-characterisation would lead to an unfair trial, in violation of the Appeals Chamber requirement that "[…] the change in the re-characterisation must not lead to an unfair trial."[146]

Relief Sought

105. Accordingly, the defence requests that the Appeals Chamber;

- Orders suspensive effect of the Notice Decision pursuant to article 82(3)
- Reverses the Notice Decision and declares that in all the circumstances of this case a requalification 'of the timing and nature proposed' cannot be effected at this stage.

[143] Cf. Prosecutor v. Lubanga, "Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008, 22 April 2008, ICC-01/04-01/06 OA 11, para. 8.

[144] See Impugned Decision, para. 57 ("As to the Defence team for the Accused, pursuant to regulation 55(3), it is to make its submissions in writing on both the law of article 25(3)(d) and its interpretation of the facts in light of the recharacterisation being considered; it is also to state, providing all appropriate justification, whether it intends to seek application of any of the measures described at regulation 55(3)(b)"); Ibid., Disposition, p. 31 ("REMINDS the Defence that if it wishes to avail itself of one of the measures described at regulation 55(3)(b), it is required to inform the Chamber to this effect in the aforementioned submissions, providing justification for its request"). See also Dissent, para. 39 ("Had the Katanga Defence been able to reasonably foresee the possibility that the charges would be recharacterised under Article 25(3)(d)(ii), it may well have adopted a different defence strategy").

[145] *See Prosecutor v. Lubanga*, "Decision on the request of the Prosecutor and the Defence for suspensive effect of the appeals against Trial Chamber I's Decision on Victim's Participation of 18 January 2008", 22 May 2008, ICC-01/04-01/06 (OA9, OA10), para. 19; *Prosecutor v. Lubanga*, "Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008", 22 April 2008, ICC-01/04-01/06 (OA 11), para. 8; *Prosecutor v. Lubanga*, "Decision on the request of the Prosecutor and the Defence for suspensive effect of the appeals against Trial Chamber I's Decision on Victim's Participation of 18 January 2008", 22 May 2008, ICC-01/04-01/06 (OA9, OA10), para. 23.

[146] See Prosecutor v. Lubanga, "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, , ICC-01/04-01/06- 2205 (OA 15 OA 16), para. 100.

Respectfully submitted,

David HOOPER Q.C.

Andreas O'Shea

Dated this 10 January 2013

At London