

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/04-01/07**

Date: **25 January 2013**

THE APPEALS CHAMBER

Before:

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public Document

**Submissions of the Legal Representative of child soldier victims on the Defence's
"Document in Support of the 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: Legal Representative of child soldier victims,
Mr Jean-Louis Gilissen**

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

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BACKGROUND

1. On 21 November 2012, Trial Chamber II (“the Chamber”) delivered its *Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons* (Decision 3319).¹
1. In that decision, the Chamber informed the parties that the Majority was contemplating the recharacterisation, on the basis of regulation 55 of the Regulations of the Court, of the mode of liability under which G. Katanga stands accused in respect of all the charges against him, save for the crime of using children under the age of 15 years to participate actively in hostilities. The parties and participants were invited to file factual and legal submissions on the proposed recharacterisation.
2. In that same decision, the Chamber further indicated, this time unanimously, that it was severing the charges against M. Ngudjolo in order to deliver a verdict without having to rule on the charges pending against G. Katanga.²
3. By judgement dated 18 December 2012, M. Ngudjolo was acquitted of all the charges against him and released.³ On 20 December 2012, the Prosecutor filed an appeal against the judgment.⁴
4. By decision of 28 December 2012, the Chamber granted the Defence for Germain Katanga (“the Defence”) leave to appeal the decision of

¹ *Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons and Dissenting opinion of Judge Christine Van den Wyngaert*, ICC-01/04-01/07-3319-tENG/FRA.

² *Ibidem*.

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

⁴ “Prosecution’s Appeal against Trial Chamber II’s *Jugement rendu en application de l'article 74 du Statut*”, ICC-01/04-02/12-10.

21 November 2012.⁵ Further to an application by the Defence, it also extended the page limits for the appeals of the Defence and the Prosecutor to 40 pages.⁶

5. On 3 January 2013, the Legal Representatives filed a joint application to participate in the appellate proceedings.⁷
6. On 8 January 2013, the Appeals Chamber set a time limit for the Defence and the Prosecutor to file submissions on the joint application to participate.⁸ Both the Prosecutor⁹ and the Defence¹⁰ stated that they had no objection to such participation.
7. By decision dated 17 January 2013,¹¹ the Appeals Chamber granted the 364 victims authorised to participate in the case of *The Prosecutor v. G. Katanga* leave to participate in the appellate proceedings and to present their views and concerns as they relate to their personal interests.
8. On 10 January 2013, the Defence filed its document in support of the appeal against Decision 3319¹² (Defence's Appeal), further seeking suspensive relief from the Appeals Chamber. By decision of 16 January 2013, the Appeals Chamber granted the request.¹³

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

⁶ *Decision on the "Urgent Defence Application for Extension of Page Limit for its Document in Support of Appeal against Trial Chamber II's Decision of 21 November 2012 on Regulation 55 (Decision 3319)"*, ICC-01/04-01/07-3334.

⁷ *Demande conjointe des représentants légaux à pouvoir participer à la procédure relative à l'appel de la Défense contre la décision de la Chambre de première instance II n° 3319 (mise en œuvre de la norme 55 du Règlement de la Cour)*, ICC-01/04-01/07-3329.

⁸ ICC-01/04-01/07-3333.

⁹ ICC-01/04-01/07-3341.

¹⁰ ICC-01/04-01/07-3336.

¹¹ *Decision on the application of victims to participate in the appeal against Trial Chamber II's decision on the implementation of regulation 55 of the Regulations of the Court*, ICC-01/04-01/07-3346

¹² *"Defence's Document in Support of Appeal Against the Decision on the implementation of regulation 55 of the regulations of the Court and severing the charges against the accused persons"*, ICC-01/04-01/07-3339.

¹³ *Decision on the request for suspensive effect of the appeal against Trial Chamber II's decision on the implementation of regulation 55 of the Regulations of the Court*, ICC-01/04-01/07-3344.

9. On 21 January 2013, the Prosecutor filed his response to the Defence's Appeal.¹⁴
10. These submissions are filed in accordance with the aforementioned decision of 17 January 2013 granting the victims leave to participate in the appeal and to file their submissions by 25 January.

ISSUE UNDER APPEAL

11. According to the decision of 28 December 2012 granting leave to appeal Decision 3319,¹⁵ the issue under appeal as identified by the Defence is the following: is the decision notifying the parties and participants that the possible legal recharacterisation of the mode of liability under which Germain Katanga stands charged lawful and appropriate in this case?

DEFENCE ARGUMENTS IN SUPPORT OF THE APPEAL

12. The Defence moves the Appeals Chamber to reverse the proposed decision and to find that, in view of the circumstances of the case, a legal recharacterisation of this nature may not be effected at this stage of the proceedings ("a requalification 'of the timing and nature proposed' cannot be effected at this stage.")¹⁶
13. The Defence submits that notifying the parties and participants of a possible recharacterisation at this stage is both unlawful and inappropriate in that:

¹⁴ "Prosecution Response to Defence Document in Support of Appeal Against the Decision on the implementation of regulation 55 of the regulations of the Court and severing the charges against the accused persons", ICC-01/04-01/07-3347.

¹⁵ ICC-01/04-01/07-3327.

¹⁶ ICC-01/04-01/07-3339, para. 105.

- a. It was rendered at a late stage, which makes it incompatible with regulation 55 and the guarantees of a fair trial (article 67(1));
- b. The proposed modification of the mode of liability falls outside the scope of regulation 55 and article 74(2) in that (1) the recharacterisation exceeds the facts and circumstances described in the charges and (2) the Majority intends to rely on subsidiary facts in the notice decision;
- c. The proposed decision could not have been anticipated by the Defence and impacts on the rights of the Accused as guaranteed by Articles 67(1)(a) and (g);
- d. The consequence of the proposed recharacterisation is that the Accused will stand charged under a vague mode of liability which has not been properly defined legally;
- e. The proposed decision does not provide the Accused with sufficient details as to the facts and circumstances that may be relied upon for the proposed recharacterisation;
- f. The proposed decision comes so late in the process as to be in violation of the Chamber's duty to conduct the trial in an expeditious manner; and
- g. The circumstances in which the impugned decision was rendered give rise to an appearance of bias on the part of the Chamber.

SPECIFIC INTEREST OF THE LEGAL REPRESENTATIVE OF CHILD SOLDIERS IN THE RESOLUTION OF THE ISSUE UNDER APPEAL

14. The Legal Representative recalls that, according to the wording of paragraph 7 of Decision 3319, the proposed recharacterisation would apply to all the crimes of which Germain Katanga stands charged, save for the crime of using children under the age of 15 years to participate actively in hostilities.

15. However, as previously explained,¹⁷ the issue under appeal also affects the interests of child victims.
16. Furthermore, should the Appeals Chamber dismiss the Defence Appeal and the Trial Chamber subsequently continue to contemplate the recharacterisation, the Trial Chamber would then have to rule on the interaction and coexistence of the liability of the Accused under article 25(3)(d) of the Statute for the majority of the crimes set out in the *Decision on the confirmation of the charges* and his liability under article 25(3)(a) in respect of the war crime of using child soldiers.¹⁸
17. In this connection, the Legal Representative notes the absence of any indication in the impugned decision of the reasons why, after having reviewed the evidence, the Trial Chamber is contemplating a mode of liability on the basis of a “contribution” rather than a “commission” in respect of all the crimes, save for the crime related to the victims he represents.
18. Any judgment by the Appeals Chamber regarding Decision 3319 will therefore undoubtedly have a major impact on subsequent action to defend the interests of the child soldier victims.
19. More specifically, should the Trial Chamber be authorised to proceed with the proposed recharacterisation, the Legal Representative would have to move the Trial Chamber to clarify the grounds for its decision not to encompass the use of children under the age of 15 years in its recharacterisation. Should the need arise, the Legal Representative would be compelled to make submissions on the simultaneous application of two different modes of liability in the instant case.

¹⁷ See the Joint application to participate, ICC-01/04-01/07-3329.

¹⁸ *Ibid.*

SUBMISSIONS OF THE LEGAL REPRESENTATIVE ON THE ISSUE UNDER APPEAL

20. The Legal Representative will make his submissions on the Defence Appeal in the form of answers to the following questions. To the extent that it notified the parties and participants of a possible recharacterisation, does the impugned decision (I) exceed the scope of regulation 55 because of its timing; (II) exceed the scope of regulation 55 and article 74 because of the nature of the contemplated recharacterisation and the manner in which the Chamber intends to effect it (would the recharacterisation exceed the facts and circumstances described in the charges within the meaning of Article 74)? Finally, does the proposed decision, inasmuch as it notified the parties and participants of a possible recharacterisation, adversely affect the rights of the Defence, given that this question is also addressed transversally in points (I) and (II)?

21. The Legal Representative submits that some of the Defence's arguments are premature in that they attempt to respond to situations or scenarios which would only materialise once the recharacterisation has been approved and do not ensue from the notice decision. This is the case for the argument that the Accused would face a poorly defined mode of liability. Even assuming that this argument is substantiated, which it is not,¹⁹ it cannot be advanced at this stage. The same can be said for the argument that the proposed recharacterisation would change the narrative underlying the charges in such a way as to exceed the facts and circumstances set out in the charges, and the issue of a reasonable timeframe.

¹⁹ This argument is unsustainable as to substance. It would preclude holding any trial unless a mode of liability is set in law, whereas this determination is essentially derived from jurisprudence. Furthermore, it involves a subjective determination of the time when the notion is deemed legally set or established.

I. Does the impugned decision exceed the scope of regulation 55 because of its timing?

22. The Defence argues that the proposed decision is incompatible with regulation 55 and the minimum guarantees contained in article 67(1) of the Statute in that it was rendered at an inappropriate time in the proceedings.
23. The Legal Representative does not subscribe to the Defence's argument and is of the view that regulation 55 must be construed to mean that it may be "triggered" for the purposes of a possible recharacterisation up until the deliberation stage.
24. The plain meaning of the terms used in regulation 55, both having regard to its context and in light of its object and purpose, undoubtedly militates in favour of the implementation of this provision at any time during the trial,²⁰ including at the deliberation stage.
25. A literal reading of regulation 55(2) ("at any time during the trial") is sufficient to sweep aside the Defence's arguments in the first instance.
26. Moreover, regulation 55(2) also clearly states that once it has appeared to the Trial Chamber that the legal characterisation of the facts may be subject to change and it has given notice to the parties of such a possibility, it shall then provide the participants, having reviewed the evidence, with adequate time to file submissions. No time limit is set in this regard and it can be argued that such a review may take place either at the deliberation stage or before, during the evidence.
27. This interpretation is supported by the contextual interpretation of the aforementioned provision as well as its reading in relation to other relevant

²⁰ The Legal representative will not address the definition of a trial, which he considers not to be in dispute for the purposes of the current proceedings, given that at various times during the proceedings all the parties and participants have accepted that the trial is ongoing until a determination is made on the basis of articles 74, 75 and 76. In this regard, see the Prosecutor's response to the Defence Appeal, ICC-01/04-01/07-3347, para. 27.

provisions of applicable texts of the Court. The Trial Chamber's authority to contemplate a recharacterisation at any time before the deliberation stage is thus in accordance with the scope of article 74(2). As this article does not refer to the legal characterisation of the facts, it may be construed as implicitly allowing the Chamber to effect a legal characterisation of the facts and circumstances set out in the charges (which are the only constraint) which is different from that contained in the decision confirming the charges.

28. Finally, there is no doubt that the object and purpose of regulation 55 also plead in favour of allowing for the recharacterisation process to be triggered at any time before the deliberation stage.
29. The system set up by regulation 55 is a response to the unique nature of the procedure before the Court, and the authority conferred on the Trial Chamber is inherent to this procedure. Accordingly, it must be possible to exercise this authority up until the outcome of the trial, including at the deliberation stage.
30. The procedure established by the Court provides for an original confirmation of charges process, with the attendant risk of petrifying the charges. Since article 61 of the Statute governs the charges and their possible modification (including after the decision confirming the charges) and since, under the applicable framework, it is the primary responsibility of the Pre-Trial Chamber to establish the factual and legal bases of the trial, it cannot be sustained that only the Pre-Trial Chamber may define the subject-matter of the trial. Otherwise, the subject-matter would be etched in stone at the end of the confirmation of charges stage. However, the new material that will perforce be introduced at trial cannot be disregarded, nor can the Trial Chamber's powers to organise the conduct of the trial (for example, by ordering the production of additional evidence), particularly in light of such new material.²¹ The Trial Chamber will be faced with situations in which new evidence comes to light

²¹ Article.64(6)(d)

during testimonies or hearings, requiring it to contemplate a recharacterisation in order to discharge effectively the functions and powers conferred upon it by article 64.

31. In the current system, the Chamber must be able – and is expected – to avoid situations where it would be compelled to render a judgment of acquittal because it is unable to adapt the legal characterisation of the facts to the crimes within the jurisdiction of the Court and the modes of liability provided for in articles 25 and 28. In the view of the Appeals Chamber, the main purpose of regulation 55 is precisely to close accountability gaps.²²

II. Does the legal recharacterisation exceed the facts and the circumstances set out in the charges within the meaning of article 74(2)

32. The Defence challenges the impugned decision on two grounds: firstly, that the proposed recharacterisation changes the narrative of the charges so fundamentally that it exceeds the facts and circumstances described in the charges; and secondly that the Majority exceeded the boundaries of regulation 55 by relying on subsidiary facts in the impugned decision.

33. On the first ground, unlike the Defence, the Legal Representative does not consider that the content of the impugned decision allows for the argument that the proposed recharacterisation would change the narrative of the charges so fundamentally that it would exceed the facts and circumstances described in the charges. The Defence's reasoning is inverted. There is no doubt that the Chamber remains within the boundaries of the facts and circumstances described in the charges, even if it casts a different light on said facts and circumstances. The Chamber is unequivocal in stating that the

²² *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 characterization 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, para. 77.

proposed legal recharacterisation relies upon the facts set out in the decision confirming the charges, against which facts G. Katanga has had the opportunity to mount a defence during the substantive proceedings.²³ In no way could its narrative of the facts – which are defined and known – set out with a view to effecting a recharacterisation and reviewing all the constituent elements of article 25(3)(d)(ii),²⁴ be such as to exceed or overstep the facts.

34. In any event, the Legal Representative submits that it is premature to rule on this issue at this stage. Indeed, the argument can only be founded on the decision effecting the recharacterisation, not before, when the parties can only speculate on the Chamber’s final decision and the reasons therefor.
35. On the second ground, the Legal Representative submits firstly that the Defence’s distinction between material facts and contextual/collateral or subsidiary facts is artificial.
36. In reference to the Appeals Chamber’s aforementioned decision of 8 December 2009, the Defence rightly recalls that the “facts” are the factual allegations which support each of the legal elements of the crime charged.²⁵ Article 74(2) refers to the “facts and circumstances” described in the charges. Regulation 52 stipulates that the document containing the charges includes, in addition to the legal characterisation, a “statement of the facts”. Nowhere in the texts are the facts underlying the charges distinguished on the basis of their “material” or “contextual” nature.
37. In the alternative, the Legal Representative submits that were such a distinction to exist in theory, which it does not, the Defence applies it in a manner that is unacceptable. The Defence argues that facts which are unquestionably factual allegations relied upon in the legal characterisation of the crimes charged are actually “non material”.

²³ See in particular ICC-01/04-01/07-3319, para. 33.

²⁴ See ICC-01/04-01/07-3319-tENG/FRA, paras. 23 to 30.

²⁵ See ICC-01/04-01/07-3339-tENG/FRA, para. 68, which refers to ICC-01/04-01/06-2205, para. 163.

38. In his response to the Defence Appeal, the Prosecutor recalls that the Summary of the Charges and the evidence table which he filed contain an extremely detailed and exhaustive statement of the “facts and circumstances” as well as the nexus between these and the legal elements of the crime and the mode of liability charged. The Prosecutor clearly states that the only contextual factual elements are those which were notified as such in the Summary of the Charges, wherein they are distinctly separated from the material factual elements.²⁶
39. At this stage, the Defence cannot *a posteriori* draw an artificial distinction in the facts and circumstances submitted as factual allegations underlying the legal characterisation of the crimes and the mode of liability charged, and claim that some of them are subsidiary.

III. Respecting the rights of the Defence

40. The Legal Representative notes *in limine* that regulation 55(2) and 55(3) provide guarantees that go beyond both the minimum required by international instruments safeguarding the rights of the defence in situations which are similar to the one contemplated in this regulation, and the provisions of a number of national systems.²⁷
41. Furthermore, the timing of the impugned decision in no way affects the argument that the regulation in itself contains all the necessary means to safeguard the rights of the Defence as enshrined in the Court’s applicable texts. In other words, the fact that the notice of a possible recharacterisation was given at the deliberation stage has no adverse effect on the guarantees afforded by regulation 55(2) and 55(3), nor does it preclude their effective application.

²⁶ ICC-01/04-01/07-3347, paras. 60-62.

²⁷ On this point, see Carsten Stahn, “Modification of the legal characterization of facts in the ICC system: a portrayal of Regulation 55”, *Criminal Law Forum* (2005), pp. 17 and 23.

42. In the opinion of the Legal Representative, the Defence's criticisms against the appealed decision are largely premature in that any prejudice to the rights of the Defence can only be assessed in relation to the future application of regulation 55(2) and 55(3), *viz.*, once the Defence has filed its submissions and sought the guarantees afforded by that regulation.

43. Nevertheless, at this juncture the Legal Representative offers a partial response to the issue of respecting the rights of the accused to be informed without delay of the charges against him (1), the right to have adequate time and facilities for the effective preparation of his defence (2), and the right to be tried within a reasonable time (3).

(1) *The right of the accused to be informed without delay of the charges against him*

44. Pursuant to regulation 55(2), the Chamber notified the parties and participants that it was contemplating a modification of the characterisation and the basis therefor, thus responding in part to the Defence's arguments in respect of the right guaranteed under article 67(1)(a) to be informed of the facts underlying the charges and of their legal characterisation.

45. The Legal Representative recalls that the impugned decision clearly states that the facts which will be relied upon for a potential recharacterisation are those contained in the decision confirming the charges, which have already been argued at trial. G. Katanga had the opportunity, of which he availed himself, to defend himself on each of the facts,²⁸ including all the relevant elements as they appeared in the Summary of the Charges.

46. As indicated above, since the Chamber stayed within the boundaries of the facts and circumstances set out in the decision confirming the charges, the outstanding issue is whether the impugned decision meets the prompt

²⁸ See impugned decision, in particular paras. 33 and 40.

notification requirement within the meaning of article 67(1)(a) of the legal characterisation of the facts underlying the charges.²⁹

47. As mentioned above by the Legal Representative, the impugned decision specifically circumscribes the scope of the proposed recharacterisation, as well as the grounds and particularly the factual elements which underlie it.

48. Moreover, the issue should be considered in light of the fact that the Defence should have anticipated a possible recharacterisation (i) and, given the nature of the recharacterisation (ii):

- i. In his response to the Defence's Document,³⁰ the Prosecutor rehearses all the elements of the case in support of such an assertion. The Legal Representative respectfully refers the Appeals Chamber to paragraphs 63 to 67 of this document;
- ii. The mode of liability contemplated has points in common with the mode of liability charged, and it may be argued that on a substantial number of factual elements, the Defence for Germain Katanga would not have adopted a different defence strategy if it were facing the mode of liability under article 25(3)(d).

(3) The right of the accused to have adequate time and facilities for the effective preparation of his defence.

49. Regulation 55(3) expressly addresses the right of the accused to have adequate time and facilities for the effective preparation of his defence by reference to article 67(1)(b).

²⁹ The Legal Representative recalls that the Appeals Chamber stated in its decision of 8 December 2009 in *Lubanga* that article 67(1)(a) does not preclude the possibility that there may be a change in the legal characterisation of facts in the course of the trial, and without a formal amendment to the charges: ICC-01/04-01/06-2205, para. 84.

³⁰ ICC-01/04-01/07-3347.

50. Furthermore, it should be recalled that regulation 55(2) affords procedural safeguards in allowing the accused to seek a stay of proceedings or to request a hearing to consider the issue of recharacterisation.
51. Finally, regulation 55(3)(b) states that the accused may be given the opportunity to examine again a previous witness or to call new witnesses, in accordance with the referenced article 67(1)(e).
52. In this regard, the Legal Representative has already argued that Germain Katanga had the opportunity to defend himself on each of the facts and that he is not now faced with the task of mounting a fresh defence on a series of new facts and circumstances underlying a new mode of liability for which the Defence would have to adopt a fundamentally different defence strategy.
53. In any event, the Legal Representative wishes to emphasise once again that any allegations as to the violation of the rights of the accused to have adequate time and facilities for the effective preparation of his defence seem premature. A meaningful discussion thereof will only be possible once the Defence has expressed its intention potentially to invoke the guarantees afforded by regulation 55(2) and 55(3).

(3) The right to be tried within a reasonable time and the obligations of the Chamber to ensure an expeditious trial

54. In its decision of 8 December 2009, the Appeals Chamber stated that a change of the legal characterisation pursuant to regulation 55 does not as such automatically lead to undue delay of the trial and that whether a recharacterisation leads to undue delay will depend on the specific circumstances of the case.³¹

³¹ ICC-01/04-01/06-2205, para. 86.

55. The Defence's arguments are premature and/or have no direct causal link with the risk of unduly delaying the trial.
56. It behoves the Chamber to oversee the implementation of the guarantees which the Defence may invoke to assert its rights in respect of the recharacterisation in order to avoid undue delays and to ensure that the trial is as expeditious as possible. If required, the Chamber may apply measures to compensate for any resultant prejudice to the Defence.
57. Whilst the Legal Representative readily acknowledges that the proposed decision has had an undeniable impact on the conduct of the trial of G. Katanga, he does not accept the argument at this stage that an undue or unjustified delay will ensue; nor does he agree that the criteria to be used in determining whether such a delay will ensue should be more stringent because the recharacterisation is being contemplated at a late stage in the course of the trial. In any event, such delay should be assessed on a case-by-case basis.

FOR THESE REASONS,

May it please the Appeals Chamber to dismiss the Defence's Appeal.

[signed]

Mr. Jean-Louis Gilissen
Legal Representative of the group of child soldiers

Done this 25 January 2013 at Liège, Belgium.