

1 International Criminal Court
2 Appeals Chamber - Courtroom 1
3 Presiding Judge Sang-Hyun Song
4 Situation: Democratic Republic of the Congo
5 In the case of The Prosecutor v. Germain Katanga - ICC-01/04-01/07
6 Appeals Chamber Hearing for the Delivering of a Judgment
7 Wednesday, 27 March 2013
8 (The hearing starts in open session at 3.29 p.m.)
9 THE COURT USHER: All rise.
10 The International Criminal Court is now in session.
11 Please be seated.
12 JUDGE SONG: Good afternoon. The Court is in session. Would the court officer
13 please call the case?
14 THE COURT OFFICER: Yes, your Honour. Situation in the Democratic Republic
15 of Congo. In the case of The Prosecutor versus Germain Katanga, case reference
16 ICC-01/04-01/07, and we are in open session, for the record.
17 JUDGE SONG: Thank you. I would like to introduce myself. My name is Judge
18 Sang-Hyun Song, and I am the Presiding Judge on this appeal arising from the case of
19 The Prosecutor against Germain Katanga.
20 May I ask the parties to introduce themselves for the record, starting with the Defence,
21 please.
22 MR HOOPER: Good afternoon, Mr President. My name is David Hooper and I'm
23 here together with counsel, Mr Andreas O'Shea, Nathalie Wagner, who sits behind
24 me to my right, and Sophie Menegon.
25 Thank you.

1 JUDGE SONG: Thank you.

2 The Office of the Prosecutor, please.

3 MS CRISCITELLI: Thank you, your Honour. My name is Sara Criscitelli. I am
4 here with Fabricio Guariglia, Eric MacDonald and Reinhold Gallmetzer from the
5 Office of the Prosecutor. Thank you.

6 JUDGE SONG: Thank you.

7 The legal representatives for victims.

8 MR LUVENGIKA NSITA: Good afternoon, your Honour. My name is Maître Fidel
9 Luvengika Nsita, legal representative of the principal group of victims.

10 Thank you.

11 JUDGE SONG: Today the Appeals Chamber is delivering its judgment on the
12 appeal by Mr Katanga against the decision of Trial Chamber II entitled "Decision on
13 the implementation of Regulation 55 of the Regulations of the Court and severing the
14 charges against the accused persons." The decision was rendered on
15 21 November 2012. In today's summary, I'll refer to this decision as the Impugned
16 Decision.

17 I shall now summarise the Appeals Chamber's judgment. Please note that only the
18 judgment is the authoritative version, which will be filed and notified to the parties
19 and participants shortly; this summary is not authoritative.

20 On 24 November 2009, Trial Chamber II, where here I will refer to hereafter as the
21 Trial Chamber, started the hearing of the joint case of Prosecutor versus Germain
22 Katanga and Mathieu Ngudjolo Chui. The presentation of evidence was closed on
23 7 February 2012. Final oral submissions were presented during hearings held
24 between 15 and 23 May 2012, after which the Trial Chamber retired for deliberations.
25 On 21 November 2012, the Impugned Decision was issued. It served as notice

1 pursuant to Regulation 55(2) of the Regulations of the Court with the majority of the
2 Trial Chamber stating that "The mode of liability under which Mr Germain Katanga
3 stands charged is subject to legal recharacterisation on the basis of Article 25(3)(d) of
4 the Statute." Judge Van den Wyngaert dissented.

5 At the same time, the Trial Chamber unanimously severed the proceedings against
6 Mr Katanga from those against Mr Ngudjolo Chui and acquitted Mr Ngudjolo on
7 18 December 2012.

8 Upon request of Mr Katanga, the Trial Chamber granted leave to appeal the
9 Impugned Decision on the following issue: I quote, "Is the Impugned Decision
10 informing the parties and participants that the legal characterisation of the facts
11 relating to Germain Katanga's mode of participation is likely to be changed, lawful
12 and appropriate in the circumstances of the case?"

13 The Appeals Chamber, in determining whether the Impugned Decision is materially
14 affected by an error, addresses the following essential questions that arise out of the
15 argument raised on appeal by Mr Katanga; namely, whether the timing of the
16 Impugned Decision and the scope of the envisaged change in the legal
17 characterisation are in conformity with the Regulation 55 of the Regulations of the
18 Court; and whether the Impugned Decision violates the rights of Mr Katanga to a fair
19 trial?

20 Mr Katanga submits that the Trial Chamber may not give notice of a change in the
21 legal characterisation of facts at the deliberation stage of the proceedings.

22 The Appeals Chamber is not persuaded by this argument. Under Regulation 55(2)
23 of the Regulations of the Court, notice of the change in the legal characterisation can
24 be given at any time during the trial, which includes the deliberation stage of the
25 proceedings.

1 In this regard, the Appeals Chamber notes that, in light of the complexity of the
2 proceedings before the Court, it may appear to the Trial Chamber only at the
3 deliberation stage that the legal characterisation of the facts may be subject to change,
4 after having analysed the material and evidence that was presented in its totality.
5 Considering that the purpose of Regulation 55 of the Regulations of the Court is to
6 close accountability gaps, the Appeals Chamber concludes that the timing of the
7 Impugned Decision is, as such, in conformity with Regulation 55 of the Regulations of
8 the Court.

9 Internationally recognised human rights do not require a different interpretation of
10 Regulation 55 of the Regulations of the Court. In fact, the jurisprudence of the
11 European Court of Human Rights provides that notice of a change in the legal
12 characterisation can be provided at late stages of proceedings, as long as the accused
13 is given the opportunity to defend himself effectively against any such change.

14 In sum, Mr Katanga's submissions as to the timing of the Impugned Decision must be
15 dismissed.

16 Mr Katanga submits that the proposed modification of the legal characterisation of
17 facts in the Impugned Decision falls outside the scope of Regulation 55 of the
18 Regulations of the Court and Article 74(2) of the Statute in that it changes the
19 narrative of the charges so fundamentally that it exceeds the facts and circumstances
20 described in the charges as set out in the decision confirming the charges, and because
21 it exceeds the boundaries of Regulation 55 by relying on subsidiary facts.

22 The Appeals Chamber recalls that by issuing the Impugned Decision, the Trial
23 Chamber has merely given notice pursuant to Regulation 55(2) of the Regulations of
24 the Court. The Appeals Chamber therefore has to review only whether the Trial
25 Chamber erred in relation to whether it appears that the legal characterisation of facts

1 may be subject to change, pursuant to Regulation 55(2) of the Regulations of the Court.

2 The review the Appeals Chamber can undertake at this stage of the proceedings is a

3 limited one. The Impugned Decision would be erroneous only if it were

4 immediately apparent to the Appeals Chamber, at this stage, that the change in the

5 legal characterisation contemplated by the Trial Chamber would exceed the facts and

6 circumstances described in the charges.

7 The Appeals Chamber further recalls that the facts and circumstances described in the

8 charges define the subject matter of the trial. The argument of Mr Katanga that only

9 material and not subsidiary or collateral facts may be subject to a legal

10 recharacterisation does not find support in either Article 74(2) of the Statute or in

11 Regulation 55(1) of the Regulations of the Court.

12 After a review of the documents describing the charges and based on the limited

13 standard of review, the Appeals Chamber finds that, at the present stage of the

14 proceedings, it is not immediately apparent that the contemplated change in the legal

15 characterisation of the facts would exceed the facts and circumstances described in the

16 charges. Thus, Mr Katanga's arguments in this regard are rejected.

17 Judge Tarfusser dissents in relation to whether it was actually necessary for the Trial

18 Chamber to give notice under Regulation 55 for the change that it envisages. He

19 does not believe that it was. This is because, in his opinion, only a change from

20 Article 25(3) to Article 28 of the Statute, but not within those provisions, amounts to a

21 change in the legal characterisation of the facts in terms of Regulation 55 of the

22 Regulations of the Court.

23 Mr Katanga raises several arguments to the effect that the Impugned Decision violates

24 his fair trial rights laid down in Article 67(1) of the Statute and should therefore be

25 reversed.

1 Mr Katanga alleges that the Impugned Decision violates his right to conduct an
2 effective defence as well as his right to be tried without undue delay. With respect
3 to these rights, the Appeals Chamber points out that the Trial Chamber specifically
4 considered the relevant rights of Mr Katanga under Article 67(1) of the Statute and
5 expressly took into account the protections guaranteed by Regulation 55(2) and (3) of
6 the Regulations of the Court. The Trial Chamber requested Mr Katanga and the
7 other participants to make submissions as provided for in these legal provisions;
8 submissions that have not yet been received due to the fact that the Appeals Chamber
9 ordered that the appeal should have suspensive effect. Therefore, the Appeals
10 Chamber finds that it cannot determine conclusively now whether the trial as a whole
11 will remain fair, and more specifically whether the right to conduct an effective
12 defence and the right to be tried without undue delay are safeguarded, if the
13 recharacterisation proceeds. Whether it will depends to a large extent upon how the
14 Trial Chamber conducts the further proceedings and, in particular, on the measures it
15 will take to protect Mr Katanga's rights.

16 The Appeals Chamber, however, emphasises that, considering the stage of the
17 proceedings, the Trial Chamber will need to be particularly vigilant in ensuring
18 Mr Katanga's right to be tried without undue delay.

19 The Appeals Chamber does not find that the impugned decision violates
20 Mr Katanga's right to an impartial tribunal and the right to be informed of the charges
21 in detail. In fact, notice of a possible change in the legal characterisation of facts
22 needs to be provided in order to give effect to the right to be informed in detail of the
23 charges, because not only the factual allegations, but also their legal characterisation
24 are part of the charges. At this stage, it is for the Trial Chamber to determine
25 whether Mr Katanga requires additional information in relation to the facts upon

1 which the Trial Chamber intends to rely. The Appeals Chamber notes in this context
2 that more detailed information about the factual allegations on which the change in
3 the legal characterisation is based may be given not only in the notice pursuant to
4 Regulation 55(2) of the Regulations of the Court, but also at a later stage. However,
5 if the Trial Chamber considers that additional, more detailed information is necessary,
6 it should be provided as soon as possible in order to enable Mr Katanga to make
7 effective submissions thereon. The Appeals Chamber underlines that it will be able
8 to determine conclusively only at the end of the trial whether Mr Katanga's right to be
9 informed of charges in detail was respected.

10 Judge Tarfusser dissents with respect to this finding. He holds that Mr Katanga can
11 only effectively conduct his defence and react to the potential change in the legal
12 characterisation if the notice under Regulation 55(2) of the Regulations of the Court
13 also refers in detail to the factual allegations to which the change in the legal
14 characterisation relates. He is of the opinion that the Impugned Decision did not
15 provide sufficient detail in this respect and therefore violates Mr Katanga's right to a
16 fair trial.

17 In the present case, therefore, the Appeals Chamber confirms, by majority, Judge
18 Tarfusser dissenting, the Impugned Decision and dismisses the appeal.

19 This concludes my summary of the judgment. It remains for me only to thank the
20 interpreters and court reporters. Thank you.

21 The session is now closed.

22 THE COURT USHER: All rise.

23 (The hearing ends in open session at 3.53 p.m.)