Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/04-01/07 OA13**
Date: **21 January 2013**

THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. GERMAIN KATANGA

Public document

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

Source: **Office of the Prosecutor**

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

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Introduction

1. The Defence for Germain Katanga ("the Appellant") has appealed the decision of Trial Chamber II ("Chamber") on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons ("Decision").[1]

2. The Prosecution submits that the Appellant fails to demonstrate any error on the part of the Trial Chamber. Contrary to the Appellant's position, the Chamber stayed at all times within the proper boundaries of Regulation 55. Similarly, nothing in the Decision supports the contention that the Chamber exceeded the facts and circumstances contained in the charges. Finally, the Appellant's claims of prejudice are not only unsubstantiated but also premature, since the Appellant is yet to request, and the Trial Chamber to decide on the adequate compensatory measures in light of the Regulation 55 notice, and no final decision on the appropriate legal characterization has been made. Accordingly, the appeal should be rejected.

Statement of facts

3. On 25 June 2007, the Prosecution sought the arrest of Mr Germain Katanga ("Appellant") and Mr Mathieu Ngudjolo, his co-accused, on the basis of the mode of liability of "ordering" pursuant to Article 25(3)(b) of the Statute.[2] On 2 July 2007, Pre-Trial Chamber I granted the Prosecution's request, finding that there were reasonable grounds to believe that the Appellant is responsible for the crimes charges under article 25(3)(a) or, in the alternative, under article 25(3)(b).[3]

[1] ICC-01/04-01/07-3319.
[2] ICC-01/04-348-US-Exp and ICC-01/04-350-US-Exp.
[3] ICC-01/04-01/07-1-US-tENG; ICC-01/04-01/07-4-US.

4. On 26 June 2008, the Prosecution submitted its "Amended Document Containing the Charges Pursuant to Decision ICC-01/04-01/07-648"[4] alleging the Appellant's responsibility for the crimes charged on the basis of Article 25(3)(a) or, in the alternative, Article 25(3)(b).[5] From 27 June 2008 until 16 July 2008, the hearing to confirm charges against the Appellant and his co-accused was held before Pre-Trial Chamber I.[6]

5. On 22 July 2008, the Prosecution Submitted the Prosecution's Observations Addressing Matters that were Discussed at the Confirmation Hearing,[7] in which it argued that:

> "…a detailed discussion of the legal elements of the mode of liability is not appropriate at this stage of the proceedings. As the Prosecution has consistently argued, any legal finding made by the Pre-Trial Chamber in the context of the decision on the confirmation of the charges cannot produce any binding effect in the trial proceedings. The Trial Chamber has full authority to make fresh and independent determinations on matters concerning the interpretation of coperpetration in Article 25(3)(a) or the mental elements prescribed in Article 30, and the Defence will have the opportunity to adduce legal and factual arguments before that Chamber in due course. For these reasons, it is submitted that any further discussions regarding the legal requirements of coperpetration should be deferred and that such argument should be made before the Trial Chamber in the event that the charges against Germain KATANGA […] are confirmed."[8]

6. On 28 July 2008 the Appellant responded to the Prosecution in the "Defence Written Observations Addressing Matters that Were Discussed at the Confirmation Hearing" stating that:

[4] ICC-01/04-01/07-649 and Annexes 1A and 2A.
[5] ICC-01/04-01/07-649-Anx1A paras.90-94.
[6] ICC-01/04-01/07-T-38-ENG CT (27 June 2008) to ICC-01/04-01/07-T-50-ENG ET (16 July 2008).
[7] ICC-01/04-01/07-692
[8] ICC-01/04-01/07-692, para.44.

> "[t]he Defence fully agrees with the Prosecution's submission [quoted in the previous paragraph, and] [t]he Prosecution may well be right that any discussion on the theory of liability is more appropriate at the level of trial."[9]

7. On 26 September 2008, in its Confirmation Decision, Pre-Trial Chamber I found substantial grounds to believe that during the attack on Bogoro on 24 February 2003, Germain Katanga and Mathieu Ngudjolo jointly committed through other persons, within the meaning of Article 25(3)(a), the charged crimes.[10] The Pre-Trial Chamber did not consider other forms of accessorial liability, concluding that its finding under Article 25(3)(a) "…renders moot further questions of accessorial liability".[11]

8. On 1 October 2009, Trial Chamber II ("Chamber" or "Trial Chamber") requested views on the interpretation given by the Pre-Trial Chamber of Article 25(3)(a).[12] The Prosecution submitted its observations on 19 October 2009,[13] suggesting limited amendments and arguing that the Trial Chamber should largely follow the approach of Pre-Trial Chamber I and other Pre-Trial Chambers on the interpretation of co-perpetration under Article 25(3)(a), including co-perpetration through another.[14] The Appellant submitted his observations on 30 October 2009, requesting that the Chamber "not adopt the interpretation given to Article 25(3)(a) by the Pre-Trial Chamber but rather read[…] this provision as it states: jointly with another or through another person. The Prosecution may charge the accused on either mode of liability or any other set out in Articles 25 and 28".[15] The Appellant further requested that the Chamber reject the

[9] ICC-01/04-01/07-698, paras.13, 15.
[10] ICC-01/04-01/07-716-Conf (public version, ICC-01/04-01/07-717), pp.207-212.
[11] Confirmation Decision, para.471.
[12] ICC-01/04-01/07-T-71-Red-ENG, pp.7-8.
[13] ICC-01/04-01/07-1541.
[14] ICC-01/04-01/07-1541, para.23.
[15] ICC-01/04-01/07-1578, p.20; ICC-01/04-01/07-1578-Corr.

Prosecution's suggested amendments to the theory as set out by the Pre-Trial Chamber.[16] The Chamber did not rule on these submissions.

9. On 21 October 2009, the Chamber issued its "Decision on the Filing of a Summary of the Charges by the Prosecutor".[17] The Chamber held that "the decision on the confirmation of the charges crystallises the facts and circumstances accepted in that decision in support of the charges it has confirmed" [18] and that the Decision Confirming Charges is "the point of reference for the trial proceedings".[19] The Chamber further noted that hearings on the merits must take into consideration "not only the legal characterisations accepted by the Pre-Trial Chamber, which are of course subject to an application of regulation 55" but "also the facts and circumstances which it describes in its Confirmation Decision". [20] The Chamber then ordered the Prosecution to "…prepare a Summary of the Charges reiterating the language of the Pre-Trial Chamber in its Confirmation Decision…"[21]

10. On 3 November 2009, the Prosecution filed its "Document Summarizing the Charges Confirmed by the Pre-Trial Chamber" ("Document Summarising the Charges"),[22] first laying out relevant "background" information,[23] followed by the facts and circumstances relevant to the "material elements of the crimes" and the "criminal responsibility".[24]

11. On 16 November 2009, the Prosecution filed its "Amended Table of Incriminating Evidence and Amended List of Evidence" ("Table of Evidence"),[25] including 13 tables demonstrating how each of the facts and circumstances referred to in the Document Summarising the Charges related to the legal

[16] ICC-01/04-01/07-1578-Corr.
[17] ICC-01/04-01/07-1547-tENG
[18] ICC-01/04-01/07-1547, para.22.
[19] ICC-01/04-01/07-1547, para.14.
[20] ICC-01/04-01/07-1547, para 17
[21] ICC-01/04-01/07-1547, para.29.
[22] ICC-01/04-01/07-1588-Anx1.
[23] ICC-01/04-01/07-1588-Anx1, paras.7-10.
[24] ICC-01/04-01/07-1588-Anx1, paras.11-88.
[25] ICC-01/04-01/07-1643; ICC-01/04-01/07-1643-AnxA.

elements for the crimes and the mode of liability under which the Appellant was charged.[26]

12. The trial against the Appellant and his co-accused commenced on 24 November 2009.[27] The last evidence was presented on 11 November 2011.[28] The presentation of evidence was declared officially closed on 7 February 2012.[29] The Prosecution filed its closing brief on 24 February 2012,[30] the Defence on 30 March,[31] followed by oral submissions from 15 to 23 May 2012.[32] During its oral submissions, the Defence for Mr. Katanga agreed that the Chamber can alter the legal qualification of the facts where this would not alter the essential nature of the charges,[33] but specifically opposed re-characterization of the nature of the armed conflict (internal vs. international) since the Prosecution did not raise this issue until its closing arguments.[34]

13. On 21 November 2012, the majority of the Chamber ("Majority") issued the "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused person" ("Decision" or "Impugned Decision"),[35] Judge Van den Wyngaert dissenting. The Majority stated that the legal characterisation of facts relating to the Appellant's mode of participation "is likely to be changed" pursuant to Regulation 55.[36] The Appellant's liability must "henceforth be considered on the basis of article 25(3)(d)" and "no longer solely on the basis of article 25(3)(a)".[37]

[26] ICC-01/04-01/07-1643-AnxB to AnxN; See in particular AnxN relating to the individual criminal responsibly of the Appellant.
[27] ICC-01/04-01/07-T-80-ENG.
[28] ICC-01/04-01/07-T-333-Red2-ENG CT2 WT 11-11-2011.
[29] ICC-01/04-01/07-3235.
[30] ICC-01/04-01/07-3251-Conf; see also ICC-01/04-01/07-3251-Conf-Corr; ICC-01/04-01/07-3251-Corr-Red.
[31] ICC-01/04-01/07-3266-Conf; ICC-01/04-01/07-3266-Conf-Corr2; ICC-01/04-01/07-3266-Corr2-Red.
[32] ICC-01/04-01/07-T-336-ENG to ICC-01/04-01/07-T-340-ENG.
[33] ICC-01/04-01/07-T-338-CONF-ENG, p.41; see also ICC-01/04-01/07-T-338-red-ENG.
[34] ICC-01/04-01/07-T-338-CONF-ENG, p.44; see also ICC-01/04-01/07-T-338-red-ENG.
[35] ICC-01/04-01/07-3319-tENG/FRA.
[36] Decision, para.6.
[37] Decision, para.7.

14. The Majority further invited the parties and participants to make submissions on the law of Article 25(3)(d) and on their interpretation of the facts in light of the proposed re-characterisation.[38] In addition, the Majority invited the Appellant to "state, providing all appropriate justifications, whether it intends to seek application of any of the measures described at regulation 55(3)(b)".[39] Finally, the Chamber ordered the severance of the charges against Mr Ngudjolo and decided to rule separately on their merits.[40]

15. On 18 December 2012, the Chamber issued its decision pursuant to Article 74 with respect to Mr Ngudjolo, acquitting him of all charges.[41]

16. On 21 December 2012, the Appellant sought leave to appeal the Decision.[42] On 28 December 2012, the Chamber granted the Appellant leave to appeal the Decision on the following issue: "Is the [Decision], informing the parties and participants that the legal characterisation of the facts relating to Germain Katanga's mode of participation is likely to be changed, lawful and appropriate in the circumstances of the case?"[43]

17. On 10 January 2013, the Appellant submitted its document in support of the appeal against the Decision ("Defence Appeal"),[44] asking the Appeals Chamber to order suspensive effect of the Decision pursuant to Article 82(3); and to reverse the Decision and to declare that in all the circumstances of this case a requalification "of the timing and nature proposed" cannot be effected at this stage.[45]

[38] Decision, paras.55, 57.
[39] Decision, para.57.
[40] Decision, p.30.
[41] ICC-01/04-02/12-3.
[42] ICC-01/04-01/07-3323.
[43] ICC-01/04-01/07-3327, para 4
[44] ICC-01/04-01/07-3339.
[45] Defence Appeal, para.105.

18. On 16 January 2013, the Appeals Chamber granted the Appellant's request for suspensive effect of the Decision until the Appeals Chamber has ruled on the matter.[46]

Submissions

19. The Appellant's overarching position is 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."[47] The Appellant specifies that his appeal "essentially concerns the timing of the notice"[48] and submits 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."[49]

20. The Prosecution addresses the Defence Appeal by responding first to the arguments regarding the legality of Regulation 55 and the question whether notice at this point in time falls within the proper scope of the regulation;[50] and second to the arguments regarding the application of the Regulation 55 process in the circumstances of this case and its impact on the fairness of the proceedings.[51]

[46] ICC-01/04-01/07-3344 OA13.
[47] Defence Appeal, para.13.
[48] Defence Appeal, para.27.
[49] Defence Appeal, para.13.
[50] See primarily Defence Appeal, paras.15-21, 26, 33-35, 38-39, 41, 44 and 52-62.
[51] See primarily Defence Appeal, paras. 19, 22-32, 36, 45-51, 63-94.

I. The Decision does not exceed the scope of Regulation 55

The Appellant misconstrues Regulation 55

21. The Appellant asserts that Regulation 55 itself remains contentious and that its scope remains undecided (though also recognizing that the Appeals Chamber has confirmed the validity of Regulation 55 and its conformity with the Statute and the Rules).[52] He claims that the notice provided by the Trial Chamber is of "radical effect" because it contemplates an alternative mode of liability that differs noticeably from the one charged. The Appellant argues such a "radical effect" would be incompatible with the Statute and the Rules, and therefore cannot be deemed to have been intended by the drafters of the Regulations.[53]

22. What the Appellant considers a "radical effect" is nothing more than the ordinary effect of Regulation 55: an alternative legal characterization – which will necessarily differ from the original one – is presented to the parties and participants as a possibility. In a prior Regulation 55 decision the Appeals Chamber spoke to this underlying issue and confirmed that the Statute "does not preclude the possibility that there may be a change in the legal characterization of facts in the course of the trial, and without a formal amendment to the charges".[54] Further, in rejecting an argument that permissible legal characterizations were limited (in that case, to consideration of lesser included offences), the Appeals Chamber noted that "the text of Regulation 55 does not stipulate, beyond what is contained in sub-regulation 1, what changes in the legal characterisation may be permissible".[55]

23. The Appeals Chamber thus has already rejected the core of the Appellant's argument, in a decision that is also legally persuasive. Nothing in the Court's

[52] See Appeal Brief, paras. 15, 18 and 20.
[53] See Appeal Brief, paras. 18-21.
[54] ICC-01/04-01/06-2205 OA15 OA16, para.84.
[55] Ibid., para.100.

basic documents and/or in the text of Regulation 55 limits the scope of permissible legal re-characterizations of the facts, as long as (a) the Trial Chamber remains within the boundaries of facts and circumstances described in the charges and any amendments thereto; (b) the procedures and safeguards enshrined in regulation 55(2) and (3) are respected; and (c) the re-characterization does not lead to an unfair trial.[56] The Prosecution further notes that, as discussed below, the notice provided by the Decision does not involve a drastic change of legal characterization, but rather the possible use of a mode of liability that closely resembles the one charged. In this sense, it is difficult to imagine a less "radical" use of regulation 55.

Timing of the notice

24. The Appellant's position appears really to be that the timing of the notice of a possible re-characterisation was inappropriate. The Appellant himself clarifies that "[t]his appeal essentially concerns the timing of the notice".[57] According to the Appellant, where "the proposed re-characterisation is, as here, more than a mere technical nature, then giving notice at such a late stage is inadequate and unlawful".[58] The Majority, according to the Appellant, failed to consider that Regulation 55 can only be exercised at an "appropriate stage". Also, the Appellant alleges, under the terms of the provision, that while the Chamber "can seek observations once the evidence is concluded, the giving of notice […] should be prior to the conclusion of the evidence".[59]

25. This argument must be rejected if the Appeals Chamber finds that the Chamber may, as a matter of law, provide notice of a possible re-characterisation under Regulation 55 at this stage of the proceedings.

[56] Ibid., para.100.
[57] Defence Appeal, para.27.
[58] Defence Appeal, para.28.
[59] Ibid.,paras. 26-27.

26. The Prosecution submits that the Appellant's construction is incompatible with both a literal and a teleological interpretation of Regulation 55. In addition, a cursory review of jurisdictions that include procedural devices similar to Regulation 55 confirm that, as long as trial proceedings have not been completed and a final decision is not yet rendered, it is possible to re-characterize the facts underlying the charges, as long as both adequate notice and a fair opportunity to present a defence have been given.

27. The Appeals Chamber has confirmed that the rule governing interpretation of any provision in the Court's basic documents is "its wording read in context and light of its object and purpose".[60] The Prosecution firstly notes that both a plain and a contextual reading of Regulation 55 refute the Appellant's position. Regulation 55(2) states in unambiguous terms that a Chamber shall give notice if "*at any time during the trial*, it appears to the Chamber that the legal characterization of facts may be subject to change".[61] In turn, the "trial", as noted by Trial Chamber I, and as regulated in Part VI of the Rome Statute, "ends with the sentence that is imposed if the accused is convicted (Article 76 of the Statute) and any award of reparations (Article 75 of the Statute)". During the trial "there are many separate stages (at least potentially) that the Trial Chamber will need to address", including "the Trial Chamber's Article 74 Decision".[62] Further, "the 'Trial', the 'Trial Procedure' or the 'Trial Proceedings' only come to an end when the Article 74, 75 and 76 Decisions have been delivered, as appropriate".[63] The Appellant himself has accepted in a previous submission that the trial does not end "until the article 74, 75 and 76 decisions have been rendered".[64] Thus, the plain wording of Regulation 55,

[60] ICC-01/04-168 OA3, para.33; see also ICC-01/04-01/07-522 OA3, para.39; ICC-01/04-01/07-573 OA6, para.5; ICC-01/04-01/06-1432 OA9 OA10, para.55; ICC-01/04-01/06-1486 OA13, para.40.
[61] Emphasis added.
[62] ICC-01/04-01/06-2800, para.45.
[63] Ibid.,para.47.The Appeals Chamber, when attaching suspensive effect to the instant appeal, has confirmed that the trial in this case is still on-going (see ICC-01/04-01/07-3344 OA13, para.8, by referring to the Notice Decision as "rendered at the final stage of the trial proceedings")
[64] ICC-01/04-01/07-3305, para.16.

when read in conjunction with the statutory provisions regulating the trial before the Court, demonstrates that, contrary to the Appellant's interpretation, a notice under Regulation 55(2) can be given up until the trial concludes with the issuance of the Article 74 decision.

28. Moreover, it should not be unexpected that a notice is given during the deliberations stage. While it may become obvious during the evidentiary portion of the trial that the facts and circumstances might support re-characterisation, it is equally likely that this issue will be clarified after deliberations start, when the Chamber analyzes the evidence in its totality and jointly with the factual and legal submissions of the parties and participants.

29. The Appellant's efforts to twist the language of Regulation 55 in order to support his position also fail: first, nothing in Regulation 55 limits its exercise to an "appropriate stage";[65] what a trial Chamber must do "at an appropriate stage of the proceedings" is give the participants the opportunity to make oral or written submissions, i.e. a procedural step that has to be taken *after* notice has been provided. The only statutory conditions for the exercise of Regulation 55 are (a) that the Trial Chamber becomes aware of the possibility of an alternative legal characterization, and (b) that the trial has not been completed.

30. Equally misconceived is the Appellant's argument that the language of Regulation 55 evidences an intention of its drafters to allow a Chamber to seek observations once the evidence is concluded, but not the notice, which should be given prior to the conclusion of the evidence.[66] Rather, the explicit language of the regulation establishes, as already advanced, that notice may be given "at any time during the trial". The language "having heard the evidence", relied upon by the Appellant, does not qualify in any particular way the giving of the

[65] Defence Appeal, para.26.
[66] Defence Appeal, para.27.

notice; it only applies to the Chamber's duty to request and receive submissions from the parties.

31. Finally, the Prosecution submits that the Appellant's interpretation of Regulation 55 is not only incompatible with a literal and contextual reading of the provision, but also with its object and purpose. As the Appeals Chamber has stated, and the Appellant himself recognizes,[67] a "principal purpose of Regulation 55 is to close accountability gaps, a purpose that is fully consistent with the Statute".[68] Its goals include preventing acquittals "that are 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 trial*".[69] Thus, the provision has been created to enable a Chamber that realizes in its analysis of the evidence presented at trial that the original legal qualification (which is based on the confirmation process where only a portion of the evidence is presented, mostly in written form) is not, in its view, correct, to resort to an alternative legal characterization that is consistent with both the charged facts and circumstances and with the trial evidence. This is precisely what the Majority has done in this case. In contrast, the Appellant's position, if accepted, would effectively mean that if the possibility of an alternative re-characterization only becomes apparent during deliberations, a Trial Chamber must acquit a person whose legal culpability it finds was proved beyond reasonable doubt. But Regulation 55 was designed specifically to avoid that result, if the person can properly and fairly be convicted pursuant to the alternative characterization. Appellant's interpretation, and contrary to the very purpose of the Statute, leaves those accountability gaps and allows impunity.[70]

[67] Ibid.,para.20.
[68] ICC-01/04-01/06-2205 OA15 OA16, para.77.
[69] Ibid. (emphasis added).
[70] Rome Statute, Preamble, para.5.

A review of comparable national jurisdictions supports the Majority's interpretation

32. Regulation 55 finds parallel procedures in many Civil Law jurisdictions that allow the trial court to depart from the legal characterization used in the charging instrument, as long as the trial court remains within the boundaries of the original factual allegations.[71] There are, to be sure, distinctions among those jurisdictions, but those distinctions do not affect the application of Regulation 55 here. In some countries a trial court may re-characterize the facts pleaded by the prosecution without notice to the accused,[72] while others do require such notice, as well as the possibility of remedial measures.[73]

33. Notably, those jurisdictions that require that notice be provided do not impose a limit on the timing of the notice. For instance, in Germany, when the possibility of a change in the legal characterization only becomes apparent after the parties have made their final submissions, the trial court can still provide notice, but it must re-open the evidentiary phase of the trial in order to do so.[74] Similarly, in Austria a trial court has the right to modify the legal characterization of the facts after the evidentiary stage of the trial has been closed, but must safeguard the accused's rights by allowing for the presentation of additional submissions and evidence, if required.[75]

34. These examples of national practices confirm that notice can be given after the evidentiary phase of the trial has been closed, as long as the rights of the accused are protected, including by allowing the accused to make additional

[71] See C. Stahn, Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55, in: Criminal Law Forum (2005) 16:1-31 ("Stahn"), p. 21 et seq. The principle is generally referred to as "*iura novit curia*" ("the court knows the law"). See A. Ledesma, *¿Es constitucional el brocardo "iuranovit curia"?*in "Estudios sobre Justicia Penal. Homenaje al Profesor Julio B.J. Maier" (2005), p. 358.
[72] For instance, Article 521(1) of the Italian Code of Criminal Procedure does not impose a notice requirement for the adoption of a different legal characterization; however, recent jurisprudence from the court of appeals (*Corte di Casazione)* requires that the application of Article 521 (1) does not prejudice the rights of the accused (see Cass. Sez.Un., 13.10.2010 n. 36551; Cass. Sez. IV, 19/3/2012 n. 10717, inter alia).
[73] Stahn, p.21.
[74] BGHR Abs. 1 Hin. 1,; BGH decision from 29.11.1963 – 4 StR 352/63; BGHSt 19, 156; BGH decision from 13.5.1993 – 4 StR 169/93, StV 1994, 63; in such a case specific obligations can apply, such as the suspension of the trial at the request of the accused, allowing for the presentation of additional evidence and/ or new oral submissions and closing arguments. See BGH StV 1994, 63 [LS].
[75] Entscheidungstext OGH 22.11.1989 14 Os 114/89.

submissions, proffer new evidence and/or request other procedural safeguards. Consistent with this principle, the Majority is providing protections to ensure the Appellant's fair trial rights – it invited the Appellant's submissions on the legal elements of article 25(3)(d) liability and the factual aspects of the case when considered in light of the proposed re-characterization, and also asked whether he seeks application of the evidence-related steps envisioned in regulation 55(3)(b).[76] As the Prosecution will argue in response to the Appellant's arguments dealing with the impact of the decision on the rights of the Appellant, the Chamber giving notice under Regulation 55, retains the duty to ensure the fairness of the proceedings and has the power to remedy any unfair prejudice that the notice may cause to an accused both in a separate decision putting in place measures under Regulation 55(2) and (3) and in its decision under Article 74.[77]

The Majority did not err by relying on the case law of the European Court of Human Rights

35. The Appellant submits that the Decision incorrectly relies on the jurisprudence of the European Court of Human Rights ("ECHR") that notice to an accused of a legal re-characterisation of the facts at a late stage of the proceedings does not in- and of itself constitute a breach of Article 6 of the European Convention. According to the Appellant, the context of that court, as well as the context of the cases in which the Court made its findings on which the Decision relies must be born in mind.[78]

36. The Prosecution agrees with the Appellant that "the [ECtHR] does not determine which laws best reflect the need to ensure a fair trial",[79] and that national courts have a degree of latitude in the interpretation of their domestic legal system.[80] However, it is the function of the ECtHR to determine whether

[76] Decision, para.57.
[77] See paras.41ff. below.
[78] Defence Appeal, paras.52-62.
[79] Defence Appeal, para.52.
[80] Defence Appeal, para.53.

the application of national laws breaches the minimum standards of fairness as set out in the European Convention on Human Rights ("European Convention"). And the Appeals Chamber has referred on several occasions to ECtHR decisions in its rulings,[81] including in its prior judgment on the legality of Regulation 55.[82]

37. Whether the facts in cases adjudicated by the ECtHR are different, whether national cases may be less complex than the case at hand, or whether the findings of the ECtHR were made in cases that were prosecuted according to inquisitorial proceedings[83] does not detract from the general validity of the principle established by the ECtHR that notice to an accused of a legal re-characterisation of the fact at a late stage of the proceedings does not breach Article 6 of the European Convention.

38. The Appellant also criticizes the Chamber for relying on cases where re-characterisation was made and a proper opportunity to respond was provided to the accused only by a higher court and fairness was reviewed on the basis of the proceedings as a whole.[84] He argues that those cases are procedurally distinguishable from the instant case. To be sure, the accused in those cases were given what may legitimately be seen as fewer protections than are available under Regulation 55. But since the ECtHR did not find any unfairness even under those circumstances, which are less advantageous for the accused, it is difficult to see the logic of the Appellant's submission that late notice by the *same court*, before the verdict, is somehow more unfair. Similarly, that the ECtHR does not require advance notice of any legal re-characterisation as an indispensible precondition for a fair trial does not mean that these findings of the ECtHR could not guide the Trial Chamber and support its conclusion that

[81] ICC-02/05-01/09-73 OA, para. 31; ICC-01/04-01/07-475 OA, para. 62; ICC-01/04-01/06-1486 OA13, paras. 46-47.
[82] ICC-01/04-01/06-2205 OA15 OA16, para.84-85.
[83] Defence Appeal, para.54.
[84] Defence Appeal, para.58.

late notice complies with the standards of fairness as set out in Article 6 of the European Convention.[85]

39. The Appellant further refers to jurisprudence of the ECtHR to re-argue the question of what type of legal re-characterisations are permissible.[86] The Prosecution recalls that, as already advanced, the Appeals Chamber has previously clarified that "the text of Regulation 55 does not stipulate, beyond what is contained in sub-regulation 1, what changes in the legal characterisation may be permissible".[87] It also noted that any re-characterisation "is limited by the facts and circumstances descried in the charges" and that "Regulations 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".[88]

40. Finally, the Appellant complains that the Trial Chamber erred in finding support in certain ECtHR cases that it cited in the Decision, providing his own interpretation of those cases.[89] However, the Appellant does not demonstrate that the Chamber erred by relying on them. The Decision refers to those cases to support its conclusion that the ECtHR found a breach of Article 6 of the European Convention "when the legal characterization of the facts was changed without affording the defence the possibility of filing observations".[90] The Prosecution does not understand that the Appellant is challenging this particular finding in the Decision. Moreover, the Prosecution submits that the Majority correctly relied on those decisions of the ECtHR. The relevance of the fact that the ECtHR only found violations of Article 6 in those cases where the accused was not given any prior indication of a possible re-characterisation (or was given that notice only one day before judgment) and/or where he was also

[85] Defence Appeal, para.58.
[86] Defence Appeal, para.60.
[87] ICC-01/04-01/06-2205 OA15 OA16, para.100.
[88] ICC-01/04-01/06-2205 OA15 OA16, para.100.
[89] Defence Appeal, paras.61-62.
[90] Decision, para.37.

not given a fair appropriate opportunity to defend himself should be beyond dispute.[91]

II. The Decision does not cause any unfair prejudice to the Appellant

A. The Decision does not infringe the fair trial guarantees contained in Article 67(1)

41. The Appellant argues that notice under Regulation 55 at such a late stage in the proceedings necessarily violates the fair trial rights under Article 67(1) because the Defence will not be able to properly respond to the alternative legal characterization, and none of the measures under Regulation 55(2) and (3) can ensure the fairness of the proceedings.[92] While characterizing this as a prejudice argument, it is at its core just another presentation of the claim that notice at this stage is irrebuttably prejudicial.

42. The Prosecution previously addressed the Appellant's argument that it is legally impermissible to give notice once the evidentiary phase of trial has been closed. Whether in fact prejudice will result cannot be determined at this stage. Rather, due to the limited scope of the Decision, these arguments are premature. They are made in the abstract and are speculative as they overlook the range of measures that are available to the Chamber to ensure the fairness of the proceedings as well as other factors that are relevant for the assessment of any claim of unfairness.

[91] ECHR, *Drassich v. Italy*, no. 25575/04, Judgment, 11 December 2007, para.36; ECHR, *Mattei v. France*, no. 34043/02, Judgment, 19 December 2006, paras.12, 16, 39; ECHR, *Sadak*et al. *v. Turkey (No. 1)*, nos. 29900/96, 29901/96, 29902/96 and 29903/96, Judgment, 17 July 2001, para.57 (notice was given one day before judgement).
[92] Defence Appeal, paras.14(A), 22, 28-29. See also paras.30-44.

Limited scope of the Decision

43. The Decision has a limited scope: it merely "triggers"[93] the process enshrined in Regulation 55 by giving notice to the parties and participants as to the possibility of a re-characterization. The Decision does not implement any further steps beyond inviting submissions on this possibility. In particular, it does not decide whether and what concrete measures under Regulations 55(2) and (3) should be taken to ensure that the ensuing process will be conducted with full respect of the rights of the Appellant. Any such decision will only be taken after the parties have made their submissions and will depend, among other factors, on the content of those submissions.[94] With that in mind, and consistent with the jurisprudence of the Appeals Chamber,[95] the Decision recognizes that re-characterisation, if ultimately pursued, cannot infringe on the fair trial rights of the Appellant.[96]

44. The Decision also does not anticipate particular findings with respect to the Appellant's responsibility pursuant to the mode of liability under Article 25(3)(d)(ii). Such findings will only be entered as part of the Trial Chamber's judgment under Article 74. The Majority made it clear that "the ongoing deliberations have not, to date, focused on the specific issue of Germain Katanga's potential liability under article 25(3)(d) of the Statute. This issue is now open to discussion and the submissions of the parties and participants in this respect will be decisive."[97]

[93] Decision, paras.15, 20, 43, 44, 46, 47, 61, Disposition, para.1.
[94] See Decision, paras.55, 57. See also the *Bemba* case where the Trial Chamber first gave notice to the parties of its intention to trigger the process of Regulation 55 (ICC-01/05-01/08-2324) and then, after hearing the submissions from the parties and participants put in place measures to ensure the fairness of the proceedings, including a temporary stay of the proceedings (ICC-01/05-01/08-2480).
[95] ICC-01/04-01/06-2205 OA16, paras.85, 100.
[96] Decision, paras.11, 13.
[97] Decision, para.19; see also para.42.

No prejudice can be claimed at this stage

45. As stated by the Majority, it cannot be said that the mere *triggering* of Regulation 55 automatically infringes the rights of Mr Katanga.[98] Whether the possible re-characterisation proposed by the Decision affects the fair trial rights of the Appellant will depend, firstly, on what measures the Chamber takes pursuant to Regulations 55(2) and (3) to ensure the protection of those rights. The Chamber will not act until it has heard the parties and participants. Under Regulations 55(2) and (3), the Chamber may give the Defence an opportunity to present additional evidence,[99] or to re-examine witnesses who already testified. The Chamber may also take other appropriate measures to ensure that no unfair prejudice is caused to the Appellant.

46. Second, the impact of the proposed re-characterisation on the rights of the Appellant will further depend on what the Chamber ultimately decides on the Appellant's role and responsibility in its judgment under Article 74. According to Regulation 55(1), a decision to change the legal characterisation of the facts will be taken "in [the Chamber's] decision under article 74".[100] Moreover, if the Chamber enters a conviction, any arguable violation of the rights of the Appellant will further depend, among other matters, on the fact and circumstances that constitute the basis of the conviction, as well as on the manner in which the Chamber assesses the evidence.

47. The Appellant is entitled to raise concerns regarding the fairness of the proceedings in his upcoming submissions and can propose to the Chamber measures that he deems adequate to address those concerns.[101] And the Chamber has a duty under Articles 64(2) and 67(1) and under Regulation 55 to ensure that the proceedings are fair. To that effect, it can order specific measures

[98] Decision, para. 44 (emphasis added); see also paras.20, 34, 41.
[99] See Defence Application, para.35.
[100] Regulation 55(1).
[101] Decision, para.57.

(in a separate order pursuant to Regulations 55(2) and (3)) or remedy unfair prejudice in the judgment under Article 74. If the Chamber determines that unfair prejudice is unavoidable and irremedial, it can decide not to proceed with the proposed re-characterisation.

B. The proposed re-characterisation does not exceed the facts and circumstances described in the charges

48. The Appellant argues that the Decision changes the "narrative" of the charges so drastically that it exceeds the facts and circumstances described in the charges as set out in the decision confirming the charges. He further claims that the Majority relied on what he calls "subsidiary facts".[102]

49. The Prosecution firstly submits that at this stage it is impossible to discern whether the proposed re-characterisation exceeds the facts and circumstances included in the charges. This Decision does not re-characterise the facts underlying the charges; it merely provides notice that re-characterization is possible in this case. Only after the Chamber's Article 74 decision is delivered will it be possible to determine whether and how it re-characterized any of the pleaded facts and circumstances. Until that happens, the Appellant's grievances are premature and should accordingly be dismissed. The Prosecution will nevertheless address the Appellant's arguments below.

The Decision does not change the narrative of the charges or exceed the facts and circumstances described in the charges

50. The Appellant elaborates on the alleged difference between Article 25(3)(a) and Article 25(3)(d)(ii). He particularly complains that the Majority plans to examine whether the evidence established that the crimes were committed by "a group of Walendu-Bindi commanders and combatants acting with a common purpose to attack Bogoro on 24 February 2003".[103] The Appellant argues that the

[102] Defence Appeal, paras.14(A), 67-94.
[103] Decision, para.26.

confirmation decision does not specify the common purpose of the group[104] and submits that based on this and other similar examples, "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".[105]

51. The Decision does not exceed the facts and circumstances described in the charges and does not change the factual narrative. The Decision repeatedly states that the notice given by the Majority in its Decision is limited to the facts and circumstances as described in the charges, in conformity with the letter of Article 74(2) and Regulation 55(1).[106] It further gives the Appellant advance notice as to what facts and circumstances are relevant in relation to the proposed re-characterisation,[107] adding that these facts "precisely reflect […] the facts described in the Decision on the confirmation of charges […] in this case".[108] The Prosecution will further elaborate on the extent of the factual notice that was provided to the Appellant in a separate section of this response.[109]

52. Nothing on the face of the appealed Decision suggests that the Chamber departed from the facts and circumstances as described in the charges. Indeed, if the Appellant is correct that if "crucial facts are missing for the new qualification"[110] then the Chamber cannot ultimately re-characterize them under Regulation 55. However, at this stage, the Chamber has not committed error by giving notice to the parties and participants of the proposed re-characterisation and by laying out clusters of general facts for each of the components of Article 25(3)(d)(ii) on which it may rely on for the purposes of the possible re-characterisation.

[104] Defence Appeal, para.85.
[105] Defence Appeal, paras. 14(B)(i), 67, 74, 76-78, 82-83, 85, 87-93.
[106] Decision, paras.10, 21, 23 and footnote 53.
[107] Decision, paras.26-30.
[108] Decision, para.23.
[109] See section E below (paras.73-75).
[110] Defence Appeal, para.83.

53. Contrary to the Appellant's contention, it is not necessary that the facts and circumstances described in the charges do not *expressly* set out some of the elements of Article 25(3)(d)(ii). For instance, it is not necessary for the confirmation decision to "specify the common purpose of the reconstituted group".[111] All that matters in this context is that the charges include sufficient factual detail to allow the Chamber to draw conclusions as to the existence of each of the elements of Article 25(3)(d)(ii).

54. In this instance, contrary to the Appellant's position, the proposed re-characterisation will not "alter […] the fabric of the story", or change the narrative of the case.[112] Re-characterisation, if implemented in the Chamber's Article 74 decision, will merely attach to the facts included all along in the charges a different legal label. This has nothing to do with the story or narrative originally alleged and proven at trial. And it is consistent with the nature and purpose of Regulation 55. Nor is it objectionable that, as the Majority correctly stated, "a legal re-characterisation of the facts necessarily implies that more emphasis could be placed on certain facts than others, as it may also require the Chamber to exclude certain facts in favour of others".[113] The wording of Regulation 55 does not prevent a Chamber from giving certain facts a different emphasis as a result of the legal re-characterisation. In fact, it is inevitable that in any legal re-characterisation, some of the facts and circumstances described in the charges will be viewed in a different light. But as long as all the relevant facts were included from the outset in the charges, no error can be found in the approach taken by the Majority.

55. The Appellant further alleges that the proposed re-characterisation would impact on the Defence's investigation and strategy.[114] The Prosecution disagrees that this could be a consequence, but even if it were so, that does not make it

[111] Defence Appeal, para.85.
[112] Defence Appeal, para.78.
[113] Decision, para.32.
[114] Defence Appeal, paras.87-93.

unlawful or necessarily impermissible. The Appellant will have the opportunity to make submissions, explain what additional time it needs for investigation and for a shift in strategy, and argue that it will be irreparably and unfairly prejudiced. It can then argue – if indeed this is his point – that he strategically defended against the co-perpetrator mode of liability expressly by pointing to the possibility of an alternative accessorial mode. And the Chamber can assess whether re-characterisation unfairly punishes the Appellant for that strategic choice. At this stage, however, the claim is, again, purely speculative and premature. The Appellant can raise these concerns with the Chamber in its upcoming submissions and request that the Chamber take all necessary measures under Regulations 55(2) and (3) to ensure the fairness of the proceedings.

The Decision does not rely on subsidiary facts

56. The Appeals Chamber defined the term "facts" as those "factual allegations which support each of the legal elements of the crime charged" and distinguished them 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 charges".[115] Relying on that previous decision, the Appellant argues that the Impugned Decision wrongly relies on "subsidiary or collateral" facts, as opposed to the facts that underline the charges that can be the subject of requalification.[116]

57. The Decision clearly does not rely on "background or other information", as defined by the Appeals Chamber. And as to the Appellant's claim of erroneous reliance on "subsidiary facts", the Prosecution submits that neither the Court's basic documents nor the Appeals Chamber's jurisprudence support the proposed distinction between core and "subsidiary" facts. Article 74(2) refers to

[115] ICC-01/04-01/06-2205 OA16, footnote 163.
[116] Defence Appeal, paras.14(B)(ii), 71-73, 75, 79, 90.

"the facts and circumstances described in the charges and any amendment to the charges", without making any distinction between categories of facts. In turn, Regulation 52(b) requires that the document containing the charges include a "statement of *the facts*" which provides a sufficient legal and factual basis to bring the relevant person to trial. Again, no distinction is made between "main" and "subsidiary" facts. The Appellant is effectively trying to import into the Court's normative framework a distinction that is nowhere to be found in the Statute, the Rules or the Regulations of the Court.

58. Even if there were a legitimate theoretical category of "subsidiary or collateral" facts that is close to, if not coextensive with, the Appeals Chamber's definition of background or other facts that do not support the legal elements of the crimes charges, the Appellant's identification of these impermissible facts sweeps far too broadly. For instance, the Appellant suggests that "permitting Aveba to be used for the transmission of weapons and troops"[117] or "Katanga's alleged role in facilitation of the attack by others"[118] cannot be considered to be among the material facts that underlie the charges. Such a position, however, ignores that these facts were alleged in support of the allegation that he was in a sufficiently commanding position to be an indirect co-perpetrator. These facts, along with the other facts and circumstances referred to in the Decision, are among the factual allegations on which the Prosecution relied to support the legal elements of the crimes charges, including the relevant mode of liability.

59. The Chamber held prior to the commencement of the trial that "the decision on the confirmation of the charges crystallises the facts and circumstances accepted in that decision in support of the charges it has confirmed"[119] and that the Confirmation Decision was "the point of reference for the trial proceedings".[120] The Chamber then ordered the Prosecution to "prepare a Summary of the

[117] Defence Appeal, para.75.
[118] Defence Appeal, para.79.
[119] ICC-01/04-01/07-1547, para.22.
[120] ICC-01/04-01/07-1547, para.14.

Charges reiterating the language of the Pre-Trial Chamber in its Confirmation Decision".[121]

60. On the basis of that order, the Prosecution filed on 3 November 2009 its "Document Summarising the Charges Confirmed by the Pre-Trial Chamber" ("Document Summarising the Charges").[122] As evidenced by the titles used in that document, only paragraphs 7-10 included "background" information, within the terms of the Appeals Chamber's ruling, while paragraphs 11-88 set out all the relevant facts and circumstances for the "material elements of the crimes" and the "criminal responsibility" of the accused.

61. On 16 November 2009, the Prosecution filed its "Amended Table of Incriminating Evidence and Amended List of Evidence" ("Table of Evidence"),[123] including 13 tables that demonstrate how each of the facts and circumstances referred to in the Document Summarising the Charges relate to the relevant legal elements for the crimes and the mode of liability under which Mr Katanga is charged.[124]

62. The Prosecution accordingly submits that *all* of the facts and circumstances referred to in paragraphs 11-88 of the Document Summarising the Charges constitute the basis of the proceedings and are potentially subject to legal re-characterisation pursuant to Regulation 55. Contrary to the contention by the Appellant, the Prosecution clearly separated those facts from other facts that are non-material.[125] The latter are only those included in paragraphs 7-10 of the Document Summarising the Charges.

[121] ICC-01/04-01/07-1547, para.29.
[122] ICC-01/04-01/07-1588-Anx1.
[123] ICC-01/04-01/07-1643; ICC-01/04-01/07-1643-AnxA.
[124] ICC-01/04-01/07-1643-AnxB to AnxN; See in particular AnxN relating to the individual criminal responsibly of the accused.
[125] Defence Appeal, paras.72-73.

C. The notice to re-characterise the charges was reasonably foreseeable to the Appellant

63. The Appellant argues that "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".[126]

64. The Prosecution submits that the Majority was correct when it noted that the Appellant was or should have been aware of the possible use of Regulation 55. When acting in a procedural system that does contemplate in its regulatory instruments the possibility of a legal re-characterization of the facts pleaded, it is the duty of counsel to remain alert at all times as to the possibility of such re-characterization, and in particular to keep that possibility in mind when defining a defensive strategy and or deciding to take certain procedural steps. In addition, in this case, and as already advanced and also emphasized in the Decision, the Chamber did provide notice of the possible application of Regulation 55 in the case. [127]

65. Moreover, the Trial Chamber advised parties and participants to be alert to the possibility that the facts included in the charges could be subject to re-characterisation. In its decision of 21 October 2009, the Chamber stated that "the hearings on the merits must take into consideration […] the legal characterisations accepted by the Pre-Trial Chamber, which are of course subject to an application of regulation 55 of the Regulations of the Court".[128] And in his closing arguments, the Appellant conceded that the Chamber has the authority to alter the legal qualification of the facts so long as it did not alter the essential nature of the charges.[129]

[126] Defence Appeal, paras.14(C), 34, 36-38, 42.
[127] Decision, para. 52.
[128] ICC-01/04-01/07-1547, para.17; see also paras.19, 21, 28.
[129] ICC-01/04-01/07-T-338-CONF-ENG ET, page 41; see also ICC-01/04-01/07-T-338-red-ENG.

66. Also, the Appellant was fully aware that a discussion regarding the legal characterisation of the facts relevant to the appropriate mode of liability would likely take place during trial. Already shortly prior to the issuance of the Confirmation Decision, the Appellant stated that it agreed with the Prosecution that "a detailed discussion of the legal elements of the mode of liability is not appropriate at this stage of the proceedings" and stated that "any discussion on the theory of liability is more appropriate at the level of trial."[130]

67. To be sure, the Trial Chamber's advisement of 21 October 2009 did not provide direct unequivocal notice of the potential change of legal characterisation of the mode of liability, from Article 25(3)(a) to Article 25(3)(d)(ii). But the principle was clearly stated, and it echoed the plain language of Regulation 55 itself. Thus, the possibility should have been considered when the Appellant made his informed decision to testify. Though the Appellant likens this to shifting from personal participation/liability to command responsibility, a greater departure from the original allegation,[131] in fact the re-characterisation is much less dramatic, much more linked to the original charge, and much more foreseeable.[132] Article 25(3)(d) sets out a residual mode of liability for contributions to the commission of crimes by a group of persons acting with a common purpose, specifying that a contribution may be rendered "in any other way".[133] Among all modes of liability under Articles 25 and 28, Article 25(3)(d) sets out a form of liability whose elements are the closest to the elements of indirect co-perpetration under Article 25(3)(a)they overlap significantly. Thus, it is appropriate to conclude that the proposed re-classification would constitute a "relatively limited step".[134]

[130] ICC-01/04-01/07-698, paras.13, 15, referring to ICC-01/04-01/07-692, para.44..
[131] Defence Appeal, para.38.
[132] Defence Appeal, para.37.
[133] ICC-01/04-01/06-803-tEN, para.337; ICC-01/04-01/07-1497 OA8, para.79; ICC-01/04-01/06-2205 OA15 OA16, para.77.
[134] Decision, para.31.

68. In this particular case, the manner in which the Prosecution charged the Appellant for his role in the crime makes the effect of the Decision even less drastic. According to the charges, the Accused together with his subordinates planned the attack on Bogoro. He participated in the attack and he was present in its aftermath, when the crimes continued. This was never a case of a person physically removed from the crimes, using persons under his control to perpetrate the crime without becoming personally involved in the execution stage (the perpetrator behind the perpetrator). Thus, the role ascribed to the Appellant by the charges is perfectly compatible with common purpose liability. And as to the group's common purpose, the Prosecution recalls that, as stated by Pre-Trial Chamber II, the common purpose of all the relevant actors can be inferred from the intention of the leader or the leaders of the group, provided that they played a major role in that group, such as being significantly involved in creating the group, leading the group, or organizing its criminal activities.[135]

69. Even if the Appellant reasonably failed to foresee the possibility of this proposed re-characterisation and that his strategic and other choices were based on assumptions that the mode of liability would never be re-characterized, he can seek specific remedies from the Trial Chamber, invoking the procedures in Regulation 55, to ameliorate his claimed prejudice. At this point, however, there is no reason to conclude that early notice would have made a significant difference to the manner in which he conducted his case.[136] Indeed, the contrary is indicated. During trial, the Appellant had an opportunity to defend himself against all the facts and circumstances included in the charges as correctly pointed out in the Decision.[137] As demonstrated in the Document Summarising the Charges and the Table of Evidence, these facts are *all* relevant to establish at

[135] ICC-01/09-01/11-373, para.352.
[136] Defence Appeal, paras.34, 42.
[137] Decision, paras.23, 33.

least one of the elements of the crime or the mode of liability charged.[138] For that reason, the Defence cannot claim that irrelevant facts are suddenly becoming relevant as a result of the proposed re-characterisation, even if the emphasis given to some of these facts might change as a result of the proposed re-characterisation.

70. Also, it is immaterial whether the legal elements of Article 25(3)(d)(ii) are necessarily subsumed in those of Article 25(3)(a).[139] Even if that was not the case, this would not detract from the fact that (a) the close proximity between both modes of liability, to the point that at a minimum they do undoubtedly share some common elements, would suffice for the purposes of establishing foreseeability; and (b) the facts and circumstances pleaded could also support the alternative mode of liability.

D. The Decision does not unfairly leave doubts as the nature and extent of the charge

71. The Appellant submits that the proposed re-characterisation will cause him to be confronted, at this late stage of the proceedings, with a mode of liability that is unclear and unsettled law. As a result, the Appellant alleges that he is left in doubt as to the nature and extent of the charge.[140]

72. Pre-decisional uncertainty about how the Chamber will rule is not a legitimate basis for a claim of prejudice. The Chamber will enter findings as to the applicable law at the end of the trial as part of its judgment, and not at the beginning. Therefore, a degree of uncertainty as to the manner in which the applicable law will be interpreted and applied to the facts of the case is an ordinary feature of any criminal trial. The proposed legal re-characterisation

[138] See paras.60-61 above.
[139] Defence Appeal, para.43.
[140] Defence Appeal, paras.14(D), 36-37, 43, 50.

does not increase that inherent degree of uncertainty, also bearing in mind that in this case the Appellant has repeatedly challenged the law on the mode of liability of indirect co-perpetration under Article 25(3)(a) and the Chamber has not yet ruled on one of the challenges.

73. Further, the Decision specifically invites the parties and participants to file written submissions, among others, "in regard to points of law (article 25(3)(d) of the Statute)".[141] For that reason, the Chamber will ultimately decide in its judgment also whether Article 25(3)(d)(ii) constitutes a lesser form of criminal liability that is included in indirect co-perpetration under Article 25(3)(a)[142] and what impact that question has on the fairness of the proceedings.

E. The Decision does not leave doubts as to the facts and circumstances that may be relied upon for the proposed re-characterisation

74. The Appellant further argues that the Decision is defective as it fails to provide sufficient detail as to the facts and circumstances that may be relied upon for the proposed re-characterisation of the charge. This is, according to the Appellant, in marked contrast to the particulars of the charges provided by the Confirmation Decision and underscores the prejudicial nature of the Decision.[143] In support of his submission, the Appellant refers to a passage in the Appeals Chamber's decision in the *Lubanga* case that stated as follows:

> "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

[141] Decision, para.55.
[142] Defence Appeal, para.43.
[143] Defence Appeal, paras.14(E), 43, 94.

these elements were covered by the facts and circumstances described in the charges"[144]

75. This paragraph in the Appeals Chamber's decision does not support the argument of the Appellant. The Appeals Chamber did not find an error in the approach taken by the Trial Chamber in the *Lubanga* case. Rather, it declined to address the merits of an argument because the impugned decision lacked sufficient detail addressed by the parties.[145] In contrast, in *this* case the Impugned Decision makes it clear that the facts to be considered for legal re-consideration on the basis of Article 25(3)(d)(ii) are those that are included in the charges and that were already discussed at the trial.[146] Additionally, the Decision lays out clusters of general facts for each of the components of Article 25(3)(d)(ii).[147] These general facts must be viewed together with the relevant details included in the Confirmation Decision, which in this case served as "the point of reference for the trial".[148] Moreover, the Chamber previously ruled that for the purposes of "promot[ing] a greater understanding of the charges against which Germain Katanga […] will have to defend [himself]"[149] and to "avoid any ambiguity as to the facts underpinning the charges confirmed by the Pre-Trial Chamber",[150] the facts included in the Confirmation Decision must be read together with the Document Summarising the Charges and the Table of Evidence.[151] The factual detail in these documents fully addresses the concerns expressed by the Appellant.[152]

76. Third, the Decision further gives notice that for the purposes of the proposed re-characterisation, the Chamber will not rely on some facts and some evidence

[144] Defence Appeal, footnote 29, quoting ICC-01/04-01/06-2205 OA16, para.109.
[145] ICC-01/04-01/06-2205 OA15 OA16, para.109.
[146] Decision, paras.23, 33-34.
[147] Decision, paras.25-30, 33, 40.
[148] ICC-01/04-01/07-1547, para.14.
[149] ICC-01/04-01/07-1547, para.12.
[150] ICC-01/04-01/07-1547, para.2; ICC-01/04-01/07-956, para.5.
[151] ICC-01/04-01/07-1547, paras.12, 30.
[152] Defence Appeal, para.94; see for instance ICC-01/04-01/07-717, paras.715, 718 and footnotes 417, 557, which sufficiently identify some of the relevant commanders either by name or by affiliation.

including facts and circumstances that are specific to Mathieu Ngudjolo.[153] By expressly excluding those facts and evidence, the Chamber provides additional clarity as to the relevant factual basis and assists the Appellant during the Regulation 55 process by narrowing the factual basis of the charges and the amount of evidence that the Appellant is requested to address.[154]

F. The Decision does not violate the Chamber's duty to conduct the trial in an expeditious manner.

77. The Appellant argues that the Decision provides notice of a possible re-characterisation so late in the process as to be in violation of the Chamber's duty to conduct the trial in an expeditious manner.[155]

78. The Decision acknowledges that "triggering regulation 55 at this stage of the proceedings will prolong the proceedings against Germain Katanga".[156] The Prosecution agrees that Regulation 55 proceedings will cause some delay. But various trial proceedings that cause predictable and unpredictable delays, including Regulation 55 proceedings, are not prohibited solely on the ground that delay will result. At this stage, it is impossible to know if there will be substantial delay However, the Appellant does not give any concrete indications as to the delay that he considers will result, offering instead a range of speculative arguments: that the alternative of the Decision would be the acquittal of the Appellant,[157] that he cannot re-call any witnesses,[158] that the security situation in Ituri would make it difficult to conduct further investigations[159] or that members of the Defence team might not be available to continue in a re-opened case.[160] Nevertheless, the Appellant himself concedes

[153] Decision, paras.24, 39.
[154] Defence Appeal, para.94.
[155] Defence Appeal, paras.14(F), 45-49, 51.
[156] Decision, para.44; see also para.61.
[157] Defence Appeal, para.46.
[158] Defence Appeal, para.48.
[159] Defence Appeal, para.49.
[160] Defence Appeal, para.51.

that "[t]he extent of future delays is unknown".[161] The speculative arguments advanced by the Appellant and the uncertainty of the real scope of the Decision's impact on the expeditious conduct of the proceedings makes it impossible to decide at this stage that the Chamber violated its duty to ensure a fair trial.

79. In fact, the Prosecution submits that until the parties have made the submissions invited by the Decision and the Chamber has ruled on any measures to be taken pursuant to Regulation 55(2) and (3) to ensure the fairness of the proceedings, no informed assessment of the Decision's impact on the expeditious conduct of the proceedings can be made. Therefore, the submissions of the Appellant regarding delay are not only unsupported, but also premature.

80. Although the Appeals Chamber has granted the Appellant's request for suspensive effect of the Decision[162] until the Appeals Chamber has ruled on the matter,[163] which will result in further delay of the judgement of the Trial Chamber pursuant to Article 74, this is irrelevant to determine whether the Trial Chamber has committed an error by violating its duty to ensure expeditious proceedings. In fact, the Trial Chamber has previously declined a request from the Appellant[164] to extend the time limit for his submissions to two weeks after the Appeals Chamber delivered its judgement on appeal based, among other factors, on the Chamber's duty to ensure the expeditiousness of the proceedings.[165]

81. Finally, and as correctly found by the Trial Chamber in its decision granting leave to appeal, an impact of the Decision on the expeditious conduct of the

[161] Defence Appeal, para.46.
[162] Defence Appeal, paras.95-104.
[163] ICC-01/04-01/07-3344 OA13.
[164] ICC-01/04-01/07-3323, para.58
[165] ICC-01/04-01/07-3327, paras.19-20.

proceedings is not equivalent to causing undue delay.[166] The latter is the relevant criteria to assess whether the Chamber has violated its duty to ensure an expeditious trial. It must be based on a broader assessment of the nature of this case and its proceedings, which the Appellant does not advance.

G. The Decision does not give rise to an appearance of bias

82. Notwithstanding the Decision's express statement -- that the Majority has not prejudged the case and, more specifically, that it has not yet deliberated on any issues regarding Article 25(3)(d)(ii) [167] -- the Appellant argues that the circumstances in which the Decision is made give rise to an inevitable appearance of bias. He suggests that the proposed re-characterisation at this late stage and one week before announcing the acquittal of Mr Ngudjolo creates the appearance that the Majority is seeking to ensure the conviction of the Appellant.[168] Alternatively, he argues that it creates an appearance that the Chamber assumed the role of the Prosecutor by acting *proprio motu*.[169]

83. The Prosecution recalls that the applicable legal test to establish an appearance of bias is "whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias in the respondent."[170] This test is concerned "not only with whether a reasonable observer could apprehend bias, but whether any such apprehension was objectively reasonable".[171] An assessment that could lead to the disqualification of a judge is "not a step to be undertaken lightly, noting that a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office, with such high threshold functioning to safeguard the interests of the sound administration of justice. When assessing the appearance of bias in the eyes of

[166] ICC-01/04-01/07-3327, para.14.
[167] Decision, para.19; see also para.42.
[168] Defence Appeal, paras.14(G), 63-66.
[169] Defence Appeal, paras.14(G)(ii), 65-66.
[170] ICC-02/05-01/09-76-Anx2, p.6; ICC-02/05-03/09-344-Anx, para.11; Prosecutor v. Anto Furundzija, IT-95-17/1-A, Appeals Chamber Judgment of 21 July 2000, para.189; Prosecutor v. Stanislav Galic, IT-98-29-A, Appeals Chamber Judgment of 30 November 2006, paras.39-40.
[171] ICC-02/05-03/09-344-Anx, para.13.

the reasonable observer, unless rebutted, it is presumed that the judges of the Court are professional judges, and thus, by virtue of their experience and training, capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in the particular case."[172]

84. The lateness of the notice given by the Decision is in itself no indication of an appearance of bias. As argued in its response to the Appellant's argument on the scope of Regulation 55, nothing in that provision or in any other applicable provision prevents the Chamber from exercising its power to give notice of a possible legal re-characterisation of the facts at this stage of the proceedings.[173]

85. The fact that the Majority decided in this case to exercise its power also in the absence of a request to that effect by the Prosecution also cannot objectively give raise to an appearance of bias. If the Appellant´s arguments were to be accepted, any notice provided under Regulation 55 – regardless of the stage of the proceedings -- or indeed any exercise of other powers to call witnesses or probe witness testimony so as to elicit incriminating evidence, would automatically trigger this objection, thereby rendering its application void.

86. Third, the Appellant cites the Dissenting Judge's view that the Majority Decision creates the perception that the Chamber would have acquitted the Appellant on indirect co-perpetration charges and that the proposed re-characterisation "is seen as a provision which could sustain a conviction".[174] Those observations may well be true, but that does not signify that the Majority appears to be unable to adjudicate the case fairly and without preconceptions or bias. If it were otherwise, then every judicial consideration of re-characterisation under Regulation 55, regardless of timing, would be subject to the same appearance-of-bias objection. This clearly cannot be the case, nor is it objectively

[172] ICC-02/05-03/09-344-Anx, para.14 and authorities referred to in footnotes 21 and 22 of that same decision.
[173] See paras.21ff. above.
[174] Dissenting Opinion Judge Christine Van Den Wyngaert, paras.30-31 relies upon in Defence Appeal, para.65, footnotes 99-100.

reasonable to find "appearance" here of any interest other than finding the truth and seeing that justice is done. As stated above, the legal standard of an appearance of bias is an *objective* one: it must be demonstrated that based on the relevant facts any such appearance is objectively reasonable. In this case, the key fact adduced by the Appellant in support of his allegation is that the Majority exercised a power provided to it by the regulatory framework at a late stage of the proceedings. The Prosecution submits that the Majority has done so within the proper limits of Regulation 55 and Article 74. Even if the Appellant and the Dissenting Judge disagree with the timing of the Decision, this can under no circumstances give rise to an appearance of bias.

87. Finally, it is irrelevant that an observer criticized the Decision[175] and alleged that it created an appearance of bias and/or improper motivation or outside factors that wrongly influenced the Majority judges.[176] Whatever actions this Court takes are bound to draw criticisms from some quarters and praise from others. The expressed – and unsupported - view of one such critic that he perceives bias cannot be sufficient to require a finding that "an appearance of bias" has reasonably resulted.

[175] Defence Appeal, para.66 and footnote 101.
[176] William A. Schabas, Serious Fairness Issues Raised by New Ruling in Katanga Case, 2 December 2012, http://humanrightsdoctorate.blogspot.nl/: "Critics of the judgement will be tempted to point out that the two majority judge of the Trial Chamber, both of whom have already passed the expiration of their terms of office, have now extended their own employment contracts with the Court and, in the case of one of them, increased the pension entitlement."

Relief Sought

88. For the reasons set out above, the Prosecution requests that the Appeals Chamber reject the Defence Appeal.

Fatou Bensouda, Prosecutor

Dated this 21st day of January 2013

At The Hague, The Netherlands