



Original: **French**

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

Date: **2 October 2013**

**TRIAL CHAMBER II**

**Before:**

**Judge Bruno Cotte, Presiding Judge  
Judge Fatoumata Dembele Diarra  
Judge Christine Van den Wyngaert**

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO  
IN THE CASE OF  
*THE PROSECUTOR v. GERMAIN KATANGA***

**Public Document**

**Decision on the Defence observations (document 3397-Conf of 17 September 2013)**

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

**Office of the Prosecutor**

Ms Fatou Bensouda, Prosecutor  
Mr Éric MacDonald, Senior Trial Lawyer

**Counsel for Germain Katanga**

Mr David Hooper  
Mr Andreas O'Shea

**Legal Representatives of Victims**

Mr Jean-Louis Gilissen  
Mr Fidel Nsita Luvengika

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparations**

**States' Representatives**

**Office of Public Counsel for the  
Defence**

**REGISTRY**

---

**Registrar**

Mr Herman von Hebel  
Mr Didier Preira  
Mr Marc Dubuisson

**Counsel Support Section**

**Detention Section**

**Victims and Witnesses Unit**

**Victims Participation and Reparations  
Section**

**TRIAL CHAMBER II** of the International Criminal Court (“the Chamber” and “the Court” respectively), acting pursuant to articles 64 and 67 of the Rome Statute of the International Criminal Court (“the Statute”) and regulations 24, 37 and 55 of the Regulations of the Court (“the Regulations”), decides as follows.

## **I. Background**

1. By majority decision of 21 November 2012, Judge Van den Wyngaert dissenting, the Chamber, acting pursuant to regulation 55 of the Regulations of the Court, informed the parties and participants that the initial mode of liability under which the Accused Germain Katanga stood charged was amenable to legal recharacterisation on the basis of article 25(3)(d)(ii) of the Statute.<sup>1</sup> The Defence’s appeal against the decision was denied by judgment of 27 March 2013.<sup>2</sup>

2. Invited, as were the other parties and participants, to set forth its observations on the proposed recharacterisation, the Defence for Germain Katanga essentially requested, on 15 April 2013, further notice of the facts and circumstances concerning the new mode of liability contemplated and the evidence on which the Chamber intended to rely. It also stated that it did not preclude, if necessary, seeking authorisation to conduct further investigations.<sup>3</sup>

3. By majority decision of 15 May 2013, Judge Van den Wyngaert dissenting, the Chamber transmitted to the parties and participants additional factual material and information of legal interest on the interpretation of article 25(3)(d)(ii) of the Statute. It also invited the parties and participants to set forth new observations, if any.<sup>4</sup>

---

<sup>1</sup> *Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons*, 21 November 2012, ICC-01/04-01/07-3319-tENG/FRA.

<sup>2</sup> Appeals Chamber, *Judgment on the Appeal of Mr Germain Katanga against the Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons*, 27 March 2013, ICC-01/04-01/07-3363 (“Judgment of the Appeals Chamber”).

<sup>3</sup> Defence for Germain Katanga, “Defence observations on Article 25(3)(d)”, 15 April 2013, ICC-01/04-01/07-3369.

<sup>4</sup> *Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court)*, 15 May 2013, ICC-01/04-01/07-3371-tENG.

4. On 3 June 2013, the Defence for Germain Katanga reiterated its intention to conduct further investigations.<sup>5</sup> It listed the possible subject areas of such investigations and reiterated that it did not preclude calling or recalling witnesses.

5. By decision of 26 June 2013, to which a dissent was also appended, the Chamber partially granted the requests submitted by the Defence for the Accused. It set deadlines for submission by the Defence of the list of witnesses whom it may have need to call or recall and, with regard to such witnesses, stipulated the modalities of the Defence's meeting with them.<sup>6</sup> Finally, it stated that it would rule on the implementation of regulation 55(3)(b) once apprised of all the information produced by the Defence.

6. In an initial submission on 5 August 2013, the Defence stated that, after travelling to the Democratic Republic of the Congo (DRC) in late July 2013, where it met various witnesses who had been called by the Prosecutor and whom it had been considering recalling, it ultimately decided not to recall them.<sup>7</sup>

7. In a further submission, entitled "Second Observations" and filed on time, on 17 September 2013,<sup>8</sup> the Defence for Germain Katanga informed the Chamber of the impossibility of its conducting the necessary investigations in the DRC and emphasised that this was due to the deterioration in the situation in the east of the country. It set out the various difficulties it had faced (in particular the very volatile situation, poor roads, difficulties communicating by telephone and the problems posed by the authorities of the Kinshasa prison when it had sought to meet with and interview a detained witness) and stated that it had been unable to visit a number of

---

<sup>5</sup> Defence for Germain Katanga, "Defence Observations on the Decision transmitting additional legal and factual material (regulation 55(2) and 55(3) of the Regulations of the Court)", 3 June 2013, ICC-01/04-01/07-3379-Conf-Corr.

<sup>6</sup> *Decision on the Defence requests set forth in observations 3379 and 3386 of 3 and 17 June 2013*, 26 June 2013, ICC-01/04-01/07-3388-tENG.

<sup>7</sup> Defence for Germain Katanga, "Defence observations following the *Décision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013*", 5 August 2013, ICC-01/04-01/07-3394.

<sup>8</sup> Defence for Germain Katanga, "Defence Second Observations following the *Décision relative aux requêtes présentées par la défense dans ses observations 3379 et 3386 des 3 et 7 juin 2013*", 17 September 2013, ICC-01/04-01/07-3397.

locations, having been deterred from doing so specifically by the Field Security Unit, the Safety and Security Section and Counsel Support Section (CSS). It also emphasised that journeys under police or military escort or with the assistance of MONUC had not enabled effective, face-to-face meetings with potential witnesses, as the presence of such escorts greatly intimidated local communities. In conclusion, the Defence requested the Chamber, mindful of “its obligation to preserve a fair and expeditious trial, [to] exercise its discretion so as not to requalify the mode of liability under which Mr. Katanga is charged, pursuant to Regulation 55”.

8. On 18 September 2013, the Chamber directed observations from the Registrar on the Defence for Germain Katanga’s analysis of the situation in the DRC, and in Ituri in particular, from July 2013 until 15 September 2013. In particular, it wished to ascertain whether the insecurity had, at that time, reached such a level that it effectively precluded travel to the locations listed in the Defence’s submission and the holding of meaningful meetings with possible witnesses. It also requested the Registrar to state whether, on the basis of the information in his possession, the situation was likely to improve in the short term, or if a mission as contemplated by the Defence had to be ruled out in the near term.<sup>9</sup> The Chamber also invited observations, if any, from the Prosecutor and the Legal Representatives of Victims.<sup>10</sup>

9. The Registrar filed his observations on 22 September 2013.<sup>11</sup> Without disregarding the prevailing difficulties of further investigations in the DRC during July, August and September 2013, he nevertheless made clear that some of the investigations, particularly travel to Bogoro, Zumbe and Nyankunde, would have been possible under escort, had they taken place prior to 23 August 2013. He also noted that it would have been possible to travel to Goma and Beni prior to 21 August 2013 and, more specifically, between 18 and 23 August. He also emphasised that the

<sup>9</sup> “*Demande d’observations adressée au Greffier de la Cour sur l’écriture 3397-Conf de la Défense de Germain Katanga*”, 18 September 2013, ICC-01/04-01/07-3398, para. 9.

<sup>10</sup> Request to the Prosecutor and the Legal Representatives for any observations sent by email on 17 September 2013 at 17.35.

<sup>11</sup> Registry, “*Observations du Greffe en application de la Décision ICC-01/04-01/07-3398*”, 23 September 2013, ICC-01/04-01/07-3400.

Defence had rejected two alternative proposals for the temporary transfer of persons whom it wished to interview to Bunia or Uganda for that purpose. The Registrar also pointed out that the Defence had not responded to two requests from the Registry's Security and Safety Section to update its mission plans. Finally, he emphasised that the events which have occurred since 21 August 2013 in North Kivu and 23 August in certain parts of Ituri have thenceforth made a mission of any kind impossible for an indefinite period of time.

10. In a joint submission filed on 25 September 2013,<sup>12</sup> the Legal Representatives of Victims set out observations that in essence mirrored those of the Registrar, noting that “[TRANSLATION] the Defence [had] not [demonstrate[d] that it [had] made every effort to attempt to remedy this situation”. In particular, they suggested that the Chamber direct additional information from the Defence so as to best ascertain the Defence's expectations of witnesses whom it had already met or planned to interview. Finally, they suggested that the Chamber itself take the alternative measures referred to by the Registrar and rejected by the Defence, so that witnesses whose testimony seemed particularly relevant may be interviewed in Bunia or any other place.

11. In observations filed on 25 September 2013,<sup>13</sup> the Prosecutor submitted that the Defence's submissions should be rejected. Without underestimating the difficulties caused by the unrest in some regions of Ituri and North Kivu, she reiterated that the Defence was able, with one of the members of her Office, to interview three prosecution witnesses in late July 2013. Like the Registrar, she noted, *inter alia*, that it would have been possible for the Defence to travel to some of the locations it wished to visit if it had arranged to travel during the appropriate periods or availed itself of the alternative solutions proposed to it. She also put into perspective the difficulties

---

<sup>12</sup> Legal Representatives of Victims, “*Observations sur le document intitulé « Défense second Observations following the Décision relative aux requêtes présentées par la défense dans ses observations 3379 et 3386 des 3 et 7 juin 2013 » (ICC-01/04-01/07-3397-Conf)*”.

<sup>13</sup> Office of the Prosecutor, “*Corrigendum de la Réponse de l'Accusation aux 'Défense Second Observations following the Decision relative aux requêtes présentées par la Défense dans ses observations 3379 et 3386 des 3 et 17 juin 2013' ICC-01-04-01/07-3397-Conf*”, 26 September 2013, ICC-01/04-01/07-3402-Conf-Red.

relating to the poor state of the telephone network and took issue with the Defence's failure to notify the Chamber about the problems it had encountered and to accept the alternative interview locations proposed to it by the Registrar. Finally, she emphasised that a status conference should be convened in order to obtain from the Defence "[TRANSLATION] accurate information on the status of its investigations vis-à-vis each witness, including those identified in Annex A to its observations, so that that the Chamber may set a new schedule for the disclosure and presentation of the Defence's evidence".

12. In two submissions of 30 September and 1 October 2013,<sup>14</sup> the Defence for Germain Katanga sought the Chamber's leave to reply to the observations of the Prosecutor and the Legal Representatives, stating its wish to put forward its views on those of the Registrar ("the Application to Reply"). It sought to make clear to the Chamber that the criticisms of its action in the DRC and of its "lack of diligence" were unfounded and were of such seriousness that it must be able to submit to it all the necessary and additional clarifications on all of the different points which its adversaries raise.

## II. Analysis

13. Thus, the Defence for Germain Katanga has drawn attention in its Second Observations to the insurmountable obstacles it encountered in the DRC in conducting further investigations, compelling it to consider that implementation of regulation 55 of the Regulations at this juncture would perforce breach the rights of the Defence and thus prejudice the fairness of the proceedings. It therefore asserts that it is now necessary to rule on the Accused's liability on the sole basis of article 25(3)(a) of the Statute.

---

<sup>14</sup> Defence for Germain Katanga, "Defence Request for leave to Reply", 30 September 2013, ICC-01/04-01/07-3403-Conf; "ADDENDUM to: Defence Request for Leave to Reply", 1 October 2013, ICC-01/04-01/07-3404-Conf.

14. Recalling that the Appeals Chamber expressly requested it to ensure respect for the rights of the Defence but also that the proceedings are concluded within a reasonable time, the Chamber considers it necessary at this juncture to confine itself to taking formal note of the Defence position. As with the issue of ascertaining whether or not certain elements enabling article 25(3)(d) of the Statute to be relied on in determination of Germain Katanga's criminal liability fall outside the facts and circumstances contained in the charges,<sup>15</sup> it will only rule on whether the various difficulties raised by the Defence are real and the recharacterisation procedure is consistent with the rights of the Accused in the judgment to be delivered pursuant to article 74 of the Statute. In so doing, it will, of course, take into account the observations submitted by the Defence, the Prosecutor, the Legal Representatives of Victims and the Registrar.

15. However, insofar as the Prosecutor, the Legal Representatives and the Registry have all raised important issues concerning a possible lack of diligence on the part of the Defence and the actuality and relevance of its further investigations, the Defence must be allowed, as it requests in its Application to Reply, to make observations which are as comprehensive as possible. In this respect, the Chamber considers that recourse to regulation 24(5) of the Regulations of the Court governing replies is unnecessary, as the observations directed and hitherto received by the Chamber fall outwith the ordinary scope of responses to an initial application. The Defence sought to clarify that it was in a position to provide its views forthwith, which the Chamber notes. The Chamber also wishes to clarify that it will rule on the need for the status conference suggested by the Prosecutor only once in receipt of the above-mentioned observations. Indeed, it has every reason to think that any such discussions will be more fruitful once it is in receipt of all observations from the parties, particularly the Defence, and the documentation that the Defence considers necessary to submit.

---

<sup>15</sup> On this point see, Decision of 26 June 2013, para. 19.

16. Furthermore, and as to the merits at this juncture, it should be noted that, since the Chamber's first decision of 21 November 2012, the Defence has primarily sought to underscore the importance of conducting further investigations, given that several factual elements forming the basis of the new legal characterisation entail completely new aspects of the case. Since 15 April 2013, it has insisted on the need to conduct further investigations and requested the implementation of regulation 55(3)(b) of the Regulations of the Court pending further details from the Chamber.<sup>16</sup> On 3 June 2013, after receiving additional details from the Chamber and considering that the level of detail provided remained insufficient, the Defence reiterated its desire to conduct further investigations.<sup>17</sup>

17. However, the Chamber wishes point out that, were regulation 55 of the Regulations of the Court to be implemented, further investigations or searches for new evidence are not the only possible means of mounting a defence. In fact the Defence also has the possibility of stating its views on the existing body of evidence in the record, thereby allowing it to adapt its defence strategy to the new legal characterisation envisioned. It must therefore have the possibility of clarifying, supplementing and nuancing the oral and written submissions which it previously advanced in respect of the mode of liability initially confirmed by the Pre-Trial Chamber. However, in this instance it appears that, as a result of the Defence's decision from the outset to request forthwith that its investigations resume or continue, such alternative procedural possibilities were overlooked or, in any case, very scarcely explored, even if some factual aspects were addressed in its initial observations.

18. For this reason, the Chamber, sharing the Defence's concerns to ensure that the present case be brought to a close, wishes at this juncture to invite the Defence to file, if it so desires and on the basis of the existing evidence in the record, additional observations on all of the issues determined by the Chamber in its Decision of 26 June 2013, in particular on the three issues it sought to distinguish, namely:

---

<sup>16</sup> Observations of 15 April 2013, para. 181.

<sup>17</sup> Observations of 3 June 2013, para. 48.

“(1) the attack on Nyankunde and/or [the] other attacks predating the attack on Bogoro; (2) the identification of the perpetrators of the crimes; and (3) the nexus between the weapons supplied to the Ngiti combatants and the crimes committed in Bogoro.”<sup>18</sup> The document should not exceed 40 pages. Should, perchance, additional evidence be subsequently presented, the Defence may, naturally, file further observations in light of the evidence thus garnered. However, any such addendum remains hypothetical and thus, for the sake of expeditiousness, the Chamber requires submission of the above-mentioned observations at this juncture.

---

<sup>18</sup> Decision of 26 June 2013, para. 17.

**FOR THESE REASONS, THE CHAMBER**

**FINDS IT UNNECESSARY TO RULE** on the Application to Reply;

**INSTRUCTS** the Defence to submit the observations referred to in paragraph 15 of this decision by 12.00 on 4 October 2013; and

**INVITES** the Defence to submit to it by 4 p.m. on 24 October 2013 its additional observations on the matters referred to in paragraph 18 of this decision.

Judge Van den Wyngaert appends a dissenting opinion to this Decision.

Done in both English and French, the French version being authoritative.

[signed]

---

**Judge Bruno Cotte**  
**Presiding Judge**

[signed]

---

**Judge Fatoumata Dembele Diarra**

[signed]

---

**Judge Christine Van den Wyngaert**

Dated this 2 October 2013

At The Hague, The Netherlands