

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **French**

No.: **ICC-01/04-01/07**  
Date: **26 December 2012**

**TRIAL CHAMBER II**

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

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

**Public Document**

**Observations of the legal representative on the Defence application for leave to  
appeal against decision 3319**

**Source:** Common legal representative of the main group of victims

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

**Office of the Prosecutor**

Ms Fatou Bensouda  
Mr Eric MacDonald

**Counsel for the Defence of 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**

**Office of Public Counsel for Victims**

**Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## PROCEDURAL BACKGROUND

1. The trial in the instant case commenced on 25 November 2009. The final witness testified on 11 November 2012. After a site visit in January 2012, the Chamber declared the presentation of evidence closed on 7 February 2012.<sup>1</sup> After hearing the closing oral statements of each of the parties from 15 to 23 May 2012, the Chamber adjourned for deliberation.

2. On 21 November 2012, the Majority of the Chamber issued a decision by which it informed the parties pursuant to regulation 55 of the Regulations of the Court of its intention of possibly recharacterising the mode of liability ascribed to G. Katanga. It thereby indicated that it was contemplating examining his responsibility in the light of article 23(5)(3)(d) (contribution to a crime committed by a group), in addition to the characterisation applied in the *Decision on the confirmation of charges* (co-perpetration through other persons, pursuant to article 25(3)(a)). Furthermore, the Chamber unanimously decided to sever the charges against M. Ngudjolo in order to issue the judgment concerning him without waiting for its verdict on the charges against G. Katanga.<sup>2</sup> That judgment was handed down on 18 December 2012.<sup>3</sup> M. Ngudjolo was acquitted of all charges against him and released.<sup>4</sup>

3. On 23 November 2012, in accordance with the Chamber's instruction,<sup>5</sup> the Defence for G. Katanga gave notice of its intention to request leave to appeal against the decision.<sup>6</sup> On 21 December 2012, three days after receipt of the translation, in

<sup>1</sup> *Declaration of closure of submission of evidence*, ICC-01/04-01/07-3235-tENG, 7 February 2012.

<sup>2</sup> *Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons and Dissenting opinion of Judge C. Van den Wyngaert*, ICC-01/04-01/07-3319-tENG.

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

<sup>4</sup> ICC-01/04-02/12-T-3 FRA; Appeals Chamber, *Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect*, ICC-01/04-02/12-12, 20 December 2012.

<sup>5</sup> E-mail from the legal officer of the Chamber, 23 November 2012.

<sup>6</sup> "Defence Notice That It Will Request Leave to Appeal the Decision 3319", ICC-01/04-01/07-3321.

accordance with the Chamber's instructions, the Defence filed the grounds in support of its application.<sup>7</sup>

4. The Legal Representative hereby sets forth the grounds on which he considers it necessary for the Chamber to allow the appeal against its decision 3319 of 21 November 2012 ("the Impugned Decision"). He will present the issues which, in his view, should be submitted to the Appeals Chamber (I). Finally, he will provide his observations on the Defence's ancillary requests for extensions of time (II).

## I. GROUNDS FOR LEAVE TO APPEAL

5. Pursuant to article 82(1)(d) of the Statute, the Chamber may grant leave to appeal an interlocutory decision provided two cumulative criteria are met:

1. The decision must involve "an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial"; and
2. The decision must involve an issue for which an immediate resolution by the Appeals Chamber may "materially advance the proceedings".

6. In its application, the Defence argues that the core issue raised by the Impugned Decision is whether it is lawful and appropriate to issue a decision giving notice of the Chamber's intention to recharacterise the charges against the Accused in the circumstances of the present case. As for the first criterion of article 82(1)(d) of the Statute, the Defence examines a number of matters related to this core issue which substantially affect the fundamental rights of the Accused. As for the second criterion, it concludes that the immediate resolution by the Appeals Chamber is necessary, in particular, to avoid a waste of time in connection with proceedings based on a possible recharacterisation of the mode of liability under which the

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<sup>7</sup> "Defence Request for Leave to Appeal the Decision 3319", ICC-01/04-01/07-3323.

Accused has been charged (as a result of new filings relating to the charges, new witness evidence, new investigations, etc.).<sup>8</sup>

7. While not necessarily subscribing to the arguments advanced by the Defence in its application, the Legal Representative is, nevertheless, of the view that the cumulative criteria of article 82(1)(d) of the Statute are met in the instant case and that it is in the interests of justice for the Appeals Chamber to allow the appeal against decision 3319, as discussed hereinafter.

**(1) The Impugned Decision involves *two issues that significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial.***

8. As the Appeals Chamber has stated, an issue is constituted by a subject “the resolution of which is essential for the determination of matters arising in the judicial cause under examination”. This must be an issue which may materially affect either “the fair and expeditious conduct of the proceedings” or “the outcome of the trial”.<sup>9</sup>

9. In the instant case, the Impugned Decision involves two closely related issues, the second being a direct consequence of the first. The first concerns the Chamber’s authority to give notice at such an advanced stage of the proceedings (several months after the closure of the presentation of evidence, at the deliberation stage) of its intention to recharacterise the mode of liability under which G. Katanga has been charged. The second, which is a direct consequence of the first, concerns the Chamber’s power to recharacterise the mode of liability under which the Accused has been charged when it has given notice, for the first time, of its intention to do so at the deliberation stage, after all the evidence, including the testimony of the Accused himself, has been heard. Even though the Majority of the Chamber has at this stage indicated only “its intention” to implement this recharacterisation, this second issue is, nevertheless, already significant in the instant case. If the notice thus given by the Majority of the

<sup>8</sup> “Defence Request for Leave to Appeal the Decision 3319”, ICC-01/04-01/07-3323.

<sup>9</sup> *Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber’s 31 March 2006 Decision Denying Leave to Appeal*, ICC-01/04-168, 13 July 2006, paras. 9-10.

Chamber were to prove to be contrary to the provisions of the Statute and the Regulations of the Court, it would not be able to carry out a recharacterisation of the mode of liability under which G. Katanga has been charged. These are indeed both “issues” within the meaning of article 82(1) of the Statute, as they affect a core point of contention in the case: the Accused’s degree of responsibility for the commission of the crimes charged in the *Decision on the confirmation of charges* and, potentially, his guilt.<sup>10</sup>

10. Moreover, these are in no wise mere matters of principle but issues which materially affect the fair and expeditious conduct of the proceedings and the outcome of the trial.

11. If it is found that the Chamber should not have given notice of its intention to recharacterise the mode of liability under which the Accused has been charged at such an advanced stage of the proceedings and in the circumstances of the case (and that it therefore lacked the power to implement its proposed recharacterisation), it will be able to issue its judgment on the guilt or innocence of the Accused without further delay and, in the event of a conviction, continue the proceedings without delay (including, potentially, sentencing and reparations proceedings) on the appropriate legal basis.

12. As the Appeals Chamber has stated, the expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial.<sup>11</sup> It is also in the interests, and a right, of the victims to have the proceedings conducted without excessive delay and in a manner which does not create unwarranted expectations.

13. In the instant matter, the Majority of the Chamber also conceded in its decision that the implementation of the recharacterisation procedure would lead to a certain, albeit limited, delay in the proceedings. In particular, it examined the impact of the recharacterisation on the Accused’s right to a fair trial, noting:

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<sup>10</sup> ICC-01/04-01/07-717, 30 September 2008.

<sup>11</sup> *Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber’s 31 March 2006 Decision Denying Leave to Appeal*, ICC-01/04-168, 13 July 2006, para. 11.

[I]t should be borne in mind that if the Chamber is mindful thereof, any potential delay engendered by recharacterisation must be limited. However the same would not apply if the Appeals Chamber held, possibly *proprio motu*, that a recharacterisation which the trial bench had declined to make after hearing the evidence was in fact necessary as the only means, in its own words, to “close accountability gaps”.<sup>12</sup>

14. The reverse is also true. Should the Appeals Chamber find that the Majority of the Chamber erred in law by announcing, at the deliberation stage and in the circumstances of the instant case, its intention to recharacterise the mode of liability under which the Accused is charged (and subsequently implementing the recharacterisation on the basis of that notification), such error would have a significant impact on the conduct, and potentially the integrity, of the subsequent proceedings. It would lengthen the proceedings unduly and may give rise to unnecessary proceedings (if, for example, discussions on reparations were initiated on the basis of a conviction under article 25(3)(d)), whereas the Chamber did not have the authority to implement such a recharacterisation. Hence, the decision does indeed involve an issue which would materially affect the fair and expeditious conduct of the proceedings.

15. Furthermore, if the Chamber were to convict the Accused pursuant to article 25(3)(d) as a result of a recharacterisation of which it did not inform the parties until the deliberation stage and it was subsequently determined that it was not empowered to do so (owing to what was deemed to be late notification), the outcome of the trial would clearly not be the same, either for the Accused (who should not have been convicted on that basis) or for the victims (who would have to be informed that the Accused had been convicted on an erroneous legal basis). Accordingly, an error concerning this issue would have a direct impact on the outcome of the trial (as to whether G. Katanga may be held liable on the basis of article 25(3)(d)) and the subsequent proceedings.

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<sup>12</sup> *Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons and Dissenting Opinion of Judge Van den Wyngaert*, ICC-01/04-01/07-3319-tENG, para.45 [emphasis added].

**(2) The Impugned Decision involves an issue for which an immediate resolution by the Appeals Chamber may “materially advance the proceedings”**

16. The issue raised in the Impugned Decision must be such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial:

A wrong decision on an issue in the context of article 82 (1) (d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process.<sup>13</sup>

17. In the matter at bar, it is vital that the Appeals Chamber should issue an immediate and authoritative determination. If the Chamber were to convict the Accused pursuant to article 25(3)(d) as it is proposing, but it was subsequently determined that it was not empowered to do so (as a result of what was deemed to be late notification), the flawed decision might cloud or unravel the subsequent judicial process.

18. If the Chamber decides to implement the recharacterisation, it will do so in its forthcoming judgment. The only possible remedy will be an appeal against the judgment, which is a much lengthier procedure than an interlocutory appeal. In the meantime, however, the judgment founded on a recharacterisation under article 25(3)(d) will have raised erroneous expectations for the victims and, consequently, for any discussion on the sentence and reparations. It would be even more difficult to explain to the victims an error of law on the Chamber’s part if the Appeals Chamber’s decision were to be issued several months or even a year after the judgment on the merits.

19. The present situation must be distinguished from appeals against other legal issues raised in the final judgment (such as appeals founded on an error in the

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<sup>13</sup> *Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal*, ICC-01/04-168, 13 July 2006, para. 16 [emphasis added].



interpretation of the definition of a crime ascribed to the Accused). Here, the Majority of the Chamber has already indicated its intention to implement a recharacterisation pursuant to rule 55 of the Regulations of the Court and, more specifically, with respect to the rights of the defence. Accordingly, the Appeals Chamber is already in a position to examine whether the Chamber has erred in law. By settling this issue, the Appeals Chamber will rid the judicial process of possible mistakes that might taint either the fair and expeditious conduct of the proceedings or mar the outcome of the trial.

## **II. EXTENSIONS OF TIME SOUGHT BY THE DEFENCE**

20. In its application, the Defence seeks extensions of time on the basis of the Chamber's forthcoming decision. In the event that the Chamber grants its application for leave to appeal, the Defence requests the Chamber's leave to file its observations on the proposed recharacterisation within 14 days of the decision on the appeal, and not by 21 January 2013 as ordered in the Impugned Decision. Should the Chamber dismiss its application for leave to appeal, the Defence seeks additional time in order to respond to the submissions of the Prosecutor and the Legal Representatives. It pleads the time which it has required to devote to the issue of leave to appeal, the novelty of the legal issue at stake, and its lack of knowledge of precisely which facts support the suggested new mode of liability.

21. The Legal Representative leaves the issue of whether such additional time is warranted to the Chamber's discretion. However, in the event that the Chamber grants the Defence an extension of time, the Legal Representative considers that he too should receive an extension, since his situation is no different from that of the Defence. Furthermore, the Legal Representative would emphasise that since the severance of the cases against M. Ngudjolo and G. Katanga, he is currently following both cases in parallel. The Prosecution has already filed two appeals in the case against M. Ngudjolo and several urgent submissions have already been exchanged.

Over the same time period, the Legal Representative will have to follow both cases and will be held to strict time limits for the filing of submissions on issues which are crucial to the defence of his clients' interests (concerning both M. Ngudjolo's acquittal and release and the recharacterisation of the mode of liability ascribed to G. Katanga).

22. Thus, in the event that the Chamber authorises the appeal against decision 3319, the Legal Representative requests that it postpone the time limit for the filing of his observations on the legal and factual application of article 25(3)(d) of the Statute (which should, in principle, be filed by 15 January 2013) until seven days after the notification of the Appeals Chamber's decision. Conversely, should the Chamber not authorise the appeal, the Legal Representative requests it to permit him to file said observations no later than 1 February 2013.

**FOR THESE REASONS**, the Legal Representative **RESPECTFULLY REQUESTS** the Chamber

- (1) **TO ALLOW** the appeal against its decision 3319 of 21 November 2012; and consequently,
- (2) **TO PERMIT** the Legal Representative to file his observations on the legal and factual application of article 25(3)(d) of the Statute in the current matter seven days after the notification of the Appeal Chamber's decision;
- (3) **In the alternative**, if the Chamber does not allow the appeal against its decision 3319 of 21 November 2012, **TO ALLOW** the Legal Representative to file said observations no later than 1 February 2013.

[signed]

Mr Fidel Nsita Luvengika,

Common legal representative  
of the main group of victims

Dated this 26 December 2012 at Brussels, Belgium.