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Introductory Note to Prosecutor v. Germain Katanga: Judgment on the Appeal against the Decision of Trial Chamber II of 21 November 2012 (Int'l Crim. Ct.)

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INTRODUCTORY NOTE TO PROSECUTOR V. GERMAIN KATANGA: JUDGMENT ON THE APPEAL
AGAINST THE DECISION OF TRIAL CHAMBER II OF 21 NOVEMBER 2012 (INT'L CRIM. CT.)

BY STEVEN ARRIGG KOH*

[March 27, 2013]

+Cite as 52 ILM 873 (2013)+

The Appeals Chamber of the International Criminal Court (ICC) in the case of *Prosecutor v. Germain Katanga* held that a Trial Chamber, during the deliberations stage of trial proceedings, may, pursuant to Regulation 55 of the Regulations of the Court (Regulation 55), give notice of a possible modification of the legal characterization of the facts in its final Judgment, so long as the trial remains fair. This Introductory Note will provide background on the *Katanga* case and Regulation 55, summarize the Appeals Chamber's Judgment, and discuss the implications of this ruling.

Background to Regulation 55

Regulation 55 provides that a Trial Chamber may “change the legal characterisation of facts to accord with the crimes . . . or to accord with the form of participation of the accused” in its final Judgment as long as it does not “exceed[] the facts and circumstances described in the charges and any amendments to the charges.” However, it contains a notice requirement: if it appears “at any time during the trial” that the legal characterization of the facts may be subject to change, the Chamber must give notice of such a possibility and “having heard the evidence, . . . at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions.” The Chamber may take a variety of measures after issuing this notice, such as suspending the hearing to ensure that the participants have adequate time and facilities for effective preparation or holding a hearing to consider matters relevant to the proposed change. The Regulation further requires the Chamber to be particularly vigilant about the accused having adequate time and facilities for the effective preparation of his or her defense and, if necessary, the accused should “be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other [admissible] evidence.”¹

While the Appeals Chamber has held that “a principal purpose of Regulation 55 is to close accountability gaps, a purpose that is fully consistent with the [Rome Statute of the ICC],” the International Criminal Court has been grappling with the application of this rule.² For example, in the *Prosecutor v. Thomas Lubanga* case, the Appeals Chamber overturned the Trial Chamber's provision of notice under Regulation 55, ruling that the changes would have gone beyond the facts and circumstances of the charges that the Pre-Trial Chamber confirmed.³ In the *Prosecutor v. Jean-Pierre Bemba Gombo* trial, the Trial Chamber has given notice that it may modify the legal characterization of the facts to include that Bemba not only “knew” but also “should have known” that his forces were committing or about to commit the crimes charged pursuant to Article 28 of the Rome Statute of the ICC (Rome Statute).⁴ In sum, the Appeals Chamber has broadly affirmed Regulation 55 while clarifying its limits, and it remains to be seen how another Trial Chamber will apply the Regulation in its final Judgment.

Procedural History in the *Katanga* Case

On September 26, 2008, Pre-Trial Chamber I rendered its Decision on the Confirmation of Charges, finding that there was sufficient evidence to establish substantial grounds to believe that during a February 2003 attack on Bogoro—a village in the Democratic Republic of Congo—Germain Katanga and Mathieu Ngudjolo jointly committed through other persons, pursuant to Article 25(3)(a) of the Rome Statute, a variety of war crimes and crimes against humanity.⁵ Hearings in the joint case of *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* began on November 24, 2009, and on May 23, 2012, the Trial Chamber retired for deliberations.⁶

Six months later, the Trial Chamber issued its Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges Against the Accused Persons (Trial Chamber Decision) and, by majority, with Judge Van den Wyngaert dissenting, gave notice pursuant to Regulation 55(2) that the mode of liability under which Mr. Katanga was charged may be subject to legal characterization on the basis of Article 25(3)(d) of the Rome

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Statute.⁷ According to the majority, it reviewed evidence which “emphasized [Katanga’s] contribution as coordinator of preparations for the attack on Bogoro while maintaining that its aim was to dislodge the [Union of Congolese Patriots] and asserting that it had been carried out by a group of local combatants linked to the [Congolese People’s Army]” and thus considered that Mr. Katanga’s mode of participation could be considered from a different perspective and found it appropriate to implement Regulation 55.⁸ Recognizing its awareness that the trial was “at a very advanced stage,” the majority explicitly concluded that application of Regulation 55 would be compatible with the right to a fair trial.⁹

Judge Van den Wyngaert dissented on the ground that the decision went “well beyond any reasonable application of the [Regulation] and fundamentally encroache[d] upon the accused’s right to a fair trial.”¹⁰ She reasoned that the majority exceeded the boundaries of the Regulation by relying on subsidiary facts and “change[d] the narrative of the charges so fundamentally that it exceed[ed] the facts and circumstances described in the charges.”¹¹ She also concluded that the *Katanga* Trial Chamber’s largely adversarial approach should have precluded it from using the Regulation.¹²

On December 28, 2012, the Trial Chamber granted Mr. Katanga’s request for leave to appeal the Trial Chamber Decision based on the question of whether “‘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 [is] lawful and appropriate.’”¹³

The *Katanga* Appeals Chamber Judgment

The Majority Opinion

On March 27, 2013, the Appeals Chamber issued its Judgment on the Appeal of Mr. Germain Katanga Against the Decision of Trial Chamber II of 21 November 2012 Entitled “Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges Against the Accused Persons.” The Appeals Chamber by majority, with Judge Tarfusser dissenting, addressed three issues: first, whether the timing of the Trial Chamber Decision was in conformity with Regulation 55; second, whether the Trial Chamber’s envisioned scope of change in the legal characterization of the facts was in conformity with Regulation 55; and third, whether the Trial Chamber Decision violated Mr. Katanga’s right to a fair trial.

With regard to the timing of the Trial Chamber Decision, the Appeals Chamber rejected Mr. Katanga’s argument that Regulation 55 notice may only be given prior to the conclusion of the evidence. The Appeals Chamber reasoned that, pursuant to Regulation 55(2), notice may be given “‘at any time during the trial’” and that the deliberations stage still constituted a stage in the trial, but that notice should be given “as early as possible.”¹⁴

In respect of the envisioned scope of change, the Appeals Chamber first limited its review to a determination of whether the Trial Chamber had erred in giving notice pursuant to Regulation 55, noting that the actual change of legal re-characterization would only take place in the final Judgment.¹⁵ The Appeals Chamber then reviewed the factors that the Trial Chamber considered to give notice that the legal characterization of the facts may be subject to change—including the 2003 attack on Bogoro, same alleged crimes, and Mr. Katanga’s contribution leading to the realization of the crime’s objective elements—and concluded that it was “not immediately apparent that the contemplated change in the legal characterization of the facts would exceed the facts and circumstances described in the charges.”¹⁶

Finally, the Appeals Chamber ruled that the Trial Chamber did not violate any of Mr. Katanga’s fair trial rights. In so doing, it noted Regulation 55’s provisions ensuring that the accused have adequate time and facilities to prepare his defense and the opportunity to examine witnesses, or present other evidence. The Appeals Chamber also approved of the Trial Chamber’s cognizance of such rights and considered that it could not yet rule on whether the Trial Chamber had taken appropriate measures to safeguard Mr. Katanga’s rights.¹⁷

The Dissenting Opinion

In his dissenting opinion, Judge Tarfusser agreed with the majority that the timing of the Trial Chamber Decision was in conformity with Regulation 55. However, he reasoned that Regulation 55 did not apply to a re-characterization from Article 25(3)(a) to Article 25(3)(d). In his opinion, only a re-characterization from Article 25—which

“describe[s] different expressions of the broad idea of (commission by) participation in the execution of the crime”—to Article 28 of the Statute—which entails an accused “violat[ing] duties arising in connection with his position *vis-à-vis* those individuals executing the crime”—or vice versa, triggers the application of Regulation 55.¹⁸ By contrast, he opined that changes in the form of responsibility *within* either Article 25 or Article 28 do not trigger the Regulation.¹⁹

Second, Judge Tarfusser also found that the Trial Chamber Decision violated Mr. Katanga’s right to be informed of the charges in detail.²⁰ He highlighted that the majority opinion failed to correct deficiencies with the Trial Chamber Decision’s provision of adequate information to the accused and effectively approved a “splitting” of Regulation 55 into a notice-giving stage and subsequent detail-giving stage. In his contention, neither Regulation 55 nor the Court’s statutory framework condoned such division.²¹

Conclusion

The Appeals Chamber Judgment has important implications for the rights of the accused, framing of charges, admission of evidence, and expeditiousness of proceedings.

First, though the Appeals Chamber affirmed the Trial Chamber’s provision of notice pursuant to Regulation 55 during deliberations, it repeatedly signaled that the application of the Regulation may violate Mr. Katanga’s rights: it denied that the timing was a *per se* violation while expressing concern about his ability to effectively prepare his defense; it rejected a finding of undue delay but expressed concern about the provision of notice almost six months into deliberations; and it generally affirmed the Trial Chamber’s statement of the re-characterized facts while instructing the Trial Chamber to provide further information “as soon as possible.”²² Whether the Appeals Chamber finds that Mr. Katanga’s rights have been violated will of course depend on further proceedings before the Trial Chamber.

The Appeals Chamber Judgment may also impact pre-trial and trial practice at the ICC. Although the ICC does not permit parallel charges, during pre-trial the Prosecution may now allege a broader range of facts to provide the Trial Chamber space to later re-characterize pursuant to Regulation 55. During trial, the Prosecution may tender additional evidence that is less focused on the specific elements of the mode of liability charged—should a Trial Chamber find that there is insufficient evidence to convict on that particular mode of liability, the other evidence could trigger a notice of re-characterization pursuant to Regulation 55. For their part, future accused and their defense teams may more carefully select the evidence they present—including deciding whether the accused themselves should testify—to guard against a Trial Chamber shifting its reliance on such evidence if the facts are re-characterized.

A related concern for the Chamber is whether any of the above considerations hinder the expeditiousness of proceedings. Regulation 55 is already extending the length of the *Katanga* trial, given that the Trial Chamber gave notice six months into deliberations and additional time may be needed to recall witnesses, call new witnesses, or present other evidence. The Appeals Chamber Judgment allows for the possibility that Mr. Katanga could be initially convicted but later acquitted on appeal on grounds of undue delay, which would extend his detention for years.

In conclusion, the ICC Appeals Chamber’s second ruling on Regulation 55 has reaffirmed its place within the Court’s procedural framework. This Regulation will surely continue to be contentious, particularly as the parties shift attention from the notice-giving aspect of the Regulation to its procedures safeguarding the rights of the accused.

ENDNOTES

1 ICC, Regulations of the Court, Regulation 55 (Dec. 18, 2007), <http://www.icc-cpi.int/NR/rdonlyres/DF5E9E76-F99C-410A-85F4-01C4A2CE300C/0/ICCBD010207ENG.pdf> [hereinafter Regulation 55].

2 Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2205 OA 15 OA 16, Judgment on the Appeals of Mr. Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 Entitled “Decision Giving

- Notice to the Parties and Participants that the Legal Characterisation of the Facts may be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court,” ¶ 77 (Dec. 8, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc790147.pdf> [hereinafter Lubanga Appeals Judgment]; Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07 OA 13, Judgment on the Appeal of Mr. Germain Katanga Against the Decision of Trial Chamber II of 21 November 2012 Entitled “Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges Against the Accused Persons,” ¶ 22 (Mar. 27, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1573822.pdf> [hereinafter Katanga Appeals Judgment].
- 3 Lubanga Appeals Judgment, *supra* note 2, ¶ 112.
- 4 Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts may be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court (Sep. 21, 2012), <http://amicc.org/docs/doc1472172.pdf>. The Trial Chamber denied leave to appeals its decision. Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Public Redacted Version of “Decision on ‘Defence Request for Leave to Appeal the Decision on the Temporary Suspension of the Proceedings Pursuant to Regulation 55(2) of the Regulations of the Court and Related Procedural Deadlines’” (Jan. 11, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1541327.pdf>.
- 5 Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges (Sep. 30, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf>.
- 6 Katanga Appeals Judgment, *supra* note 2, ¶ 2.
- 7 Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges Against the Accused Persons (Nov. 21, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1529337.pdf> [hereinafter Trial Chamber Decision]; Katanga Appeals Judgment, *supra* note 2, ¶ 3. In the same decision, the Chamber also unanimously severed the proceedings against Mr. Ngudjolo and later, by Judgment of December 18, 2012, acquitted him. Prosecutor v. Mathieu Ngudjolo, Case No. ICC-01/04-02/12, Judgment Pursuant to Article 74 of the Statute (Dec. 18, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1579080.pdf>; Katanga Appeals Judgment, *supra* note 2, ¶ 3.
- 8 Trial Chamber Decision, *supra* note 7, ¶¶ 5-6.
- 9 *Id.* ¶¶ 14-52.
- 10 *Id.* ¶ 1 (Van den Wyngaert, J., dissenting), <http://www.icc-cpi.int/iccdocs/doc/doc1511676.pdf>.
- 11 *Id.* ¶ 10.
- 12 *Id.* ¶¶ 1-58.
- 13 Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, Decision on the “Defence Request for Leave to Appeal the Decision 3319,” ¶ 4 (Dec. 28, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc1532429.pdf>; Katanga Appeals Judgment, *supra* note 2, ¶ 9.
- 14 Katanga Appeals Judgment, *supra* note 2, ¶¶ 11-24 (citations omitted).
- 15 The Appeals Chamber also, based on a plain reading of Regulation 55(1) and Article 74(2), rejected Mr. Katanga’s argument that only “material facts,” as opposed to “subsidiary or collateral fact,” may be the subject of a change in the legal characterization. *Id.* ¶ 50.
- 16 *Id.* ¶¶ 25-58.
- 17 *Id.* ¶¶ 59-105.
- 18 *Id.* ¶ 10 (Tarfusser, J., dissenting).
- 19 *Id.* ¶ 11.
- 20 *Id.* ¶ 22.
- 21 *Id.* ¶¶ 22-27.
- 22 The Trial Chamber by majority, Judge Van den Wyngaert dissenting, provided such detail in a May 2013 decision. Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, *Décision Relative à la Transmission D’éléments Juridiques et Factuels Complémentaires* (Norme 55-2 et 3 du Règlement de la Cour) (May 20, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1594418.pdf>.

INTRODUCTORY NOTE TO PROSECUTOR V. GERMAIN KATANGA: JUDGMENT ON THE APPEAL
AGAINST THE DECISION OF TRIAL CHAMBER II OF 21 NOVEMBER 2012 (INT'L CRIM. CT.)

[March 27, 2013]

+ Cite as 52 ILM 877 (2013)+

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/04-01/07 OA 13

Date: 27 March 2013

THE APPEALS CHAMBER

Before:

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

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

Public document

Judgment*

**on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of
21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the
Court and severing the charges against the accused persons"**

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence

Mr David Hooper
Mr Andreas O'Shea

Legal Representatives of Victims

Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

REGISTRY

Registrar

Ms Silvana Arbia

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The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Germain Katanga against the decision of Trial Chamber II entitled “Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons” of 21 November 2012 (ICC-01/04-01/07-3319-tENG/FRA),

After deliberation,

By majority, Judge Cuno Tarfusser dissenting,

Delivers the following

JUDGMENT

The “Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons” is confirmed. The appeal is dismissed.

REASONS

I. KEY FINDING

1. Notice of a possible modification of the legal characterisation of facts under regulation 55 (2) of the Regulations of the Court may be given at the deliberations stage of the trial proceedings. However, the Trial Chamber must ensure that the trial remains fair.

II. PROCEDURAL HISTORY

A. Proceedings before the Trial Chamber

2. On 24 November 2009, Trial Chamber II (hereinafter: “Trial Chamber”) started the hearing of the joint case of *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.¹ The presentation of evidence was declared officially closed on 7 February 2012.² Closing written submissions were filed by the Prosecutor on 24 February 2012³ and by Mr Germain Katanga (hereinafter: “Mr Katanga”) on 30 March 2012.⁴ Final oral submissions were presented during hearings held between 15 and 23 May 2012,⁵ after which the Trial Chamber retired for deliberations.

3. On 21 November 2012, the Trial Chamber rendered the “Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons”⁶ (hereinafter: “Impugned Decision”). In the Impugned Decision, the Trial Chamber, by majority, Judge Van den Wyngaert dissenting, gave notice pursuant to regulation 55 (2) of the Regulations of the Court holding that “the mode of liability under which Germain Katanga stands charged is subject to legal recharacterisation on the basis of article 25(3)(d) of the Statute”.⁷ Further, unanimously, it severed the proceedings against Mr Katanga from those against Mr Mathieu Ngudjolo Chui (hereinafter: “Mr Ngudjolo”).⁸ On 18 December 2012, the Trial Chamber unanimously acquitted Mr Ngudjolo, finding that it was not convinced beyond reasonable doubt that he had committed the crimes charged.⁹

4. On 28 December 2012, the Trial Chamber rendered the “Decision on the ‘Defence Request for Leave to Appeal the Decision 3319’”¹⁰ (hereinafter: “Decision Granting Leave to Appeal”), in which it granted the request for leave to appeal.¹¹

B. Proceedings before the Appeals Chamber

5. On 10 January 2013, Mr Katanga filed the “Defence’s Document in Support of Appeal Against the Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons”¹² (hereinafter “Document in Support of the Appeal”).

6. On 16 January 2013, the Appeals Chamber granted Mr Katanga’s request that the appeal should have suspensive effect.¹³

7. On 21 January 2013, the Prosecutor filed the “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”¹⁴ (hereinafter: “Response to the Document in Support of the Appeal”).

8. On 25 January 2013, further to a decision of the Appeals Chamber granting them the right to participate in the appeal,¹⁵ the two common legal representatives of victims (hereinafter: "Legal Representative of Victims Group 1", "Legal Representative of Victims Group 2" and, collectively, "Legal Representatives of Victims") filed their respective submissions,¹⁶ to which Mr Katanga responded on 30 January 2013.¹⁷

III. MERITS

9. Mr Katanga's appeal is based upon the issue for which the Trial Chamber granted leave to appeal, formulated as follows:

Is the [Impugned 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?¹⁸

10. In light of this issue, the Appeals Chamber, in determining whether the Impugned Decision is materially affected by an error, will address the following essential questions that arise out of the arguments raised on appeal by Mr Katanga, namely: whether the timing of the Impugned Decision (*see* below, section A) and the scope of the change in the legal characterisation of the facts that is envisaged (*see* below, section B) are in conformity with regulation 55 of the Regulations of the Court;¹⁹ and whether the Impugned Decision violates the rights of Mr Katanga to a fair trial (*see* below, section C).²⁰

A. Timing of the Impugned Decision

1. *Relevant part of the Impugned Decision*

11. The Impugned Decision was issued after the Trial Chamber had retired to deliberate on the case. In the Impugned Decision, the Trial Chamber stated that, pursuant to regulation 55 of the Regulations of the Court, the legal characterisation of the facts could be changed "at any time during the trial", which implied that there was no temporal limitation to the use of the provision.²¹ The Trial Chamber opined that it was possible for re-characterisation to take place at the deliberations stage of the proceedings.²²

2. *Submissions of the parties and participants before the Appeals Chamber*

12. Mr Katanga argues that notice under regulation 55 (2) of the Regulations of the Court could not be given after the close of the evidence and several months into the deliberations of the Chamber.²³ He argues, in particular, that, while the Trial Chamber found that the wording of regulation 55 (2) of the Regulations of the Court, namely that notice can be given "at any time during the trial", implied that there was no temporal limitation to using the provision, such notice must be given "at an appropriate stage of the proceedings".²⁴ He submits that there was, therefore, "a temporal limit, albeit unspecified, as to when Notice may be given" and that "no reasonable tribunal could, in the circumstances of this case, order service of notice to re-characterise offences to the proposed extent at such a late stage".²⁵ Referring to the specific terms of regulation 55 (2) of the Regulations of the Court, Mr Katanga argues that, while submissions can be sought once the evidence has closed, giving notice should be prior to the conclusion of the evidence.²⁶ Mr Katanga avers that regulation 55 should be interpreted narrowly²⁷ and that the interpretation favourable to the accused should be adopted.²⁸

13. The Prosecutor submits that Mr Katanga's interpretation of regulation 55 (2) of the Regulations of the Court is "incompatible with both a literal and a teleological interpretation" of the provision.²⁹ She notes that notice may be given "at any time during the trial" and avers that the "trial concludes [only] with the issuance of the Article 74 decision".³⁰ In her view, Mr Katanga "twist[s] the language of Regulation 55" because the reference in that provision to an appropriate stage relates not to the giving of notice, but to the opportunity to be given to the participants to make submissions on the re-characterisation.³¹ The Prosecutor submits that the phrase "having heard the evidence" does not qualify the fact that notice can be given at any time during the trial, but rather "only applies to the Chamber's duty to request and receive submissions from the parties".³² She also notes that, if Mr Katanga's interpretation were accepted, a Trial Chamber would have to acquit an accused if it realised in the course of its

deliberations that the legal characterisation of the charges was, in its view, incorrect; a result “Regulation 55 was designed specifically to avoid”.³³ The Legal Representatives of Victims make arguments to similar effect.³⁴

3. *Determination by the Appeals Chamber*

14. The Impugned Decision was rendered on 21 November 2012, after the Trial Chamber had begun its deliberations on Mr Katanga’s guilt or innocence. This was more than one year after the last evidence was presented (11 November 2011),³⁵ and several months after the formal close of the evidence (7 February 2012)³⁶ and the hearing of closing statements (15 to 23 May 2012).³⁷

15. The Appeals Chamber needs first to determine whether, at that stage of the proceedings, it was in principle lawful, pursuant to the terms of regulation 55 of the Regulations of the Court, to give notice to the participants that the legal characterisation of facts may be subject to change.

16. Regulation 55 of the Regulations of the Court provides as follows:

1. In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.
2. If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change.
3. For the purposes of sub-regulation 2, the Chamber shall, in particular, ensure that the accused shall:
 - (a) Have adequate time and facilities for the effective preparation of his or her defence in accordance with article 67, paragraph 1 (b); and
 - (b) If necessary, be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1 (e).

17. Pursuant to regulation 55 (2) of the Regulations of the Court, notice of a possible re-characterisation may be given “at any time during the trial”. The Appeals Chamber observes that, at the time the Impugned Decision was rendered, the trial was at the deliberations stage and that no decision under article 74 of the Statute had yet been rendered. Furthermore, nothing in the Statute, the Rules of Procedure and Evidence or the Regulations of the Court prevents the Trial Chamber from re-opening the hearing of evidence at the deliberations stage of the proceedings.³⁸ The Appeals Chamber therefore concludes that, for the purposes of regulation 55 of the Regulations of the Court, the trial is ongoing at the present time. The timing of the Impugned Decision was therefore not incompatible with regulation 55 of the Regulations of the Court.

18. The Appeals Chamber is not persuaded by Mr Katanga’s argument that there is an unspecified temporal limit as to when notice of a possible re-characterisation can be given by the Trial Chamber under regulation 55 (2) of the Regulations of the Court, by reason of that provision’s reference to the “appropriate stage of the proceedings”. The Appeals Chamber considers, as was pointed out by the Prosecutor, that the reference to the “appropriate stage of the proceedings” relates to the opportunity to be given to the participants to make oral or written submissions. In other words, the participants must be given an opportunity to make submissions at an appropriate stage of the proceedings, following notice of a possible re-characterisation, but this does not limit the Trial Chamber’s power to give such notice “at any time during the trial”.

19. As to Mr Katanga’s argument that the phrase “and having heard the evidence” within the first sentence of regulation 55 (2) of the Regulations of the Court suggests that notice must be given before the conclusion of the

evidence, the Appeals Chamber accepts that this is a possible reading of that sentence. However, for the reasons set out below, and having regard to the regulation as a whole, the Appeals Chamber is not persuaded by this argument.

20. First, as pointed out above, it is clear from the opening words of regulation 55 (2) of the Regulations of the Court that the Trial Chamber can give notice “at any time during the trial”.

21. Second, the interpretation put forward by Mr Katanga is inconsistent with the purpose of the provision. The Appeals Chamber observes that changing the legal characterisation of the facts may become necessary not only in the course of the hearing of evidence as, for example, an immediate reaction thereto, but also thereafter. At that latter stage, the Trial Chamber may realise, upon carefully analysing the material and evidence that was presented in its totality, that the legal characterisation on the basis of which the charges were confirmed may be subject to change. That this may be necessary at the deliberations stage is particularly the case in light of the length, complexity and evidentially voluminous nature of the proceedings that come before this Court. As the Prosecutor correctly points out, if regulation 55 of the Regulations of the Court were inapplicable at the deliberations stage of the proceedings, the Trial Chamber would have to acquit the accused in such a situation, even if the evidence presented clearly established his or her guilt based upon the appropriate legal characterisation of the facts.

22. In this context, the Appeals Chamber recalls that it has previously held that “a principal purpose of Regulation 55 is to close accountability gaps, a purpose that is fully consistent with the Statute”.³⁹ The Appeals Chamber found that failing to permit a Trial Chamber to re-visit the legal characterisation that was confirmed by the Pre-Trial Chamber at the end of the confirmation procedure:⁴⁰

bears the risk of 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. This would be contrary to the aim of the Statute to “put an end to impunity” (fifth paragraph of the Preamble).⁴¹

23. Third, the last sentence of regulation 55 (2) of the Regulations of the Court provides that the Trial Chamber may, when considering a possible change in the legal characterisation of facts and having given notice, either suspend the hearing or, “if necessary”, “order a hearing to consider all matters relevant to the proposed change”. The Appeals Chamber interprets this to mean that the hearing may be suspended to enable effective preparation if notice is given during a hearing; but that there is also provision for a hearing to be ordered “if necessary”, which implies that notice can be given, *inter alia*, after the hearing of evidence has been concluded, such as at the deliberations stage.

24. The Appeals Chamber therefore concludes that, while it is preferable that notice under regulation 55 (2) of the Regulations of the Court should always be given as early as possible, Mr Katanga’s argument that the timing of the Impugned Decision is incompatible with the terms of regulation 55 (2) of the Regulations of the Court is not persuasive.

B. Scope of the envisaged change in the legal characterisation of facts

1. Relevant procedural context

25. The factual allegations against Mr Katanga relevant to the present appeal are set out primarily in three documents: the “Amended Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute”⁴² (hereinafter: “Amended Document Containing the Charges”), which formed the basis of the confirmation hearing before Pre-Trial Chamber I; the “Decision on the confirmation of charges”⁴³ (hereinafter: “Decision on the Confirmation of Charges”), which was the decision of Pre-Trial Chamber I confirming the charges following the confirmation hearing; and the “Document Summarising the Charges Confirmed by the Pre-Trial Chamber”⁴⁴ (hereinafter: “Summary of the Charges”), which the Trial Chamber had ordered the Prosecutor to file for the purposes of the trial.⁴⁵

26. In the Amended Document Containing the Charges, the Prosecutor alleged that Mr Katanga and Mr Ngudjolo, together with other FRPI⁴⁶ (the group to which Mr Katanga was alleged to belong) and FNI⁴⁷ (the group to which Mr Ngudjolo was alleged to belong) commanders, agreed on a common plan to carry out a joint attack to “wipe out” Bogoro.⁴⁸ Mr Katanga was alleged, in his capacity as military chief of the FRPI,⁴⁹ to have made “an

essential contribution to the common plan and the crimes it furthered”, including by providing weapons to commanders of the FRPI and the FNI, overseeing and ensuring that the attack on Bogoro was executed by the FNI and FRPI forces in a coordinated and joint manner, communicating the details of the common plan to all FRPI and FNI commanders, and ordering subordinates to carry out the plan.⁵⁰ It was alleged that Mr Katanga and Mr Ngudjolo, in contributing to the common plan, were aware of their essential roles, which gave them joint control over the implementation of the common plan and that they, “as well as the other co-perpetrators”, were all mutually aware that implementing the common plan may result in the commission of the various crimes charged.⁵¹

27. In the Decision on the Confirmation of Charges, it is mentioned that, even if the attack on Bogoro was intended to “target a military objective”, it was also intended to be directed against the Hema civilian population.⁵² The section on the criminal responsibility of the suspects commenced with a detailed exposition of the Pre-Trial Chamber’s interpretation of the notion of joint responsibility as a principal perpetrator under article 25 (3) (a) of the Statute.⁵³ The Pre-Trial Chamber then assessed whether there was sufficient evidence to establish substantial grounds to believe that Mr Katanga and Mr Ngudjolo were responsible for the crimes with which they were charged, by reference to each of the legal elements it had defined.⁵⁴ The Pre-Trial Chamber found that, at all material times, Mr Katanga was the supreme commander of the FRPI and had *de facto* ultimate control over its commanders,⁵⁵ that the FRPI was a hierarchically organised group, with FRPI commanders having the ability to communicate with each other,⁵⁶ and that compliance with Mr Katanga’s orders was ensured.⁵⁷ The Pre-Trial Chamber further considered that Mr Katanga and Mr Ngudjolo agreed upon a common plan to attack Bogoro⁵⁸ and that Mr Katanga made an essential contribution to the plan.⁵⁹ More specifically, the Pre-Trial Chamber found, *inter alia*, that Mr Katanga had responsibility for implementing the plan, including by ordering militias to “wipe out” Bogoro, distributing the plan of attack to commanders and distributing weapons and ammunition; and that Mr Katanga had a coordinating role in implementing the common plan, including by having contacts with other participants in implementing the plan, and obtaining and distributing weapons and ammunition.⁶⁰ The Decision on the Confirmation of Charges mentioned that other FRPI and FNI commanders were also involved in the planning and/or execution of the attack.⁶¹ The Pre-Trial Chamber, however, found that, without the agreement of Mr Katanga and Mr Ngudjolo on, and their participation in the implementation of, the common plan, the crimes would not have been committed as planned⁶² and concluded that Mr Katanga and Mr Ngudjolo implemented the plan in a coordinated manner and had “joint control over the implementation of the plan, insofar as their essential overall coordinating roles gave to them, and only to them, the power to frustrate the implementation of the plan”.⁶³ It was further alleged that Mr Katanga and Mr Ngudjolo “were aware of the factual circumstances enabling them to exercise joint control over the crimes” and that crimes would be committed in the implementation of the common plans.⁶⁴

28. In the Summary of the Charges, the Prosecutor repeated the findings of the Pre-Trial Chamber,⁶⁵ sometimes linking them back to the Amended Document Containing the Charges.⁶⁶

2. *Relevant part of the Impugned Decision*

29. In the Impugned Decision, the Trial Chamber stated that, further to its receipt of “the written and oral summaries of the parties and participants”, it noted that, “both during his testimony and his defence, Germain Katanga emphasised his contribution as coordinator of preparations for the attack on Bogoro while maintaining that its aim was to dislodge the UPC and asserting that it had been carried out by a group of local combatants linked to the APC”.⁶⁷ The Trial Chamber further noted that a number of witnesses called by both parties had also highlighted Mr Katanga’s “contribution to the attack, albeit in different terms”.⁶⁸

30. The Trial Chamber regarded it as “appropriate to implement regulation 55 of the Regulations of the Court”, informing the parties and participants “that the legal characterisation of facts relating to Germain Katanga’s mode of participation is likely to be changed”.⁶⁹ The Trial Chamber proceeded to state that “Mr Katanga’s liability must henceforth be considered on the basis of article 25(3)(d) of the Statute” rather than exclusively on the basis of article 25 (3) (a) of the Statute.⁷⁰ The Trial Chamber stated that, “guided by the sole concern of determining the truth of the charges referred to them,” it was for the Chambers of the Court to reach a decision without necessarily being restricted “to the characterisation employed by the Pre-Trial Chamber”.⁷¹

31. By reference to article 74 (2) of the Statute and regulation 55 of the Regulations of the Court, the Trial Chamber highlighted that the facts and circumstances described in the charges could not be exceeded in any proposed re-characterisation.⁷² The Trial Chamber observed that “it is vital to ensure that all facts underpinning the charges whose legal character is modified were clearly set out in the original indictment, from the outset”,⁷³ and continued:

[T]he legal characterisation proposed by the Majority, to determine the responsibility of the Accused on the basis of the mode of complicity defined in article 25(3)(d)(ii), precisely reflects the facts described in the *Decision on the confirmation of charges, scilicet*, in this case, the substantiating legal elements underlying the charges confirmed against Germain Katanga, who had the opportunity to defend each of these facts during the trial.⁷⁴ [Footnote omitted.]

32. In implementing regulation 55 of the Regulations of the Court, the Trial Chamber stated that it intended, “after setting aside the implication of Mathieu Ngudjolo and the conclusion of a common plan by the two Accused [. . .] to rely on facts and circumstances specific to Germain Katanga and not relevant to his co-Accused”.⁷⁵

33. The Trial Chamber indicated that its re-characterisation contemplates “that Germain Katanga contributed in another way to the commission of crimes by a group of Walendu-Bindi commanders and combatants acting with a common purpose to attack Bogoro on 24 February 2003. The recharacterisation further considers that the Accused’s contribution was intentional and made with full knowledge of the group’s intention to commit the crimes”.⁷⁶

34. The Trial Chamber emphasised that its re-characterisation would, in any event, relate to essential matters set out in the Decision on the Confirmation of Charges.⁷⁷ In respect of Mr Katanga’s contribution to the commission of crimes, the Trial Chamber noted that the Pre-Trial Chamber had held that he had played an “overall coordinating role” in the implementation of a predominantly criminal plan to attack Bogoro and indicated that, in its view, “although the contribution described by the Pre-Trial Chamber relates to the implementation of a common plan to wipe out Bogoro, it is expressly defined as a fundamental contribution resulting in the realisation of the objective elements of the crime”.⁷⁸ The Trial Chamber pointed out that, while the Decision on the Confirmation of Charges “adopts the existence of a common plan between Germain Katanga and Mathieu Ngudjolo, it also includes, in its assessment of responsibility through another person, the commission of crimes by a hierarchically organised group, operating in Walendu-Bindi”.⁷⁹ The Trial Chamber considered that the Decision on the Confirmation of Charges had “already confirmed the concerted action of this group”, yet it remained to be determined whether the existence of “a common plan” is required for the purposes of article 25 (3) (d) of the Statute.⁸⁰

35. In respect of the subjective elements of liability under the proposed re-characterisation, the Trial Chamber recalled that Mr Katanga had defended himself at the trial in relation to crimes committed in the attack on Bogoro by a group comprising commanders and combatants of the Walendu-Bindi *collectivité*, whose criminal intent had been assessed in the Decision on the Confirmation of Charges.⁸¹ The Trial Chamber was of the view that:

The facts underlying Germain Katanga’s knowledge of the alleged criminal intent of the group pursuant to article (25(3)(d)(ii)) are, in the Majority’s view, necessarily included in the Pre-Trial Chamber’s description, of the Accused’s intent and the knowledge of the fact that the realisation of the crimes “would result in the implementation of the common plans” (25(3)(a)).⁸²

36. The Trial Chamber accepted that it was arguable that it was suggesting an amended narrative of the charges, by proposing to focus on certain facts to the exclusion of others, yet emphasised that it was “confining itself to proposing a different assessment of the facts” without amending the statement of facts set out in the Decision on the Confirmation of Charges.⁸³ The Trial Chamber further stated that Mr Katanga was able fully to express himself during the trial in relation to the facts that would form the basis for the re-characterisation⁸⁴ and that he had already, during the course of his defence, addressed the majority of the factual and legal issues that arose under article 25 (3) (d) of the Statute.⁸⁵

37. In her dissenting opinion⁸⁶ (hereinafter: “Dissenting Opinion”), Judge Van den Wyngaert concluded that the Impugned Decision violated regulation 55 of the Regulations of the Court in exceeding the facts and circumstances described in the charges.⁸⁷ In his submissions on appeal, Mr Katanga raises arguments that reflect views expressed in the Dissenting Opinion.

3. *Submissions of the parties and participants before the Appeals Chamber*

38. Mr Katanga submits that, pursuant to regulation 55 of the Regulations of the Court, any change in the legal characterisation of the facts may not exceed “the facts and circumstances described in the charges” and that the surrounding circumstances cannot be turned into facts “when they were not previously considered as such”.⁸⁸ By reference to a previous judgment of the Appeals Chamber and quoting from the Dissenting Opinion, Mr Katanga submits that the Trial Chamber “cannot rely on allegations, which, although mentioned in the [Decision on the Confirmation of Charges], do not constitute factual allegations that support the legal elements of the crimes charged” or “change the narrative of the facts underlying the charges so fundamentally that it exceeds the facts and circumstances described in the charges”,⁸⁹ arguing that it is necessary to distinguish material facts from subsidiary facts.⁹⁰

39. Mr Katanga submits that there is sufficient information in the Impugned Decision to demonstrate that the facts and circumstances underlying the charges would be exceeded.⁹¹ He argues that his alleged role as a coordinator and his contribution to the plan to attack Bogoro by permitting Aveba to be used for the transmission of weapons and troops⁹² “are clearly secondary to his alleged joint planning with Ngudjolo of this attack and his direct responsibility for its implementation”.⁹³ He argues that these are significantly different roles, with “the latter being the material role for the purposes of the existing charges”.⁹⁴ Mr Katanga further argues that those who executed the crimes are now to be viewed as individuals who harboured a common plan to wipe out Bogoro, to which he contributed by facilitating preparations for the attack, as opposed to individuals who automatically complied with his orders and through whom he acted,⁹⁵ also directly quoting a passage from the Dissenting Opinion in this respect.⁹⁶ By reference to his role and that of the perpetrators of the crimes, Mr Katanga argues that the proposed re-characterisation would “alter, in a fundamental way, the fabric of the story”, thereby exceeding the facts and circumstances contained in the charges.⁹⁷ He points out that this was also the view expressed in the Dissenting Opinion.⁹⁸ Given the role attributed to him in the Decision Confirming the Charges, Mr Katanga avers that changing his role “from that of an essential contribution to that of a significant but not necessarily essential contribution” alters the circumstances described in the charges.⁹⁹

40. Mr Katanga submits that crucial facts are clearly missing from the charges in respect of article 25 (3) (d) of the Statute as neither the group, nor its common purpose, were previously identified.¹⁰⁰ Mr Katanga argues that what the Trial Chamber proposes “is a categorical change” and that he would now have to move his attention from his alleged actions undertaken jointly with Mr Ngudjolo to whether there were “meetings between other groups in other places, who were there and what was discussed etc.”.¹⁰¹ He submits that there “is a risk of having to restart the whole trial process”.¹⁰²

41. In the Response to the Victims’ Observations, Mr Katanga further submits that it is not premature to resolve the issue of whether the facts and circumstances are exceeded at this stage of the proceedings.¹⁰³ He refers to the Trial Chamber itself having ruled that the matter was appropriate for resolution at this time and that waiting to resolve this issue until the decision on his guilt or innocence “would lead to an irremediable violation of [his] rights to a fair and expeditious trial”.¹⁰⁴ He submits that, had the Trial Chamber provided him with a detailed analysis of the facts upon which it proposed to rely for the re-characterisation, he would have been able fully to demonstrate the extent by which the facts and circumstances had been exceeded.¹⁰⁵ In the circumstances, he argues that “the appropriate remedy for this error on the part of the Trial Chamber is not to state that the issue is premature or to allow the Trial Chamber to give further precision, but to overturn the [Impugned Decision]”.¹⁰⁶

42. The Prosecutor avers that Mr Katanga’s arguments are premature. As the Impugned Decision does not re-characterise the charges, it is impossible to say whether the facts and circumstances will be exceeded.¹⁰⁷ She further submits, *inter alia*, that all of the facts and circumstances referred to at paragraphs 11 to 88 of the Document Summarising the Charges are potentially subject to legal re-characterisation under regulation 55 of the Regulations of the Court.¹⁰⁸

43. The victims make arguments along similar lines to those of the Prosecutor.¹⁰⁹ The Legal Representative of Victims Group 1 submits that Mr Katanga’s arguments are premature in that it is impossible to determine whether

the Trial Chamber has exceeded the facts and circumstances in the charges until it has in fact performed the re-characterisation that is currently under consideration.¹¹⁰ The Legal Representative of Victims Group 2 agrees¹¹¹ and further submits, *inter alia*, that the narrative will not change in a manner that would exceed the facts,¹¹² and that Mr Katanga's purported distinction between material and subsidiary facts is artificial¹¹³ and unsupported by the relevant legal texts.¹¹⁴

4. *Determination by the Appeals Chamber*

44. Mr Katanga essentially submits that the Trial Chamber's proposed change of legal characterisation falls outside the scope of both regulation 55 (1) of the Regulations of the Court and article 74 (2) of the Statute in that it would exceed "the facts and circumstances described in the charges" by fundamentally changing the narrative of the charges and by relying on subsidiary facts.

(a) **Standard of review**

45. The Appeals Chamber recalls at the outset that the Impugned Decision is a decision rendered pursuant to regulation 55 (2) of the Regulations of the Court, which provides that if "it appears to the Chamber that the legal characterisation may be subject to change, the Chamber shall give notice to the participants of such a possibility". The actual change in the legal characterisation will, if at all, only take place in the Trial Chamber's eventual decision under article 74 of the Statute. It is only in that decision that the Trial Chamber will have to demonstrate that the legal characterisation of the facts has changed without exceeding the "facts and circumstances described in the charges".

46. Accordingly, at this stage of the proceedings, the Appeals Chamber is not called upon to determine whether the legal characterisation of the facts actually can be changed from article 25 (3) (a) of the Statute to article 25 (3) (d) of the Statute without exceeding the facts and circumstances described in the charges. By issuing the Impugned Decision, the Trial Chamber has merely given notice pursuant to regulation 55 (2) of the Regulations of the Court. The Appeals Chamber therefore has to review whether the Trial Chamber erred in relation to whether "it appears [. . .] that the legal characterisation of facts may be subject to change", pursuant to regulation 55 (2) of the Regulations of the Court. Hence, the review that the Appeals Chamber can undertake at this stage of the proceedings is a limited one, in that the Impugned Decision would be erroneous only if it were immediately apparent to the Appeals Chamber, at this stage, that the change in the legal characterisation contemplated by the Trial Chamber would exceed the facts and circumstances described in the charges.

47. The Appeals Chamber underlines that it follows from the above that what is said in the present judgment is without prejudice to any future review that it may have to undertake in any appeal against the Trial Chamber's ultimate decision under article 74 of the Statute, should the Trial Chamber eventually decide to re-characterise the facts. Whether any change in the legal characterisation actually exceeded the facts and circumstances as described in the charges could only be determined at that stage.

(b) **Facts and circumstances**

48. Pursuant to regulation 55 (1) of the Regulations of the Court:

In its decision under article 74, the Chamber may change the legal characterisation of facts [. . .] to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.

49. The requirement in regulation 55 (1) of the Regulations of the Court that any change in legal characterisation must not exceed the facts and circumstances described in the charges is consistent with the requirements that relate to the decision of the Trial Chamber on the guilt or innocence of the accused.¹¹⁵ Article 74 (2) of the Statute, second sentence, provides that the decision of the Trial Chamber "shall not exceed the facts and circumstances described in the charges and any amendments to the charges". It is the "facts and circumstances described in the charges" that defines the subject-matter of the trial.¹¹⁶

50. The Appeals Chamber is not persuaded by Mr Katanga's argument that, necessarily, only "material facts", but not "subsidiary or collateral facts" may be the subject of a change in the legal characterisation. There is no indication of any such limitation in the text of article 74 (2) of the Statute or regulation 55 (1) of the Regulations of the Court. Rather, those provisions stipulate that any change cannot exceed the "facts and circumstances". To the extent that Mr Katanga relies on the *Lubanga OA 15 OA 16 Judgment*, where the Appeals Chamber indicated at footnote 163 that "facts" must be distinguished from the evidence put forward by the Prosecutor, as well as from background or other information contained in the document containing the charges or the decision confirming the charges,¹¹⁷ the Appeals Chamber notes that it did not determine in that judgment how narrowly or how broadly the term "facts and circumstances described in the charges" as a whole should be understood. The Appeals Chamber will not, in the abstract, address this matter any further.

(c) **The nature of the proposed change**

51. The Appeals Chamber recalls that the contemplated change in the characterisation is from the form of participation charged (co-perpetration under article 25 (3) (a) of the Statute) to contribution to the commission of a crime by a group acting with a common purpose under article 25 (3) (d) of the Statute.

52. Article 25 (3) of the Statute provides, in relevant part, as follows:

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

[. . .]

- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

- (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
- (ii) Be made in the knowledge of the intention of the group to commit the crime;

53. Article 25 (3) (d) (ii) of the Statute requires, on its face, that one or more crimes are committed by a group of persons, that this group acts with a common purpose, and that the accused intentionally contributes to the commission of the crime in the knowledge of the group's intention to commit the crime.

54. In determining whether it is immediately apparent that the proposed change in the legal characterisation would exceed the facts and circumstances described in the charges, the Appeals Chamber has had particular regard to the factors to which the Trial Chamber referred in the Impugned Decision in deciding to give notice, pursuant to regulation 55 (2) of the Regulations of the Court, that the legal characterisation of facts may be subject to change.

55. The Appeals Chamber observes that the Trial Chamber stated that its re-characterisation would relate to factors that were described in the Decision on the Confirmation of Charges: the attack on Bogoro on 24 February 2003; the same alleged crimes; an analysis of the role played by the group of Ngiti combatants based in Walendu-Bindi *collectivité*; local commanders who were members of that group; and Mr Katanga's contribution which led to the realisation of the objective elements of the crime.¹¹⁸ The Trial Chamber further referred to the Decision on the Confirmation of Charges as incorporating the commission of crimes by a hierarchically organised group acting in a concerted manner,¹¹⁹ that Mr Katanga's contribution to the attack on Bogoro resulted in the realisation of the objective elements of the crime,¹²⁰ and that the group was acting with criminal intent, of which Mr Katanga was aware.¹²¹

56. Having reviewed the Impugned Decision in light of the documents describing the charges, the Appeals Chamber concludes that, at the present stage of the proceedings, it is not immediately apparent that the contemplated change in the legal characterisation of the facts would exceed the facts and circumstances described in the charges.

The Appeals Chamber emphasises that, in reaching that conclusion, it is not expressing any view about the correct legal interpretation of article 25 (3) (d) of the Statute. To do so would be premature at this stage of the proceedings. In this regard, the Appeals Chamber observes that the Trial Chamber expressly stated that it remained to be considered whether a common plan was required for the purposes of article 25 (3) (d) of the Statute,¹²² and that it has requested submissions, *inter alia*, on the interpretation of article 25 (3) (d) of the Statute.¹²³

57. The Appeals Chamber does, however, make the following further observations in relation to the arguments that Mr Katanga has raised. The Appeals Chamber does not accept that it is obviously impermissible to re-characterise the facts so that the role of Mr Katanga changes from, in his words, “that of an essential contribution to that of a significant but not necessarily essential contribution”.¹²⁴ Any change from, for example, being alleged to be a principal to being alleged to have in fact been an accessory will always necessarily involve a change in the characterisation of the role. Were such a change not to be permissible, it would defeat the purpose of regulation 55 of the Regulations of the Court. The Trial Chamber would be constrained exclusively to using the precise characterisations established by the Pre-Trial Chamber at a much earlier stage of the proceedings and with a necessarily more restricted view of the case as a whole.

58. The Appeals Chamber also does not accept that a change in the narrative exceeds *per se* the facts and circumstances described in the charges. As pointed out by the Trial Chamber, focusing on certain facts to the exclusion of others will necessarily alter the narrative: indeed, it would appear inevitable that a change in characterisation would result in a change of narrative to a certain extent. Whether the change of narrative is of such an extent or nature that it does, in fact, exceed the facts or circumstances is something on which the Appeals Chamber will only be able to rule if and when the Trial Chamber has changed the legal characterisation in its decision under article 74 of the Statute.

C. Alleged violations of Mr Katanga’s fair trial rights

1. Relevant part of the Impugned Decision

59. In the Impugned Decision, the Trial Chamber referred to the safeguards to the rights of the accused that were set out in regulation 55 of the Regulations of the Court, stating that the accused must have adequate time and facilities to prepare the defence and have the opportunity to examine witnesses or present other evidence.¹²⁵ The Trial Chamber stated that it had to decide whether it was possible to apply regulation 55 of the Regulations of the Court without violating the rights of the accused.¹²⁶ It concluded that the application of regulation 55 of the Regulations of the Court would not appear to violate Mr Katanga’s rights under article 67 (1) of the Statute.¹²⁷

60. The Trial Chamber noted that the European Court of Human Rights (hereinafter: “ECtHR”) had found that re-characterisation that took place at a late stage in the proceedings did not, without more, infringe the right to a fair trial or cast doubt upon the impartiality of the judges.¹²⁸ In respect of this latter factor, while noting that re-characterisation at the deliberations stage “may raise concerns about an appearance of partiality on the part of the judges”, the Trial Chamber stated that its decision to consider a legal re-characterisation had been based on a thorough review of the evidence and that “the submissions of the parties and participants [. . .] will be decisive” in relation to Mr Katanga’s potential liability under article 25 (3) (d) of the Statute.¹²⁹

61. Having set out the nature of the re-characterisation that was within its contemplation under the heading, “The right to be informed promptly of the nature, cause and content of the charges against him”,¹³⁰ the majority of the Trial Chamber found, with reference to the case-law of the ECtHR, that giving notice to the participants and complying with regulation 55 (2) and 55 (3) of the Regulations of the Court placed the parties in a position to exercise their rights.¹³¹ It further recalled that Mr Katanga had already responded to most of the factual and legal issues that arose under article 25 (3) (d) of the Statute.¹³²

62. The Trial Chamber also stated that it was essential to ensure that Mr Katanga’s right not to be compelled to testify to his detriment within the meaning of article 67 (1) (g) of the Statute was not violated, “[c]onsidering the use to which Germain Katanga’s own testimony may be put in ‘triggering’ regulation 55”.¹³³ In that connection, the Trial Chamber concluded that this right was not infringed by the use of regulation 55 of the Regulations of the

Court.¹³⁴ Having recalled that “[i]n practice, the right not to be compelled to testify against oneself [. . .] seeks to ensure that confessions obtained under duress or by coercion or subterfuge cannot be used at trial in disregard of the expressed will of the accused to remain silent”,¹³⁵ the Trial Chamber stated that Mr Katanga freely chose to give evidence, in the presence of his counsel, knowing that his testimony may be used to incriminate him.¹³⁶ While recognising that “[a]rguably, the Accused might have expressed himself differently had he known beforehand that his statements would be used under article 25(3)(d)”, the Trial Chamber stated that the parties were “fully aware of the existence of regulation 55” and he now had the opportunity to make submissions on the proposed re-characterisation and “to provide any clarifications he wishes regarding statements he has made”.¹³⁷

63. The Trial Chamber acknowledged that giving notice under regulation 55 of the Regulations of the Court would prolong the proceedings, but not in a manner that would “inevitably entail a violation of the right to be tried without undue delay”.¹³⁸ The Trial Chamber “will ensure that the application of [regulation 55 of the Regulations of the Court] does not engender a future unjustified or undue delay”.¹³⁹

64. The Trial Chamber provided for measures to be taken in accordance with regulation 55 (2) of the Regulations of the Court, including giving the parties the opportunity to make written submissions on the legal re-characterisation described and requiring Mr Katanga to state whether he wishes to call witnesses or present other evidence pursuant to regulation 55 (3) (b) of the Regulations of the Court.¹⁴⁰

65. In the Dissenting Opinion, Judge Van den Wyngaert concluded that the Impugned Decision could not be implemented fairly and was incompatible with articles 64 (2) and 67 (1) (a), (b), (c), (g) and (i) of the Statute.¹⁴¹ In his submissions on appeal, Mr Katanga raises arguments that reflect views expressed in the Dissenting Opinion.

2. *Submissions of the parties and participants before the Appeals Chamber*

(a) **Timing of the Impugned Decision and the right to an effective defence**

66. Mr Katanga argues that early notice of a possible re-characterisation pursuant to regulation 55 of the Regulations of the Court is “essential to fair trial in all but the most technical of changes”.¹⁴² He challenges¹⁴³ the position of the Trial Chamber on the case-law of the ECtHR, supporting its finding that the legal re-characterisation of facts even late in the criminal proceedings is not *per se* incompatible with the right to be informed of the charges promptly.¹⁴⁴

67. Mr Katanga submits that his right to be informed promptly of the charges and to have adequate time and facilities to prepare his defence is compromised because he a) should have been informed prior to the defence case, or in any event in a much more timely fashion,¹⁴⁵ that there may be a change in the legal characterisation, b) his defence strategy, including his decision to testify, may have been different, had he known that the alleged form of participation may change, thereby infringing his right not to be compelled to testify.¹⁴⁶

68. In elaborating upon these arguments, Mr Katanga avers that early notice of the charges determines the defence strategy in an adversarial trial: “what evidence to challenge, whether to call any evidence and, in particular, whether to testify”.¹⁴⁷ He argues, including by reference to views expressed in the Dissenting Opinion,¹⁴⁸ that he did not anticipate that the charges “would be changed in this manner”,¹⁴⁹ and that he would have conducted his case significantly differently had he had early notice of the re-characterisation.¹⁵⁰ He states that he would have “been contesting a different case”;¹⁵¹ that he may not have put forward a positive defence case and that it is unlikely that he would have given evidence.¹⁵² He further submits that the focus of the defence case could have been different.¹⁵³ He avers that article 25 (3) (d) of the Statute is not “a lesser included mode of liability” of article 25 (3) (a) of the Statute as “[p]roof of an essential contribution to a common plan does not necessarily mean proof of a non-essential contribution to a crime” (footnote omitted).¹⁵⁴ Mr Katanga argues in addition that, at this late stage of the proceedings,¹⁵⁵ he is “left in doubt as to the nature and extent of the charge it is proposed he faces”:¹⁵⁶ specifically, no Trial Chamber has yet defined the “unclear” form of participation provided for in article 25 (3) (d) of the Statute – and that he will not now have the benefit of having its scope “raised, discussed and if necessary, reviewed in the Confirmation process”.¹⁵⁷

69. While Mr Katanga refers to the Impugned Decision being incompatible with his right not to have imposed on him any reversal of the burden of proof or any onus of rebuttal pursuant to article 67 (1) (i) of the Statute in one introductory sub-paragraph of the Document in Support of the Appeal,¹⁵⁸ he does not further elaborate this argument elsewhere in his submissions.

70. The Prosecutor submits that both a review of comparable national jurisdictions¹⁵⁹ and, contrary to the submissions of Mr Katanga, the case-law of the ECtHR,¹⁶⁰ supports the position adopted by the Trial Chamber.

71. The Prosecutor generally argues that:

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.¹⁶¹

72. The Prosecutor further submits that it was reasonably foreseeable to Mr Katanga that notice to re-characterise the facts might be given.¹⁶² She submits that, in devising its strategy, the defence must bear the existence of regulation 55 of the Regulations of the Court in mind.¹⁶³ She further submits that the re-characterisation now proposed would be, as said by the Trial Chamber, a “relatively limited step”.¹⁶⁴

73. On the facts, the Prosecutor argues that Mr Katanga was charged with having planned the attack on Bogoro together with his subordinates, participating in the attack and being present in its aftermath, a role “perfectly compatible with common purpose liability”, with that common purpose capable of being inferred from the intention of the leader of the group.¹⁶⁵ She further submits that “it is immaterial whether the legal elements of Article 25(3)(d)(ii) are necessarily subsumed in those of Article 25(3)(a)”, as there is a “close proximity” between the two forms of participation and the facts and circumstances could support the form of participation now under consideration.¹⁶⁶

74. The Prosecutor submits that, at this stage, “there is no reason to conclude that early notice would have made a significant difference to the manner in which [Mr Katanga] conducted his case”.¹⁶⁷

75. In response to Mr Katanga’s argument that article 25 (3) (d) of the Statute is unclear and unsettled law, the Prosecutor avers that “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”;¹⁶⁸ and that Mr Katanga has made, and has been invited to present future, submissions on the mode of liability.¹⁶⁹

76. The victims make arguments which are largely to similar effect to those of the Prosecutor.¹⁷⁰ The Legal Representatives of Victims argue, *inter alia*, that Mr Katanga was informed promptly and in detail of the charges in the Decision on the Confirmation of Charges and in the Summary of the Charges,¹⁷¹ and that he has been able to defend himself in relation to the facts that are directly linked to the proposed re-characterisation.¹⁷²

(b) Right to be informed of the charges in detail

77. Mr Katanga argues that the notice given by the Trial Chamber, i.e. the Impugned Decision, violates his right to be informed of the charges in detail.¹⁷³ Specifically, Mr Katanga argues that, “in marked contrast to the particulars of the charges provided to the accused by the Confirmation Decision which ran to 98 pages of law and fact”, the Impugned Decision does not clearly indicate the material facts being relied upon for the proposed re-characterisation, “[f]or example, the defence has little information about the group of persons acting with a common purpose”.¹⁷⁴ He argues that the appropriate remedy for the Trial Chamber’s failure to give sufficient details is to “overturn” the Impugned Decision.¹⁷⁵

78. The Prosecutor argues that it is clear from the Impugned Decision that the facts to be relied upon are those that were included in the charges and that the Impugned Decision “lays out clusters of general facts for each of the components of Article 25(3)(d)(ii)”.¹⁷⁶ She further submits that the Decision on the Confirmation of Charges, when read with the Summary of the Charges and the Prosecutor’s table of evidence, provides sufficient factual detail.¹⁷⁷ The Prosecutor also argues that the Trial Chamber pointed out certain facts and evidence on which it would

not rely, thereby narrowing the amount of material that Mr Katanga needs to address.¹⁷⁸ The Prosecutor further avers that the Impugned Decision established that all facts relevant to Mr Ngudjolo would be disregarded, therefore clarifying on which of the charged facts the Chamber intended to rely.¹⁷⁹

79. The Legal Representative of Victims Group 1 argues that the Impugned Decision clearly sets out the facts that would be retained if a re-characterisation were made.¹⁸⁰

(c) Right to an impartial trial

80. Mr Katanga submits, including by reference to the Dissenting Opinion,¹⁸¹ that the timing and nature of the Impugned Decision, including the language employed by the Trial Chamber, violates his right to an impartial trial and creates an appearance of bias because the Judges appear to want to convict him and risk “being seen as performing a prosecutorial function”.¹⁸²

81. The Prosecutor argues that neither the late stage at which the Impugned Decision was rendered nor the decision of the Trial Chamber to consider regulation 55 of the Regulations of the Court on its own motion can give rise to an objective appearance of bias.¹⁸³ The Prosecutor further submits that “[i]f the Appellant’s arguments were to be accepted, any notice provided under Regulation 55 [. . .] would automatically trigger this objection, thereby rendering its application void”.¹⁸⁴

(d) Right to be tried without undue delay

82. Mr Katanga argues that the Impugned Decision violates the right to be tried without undue delay because changing the legal characterisation of the facts would necessarily prolong the trial—a process that “has already taken over five years”.¹⁸⁵ He notes that, in the absence of the Impugned Decision, the judgment in his case would have been rendered on 18 December 2012 and it is likely that he would have been acquitted.¹⁸⁶ He argues that he cannot at this stage be expected to re-open the case or recall witnesses.¹⁸⁷ Referring to deteriorating security conditions in the Ituri region and the difficulty in securing the cooperation of witnesses, Mr Katanga submits that any necessary additional investigations will cause further delay.¹⁸⁸ For the Trial Chamber to address the scope and definition of article 25 (3) (d) (ii) of the Statute at this stage of the proceedings, further to submissions from the participants, will, it is argued, also impact upon their fairness and expeditiousness.¹⁸⁹ He also argues that his defence team may not be available to continue in a case that is re-opened.¹⁹⁰ Mr Katanga provides further details of this in his Response to the Victims’ Observations, in which he states that, during the period of deliberations, defence resources have reduced.¹⁹¹

83. Mr Katanga submits that the Appeals Chamber may presume that further investigations may be necessary in this case. He states that:

Given the existing lack of clarity as to the facts upon which the new mode of responsibility may be based, the extent of future defence investigations is difficult to finalise. In any event, this appeal is not the proper forum for the accused to enter into such details, though the accused can provide them, on an *ex parte* basis, if called upon to do so by the Appeals Chamber.¹⁹²

84. The Prosecutor submits that, “[a]t this stage, it is impossible to know if there will be substantial delay” and that Mr Katanga’s arguments in this regard are speculative and premature.¹⁹³ Arguments to similar effect are made by the Legal Representatives of Victims.¹⁹⁴

3. Determination by the Appeals Chamber

85. Mr Katanga raises several arguments to the effect that the Impugned Decision violates a number of his rights laid down in article 67 (1) of the Statute, is therefore unfair and should be reversed.

(a) General considerations in relation to fairness

86. The Appeals Chamber has had specific regard to, and emphasises the importance of, the rights of the accused to a fair trial, as detailed in article 67 of the Statute. The Appeals Chamber further underlines that, pursuant to article

21 (3) of the Statute, the application and interpretation of the law of the Court “must be consistent with internationally recognized human rights”.

87. The Appeals Chamber underscores that regulation 55 (2) and (3) of the Regulations of the Court make specific provision, *inter alia*, for notice of a possible re-characterisation to be given to the parties and for the receipt of their submissions thereon,¹⁹⁵ in particular ensuring that the accused has adequate time and facilities to prepare the defence in accordance with article 67 (1) (b) of the Statute¹⁹⁶ and has the opportunity to examine witnesses or to present other evidence in accordance with article 67 (1) (e) of the Statute.¹⁹⁷

88. The Appeals Chamber further recalls that, in the *Lubanga OA 15 OA 16 Judgment*, it held that:

[. . .] human rights law demands that the modification of the legal characterisation of facts in the course of the trial must not render that trial unfair. The Appeals Chamber notes in this context that article 67 (1) (b) of the Statute provides for the right of the accused person to “have adequate time and facilities for the preparation of the defence”. It is to avoid violations of this right that Regulation 55 (2) and (3) set out several stringent safeguards for the protection of the rights of the accused. How these safeguards will have to be applied to protect the rights of the accused fully and whether additional safeguards must be implemented has not been fully considered in the context of the present appeal and will depend on the circumstances of the case.¹⁹⁸ [Footnote omitted.]

89. The Appeals Chamber notes that, in the Impugned Decision, the Trial Chamber specifically considered the relevant rights of Mr Katanga under article 67 (1) of the Statute (summarised above), thereby making it clear that it was aware of the various rights that could potentially be violated in the course of making a re-characterisation pursuant to regulation 55 of the Regulations of the Court. Furthermore, the Trial Chamber expressly took into account the protections guaranteed by regulation 55 (2) and (3) of the Regulations of the Court by making specific provision for submissions to be made, including by Mr Katanga in relation to those matters set out in regulation 55 (3) of the Regulations of the Court.¹⁹⁹

90. The Appeals Chamber further emphasises that, when leave to appeal the Impugned Decision was granted, those submissions had not yet been received (and, considering that the proceedings have been in suspension thereafter, have still not been received). At the present stage of the proceedings, the Appeals Chamber is not called upon to, and cannot, rule on the measures that the Trial Chamber may take in the future to ensure the continued fairness of the proceedings, should the re-characterisation proceed.

91. In these circumstances, the Appeals Chamber cannot determine conclusively now whether the trial as a whole will remain fair if the re-characterisation proceeds. Whether it will depends to a large extent upon how the Trial Chamber conducts the further proceedings and, in particular, on the measures it will take to protect Mr Katanga's rights. Nevertheless, the Appeals Chamber will briefly address the arguments of Mr Katanga that the Impugned Decision has rendered the trial unfair. Any such assessment is without prejudice to any ruling that it may be called upon to make in the future as to whether the trial in fact remained fair, should the Trial Chamber proceed to re-characterise the facts in this case in its decision under article 74 of the Statute.

(b) Timing of the Impugned Decision and the right to an effective defence

92. Mr Katanga avers that the timing of the Impugned Decision violates his rights under article 67 (1) (a) and (b) of the Statute because notice that the legal characterisation may change was only given at the deliberations stage of the proceedings.

93. The Appeals Chamber has found above that there is no reason, in principle, why notice of a proposed re-characterisation cannot be given at the present stage of the proceedings. It has been demonstrated earlier that regulation 55 of the Regulations of the Court itself does not prohibit this from being done. Internationally recognised human rights do not require a different interpretation of this legal provision. The cases of the ECtHR referred to by the Trial Chamber demonstrate that changes to the legal characterisation of facts may be addressed at late stages of the proceedings, including at the appeals stage, or in review proceedings before the highest domestic courts, without necessarily causing unfairness.²⁰⁰ The jurisprudence of the ECtHR equally provides that notice of a possible

re-characterisation is necessary in order to give the accused the possibility to defend himself or herself in a practical and effective manner and in good time against any such possible re-characterisation.²⁰¹

94. The Appeals Chamber has had regard to Mr Katanga's arguments in relation to the case-law of the ECtHR, but does not find them to be convincing. None of his arguments undermines the general principle that can be drawn from those cases, namely that notice of a legal re-characterisation at a late stage of the proceedings does not, in and of itself, violate the right to a fair trial. As such, there is no reason of principle as to why, without more, the timing of the notice of re-characterisation would result in a violation of Mr Katanga's right to be informed promptly of the charges under article 67 (1) (a) of the Statute in the present case.

95. In relation to the arguments that Mr Katanga makes about his defence strategy, the Appeals Chamber neither knows the precise nature of the re-characterisation that may be made nor the evidence on which the Trial Chamber may rely in relation thereto, and the impact that this may have on the effectiveness of Mr Katanga's defence as a whole. Therefore, it is premature for the Appeals Chamber to address Mr Katanga's arguments in this regard at this stage of the proceedings. The Appeals Chamber, however, recalls that, having been given notice of the potential re-characterisation, regulation 55 (3) (a) of the Regulations of the Court requires the accused to have adequate time and facilities for the effective preparation of his defence – and that the Trial Chamber has given Mr Katanga the opportunity to make submissions. In those submissions Mr Katanga may, *inter alia*, address the scope of article 25 (3) (d) of the Statute and point out measures that he believes are necessary in order to safeguard his rights pursuant to article 67. The Trial Chamber thereafter will need to assess whether it remains possible for Mr Katanga effectively to prepare his defence in light of both the manner in which the trial has been conducted to date and the re-characterisation that is now proposed. The Trial Chamber will also need to consider what measures may need to be implemented to ensure that the trial as a whole remains fair. Such consideration could include an assessment by the Trial Chamber of whether Mr Katanga has, in fact, been prejudiced by a re-characterisation made at this stage, including in particular whether he has been deprived of mounting the defence in relation to article 25 (3) (d) of the Statute that he otherwise would have wished to present.

96. In light of the above, the Appeals Chamber cannot conclude, at this stage, that proceeding with the proposed re-characterisation would result in a violation of his right to an effective defence. Any such determination by the Appeals Chamber would be premature.

(c) Right to be tried without undue delay

97. Mr Katanga submits that the Impugned Decision violates his right to be tried without undue delay because, at this late stage, it will necessarily prolong the trial. In this context, it is recalled that at paragraph 86 of the *Lubanga OA 15 OA 16 Judgment*, the Appeals Chamber held:

As to the right to a trial without undue delay (article 67 (1) (c) of the Statute), the Appeals Chamber does not consider that a change of the legal characterisation of the facts pursuant to Regulation 55 as such will automatically lead to undue delay of the trial. Whether a re-characterisation leads to undue delay will depend on the circumstances of the case.

98. The Appeals Chamber finds that the arguments of Mr Katanga that the Impugned Decision violates his right to be tried without undue delay are premature. At present, the Appeals Chamber is not in a position to judge how much time will be added to the trial proceedings as a result of the re-characterisation. The arguments raised concerning the extent of further defence investigations, whether the security situation in the Ituri region will cause further delay, whether witnesses will co-operate and whether members of Mr Katanga's defence team will remain available are speculative. At this stage of the proceedings, the Trial Chamber is in the best position to assess such arguments, based upon the conduct of the trial to date, the precise nature of the re-characterisation proposed and following receipt of the submissions that it has requested from the participants. The Appeals Chamber notes, however, that insofar as Mr Katanga argues that during the period of deliberations defence resources have reduced, it is to be assumed that, upon application by the defence, appropriate additional resources could be provided, should the trial proceed.

99. The Appeals Chamber emphasises that it is concerned that the Impugned Decision was rendered almost six months into the deliberations of the Trial Chamber. Nevertheless, at the present time it is not clear that “undue delay” will be caused as a result of the Impugned Decision. However, given that notice under regulation 55 (2) of the Regulations of the Court was given at the deliberations stage, the Trial Chamber will need to be particularly vigilant in ensuring Mr Katanga’s right to be tried without undue delay. Recalling article 64 (2) of the Statute, the Appeals Chamber emphasises that the Trial Chamber will have to ensure that the proceedings, taken as a whole, are fair and expeditious.

(d) Right to be informed of the charges in detail

100. The Appeals Chamber recalls that, under article 67 (1) (a) of the Statute, the accused is entitled to be informed of the “nature, cause and content” of the charges, which includes both the factual allegations and their legal characterisation. In light of this provision, the purpose of regulation 55 (2) of the Regulations of the Court is to ensure that the accused is informed of a possible change to the legal characterisation. This reading is consistent with the jurisprudence of the ECtHR, according to which notice of an envisaged change in the legal characterisation of the facts is required so as to allow the accused to exercise his or her rights in a practical and effective manner.²⁰² By issuing the Impugned Decision, the Trial Chamber informed Mr Katanga of the potential change from article 25 (3) (a) to article 25 (3) (d) of the Statute, thereby ensuring that Mr Katanga remains informed of this aspect of the charges, namely their legal characterisation.

101. As to the argument that the Impugned Decision does not clearly inform Mr Katanga of the facts upon which the Trial Chamber intends to rely, the Appeals Chamber notes that, if a Trial Chamber gives notice under regulation 55 (2) of the Regulations of the Court, the Trial Chamber may also need to indicate upon which specific facts, within the “facts and circumstances described in the charges”, it intends to rely. This is, in particular, because the charges before this Court usually cover complex factual allegations, and more detailed information about the factual allegations to which the potential change in the legal characterisation of the facts relate will therefore often be required to enable the accused to defend himself or herself effectively. Such information, however, may be provided not only at the time of giving notice under regulation 55 (2) of the Regulations of the Court, but also, in an adequate manner, subsequently in the proceedings.

102. Turning to the case at hand, and as mentioned above, in addition to informing Mr Katanga of the potential change in the legal characterisation of the facts, the Impugned Decision sets out generally on which facts the Trial Chamber intends to rely.²⁰³ The information contained in those paragraphs, however, does not provide much detail, for instance, in relation to the “group of persons acting with a common purpose”, a fact noted by Mr Katanga.²⁰⁴ The Appeals Chamber considers that, at this stage, the Trial Chamber is in the best position to determine what level of factual detail has to be provided to Mr Katanga in order not to prejudice his right to be informed of the charges against him, taking into account, *inter alia*, the way in which the trial has been conducted to date when combined with what it now proposes by way of re-characterisation. Should, however, the Trial Chamber consider that further information is required, the Appeals Chamber is of the view that it should be provided to Mr Katanga as soon as possible, to enable him to make effective submissions thereon. The Appeals Chamber underlines that it will be able to determine conclusively only at the end of the trial whether Mr Katanga’s right to be informed of the charges in detail was respected.

(e) Right to an impartial trial

103. The Appeals Chamber is not persuaded by Mr Katanga’s argument that his right to an impartial trial has been violated by the Impugned Decision.

104. First, the Trial Chamber does not risk being seen as “performing a prosecutorial function”.²⁰⁵ Regulation 55 of the Regulations of the Court exists so as to assist the judges in ensuring that justice is done in individual cases by means of giving notice that the legal characterisation of facts may be subject to change in pursuing its duty to establish the truth and “to close accountability gaps”.²⁰⁶ Regulation 55 of the Regulations of the Court specifically empowers the Trial Chamber to give such notice, even in the absence of a request by the Prosecutor to that effect. Giving such notice is therefore a neutral judicial act, which, without more, has no impact on the impartiality of the

Judges exercising their powers. As argued by the Prosecutor, if the argument of Mr Katanga were to be accepted, then the provision would, in effect, be rendered inapplicable.

105. Second, the Appeals Chamber specifically finds that the stage of the proceedings at which regulation 55 of the Regulations of the Court was invoked also does not give rise to an appearance of bias. The Appeals Chamber does not conclude that any of the considerations that were outlined in the previous paragraph are affected by the stage at which the notice under regulation 55 of the Regulations of the Court is given. Finally, the Appeals Chamber does not accept that the language used in the Impugned Decision affects its conclusion: the Trial Chamber was fully aware that the final decision on the legal re-characterisation, if any, would and could only be taken in the decision pursuant to article 74 of the Statute, following, *inter alia*, the receipt of submissions from the parties.

IV. APPROPRIATE RELIEF

106. On an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case, for the reasons given above, it is appropriate to confirm the Impugned Decision.

Judge Cuno Tarfusser appends a dissenting opinion to this judgment.

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

[undersigned]

Judge Sang-Hyun Song
Presiding Judge

Dated this 27th day of March 2013
At The Hague, The Netherlands

ENDNOTES

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| <p>1 ICC-01/04-01/07-T-80-ENG.</p> <p>2 “Declaration of closure of submission of evidence”, 7 February 2012, ICC-01/04-01/07-3235-tENG (hereinafter: “Declaration of Closure of Submission of Evidence”).</p> <p>3 “Mémoire final”, ICC-01/04-01/07-3251-Conf; a corrigendum, ICC-01/04-01/07-3251-Conf-Corr and a public redacted version, ICC-01/04-01/07-3251-Corr-Red, were subsequently filed.</p> <p>4 “Defence Closing Brief”, ICC-01/04-01/07-3266-Conf; a corrigendum, ICC-01/04-01/07-3266-Conf-Corr2, and a public redacted version, ICC-01/04-01/07-3266-Corr2-Red, were subsequently filed.</p> <p>5 ICC-01/04-01/07-T-336-ENG to ICC-01/04-01/07-T-340-ENG.</p> <p>6 ICC-01/04-01/07-3319-tENG/FRA.</p> <p>7 Impugned Decision, p. 29; the French original reads: “que le mode de responsabilité retenu à l’encontre de Germain Katanga est susceptible de faire l’objet d’une requalification juridique sur le fondement de l’article 25-3-d du Statut”.</p> <p>8 Impugned Decision, paras 9, 59, 62 and p. 30.</p> | <p>9 “Jugement rendu en application de l’article 74 du Statut”, ICC-01/04-02/12-3.</p> <p>10 ICC-01/04-01/07-3327.</p> <p>11 Decision Granting Leave to Appeal, p. 9.</p> <p>12 ICC-01/04-01/07-3339 (OA 13).</p> <p>13 “Decision on the request for suspensive effect of the appeal against Trial Chamber II’s decision on the implementation of regulation 55 of the Regulations of the Court”, ICC-01/04-01/07-3344 (OA 13).</p> <p>14 ICC-01/04-01/07-3347 (OA 13); a corrigendum, ICC-01/04-01/07-3347-Corr (OA 13), was filed on 22 January 2013.</p> <p>15 “Decision on the application of victims to participate in the appeal against Trial Chamber II’s decision on the implementation of regulation 55 of the Regulations of the Court”, 17 January 2013, ICC-01/04-01/07-3346 (OA 13).</p> <p>16 Legal Representative of Victims Group 2, “Submissions of the Legal Representative of child soldier victims on the Defence’s ‘Document in Support of the Appeal Against the ‘Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons’””, ICC-01/04-01/07-3348-tENG (OA 13) (hereinafter:</p> |
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- “Legal Representative of Victims Group 2 Observations”); Legal Representative of Victims Group 1, “Observations of the Legal Representative on the Defence’s document in support of appeal against Trial Chamber II’s decision No. 3319 (implementation of regulation 55 of the Regulations of the Court)”, ICC-01/04-01/07-3349-tENG (OA 13) (hereinafter: “Legal Representative of Victims Group 1 Observations”).
- 17 “Defence Reply to the Legal Representatives’ Observations on the Defence’s Document in Support of Appeal against the Decision on the Implementation of Regulation 55”, ICC-01/04-01/07-3350 (OA 13) (hereinafter: “Response to the Victims’ Observations”).
- 18 Decision Granting Leave to Appeal, para. 4; *see also* Document in Support of the Appeal, para. 11.
- 19 *See* Document in Support of the Appeal, paras 13-29, 67-94.
- 20 *See* Document in Support of the Appeal, paras 13-21, 30-66.
- 21 Impugned Decision, para. 15.
- 22 Impugned Decision, para. 17. *See also* paras 16, 18.
- 23 Document in Support of the Appeal, paras 26-27.
- 24 Document in Support of the Appeal, para. 26.
- 25 Document in Support of the Appeal, para. 26.
- 26 Document in Support of the Appeal, para. 27. *See also* Response to the Victims’ Observations, para. 6.
- 27 Response to the Victims’ Observations, para. 4.
- 28 Response to the Victims’ Observations, para. 6.
- 29 Response to the Document in Support of the Appeal, para. 26.
- 30 Response to the Document in Support of the Appeal, para. 27.
- 31 Response to the Document in Support of the Appeal, para. 29.
- 32 Response to the Document in Support of the Appeal, para. 30.
- 33 Response to the Document in Support of the Appeal, para. 31.
- 34 Legal Representative of Victims Group 1 Observations, paras 13-23; Legal Representative of Victims Group 2 Observations, paras 24-31.
- 35 ICC-01/04-01/07-T-333-Red2-ENG CT2.
- 36 Declaration of Closure of Submission of Evidence.
- 37 ICC-01/04-01/07-T-336-ENG to ICC-01/04-01/07-T-340-ENG.
- 38 It is noted that if the Trial Chamber decides to re-open the hearing, it will need to repeat the procedure set out in rule 141 of the Rules of Procedure and Evidence when closing the evidence.
- 39 “Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled ‘Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’”, 8 December 2009, ICC-01/04-01/06-2205 (OA 15 OA 16) (hereinafter: “*Lubanga OA 15 OA 16 Judgment*”), para. 77 (footnote omitted).
- 40 *See Lubanga OA 15 OA 16 Judgment*, para. 76.
- 41 *Lubanga OA 15 OA 16 Judgment*, para. 77.
- 42 26 June 2008, ICC-01/04-01/07-649-Anx1A.
- 43 26 September 2008, ICC-01/04-01/07-716-Conf. A public redacted version of the Decision on the Confirmation of Charges was registered on 1 October 2008 (ICC-01/04-01/07-717). All references to the Decision on the Confirmation of Charges in this judgment are to the public redacted version.
- 44 3 November 2009, ICC-01/04-01/07-1588-Anx 1.
- 45 “Decision on the Filing of a Summary of the Charges by the Prosecutor”, 21 October 2009, ICC-01/04-01/07-1547-tENG.
- 46 The abbreviation used for the “*Force de Résistance Patriotique en Ituri*”.
- 47 The abbreviation used for the “*Front des Nationalistes et Intégrationnistes*”.
- 48 Amended Document Containing the Charges, para. 63. *See also* paras 65, 66, 90.
- 49 Amended Document Containing the Charges, para. 91. *See also* para. 94.
- 50 Amended Document Containing the Charges, para. 92. *See also* paras 42, 44, 63-78, 85, 87.
- 51 Amended Document Containing the Charges, para. 93.
- 52 Decision on the Confirmation of Charges, para. 275. *See also*, for instance, paras 281, 413.
- 53 Decision on the Confirmation of Charges, paras 466-539.
- 54 Decision on the Confirmation of Charges, paras 540-572.
- 55 Decision on the Confirmation of Charges, para. 540.
- 56 Decision on the Confirmation of Charges, para. 543.
- 57 Decision on the Confirmation of Charges, paras 545-547.
- 58 Decision on the Confirmation of Charges, para. 548.
- 59 Decision on the Confirmation of Charges, para. 555.
- 60 Decision on the Confirmation of Charges, para. 555.
- 61 *See*, for instance, Decision on the Confirmation of Charges, paras 548, 555-558, footnote 733.
- 62 Decision on the Confirmation of Charges, para. 560.
- 63 Decision on the Confirmation of Charges, para. 561.
- 64 Decision on the Confirmation of Charges, paras 562-569.
- 65 *See*, in particular, examples contained within the Summary of the Charges, paras 60-88.
- 66 For instance, the Prosecutor stated at footnote 131, with reference to paragraph 65 of the Amended Document Containing the Charges, that the planning meeting that was alleged to have taken place in Aveda in early 2003 was attended by Mr Katanga and “most of the FRPI commanders”, specifying the names of those individuals.
- 67 Impugned Decision, para. 5.
- 68 Impugned Decision, para. 5.
- 69 Impugned Decision, para. 6. The original French version of the Impugned Decision reads: “[...] la qualification juridique des faits relative au mode de participation de Germain Katanga est susceptible d’être modifiée”.
- 70 Impugned Decision, para. 7. *See also* para. 6.
- 71 Impugned Decision, para. 8. *See also* para. 12.
- 72 Impugned Decision, para. 10. *See also* paras 11, 21, 22, 31.
- 73 Impugned Decision, para. 22.
- 74 Impugned Decision, para. 23.
- 75 Impugned Decision, para. 24.

- 76 Impugned Decision, para. 26.
- 77 Impugned Decision, para. 27.
- 78 Impugned Decision, para. 28.
- 79 Impugned Decision, para. 29.
- 80 Impugned Decision, para. 29 [footnote omitted].
- 81 Impugned Decision, para. 30.
- 82 Impugned Decision, para. 30.
- 83 Impugned Decision, para. 32.
- 84 Impugned Decision, para. 31.
- 85 Impugned Decision, paras 33, 40.
- 86 “Décision relative à la mise en oeuvre de la norme 55 du Règlement de la Cour et prononçant la disjonction des charges portées contre les accusés”, 21 November 2012, ICC-01/04-01/07-3319, pp. 33-61.
- 87 Dissenting Opinion, paras 12-23.
- 88 Document in Support of the Appeal, para. 67.
- 89 Document in Support of the Appeal, paras 68-70, referring to the *Lubanga OA 15 OA 16 Judgment*, fn. 163 and the Dissenting Opinion, para. 13.
- 90 Document in Support of the Appeal, para. 71. *See also* Dissenting Opinion, paras 14-17.
- 91 Document in Support of the Appeal, para. 75.
- 92 *See* Decision on the Confirmation of Charges, para. 555 (ii).
- 93 Document in Support of the Appeal, para. 75.
- 94 Document in Support of the Appeal, para. 75.
- 95 Document in Support of the Appeal, paras 76-77.
- 96 Document in Support of the Appeal, para. 77. *See also* Dissenting Opinion, para. 22.
- 97 Document in Support of the Appeal, para. 78.
- 98 Document in Support of the Appeal, para. 78, referring to Dissenting Opinion, paras 21-22. *See also* Dissenting Opinion, paras 18-20.
- 99 Document in Support of the Appeal, para. 82. *See also* paras 79-81.
- 100 Document in Support of the Appeal, paras 83-90.
- 101 Document in Support of the Appeal, para. 87.
- 102 Document in Support of the Appeal, para. 89.
- 103 Response to the Victims’ Observations, paras 15-23.
- 104 Response to the Victims’ Observations, paras 17-18.
- 105 Response to the Victims’ Observations, para. 21.
- 106 Response to the Victims’ Observations, para. 21.
- 107 Response to the Document in Support of the Appeal, para. 49.
- 108 Response to the Document in Support of the Appeal, para. 62.
- 109 Legal Representative of Victims Group 1 Observations, paras 24-27; Legal Representative of Victims Group 2 Observations, paras 32-39.
- 110 Legal Representative of Victims Group 1 Observations, paras 25-26.
- 111 Legal Representative of Victims Group 2 Observations, para. 34.
- 112 Legal Representative of Victims Group 2 Observations, para. 33.
- 113 Legal Representative of Victims Group 2 Observations, para. 35.
- 114 Legal Representative of Victims Group 2 Observations, para. 36.
- 115 *See generally* *Lubanga OA 15 OA 16 Judgment*, paras 89-93.
- 116 *See Lubanga OA 15 OA 16 Judgment*, para. 91: “Thus, the purpose of [article 74 (2) of the Statute] was to bind the Chamber to the factual allegations in the charges”.
- 117 The footnote reads as follows: “In the view of the Appeals Chamber, the term ‘facts’ refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61 (5) of the Statute), as well as 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 charged”.
- 118 Impugned Decision, para. 27.
- 119 Impugned Decision, para. 29.
- 120 Impugned Decision, para. 28. *See also* para. 33.
- 121 Impugned Decision, para. 30. *See also* para. 33.
- 122 Impugned Decision, para. 29.
- 123 Impugned Decision, paras 55, 57.
- 124 Document in Support of the Appeal, para. 82.
- 125 Impugned Decision, para. 11.
- 126 Impugned Decision, para. 13.
- 127 Impugned Decision, para. 20.
- 128 Impugned Decision, para. 18.
- 129 Impugned Decision, para. 19.
- 130 Impugned Decision, paras 21-34, as summarised above.
- 131 Impugned Decision, paras 35-39.
- 132 Impugned Decision, para. 40.
- 133 Impugned Decision, para. 20.
- 134 Impugned Decision, para. 47.
- 135 Impugned Decision, para. 49 (footnote omitted).
- 136 Impugned Decision, para. 51.
- 137 Impugned Decision, para. 52.
- 138 Impugned Decision, paras 43-46.
- 139 Impugned Decision, para. 44.
- 140 Impugned Decision, paras 53-57.
- 141 Dissenting Opinion, paras 53, 58. *See, generally*, paras 24-57 of the Dissenting Opinion.
- 142 Document in Support of the Appeal, para. 39. *See also* paras 30-44.
- 143 Document in Support of the Appeal, paras 52-55. *See also* paras 56-62.
- 144 *See* Impugned Decision, paras 16, 18, 22 and 37.
- 145 Document in Support of the Appeal, para. 44. *See also* para. 36; Response to the Victims’ Observations, paras 8-10.
- 146 Document in Support of the Appeal, para. 14A.
- 147 Document in Support of the Appeal, para. 34.
- 148 Document in Support of the Appeal, paras 37-38, referring to paras 36 and 40-41 of the Dissenting Opinion. *See, generally*, paras 36-47 of the Dissenting Opinion.

- 149 Document in Support of the Appeal, para. 37. *See also* para. 38.
- 150 Document in Support of the Appeal, para. 42.
- 151 Document in Support of the Appeal, para. 91.
- 152 Document in Support of the Appeal, para. 92.
- 153 Document in Support of the Appeal, para. 93. *See also* Response to the Victims' Observations, para. 32.
- 154 Document in Support of the Appeal, para. 43. *See also* Dissenting Opinion, paras 42-43.
- 155 *See* Response to the Victims' Observations, paras 13-14.
- 156 Document in Support of the Appeal, para. 14D.
- 157 Document in Support of the Appeal, para. 50.
- 158 Document in Support of the Appeal, para. 14A.
- 159 Response to the Document in Support of the Appeal, paras 32-34.
- 160 Response to the Document in Support of the Appeal, paras 35-40.
- 161 Response to the Document in Support of the Appeal, para. 42. *See also* paras 43-47.
- 162 Response to the Document in Support of the Appeal, paras 63-70.
- 163 Response to the Document in Support of the Appeal, para. 64. *See also* paras 65 and 67.
- 164 Response to the Document in Support of the Appeal, para. 67.
- 165 Response to the Document in Support of the Appeal, para. 68.
- 166 Response to the Document in Support of the Appeal, para. 70.
- 167 Response to the Document in Support of the Appeal, para. 69.
- 168 Response to the Document in Support of the Appeal, para. 72.
- 169 Response to the Document in Support of the Appeal, paras 72-3.
- 170 Legal Representative of Victims Group 1 Observations, paras 29-49; Legal Representative of Victims Group 2 Observations, paras 40-53.
- 171 Legal Representative of Victims Group 1 Observations, paras 34, 36; Legal Representative of Victims Group 2 Observations, para. 45.
- 172 Legal Representative of Victims Group 1 Observations, para. 43; Legal Representative of Victims Group 2 Observations, para. 52.
- 173 Document in Support of the Appeal, para. 14E.
- 174 Document in Support of the Appeal, para. 94. *See also* para. 14E.
- 175 Response to the Victims' Observations, para. 21.
- 176 Response to the Document in Support of the Appeal, para. 75.
- 177 Response to the Document in Support of the Appeal, para. 75.
- 178 Response to the Document in Support of the Appeal, para. 76.
- 179 Response to the Document in Support of the Appeal, para. 76.
- 180 Legal Representative of Victims Group 1 Observations, para. 37. *See also* Legal Representative of Victims Group 2 Observations, para. 45.
- 181 Document in Support of the Appeal, para. 65, referring to the Dissenting Opinion, paras 28-32.
- 182 Document in Support of the Appeal, para. 66. *See also* paras 63-65.
- 183 Response to the Document in Support of the Appeal, paras 84-85.
- 184 Response to the Document in Support of the Appeal, para. 85. *See also* para. 86.
- 185 Document in Support of the Appeal, para. 45.
- 186 Document in Support of the Appeal, para. 46.
- 187 Document in Support of the Appeal, para. 48.
- 188 Document in Support of the Appeal, para. 49.
- 189 Document in Support of the Appeal, para. 50.
- 190 Document in Support of the Appeal, para. 51.
- 191 Response to the Victims' Observations, para. 33.
- 192 Response to the Victims' Observations, para. 31.
- 193 Response to the Document in Support of the Appeal, paras 78 and 79.
- 194 Legal Representative of Victims Group 1 Observations, paras 50-55; Legal Representative of Victims Group 2 Observations, paras 54-57.
- 195 Regulation 55 (2) of the Regulations of the Court.
- 196 Regulation 55 (3) (a) of the Regulations of the Court.
- 197 Regulation 55 (3) (b) of the Regulations of the Court.
- 198 *Lubanga OA 15 OA 16 Judgment*, para. 85. *See also* para. 100.
- 199 Impugned Decision, paras 53-57.
- 200 *See* ECtHR, Chamber, *Dallos v. Hungary*, "Judgment", 1 March 2001, application no. 29082/95; Chamber, *Sipavičius v. Lithuania*, "Judgment", 21 February 2002, application no. 49093/99; Grand Chamber, *Pélissier and Sassi v. France*, "Judgment", 25 March 1999, application no. 25444/94 (hereinafter: "*Pélissier and Sassi v. France*"); Chamber, *Bäckström and Andersson v. Sweden*, "Final Decision as to the Admissibility", 5 September 2006, application no. 67930/01.
- 201 *Pélissier and Sassi v. France*, paras 52, 62; ECtHR, Chamber, *Borisova v. Bulgaria*, "Judgment", 21 December 2006, application no. 56891/00, para. 41; Chamber, *Varela Geis v. Spain*, "Arrêt", 5 March 2013, application no. 61005/09, para. 44.
- 202 *Pélissier and Sassi v. France*, paras 52-54, 62; Chamber, *Drassich v. Italy*, "Arrêt", 11 December 2007, application no. 25575/04, para. 34; Chamber, *Mattochia v. Italy*, "Judgment", 25 July 2000, application no. 23969/94, paras 60-61.
- 203 *See*, in particular, Impugned Decision, paras 26-30.
- 204 *See* Document in Support of the Appeal, para. 94. *See also* Dissenting Opinion, para. 17.
- 205 Document in Support of the Appeal, para. 66.
- 206 *Lubanga OA 15 OA 16 Judgment*, para. 77.

Dissenting opinion of Judge Cuno Tarfusser

1. The Majority took the view that the Trial Chamber did not err in triggering the application of regulation 55 of the Regulations of the Court. Accordingly, it rejected the appeal and confirmed the Impugned Decision, albeit with a number of caveats and “warnings” to the Trial Chamber as regards the object and timing of the forthcoming continuation of proceedings. I concur in the point made by the Majority under Section A of the Judgment as regards the timing of the Impugned Decision. However, I strongly dissent from the Majority in two critical respects. First, I dissent from the preliminary assumption on which the Majority (albeit implicitly) premises all of its reasoning. I am not persuaded that regulation 55 of the Regulations of the Court applies to the type of change contemplated by the Trial Chamber, namely from “(indirect) co-perpetration” under article 25 (3) (a) of the Statute to “contribution to a crime committed by a group acting with a common purpose” under article 25 (3) (d) of the Statute. I also dissent from the Majority’s holding that the Impugned Decision does not violate Mr Katanga’s right to a fair trial, namely his right to be informed in detail of the nature, cause and content of the charges.

I. COMPATIBILITY OF THE IMPUGNED DECISION WITH REGULATION 55 OF THE REGULATIONS OF THE COURT—TIMING

2. I subscribe to the Majority’s view that “[t]he timing of the Impugned Decision was [. . .] not incompatible with regulation 55 of the Regulations of the Court”.¹ The wording of the regulation, stating that notice of a possible re-characterisation may be given “at any time during the trial”, is so clear as to prompt the well-known Latin maxim *in claris non fit interpretatio*: when the wording of a legal provision is univocal, the meaning and content of that provision must be determined based solely on such wording, with no need to recur to systematic or teleological arguments, or to look elsewhere. As long as it can be said that the trial is ongoing (i.e., from the first hearing until a decision under article 74 of the Statute has been rendered), regulation 55 of the Regulations of the Court may in principle be triggered. This conclusion is obviously without prejudice to the need to carefully assess whether the specific circumstances of the case make it possible to actually do so without violating the overarching right of the accused to be tried without undue delay.

II. COMPATIBILITY OF THE IMPUGNED DECISION WITH REGULATION 55 OF THE REGULATIONS OF THE COURT—ENVISAGED CHANGE IN THE LEGAL CHARACTERISATION OF FACTS

3. Without explicitly saying it,² the Majority premises all of its reasoning on the assumption that regulation 55 of the Regulations of the Court applies to the type of “change in the legal characterisation of facts” contemplated by the Trial Chamber, namely from “(indirect) co-perpetration” under article 25 (3) (a) of the Statute to “contribution to a crime committed by a group acting with a common purpose” under article 25 (3) (d) of the Statute.

4. I dissent from this assumption based on a number of considerations, relating both to the nature, scope and purpose of regulation 55 (Section A) and to the relationship between the various forms of responsibility respectively set forth in articles 25 and 28 of the Statute (Section B). I will also submit my views as to the relationship between regulation 55 of the Regulations of the Court and the current practice of the Pre-Trial Chambers at the stage of the confirmation of the charges (Section C).

A. Regulation 55 of the Regulations of the Court is a provision of an exceptional nature, as such subject to narrow interpretation

5. Regulation 55 of the Regulations of the Court vests in a Chamber the authority “to modify the legal characterisation of facts” and to do so “at any time during the trial”. In so doing, it places itself at the crossroads between two fundamental, albeit inherently conflicting, tenets of the right to a fair trial: the right to be tried without undue delay, on the one hand, and the right to be adequately informed of the nature, cause and content of the charges, on the other. Both these components are duly enshrined in the Statute, respectively under article 67 (1) (c) and article 67 (1) (a).

6. It is beyond controversy that the triggering of regulation 55 of the Regulations of the Court and of the subsequent procedural steps mentioned in its sub-regulations (2) and (3) will result in delaying the proceedings; hence

the need to read the provision through the lens of a narrow interpretive criterion which will make the adverse impact on the expeditiousness of the proceedings as limited as feasible. More specifically, I believe that the adverse impact must be circumscribed, and hence be proportional, to the need to safeguard the right to an informed, and therefore effective, defence.

7. Nowhere is the inherent tension between the necessary expeditiousness of the trial, on the one hand, and the duty to provide full information to the accused, on the other, more apparent than in the ECtHR case law, and in its carefully crafted determinations as regards the need to give notice of a modification *vis-à-vis* the original charge. Whilst invariably requiring that full, detailed information concerning the charges, including information on the legal characterisation of the relevant facts, be provided to the accused,³ the ECtHR takes great care, if only implicitly, to point out that not every difference between the legal terms of the initial accusation and those of the conviction will trigger the obligation to provide notice to the defendant for the purposes of his or her response. In particular, in a case where at stake was a conviction for aiding and abetting, which the defendant complained had not been initially charged, the ECtHR rejected the Government's argument that the offence of "aiding and abetting" the contested crime only differed from the offence initially charged in respect of the "degree of participation" of the accused and found that a violation of article 6 of the European Convention on Human Rights had occurred.⁴ In so doing, it clearly hinted at the fact that detailed information is not due when the legal characterisation found in the conviction only differs from the initial act of accusation in respect of the "degree of participation" of the defendant. Similarly, in a different case, the fact that the relevant two incriminating provisions differed in their material and mental constituent elements was the basis for the ECtHR's rejection of the Government's argument that no re-characterisation was at stake; in the view of the ECtHR, those differences and the fact that not all of the elements of the offence charged at a later stage could be considered as "intrinsic to the offence of which the applicants had been accused since the start of the proceedings" made it impossible to hold that they merely amounted "to varying degrees of the same offence".⁵ The need to make the accused aware of any change from one offence to another whenever those two offences differ "significantly" is also clearly spelt out in the ECtHR jurisprudence.⁶

8. The careful stance of the ECtHR, appropriately aimed at solving the inherent tension between those two potentially conflicting tenets of the right to a fair trial, appears of great assistance in shaping the principle which should govern the balancing act required in interpreting regulation 55 of the Regulations of the Court. The notion of modification of the legal characterisation of facts cannot be read as if it were to encompass any change brought to the initial accusation, because this would be tantamount to obliterating the right of the accused to be tried expeditiously. Rather, it must be qualified and tailored in order to ensure that the right to be tried without undue delay be curtailed only to the extent that it is necessary, with a view to preserving the right to an effective defence. Accordingly, it should be read so as to encompass only those modifications which, being significant, are suitable to have a meaningful impact on the "nature, cause and content" of the charges.

9. In my view, the specific determination as to whether a particular amendment to the initial legal framing of the charge qualifies as a modification triggering the application of regulation 55 of the Regulations of the Court has to be made on a case-by-case basis. It would not therefore be appropriate to aim at providing comprehensive and detailed guidance as to the criteria for conducting such an assessment. Accordingly, I will here only address the question raised by the specific change envisaged by the Impugned Decision, namely whether a change from (indirect) co-perpetration under article 25 (3) (a) of the Statute to contribution under article 25 (3) (d) of the Statute amounts a change that is required "to accord with the form of participation of the accused under articles 25 and 28" and suitable to trigger the application of regulation 55.

B. Regulation 55 only applies to changes to the form of participation which require shifting from article 25 to article 28 of the Statute, and *vice versa*

10. In my view, a change in "the legal characterisation of facts to accord with [. . .] the form of participation of the accused under articles 25 and 28" triggering the application of regulation 55 of the Regulations of the Court only occurs when a Chamber envisages the possibility of switching from (any of the forms of responsibility provided under) article 25 to (any of the forms of responsibility provided under) article 28 of the Statute, or *vice versa*. Conversely, whenever a Chamber, based on its assessment of the evidence, contemplates applying one particular form

of responsibility among those listed in the same provision as the one originally charged, such application does not amount to a change in the legal characterisation of facts for the purposes of regulation 55, irrespective of whether that particular form happens to be the same as charged by the Prosecutor or any other form provided within the same provision. Sub-paragraphs (a) to (d) of article 25 (3) of the Statute describe different expressions of the broad idea of (commission by) participation in the execution of a crime; in any and all of the scenarios contemplated by the provision the accused has taken part in the commission of a given crime and the difference among the different sub-paragraphs is one of degree rather than of nature. An altogether different rationale underpins instead the responsibility arising under article 28, which is triggered by the fact that the accused violated duties arising in connection with his position *vis-à-vis* those individuals executing the crime: in particular, the duty to be aware of and control the behaviour of one's own subordinates and to take action whenever such behaviour does not conform to proper standards.

11. Based on the above, I take the view that no envisaged shift from one form of responsibility listed in respectively article 25 and 28 to another form included in the same provision amounts to a modification in "the legal characterisation of facts" suitable of triggering the application of regulation 55 of the Regulations of the Court.

12. In my view, this finds support in several considerations, based both on the wording of regulation 55 of the Regulations of the Court and on the practical impact of the approach underpinning the Impugned Decision.

13. From a textual standpoint, I find it significant that the provision refers to the "form" of participation of the accused under articles 25 and 28 of the Statute in the singular, whereas it uses the plural form when referring to the "crimes" listed under articles 6, 7 and 8 of the Statute. In light of this, it seems reasonable to argue that, had the drafters meant to make the regulation applicable each time a shift within either article 25 or article 28 was envisaged, reference would have been likewise made to the "forms" of responsibility; as another Latin maxim goes, "*ubi lex voluit, dixit*".

14. Any doubts one may have as regards the univocality of this argument are bound to be dispelled when considering the concrete and practical impact of the opposite approach, and its ultimate inconsistency with critical tenets of the right to a fair trial, as well as with the overall features of the procedure before the Court.

15. First, holding that any shift from one form of participation to another listed within one and the same provision (be it article 25 or article 28 of the Statute) triggers the application of regulation 55 of the Regulations of the Court would result in introducing a degree of uncertainty and unpredictability in the proceedings. As regards article 25 (3) of the Statute, both the legal doctrine⁷ and, more significantly, the relevant case law of the Court show that its interpretation is far from being uncontentious or settled. Suffice it to mention the case law of the Pre-Trial Chambers of the Court on the issue of indirect co-perpetration through participation in a common plan, on the one hand,⁸ and the separate opinion recently appended by Judge Adrian Fulford to the decision convicting Mr Thomas Lubanga Dyilo, on the other.⁹ Judge Fulford engaged in a comprehensive discussion and critique of the reading of article 25 (3) (a) of the Statute given by Pre-Trial Chamber I in the same case. In particular, he observed that "by creating a clear degree of crossover between the various modes of liability, Article 25(3) covers all eventualities" and took the view that "the plain language of Article 25(3) demonstrates that the possible modes of commission under Article 25(3)(a)-(d) of the Statute were not intended to be mutually exclusive", nor hierarchically ranked.¹⁰

16. It is obviously neither for these appeal proceedings, nor for this dissent, to take a position *vis-à-vis* the current doctrinal and judicial debate on the nature of article 25 of the Statute, or on the "control of the crime" theory underpinning the approach to indirect co-perpetration, which has so far been prevailing at the pre-trial stage. The purpose of this allusion to the existence of different interpretive options as regards article 25 (3) of the Statute is much more limited. It is aimed at highlighting that, under the approach taken by the Impugned Decision (and by the Majority), the triggering (or not) of regulation 55 in respect of a shift from one form of participation listed in article 25 (3) to another will depend on the particular theoretical angle taken by the relevant Chamber. Whenever such a Chamber takes the view that article 25 (3) provides for at least as many distinct forms of responsibilities as it has sub-paragraphs, any shift between them will result in the application of regulation 55; instead, this will not happen whenever the Chamber rather chooses to read the provision as a unitary set, declining several expressions of a single concept of participation. I believe that the ensuing degree of uncertainty and unpredictability is so high as to make this

approach incompatible with the obligation of the Court to construe its instruments in such a way as to make them consistent both with the principle of legality and with internationally recognised human rights.

17. Second, a strict and logically consistent adherence to the approach taken by the Trial Chamber would result in unreasonably broadening the scope of application of regulation 55 of the Regulations of the Court, even beyond the already ample boundaries traced by the Impugned Decision. It is true that the Trial Chamber has failed to indicate whether it considered that proceedings under regulation 55 would also be triggered when the change from one form of individual responsibility to another occurs within the same sub-paragraph of article 25 (3) of the Statute (i.e. from “direct” to “indirect” perpetration under article 25 (3) (a); from “ordering” to “inducing” under article 25 (3) (b); from “aiding and abetting” to “otherwise assisting” under article 25 (3) (c); etc.). Once, however, it is accepted that shifting from one form of participation to another laid down in any of the different sub-paragraphs of article 25 (3) of the Statute amounts to a modification in “the legal characterisation of facts” for the purposes of regulation 55, it seems reasonable, if not inevitable, to assume that the same conclusion would also apply to shifts occurring within the same sub-paragraph. Indeed, one may argue that the difference between individually committing a crime (pursuant to the first part of sub-paragraph (a)), on the one hand, and committing that crime through another person (pursuant to the third and last part of sub-paragraph (a)), on the other hand, is greater than the difference between indirect co-perpetration by participation in a common plan (pursuant to the second part of sub-paragraph (a), as construed by abundant case law of the Court), on the one hand, and contributing “in any other way” to the commission of that crime by a group of persons acting with a common purpose (subparagraph (d)), on the other hand; in such a perspective, the application of regulation 55 to a shift within sub-paragraph (a) may be even more warranted than to a shift from sub-paragraph (a) to sub-paragraph (d).

18. A rigorous application of the approach taken by the Trial Chamber would thus entail that for each case brought under article 25 of the Statute there would be as many as about nine scenarios possibly triggering the application of regulation 55 of the Regulations of the Court.¹¹ Under these premises, and given the complexity of the cases falling within the jurisdiction of the Court, it seems reasonable to envisage that virtually all of the cases coming before the Court may, at one point of the proceedings, require the application of regulation 55 of the Regulations of the Court and the resulting addition of procedural steps to proceedings which are already likely to be lengthy because of the very nature of the crimes adjudicated by the Court. The ensuing impact on the necessary expeditiousness of the proceedings as a fundamental tenet of the right to a fair trial seems, at the very least, questionable; the more so, when one bears in mind that the overall system of the Rome Statute appears to be aimed at favouring an early determination of the boundaries of each case, first and foremost through the pre-trial phase and the decision on the confirmation of the charges, as well as through the prohibition to amend the charges after the commencement of the trial (article 61 (9) of the Statute).

19. Accordingly, I submit that both the general principles governing the interpretation of the instruments of the Court (in particular, the need to ensure their consistency with fundamental human rights) and the overarching features of its proceedings make it mandatory to restrictively interpret regulation 55 of the Regulations of the Court.

20. For these reasons, I maintain that the change envisaged by the Trial Chamber in the Impugned Decision does not amount to a modification in “the legal characterisation of facts” within the meaning and for the purposes of regulation 55 of the Regulations of the Court.

C. The current practice of the Pre-Trial Chambers should be revisited in light of the exceptional nature of regulation 55

21. I am also mindful that a restrictive interpretation of regulation 55 of the Regulations of the Court may have an impact on the practice so far established before the Pre-Trial Chambers, where it has become customary, whether for the purposes of the issuance of warrants of arrest or summonses to appear, or for the purposes of the confirmation of charges, not to address alternative modes of liability which were brought forward by the Prosecutor.¹² In some instances,¹³ reference has been made to regulation 55 of the Regulations of the Court as an available remedy for any changes which might prove necessary at a later stage of the trial. While this is obviously not the appropriate

venue to fully address that issue, the present case might indeed prompt the Pre-Trial Chambers to revisit - and possibly amend - their current approach.

III. ALLEGED VIOLATIONS OF MR KATANGA'S FAIR TRIAL RIGHTS: THE IMPUGNED DECISION VIOLATES MR KATANGA'S RIGHT TO BE INFORMED OF THE CHARGES IN DETAIL

22. Based on the reasons given in the previous section, I come to the conclusion that the Trial Chamber should not have applied regulation 55 (2) of the Regulations of the Court. However, as my opinion did not find a majority, I find it important also to address my view with respect to a particular aspect of the Majority Judgment with which I disagree: namely, the Majority's finding that the Impugned Decision does not violate Mr Katanga's right to a fair trial. More specifically, I believe that the Impugned Decision, in light of its content (or, rather, the lack of it), violates Mr Katanga's right to be informed of the charges in detail.

23. Regulation 55 of the Regulations of the Court reflects the right of the accused to be adequately informed of the charges in respect of this particular phase of the proceedings by providing, *inter alia*, that the accused shall "[h]ave adequate time and facilities for the effective preparation of his or her defence" (regulation 55, sub-regulation 3 (a)). I believe that the amount of information provided by the Trial Chamber when giving notice of the possibility of a re-characterisation is critical. No defence, even less an effective one, can be prepared if the accused is left in the dark as to the factual and legal elements on the basis of which the envisaged re-characterisation might take place.

24. The Majority Judgment itself makes it apparent that the Impugned Decision falls largely short of providing an adequate amount of information to the accused. The Majority explicitly admits that it "neither knows the precise nature of the re-characterisation that may be made nor the evidence on which the Trial Chamber may rely in relation thereto [. . .]".¹⁴ It acknowledges, in particular, that the Impugned Decision "does not provide much detail [. . .] in relation to the 'group acting with a common purpose'" within the meaning of article 25 (3) (d) of the Statute.¹⁵ The word "premature" is recurrently used by the Majority, either to indicate the nature of the arguments raised by the defence of Mr Katanga,¹⁶ or to justify the failure to address and adjudicate such arguments.¹⁷ In failing to censure the Trial Chamber for providing so little information as to make it impossible for it even to take a position on the arguments raised by the Defence, however, the Majority is sanctioning the principle that it is appropriate for a decision providing notice of a possible re-characterisation to provide this scant amount of detail.

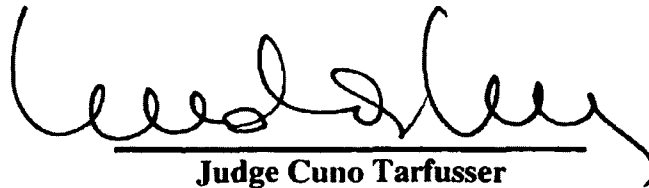
25. I dissent from this conclusion, in light of its momentous implications on the reading and implementation of regulation 55 of the Regulations of the Court. A decision giving notice of a possible legal re-characterisation must be as specific and precise as feasible as to both the legal and factual boundaries of the envisaged change, including by reference to all relevant evidence. In the absence of such specific and precise information, it is not clear what meaningful submissions could now be made by Mr Katanga.

26. More specifically, I strongly dissent from the Majority's statement that "more detailed information about the factual allegations to which the potential change in the legal characterisation of the facts relate [. . .] may be provided not only at the time of giving notice under regulation 55 (2) of the Regulations of the Court itself, but also, in an adequate manner, subsequently in the proceedings".¹⁸ First, I note that the Majority does not seem entirely at ease with its own statements, when it admonishes the Trial Chamber that the relevant information should be provided to Mr Katanga "as soon as possible".¹⁹ Second, it must be observed that the position taken by the Trial Chamber (and, as a result of its approach, by the Majority) results in splitting the proceedings under regulation 55 of the Regulations of the Court into two sub-procedures: the first phase would be merely aimed at abstractly debating the triggering of regulation 55 from a mere procedural standpoint, whereas the second would be focussed on determining the precise factual and legal scope of the envisaged change.

27. It is my view that neither regulation 55 of the Regulations of the Court, nor the statutory framework as a whole, allow for such splitting, in light both of the wording of the provision and of the ultimate need to make its intrinsically sensitive nature compatible with the fundamental tenets of the right to a fair trial. I agree that the provision makes it possible for a trial to be prolonged when the need for re-characterisation arises, and I also agree that such prolongation cannot be regarded as *per se* violating the accused's rights. Nevertheless, I maintain that the inherent tension *vis-à-vis* the expeditiousness of the proceedings makes it necessary to read and implement it in

such a way so as to contain such prolongation and preserve the other tenets of the right to a fair trial as much as feasible. The right to be adequately informed of the nature and content of the charges requires that, in giving notice of their intention to consider a re-characterisation within the meaning of regulation 55 of the Regulations of the Court, the relevant Chamber provides *at the same time* adequate information as to the factual and legal scope of that change, with a view to allowing the accused to promptly take a meaningful stance and swiftly review his or her defence strategies accordingly, if need be. I therefore take the view that the Impugned Decision does not provide enough detail to allow Mr Katanga effectively to prepare his defence *vis-à-vis* the envisaged re-characterisation.

28. The reasoning developed in Sections II and III above leads me to dissent from the Majority's decision to dismiss the appeal. Instead, I would have granted the appeal and reversed the Impugned Decision. The Trial Chamber would have had therefore to render a decision under article 74 of the Statute on the basis of the evidence heard and in light of the applicable evidentiary standard.



Judge Cuno Tarfusser

Dated this 27th day of March 2013
At The Hague, The Netherlands

ENDNOTES

- 1 Majority Judgment, para. 17.
- 2 The closest the Majority gets to clarifying its approach in this particular respect is to be found in paragraph 57 of the Majority Judgment, stating that “[a]ny change from, for example, being alleged to be a principal to being alleged to have in fact been an accessory will always necessarily involve a change in the characterisation of the role”.
- 3 ECtHR, Chamber, *Zhupnik v. Ukraine*, “Judgment”, 9 December 2010, application no. 20792/05, para. 37; Chamber, *Abramyan v. Russia*, “Judgment”, 9 October 2008, application no. 10709/02 (hereinafter: “*Abramyan v. Russia*”), para. 34; Grand Chamber, *Pélissier and Sassi v. France*, “Judgment”, 25 March 1999, application no. 25444/94 (hereinafter: “*Pélissier and Sassi v. France*”), para. 52.
- 4 *Pélissier and Sassi v. France*, para. 59.
- 5 ECtHR, Chamber, *Sadak and others v. Turkey* (No.1), “Judgement”, 17 July 2001, applications nos. 29900/96, 29901/96, 29902/96 and 29903/96, paras 54 and 56.
- 6 *Abramyan v. Russia*, para. 36.
- 7 G. Werle, “Individual Criminal Responsibility in Article 25 ICC Statute”, 5 *Journal of International Criminal Justice* (2007), p. 953, at pp. 953-975; T. Weigend, “Intent, Mistake of Law, and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges”, 6 *Journal of International Criminal Justice* (2008), p. 471, at pp. 471-487.
- 8 Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the Confirmation of charges”, 29 January 2007, ICC-01/04-01/06-803-tEN, paras 317-367; Pre-Trial Chamber I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Decision on the Confirmation of charges”, 30 September 2008, ICC-01/04-01/07-716, paras 487-538.
- 9 ICC-01/04-01/06-2842, Separate Opinion of Judge Adrian Fulford, pp. 1-14.
- 10 ICC-01/04-01/06-2842, Separate Opinion of Judge Adrian Fulford, para. 7.
- 11 Any case brought under article 28 of the Statute would inevitably be under the same sword of Damocles, in case the Chamber decides to shift from “knew” to “should have known”. The scenario is not hypothetical: such a broad approach has indeed been recently followed by Trial Chamber III in the *Bemba* case, where the possibility that the judges may determine that the accused “should have known”, as opposed to “knew”, prompted the Chamber to invoke regulation 55 (*Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, 21 September 2012, ICC-01/05-01/08-2324). Whilst it would not be appropriate to discuss this precedent here in detail, it is nevertheless worth mentioning as a concrete example of the practical consequences entailed by a broad reading of regulation 55 of the Regulations of the Court.
- 12 See Trial Chamber II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Décision relative à la mise en oeuvre de la norme 55 du Règlement de la Cour et prononçant la disjonction des charges portées contre les accusés”, Dissenting

Opinion of Judge Van den Wyngaert, 21 November 2012, ICC-01/04-01/07-3319, para. 5, highlighting that this practice “marks a significant difference with the *ad hoc* tribunals, where cases usually proceed on alternative charges”.

- 13 Pre-Trial Chamber II, *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the Prosecutor’s Application for Leave to Appeal the ‘Decision Pursuant to Article 61 (7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo’”, 18 September 2009, ICC-01/05-01/08-532, para. 56 (referencing regulation 55 in the context of justifying a decision to decline to confirm cumulative charges); “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, 15 June 2009, ICC-01/05-01/08-424, para. 203.
- 14 Majority Judgment, para. 95.
- 15 Majority Judgment, para. 102.
- 16 Majority Judgment, para. 98.
- 17 Majority Judgment, paras 56, 95, 96.
- 18 Majority Judgment, para. 101.
- 19 Majority Judgment, para. 102.