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BOFAXE



The third judgment of the ICC in the Situation in DRC – *The Prosecutor v. Germain Katanga*

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Fokus

The Katanga judgment addresses accessory liability under article 25 (3) (d) Rome Statute and touched upon the important question to which extent charges can be re-characterized by the Trial Chamber under regulation 55 Court Regulations.

Sources
Prosecutor v. Katanga, Jugement rendu en application de l'article 74 du Statut, 08.03.2014 (ICC-01/04-01/07-3436).
Minority Opinion of Judge Christine Van den Wyngaert, 08.03.2014 (ICC-01/04-01/07-3436-Anx1)

On 7th March 2014, Trial Chamber II of the International Criminal Court issued a judgment in the case of Germain Katanga, the third judgment of the situation in DRC after convicting Thomas Lubanga Dyilo and acquitting Mathieu Ngudjolo Chui. In accordance with article 66 (3) Rome Statute, the majority of the Chamber, Judge Christine Van den Wyngaert dissenting, was convinced "beyond reasonable doubt" that Katanga was guilty as an accessory of crimes against humanity and war crimes during the attack on the village of Bogoro in Ituri, DRC. The Katanga verdict will be followed by a sentencing stage pursuant to article 76 Rome Statute, and the decision can be appealed pursuant to article 81 (1) Rome Statute.

The judgment is more than 700 pages long, followed by a dissenting opinion of 170 pages, and contains key legal controversies for the future development of ICC case law. Most importantly, accessory liability under article 25 (3) (d) (ii) Rome Statute was addressed and, in this context, the Chamber re-characterized the legal modification of the charges. Katanga had originally been charged as a principal perpetrator under article 25 (3) (a) Rome Statute as "jointly committing through other persons" crimes under the Rome Statute. On 21st November 2012, the Trial Chamber changed the qualification to accessory liability, contributing "[i]n any other way [...] to the commission [...] of [...] a crime by a group of persons acting with a common purpose". The re-characterization under regulation 55 of the Regulations of the Court has led to controversies within the Trial Chamber and the Appeals Chamber. The decision of November 2012 was appealed, and in the affirmative decision of 27 March 2013, Judge Cuno Tarfusser issued a dissenting opinion, basically supporting the view of Judge Van den Wyngaert.

First, the application of regulation 55 shall not exceed the facts and circumstances described in the charges, article 74 (2), second sentence, Rome Statute. Second, the rights of the accused must be respected as stipulated in regulation 55 (2) and (3) Court Regulations and article 67 (1) Rome Statute. Since the re-characterization took place at the (late) deliberation stage and the change from principal to accessory liability was disputed, the Trial Chamber was split over the issue. Judge Van den Wyngaert did not agree with the majority and holds the opinion that (i) the change substantially transforms the charges, violating article 74 (2) Rome Statute, (ii) the re-characterization process violated fair trial rights of the accused under article 67 (1) Rome Statute, and, in any event, (iii) the evidence does also not support the charges under article 25 (3) (d) (ii) Rome Statute to issue a finding of guilt beyond a reasonable doubt.

Trial Chambers are bound to the factual allegations that have been included in the charges. Any applications of regulation 55 of the Court Regulations are limited to those facts and cannot exceed this basis. This line between factual and legal characterizations is to be found in article 74 (2) Rome Statute and was emphasised by the Appeals Chamber in the Lubanga case (Regulation 55 Appeals Judgment, 8.12.2009, ICC-01/04-01/06-2205, para.93):

"[...] the Appeals Chamber is of the view that article 74 (2) of the Statute confines the scope of Regulation 55 to the facts and circumstances described in the charges and any amendment thereto. If applied with such limitation. Regulation 55 is consistent with article 74 (2) of the Statute. This latter provision binds the Trial Chamber only to the facts and circumstances described in the charges or any amendment thereto, but does not make reference to the legal characterisation of these facts and circumstances. It follows *a contrario* that article 74 (2) of the Statute does not rule out a modification of the legal characterisation of the facts and circumstances."

The thin line of a valid legal re-characterization and impermissible factual changes will surely have to be revisited by the Appeals Chamber in Katanga. In the case at hand, the implementation of regulation 55 is pertinent to the final result and has an immense impact on the defendant: guilt or innocence, in other words, walking free as opposed to a lengthy trial sentence.

Verantwortung

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