

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/04-01/07**  
Date: **15 January 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**

**Prosecution response to the Defence request for suspensive effect**

**Source: Office of the Prosecutor**

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

**The Office of the Prosecutor**

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**REGISTRY**

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Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## Introduction

1. The Defence for Germain Katanga (the “Appellant”) requests that suspensive effect be attached to his appeal against Trial Chamber II’s 21 November 2012 decision to give notice pursuant to Regulation 55 of the Regulations of the Court (ICC-01/04-01/07-3319, hereinafter “Decision”). The Appellant appears to claim that implementation of the Decision would lead to consequences that would be very difficult to correct, may be irreversible, and/or could potentially defeat the purpose of the appeal.

2. In the very particular and unique circumstances of this case, the Prosecution does not oppose the Appellant’s request. While the request may not squarely meet the previously articulated criteria identified by the Appeals Chamber, the issue under consideration here is not complicated, is a purely legal one, appears likely to have a substantial impact on the resolution of the trial, and is raised close to the issuance of the judgment itself.

## Procedural Background

3. On 21 November 2012 Trial Chamber II issued a decision entitled “*Décision relative à la mise en oeuvre de la norme 55 du Règlement de la Cour et prononçant la disjunction des charges portées contre les accusés*”.<sup>1</sup>

4. On 23 November 2012, the Appellant sought leave to appeal the Decision.<sup>2</sup> Pursuant to an order from the Chamber, the arguments supporting the request were filed on 21 December 2012.<sup>3</sup> Leave to appeal was granted on 28 December 2012.<sup>4</sup>

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<sup>1</sup> ICC-01/04-01/07-3319

<sup>2</sup> ICC-01/04-01/07-3321

<sup>3</sup> ICC-01/04-01/07-3323

<sup>4</sup> ICC-01/04-01/07-3327

5. On 10 January 2013 the Appellant filed his Document in Support of the Appeal, which included a request for suspensive effect.<sup>5</sup> On 11 January 2013, the Appeals Chamber instructed the Prosecution to file any response to the request for suspensive effect no later than 15 January 2013 at 12h00.<sup>6</sup>

### Submissions

6. The Appellant claims that he will be prejudiced if the Decision is implemented without an order granting suspensive relief. First, he submits that it would be unfair to demand that he file submissions without the benefit of this Chamber's decision because he might well file submissions that are later shown to be premised on an incorrect legal and/or factual basis. Second, the Appellant claims that the Decision allegedly requires him now to indicate additional potential lines of defence, which could cause prejudice to him, including by the possible use of any additional material in a re-trial.<sup>7</sup>

7. The Prosecution notes that in past decisions, the Appeals Chamber has considered for the purposes of determining whether suspensive effect should be attached to an appeal whether the implementation of the decision under appeal (i) "would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant", (ii) "would lead to consequences that would be very difficult to correct and may be irreversible", or (iii) "could potentially defeat the purpose of the appeal".<sup>8</sup>

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<sup>5</sup> ICC-01/04-01/07-3339

<sup>6</sup> ICC-01/04-01/07-3342

<sup>7</sup> Document in Support of the Appeal, para. 104.

<sup>8</sup> *Prosecutor v Bemba*, Decision on Bemba request for suspensive effect, ICC-01/05-01/08-817 OA3, 9 July 2010, para.11 [see fn.24-26], quoted in *Prosecutor v. Ruto and Sang*, Decision on Mr Ruto and Mr Sang's requests for suspensive effect in Jurisdiction Appeal, ICC-01/09-01/11-391 OA4, 29 February 2012, para.9; and *Prosecutor v. Kenyatta, Muthaura and Ali*, Decision on Mr Kenyatta and Mr Muthaura's requests for suspensive effect in Jurisdiction Appeal, ICC-01/09-02/11-401 OA4, 29 February 2012 para.9.

8. The Prosecution submits that the Appellant has failed to establish the risk of an “irreversible situation”. However, the Prosecution also notes the particular circumstances of this case, including that the Regulation 55 notice itself was issued well after closure of the evidentiary phase of the trial, and that whether and how to recharacterize the facts and circumstances is likely to be the only remaining matter to be resolved before the final judgment can be issued. In this very unique situation, it appears to serve the interests of legal certainty and judicial economy that the Trial Chamber knows, before it embarks on the last stage of its proceedings, whether the notice of possible recharacterization itself is legally sound. Indeed, the very fact that the Trial Chamber certified this issue for interlocutory appeal notwithstanding the very late stage of the trial proceedings suggests that it too agreed on the desirability of having that fundamental issue resolved before it takes those further steps.

9. Second, the Prosecution further recognizes that litigating the necessary post-notice steps in the absence of an authoritative ruling by the Appeals Chamber on the notice as framed by the Trial Chamber may adversely impact the fair and expeditious conduct of the proceedings. For instance, the Appeals Chamber may affirm the validity of the notice, but attach certain conditions and safeguards to it, to which the parties will obviously not be privy when advancing their submissions before the Trial Chamber. It would be detrimental to the fair and efficient conduct of the proceedings if in the meantime the Trial Chamber enters a decision that does not contemplate those conditions. Indeed, implementation of such a decision may not only adversely affect the rights of the parties but also the purpose of the appeal, and in an addition, would almost unavoidably lead to further litigation – including possibly a new appeal.

10. It has been held that a Chamber’s discretionary authority to suspend the implementation of a decision should be exercised in the interest of justice and the

efficacy of the judicial process.<sup>9</sup> In the circumstances of this case, it appears desirable that the Appeals Chamber exercise its discretion under article 82(3) and attach suspensive effect to the appeal. The Prosecution further notes that since under the latest schedule the Prosecution must file its submissions before the Trial Chamber by 22 January and the Appellant by 29 January, a prompt determination of the request is desirable.

### **Conclusions**

11. For the above referred reasons, the Prosecution does not oppose the Appellant's request for suspensive effect.



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**Fatou Bensouda, Prosecutor**

Dated this 15<sup>th</sup> day of January 2013

At The Hague, The Netherlands

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<sup>9</sup> ICC-01/04-01/06-1444-Anx OA12, paras. 6, 9 and 10 Sep Op. Judge Pikis.