

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 16 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 document

**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**



Decision 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

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),

Renders unanimously the following

DECISION

The request for suspensive effect is granted.

REASONS

I. BACKGROUND

1. On 21 November 2012, Trial Chamber II (hereinafter: “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”¹ (hereinafter: “Impugned Decision”), in which it, *inter alia*, decided, by majority, “to trigger regulation 55 of the Regulations of the Court” in relation to the mode of liability under which Mr Katanga stands charged and invited submissions on that matter from the Prosecutor and the victims, as well as Mr Katanga by 15 January 2013 and 21 January 2013, respectively.² At the request of the Prosecutor,³ the Trial Chamber subsequently extended these time limits to 22 January 2013 and 29 January 2013, respectively.⁴

2. On 28 December 2012, the Trial Chamber granted Mr Katanga leave to appeal the Impugned Decision (hereinafter: “Decision Granting Leave to Appeal”).⁵ In the

¹ ICC-01/04-01/07-3319-tENG/FRA.

² Impugned Decision, p. 29.

³ Requête de l’Accusation sur la base de la norme 35 du Règlement de la Cour aux fins de prorogation de délai pour soumettre ses observations sur la requalification juridique sur le fondement de l’article 25-3-d du Statut”, 8 January 2013, ICC-01/04-01/07-3331.

⁴ “Décision relative à la requête du Procureur aux fins de prorogation du délai de dépôt des observations sur la requalification juridique sur le fondement de l’article 25-3-d du Statut”, 11 January 2013, ICC-01/04-01/07-3340.

⁵ “Decision on the ‘Defence Request for Leave to Appeal the Decision 3319’”, ICC-01/04-01/07-3327.

same decision, the Trial Chamber rejected Mr Katanga's request to extend the time limit for his submissions to two weeks after the Appeals Chamber delivered its judgment on this appeal.⁶ The Trial Chamber held that "[t]he effect of such an extension would be to freeze the ongoing proceedings against Mr Katanga until after the Appeals Chamber has ruled on the appeal against the Impugned Decision"⁷ and that the request "effectively amounts to a request for suspensive effect of the Impugned Decision", which falls within the Appeals Chamber's authority.⁸

3. On 10 January 2013, Mr Katanga submitted 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"⁹ (hereinafter: "Document in Support of the Appeal"), in which he, *inter alia*, requests that his appeal have suspensive effect (hereinafter: "Request for Suspensive Effect").¹⁰ He asks that he should only be required to make submissions on the possible re-characterisation of the facts once the appeal is concluded.¹¹ In support of the Request for Suspensive Effect, Mr Katanga submits that he will be prejudiced "if submissions made now are later overtaken or adversely affected by the appeal decision".¹² He also avers that he would be prejudiced if he had to disclose his lines of defence and that, based on the Impugned Decision, the Trial Chamber might consider additional material.¹³ This could, in his opinion, lead to an irreversible situation.¹⁴

4. Further to the Appeals Chamber's order of 11 January 2013,¹⁵ the Prosecutor filed her response to the Request for Suspensive Effect on 15 January 2013 (hereinafter: "Response to the Request").¹⁶ The Prosecutor states that she does not oppose the Request for Suspensive Effect.¹⁷ She argues that continuing the proceedings without an authoritative ruling of the Appeals Chamber may adversely

⁶ Decision Granting Leave to Appeal, paras 17-20.

⁷ Decision Granting Leave to Appeal, para. 19.

⁸ Decision Granting Leave to Appeal, para. 20.

⁹ ICC-01/04-01/07-3339.

¹⁰ Document in Support of the Appeal, paras 95-105.

¹¹ Document in Support of the Appeal, para. 103.

¹² Document in Support of the Appeal, para. 103.

¹³ Document in Support of the Appeal, para. 104.

¹⁴ Document in Support of the Appeal, para. 104.

¹⁵ "Order on the filing of a response to the request of Mr Katanga for suspensive effect", ICC-01/04-01/07-3342.

¹⁶ "Prosecution response to the Defence request for suspensive effect", ICC-01/04-01/07-3343.

¹⁷ Response to the Request, para. 11.

affect the fair and expeditious conduct of the proceedings.¹⁸ She draws attention to the possibility that the Appeals Chamber may attach certain conditions and safeguards to confirming the Impugned Decision, which would have an impact on the submissions to be made pursuant to regulation 55 (2) of the Regulations of the Court.¹⁹ In the Prosecutor's opinion, by granting leave to appeal, the Trial Chamber "agreed on the desirability of having that fundamental issue resolved before it takes those further steps".²⁰

II. MERITS

5. The Appeals Chamber recalls that, in the Impugned Decision, the Trial Chamber gave notice to the parties and participants that the legal characterisation of facts may be modified pursuant to regulation 55 (2) of the Regulations of the Court and invited submissions from them on that matter.²¹ The issue in this appeal is whether it was lawful and appropriate in the circumstances of the case to give such notice.²² The Appeals Chamber recalls that it has previously stated that: "[s]uspension involves the non-enforcement of a decision, the subject of an appeal".²³ The Appeals Chamber notes that granting the Request for Suspensive Effect would have the effect of suspending any action based on the Impugned Decision, including hearing submissions pursuant to regulation 55 (2) of the Regulations of the Court, hearing evidence or re-characterising the facts in a decision pursuant to article 74 of the Statute.

6. The Appeals Chamber previously summarised circumstances in which it has exercised its discretion to grant suspensive effect as follows:

In past decisions, the Appeals Chamber, when deciding on requests for suspensive effect, has considered whether the implementation of the decision under appeal (i) "would create an irreversible situation that could not be

¹⁸ Response to the Request, para. 9.

¹⁹ Response to the Request, para. 9.

²⁰ Response to the Request, para. 8.

²¹ Impugned Decision, p. 29.

²² Document in Support of the Appeal, para. 11.

²³ *Prosecutor v. Joseph Kony et al.*, "Decision on the Prosecutor's 'Application for Appeals Chamber to Give Suspensive Effect to Prosecutor's Application for Extraordinary Review'", 13 July 2006, ICC-02/04-01/05-92 (OA), para. 3; *see also* *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings", 14 December 2012, ICC-01/04-01/06-2953 (A A 2 A 3 OA 21) (hereinafter: "*Lubanga* Reparations Admissibility Decision"), para. 81.

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”.²⁴ [Footnotes omitted.]

7. The Appeals Chamber has consistently underlined that “[t]he decision on [...] a request [pursuant to article 82 (3) of the Statute] is within the discretion of the Appeals Chamber”.²⁵

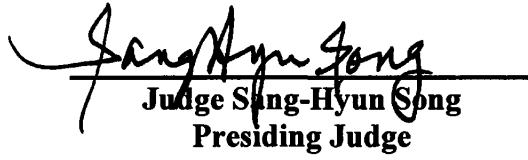
8. In exercising its discretion in the specific circumstances of the present case, the Appeals Chamber needs to weigh the delay that a suspension would cause against the impact that continuing the proceedings before the Trial Chamber based on the Impugned Decision could have, in particular, on the rights of the accused, should the Appeals Chamber eventually reverse or amend the Impugned Decision.

9. The Appeals Chamber finds that, in this appeal, which is directed against a decision that was rendered at the final stage of the trial proceedings, the need to preserve the integrity of the proceedings overrides any other consideration. In this regard, if the trial proceedings continued based on the Impugned Decision, and that decision were eventually reversed on appeal, any adverse effects on the overall fairness of the proceedings and the rights of the accused might be difficult to correct. Similarly, even if the Appeals Chamber were to confirm the Impugned Decision, the Appeals Chamber’s judgment may have a significant impact on the further conduct of the trial proceedings. Therefore, the Appeals Chamber finds that the Trial Chamber should not proceed with the trial on the basis of the Impugned Decision and decides that the appeal shall have suspensive effect.

²⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the ‘Decision on the Admissibility and Abuse of Process Challenges’”, 9 July 2010, ICC-01/05-01/08-817 (OA 3), para. 11.

²⁵ *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the Request of the Prosecutor for Suspensive Effect”, 3 September 2009, ICC-01/05-01/08-499 (OA 2), para. 11, citing *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008”, 22 April 2008, ICC-01/04-01/06-1290 (OA 11); *see also*, for recent examples, *Lubanga Reparations Admissibility Decision*, para. 81; *Prosecutor v. Mathieu Ngudjolo Chui*, “Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect”, 20 December 2012, ICC-01/04-02/12-12, para. 20.

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


Judge Sang-Hyun Song
Presiding Judge

Dated this 16th day of January 2013

At The Hague, The Netherlands