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**No. ICC-01/04-01/07 OA 15
Date: 9 June 2016**

THE APPEALS CHAMBER

Before: Judge Piotr Hofmański, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Christine Van den Wyngaert
Judge Howard Morrison
Judge Raul C. Pangalangan

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

Public document

Decision on the admissibility of Mr Katanga's appeal against the "Decision pursuant to article 108(1) of the Rome Statute"

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
Ms Helen Brady

Counsel for the Defence
Mr David Hooper
Ms Caroline Buisman

Legal Representatives of Victims
Mr Fidel Nsita Luvengika

**Legal Representatives of the
Democratic Republic of the Congo**

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

Having before it Mr Katanga's appeal against the decision of the Presidency entitled "Decision pursuant to article 108(1) of the Rome Statute" of 7 April 2016 (ICC-01/04-01/07-3679),

After deliberation,

Renders unanimously the following

DECISION

1. Mr Katanga's request for leave to file a reply is rejected.
2. Mr Katanga's appeal is dismissed as inadmissible.

REASONS

I. PROCEDURAL HISTORY

1. On 7 April 2016, the Presidency rendered the "Decision pursuant to article 108(1) of the Rome Statute"¹ ("Impugned Decision"), in which it "approve[d], [...], the prosecution of Mr. Katanga [in the Democratic Republic of the Congo ("DRC")] as set out in the '*Décision de renvoi*'"², issued by the *Haute Cour Militaire*.³

2. On 9 May 2016, Mr Germain Katanga ("Mr Katanga") filed the "Defence Notice of Appeal against the Presidency 'Decision pursuant to article 108(1) of the Rome Statute'"⁴ ("Notice of Appeal") and, on 11 May 2016, he filed the "Defence Document in Support of Appeal Against the Presidency Decision pursuant to article 108(1) of the Rome Statute"⁵ ("Document in Support of the Appeal").

3. On 19 May 2016, the Prosecutor filed the "Prosecution's submissions on Germain Katanga's 'Notice of Appeal against the Presidency 'Decision pursuant to

¹ [ICC-01/04-01/07-3679](#).

² [Impugned Decision](#), p. 12.

³ [Impugned Decision](#), para. 4.

⁴ [ICC-01/04-01/07-3684](#).

⁵ ICC-01/04-01/07-3685-Conf; a public redacted version was registered on the same day ([ICC-01/04-01/07-3685-Red](#)).

article 108(1) of the Rome Statute”⁶ (“Prosecutor’s Response to the Document in Support of the Appeal”).

4. On 26 May 2016, Mr Katanga filed the “Defence Request for Leave to Reply to Prosecution’s submissions on Germain Katanga’s ‘Notice of Appeal against the Presidency “Decision pursuant to article 108(1) of the Rome Statute”⁷ (“Request for Leave to Reply”).

II. PRELIMINARY ISSUE: DECISION ON THE REQUEST FOR LEAVE TO REPLY

5. Mr Katanga seeks leave to file a reply to the Prosecutor’s Response to the Document in Support of the Appeal.⁸ Mr Katanga states that his reply would be limited to addressing novel issues raised by the Prosecutor, the main one being whether the jurisprudence cited by her (footnoting two Appeals Chamber decisions) “is applicable to decisions issued by the Presidency”.⁹ He notes, in addition, that the jurisprudence cited refers to interlocutory appeals and is therefore not instructive for appeals against final decisions, as is the case here.¹⁰ He submits that the Appeals Chamber would benefit from a more detailed analysis of these cases, explaining how they can be distinguished from the current appeal, which is without precedent, “as it has the difficult task to determine this very significant and novel issue”.¹¹

6. The Appeals Chamber is not convinced by these arguments. A large portion of Mr Katanga’s Document in Support of the Appeal addresses the issue of whether this decision rendered by the Presidency may be appealed.¹² The Appeals Chamber further notes that it has rendered only a few relevant decisions on the admissibility of appeals and that Mr Katanga had the opportunity to address the applicability of this jurisprudence in his Document in Support of the Appeal. The Appeals Chamber does not consider that, in pointing to this jurisprudence, the Prosecutor raised a novel issue. In addition, in light of the Appeals Chamber’s conclusions below as to the need to

⁶ [ICC-01/04-01/07-3690](#).

⁷ [ICC-01/04-01/07-3693](#).

⁸ [Request for Leave to Reply](#), para. 1.

⁹ [Request for Leave to Reply](#), para. 3.

¹⁰ [Request for Leave to Reply](#), para. 4.

¹¹ [Request for Leave to Reply](#), para. 5.

¹² [Document in Support of the Appeal](#), pp. 8-22.

rely on this jurisprudence,¹³ it does not consider it necessary to receive further submissions thereon. The Request for Leave to Reply is accordingly rejected.

III. ADMISSIBILITY OF THE APPEAL

7. Mr Katanga is appealing a decision taken by the Presidency pursuant to article 108 (1) of the Statute. He requests “[t]hat the Presidency decision be reversed and that the Appeals Chamber declare[] that it does not approve the prosecution of Mr Katanga by the DRC on the basis of the charges defined in the *Décision de Renvoi* and the *Résumé des Faits*” (footnotes omitted).¹⁴ The Prosecutor requests that the Appeals Chamber dismiss Mr Katanga’s Notice of Appeal *in limine* as being inadmissible;¹⁵ should the Appeals Chamber find it to be admissible, she requests the opportunity to file submissions on the merits, “if necessary”.¹⁶

8. Article 108 of the Statute (“Limitation on the prosecution or punishment of other offences”) provides:

1. A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person’s delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.

2. The Court shall decide the matter after having heard the views of the sentenced person.

3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.

9. Neither article 108 of the Statute, nor the relevant provisions in the Rules of Procedure and Evidence (“Rules”) (rules 214 – 216), expressly provide for a right to appeal the Presidency’s decision referred to in article 108. Nevertheless, Mr Katanga files his appeal pursuant to article 81 (1) (b) of the Statute, rule 150 (1) of the Rules and regulation 57 of the Regulations of the Court.¹⁷ Mr Katanga argues “that a right to

¹³ See *infra* para. 15.

¹⁴ [Notice of Appeal](#), para. 4.

¹⁵ [Prosecutor’s Response to the Document in Support of the Appeal](#), paras 2, 19.

¹⁶ [Prosecutor’s Response to the Document in Support of the Appeal](#), para. 3.

¹⁷ [Notice of Appeal](#), para. 4.

appeal a decision under article 108 lies as of right”.¹⁸ He submits that, “[w]hilst it is not a decision involving an acquittal, conviction, or sentencing determination, it is a final decision in that it closes the proceedings under article 108.”¹⁹ He argues that it is not an intermediate decision that could be covered by article 82 (1) (d) of the Statute and therefore he “adopts the appeal mechanism to be followed for a final decision, subject to any subsequent direction of the Court”.²⁰

10. Article 81 of the Statute (supplemented by, *inter alia*, rule 150 of the Rules and regulation 57 of the Regulations of the Court) regulates the filing of appeals against a “decision of acquittal or conviction or against sentence”. The wording of this provision relates to appeals against decisions on guilt or innocence (article 74 of the Statute) or sentence. To find that an appeal against a decision taken by the Presidency under article 108 of the Statute could fall within article 81 (1) of the Statute would, in the view of the Appeals Chamber, unacceptably stretch this wording.

11. As to whether such an appeal is otherwise possible, the Appeals Chamber notes that articles 81 and 82, found in Part 8 of the Statute (Appeals and Revision) expressly regulate appeals that can be filed before the Appeals Chamber. Appeals under article 82 of the Statute (“Appeal against other decisions”), paragraphs (1) (a) to (c)²¹ clearly find no application in the instant case, while Mr Katanga himself states that article 82 (1) (d)²² is also inapplicable,²³ and did not seek leave to appeal thereunder.²⁴ Accordingly, the Appeals Chamber itself does not need to address the applicability of article 82 (1) (d) to the Presidency’s decision under article 108 of the Statute. Article

¹⁸ [Document in Support of the Appeal](#), para. 61.

¹⁹ [Document in Support of the Appeal](#), para. 61.

²⁰ [Document in Support of the Appeal](#), para. 61.

²¹ “1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: (a) A decision with respect to jurisdiction or admissibility; (b) A decision granting or denying release of the person being investigated or prosecuted; (c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3; [...]”.

²² “1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: [...] “(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

²³ [Document in Support of the Appeal](#), para. 61.

²⁴ See in this context *Prosecutor v. Bemba et al.*, “Decision on the ‘Requête en appel de la défense de monsieur Aimé Kilolo Musamba contre la décision de la Chambre de première instance VII du 17 novembre 2015’”, 23 December 2015, [ICC-01/05-01/13-1533](#) (OA 12), para. 16.

82 (2)²⁵ specifically regulates appeals against a decision by a Pre-Trial Chamber under article 57 (3) (d) of the Statute. Article 84 of the Statute also finds no application, dealing expressly with revision of conviction or sentence, and neither do the provisions dealing with the other express powers of the Appeals Chamber (concerning disqualification of the Prosecutor or Deputy Prosecutor under article 42 (8) of the Statute and review concerning reduction of sentence under article 110 of the Statute).

12. Mr Katanga argues that article 108 of the Statute “provides a significant power distinguishable from the other functions allocated to the Presidency which are mainly administrative”²⁶ and that “[s]uch a significant decision should be capable of review on appeal despite the absence of an explicit appeal mechanism in the Statute or Rules.”²⁷

13. The Appeals Chamber recalls that article 108 falls within Part 10 of the Statute, dealing with enforcement. Rule 199 of the Rules (Organ responsible under Part 10) provides that, “[u]nless provided otherwise in the Rules, the functions of the Court under Part 10 shall be exercised by the Presidency.” Rules 214 to 216,²⁸ in a confined section of the Rules (Limitation on the prosecution or punishment of other offences under article 108) in Chapter 12 thereof (Enforcement), expressly regulate the procedure to apply to article 108 of the Statute. While it is the case that the nature of the Presidency’s functions under this section of the Rules may differ from some of those in other parts of the Statute, including those that may be more administrative in nature, the States Parties, in adopting the Rules, have taken the decision that the Presidency shall exercise the functions under this article. Contrary to Mr Katanga’s arguments, the Appeals Chamber would have expected States, in regulating the procedure relevant to article 108 of the Statute in such a detailed way, to have expressly provided for a right to appeal a decision thereunder if that had been their intention.

²⁵ “A decision of the Pre-Trial Chamber under article 57, paragraph 3 (d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis”.

²⁶ [Document in Support of the Appeal](#), para. 31.

²⁷ [Document in Support of the Appeal](#), para. 33.

²⁸ Rule 214: Request to prosecute or enforce a sentence for prior conduct; Rule 215: Decision on request to prosecute or enforce a sentence; Rule 216: Information on enforcement.

14. Mr Katanga argues that jurisprudence from the *ad hoc* tribunals supports his argument that the Presidency's decision should be reviewable.²⁹ Notwithstanding that such jurisprudence is not binding,³⁰ the Appeals Chamber notes that, in any event, the decisions cited, which are related to instances where the Appeals Chamber may assume powers despite a lack of regulation, are not comparable. The Appeals Chamber notes that the jurisprudence of the *ad hoc* tribunals has acknowledged that Chambers can review certain decisions taken by the President (following his or her review of a decision by the Registrar), despite the lack of express provision providing as such and for the purposes of ensuring the fairness of the proceedings.³¹ Those decisions, however, concerned issues raised while the substantive case was pending before the relevant Chamber³² or, exceptionally, where an order of the Chamber needed to be executed.³³ The current proceedings are not pending before the Appeals Chamber, nor do they relate directly to the execution of an order of the Appeals Chamber. Concerning Mr Katanga's arguments regarding the case of *Prosecutor v. Radovan Stanković*,³⁴ the Appeals Chamber finds that this case is also not comparable. Mr Stanković appealed a Trial Chamber decision dismissing his request for revocation of referral of his case to the authorities of Bosnia and Herzegovina

²⁹ [Document in Support of the Appeal](#), paras 46-52.

³⁰ "Decision on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Pre-Trial Chamber II of 23 January 2012 entitled 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute'", 23 May 2012, [ICC-01/09-01/11-414](#) (OA 3) (OA 4), para. 31; *see also* in this context article 21(2) of the Statute.

³¹ ICTR, *Nahimana et al. v. Prosecutor*, "[Decision on appellant Jean Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-counsel](#)", 23 November 2006, ICTR-99-52-A, para. 9; ICTR, *Nahimana et al. v. Prosecutor*, "[Decision on Hassan Ngeze's motion to set aside President Mose's Decision and Request to Consummate his Marriage](#)", 6 December 2005, ICTR-99-52-A, p. 3; ICTR, *Nahimana et al. v. Prosecutor*, "[Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase](#)", 3 May 2005, ICTR-99-52-A, paras 4, 7; ICTR, *Nahimana et al. v. Prosecutor*, "[Decision on Appellant Hassan Ngeze's Motion for Leave to Permit his Defence Counsel to Communicate with him during Afternoon Friday, Saturday, Sunday and Public Holidays](#)", 25 April 2005, ICTR-99-52-A, para. 3; ICTY, *Prosecutor v. Milan Milutinović*, "[Decision on Interlocutory Appeal on Motion for Additional Funds](#)", 13 November 2003, IT-99-37-AR73.2, paras 19-20.

³² *See e.g.* a dismissal of a request for review because the substantive matter was not pending on appeal: ICTR, *Prosecutor v. Karemera et al.*, "[Decision on Joseph Nzirorera's Appeal from Denial of a Request for Designation of a Trial Chamber to Consider Referral to a National Jurisdiction](#)", 3 July 2007, ICTR-98-44-AR11bis, para. 10.

³³ ICTR, *In Re Andre Ntagerura*, "[Decision on Motion for Leave to Appeal the President's Decision of 31 March 2008, and the Decision of Trial Chamber III rendered on 15 May 2008](#)", 11 September 2008, ICTR-99-46-A28, para. 12.

³⁴ [Document in Support of the Appeal](#), para. 50, referring to MICT, *Prosecutor v. Radovan Stanković*, "[Decision on Stanković's Appeal Against Decision Denying Revocation of Referral and on the Prosecution's Request for Extension of Time to Respond](#)", 21 May 2014, MICT-13-51.

under rule 11*bis* of the ICTY Rules. Although there was no express right in rule 11*bis* of the ICTY Rules to appeal a decision on revocation, there was an express right to appeal, in the same provision, a decision on referral of a case. The Appeals Chamber considers this factor to be of importance, bearing in mind the similarity between a decision on referral and a decision on revocation. It notes that there is no provision similar to article 108 of the Statute that provides for a right to appeal by the convicted person.

15. As noted above, and also referred to by the Prosecutor, the Appeals Chamber has previously considered the scope of its appellate functions when faced with appeals or requests that did not fall within the express terms of the Statute.³⁵ It notes that those decisions did not directly address the appealability of a Presidency decision. In any event, given its conclusions on article 108 of the Statute, the Appeals Chamber finds it unnecessary to address this jurisprudence and whether it also applies to decisions under article 108 of the Statute.

16. Although the Appeals Chamber considers that the Statute and the Rules do not expressly provide for appeals of decisions under article 108 of the Statute, decisions taken pursuant to that provision are important in nature and it may be, in light of the Presidency's approach to article 108 of the Statute, that a right to appeal such decisions is appropriate. In that respect, it notes that the Presidency considered issues that are of significance, namely the upholding of certain fundamental principles or procedures of the Statute and otherwise of the integrity of the Court,³⁶ requiring

³⁵ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the admissibility of the appeal against the 'Decision on the application for the interim release of detained Witnesses DRC-D02-P0236, DRCD02-P0228 and DRC-D02-P0350'", 20 January 2014, [ICC-01/04-01/07-3424](#) (OA 14), paras 28, 29; *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the 'Registrar's Submissions under Regulation 24*bis* of the Regulations of the Court in Relation to Trial Chamber I's Decision ICC-01/04-01/06-2800' of 5 October 2011", 21 November 2011, [ICC-01/04-01/06-2823](#) (OA 20), para. 14; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the 'Urgent Request for Directions' of the Kingdom of the Netherlands of 15 July 2011", 26 August 2011, [ICC-01/04-01/07-3132](#) (OA 12), para. 6; *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the 'Urgent Request for Directions' of the Kingdom of the Netherlands of 17 August 2011", 26 August 2011, [ICC-01/04-01/06-2799](#) (OA 19), para. 7; *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'D cision sur la confirmation des charges' of 29 January 2007", 13 June 2007, [ICC-01/04-01/06-926](#) (OA 8), para. 9; *Situation in the Democratic Republic of the Congo*, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, [ICC-01/04-168](#) (OA 3), paras 38-40.

³⁶ [Impugned Decision](#), para. 20.

considerations relevant to e.g. *ne bis in idem*, the possible imposition of the death penalty and the possibility of holding a fair trial.³⁷ The Appeals Chamber further notes that, where such issues are addressed in similar or comparable proceedings, an appeals mechanism is often in place. The Appeals Chamber therefore considers that there is merit in the Assembly of States Parties addressing whether the Court's underlying legal texts should be amended so as to permit appellate review in relation to the decision taken under article 108 of the Statute.

17. In conclusion, the Appeals Chamber finds that Mr Katanga's appeal is inadmissible and accordingly dismisses it.

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



Judge Piotr Hofmański
Presiding Judge

Dated this 9th day of June 2016

At The Hague, The Netherlands

³⁷ [Impugned Decision](#), paras 21-25, 28, 30-31 (respectively).