

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/07
Date: 28 December 2012

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

***IN THE CASE OF
THE PROSECUTOR v. GERMAIN KATANGA***

Public Document

Decision on the "Defence Request for Leave to Appeal the Decision 3319"

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr Eric MacDonald

Counsel for Germain Katanga

Mr David Hooper

Mr Andreas O'Shea

Legal Representatives of the Victims

Mr Fidel Nsita Luvengika

Mr Jean-Louis Gilissen

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber II (“Chamber”) of the International Criminal Court (“Court”), in the case of the *Prosecutor v. Germain Katanga*, having regard to article 82(1)(d) of the Rome Statute of the International Criminal Court (“Statute”), issues the following decision on the “Defence Request for Leave to Appeal the Decision 3319” (“Application”).¹

I. BACKGROUND

1. On 21 November 2012, the Chamber by majority decided to activate Regulation 55 of the Regulations of the Court (“Regulations”) and to sever the cases against Mr Germain Katanga and Mr Mathieu Ngudjolo (“Impugned Decision”).²

2. On 22 November 2012, the Defence for Mr Katanga requested an extension of time limit to file a request for leave to appeal until the decision had been translated. The Chamber instructed the Defence to submit a formal request for leave to appeal within the normal deadline, but authorised the Defence to submit its motives three days after the official translation had been notified.³

3. On 23 November 2012, the Defence filed a notice indicating that it would seek leave to appeal the Impugned Decision and that it would submit its grounds in support thereof not later than three days following the receipt of the relevant translation, in accordance with the Chamber’s instructions.⁴

4. On 21 December 2012, the Defence filed the grounds in support of its request for leave to appeal the Impugned Decision.⁵ In its Application, the Defence seeks leave to bring the following issue before the Appeals Chamber:

Is the [Impugned Decision], informing the parties and participants that the legal characterisation of the facts relating to Germain Katanga’s

¹ “Defence Request for Leave to Appeal the Decision 3319”, 21 December 2012, ICC-01/04-01/07-3323

² “Décision relative à la mise en œuvre 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

³ Annex A – Electronic communication between Chamber’s Legal Officer and Case Manager Defence for Mr. Katanga

⁴ “Defence Notice That It Will Request Leave to Appeal the Decision 3319”, 23 November 2012, ICC-01/04-01/07-3321

⁵ ICC-01/04-01/07-3323

mode of participation is likely to be changed, lawful and appropriate in the circumstances of the case?⁶

5. In addition, the Defence identifies seven reasons as to why the Impugned Decision is alleged to be unlawful and inappropriate.⁷

6. The Application also contains a request for a variation of the time limit for the Defence to submit its observations on the Impugned Decision by 21 January 2013. If leave to appeal is granted, the Defence wishes the deadline to be extended until fourteen days after the appeals decision is made.⁸ If no leave to appeal is granted, the Defence asks to be granted “additional time to reply to the prosecution and victims’ representatives observations [...] in the light of the time which has been necessary to devote to the issue of appealing the [Impugned Decision]”.⁹

7. On 26 December 2012, the Common Legal Representative of the main group of participating victims and the Legal Representative of the child soldiers filed their observations.¹⁰ Both Legal Representatives support the Defence’s Application and request the Chamber to grant leave to appeal the Impugned Decision. Both also request the Chamber to grant them an extension of time limit to submit their substantive observations on the activation of Regulation 55 until 7 days after the Appeals Chamber has rendered its decision on the interlocutory appeal.¹¹

8. On 27 December 2012, the Office of the Prosecutor (“prosecution”) submitted its response to the Application.¹² The prosecution asks the Chamber to refuse leave to appeal the Impugned Decision. The prosecution argues, in essence, that the matter is premature and that the Defence’s arguments for why the Impugned Decision might violate its rights are abstract and speculative. In the view of the prosecution, the effects of the Impugned Decision can only be known when

⁶ ICC-01/04-01/07-3323, par. 14

⁷ ICC-01/04-01/07-3323, par. 15

⁸ ICC-01/04-01/07-3323, par. 57

⁹ ICC-01/04-01/07-3323, par. 58

¹⁰ “Observations du représentant légal sur la demande d’autorisation d’interjeter appel de la Défense contre la décision n° 3319”, 26 December 2012, ICC-01/04-01/07-3324 ; “Réponse du représentant légal des victimes enfants soldats au document de la Défense de G. Katanga intitulé ‘Defence Request for Leave to Appeal the Decision 3319’ (Norme 65.3 du Règlement de la Cour)”, 26 December 2012, ICC-01/04-01/07-3325

¹¹ ICC-01/04-01/07-3324, par. 22; ICC-01/04-01/07-3325, par.13

¹² “Prosecution response to the ‘Defence Application for Leave to Appeal the Decision 3319’”, 27 December 2012, ICC-01/04-01/07-3326

the Chamber has rendered its final judgment under Article 74 and any appeals should therefore be reserved for that stage of the proceedings.

II. ANALYSIS AND CONCLUSION

9. Having regard to article 81(2)(d) of the Statute, as interpreted by the Appeals Chamber in its “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”¹³ of 13 July 2006, the Chamber considers the issues raised by the Defence in light of the following criteria:

- a) Whether the matter is an “appealable issue”;
- b) Whether the issue at hand could significantly affect:
 - (i) The fair and expeditious conduct of the proceedings; or
 - (ii) The outcome of the trial; and
- c) Whether, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber could materially advance the proceedings.

10. The requirements set out in a), b), and c) above, are cumulative. The failure to fulfil one or more of them is fatal to an application for leave to appeal.¹⁴

A. Is there an appealable issue?

11. As has previously been stated by the Appeals Chamber, an “issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion [...] An issue is constituted by a subject, the resolution of which is essential for the determination of

¹³ “Judgement on the Prosecutor’s Application for Evidentiary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, par. 9-20

¹⁴ Trial Chamber I, *The Prosecutor v Thomas Lubanga Dyilo*, “Decision on the Prosecution’s Application for Leave to Appeal the ‘Decision on the Prosecution’s Application to Lift the Stay of the Proceedings’”, 24 September 2008, ICC-01/04-01/06-1473, par. 22

matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one.”¹⁵

12. The Chamber is of the view that the issue as defined by the Defence, especially when read in light of the several reasons that are invoked by the Defence to claim that the Impugned Decision is unlawful and/or inappropriate, qualifies as an appealable issue. The Chamber considers that the formulation of the appealable issue by the Common Legal Representative, which includes a reference to the Chamber’s power to actually recharacterise the facts after giving notice of this possibility for the first time at the deliberation stage,¹⁶ is subsumed in the Defence’s formulation and is also subject to appellate review.

B. Does the issue significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial?

13. The Chamber acknowledges that the Impugned Decision has an important impact on the conduct of the proceedings against Mr Katanga. In fact, the point on which the Defence wishes to appeal the Impugned Decision is whether the activation of Regulation 55 of the Regulations of the Court at the deliberation stage violates the rights of the accused. This question clearly raises an issue that affects the fairness of the proceedings.

14. There can also be little doubt that the Impugned Decision has the clear potential to significantly affect the expeditiousness of the proceedings as well. That the impact of the Impugned Decision in this regard cannot be determined with absolute certainty, as is argued by the prosecution, is not a sufficient reason to refuse leave to appeal. Absolute certainty about how a decision will affect the expeditiousness of the proceedings is not a precondition under Article 82(1)(d). Moreover, it is not a precondition that the Impugned Decision causes an undue delay, only that the expeditiousness of the proceedings be significantly affected.

¹⁵ “Judgment on the Prosecutor’s Application for Evidentiary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, par. 9

¹⁶ ICC-01/04-01/07-3324, par. 9

C. Could an immediate resolution by the Appeals Chamber materially advance the proceedings?

15. Although it is too early to say, at this stage, how long the trial proceedings may continue as a consequence of the Impugned Decision, it is clear that a swift intervention by the Appeals Chamber, indicating whether or not the activation of Regulation 55 of the Regulations of the Court was permissible under the present circumstances, could materially advance the proceedings.

16. While it is true that the Defence could also raise its objections against the Impugned Decision after the Chamber has rendered its judgment under Article 74 of the Statute, it is clear that waiting until then may create the undesirable situation in which the Chamber would have pronounced itself on the guilt or innocence of the accused and may have passed sentence and awarded reparations, even though the legality of the Impugned Decision is still unresolved.

D. Variation of time limit

17. The Defence asks the Chamber to defer the time limit for making observations on the Impugned Decision as well as the observations of the Office of the Prosecutor and the Victims' Legal Representatives, until fourteen days after the Appeals Chamber has rendered its judgment. The Legal Representatives have adhered to the Defence's request for a variation of the time limit, asking the Chamber to allow them to file their observations seven days after the Appeals Chamber has rendered its judgment.

18. Although neither the Defence nor the Victims Legal Representatives invoke Regulation 35 of the Regulations of the Court, their requests must be considered on the basis of this provision. In this regard, the Chamber notes that the Defence argues that a variation of time limit is warranted "in the light of the time which has been necessary to devote to the issue of appealing the [Impugned Decision], which, it is submitted, was justified, given the unusual nature and potential impact of the [Impugned Decision]."¹⁷

¹⁷ ICC-01/04-01/07-3323, par. 58

19. The Chamber is not persuaded by the Defence's arguments for asking such a lengthy and undetermined extension of the time limit. The 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. As the Chamber is accountable for the expeditiousness of the proceedings, it cannot allow them to be halted for an indefinite amount of time on the basis of unspecified motives such as the ones invoked by the Defence.

20. Moreover, the Defence's request effectively amounts to a request for suspensive effect of the Impugned Decision. As is well-known to the Defence, the authority to grant suspensive effect in cases of interlocutory appeals rests with the Appeals Chamber pursuant to Article 82(3) of the Statute. Therefore, short of specific reasons indicating why it is not possible for the Defence to comply with the applicable time limit contained in the Impugned Decision and especially why the deadline should be linked to the Appeals Chamber's decision, the Chamber must reject the Defence's and the Legal Representatives' request for a variation of time limit as an invalid request for suspensive effect.

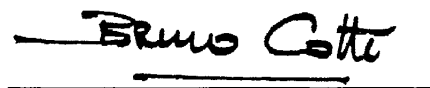
FOR THESE REASONS,

THE CHAMBER,

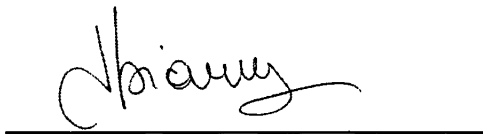
GRANTS the Defence's Application for leave to appeal; and

REJECTS the request for variation of time limit.

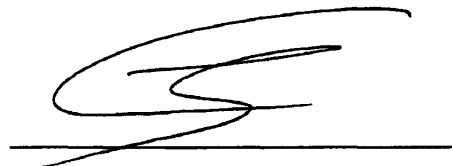
Done in both English and French, the English version being authoritative.



Judge Bruno Cotte
Presiding Judge



Judge Fatoumata Dembele Diarra



Judge Christine Van den Wyngaert

Dated this 28 December 2012

At The Hague, the Netherlands

ANNEX A

From: De Smet, Simon
Sent: 23 November 2012 14:52
To: Menegon, Sophie
Cc: Schoeters, Sandra; Garcia, Lucio; Luping, Dianne; Dutertre, Gilles; Macdonald, Eric; Droumaji, Jasmine; Assathiany, Daredjane; Catani, Lucia; Godart, Stephanie; Seroussi, Julien; Saracco, Marianne
Subject: RE: Request regarding the decision 3319

Dear Ms Menegon,

The Trial Chamber has asked me to forward the following message to you.

Sincerely yours,

Simon De Smet

« Par message email du 22 novembre 2012 (13 h 37), la Défense de Germain Katanga a manifesté le souhait d'obtenir une traduction en langue anglaise de la décision n° 3319 du 21 novembre 2012 relative à la mise en œuvre de la norme 55 du Règlement de la Cour et prononçant la disjonction des charges portées contre les accusés ainsi qu'une traduction en langue française de l'opinion dissidente de Mme le Juge Van den Wyngaert. Elle a également souhaité pouvoir bénéficier d'une extension du délai d'appel prévu par la Règle 155-1 du Règlement de la Cour (« le Règlement »).

Vu l'urgence (le délai d'appel expirant le 27 novembre 2012), la Chambre entend répondre par le présent email copié aux parties ainsi qu'aux participants concernés et qui sera ultérieurement versé au dossier.

Comme le prescrit la norme 55-3-a du Règlement de la Cour, la Chambre entend garantir à l'accusé Germain Katanga le temps et les facilités nécessaires pour préparer sa défense de manière efficace, conformément à l'alinéa b) du paragraphe 1er de l'article 67 du Statut.

Le Greffe vient toutefois de porter à la connaissance de la Chambre que, selon toute vraisemblance, elle ne pourra pas disposer d'une traduction de la décision précitée et de l'opinion dissidente avant le 14 décembre 2012. Il en résulte, la Chambre en convient, que la Défense de cet accusé ne sera pas en mesure de formuler, dans le délai fixé par la Règle 155-1 et en pleine connaissance de cause, une éventuelle demande d'autorisation d'appel exposant les motifs de ladite demande.

Dans cette situation très particulière, la Chambre considère qu'il s'impose de privilégier le libre et plein exercice des droits de la défense. Il appartient donc, selon elle, à la défense de Germain Katanga, si celui-ci entend exercer la voie de recours prévue par l'article 82 du Statut, de préserver les droits de l'accusé en interjetant appel dans le délai de cinq jours. Les motifs exposant la demande d'autorisation d'appel devront être déposés dans les trois jours suivant la notification de la remise de la traduction de la décision précitée.

Pour répondre enfin à la question posée à la fin de l'email précité de la Défense de Germain Katanga, la Chambre entend confirmer à cette dernière qu'en raison de la disjonction prononcée le 21 novembre 2012, elle n'a pas à être présente lors de l'audience du 18 décembre 2012 au cours de laquelle sera rendue la décision concernant l'accusé Mathieu Ngudjolo.

-----Original Message-----

From: Menegon, Sophie [mailto:smenegon

Sent: 22 November 2012 13:37

To: Assathiany, Daredjane; De Smet, Simon; Catani, Lucia; Godart, Stephanie; Seroussi, Julien; Saracco, Marianne

Cc: Schoeters, Sandra; Garcia, Lucio; Luping, Dianne; Dutertre, Gilles; Macdonald, Eric;

Toumaj, Jasmine

Subject: Request regarding the decision 3319

Dear Trial Chamber,

Please find below a message from Mr Hooper :

Dear Trial Chamber,

Last night I received the decision relating to Regulation 55. This is plainly a very significant decision and I can indicate now that it is highly likely that the defence will seek leave to appeal. In the normal course of events that will need to be lodged by Tuesday. However, I do not have the english translation of the majority decision, and Mr Katanga does not as yet have a french translation of the dissenting judgment. I hope both translations can be expedited. Given the importance of this decision in the case I request an extension of time to lodge any application for leave to appeal -- perhaps better framed as 'time not to run' until both I and the accused have received the translations.

The chamber will be aware of the modified team structure. I have applied to the Counsel Support Section for the team to be put back in place in the light of events and await their decision.

I also assume that there will no need for me or my team members to attend the hearing on the 18th December.

Sincerely,

David Hooper

Kind regards,

Sophie

Sophie MENEGON

Case Manager - Katanga Defence Team

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