

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/04-01/07 OA 12

Date: 26 August 2011

THE APPEALS CHAMBER

Before:

**Judge Sang-Hyun Song, Presiding Judge
Judge Erkki Kourula
Judge Daniel David Ntanda Nsereko
Judge Sanji Mmasenono Monageng
Judge Kuniko Ozaki**

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF THE PROSECUTOR v. GERMAIN KATANGA and
MATHIEU NGUDJOLO CHUI**

Public document

**Decision on the “Urgent Request for Directions” of the Kingdom of the
Netherlands of 15 July 2011**

Shs

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

The Office of the Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence of Germain Katanga
Mr David Hooper
Mr Andreas O'Shea

States Representatives
Ms Liesbeth Lijnzaad, the Kingdom of the Netherlands

Counsel for the Defence of Mathieu Ngudjolo Chui
Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofe Djofia Malewa

REGISTRY

Registrar
Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

Having before it the “Urgent Request for Directions” of 15 July 2011 (ICC-01/04-01/07-3077),

Renders unanimously the following

DECISION

The “Urgent Request for Directions” is rejected.

REASONS

I. PROCEDURAL HISTORY

1. On 9 June 2011, Trial Chamber II (hereinafter: “the Trial Chamber”) issued the “Decision on an *Amicus Curiae* application and on the ‘*Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d’asile*’ (articles 68 and 93(7) of the Statute)”¹ (hereinafter: “Decision of 9 June 2011”).

2. On 14 July 2011, the Trial Chamber issued the “Decision on three applications for leave to appeal Decision ICC-01/04-01/07-3003 of 9 June 2011”² (hereinafter: “Decision on Requests for Leave to Appeal”) in which it declared inadmissible three requests made pursuant to article 82 (1) (d) of the Statute for leave to appeal the Decision of 9 June 2011. The Trial Chamber stated therein that “the [Trial] Chamber therefore considers that it would overstep its vested powers in agreeing to examine applications for leave to appeal submitted in respect of decisions which, by their very nature, do not fall under article 82(1)(d) of the Statute. Accordingly, the [Trial] Chamber can only grant or refuse leave for such appeals if it considers, subject to their admissibility, that they can be lodged directly with the Appeals Chamber without its authorisation”.³

¹ ICC-01/04-01/07-3003-tENG.

² ICC-01/04-01/07-3073-tENG.

³ Decision on Requests for Leave to Appeal, para. 9.

3. On 15 July 2011, the Kingdom of the Netherlands (hereinafter: “the Netherlands”) filed before the Appeals Chamber the “Urgent Request for Directions”.⁴ The Netherlands “notes the unprecedented nature of the Decision on Request[s] for Leave to Appeal and the lack of relevant provisions in the legal framework of the Court concerning the appeal which the Netherlands intends to file against the Decision before the Appeals Chamber”⁵ and “respectfully requests the Appeals Chamber for urgent directions as to the procedure to follow, including the applicable time limits, concerning the appeal which the Netherlands intends to file against the Decision”.⁶

4. On 20 July 2011, the Prosecutor filed the “Prosecution’s Response to the Government of the Kingdom of the Netherlands ‘Urgent Request for Directions’ (ICC-01/04-01/07-3077)”⁷ (hereinafter: “Response to the Urgent Request for Directions”). The Prosecutor “agrees with the Kingdom of the Netherlands that the Decision [on Requests for Leave to Appeal] is unprecedented and has created a situation of uncertainty as to the procedure to follow before the Appeals Chamber” and “accordingly supports the Kingdom of the Netherlands’ request for directions from the Appeals Chamber”.⁸

5. On 2 August 2011, the Presidency issued the “Decision replacing judges in the Appeals Chamber”⁹ wherein it recalled its previous decision granting the excusal of Judges Akua Kuenyehia and Anita Ušacka from all appeals in the case of *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* and temporarily attached Judges Sanji Mmasenono Monageng and Kuniko Ozaki to the Appeals Chamber in respect of the Urgent Request for Directions.

II. MERITS

6. The Appeals Chamber observes that the Urgent Request for Directions is submitted prior to the bringing of any appeal under article 81 or 82 of the Statute. As the Appeals Chamber has previously noted, its jurisdiction is clearly and exhaustively

⁴ ICC-01/04-01/07-3077.

⁵ Urgent Request for Directions, para. 5.

⁶ Urgent Request for Directions, para. 6.

⁷ ICC-01/04-01/07-3080.

⁸ Response to the Urgent Request for Directions, para. 5.

⁹ ICC-01/04-01/07-3084.

defined in the Statute and Rules of Procedure and Evidence to proceedings in relation to: (i) appeals under articles 81 and 82 of the Statute, (ii) the revision of conviction or sentence under article 84 of the Statute, (iii) the disqualification of the Prosecutor or a Deputy Prosecutor under article 42 (8) of the Statute and (iv) review concerning reduction of sentence under article 110 of the Statute.¹⁰ As the Urgent Request does not fit within any of these provisions, it falls outside of the Appeals Chamber's jurisdiction and must be dismissed *in limine*.

7. Moreover, the Appeals Chamber recalls that, in the context of appeals brought under article 82 (1) (d) of the Statute, it previously rejected requests for directions concerning the procedures to be followed by victims wishing to participate in appeals on the grounds that such requests had no foundation in the Court's legal instruments.¹¹ In those instances, the Appeals Chamber found that "[i]f the Appeals Chamber were to answer such a request, it would have to assume the role of an advisory body, which it considers to be beyond and outside the scope of its authority".¹² The Appeals Chamber finds that the Urgent Request for Directions similarly lacks any foundation in the Court's legal instruments and asks the Appeals Chamber to go beyond and outside the scope of its authority.

8. For the reasons given above, the Appeals Chamber rejects the Urgent Request for Directions.

¹⁰ See *Prosecutor v. Thomas Lubanga Dyilo*, "Decision of the Appeals Chamber upon the Registrar's Requests of 5 April 2007", 27 April 2007, ICC-01/04-01/06-873 (OA 8), para. 6; *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 33 *et seq.*

¹¹ *Situation in the Democratic Republic of the Congo*, "Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 24 December 2007", 30 June 2008, ICC-01/04-503 (OA 4, OA 5, OA 6), para 30; *Situation in Darfur, Sudan*, "Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 6 December 2007", 18 June 2008, ICC-02/05-138 (OA 2, OA 3), para. 19.

¹² *Situation in the Democratic Republic of the Congo*, "Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 24 December 2007", 30 June 2008, ICC-01/04-503 (OA 4, OA 5, OA 6), para. 30; *Situation in Darfur, Sudan*, "Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 6 December 2007", 18 June 2008, ICC-02/05-138 (OA2, OA 3), para. 19.

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


Judge Sang-Hyun Song
Presiding Judge

Dated this 26th day of August 2011

At The Hague, The Netherlands