

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 17 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 CONGO

IN THE CASE OF THE PROSECUTOR v. GERMAIN KATANGA

URGENT

Public document

Decision on the application of victims to participate in the appeal against Trial Chamber II's decision on the implementation of regulation 55 of the Regulations of the Court

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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

Legal Representatives of Victims
Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

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 person” of 21 November 2012 (ICC-01/04-01/07-3319-tENG/FRA),

Having before it the “Demande conjointe des représentants légaux à pouvoir participer à la procédure relative à l’appel de la Défense contre la décision de la Chambre de première instance II n° 3319 (mise en œuvre de la Norme 55 du Règlement de la Cour)” of 3 January 2013 (ICC-01/04-01/07-3329),

Renders the following

DECISION

- (i) The 364 victims represented by Mr Nsita Luvengika and Mr Gilissen, who have applied to participate in the present appeal, are granted the right to participate for the purpose of presenting their views and concerns with respect to their personal interests in the issues raised on appeal. They may file their observations by 25 January 2013, 16h00.
- (ii) Mr Katanga and the Prosecutor may file their responses to the observations presented by the victims by 30 January 2013, 16h00.

REASONS

I. PROCEDURAL HISTORY

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

¹ ICC-01/04-01/07-3319-tENG/FRA.

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regulation 55 of the Regulations of the Court” in relation to the mode of liability under which Mr Katanga stands charged.²

2. On 21 December 2012, Mr Katanga requested leave to appeal the Impugned Decision.³ On 28 December 2012, the request was granted by the Trial Chamber⁴ (hereinafter: “Decision Granting Leave to Appeal”) with respect to the issue whether it was lawful and appropriate in the circumstances of the case to give notice pursuant to regulation 55 (2) of the Regulations of the Court.⁵

3. On 3 January 2013, the common legal representatives Mr Gilissen and Mr Nsita (hereinafter: “Legal Representatives”) jointly filed the “Demande conjointe des représentants légaux à pouvoir participer à la procédure relative à l’appel de la Défense contre la décision de la Chambre de première instance II n° 3319 (mise en œuvre de la Norme 55 du Règlement de la Cour)”⁶ (hereinafter: “Application for Participation”). They submit that all four criteria for victim participation are met in the present circumstances and request the Appeals Chamber to grant leave to participate in Mr Katanga’s appeal against the Impugned Decision.

4. 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”⁷ (hereinafter: “Document in Support of the Appeal”).

5. Following an order of the Appeals Chamber of 8 January 2013,⁸ Mr Katanga responded to the Application for Participation on 9 January 2013;⁹ the Prosecutor

² Impugned Decision, p. 29.

³ “Defence Request for Leave to Appeal the Decision 3319”, ICC-01/04-01/07-3323.

⁴ “Decision on the ‘Defence Request for Leave to Appeal the Decision 3319’”, ICC-01/04-01/07-3327.

⁵ Decision Granting Leave to Appeal, paras 5, 12; *see also* Document in Support of the Appeal, para. 11.

⁶ ICC-01/04-01/07-3329 (OA 13).

⁷ ICC-01/04-01/07-3339 (OA 13).

⁸ “Order on the filing of a response by Mr Germain Katanga and by the Prosecutor to the ‘Demande conjointe des représentants légaux à pouvoir participer à la procédure relative à l’appel de la Défense contre la décision de la Chambre de première instance II n° 3319 (mise en œuvre de la Norme 55 du Règlement de la Cour)’”, ICC-01/04-01/07-3333 (OA 13).

⁹ “Defence Observations on the ‘Demande conjointe des représentants légaux à pouvoir participer à la procédure relative à l’appel de la Défense contre la décision de la Chambre de première instance II n° 3319 (mise en œuvre de la Norme 55 du Règlement de la Cour)’”, ICC-01/04-01/07-3336 (OA 13) (hereinafter: “Mr Katanga’s Response”).

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responded on 11 January 2013.¹⁰ Neither Mr Katanga nor the Prosecutor object to the Application for Participation.¹¹

II. DETERMINATION BY THE APPEALS CHAMBER

6. The Appeals Chamber has held that, with respect to victims' participation in appeals brought under article 82 (1) (d) of the Statute, the following four cumulative criteria enumerated in article 68 (3) of the Statute must be fulfilled: (i) the individuals seeking participation must be victims in the case; (ii) their personal interests must be affected by the issues on appeal; (iii) their participation must be at an appropriate stage of the proceedings; and (iv) the manner of participation should neither cause prejudice to nor be inconsistent with the rights of the accused and a fair and impartial trial.¹²

7. The Appeals Chamber finds that all four criteria for the participation of the victims are fulfilled.

8. As regards the first criterion, the Legal Representatives have substantiated that the Trial Chamber allowed 353 victims represented by Mr Nsita Luvengika and 11 victims represented by Mr Gilissen to participate in the trial proceedings.¹³ The Appeals Chamber further notes that, as identified in the Application for Participation,

¹⁰ "Prosecution response to the 'Demande conjointe des représentants légaux à pouvoir participer à la procédure relative à l'appel de la Défense contre la décision de la Chambre de première instance II n° 3319 (mise en œuvre de la Norme 55 du Règlement de la Cour)'" , ICC-01/04-01/07-3341 (OA 13) (hereinafter: "Prosecutor's Response").

¹¹ Mr Katanga's Response, para. 1; Prosecutor's Response, para. 9.

¹² *Prosecutor v. Thomas Lubanga Dyilo*, "Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled 'Decision on Victims' Participation'", 16 May 2008, ICC-01/04-01/06-1335 (OA 9 OA 10), para. 36; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Decision on the Second Application by Victims a/0443/09 to a/0450/09 to Participate in the Appeal against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'", 28 January 2010, ICC-02/05-01/09-70 (OA), para. 9; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the Participation of Victims in the Appeal of Mr Katanga Against the 'Decision on the Modalities of Victims Participation at Trial'", 24 May 2010, ICC-01/04-01/07-2124 (OA 11), para. 5; *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the Participation of Victims in the Appeal against Trial Chamber I's Decision to Stay the Proceedings", 18 August 2010, ICC-01/04-01/06-2556 (OA 18), para. 7.

¹³ Application for Participation, para. 7; see "Décision relative au maintien du statut de victime participant à la procédure des victimes a/0381/09 et a/0363/09 et à la demande de Me Nsita Luvengika en vue d'être autorisé à mettre fin à son mandat de Représentant légal desdites victimes", 7 July 2011, ICC-01/04-01/07-3064.

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the Trial Chamber has authorised the continued participation in each of the severed cases of those victims who were allowed to participate in the joint proceedings.¹⁴

9. As to their personal interests, the Appeals Chamber recalls that “any determination [...] of whether the personal interests of victims are affected in relation to a particular appeal will require careful consideration on a case-by-case basis”.¹⁵ The Legal Representatives argue that the appeal relates to the form of individual criminal responsibility that may be the basis of the Trial Chamber’s decision pursuant to article 74 of the Statute.¹⁶ They aver that, depending on the outcome of the appeal, the further trial proceedings and the decision pursuant to article 74 of the Statute could take very different directions, which will affect the personal interests of the victims.¹⁷ The Appeals Chamber finds the arguments of the Legal Representatives convincing and holds that the personal interests of the victims who participated throughout the trial in the proceedings before the Court are affected by this appeal.

10. The Appeals Chamber finds that the participation of victims in this appeal is appropriate and, as to the manner of participation, decides that the victims may participate in the present appeal by making written submissions limited to their views and concerns with respect to their personal interests relating to the issues raised in this appeal. The Appeals Chamber considers that the participation of victims in the present appeal, in that manner, is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Furthermore, Mr Katanga and the Prosecutor will be permitted to reply to the victims’ views and concerns, in accordance with rule 91 (2) of the Rules of Procedure and Evidence.

¹⁴ Impugned Decision, para. 64.

¹⁵ *Prosecutor v. Thomas Lubanga Dyilo*, “Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the ‘Directions and Decision of the Appeals Chamber’ of 2 February 2007”, 13 June 2007, ICC-01/04-01/06-925 (OA 8), para. 28; *see also* *Prosecutor v. Jean- Pierre Bemba Gombo*, “Reasons for the ‘Decision on the Participation of Victims in the Appeal against the “Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa””, 20 October 2009, ICC-01/05-01/08-566 (OA 2), para. 15.

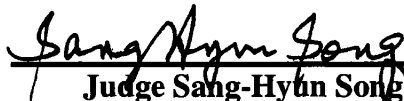
¹⁶ Application for Participation, paras 12-14; *see also* Prosecutor’s Response, para. 6.

¹⁷ Application for Participation, paras 12-14.

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Judge Sang-Hyun Song appends a separate opinion to this decision.

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



Judge Sang-Hyun Song
Presiding Judge

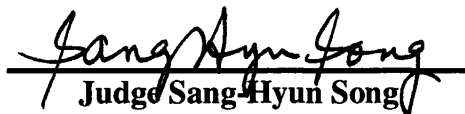
Dated this 17th day of January 2013

At The Hague, The Netherlands

Separate Opinion of Judge Sang-Hyun Song

I disagree with the approach taken by the majority regarding victim participation in appeals brought under article 82 (1) (d) of the Statute. In my view, victims who were permitted to participate in proceedings giving rise to an appeal under that provision are participants within the meaning of regulations 64 (4) and 65 (5) of the Regulations of the Court.¹ As participants, they have the right to file a response to the document in support of the appeal. There is no need for them to apply for participation or for the Appeals Chamber to rule on such applications. Therefore, while I agree that the victims who filed the Application for Participation are entitled to participate in the present appeal, in my view, there was no need for them to apply for participation or for the Appeals Chamber to rule on this application.

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


Judge Sang-Hyun Song

Dated this 17th day of January 2013

At The Hague, The Netherlands

¹ As consistently expressed since my first dissenting opinion in *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’”, 13 February 2007, ICC-01/04-01/06-824 (OA 7), pp. 55-57.