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No.: **ICC-01/04-01/07**

Date: **13 March 2014**

THE APPEALS CHAMBER

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Anita Ušacka
Judge Sanji Mmasenono Monageng

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

Public

**Defence Application regarding the Translation and Notification of the Article 74
Decision or, alternatively, for an extension of the time limit to file an appeal**

Source: Defence for Mr Germain Katanga

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

The Office of the Prosecutor

Ms Fatouma Bensouda, Prosecutor
Mr Eric Macdonald, Senior Trial Lawyer

Counsel for the Defence for Germain

Katanga
Mr David Hooper Q.C.

Legal Representatives of Victims

Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

REGISTRY

Registrar

Mr Herman von Hebel

Introduction

1. The defence for Germain Katanga (“defence”) requests the Appeals Chamber to exercise its discretion so as to order that the *Jugement rendu en application de l’article 74 du Statut* (“Article 74 decision”)¹ be deemed to have been ‘officially notified’ to the defence only when a full English translation of the majority’s Article 74 decision is provided to Counsel for the defence, who is Anglophone, and a full French translation of the dissenting opinion is provided to Germain Katanga, who is Francophone. Neither person speaks the other’s language other than to a rudimentary level.

2. In the alternative, the defence requests an extension of the time limit pursuant to Rule 150(2) of the Rules of Procedure and Evidence until 30 days after a full English translation of the majority’s Article 74 decision is provided to Counsel for the defence, and a full French translation of the dissenting opinion is provided to Germain Katanga. This alternative request is based on good cause, as is demonstrated in this Application.

Procedural background

3. On 7 March 2014, Trial Chamber II issued its Article 74 decision by which it found, by a majority, Mr Germain Katanga guilty on five charges and unanimously acquitted him of the remaining five charges.²

4. Prior to that decision, on 28 February 2014, the defence requested the Trial Chamber to order that the Article 74 Decision not be ‘officially notified’ until translations had been provided to the defence.³ On the 3rd of March 2014, the prosecution responded that it “does not object to the Defence request, provided that the same applies to the Prosecution.”⁴ The Legal Representative of the main

¹ ICC-01/04-01/07-3436, 7 March 2014.

² ICC-01/04-01/07-3436.

³ ICC-01/04-01/07-3433, 28 February 2014, para. 1.

⁴ ICC-01/04-01/07-3434, Prosecution Response to “Defence Request regarding the Translation and Notification of the Article 74 Decision”, submitted on 28 February and notified on 3 March 2014, para. 1.

group of victims also responded, stating that he had no objection to the defence request and that, if it was allowed, it should apply to all parties and participants.⁵

5. On the same day that it rendered judgement, the Trial Chamber, by *Ordonnance portant calendrier de la procédure relative à la fixation de la peine (article 76 du Statut)* stated, in respect of the defence's 'notification' request, that ;

En ce qui concerne les éventuelles procédures d'appel et, plus précisément, la question du point de départ des délais, il appartient à la Défense d'en saisir directement la Chambre d'appel.⁶

The Law

6. Article 81 of the Statute: Appeal against decision of acquittal or conviction or against sentence

1. A decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:

[...]

(b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:

(i) Procedural error,

(ii) Error of fact,

(iii) Error of law, or

(iv) Any other ground that affects the fairness or reliability of the proceedings or decision.

Rule 150 of the Rules of Procedure and Evidence: Appeal

1. Subject to sub-rule 2, an appeal against a decision of conviction or acquittal under article 74, a sentence under article 76 or a reparation order under article 75 may be filed not later than 30 days from the date on which the party filing the appeal is notified of the decision, the sentence or the reparation order.

2. The Appeals Chamber may extend the time limit set out in sub-rule 1, for good cause, upon the application of the party seeking to file the appeal.

[...]

Regulation 58 of the Regulation of the Court: Document in support of the appeal

1. Having filed an appeal in accordance with regulation 57, the appellant shall file a document in support of the appeal within 90 days of notification of the relevant decision.

[...]

Regulation 31(2) of the Regulations of the Court: Notification

⁵ ICC-01/04-01/07-3435, paras 3-4.

⁶ ICC-01/04-01/07-3437, para. 3.

*Unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber, a participant is deemed notified, informed of or to have had communicated to him or her, a document, decision or order on the day it is effectively sent from the Court by the Registry. [...]*⁷

Ground 1: Notification of the Judgment

7. The defence respectfully requests the Appeals Chamber to order that notification of the Article 74 Decision (within the meaning of Regulation 31(2) of the Regulations of the Court) be deemed to take place from the day that the full English translation of the Decision is provided to Counsel for the defence, and a full French translation of the Dissenting Opinion is provided to Mr Katanga, so as to guarantee the Accused's right to have adequate time and facilities for the preparation of the defence, and to ensure the fairness of the proceedings, pursuant to Article 67(1) of the Statute and in light of the circumstances of the present case.
8. As to provision of a French translation of the dissenting opinion to Germain Katanga, the defence submits that it is only fair that the accused benefits from seeing the totality of the circumstances of the decision, including the dissent, in a language he understands. The dissent is a wide-ranging criticism of the Decision. It is 170 pages in length. Mr Katanga does not speak English to a level sufficient for him to read and understand it. A translation of the Dissenting Opinion would be in conformity with Article 67(1)(f) whereby an accused should have 'such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks'.
9. As to the provision of a full English translation of the Article 74 Decision to Defence Counsel, the defence submits that, before it files any notice of appeal of this Judgment, it is only fair and just that the English translation be provided so as to enable Counsel to read and understand it. The judgement is a lengthy document, running to over 700 pages, and addresses significant and complex issues expressed in a heightened and precise vocabulary. Lead Counsel can best be described as 'struggling' in the French language. In a nutshell, he does not

⁷ Italic added.

understand it. Provision of the translation is the only practicable solution to the problem.

10. While Counsel for the defence does not speak French to a level adequate to understand the Article 74 Decision, it is to be noted that both the prosecution trial team, and the prosecution appeals team, have several counsel whose primary language is French.
11. Given that Article 50(1) of the Statute requires that “The judgements of the Court, as well as other decisions resolving fundamental issues before the Court, [be] published in the official languages” of the Court, including English, it follows that the *Katanga* Judgement will be fully translated as a matter of course. The defence merely asks that ‘official notification’ be deemed to take place only when such translation is received. The significance of ‘notification’ is, of course, because it is only when such notification is deemed to have taken place that the various time periods for submitting notice and grounds of appeal begin to run.
12. This practice, whereby notification is only deemed to have taken place when the decision has been translated into a language that counsel understands, is supported by several decisions emanating from both Pre-Trial⁸ and Trial Chambers. In particular, in the *Lubanga* case, Trial Chamber I, relying, *inter alia*, on Articles 21(1), 50, 64, 67, and 81 of the Statute, Rules 40, 41, 144, and 150 of the Rules, Regulations 31 and 32 of the Regulations, issued an order by which it indicated that, in the event of a conviction, the Accused and the Prosecutor would be notified of the Article 74 Decision when the French translation was officially notified from the Court by the Registry; in the event of an acquittal, the Prosecutor would be notified of the Article 74 Decision when the English version was

⁸ See Pre-Trial Chamber I, “*Decision on the “Requête urgente de la défense portant sur la détermination de la date à partir de laquelle courent les délais fixés pour qu'elle puisse déposer une éventuelle demande d'autorisation d'interjeter appel de la décision «adjourner la hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute» (ICC-02/11-01/11-432) et/ou pour qu'elle puisse déposer une éventuelle réponse à une éventuelle demande d'autorisation d'interjeter appel déposée par le Procureur*”, 10 June 2013, ICC-02/11-01/11-434, paragraphs 6-8; Pre-Trial Chamber II, “*Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*”, 15 June 2009, ICC-01/05-01/08-424, page 185; Pre-Trial Chamber I, “*Decision on the Confirmation of Charges*”, 8 February 2010, ICC-02/05-02/09-243-Red, page 98.

notified.⁹ In that case the Article 74 Decision was in English and the accused and most of the defence team were francophone. Trial Chamber I considered that “certain minimum safeguards need to be in place to ensure that the accused and his counsel are able adequately to prepare for this next phase if the accused is convicted.”¹⁰

13. In the current case, Trial Chamber II has previously ordered that a decision be ‘officially notified’ only when an English translation was provided to the defence in order that the accused’s counsel had the benefit of it.¹¹
14. The practice whereby notification be deemed to take place only from the time that translations are provided is understood by the defence to be endorsed by The Hague Working Group’s proposed clarification of Rule 101, currently under discussion, and which reflects the practice referred to in paragraph 12 above.
15. The occasions when Chambers have acted to allow notification to be deemed to have taken place only when translations have been served, so as to enable Counsel to understand the documents, are a necessary way to preserve the accused’s interests. It should be emphasized that the discretion is exercised for the accused’s benefit, not counsel’s, and is done to secure the accused’s Article 67 (1) rights. Counsel may be seen to be, in practice, an accused’s *alter ego* – an extension of the accused and his interests in a case. Service of a document on the accused, even if served in a language that he understands, may not, in fact, be sufficient to alert him of the full implications of its content so as to have him fully informed. He will rely on his counsel for that advice.

Ground 2: Extension of the Time Limit

⁹ ICC-01/04-01/06-2834, Decision on the translation of the Article 74 Decision and related procedural issues, 15 December 2011, para. 26.

¹⁰ *Idem*, para. 21.

¹¹ By email dated 20 May 2013, the Trial Chamber II granted the defence request that the time allocated to the defence to respond to the *Décision relative à la transmission d’éléments juridiques et factuels complémentaires (norme 55-2 et 3 du Règlement de la Cour)*, ICC-01/04-01/07-3371, be extended so as to be ten days from the day that an English (draft) translation is provided to the defence. See ICC-01/04-01/07-3432-Conf-Anx3.

16. In the alternative, Rule 150(2) of the Rules provides the discretionary power by which the Appeals Chamber may extend the time limit set out in Rule 150(1), for good cause.

17. The defence submits that, for all the reasons stated above, it has shown good cause.

Conclusion

18. The defence requests the Appeals Chamber:

(i) to order that notification of the Article 74 Decision (within the meaning of Regulation 31(2) of the Regulations of the Court) be deemed to take place from the day that an authorised English translation of that Decision is provided to the defence and an authorized French translation of the Dissenting Opinion is provided to Mr Katanga;

(ii) in the alternative, to extend the time limit set out in Rule 150(1) to achieve the same effect.

Respectfully submitted,



David Hooper Q.C

Dated this 13 March 2014

The Hague