

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **19 May 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 CONGO**

***IN THE CASE OF***

***THE PROSECUTOR  
v. GERMAIN KATANGA***

**Public**

**Prosecution's submissions on Germain Katanga's "Notice of Appeal against the Presidency 'Decision pursuant to article 108(1) of the Rome Statute'"**

**Source:** Office of the Prosecutor

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

**The Office of the Prosecutor**

Ms Fatou Bensouda

Mr James Stewart

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 Congo**

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

## Introduction

1. Germain Katanga has improperly attempted to appeal the Presidency's decision approving his further prosecution by the DRC national authorities.<sup>1</sup> His filed "Notice of Appeal" and supporting Submissions are inadmissible. Not only has Mr Katanga brought an appeal where none lies, but he has wrongly filed his "Notice of Appeal" under article 81—a provision limited exclusively to final decisions of convictions or acquittals under article 74 and sentence decisions under article 76. An article 108 decision is not such a final decision. Nor is it clear that Mr Katanga, having served his sentence and received the Presidency's article 108 Decision, even has a role on this issue before this Court, let alone a right to challenge it by way of appeal. Moreover, his attempt to appeal a decision of the Presidency rendered in the exercise of its enforcement responsibilities under Part 10 of the Statute is unpersuasive.

2. Since Mr Katanga's "Notice of Appeal" is inadmissible, it should be dismissed *in limine*. Likewise, his Submissions—seeking both to justify this "appeal" and to address the merits of the article 108 Decision—should be dismissed *in limine*.

3. The Prosecution does not address the merits of this matter at this stage. Should the Appeals Chamber find the "Notice of Appeal" admissible, the Prosecution requests an opportunity to address the merits, if necessary.<sup>2</sup>

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<sup>1</sup> ICC-01/04-01/07-3684 OA15 ("Germain Katanga's 'Notice of Appeal'"); ICC-01/04-01/07-3685-Red OA15 or ICC-01/04-01/07-3685-Conf OA15 ("Submissions" or "Katanga Submissions"); ICC-01/04-01/07-3679 ("Article 108 Decision" or "Decision").

<sup>2</sup> Rule 214(5) allows the Prosecutor to comment on article 108 matters.

## Submissions

*i. No appeals, other than those explicitly provided by the Statute, are permitted.*

4. The Appeals Chamber has held that an appeal lies only if the Statute explicitly provides for it. Part 8 of the Statute exhaustively enumerates, in articles 81 and 82, the decisions that are subject to appeal. No right to appeal arises except as provided in Part 8.<sup>3</sup> According to the Appeals Chamber, the “inexorable inference” that “[t]he Statute defines exhaustively the right to appeal against decisions of first instance courts, namely decisions of the Pre-Trial or Trial Chambers”<sup>4</sup> is determinative. Furthermore, the *travaux préparatoires* confirm that States negotiating the Rome Statute specifically considered—but rejected—a proposal which would have provided for a broader scope of appeal.<sup>5</sup>

5. The Court’s statutory framework does not provide for an appeal against a decision by the Presidency under article 108.<sup>6</sup> As Mr Katanga concedes, “[t]he Statute and the Rules of Procedure and Evidence are silent as to the right of appeal from a Presidency decision[...].”<sup>7</sup> The Statute’s intent should be respected. Article 108 decisions therefore cannot be appealed. The Katanga Submissions fail to acknowledge the statutory intent<sup>8</sup> or the established case law on this issue.<sup>9</sup>

<sup>3</sup> ICC-01/04-168 OA3 (“DRC Extraordinary Review Appeal Decision”), para. 35; ICC-01/04-01/06-2799 OA19 (“Lubanga Appeal Decision of 26 August 2011”), paras. 7 and 8; ICC-01/04-01/07-3424 OA14 (“Katanga Appeal Decision on detained witnesses”), paras. 27-31.

<sup>4</sup> DRC Extraordinary Review Appeal Decision, para. 39. See Staker, C., and Eckelmans, F., “Appeal and Revision” in Triffterer, O and Ambos, K, (ed.), *The Rome Statute of the International Criminal Court: A Commentary*, 3<sup>rd</sup> edn., (Verlag C.H.Beck oHG: München, 2016) (Staker, C. and Eckelmans, F., “Appeal and Revision”), pp. 1950-1951, stating that “[the Appeals Chamber] has consistently rejected appeals and motions that do not fall within the detailed legal framework of article 81 and 82.”

<sup>5</sup> *Lubanga* Appeal Decision of 26 August 2011, para. 7; *Katanga* Appeal Decision on detained witnesses, paras. 29-30.

<sup>6</sup> See generally articles 81 and 82.

<sup>7</sup> Katanga Submissions, para. 2.

<sup>8</sup> *Contra* Submissions, para. 30, stating “[i]f it were the drafter’s intentions for decisions under article 108 not to be capable of appeal then [...] such would be expressed in the Statute, Rules or Regulations.”

<sup>9</sup> *Contra* Submissions, paras. 1-62.

ii. *Article 81(1) is limited to appeals against article 74 decisions*

6. Mr Katanga has improperly filed a “Notice of Appeal” under article 81(1)(b).

7. First, only article 74 decisions—decisions of acquittal or conviction—may be appealed under article 81(1). The statutory text<sup>10</sup> and commentaries<sup>11</sup> make this clear. The only other decisions that can be appealed under article 81 are article 76 sentencing decisions (article 81(2)).

8. The article 108 Decision is quite simply not an article 74 decision—it is not a final decision of acquittal or conviction. The Decision was not pronounced under article 74. Nor does it adjudicate Germain Katanga’s guilt or innocence.

9. In addition, as the Appeals Chamber has stated with respect to other appeals under the Statute, “[i]t is the nature, and not the ultimate effect or implication of a decision, that determines whether an appeal falls under [a particular provision].”<sup>12</sup> The article 108 Decision neither resembles the subject matter of an article 81 appeal in

<sup>10</sup> Article 81 is titled “Appeal against decision of acquittal or conviction or against sentence”. Article 81(1) states “[a] decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows[...].”

<sup>11</sup> Staker, C. and Eckelmans, F., “Appeals and Revision”, p. 1919, noting that article 81(1) “provided for appeals against a **‘decision under article 74’**.” (emphasis in original); further stating that “[i]t seems clear that paragraph 1 of article 81 is in fact intended to apply only to a final judgement of a Trial Chamber, convicting or acquitting the accused. This is apparent from the title to article 81, which refers, in addition to appeals against ‘sentence’ (which are governed by paragraph 2 of this article), only to appeals against ‘conviction or acquittal’. Also, the requirement in article 74 para. 2 that ‘[t]he Trial Chamber’s decision shall be based on its evaluation of the evidence and the entire proceedings’ would confirm that the references in article 74 to ‘the Trial Chamber’s decision’ are confined to the Trial Chamber’s final judgement.” See also Triffterer, O. and Kiss, A., “Article 74: Requirements for the decision” in Triffterer, O. and Ambos, K., (ed.), *The Rome Statute of the International Criminal Court: A Commentary*, 3<sup>rd</sup> edn., (Verlag C.H.Beck oHG: München, 2016) (Triffterer, O. and Kiss, A., “Article 74”), p. 1830, stating “[t]he indication that the decision shall be based on the ‘entire proceedings’ and on the ‘evidence submitted and discussed before [the Court] at the trial’ and that it shall contain a ‘full and reasoned statement of the Trial Chamber’s findings on the evidence and conclusions’ suggest that article 74 is applicable to the decision on the guilt or innocence of the accused. This interpretation is confirmed by the term used in the Spanish version of this provision ‘fallo’, which usually designates the judgement.[...]”; See also Brady, H. and Jennings, M., “Appeal and Revision” in Lee, R. S., (ed.), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International: The Hague, 1999) (Brady, H. and Jennings, M., “Appeal and Revision”), pp. 297-299.

<sup>12</sup> ICC-01/09-78 OA (“Kenya Admissibility Decision”), para. 17.

nature nor in effect. Its nature—considering the Decision’s operative part<sup>13</sup>—pertains to the Presidency’s approval, pursuant to article 108(1), of Germain Katanga’s prosecution by the DRC authorities in the DRC as set out in the “*Décision de renvoi*”.<sup>14</sup> And even if the Decision’s effect were to be considered, it does not remotely relate to a final decision of acquittal or conviction. Rather, the Decision authorises the DRC authorities to proceed with their proposed prosecution of Germain Katanga for the charges set out in the *Décision de renvoi*.<sup>15</sup> In short, the Presidency did not decide on whether Germain Katanga should be convicted or acquitted.

10. Second, Mr Katanga does not claim that the article 108 Decision is an article 74 decision or that it resembles one.<sup>16</sup> Rather, in an effort to “judge the Presidency”,<sup>17</sup> he seeks to fashion an appeal based *inter alia* on a purported “lacuna in the Court’s legal instruments”, “implied powers and inherent jurisdiction” and alleged “violations of fundamental human rights”.<sup>18</sup> These arguments yet again ignore established law. Indeed, the Appeals Chamber has previously considered and rejected efforts (channelling article 21 and human rights) to extend the scope of appeals.

11. As the Appeals Chamber has held, no “internationally recognised human right to appeal” exists that requires it to expand its limited subject-matter appellate jurisdiction under the Statute, beyond the scope of the powers vested in it by the

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<sup>13</sup> See e.g., *Kenya* Admissibility Decision, para. 15, noting that “[t]he operative part of the decision itself must pertain directly to [the] question[...]. It is not sufficient that there is an indirect or tangential link between the underlying decision and questions[...].” See also ICC-01/13-51 OA (“*Comoros* Admissibility Decision”), para. 50, noting that “[t]he Impugned Decision did not consist of, nor was it based upon, a ruling on admissibility which could be appealed under article 82(1)(a).”; para. 51, noting “[t]hat the operative part of the Impugned Decision did not pertain directly to a question of the admissibility of a case[...].”; see also ICC-01/04-02/06-1225 OA2 (“*Ntaganda* Jurisdiction Decision”), para. 15, fn. 25.

<sup>14</sup> Decision, para. 32, also stating “[f]or the reasons given above and taking into account the information available, the Presidency is of the view that the proposed prosecution of Mr Katanga, as set out in the “*Décision de renvoi*”, does not undermine fundamental principles or procedures of the Rome Statute or otherwise affect the integrity of the Court.”

<sup>15</sup> See Decision, para. 32.

<sup>16</sup> See generally Katanga Submissions.

<sup>17</sup> Katanga Submissions, para. 36.

<sup>18</sup> Katanga Submissions, paras. 40-62.

States Parties.<sup>19</sup> Significantly, in the *DRC Extraordinary Review Appeal Decision*, the Appeals Chamber rejected the notion of a “right to appeal” against every decision of a criminal court. Instead, it found that only appeals of “final decisions of a criminal court determinative of its verdict or decisions pertaining to the punishment meted out to the convict” are matters which may be appealed as of right. This right is assured to the *accused* under article 81.<sup>20</sup>

12. Mr Katanga is no longer an accused before this Court. Nor is he a “convicted person” in the sense of article 81(1)(b), which relates to a convicted person’s right to appeal an adjudication of guilt under article 74. Accordingly, he does not have the right to appeal the Presidency’s article 108 decision under article 81. Nor is it even clear that he has any role left to play once the Presidency has made its article 108 determination. Even so, his role in the article 108 determination was circumscribed: it was limited to the giving of his views.<sup>21</sup> Contrary to the Submissions,<sup>22</sup> merely claiming that a decision is “significant” or “weighty” does not guarantee a right to appeal under article 81.

*iii. The Presidency’s determination under article 108 is distinct*

13. As the Presidency has already noted, Mr Katanga’s “Notice of Appeal” raises “significant issues related to the competence of different organs of the Court within the structure of the Statute.”<sup>23</sup> This Court’s institutional structure and the statutorily distinct mandates of the Presidency and the Appeals Chamber as separate organs appear to militate against appellate review—in the traditional sense—of a Presidency’s article 108 decision rendered under Part 10.

<sup>19</sup> See also *Katanga Appeal Decision* on detained witnesses, para. 30.

<sup>20</sup> *DRC Extraordinary Review Appeal Decision*, para. 38. (emphasis added). See also *Katanga Appeal Decision* on detained witnesses, paras. 27-31.

<sup>21</sup> Rule 214(1).

<sup>22</sup> See e.g., Submissions, paras. 33, 53.

<sup>23</sup> ICC-01/04-01/07-3686 OA15 (“Decision replacing a judge in the Appeals Division”), p. 3.

14. Article 34 designates the Presidency as a distinct organ of the Court.<sup>24</sup> This article also designates the Appeals Division, Trial Division and Pre-Trial Division as a separate organ.<sup>25</sup> The Presidency is responsible for (i) “[t]he proper administration of the Court, with the exception of the Office of the Prosecutor” and (ii) “other functions conferred upon it in accordance with this Statute.”<sup>26</sup> Specifically, rule 199 tasks the Presidency with the Court’s Part 10 enforcement functions.<sup>27</sup> These Part 10 functions fall within the Presidency’s external relations and cooperation mandate.<sup>28</sup> The Presidency’s article 108 Decision approving Germain Katanga’s prosecution in the DRC was rendered in that capacity.

15. Several of Mr Katanga’s submissions underpinning his request to appeal the Presidency’s Decision are unsubstantiated and incorrect. First, in view of the clear text of rule 199, his suggestion questioning the Presidency’s role in article 108 matters is unpersuasive.<sup>29</sup> To the contrary, the Statute and a commentary underscore the Presidency’s role in enforcement matters.<sup>30</sup> The Presidency’s role under Part 10 is among its core statutory functions. Its enforcement functions encompass a “full cycle of enforcement of the sentences of imprisonment [...], as described in details under Part X of the Statute, Chapter 12 of the Rules and Chapter 7 of the Regulations of the Court.”<sup>31</sup> These functions essentially include features of public international law and incorporate aspects of diplomatic communication and international relations.<sup>32</sup>

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<sup>24</sup> Article 34(a).

<sup>25</sup> Article 34(b).

<sup>26</sup> Article 38(3).

<sup>27</sup> Rule 199 states “Unless provided otherwise in the Rules, the functions of the Court under Part 10 shall be exercised by the Presidency.”

<sup>28</sup> See e.g., Abtahi, H. and Young, R., “The Presidency” in Triffterer, O. and Ambos, K., (ed.), *The Rome Statute of the International Criminal Court: A Commentary*, 3<sup>rd</sup> edn., (Verlag C.H.Beck oHG: München, 2016) (Abtahi, H. and Young, R., “The Presidency”), p. 1240.

<sup>29</sup> *Contra e.g.*, Katanga Submissions, para. 56.

<sup>30</sup> See e.g., Abtahi, H. and Young, R., “The Presidency”, p. 1239, noting “[a]s far as the Presidency is concerned, its functions are scattered across the Statute, the Rules, the Regulations of the Court and the Regulations of the Registry. The core of the functions of the Presidency that are expressly referred to in the Statute is concentrated in [...] Part X on the enforcement.”

<sup>31</sup> Abtahi, H. and Young, R., “The Presidency”, p. 1240.

<sup>32</sup> *Ibid.*, p. 1240.



16. Second, there is no indication, contrary to the Submissions, that “[a]n organ discharging a quasi-executive function, which is primarily concerned with the smooth operation of the Court, is more likely to be influenced[...].”<sup>33</sup> This is particularly so when the Presidency is itself composed of sitting judges of this Court, and elected from among them.<sup>34</sup>

17. Third, Mr Katanga is wrong to claim that “[t]he decision of the Presidency frustrates the objective of the Appeals Chamber’s sentencing review decision.”<sup>35</sup> Indeed, as the Presidency has noted, it “designated the DRC as the State of enforcement following a request from Mr Katanga himself.”<sup>36</sup> Also as the Presidency noted, Mr Katanga was informed of the possibility that if he returned to the DRC he would face domestic criminal proceedings relating to his alleged conduct in the DRC before his transfer to the Court in 2007, even though he does not seem to have been told of the precise charges in the *Décision de renvoi*.<sup>37</sup> Despite this, Mr Katanga still expressed his desire to return to the DRC. The Presidency took his view into account in designating the DRC as the State of enforcement<sup>38</sup>—a preference Mr Katanga has previously underscored, including during the sentencing review proceedings before the panel of the Appeals Chamber.<sup>39</sup>

18. For all the reasons above, Germain Katanga’s “Notice of Appeal” and Submissions are inadmissible.

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<sup>33</sup> *Contra* Katanga Submissions, para. 59.

<sup>34</sup> Article 38(1).

<sup>35</sup> *Contra* Katanga Submissions, para. 55.

<sup>36</sup> Article 108(1) Decision, para. 27.


<sup>37</sup> *Ibid.*, para. 27.

<sup>38</sup> *Ibid.*, para. 27.

<sup>39</sup> *See generally* ICC-01/04-01/07-3626 (Decision designating a State of enforcement). *See generally* ICC-01/04-01/07-T-347-ENG; ICC-01/04-01/07-3594.

### Conclusion and Relief sought

19. Mr Katanga cannot appeal the Presidency's article 108 Decision. Accordingly the Prosecution requests the Appeals Chamber to dismiss Germain Katanga's "Notice of Appeal" and Submissions *in limine*.




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**Fatou Bensouda, Prosecutor**

Dated this day of 19<sup>th</sup> May 2016

At The Hague, The Netherlands

Word Count: 2722<sup>40</sup>

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<sup>40</sup> The Prosecution hereby makes the required certification: ICC-01/11-01/11-565 OA6, para. 32.