

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 24 August 2011

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 and MATHIEU NGUDJOLO CHUI

Public

**Decision on the Security Situation of witnesses
DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350**

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

The Office of the Prosecutor

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Mr Eric MacDonald

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Mr David Hooper
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Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofé Djofia Malewa

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

States Representatives

Democratic Republic of the Congo
Kingdom of the Netherlands

The Office of Public Counsel for the Defence

REGISTRY

Registrar

Ms Silvana Arbia
Mr Marc Dubuisson

Victims and Witnesses Unit

Ms Maria-Luisa Martinod-Jacome

Counsel Support Section

Others

Mr Ghislain Mabanga Monga Mabanga

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court” respectively), acting pursuant to articles 68 and 93 of the Rome Statute (“the Statute”), and rules 86, 87, 88 and 192 of the Rules of Procedure and Evidence (“the Rules”), decides as follows:

I. PROCEDURAL HISTORY

1. Between 30 March 2011 and 3 May 2011, three witnesses who were detained by the authorities of the Democratic Republic of the Congo (“DRC”), DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, appeared before the Chamber. They had been transferred to The Hague for that purpose in cooperation with the DRC authorities in accordance with Article 93(7) of the Statute.

2. On 12 May 2011, the three detained witnesses filed an application for asylum with the competent authorities of The Netherlands.¹ The witnesses also claimed that they would be in danger from the DRC authorities as a result of their testimony if they were to be returned to the DRC. This raised the question of whether the Court could return the witnesses to the DRC in accordance with its obligations under Article 93(7) of the Statute and Rule 192(4) of the Rules.

3. On 9 June 2011, the Chamber rendered its “Decision on an *Amicus Curiae* application and on the ‘*Requête tendant à obtenir présentation des témoins DRC-D02-P-350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d’asile*’ (articles 68 and 93(7) of the Statute)”.² For a full procedural history of all events and submissions leading up to this decision, the Chamber refers

¹ “Request for leave to submit Amicus Curiae Observations by mr. Schuller and mr. Sluiter, Counsel in Dutch Asylum proceedings of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350”, 26 May 2011, ICC-01/04-01/07-2968, para. 2

² ICC-01/04-01/07-3003

to its paragraphs 1 to 34. In the decision, the Chamber held that “the Statute unequivocally places an obligation on the Court to take all protective measures necessary to prevent the risk witnesses incur on account of their cooperation with the Court.”³ The Chamber also held that until a solution was reached regarding the security situation of the three detained witnesses in the DRC, they would remain in the Court’s custody.⁴ When the abovementioned decision was rendered, there was still disagreement between counsel for the three detained witnesses and the Registry over whether the witnesses could be sent back to the DRC without undue risk for their security. The Chamber therefore had to arbitrate on this issue after obtaining all relevant information about the security situation in the DRC and the possible protective measures that could be put in place.

4. Anticipating a number of different scenarios, the Chamber considered what should happen in case a suitable solution to the security concerns was to be found, thus allowing the Court to return the detained witnesses to the DRC:

Once satisfied of the proposed protective measures, there would in principle be no reason for the Court to delay the witnesses’ return to the DRC any further. However, the fact that an asylum procedure is still ongoing does not in and of itself permit the Court to order a person’s return pursuant to article 93(7) of the Statute. Neither that article nor the Rules contemplate this unprecedented situation. Hence, a solution must be sought as soon as possible in consultations between the Court, the host State and the DRC in order determine whether these witnesses should remain in detention and, if so, in whose custody. During this consultation procedure, the witnesses will remain in the Court’s custody, in accordance with article 93(7) of the Statute.⁵

³ ICC-01/04-01/07-3003, para. 61

⁴ ICC-01/04-01/07-3003, para. 81

⁵ ICC-01/04-01/07-3003, para. 85

5. On 15 June 2011, the DRC filed a request for leave to appeal the decision of 9 June 2011.⁶ In the same document, the Congolese Minister of Justice and Human Rights, His Excellency LUZOLO Bambi Lessa, affirmed that no harm would befall the three witnesses and that the DRC authorities did not pose any threat to their security.⁷

6. On 22 June 2011, the Chamber rendered a further decision⁸ in which it took formal notice of the guarantees offered by the Congolese authorities and instructed the Registry to dispatch a cooperation request to the DRC in order to put in place the following protective measures:

- The witnesses shall be detained in a detention centre which, in terms of infrastructure and population, is most conducive to offering maximum protection. The VWU is instructed to consult with the DRC authorities to identify whether this is the CPRK Kinshasa, the Ndolo prison, or any other detention centre where the witnesses can be legally detained.
- If the witnesses are transported or transferred to another location, the VWU must be informed in advance.
- The detained witnesses shall be held under conditions which protect them from possible aggression by co-detainees. However, this should not lead to their permanent isolation.
- There shall be permanent surveillance of the security of the detained witnesses by guards who are specifically selected and trained for this purpose in close consultation between the Congolese prison authorities and the VWU. These guards must be reachable at all times by the VWU.
- A member of the VWU must be able to visit each detained witness twice per week and must be allowed to speak with them confidentially.
- When the detained witnesses are to be tried, an observer of the Court must be allowed to attend the proceedings. The Registry must thus be informed in advance

⁶ “Demande d’autorisation d’interjeter appel de la Décision sur une requête en amicus curiae et sur la ‘requête tendant à obtenir présentations des témoins DRC-D02-P350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d’asile”, 15 June 2011, ICC-01/04-01/07-3023

⁷ ICC-01/04-01/07-3023, para. 10 and 26

⁸ “Decision on the security situation of three detained witnesses in relation to their testimony before the Court (art. 68 of the Statute) and Order to request cooperation from the Democratic Republic of the Congo to provide assistance in ensuring their protection in accordance with article 93(1)(j) of the Statute”, 22 June 2011, ICC-01/04-01/07-3033

of the date and location of any legal proceedings involving one of the detained witnesses.⁹

7. The Chamber decided that these measures should be in place before the Court could return the three detained witnesses to the DRC and should remain in place until the end of their respective trials.¹⁰

8. On 5 July 2011, the Registry informed the Chamber that it had entered into contact with the relevant DRC authorities and had transmitted a formal cooperation request on the basis of article 93(1)(j) for the implementation of the abovementioned protective measures on 27 June 2011.¹¹

9. On 5 August 2011, the Registry submitted another report on the results of a visit to the DRC by the ICC Chief Custody Officer and a representative of the Division of Court services.¹² In this report, the Registry indicated that Ndolo military prison is the best option for offering maximum protection to the three detained witnesses.¹³ The Registry further states that the DRC authorities have agreed to place a security guard at the entrance of the wing where the three detained witnesses would be kept.¹⁴ In addition, the DRC authorities have agreed to cooperate with the Court and the MONUSCO Corrections Unit in the selection of the other persons with whom the detained witnesses will be accommodated.¹⁵

10. On 10 August 2011, the Chamber welcomed the positive response from the DRC authorities, but ordered the Registry to obtain further confirmation about whether all the conditions which the Chamber had defined would be

⁹ ICC-01/04-01/07-3033, Para. 41

¹⁰ ICC-01/04-01/07-3033, para. 41

¹¹ "Registry's report on the orders received in document ICC-01/04-01/07-3033", 5 July 2011, ICC-01/04-01/07-3061

¹² "Registry's report on the implementation of ICC-01/04-01/07-3033", 5 August 2011, ICC-01/04-01/07-3087-Conf

¹³ ICC-01/04-01/07-3087-Conf, para. 3

¹⁴ ICC-01/04-01/07-3087-Conf, para. 6

¹⁵ ICC-01/04-01/07-3087-Conf, para. 7

complied with.¹⁶ In particular, the Chamber wished to receive the following confirmations:

First, with regard to the affirmation by the Registry that there are no jurisdictional impediments against transferring the three detained witnesses to the Ndolo prison, the Chamber wishes to have it confirmed by the Congolese authorities that the charges against the three detained witnesses do indeed fall under military jurisdiction.

Second, the Chamber wants explicit confirmation that the VWU will be able to be in contact with the designated guards at all times and that the VWU will be allowed to meet privately with the detained witnesses at least twice per week.

Third, the Chamber wants confirmation that the DRC authorities have agreed to inform the VWU whenever the detained witnesses are to be transported.

Fourth, the Chamber wants explicit confirmation that the Court will be informed in advance of any legal proceedings against the three detained witnesses and will be allowed to send observers to any hearings.¹⁷

11. On 23 August 2011, the Registry transmitted the observations of the DRC authorities.¹⁸ After expressing its dissatisfaction with the delayed return of the three detained witnesses, the DRC confirmed that the crimes for which they stand accused are justiciable by the Congolese military criminal justice system.¹⁹ The DRC authorities also confirmed that they are willing to fully comply with the three other points mentioned in paragraph 6 of this decision, which relate to the protective measures to be put in place for the accused once they are returned to the DRC.²⁰

¹⁶ "Order to provide confirmation of full implementation of Decision ICC-01/04-01/07-3033", 10 August 2011, ICC-01/04-01/07-3097

¹⁷ ICC-01/04-01/07-3097, para. 6

¹⁸ "Registry's transmission of observations received from the DRC authorities in execution of Document ICC-01/04-01/07-3097", 23 August 2011, ICC-01/04-01/07-3123

¹⁹ ICC-01/04-01/07-3123-Anx1, para. 9

²⁰ ICC-01/04-01/07-3123-Anx1, para. 10

II. ANALYSIS

12. The Chamber welcomes the cooperative response from the DRC authorities, which greatly assists the Court in honouring its obligations under Article 68 of the Statute.

13. The conditions for the return of the three detained witnesses have now been fulfilled. First, the DRC authorities have offered explicit guarantees that no harm will be done to the detained witnesses on account of their testimony before the Court. Second, the measures that will be in place when the witnesses return to their home country are sufficient to offer adequate protection against any other possible security risk to which the witnesses might be exposed to as a consequence of having testified before the Court. In particular, until the end of their respective trials:

- a. The witnesses will be detained in a secure prison facility where they will be protected from aggression by other inmates.
- b. The guards who will guard the witnesses are trained according to international standards and will be selected in consultation between the VWU and the Congolese authorities.
- c. The VWU will, through the prison authorities, maintain regular and direct contact with the guards in order to anticipate any change in the security situation of the detained witnesses.
- d. The VWU will regularly visit the detained witnesses to assess their security situation.
- e. The VWU will be able to monitor any legal proceedings against the detained witnesses.

14. From the Chamber's point of view, the Court has fulfilled its obligations under article 68 of the Statute and there are no further grounds to delay the return of the three detained witnesses to the DRC. As the Chamber held in its decision of 9 July 2011, the current finding that the requirements of article 68 of the Statute have been met is limited to risks related to the cooperation of the witnesses with the Court.²¹ The Chamber thus takes no position on the alleged risk for violations of the human rights of the detained witnesses in the DRC, or indeed on the question of their alleged persecution by the DRC authorities.

15. However, for the reasons explained in its decision of 9 July 2011, so long as the request for asylum is still pending before the Dutch authorities, the Court cannot request that the Host State facilitate their return to the DRC.²² The fact that the asylum request is still pending makes their return temporarily impossible from a legal point of view.²³

16. The question is now whether DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350 should remain detained pending the final outcome of their request for asylum in The Netherlands and, if so, who should assume responsibility for detaining them. As the Chamber held in its decision of 9 July 2011, the Statute does not provide an answer to this question and "a solution must be sought as soon as possible in consultations between the Court, the host State and the DRC in order to determine whether these witnesses should remain in detention and, if so, in whose custody."²⁴

17. It is therefore incumbent upon the Registry to commence a consultation process with the authorities of The Netherlands and the DRC at once. It is the responsibility of the Registrar to establish the appropriate modalities of these

²¹ ICC-01/04-01/07-3003, para. 59-63

²² ICC-01/04-01/07-3003, para. 64

²³ ICC-01/04-01/07-3003, para. 73

²⁴ ICC-01/04-01/07-3003, para. 85

consultations and to determine whether it is more appropriate to enter into bilateral discussions with The Netherlands first, or whether to engage immediately in a dialogue with both concerned States. In any event, given that the obligation of the Court to detain the three witnesses has now, in principle, come to an end, the Chamber is of the view that a solution must be found urgently. Considering the importance of this issue, the Chamber wishes to be regularly informed about the progress of the consultations.

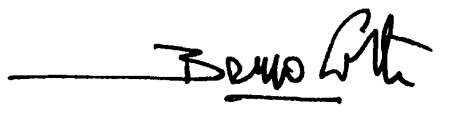
FOR THESE REASONS,

THE CHAMBER,

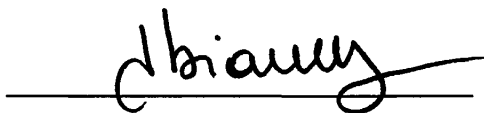
ORDERS the Registry to initiate consultations with the authorities of The Kingdom of the Netherlands and the Democratic Republic of the Congo in order to determine whether DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350 should remain detained pending the final outcome of their request for asylum in The Netherlands and, if so, who should be responsible for their detention; and

ORDERS the Registry to keep the Chamber regularly informed about the progress of these consultations and to file a first report no later than 16 September 2011 at 12h00.

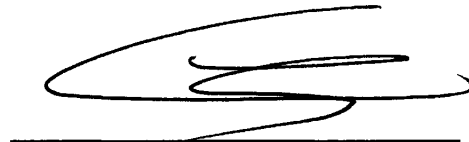
Done in both English and French, the English version being authoritative.



Judge Bruno Cotte
Presiding Judge



Judge Fatoumata Dembele Diarra



Judge Christine Van den Wyngaert

Dated this 24 August 2011

At The Hague, The Netherlands