

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 1 March 2012

**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 Urgent Request for Convening a Status  
Conference on the Detention 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**

Mr Luis Moreno-Ocampo

Ms Fatou Bensouda

Mr Eric MacDonald

**Counsel for Germain Katanga**

Mr David Hooper

Mr Andreas O'Shea

**Counsel for Mathieu Ngudjolo Chui**

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 article 93 of the Rome Statute (“the Statute”), and rule 192 of the Rules of Procedure and Evidence (“the Rules”), decides as follows:

## I. PROCEDURAL HISTORY

### A. Main Procedural Events Leading up to the Current Request

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.<sup>1</sup> 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*

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

*fins d'asile'* (articles 68 and 93(7) of the Statute)".<sup>2</sup> In this 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."<sup>3</sup> 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.<sup>4</sup> 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*

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<sup>2</sup> ICC-01/04-01/07-3003. For a full procedural history of all events and submissions leading up to this decision, the Chamber refers to its paragraphs 1 to 34.

<sup>3</sup> ICC-01/04-01/07-3003, para. 61

<sup>4</sup> ICC-01/04-01/07-3003, para. 81

*whose custody. During this consultation procedure, the witnesses will remain in the Court's custody, in accordance with article 93(7) of the Statute.*<sup>5</sup>

5. On 15 June 2011, the DRC filed a request for leave to appeal the decision of 9 June 2011.<sup>6</sup> 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.<sup>7</sup>

6. On 22 June 2011, the Chamber rendered a further decision<sup>8</sup> 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 a number of protective measures. 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.<sup>9</sup>

7. On 24 August 2011, after the Court had obtained the necessary guarantees from the DRC that all requested protective measures would be put in place upon the return of the detained witnesses, the Chamber found that there no longer were grounds to further delay the return of the detained

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<sup>5</sup> ICC-01/04-01/07-3003-tENG, para. 85

<sup>6</sup> "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

<sup>7</sup> ICC-01/04-01/07-3023, paras. 10 and 26

<sup>8</sup> "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

<sup>9</sup> ICC-01/04-01/07-3033, para. 41

witnesses to the DRC.<sup>10</sup> However, as the asylum request was still pending, this made their return temporarily impossible from a legal point of view.<sup>11</sup>

8. As the Statute does not regulate this situation, the Chamber asked the Registry to start a consultation process with the authorities of The Netherlands and the DRC, in order to determine whether the witnesses should remain detained pending the final outcome of their request for asylum, and, if so, who should assume responsibility for detaining them.<sup>12</sup> Pending these consultations, the Chamber held that the witnesses should remain in the custody of the Court in accordance with article 93(7) of the Statute.<sup>13</sup>

9. On 16 September 2011, the Registry reported on the outcome of the consultations with The Netherlands.<sup>14</sup> According to this report and the attached *Notes Verbales* sent by the Host State, the latter considered that the witnesses had “to remain in custody of the Court during the asylum procedure.”<sup>15</sup> The Netherlands further stated that under the current circumstances, it lacked jurisdiction to keep the witnesses in custody throughout the consideration of their asylum application and concluded that there was no need to consult with the Court at that time.<sup>16</sup>

10. On 20 September 2011, the Registry reported on the outcome of the consultations with the DRC.<sup>17</sup> The report indicates that the DRC regarded the Court’s request for consultation about whether the witnesses should remain in

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<sup>10</sup> “Decision on the Security Situation or witness DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350”, 24 August 2011, ICC-01/04-01/07-3128

<sup>11</sup> ICC-01/04-01/07-3128, para. 15

<sup>12</sup> ICC-01/04-01/07-3128, paras. 16 and 17

<sup>13</sup> ICC-01/04-01/07-3003, para. 85

<sup>14</sup> “Rapport du Greffe soumis en vertu de la décision ICC-01/04-01/07-3128”, 16 September 2011, ICC-01/04-01/07-3158-Conf

<sup>15</sup> *Note verbale* of 26 August 2011, ICC-01/04-01/07-3158-Conf-Anx3

<sup>16</sup> *Id.*

<sup>17</sup> “Second rapport du Greffe soumis en vertu de la décision ICC-01/04-01/07-3128”, 20 September 2011, ICC-01/04-01/07-3161

detention during the asylum procedure as unfounded.<sup>18</sup> The DRC maintained its demand that the detained witnesses be returned to the DRC, as soon as they had finished their testimony before the Court.<sup>19</sup>

11. As a result of the failure of the consultations to produce any alternative solution, the Court has found itself bound in the following position. On the one hand, since the witnesses have finished their testimony and their security in the DRC in case of return is guaranteed, the Court has no reason anymore to maintain custody over the witnesses and should return them. On the other hand, the Court's obligation to return the witnesses has been suspended until the final outcome of their asylum claim. Given this situation, the Court has had so far no other choice but to keep the three detained witnesses in its custody, in accordance with article 93(7) of the Statute. This situation continues until today.

#### **B. Request by the Detained Witnesses**

12. On 30 January 2012, duty counsel for the three detained witnesses before the Court, in collaboration with the Dutch lawyers who represent them in their asylum proceedings, filed an "Urgent Request for Convening a Status Conference on the Detention of Witnesses DRC-D02-P-036, DRC-D02-P-0228, and DRC-D02-P-0350" ("Request").<sup>20</sup> In this filing, the detained witnesses draw attention to the fact that they have been in detention at the ICC Detention Unit since 27 March 2011 and that, as a result of their request for protection, this detention has been prolonged for a considerable period of time.<sup>21</sup> They point out, in this regard, that "it can safely be concluded that [the consultations mentioned in paragraphs 8 to 10] have not led to any result, other than the continuation of the detention of the witnesses at the ICC

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<sup>18</sup> ICC-01/04-01/07-3161-Conf-Anx1

<sup>19</sup> Id.

<sup>20</sup> ICC-01/04-01/07-3224

<sup>21</sup> ICC-01/04-01/07-3224, para. 2

Detention Unit, without any prospect of (conditional) release and without any possibility of review.”<sup>22</sup>

13. Submitting that both this Chamber and Trial Chamber I “have acknowledged there was no power to continue the detention of the witnesses, after they had finished their testimonies at the ICC,”<sup>23</sup> and that there is no Congolese detention order in force and no detention order from this Court,<sup>24</sup> counsel questions whether there is any legal basis for their detention and asks in whose custody they are being held.<sup>25</sup> Counsel further refers to Article 9(4) of the ICCPR, and argues that “it befalls to this Chamber to review the detention of the witnesses.”<sup>26</sup>

14. Drawing attention to the impact of the current situation on the well-being of the witnesses, counsel alleges that the ongoing detention “deeply affects the mental and physical health of the three witnesses, which is aggravated by the unbearable insecurity as to the title and responsibility for their detention, as well as its expected duration.”<sup>27</sup>

15. Counsel for the detained witnesses also points out that a Decision of The Hague District Court of 28 December 2011, ordering the host State to allow the witnesses access to the regular Dutch asylum procedure, had not been appealed and had therefore become final.<sup>28</sup> According to counsel, “this confirmation of jurisdiction in the asylum cases (...) constitutes a new fact which may also have consequences for the witnesses’ ongoing detention.”<sup>29</sup>

16. Finally, Counsel requests this Chamber to convene a status conference “to exchange views and arguments and discuss with all relevant actors the matter

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<sup>22</sup> ICC-01/04-01/07-3224, para. 6

<sup>23</sup> ICC-01/04-01/07-3224, para. 10

<sup>24</sup> Id.

<sup>25</sup> ICC-01/04-01/07-3224, para. 6

<sup>26</sup> ICC-01/04-01/07-3224, para. 15

<sup>27</sup> ICC-01/04-01/07-3224, paras. 12

<sup>28</sup> ICC-01/04-01/07-3224, para. 9

<sup>29</sup> Id.



of the witnesses' ongoing detention."<sup>30</sup> Counsel is of the view that holding such a status conference is "the most efficient way to enable the Chamber to take a fully informed and comprehensive decision on the detention of the witnesses."<sup>31</sup>

## II. ANALYSIS

17. The role and authority of the Chamber *vis-à-vis* the witnesses are determined by articles 68(1) and 93(7) of the Statute and rule 192 of the Rules, read in conjunction with article 21(3) of the Statute. As outlined above at paragraph 11, the ongoing custody of the detained witnesses by the Court is based on article 93(7) of the Statute and is linked to both their detention by the DRC and their pending claim for asylum in The Netherlands.

18. Although the detention of the witnesses by the DRC and the custody of the Court are clearly interrelated, the Chamber has no authority to review the detention of the witnesses by the DRC. The Chamber notes, in this regard, that the Court has not been advised by the DRC of any change in their detention status. In the absence of such notification by the Congolese authorities, the witnesses are to remain in detention while they are in the custody of the Court.

19. The Court's role in relation to the Congolese proceedings can only be limited to ensuring, to the extent possible, that the ongoing detention under the Court's custody does not impede the witnesses from exercising any rights they may have under Congolese law to challenge their detention before the competent Congolese authorities. Considering the present circumstances, the Chamber deems it appropriate, in line with its decision of 22 June 2011<sup>32</sup>, that the Court should provide reasonable technical and logistical assistance to

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<sup>30</sup> ICC-01/04-01/07-3224, para. 7

<sup>31</sup> *Id.*

<sup>32</sup> ICC-01/04-01/07-3033, para. 43

enable the witnesses' participation in the relevant Congolese proceedings. This may include, for example, facilitating communication between the detained witnesses and their Congolese lawyers.

20. As regards the legality of the continued detention of the witnesses by the Court since the completion of their testimony, the Chamber notes that the custody of the Court on the basis of article 93(7) of the Statute has so far been maintained because the existence of the asylum claim has engendered an extraordinary situation, in which the Court has very little room for manoeuvre. The Chamber reiterates, in this respect, that the processing of the witnesses' asylum applications must not cause the unreasonable extension of their detention under article 93(7) of the Statute and that, in light of *inter alia* Article 21(3) of the Statute, the Court cannot contemplate prolonging their custody indefinitely.<sup>33</sup> The Chamber can therefore only deplore that the consultations have failed to produce an alternative solution pending the outcome of the Dutch asylum procedure, especially since the Court has no control over its duration.

21. For these reasons, and taking into account The Hague District Court's decision of 28 December 2011, which has recently become final and which confirms the applicability of Dutch immigration law to the processing and assessment of the witnesses' asylum applications on the basis of the fact that the witnesses are on Dutch territory,<sup>34</sup> the Chamber finds it necessary to ask the Dutch authorities whether:

- (1) they are now in a position to take control of the witnesses pending the outcome of their asylum claim and, in case their application is rejected, to ensure their return to the DRC;

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<sup>33</sup> ICC-01/04-01/07-3003, para. 85

<sup>34</sup> See *Note Verbale* from the Ministry of Foreign Affairs of the Kingdom of the Netherlands to the Court dated 13 January 2012 submitting and official copy of the decision and an English translation thereof, and, in particular, paragraphs 9.1 to 9.9 of the English translation.

- (2) they consider themselves obliged to receive the witnesses in accordance with article 48 of the Headquarters Agreement<sup>35</sup> in case the Court were to find it unreasonable to further detain them on the basis of article 93(7) of the Statute.

If the Dutch authorities so request, the Court is ready to engage in further consultations on the above matters.

22. Considering the foregoing, a status conference does not appear necessary to address the matters raised by the detained witnesses. Any observations of the witnesses on the issue of “the legality of their ongoing detention for almost a year at the ICC”<sup>36</sup> are to be filed in due course by duty counsel in writing.

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<sup>35</sup> Paragraph 1 of Article 48 reads in relevant part: “[W]here a person surrendered to the Court is released from the custody of the Court because the Court does not have jurisdiction, [...] or for any other reason, the Court shall, as soon as possible, make such arrangements as it considers appropriate for the transfer of the person, taking into consideration the views of the person, to a State which is obliged to receive him or her, to another State which agrees to receive him or her [...]”.

<sup>36</sup> ICC-01/04-01/07-3224, para. 6

**FOR THESE REASONS,**

**THE CHAMBER,**

**REJECTS** the Request to convene a status conference;

**ORDERS** the Registry to provide all reasonable assistance required by the detained witnesses in order to facilitate the exercise of their rights under Congolese law;

**ORDERS** the Registry to transmit the questions specified at paragraph 21 to the Dutch authorities, and to notify their response to the Chamber, the parties and the participants, as well as counsel for the witnesses; and

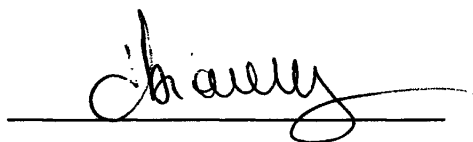
**REITERATES** its instruction to the Registry to keep the Chamber informed punctiliously of any developments in the Dutch asylum proceedings.

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

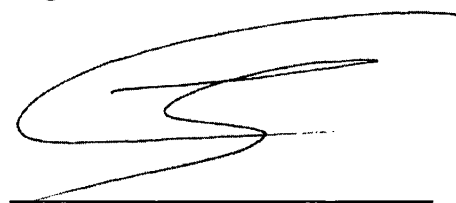


**Judge Bruno Cotte**

**Presiding Judge**



**Judge Fatoumata Dembele Diarra**



**Judge Christine Van den Wyngaert**

Dated this 1 March 2012

At The Hague, The Netherlands

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

12/12

1 March 2012