

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/04-01/07  
Date: 8 February 2013

**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***

**Public**

**Decision on the request for release 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**

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 articles 21, 64, 68, and 93 of the Rome Statute (“the Statute”), and rule 192 of the Rules of Procedure and Evidence (“the Rules”), decides as follows:

## PROCEDURAL HISTORY

### 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 (“Detained Witnesses”), 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 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. On 1 March 2012, responding to a request of the Detained Witnesses to convene a status conference on the matter of their ongoing detention,<sup>20</sup> the Chamber reiterated its view that the witnesses' asylum claims should "not cause the unreasonable extension of their detention under article 93(7) of the Statute" and that the Court could not contemplate prolonging their custody indefinitely.<sup>21</sup> Accordingly, the Chamber asked the Dutch authorities (1) whether they were in a position to take over control over the witnesses pending the outcome of their asylum claim (and to ensure their return to the DRC in case their asylum request were to be rejected), and (2) whether the Host State deemed it would be obliged to receive the witnesses on the basis of article 48 of the Headquarters Agreement, in case the Court were to find it unreasonable to further detain them on the basis of article 93(7) of the Statute.<sup>22</sup>

12. In a *Note Verbale* of 15 March 2012, the Host State stated that its position was that the witnesses were to remain in the custody of the Court pending the consideration of their asylum applications and that article 48 of the Headquarters Agreement imposed no obligation upon the Netherlands to receive the Detained Witnesses.<sup>23</sup>

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

<sup>19</sup> *Id.*

<sup>20</sup> "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 (Regulation 30 of the Regulations of the Court", 30 January 2012, ICC-01/04-01/07-3224

<sup>21</sup> "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", 1 March, ICC-01/04-01/07-3254, para. 20

<sup>22</sup> ICC-01/04-01/07-3254, para. 21

<sup>23</sup> ICC-01/04-01/07-3267-Conf-Anx1

13. On 14 May 2012, Duty Counsel for the detained witnesses filed a request in which he asked the Chamber, *inter alia*, to “adjudge and declare that at present the ongoing detention of the witnesses has also become the responsibility of the host-State and is no longer a matter within the exclusive jurisdiction of the Court.”<sup>24</sup>

14. On 1 June 2012, the Chamber referred back to its earlier decisions, in which it had held that the basis for the detention of the witnesses remained article 93(7) of the Statute.<sup>25</sup> The Chamber reiterated its view that a consensus solution needed to be reached in order to put an end to the extraordinary situation in which the Detained Witnesses find themselves.<sup>26</sup> The Chamber took note of the unwavering stance of the Host State in this regard.<sup>27</sup>

15. As a result of the failure of the consultations to produce an alternative solution, the Court remains in the following position. On the one hand, since the witnesses have finished their testimony and their security in case of return to the DRC is guaranteed, the Court has no reason any more 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 pending the final outcome of their asylum claim. Given this situation, and the unwillingness of both the Host State and the DRC to find a constructive solution to this unprecedented situation, the Court has so far had no choice but to keep the three detained witnesses in its custody, in accordance with article 93(7) of the Statute.

16. In the meantime, the Court has been informed about the following developments before Dutch jurisdictions: First, a decision of 26 September

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<sup>24</sup> “Request concerning the Detention of Witnesses DRC-D02-P-0236, DRC-D02-P-0228, and DRC-D02-P-0350”, 14 May 2012, ICC-01/04-01/07-3291

<sup>25</sup> “Order on duty counsel’s request concerning the detention of Witnesses DRC-D02-P-0236, DRC-D02-P-0228, and DRC-D02-P-0350”, 1 June 2012, ICC-01/04-01/07-3303, para. 14

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*



2012 by the District Court of The Hague, holding that the Host State had an obligation to enter in consultations with the Court in order to put an end to the detained witnesses' detention by the Court pending the resolution of their asylum application<sup>28</sup>, was overturned by the Court of Appeals of The Hague on 18 December 2012.<sup>29</sup> The Chamber is given to understand that this decision is, in turn, currently being appealed before the *Hoge Raad* of The Netherlands.<sup>30</sup> Second, it appears that the asylum requests of all three detained witnesses have been rejected by the Host State's Immigration and Naturalisation Service.<sup>31</sup> These decisions are currently being appealed before the competent judicial authorities of the Host State.

### Request by the Detained Witnesses

17. On 4 February 2013, the Detained Witnesses filed a Request,<sup>32</sup> asking the Chamber to declare that their detention by the Court on the basis of article 93(7) of the Statute is no longer justified and order their immediate release. In the alternative, the Detained Witnesses asked the Chamber to convene a status conference in order to discuss the legal problems raised by them in the Request.

18. In the Request, the Detained Witnesses submit that it would be unthinkable for a court of justice not to have the power to order the release of persons in its custody when their detention violates internationally recognised human rights.<sup>33</sup> In this regard, they argue that since the Chamber decided, on

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<sup>28</sup> Rechtbank 's-Gravenhage, Sector Civiel Recht – voorzieningsrechter, LJN: BX8320, available at [www.rechtspraak.nl](http://www.rechtspraak.nl)

<sup>29</sup> Gerechtshof 's-Gravenhage, Sector Civiel Recht, LJN: BY6075, available at [www.rechtspraak.nl](http://www.rechtspraak.nl)

<sup>30</sup> ICC-01/04-01/07-3351, para. 18

<sup>31</sup> ICC-01/04-01/07-3351, para. 19

<sup>32</sup> "Requête en mainlevée de la détention des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350", 4 February 2013, ICC-01/04-01/07-3351 ("Request")

<sup>33</sup> ICC-01/04-01/07-3351, para. 29

24 August 2011, that it was safe to return them to the DRC, the Court's obligation to keep them in custody has been extinguished and that, accordingly, their continued detention by the Court has been without a legal basis since that date.<sup>34</sup> Moreover, the Detained Witnesses state that the duration of their detention has become unreasonable, for reasons that are mainly attributable to the Host State and the extraordinary slowness of the Dutch asylum proceedings.<sup>35</sup>

19. In relation to the legal basis of their detention by the DRC, the Detained Witnesses submit, in essence, that there currently exists no valid Congolese title to deprive them of their freedom and that there is in any event insufficient evidence against them for the crimes with which they are charged in the DRC.<sup>36</sup>

## ANALYSIS

20. As previously stated, the role and authority of the Chamber *vis-à-vis* the Detained 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. 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.

21. As far as the former is concerned, the Chamber has no authority to review the detention of the witnesses by the DRC. It is noteworthy, in this regard, that the Court has not been advised by the DRC of any change in their detention status since the witnesses have arrived in The Hague almost two years ago. In the absence of such notification by the Congolese authorities, the

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<sup>34</sup> ICC-01/04-01/07-3351, para. 34

<sup>35</sup> ICC-01/04-01/07-3351, para 37

<sup>36</sup> ICC-01/04-01/07-3351, paras 43-48 and 53

witnesses are to remain in detention as long as they are in the custody of the Court.

22. The Chamber once again stresses that the Court has maintained custody over the Detained Witnesses until now because the existence of the asylum claims, combined with the intransigent position of the Host State, has engendered an extraordinary situation in which the Court has had very little room for manoeuvre. However, the Chamber reiterates its previous finding 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 keeping them in its custody indefinitely.<sup>37</sup>

23. Therefore, in order to allow the Chamber to determine whether the Court is still in a position to maintain the Detained Witnesses in custody on the basis of article 93(7) of the Statute, the Chamber deems it necessary to obtain some clarifications from the Host State and the DRC.

24. Accordingly, the Chamber invites the Government of the Host State to respond to the following question:

- a. What is the maximum time for which the asylum proceedings of the Detained Witnesses can be expected to last until all possible procedural avenues have been exhausted?

25. The Chamber invites the Government of the DRC to respond to the following questions:

- a. What is the exact situation of each of the Detained Witnesses with regard to their provisional detention by the DRC?
- b. Do the competent judicial authorities of the DRC consider, in light of the dates upon which the initial titles for the detention of the

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<sup>37</sup> ICC-01/04-01/07-3003, para. 85; ICC-01/04-01/07-3254, para. 20

respective witnesses were delivered, that their continued detention is still warranted and justified?

- c. What are the prospects for finalisation of the proceedings against the respective witnesses, since the Court has not received any response to its proposal to provide the necessary technical and logistical support to facilitate the witnesses' participation in these proceedings from a distance?

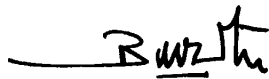
**FOR THESE REASONS,**

**THE CHAMBER,**

**INVITES** the governments of The Kingdom of the Netherlands and the Democratic Republic of the Congo to respond to the abovementioned questions by 1 March 2013.

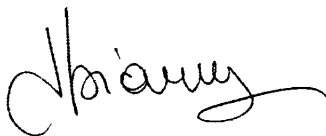
**ORDERS** the Registry to transmit the questions specified in paragraph 24 to the Dutch authorities and the questions specified in paragraph 25 to the Congolese authorities, and to notify their responses as soon as possible.

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

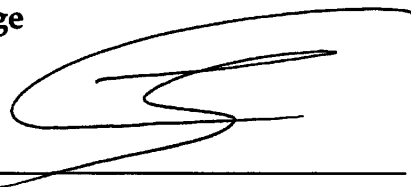


**Judge Bruno Cotte**

**Presiding Judge**



**Judge Fatoumata Dembele Diarra**



**Judge Christine Van den Wyngaert**

Dated this 8 February 2013

At The Hague, The Netherlands