



Original: English

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

Date: 7 March 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**

**Order authorising the submission of observations**

**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 Philip-Jan Schüller

Mr Göran Sluiter

Mr Ghislain Mabanga Monga Mabanga

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court” respectively), acting pursuant to article 64 of the Rome Statute (“the Statute”), and rule 103 of the Rules of Procedure and Evidence (“the Rules”), delivers the following Order authorising the submission of observations:

### **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 (“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

3. In a series of decisions, the Chamber found that the Detained Witnesses had a right to ask for asylum in The Netherlands and that they could not be returned to the DRC pending the final outcome of these proceedings. As this created an unprecedented situation that was not regulated in the Statute or the Rules, 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>2</sup> Pending these

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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.

<sup>2</sup> ICC-01/04-01/07-3128, paras. 16 and 17.

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>3</sup> However, despite repeated efforts on the part of the Court, the consultation process yielded no result. As a direct consequence of this failure, the Detained Witnesses have remained in the Court's custody.<sup>4</sup>

4. On 4 February 2013, the Detained Witnesses filed a request asking the Chamber to declare that their detention by the Court on the basis of article 93(7) of the Statute was no longer justified and order their immediate release or, in the alternative, to convene a status conference in order to discuss the legal problems raised by them in their request.<sup>5</sup>

5. On 8 February 2013, the Chamber rendered a decision on the request of the Detained Witnesses.<sup>6</sup> In this decision the Chamber requested, *inter alia*, that the government of the Kingdom of the Netherlands inform the Chamber of the maximum time period for which the asylum proceedings against the Detained Witnesses could be expected to last.<sup>7</sup>

6. On 15 February 2013, counsel representing the Detained Witnesses in their asylum proceedings before the Dutch authorities requested leave to submit *amicus curiae* observations on the nature and possible duration of the Dutch asylum proceedings to the Chamber ("Request").<sup>8</sup>

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<sup>3</sup> ICC-01/04-01/07-3003, para. 85.

<sup>4</sup> The history of the Chamber's decisions relating to the Detained Witnesses to date has been set out previously by the Chamber. See, "Decision on the request for release of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350", 8 February 2013, ICC-01/04-01/07-3352, paras 1–16.

<sup>5</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.

<sup>6</sup> ICC-01/04-01/07-3352.

<sup>7</sup> ICC-01/04-01/07-3352, para 24.

<sup>8</sup> "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". 15 February 2013, ICC-01/04-01/07-3354.

7. The Registry communicated the responses of the governments of the Kingdom of the Netherlands and the Democratic Republic of the Congo in its report of 1 March 2013 (“Report”).<sup>9</sup>

8. On 6 March 2013, counsel for the Detained Witnesses requested the Chamber to order notification of the Registry’s report of 1 March 2013 and its annexes to the Detained Witnesses.<sup>10</sup>

## II. Submissions and Analysis

### A. Request of 15 February 2013

9. In their request, counsel representing the Detained Witnesses in their asylum proceedings seek to inform the Chamber about (1) the estimated duration of the first instance judicial proceedings before the District Court of Amsterdam; (2) the possibility and duration of an appeal of the decisions of the District Court to the Administrative Judicial Division of the Council of State; (3) the possibility of intervention by the European Court of Human Rights in the form of interim measures if the Council of State rules that it is safe for the Detained Witnesses to return to the DRC; (4) counsel’s estimate, uncontested by the State in recent proceedings before Dutch courts, of the duration of the entire proceedings at the national level.<sup>11</sup>

10. Counsel submit that information must be provided by both parties in the ongoing asylum proceedings in order for the Chamber to be ‘fully, even-handedly and objectively informed’ about the possible duration of the asylum

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<sup>9</sup> “Report of the Registrar on the execution of the ‘Decision on the request for release of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350’”, 1 March 2013, ICC-01/04-01/07-3355.

<sup>10</sup> “Requête tendant à obtenir notification du ‘Report of the Registrar on the execution of the “Decision on the request for release of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350”’ (ICC-01/4-01/07-3355) et de ses annexes”, 6 March 2013, ICC-01/04-01/07-3356.

<sup>11</sup> ICC-01/04-01/07-3354, para. 11.

proceedings of the Detained Witnesses, because ‘the duration of the procedure also depends on the trial position of the witnesses’.<sup>12</sup>

11. Counsel submit that their application satisfies rule 103 under the ‘most stringent’ test in the Court’s case law in respect of *amicus curiae* applications, that ‘amicus curiae observations are only resorted to on an exceptional basis, when such observations are needed on particular topics, and subject to the Chamber’s consideration that this is desirable for the proper determination of the case’.<sup>13</sup> Counsel submit that, without the proposed brief, the Chamber ‘will be deprived of vital factual information’ required to determine if and when detention of the Detained Witnesses should end.<sup>14</sup>

12. As set out by the Appeals Chamber, leave for any State, Organisation or person to submit observations is ‘discretionary’.<sup>15</sup> In order to rule on the application, the Chamber must determine whether the observations which the applicant proposes to submit will be useful in order to reach a proper determination.<sup>16</sup> Bearing in mind the Chamber’s responsibility under the Statute to ensure that the rights of the Detained Witnesses are not infringed by any acts or omissions attributable to the Court, the Chamber is satisfied that it is appropriate for counsel to submit the proposed observations, which will enable the Chamber to be more fully informed about the nature and especially duration of the Dutch asylum proceedings, pursuant to rule 103(1) of the Rules.

13. Furthermore, the Chamber considers that counsel should also submit observations on a separate matter which was raised in the earlier request of

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<sup>12</sup> ICC-01/04-01/07-3354, para. 9.

<sup>13</sup> ICC-01/04-01/07-3354, paras 12–13.

<sup>14</sup> ICC-01/04-01/07-3354, para. 13.

<sup>15</sup> “Decision on ‘Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence’”, 22 April 2008, ICC-01/04-01/06-1289, para. 8.

<sup>16</sup> “Decision Inviting Observations from the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict”, 18 February 2008, ICC-01/04-01/06-1175, para. 7.

4 February 2013.<sup>17</sup> In that request, counsel detailed the course of proceedings, distinct from the asylum proceedings, in which the Detained Witnesses had argued that the lawfulness of their detention was a matter for the Dutch state.<sup>18</sup> The decision of the District Court of The Hague accepting this argument was overturned by the Court of Appeal of The Hague apparently on the basis of a decision of the European Court of Human Rights on the similar request of a witness in the *Lubanga* case.<sup>19</sup>

14. In the request of 4 February 2013, counsel informed the Chamber that the Detained Witnesses had filed a request on 1 February 2013 for judicial assistance in order to appeal the decision of the Court of Appeal of The Hague in cassation.<sup>20</sup> Counsel also stated that an appeal along these lines would not be possible within a reasonable period of time.<sup>21</sup> The Chamber invites counsel to make observations about the possible nature and duration of these proceedings on appeal, in addition to counsel's observations about the asylum proceedings.

15. The prosecution and the defence may file responses to counsel's *amicus curiae* brief, pursuant to rule 103(2) of the Rules. If the parties do not wish to file responses to the brief, they should inform the Chamber of this as soon as possible.

#### ***B. Request of 6 March 2013***

16. In the request of 6 March 2013, counsel for the Detained Witnesses submits that the proceedings related to the request of 4 February 2013 are separate from the main proceedings and principally concern the Detained Witnesses.<sup>22</sup> Counsel submits that there is therefore no justification for not transmitting the Registry's

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<sup>17</sup> ICC-01/04-01/07-3351.

<sup>18</sup> ICC-01/04-01/07-3351, paras 15–18, 23.

<sup>19</sup> ICC-01/04-01/07-3351, paras 15–17.

<sup>20</sup> ICC-01/04-01/07-3351, para. 18.

<sup>21</sup> ICC-01/04-01/07-3351, para. 23.

<sup>22</sup> ICC-01/04-01/07-3356, para. 4.

report and its annexes to the Detained Witnesses,<sup>23</sup> and requests the Chamber to order the notification to counsel of the report and its annexes.<sup>24</sup>

17. The Chamber considers that counsel's request is justified. The report in question is solely concerned with the proceedings related to the Detained Witnesses, not with the main proceedings in the case. The Chamber considers that counsel for the Detained Witnesses should be notified of the report and its annexes.

18. Moreover, the Chamber is of the view that, as one of the Detained Witnesses was called by both Defence teams, Counsel for Mr. Ngudjolo should also continue to be notified of all filings pertaining to this witness, notwithstanding the fact that this Chamber is no longer seized of Mr. Ngudjolo's case.

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<sup>23</sup> ICC-01/04-01/07-3356, para. 4.

<sup>24</sup> ICC-01/04-01/07-3356, para. 5.



**FOR THESE REASONS,**

**THE CHAMBER**

**GRANTS** authorisation to counsel representing the Detained Witnesses in their asylum proceedings to file their observations by 14 March 2013.

**INVITES** the prosecution and the defence to file responses by 20 March 2013 or, alternatively, to indicate that they will not be filing responses.

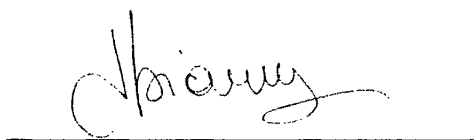
**ORDERS** the Registry to notify counsel for the Detained Witnesses of the Registry report of 1 March 2013 and its annexes.

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

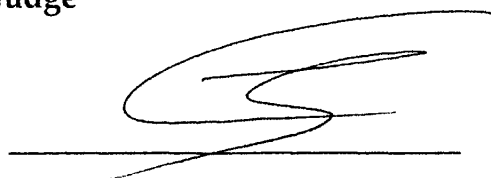


**Judge Bruno Cotte**

**Presiding Judge**



**Judge Fatoumata Dembele Diarra**



**Judge Christine Van den Wyngaert**

Dated this 7 March 2013

At The Hague, The Netherlands