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Date: **1 June 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 Document

Order on duty counsel's requests concerning the detention of Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350

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

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Mr Jean-Pierre Kilenda Kakengi Basila
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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

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Kingdom of The Netherlands

REGISTRY

Registrar

Ms Silvana Arbia
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**Victims Participation and Reparations
Section**

Other

Mr Ghislain Mabanga Monga

TRIAL CHAMBER II of the International Criminal Court (“the Chamber” and “the Court”), acting pursuant to articles 21 and 93(7) of the Rome Statute (“the Statute”), rule 192 of the Rules of Procedure and Evidence (“the Rules”) and regulation 23 *bis* of the Regulations of the Court, orders the following.

I. Procedural background

1. The Chamber expressly refers to its decisions of 9 June 2011,¹ 24 August 2011² and 1 March 2012.³ Nonetheless, it considers it appropriate to recall briefly that three witnesses in detention in connection with proceedings before a court in the Democratic Republic of the Congo (“the Detained Witnesses”) who were called to testify before the Court lodged applications for asylum with the competent authorities of the Netherlands once their evidence had been concluded. The treatment of these asylum applications, which the Court is not in a position to influence, is ongoing. Moreover, as the Court was unable to reach an agreement with the Dutch authorities on who would bear responsibility for the Detained Witnesses’ custody during the treatment of their applications for asylum, the witnesses have remained in the Court’s custody under article 93(7) of the Statute since they concluded their testimonies in May 2011.

II. Requests submitted by the Detained Witnesses

2. On 14 May 2012, duty counsel for the Detained Witnesses submitted requests to the Chamber regarding the detention of Witnesses DRC-D02-P-236, DRC-D02-P-228 and DRC-D02-P-0350 (“the Requests”).⁴
3. Duty counsel deplored the lengthiness of the asylum procedure and the ensuing detention and went on to recall that in response to two questions put by the

¹ *Decision on an Amicus Curiae application and on the “Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d’asile” (articles 68 and 93(7) of the Statute)*, 9 June 2011, ICC-01/04-01/07-3003-tENG.

² *Decision on the Security Situation of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350*, 24 August 2011, ICC-01/04-01/07-3128.

³ *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 2012, ICC-01/04-01/07-3254.

⁴ “Requests 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-Conf.

Chamber in its above-mentioned 1 March 2012 decision, the Dutch Government responded by note verbale no. DKP-212/255 of 15 March 2012 (“the Note Verbale”), wherein it emphasised, *inter alia*, that it was for the Court to maintain custody of the Detained Witnesses during the treatment of the applications for asylum.⁵

4. Regretting the terms of the Note Verbale and contesting the host State’s interpretation of the provisions of article 48 of the Headquarters Agreement,⁶ regarding whose applicability to the matter at hand the Chamber had sought submissions from the Dutch authorities, duty counsel informed the Chamber that the witnesses were considering “the appropriate avenue for challenging their detention”, adding that “[w]ith a view to initiation of proceedings in the Netherlands in respect of the ongoing detention of the witnesses, it is necessary to provide the Dutch courts with sufficient information and clarity in respect of the present legal status of the detention of the witnesses”.⁷

5. To this end, duty counsel raised three issues with the Chamber:

(a) Firstly, he requested authorisation from the Chamber to use the Note Verbale, currently classified as “confidential”, in the event of judicial proceedings in the Netherlands⁸ and stated his willingness to comply with any conditions the Chamber might attach to its use;

(b) Secondly, he stated that in the event the Dutch court held hearings on the issue of the Detained Witnesses’ continued detention, it was their intention to seek to attend. Accordingly, duty counsel prayed the Chamber to instruct the Registry to take all measures, in collaboration

⁵ *Ibid.*, paras. 1-5.

⁶ *Ibid.*, paras. 6-9.

⁷ *Ibid.*, paras. 12 and 13.

⁸ *Ibid.*, para. 14.

with the Dutch authorities, to ensure their transportation to and effective attendance at the Dutch court;⁹

(c) Finally, in order to ascertain who bears the responsibility for the ongoing detention of the Detained Witnesses, duty counsel prayed the Chamber to “adjudge and declare that in light of the following factors a) the ongoing detention of the witnesses for well over a year now at the ICC, b) the fact that at present the witnesses are engaged in ordinary asylum proceedings in the Netherlands, and on that basis entitled to reside in the Netherlands for the duration of that procedure (which is likely to continue for a considerable period of time), c) the Netherlands has refused repeatedly to cooperate in good faith with the Court to find a solution for the ongoing detention of the witnesses, the ongoing detention of the witnesses has at present also become the – primary – responsibility of the host-State and is no longer a matter within the exclusive jurisdiction of the Court”.¹⁰

6. The parties and participants were invited to submit their observations on the Requests.¹¹ The Defence for Mathieu Ngudjolo responded on 29 May 2012,¹² stating that it intended to join the Requests, particularly insofar as the Requests sought the protection of the Detained Witnesses’ right to appear before the national court which might be seized of their continued detention. More generally, it emphasised that their application for asylum could not be relied on to justify an unreasonable extension of their detention. The Defence for Germain

⁹ *Ibid.*, para. 15.

¹⁰ *Ibid.*, para. 16.

¹¹ E-mail from a legal officer of the Chamber on 16 May 2012 at 16.22: “[TRANSLATION] With reference to application no. 3291 of 14 May 2012 filed by Mr Ghislain Mabanga, the Chamber requests Mr Mabanga to explain by 2 p.m. on Friday 18 May why this application was filed as “confidential” in accordance with regulation 23 *bis* of the Regulations of the Court. The Chamber also invites the parties, participants and the Registry to file any responses to the said application by 4 p.m. on 30 May 2012 [...]”.

¹² Defence for Mathieu Ngudjolo, “*Adjonction de la Défense de Mathieu Ngudjolo aux requêtes relatives à la détention DRC-D02-P-0236, DRC-DO2-P-228, et DRC-D02-P-0350 et introduites par le Conseil de permanence (ICC-01/04-01/07-3291-Conf-tFRA)*”, 29 May 2012, ICC-01/04-01/07-3299-Conf.

Katanga, for its part, filed its observations on 30 May 2012.¹³ It also took the view that the Note Verbale should be usable in proceedings before a national court and argued that it was necessary and just for the Detained Witnesses to be able to attend hearings in the Dutch court seized of their ongoing detention. The Prosecutor's observations dealt with the detention *per se*, advancing a variety of scenarios depending on the developments in the ongoing asylum proceedings, but he made no submissions regarding the first two issues raised by the Requests.¹⁴ The legal representatives of the victims filed no submissions.

7. The Registry filed its observations on 30 May 2012.¹⁵ In response to the second issue raised in the Requests, concerning the possible attendance of the Detained Witnesses at a Dutch court, the Registry recalled that it has no mandate to transport the Detained Witnesses from the Court's detention facility to the Dutch court that might be seized of the matter. It further emphasised that it has no jurisdiction to provide security on the territory of the host State, which has the exclusive authority to provide security.¹⁶
8. Nonetheless, mindful of the fact that the Detained Witnesses should be able to participate in asylum proceedings before a Dutch court, the Registry advanced several proposals.¹⁷ Firstly, it suggested that a video-link conference could be used and offered to help facilitate communication between the Dutch court and the ICC Detention Centre. Secondly, it advanced the possibility of members of the Dutch court travelling to the Detention Centre in order to meet the Detained Witnesses *in situ*. Finally, it raised the possibility of the host State accepting to

¹³ Defence for Germain Katanga, "Defence Observations on the Requests concerning the Detention of Witnesses DRC-D02-P-0236, DRC-D02-P-0228, and DRC-D02-P-0350", 30 May 2012, ICC-01/04-01/07-3300-Conf.

¹⁴ Office of the Prosecutor, "Prosecution's Observations to 'Request concerning the Detention of Witnesses DRC-D02-P-0236, DRC-D02-P-0228, and DRC-D02-P-0350'", 30 May 2012, ICC-01/04-01/07-3301-Conf.

¹⁵ Registry, "Registry's observations following the 'Requests concerning the Detention of Witnesses DRC-D02-P-0236, DRC-D02-P-0228, and DRC-D02-P-0350'", 30 May 2012, ICC-01/04-01/07-3302-Conf.

¹⁶ *Ibid.*, para. 2.

¹⁷ *Ibid.*, para. 3.

transport the Detained Witnesses to the Dutch court and guard them during the hearing, and stated its willingness to make the Detained Witnesses available to the competent Dutch services.

III. Discussion

(a) Request for authorisation to use the Note Verbale

9. The Chamber finds that there is no impediment to the use of the Note Verbale, which answers questions the Chamber itself put to the Dutch Government, before a Dutch court.
10. Nonetheless, the Chamber requests the Detained Witnesses and their counsel to use the Note Verbale in its current form only before those Dutch administrative and other courts which may be required to consider and adjudge their ongoing detention and the treatment of their applications for asylum.
11. On 24 May 2012, through the authorised services of the Registry, the Chamber orally informed the qualified representatives of the Dutch Government of the position it was inclined to adopt on this matter and the restrictions that it felt bound to impose. In reply, the Dutch authorities stated that they had no objection to the transmission of the Note Verbale under the conditions fixed by the Chamber.¹⁸

(b) Role of the Registry in the event of appearance of the Detained Witnesses before a Dutch court

12. The Chamber is of the view that it is necessary to facilitate arrangements to transfer, escort and guard the Detained Witnesses should they seek to attend the Dutch court seized of the extension of their detention or should the Dutch court decide *proprio motu* to call them.

¹⁸ *Ibid*, para. 1.

13. The Chamber considers it must adopt the third proposal of the Registry and accordingly orders the Registry as soon as practicable to contact the authorised services of the host State, which have exclusive jurisdiction over this matter, to discuss what arrangements may be implemented in optimal security conditions to transport and guard the Detained Witnesses before a Dutch court, in the event one of the propositions for their appearance envisaged at paragraph 12 were to be implemented.

(c) Determination of the organ bearing principal responsibility for the detention of the Detained Witnesses

14. As it recalled at paragraph 1 above, the Court currently has custody of the Detained Witnesses under article 93(7) of the Statute. In its aforementioned decisions of 9 June and 24 August 2011, as reiterated in its decision of 1 March 2012, the Chamber clearly set out the grounds for their detention,¹⁹ also stating unequivocally that “the processing of the witnesses’ asylum applications must not cause the unreasonable extension of their detention under article 97(3) of the Statute [...]”.²⁰ Accordingly, in response to the third issue raised by duty counsel, the Chamber need only refer him to these two decisions, both public documents which can therefore be tendered in court if necessary. Nonetheless, the Chamber would recall that in its 9 June 2011 decision, regarding the custody of the Detained Witnesses, it expressed its desire to reach a consensus solution in light of the extraordinary situation in which the Detained Witnesses find themselves. Similarly, in the circumstances, it could only take note of the unwavering stance of the Dutch authorities as recorded in the Note Verbale.

¹⁹ ICC-01/04-01/07-3003, paras. 79-85; ICC-01/04-01/07-3128, paras. 16 and 17; ICC-01/04-01/07-3254, paras. 17-21.

²⁰ ICC-01/04-01/07-3254, para. 20.

FOR THESE REASONS, THE CHAMBER

AUTHORISES the Detained Witnesses to make use of the Note Verbale subject to the conditions set out at paragraph 10 of this order and **INVITES** them to refer to its decisions of 9 June 2011, 24 August 2011 and 1 March 2012 for any clarification regarding their continued detention;

ORDERS the Registrar urgently to initiate the consultations with the host State described at paragraph 13 herein and **INSTRUCTS** her to report on their outcome by 4 p.m. on 18 June 2012; and

ORDERS the Registry to reclassify court record numbers 3291, 3299, 3300, 3301 and 3302 as public documents.

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Christine Van den Wyngaert

Dated this 1 June 2012
At The Hague, The Netherlands