



Original: **French**

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

Date: **5 May 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 Document
URGENT**

**Order convening a status conference
(regulation 30 of the Regulations of the Court)**

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo
Mr Éric 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 Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

The host State

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Counsel Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other

Division of Court Services

Mr Marc Dubuisson
Mr Ghislain Mabanga Monga Mabanga

TRIAL CHAMBER II of the International Criminal Court (“the Chamber” and “the Court” respectively), acting pursuant to regulation 30 of the Regulations of the Court, orders the following.

1. On 29 November 2010, the Defence for Germain Katanga (“the Defence”) informed the Chamber of its intention to call four witnesses held in detention by the authorities of the Democratic Republic of the Congo (“the DRC”). It also requested that the necessary arrangements be made for their transfer to the Court and highlighted the fears the witnesses had expressed regarding their safety.¹

2. The Chamber granted the Defence request on 7 January 2011, and sought the assistance of the DRC authorities for the temporary transfer of the witnesses.² In its decision, the Chamber recalled its duty under article 68(1) of the Statute to take appropriate measures to guarantee the protection and safety of witnesses. It instructed the Victims and Witnesses Unit (“the VWU”) to be closely involved in the consultations on the conditions of the requested transfers and to propose a range of appropriate and coherent protective measures.

3. On 21 January 2011, the Defence requested leave to modify the list of exculpatory witnesses in order to replace two of the witnesses it had originally proposed.³ Whilst it did not link the withdrawal of those two witnesses exclusively

¹ Defence for Germain Katanga, “Corrigendum of the Urgent Defence Request to Call Detained Defence Witnesses and for Cooperation from the DRC”, 8 December 2010, ICC-01/04-01/07-2585-Conf-Exp-Corr.

² *Décision relative à la requête de la Défense de Germain Katanga visant à obtenir la coopération de la République démocratique du Congo en vue de la comparution de témoins détenus*, 7 January 2011, ICC-01/04-01/07-2640-Conf-Exp. See the public redacted version of the *Décision relative à la requête de la Défense de Germain Katanga visant à obtenir la coopération de la République démocratique du Congo en vue de la comparution de témoins détenus* (ICC-01/04-01/07-2640-Conf-Exp), 3 May 2011, ICC-01/04-01/07-2640-Red3.

³ Defence for Germain Katanga, “Urgent Defence Request to Vary the Chamber’s *Décision relative à la Requête de la Défense de Germain Katanga visant à obtenir la coopération de la République démocratique du Congo en vue de la comparution de témoins détenus*”, 21 January 2011, ICC-01/04-01/07-2659-Conf-Exp. See also the “Urgent Defence Request to Vary the Chamber’s *Décision relative à la Requête de la Défense*

to safety concerns, the Defence once again indicated that the witnesses feared that they would suffer retaliation by the DRC authorities.⁴ The Chamber granted this request on 25 January 2011 and instructed the Registrar to notify the modified witness list to the Congolese authorities.⁵

4. On 22 February 2011, the Registry submitted to the Chamber a report on the implementation of the aforementioned decisions.⁶ In that filing and in the minutes of a meeting held on 16 February 2011 between the Registry, the DRC authorities and the four detained witnesses,⁷ it is stated that the discussions between the representatives of the Registry and the detained witnesses had included the following points: “[r]eason for return to the DRC after testimony; [...] [t]he possibility of raising before the Court their detention in the DRC and the fact that they have been detained for over five years without a trial; [...] [t]heir personal protection in the Prison Central prior to and after their transfer to the Hague; [t]he protection of their family members prior to and after their transfer to The Hague; [and] [w]hether the DRC authorities will have access to the transcripts of their testimonies”.⁸ In light of the fears the witnesses expressed regarding their return to the DRC after their testimony, the Registry communicated its intention of raising this issue with the authorities and conducting a study of the protective measures to be implemented.⁹

5. On 1 March 2011, the Registry appointed Mr Ghislain Mabanga Monga Mabanga as duty counsel for the four detained witnesses for the purposes of

de Germain Katanga visant à obtenir la coopération de la République démocratique du Congo en vue de la comparution de témoins détenus”, 18 March 2011, ICC-01/04-01/07-2659-Conf-Red.

⁴ ICC-01/04-01/07-2659-Conf-Red, para. 4.

⁵ *Décision relative à la requête de la Défense de Germain Katanga tendant à l’amendement de la décision sur sa requête visant à obtenir la coopération de la République démocratique du Congo en vue de la comparution de témoins détenus*, 25 January 2011, ICC-01/04-01/07-2660-Conf-Exp. See also the public redacted version of the *Décision relative à la requête de la Défense de Germain Katanga tendant à l’amendement de la décision sur sa requête visant à obtenir la coopération de la République démocratique du Congo en vue de la comparution de témoins détenus* (ICC-01/04-01/07-2660-Conf-Exp), 3 May 2011, ICC-01/04-01/07-2660-Red3.

⁶ Registry, “Registry’s report on the execution of Decisions 2640 and 2660”, 22 February 2011, ICC-01/04-01/07-2724-Conf.

⁷ ICC-01/04-01/07-2724-Conf-Anx5.

⁸ ICC-01/04-01/07-2724-Conf, para. 8.

⁹ ICC-01/04-01/07-2724-Conf-Anx5.

notifying them of rule 74 of the Rules and providing them with qualified and independent legal assistance (“Duty Counsel”). For its part, the Defence informed the Chamber on 14 March 2011 that one of the witnesses on its list had been withdrawn, although it did not provide the reasons for his withdrawal.¹⁰

6. On 21 March 2011, the Defence also reported that the three detained witnesses did not request special protective measures during their testimony. However, DRC-D02-P-0228 expressed the wish to testify in closed session when the names of certain persons were mentioned.¹¹ The Defence also requested the Court to engage in dialogue with, and assert its influence on, the DRC authorities to ensure that the witnesses would not suffer retaliation if they returned to the Kinshasa central prison (“the Defence Observations”).

7. On 25 March 2011, the VWU submitted a report on the Defence Observations to the Chamber, in which it set out the protective measures for the detained witnesses that it considered feasible.¹² On 30 March 2011, the Chamber rendered an oral decision noting the proposals thus made.¹³

8. In his observations on 1 April 2011, Witness DRC-D02-P-0228 requested the Chamber to allow him to testify *ex parte*, arguing that the safeguards provided for in article 93(2) of the Statute and rule 74 of the Rules did not allow him to testify without fear of retaliation, or for his safety and that of his family.¹⁴

¹⁰ Defence for Germain Katanga, “Disclosure of Additional Information on the Defence Witnesses”, 14 March 2011, ICC-01/04-01/07-2770-Conf.

¹¹ Defence for Germain Katanga, “Defence Observations on the protective measures for DRC-D02-P-0350, DRC-D02-P-0326, DRC-D02-P-0228”, 21 March 2011, ICC-01/04-01/07-2790-Conf.

¹² Registry, “Report on the ‘Defence observations on the protective measures for DRC-D02-P-0350, DRC-D02-P-0326, DRC-D02-P-0228 (ICC-01/04-01/07-2790-Conf)’”, ICC-01/04-01/07-2799-Conf.

¹³ ICC-01/04-01/07-T-242-CONF-FRA ET 30-03-2011, p. 19, lines 7-22.

¹⁴ Duty Counsel, “*Observations du témoin DRC-D02-P-0228 sur la mise en oeuvre de l’article 93-2 du Statut et des règles 191 et 74 et demande de mesures spéciales sur pied de la règle 88 du Règlement*”, ICC-01/04-01/07-2812-Conf, para. 8.

9. In an e-mail sent on 5 April 2011, the Chamber invited Duty Counsel to contact the VWU so that it could explain to the witness in Duty Counsel's presence what protective, procedural and operational measures could be implemented to protect his safety and that of his family.

10. At a meeting held on 11 April 2011, the VWU confirmed the protective measures set out in the Registry's report of 25 March 2011.

11. In an application filed on 12 April 2011, Duty Counsel sought the Chamber's leave for the three detained witnesses to be presented to the Dutch authorities for the purposes of asylum, arguing that the protective measures proposed by the Registry were inadequate for their situation ("Duty Counsel's Application").¹⁵

12. In compliance with the Chamber's invitation to the parties and participants,¹⁶ the Defence submitted its observations on Duty Counsel's Application on 15 April 2011 ("the Defence Observations").¹⁷ The Registry submitted its observations on 21 April 2011 ("the First Observations of the Registry").¹⁸ On 3 May 2011, the Registry filed further observations ("the Further Observations").¹⁹

13. On 4 May 2011, Duty Counsel filed a fresh submission in response to the Registry's observations²⁰ ("the Second Observations of Duty Counsel") and, on 5 May 2011, petitioned the Chamber, *inter alia* to instruct the Registry with a view to

¹⁵ Duty Counsel, "*Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0326, DRC-D02-P-0228 aux autorités néerlandaises aux fins d'asile*", ICC-01/04-01/07-2830-Conf.

¹⁶ ICC-01/04-01/07-T-246-Conf-FRA ET 13-04-11, p. 2, line 3 to p. 6, line 12.

¹⁷ Defence for Germain Katanga, "Defence observations on '*Requête tendant à obtenir présentation des témoins DRC-D02-P-0350, DRC-D02-P-0326, DRC-D02-P-0228 aux autorités néerlandaises aux fins d'asile*' (ICC-01/04-01/07-2830-Conf) of 12 April 2011", ICC-01/04-01/07-2836-Conf.

¹⁸ Registry, "*Observations du Greffe en relation avec la requête ICC-01/04-01/07-2830-Conf*", 21 April 2011, ICC-01/04-01/07-2849-Conf.

¹⁹ Registry, "*Observations complémentaires du Greffe en relation avec la Requête ICC-01/04-01/07-2830-Conf*", 3 May 2011, ICC-01/04-01/07-2858-Conf.

²⁰ Duty Counsel, "*Observations des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350 en réponse aux 'Observations du Greffe en relation avec la requête ICC-01/04-01/07-2830-Conf'*", 4 May 2011, ICC-01/04-01/07-2861-Conf.

appointing a lawyer specialised in asylum law to replace him and defend the interests of the three witnesses (“the Third Observations of Duty Counsel”).²¹

14. In light of all the submissions, and considering that a number of issues remain to be elucidated for it to rule in full knowledge of the facts, the Chamber convenes a status conference, to which the authorities of the host State are invited. The host State authorities shall, *inter alia*, address the legal status of the three detained witnesses with effect from their arrival in the Netherlands and shall state the extent of their jurisdiction over the witnesses.

FOR THESE REASONS, the Chamber

CONVENES a hearing for Tuesday 10 May at 09.00 to be attended by the parties, participants, Duty Counsel, the host State authorities, the Victims and Witnesses Unit and any other relevant Registry services;

ORDERS the Registry to notify the host State authorities no later than 6 May 2011 at 10.00 of Duty Counsel’s Application, the Defence Observations, the First Observations of the Registry and its Further Observations, as well as the Second and Third Observations of Duty Counsel; and

ORDERS the Registry to request the host State to ensure that it is represented at the hearing by a qualified representative, in particular to address the relations between the host State and the Court and issues relating to the exercise of the right to asylum in the Netherlands.

²¹ Duty Counsel, “*Observations du Conseil de permanence sur l’instruction de la Chambre du 2 mai 2011 relative aux courriers du témoin DRC-D02-P-0228*”, 5 May 2011, ICC-01/04-01/07-2865-Conf-Exp.

Done in both 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 5 May 2011

At The Hague, The Netherlands