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

Source : Ghislain M. Mabanga, Philip-Jan Schüller and Göran Sluiter

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

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**Unrepresented Applicants
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1. On behalf of witnesses DRC-D02-P-0236, DRC-D02-P-0228, and DRC-D02-P-0350 ('the witnesses') counsel hereby respectfully submit an urgent request for convening a status conference on their ongoing detention. This application represents the fruits of collaboration between Mr. Mabanga, duty counsel, and mr. Sluiter and mr. Schüller. It is acknowledged that the latter two do not have standing before this Chamber as counsel, but they are representing the witnesses in their Dutch asylum proceedings. As such, the matter of detention is of equal concern to them and the present submission represents our collective views. Under the unique circumstances of this case we cannot see any objection to associating the Dutch colleagues with the present submission. However, should the Chamber consider otherwise, the submission can be regarded as filed in the name of Duty Counsel Mr. Mabanga only.
2. This Chamber is well aware of the fact that two of the three witnesses have been detained since March 2005 in Congo and since 27 March 2011 all three witnesses have been detained at the ICC Detention Unit. As a result of the witnesses' requests for protection –both directed at this Chamber and through the Dutch authorities on the basis of an asylum application- their presence at the ICC has been prolonged for considerable time. It appears self-evident that further continuation of the detention needs to be critically assessed in light of all the relevant factual and legal circumstances of the case.
3. This Chamber has always been mindful of the importance of finding a solution in respect of the witnesses' ongoing detention. In the Decision of 9 June 2011, it was decided that a solution must be found as soon as possible in consultations between the Court, the host State and the DRC in order to determine whether these witnesses should remain in detention and, if so, in whose custody.¹ Moreover, in the Decision of 24 August 2011, this Chamber ruled in relation to the detention of the witnesses as follows: '(...) given that the obligation of the Court

¹ ICC/01-04/01-07/3003/tENG 16/06/2011, para. 85.

to detain the three witnesses has now, in principle, come to an end, the Chamber is of the view that a solution must be found urgently.’²

4. In her Report of 16 September 2011 the Registrar informed this Chamber of the results of consultations with the host State and the DRC.³ It follows from this report that no solution was found for the ongoing detention. The host State, simply, insisted on continuing detention at the ICC and the DRC insisted on the return of the witnesses to the DRC.⁴
5. By letter of 16 December 2011 counsel for the witnesses in the Dutch asylum proceedings asked the Dutch immigration authorities if they were still consulting with the Registrar in respect of the detention of the witnesses.⁵ By letter of 20 January 2012 the Dutch authorities responded that these consultations had for now been terminated by means of the note-verbale of 15 September 2011, in which the Dutch authorities required that for the duration of processing the asylum application the witnesses will be detained at the ICC Detention Unit.⁶
6. In spite of this Chamber’s insistence on finding a solution by means of consultations for the detention of the witnesses, it can safely be concluded that these consultations have not led to any result, other than the continuation of the detention of the witnesses at the ICC Detention Unit, without any prospect of (conditional) release and without any possibility of review. Taking into account this Chamber’s finding that the obligation to detain the witnesses has come to an end, it is highly uncertain if there is at present any legal basis for the detention of the witnesses. After having been detained for around four years in the DRC without a valid judicial warrant, the witnesses respectfully would like to question the legality of their ongoing detention for almost a year at the ICC, without knowing a) the current legal basis for their detention and b) in whose custody they are being held.

² ICC-01/04-01/07-3128, 24-08-2011, para. 17.

³ ICC-01/04-01/07-3158-tENG, 04-10-2011.

⁴ Id., paras. 4 and 7.

⁵ Letter on file with counsel and ready for submission to the Chamber at its request.

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7. It is proposed that a status conference is convened, pursuant to regulation 30 of the Regulations of the Court, to exchange views and arguments and discuss with all relevant actors the matter of the witnesses' ongoing detention. Holding a status conference would, in our view, assist the Chamber in being fully informed of all relevant views and the latest developments in relation to the witnesses' asylum proceedings. It appears to us the most efficient way to enable the Chamber to take a fully informed and comprehensive decision on the detention of the witnesses.
8. Holding a status conference on the witnesses' ongoing detention is in our view furthermore justified by the following factors and recent developments.
9. First, we would like to inform the Chamber of a Decision of The Hague District Court (sitting in Amsterdam) related to the asylum case of the three witnesses, of 28 December 2011.⁷ In that Decision the District Court ruled in favour of the witnesses and ordered that the Dutch State must allow the witnesses access to the regular Dutch asylum procedure as described in Dutch refugee law. This Decision has not been appealed and is final since 25 January 2012. It is submitted that this confirmation of jurisdiction in the asylum cases –fully rejecting the position of the Dutch State- constitutes a new fact which may also have consequences for the witnesses' ongoing detention. It can no longer be maintained that the witnesses are at present outside the jurisdiction of the Netherlands. Since the consultation process in respect of the witnesses' detention had been ended by the host State on 15 September 2011, it has not yet indicated what its current position is on the witnesses' detention in light of the Decision of 28 December 2011.
10. Second, with the passing of time both the legal basis for and necessity of detention have to be established beyond any doubt. In March 2012, witnesses will be detained for a year at the ICC Detention Unit, under the responsibility of the ICC. This is a long period of time, bearing in mind that a) as of July 2007 there has not been any judicial order or warrant in force justifying their detention at the

⁷ The decision is available in Dutch at www.rechtspraak.nl , under 'zoeken in uitspraken', and under LJN number BU9492.

DRC, b) there has never been any judicial order or warrant from this Court justifying their detention, and both the present Chamber and the Lubanga Chamber have acknowledged there was no power to continue the detention of the witnesses, after they had finished their testimonies at the ICC.⁸

11. Third, there is not any prospect that detention will end or will be reviewed within a reasonable period of time. The District Court has in its Decision of 28 December 2012 ordered that the State takes a decision on the asylum application before 28 June 2012. This seems to imply the continuation of detention at the ICC Detention Unit until at least that date,⁹ an even longer period of time. It must also be noted that the decision to be taken by the Dutch authorities on 28 June 2012 might only be a first step in the procedure. In case of rejection of the asylum applications, there are possibilities of administrative review and appeal, which could easily take two years. It is difficult to imagine that the Trial Chamber wishes for the detention at the ICC to be continued throughout the entire asylum proceedings.
12. Fourth, 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.
13. Fifth, this Chamber will be fully aware of the Decision taken by Trial Chamber I in the Lubanga case of 15 December 2011, which among other things dealt with the question of the detention of a witness in the Lubanga case, who is in an identical situation as the three witnesses in the present case.¹⁰ In that Decision, the Lubanga Trial Chamber reiterated its instructions to the Registry to prepare for the return of defence Witness 19 once he is fit to travel and ruled that it is for the Dutch authorities to determine whether it is necessary to intervene in order to

⁸ The present Chamber has ruled on 24 August 2011 that the obligation of the Court to detain the three witnesses has now, in principle, come to an end (see *supra* note 2). We infer from this that failing an obligation to detain the witnesses by the Court, there can, under the circumstances, also not be identified any power for the witnesses' continuing detention. The Lubanga Chamber has ruled even earlier, on 5 August 2011, that the ICC will have no continuing power to detain witness 19 (ICC-01/04-01/06-2766-Red 05-08-2011, para. 88).

⁹ It is, furthermore, not excluded that no decision will be taken on or before 28 June if the asylum applications are considered to be particularly complex or if there are circumstances as a result of which the State feels it cannot decide yet on the applications.

¹⁰ ICC-01/04-01/06-2835, 15-12-2011.

take control of him for the purposes of conducting national asylum proceedings; the Chamber instructed the Registrar to cooperate with the Dutch authorities if they indicated that they intend to take control of the witness.¹¹

14. Following this decision the counsel for Witness 19 in his Dutch asylum procedure have asked by letter of 16 December 2011 the Dutch authorities if and how they would intervene with the ICC to ensure that Witness 19 can effectively pursue his asylum application in the Netherlands.¹² By letter of 20 January 2012 the immigration authorities informed counsel that there is no duty incumbent upon the Netherlands to take control of Witness 19 and that the Netherlands has not received a request for transportation of Witness 19 to the DRC; it was said that the questions were premature and could not be answered and that the Netherlands would take into account its international obligations.¹³ In the meantime, detention is ongoing without any title and without any possibility of judicial review, and there is no concrete prospect of finding a solution. The situation of Witness 19 illustrates the continuing shifting of responsibility among key actors in respect of the witnesses' detention and has aggravated the feelings of insecurity of witnesses in respect of their detention and the responsible state/organ/institution for their custody.

15. In light of the above it is submitted that it befalls to this Chamber to review the detention of the witnesses, before they will be detained for a year at and by the ICC. The right to control by a court of the legality of the detention, as provided for in article 9 (4) of the ICCPR, applies to all persons deprived of their liberty by arrest or detention.¹⁴

¹¹ Id., paras. 18 and 19.

¹² Supra note 5.

¹³ Supra note 6.

¹⁴ See General Comment No. 08 [16] , Adopted by the Human Rights Committee on 28 July 1982.

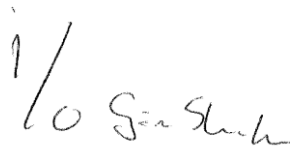
Conclusion

16. The Chamber is respectfully requested :

- a. To convene urgently a status conference on the detention of witnesses DRC-D02-P-0236, DRC-D02-P-0228, and DRC-D02-P-0350, pursuant to regulation 30 of the Regulations of the Court;
- b. To allow counsel in the Dutch asylum proceedings, mr. Schüller and mr. Sluiter, to participate in that hearing.



Ghislain M. Mabanga
Duty Counsel



Philip-Jan Schüller



Göran Sluiter

Dated this 30 January 2012,
At Paris, France

Dated this 30 January 2012
At Amsterdam, The Netherlands