

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No : ICC-01/04-01/07

Date : 14 May 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***

Confidential

Requests concerning the Detention of Witnesses DRC-D02-P-0236, DRC-D02-P-0228, and DRC-D02-P-0350

Source : Duty Counsel

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

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I. Introduction

1. The increasingly long procedural history concerning the three detained witnesses in the Katanga case who have applied for asylum in the Netherlands is well known to this Chamber and does not to be repeated in detail.
2. On 31 January 2012 Duty Counsel for the three witnesses –together with the Dutch counsel in asylum proceedings mr. Sluiter and mr. Schüller- requested this Chamber to convene a status conference with a view to discuss the witnesses' ongoing detention, which has exceeded a year since 27 March 2012.¹
3. By decision of 1 March 2012 this Chamber has ruled 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 prolonging their custody indefinitely'.² In addition the Chamber considered: 'The Chamber can therefore only deplore that the consultations have failed to produce an alternative solution pending the outcome of the Dutch asylum procedure, especially since the Court has no control over its duration'.³
4. Following the aforementioned views, this Chamber then submitted two precise questions to the Dutch authorities, namely (1) whether they are in a position to take control of the witnesses, and (2) whether they consider themselves obliged to receive the witnesses in accordance with article 48 of the Headquarters Agreement in case the Court were to find it unreasonable to further detain them (...).⁴
5. By note-verbale of 15 March 2012 the Protocol Department of the Dutch Ministry for Foreign Affairs provided a response.⁵ In the reaction the host State put forward that '(...) the position of the Netherlands remains that the witnesses are

¹ ICC-01/04-01/07-3224 30-01-2012.

² ICC-01/04-01/07-3254 01-03-2012, para. 20.

³ Ibid.

⁴ Id., para. 21.

⁵ ICC-01/04-01/07-3267-Conf-Anx1.

to remain in the custody of the Court pending the consideration of their asylum applications.⁶ It was furthermore contended that, '(...) with reference to article 48 of the Headquarters Agreement between the ICC and the host State, insofar as applicable in the present case, the Netherlands is under no obligation to receive the witnesses, nor does it agree to do so.' The note-verbale does not provide any motivation or reasoning substantiating this response.

II. Observations in respect of the Response of the Host-State and the Ongoing Detention of the Witnesses

6. The witnesses are disappointed and concerned over the facts that further efforts to find a solution for their ongoing detention by consultations have failed and that the Netherlands continues to refuse to assist the Trial Chamber as requested. Moreover, the witnesses would assert that the reaction provided by the host State is to be considered flawed and problematic for a number of reasons. The following observations may assist the Chamber in their further determination of the issue
7. First, it is clear from the questions formulated by this Chamber in its Decision of 1 March 2012 that The Hague's District Court Decision of 28 December 2011 is to be considered a new factor in respect of the witnesses' overall legal situation. Indeed, this Decision –contrary to the position adopted by the Dutch Government- confirms that the Netherlands has full jurisdiction over the asylum applications submitted by the witnesses and has obliged the Dutch authorities to apply the ordinary asylum procedure. Regrettably, the host State has not considered this final Decision –a significant and new factor- at all in the formulation of and/or the motivation underlying its responses.
8. Second, counsel would argue that the interpretation of article 48 of the Headquarters Agreement by the host-State is flawed. It is submitted that this

⁶ ICC-01/04-01/07-3267-Conf-Anx1.

provision would be fully applicable to a scenario of release of the witnesses by this Chamber, because such release can be regarded as release of persons detained at the ICC 'for any other reason'. Whether or not a state is obliged to receive persons released by the ICC cannot solely depend upon the formal acceptance of the State concerned. Rather, it would primarily be a matter of a legal title of residence in a certain State. It is *in confesso* between the host State and the witnesses that they are admitted in the ordinary Dutch asylum procedure, which gives them a right to stay in the Netherlands, at least for the duration of this procedure. As a result, the host State must be considered the State which is obliged to receive the witnesses, as a corollary to, and on account of, them already being admitted to the Dutch asylum procedure.

9. It is, moreover, submitted that article 48 of the Headquarters Agreement cannot be the exclusive procedure governing the release of persons, or at least that its scope of application cannot be unilaterally determined by the Netherlands. In case this Chamber is of the view that continuation of detention is in violation of human rights law it must be in a position to end such detention, irrespective of the fact whether or not there is a State obliged to receive the detained person. Another view would lead to the untenable situation that detention at the ICC could in fact continue indefinitely if no State is ready to accept a released person. Moreover, the Headquarters Agreement is a source of law in the sense of article 21 (1) (b) of the Statute –namely an applicable treaty-, and pursuant to article 21 (3) of the Statute the interpretation and application of these sources of law – including the Headquarters Agreement- by the Court must be consistent with internationally recognized human rights. In other words, article 48 of the Headquarters Agreement is subordinate to any conflicting requirement originating from human rights law.
10. The witnesses note that as a result of the position of the Netherlands there is the increasing risk that their detention will continue indefinitely and that there is no prospect of effectively challenging their detention at any judicial forum.

11. We have taken note of this Chamber's observations in paras. 18 and 19 of the Decision of 1 March 2012, which concern the possibility for the witnesses to challenge the Congolese title of detention, which constitutes the origin for their presently ongoing detention at the ICC. While this matter had already been seriously explored in the past, the observations of this Chamber have led to renewed coordination and consultation between the duty counsel, Dutch counsel and Congolese counsel. We can inform you that all national remedies in respect of the Congolese title of detention have been exhausted and that, following that exhaustion, witnesses have filed a complaint against the DRC with the Human Rights Committee.⁷ Furthermore, it is our understanding that the DRC shares the view that local remedies in respect of the witnesses' ongoing detention have been exhausted, in the sense that in the consultations with the Registrar the DRC has insisted on the return of the witnesses to Congolese detention and has never suggested that detention could be terminated through domestic legal proceedings. Finally, it cannot be expected that individuals who have been unlawfully detained in the DRC for many years and fear for persecution in the DRC upon return engage in future legal proceedings in that country, for which their presence is required.

III. Requests related to envisaged Dutch Habeas Corpus Proceedings

12. In light of the foregoing, the witnesses have to consider the selection of the appropriate avenue for challenging their detention. They will have to choose between initiating proceedings in the host-State or requesting their release from this Chamber. It is their understanding, especially since the latest reaction from the Dutch authorities, that their detention at the ICC could increasingly be considered also the responsibility of the Dutch authorities, as its continuation is the direct result of the conduct of the Dutch authorities. To put it simply,

⁷ ICC-01/04-01/06-2827-Anx5 23-11-2011; see paras. 7 – 17 in Section VI 'Facts of the Complaint' giving an overview of all efforts that have been undertaken within the DRC to challenge the detention, which clearly amount to a full exhaustion of local remedies.

acceptance of the witnesses and cooperation with the Court in finding a solution on the part of the Dutch authorities would already have long ago terminated the detention of the witnesses at the ICC.

13. With 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. In this light, I respectfully submit a number of questions to this Chamber.
14. First, until now the note verbale of the Protocol Department of the Ministry of Foreign Affairs of the Netherlands, dated 12 March 2012, has been classified as a confidential document. In spite of this classification, we hereby request the permission of the Trial Chamber to use this document in national court proceedings. If necessary, we will urge the competent Dutch court to treat this document confidentially and are ready to accept and carry out conditions imposed by this Chamber.
15. Second, when hearings are scheduled in a Dutch court to discuss the witnesses' ongoing detention, they insist on effectuation of their right to be present at such hearings. In respect of court hearings preceding the 28 December Decision of The Hague District Court, notably the hearing of 21 December 2012, the Dutch authorities have refused to transport witnesses to the hearings. One of the reasons given was that there was no order given by a competent ICC Chamber for the transportation of the witnesses. With a view to facilitating and expediting relevant Dutch court proceedings involving these witnesses and in which the witnesses have a right to be present, this Chamber is requested to order the Registrar to provide the necessary assistance. Since national court hearings may in practice be scheduled on short notice, making it impossible to obtain a separate order from this Chamber for the transportation of the witnesses, it is proposed that a broad instruction is given to the Registrar ordering her to assist the witnesses in ensuring their presence at future Dutch court hearings related to

their ongoing detention and to request the Dutch authorities to consider these instructions to the Registrar as an order for the transportation of these witnesses to any national court hearing related to their respective cases.

16. Third, for a proper and swift resolution of the pending and urgent problem of the witnesses' ongoing detention at the ICC it is vital that there is clarity in respect of the actors which are at present responsible for the ongoing detention of the witnesses. It is important that such clarity is provided by the competent Chamber and not by a non-judicial organ of the Court, in order to avoid misunderstandings. The Chamber is therefore requested whether it can 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.

IV. Conclusion

17. The Duty Counsel respectfully submits the following requests to the Chamber:
- a) To authorize Dutch counsel of the witnesses who wish to initiate national proceedings aimed at ending the detention of the witnesses at the ICC to make use of the note-verbale of the host-State of 12 March 2012, and, if necessary, to indicate the conditions under which use can be made of the said note-verbale.
 - b) To order the Registrar to assist the detained witnesses in securing their right to be present at future Dutch court hearings related to their ongoing detention, and to request the host-State to consider the instructions to the Registrar as an order for the transport of the witnesses to future Dutch court hearings.

- c) 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.

Respectfully submitted

Ghislain M. Mabanga



Duty Counsel

Dated this 14 May 2012,

At Brussels, Belgium