

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: French

No.: ICC-01/04-01/07
Date: 7 September 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
URGENT**

**Order in relation to the request by the duty counsel on the transport of Witnesses
DRC-D02-P-0236, DRC-D02-P-0228, and DRC-D02-P-0350 to the District Court of
The Hague
(Article 44(3) of the Headquarters Agreement)**

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

Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr Éric MacDonald, Senior Trial Lawyer

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 Victims

Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

**Office of Public Counsel for the
Defence**

States' Representatives

Kingdom of the Netherlands

REGISTRY

Registrar

Ms Silvana Arbia
Mr Marc Dubuisson

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**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 article 44 of the Headquarters Agreement (“Headquarters Agreement”), orders as follows:

I. Procedural background

1. The Chamber expressly refers to its decisions of 9 June 2011,¹ 24 August 2011,² 1 March 2012³ and 1 June 2012.⁴ 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 Chamber is not in a position to influence, is ongoing, and it has given rise, on the part of the detained witnesses, to proceedings before the competent Dutch courts, in particular, the District Court of The Hague.

2. By a request of 14 May 2012,⁵ the duty counsel for the three detainees applied to the Chamber seeking, *inter alia*, that the Registry be instructed to take all measures, in collaboration with the Dutch authorities, to ensure their transportation to and effective attendance at the Dutch court.

3. In the above-mentioned order of 1 June 2012, the Chamber was of the view that it was necessary “to facilitate arrangements to transfer, escort and guard 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 *Order on duty counsel’s requests concerning the detention of Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350*, 1 June 2012, ICC-01/04-01/07-3303-tENG.

⁵ “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.

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”.⁶

4. On 18 June 2012, the Registry forwarded a Note Verbale from the Host State to the Chamber, dated 14 June 2012, confirming receipt of the order of 1 June 2012, and stating that in its view, consultations would be premature, given the absence of any pending national proceedings on the issue of the detention of the detained witnesses.⁷

II. Request submitted by counsel for the three detained witnesses

5. The duty counsel lodged an urgent new written application dated 6 September 2012, asking the Chamber:⁸

- a. to refer to the competent Dutch authorities a transport request for the detained witnesses in light of their appearance at the hearing of the District Court of The Hague on 12 September 2012 at 12.00, pursuant to article 44(3) of the Headquarters Agreement.
- b. to instruct the Registry to authorise, exceptionally, one or more associates of the law firm responsible for the interests of the detained witnesses before the Dutch courts to contact the witnesses, even outside the opening hours of the Detention Centre, if they are in possession of documents, drawn up by the Dutch authorities for the three witnesses concerned, to facilitate their retrieval and transport to appear before the above-mentioned District Court.

⁶ Order on duty counsel's requests concerning the detention of Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, 1 June 2012, ICC-01/04-01/07-3303-tENG.

⁷ "Registry's transmission of correspondence received from the Host State following the 'Order on duty counsel's requests concerning the detention of the detention of Witnesses DRC-D02-P-0236, DRC-D02-P-0228, and DRC-D02-P-0350' (Document ICC-01/04-01/07-3291-Conf)", 18 June 2012, ICC-01/04-01/07-3308.

⁸ "Requête tendant à obtenir demande de transport des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350 devant la Cour de district de La Haye (Article 44-3 de l'Accord de siège)", 6 September 2012, ICC-01/04-01/07-3313.

III. Discussion

a) The transport request

6. The Chamber notes that, according to the duty counsel, the Host State will “cooperate with the transport of detained witnesses to appear before the District Court of the Hague”, but it expects to receive a prior request from the Court to that effect, in accordance with the provisions of article 44(3) of the Headquarters Agreement.

7. Under the terms of article 44(3) of the Headquarters Agreement, which is duly applied to transfers carried out between the Detention Centre and the Court and, which may therefore, henceforth, *mutatis mutandis*, indeed apply to the situation at issue in the present request, “[a]ny transport of persons in custody in the host State outside the premises of the Court shall, at the request of the Court, be carried out by the competent authorities in consultation with the Court”.

8. Pursuant to that provision and, in accordance with the position adopted by the Chamber in the above-mentioned order of 1 June 2012, the Chamber therefore kindly requests the competent Dutch authorities to cooperate in order to facilitate the appearance of the three detained witnesses at the hearing of 12 September 2012 at 12.00, thereby allowing them to exercise their rights fully. To this end, the Chamber asks the competent Dutch authorities to ensure the transfer of the three detained persons from the Detention Centre of the Court to the seat of the District Court of The Hague and to take all useful measures to ensure their constant surveillance during the transport operations.

9. The Chamber instructs the Registry to transmit this request for cooperation as a matter of urgency to the competent authorities, drawing their attention especially to the extremely short timeframe in which to organise the transfer. The Chamber also requests the Registry to initiate the necessary consultation with the Dutch authorities, as soon as possible, for the implementation of the practical procedures for the transfer operations. On this occasion, it is for the Registry to determine, together with

its interlocutors, the conditions for surveillance of the detained witnesses on the premises of the District Court of The Hague.

b) The annexed request

10. The Chamber cannot, as matters stand, rule on the aspect of the request which depends on the timeframe for response to the cooperation request and implementation of the practical arrangements for the transfers.

11. If, having regard to the proximity of the hearing, counsel for the three detained witnesses are unable to meet their clients during normal visiting hours, the Chamber hereby requests the Registry, to which a new request will be made beforehand, to take all useful measures to allow counsel to communicate freely with the detainees and thus to promote the correct exercise of the rights of the defence.

FOR THESE REASONS, the Chamber,

REQUESTS the competent authorities of the Kingdom of the Netherlands to cooperate in order to ensure the transfer of the three detained witnesses to the District Court of The Hague on 12 September 2012;

INSTRUCTS the Registrar to initiate the necessary consultation for the implementation of the above-mentioned measures and to report back to the Chamber.

INSTRUCTS the Registrar, where applicable, to ensure that counsel for the three detained witnesses called to appear before the above-mentioned District Court, are able to meet with the latter freely for the purposes of all formalities required for the implementation of the transfer measures and surveillance mentioned above.

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

[signed]

Presiding Judge, Judge Bruno Cotte

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Christine Van den Wyngaert

Dated this 7 September 2012

At The Hague, The Netherlands