

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/07
Date: 15 February 2013

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***

Public Document

**Request for leave to submit Amicus Curiae Observations by mr.
Schuller and mr. Sluiter, Counsel in Dutch asylum proceedings of witnesses DRC-
D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350**

Source: Flip Schüller and Göran Sluiter

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
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
Democratic Republic of Congo

Amicus Curiae

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Mr Marc Dubuisson

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Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other

Mr Ghislain Mabanga Monga Mabanga
Duty counsel

Introduction

1. Pursuant to Rule 103 of the Rules of Procedure and Evidence (“the Rules”) Flip Schüller and Göran Sluiter (“the applicants”), counsel in Dutch asylum proceedings on behalf of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 (“three witnesses”) in the case of *The Prosecutor v. Katanga*, seek leave to submit, as amicus curiae, written observations on the nature and possible duration of Dutch asylum proceedings, which are at present conducted in respect of their clients who are detained at the ICC Detention Center.

Application for Leave

2. The applicants are counsel with Böhler Attorneys, Amsterdam, and are specialized in (international) asylum/refugee law and international criminal law, respectively. They have been instructed by the three witnesses, and have filed on their behalf an application for asylum with the competent Dutch authorities on 12 May 2011.
3. They have already been admitted as amicus curiae before the ICC. They have filed in that capacity an extensive brief, in the Lubanga case.¹
4. Rule 103 (1) of the Rules permits application by a State, organization or individual for leave to submit observations by providing:

At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.

5. For the reasons set forth below, the applicants request that they be granted leave to submit a proposed amicus curiae brief.

Relevant Procedural History

6. The procedural history concerning the three detained witnesses is well-known and has been set out most recently in this Chamber’s Decision of 8 February 2013.²

¹ ICC-01/04-01/06-2831.

7. In that Decision the Chamber deemed it necessary to obtain certain clarifications from both the DRC and the host-State, with a view to answering the question whether the detention of the three witnesses at the ICC Detention Unit can be maintained, and if so, for how long.
8. The host-State has been invited to respond to the following question before 1 March 2013: what is the maximum time for which the asylum proceedings of the detained witnesses can be expected to last until all possible procedural avenues have been exhausted?
9. The present request relates to that particular question of national asylum law. As we understand it, the Chamber seeks to be fully, evenhandedly and objectively informed about the possible duration of the asylum proceedings of the three witnesses. It is our view that in the interest of the Chamber to be properly informed, the requested information should be provided by both the host State and the lawyers in the Dutch asylum procedure as the duration of the procedure also depends on the trial position of the witnesses. The granting of the amicus request will ensure that the Chamber will be informed by both parties in ongoing litigation about possible future scenarios in the asylum procedure of the three witnesses.
10. Therefore, the asylum lawyers are available via the present amicus application to assist the Chamber in its decision making, as a result of which the Chamber will dispose of a comprehensive and balanced factual basis underlying further determination of the issue before it.

The Proposed Amicus Curiae Brief Will Provide the Trial Chamber with Information from both Parties Currently Engaged in the Asylum Proceedings

11. We can –by way of amicus observations- assist the Chamber in the proper determination of this case. We intend to organise our brief as follows, if so invited by the Chamber.
 - a. Duration until first instance judicial determination: on 11 April 2013 a hearing will be held at the District Court of Amsterdam. Having regard to the complexity of the case and the errors committed by the immigration service, it is likely that the Court will determine that the immigration service has to re-do (part of) the

² ICC-01/04-01/07-3352.

investigations. This estimation on our part is based, among other things, on the fact that in all three asylum cases, the Ministry of Foreign Affairs has conducted investigations in the DRC and the conclusions of these investigations confirm for the most part the asylum story of the witnesses. However, the immigration service has not included the information of the investigations in its decisions to reject the asylum requests. As a result, the Court may find the decisions not sufficiently conclusive to properly rule out the possibility of the risk of non refoulement, given the stringent conditions underscored in established case law of the European Court of Human Rights (ECtHR) in extradition and expulsion cases. In addition, the District Court may deem it necessary and useful to issue interlocutory orders in these first, unique and complex cases, related to ICC-proceedings. In the most optimistic (but unlikely) scenario a decision of the Court will not be expected before 23 May 2013. Due to the complexity of the case, it is more likely that the Court will not deliver its decision within the time-limit of six weeks, but will extend the time-limit with another six weeks (twelve weeks in total) as statutory they are allowed to do. If the hearing of 11 April would be the one and only before the Court, the Decision in that scenario -12 weeks- would have to be rendered on 4 July 2013.

- b. In case the District Court would confirm the decisions of the immigration service there is the possibility to appeal the decisions of the Court with the Administrative Judicial Division of the Council of State. Such appeals in the Netherlands generally take at least six months. Yet in complex cases as the present the Council of State tends to exceed their own time limits by at least a year.
- c. In case the Council of State would rule that it would be safe for clients to return to the DRC, they can avail themselves of an intervention by the ECtHR by the issuance of interim measures (under Rule 39), pending a full application.
- d. In recent proceedings before Dutch courts we have provided a reasoned estimation that the entire proceedings at the national level (thus not including possible redress at the ECtHR) would not be over before Summer 2014. In these proceedings the State has not contested or refuted our position on the estimated duration.

Applicants' Focused Observations Satisfy the Content and Purpose of Rule 103

12. The Court's case law in respect of amicus applications has not always been consistent over the years. There are examples of a relatively low threshold when it was said that the amicus application concerns issues that 'the Chamber may find useful'.³ In cases where applications were rejected a more stringent test appears to be applied, namely that amicus curiae observations are only resorted to on an exceptional basis, when such observations are needed on particular topics, and subject to the Chamber's consideration that this is desirable for the proper determination of the case.⁴
13. It is submitted that even under the most stringent test, this application fully satisfies Rule 103. We are aware that even when the application satisfies Rule 103, it remains at the discretion of the Chamber to grant leave. However, without this proposed amicus brief, it is our conviction that the Chamber will be deprived of vital factual information for the determination of the complex question if and when detention of the three witnesses at the ECCC should end.
14. Since this is an urgent matter, we can commit to a swift delivery of our amicus brief. In addition we can be available at hearings, if needed, and can, for example, provide the Chamber with a direct update on the ongoing asylum proceedings.

Applicants Are Appropriate Individuals to Act as Amicus Curiae in the Present Matter

15. Applicants fulfill the criterion of 'persons' under Rule 103. Because of our role as counsel for the three witnesses in Dutch asylum proceedings, there can be no doubt that we are qualified to inform the Chamber effectively on the issues proposed.

Conclusion

16. For the reasons set forth above, mr. Schuller and mr. Sluiter respectfully request that they be granted leave to submit the proposed amicus curiae brief –or to submit views orally- on these matters pursuant to Rule 103 of the Rules, within any time-limit fixed by the Chamber.

³ E.g. Decision on Application for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, *Prosecutor v. Bemba*, case No. ICC-01/05-01/08, 9 April 2009.

⁴ E.g. Decision on the "Request for leave to submit Amicus Curiae Observations on behalf of the Kenyan Section of the International Commission of Jurists Pursuant to Rule 103 of the Rules of Procedure and Evidence", *Prosecutor v. Ruto and others*, Case No. ICC-01/09-01/11, 11 May 2011, para. 9.

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Gün

Flip Schüller

Göran

Göran Sluiter

Dated this 15 February 2013

At Amsterdam, The Netherlands