

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 20 March 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 CONGO
IN THE CASE OF THE PROSECUTOR *v.* GERMAIN KATANGA**

Public Redacted Version of the

**Defence Response to
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: Defence for Mr Germain Katanga

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

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Unrepresented Victims

Legal Representatives of Applicants

**Unrepresented Applicants for
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

Mr Schüller and Mr Sluiter

REGISTRY

Registrar

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Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacob

Detention Section

**Victims Participation and Reparations
Section**

Other

Mr Ghislain M. Mabanga

Procedural Background

1. On 4 February 2012, Mr Mabanga filed a '*Requête en mainlevée de la détention des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350*',¹ by which he requested the Trial Chamber to rule that the continued detention of defence witness 236, 228 and 350 at the ICC detention unit was not justified, to order their release, and to convene, if necessary, a status conference to discuss the issue.
2. On 8 February 2013, the Trial Chamber, by its Decision on the request for release of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, invited the Government of the Host State to respond to the following question:
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?
3. It also invited the Government of the DRC to respond to the following questions:
What is the exact situation of each of the Detained Witnesses with regard to their provisional detention by the DRC? Do the competent judicial authorities of the DRC consider, in light of the dates upon which the initial titles for the detention of the respective witnesses were delivered, that their continued detention is still warranted and justified? What are the prospects for finalisation of the proceedings against the respective witnesses, since the Court has not received any response to its proposal to provide the necessary technical and logistical support to facilitate the witnesses' participation in these proceedings from a distance?²
4. On 18 February 2013, Mr Schüller and Mr Sluiter, Counsel in Dutch asylum proceedings of witnesses 236, 228 and 350, sought 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 these witnesses.³
5. On 1st March 2013, the Registry filed in the record of the case its *notes verbales* to the DRC and the Netherlands and their responses to the Chamber's questions regarding the detention and eventual release of the detained witnesses 236, 228 and 350.⁴ [REDACTED].⁵ The Netherlands replied that the appeals of witnesses 228 and 236 in their asylum proceedings can last until 20 June 2013; thereafter, the Council of State must rule on the appeals within 23 weeks; and thereafter the witnesses may apply to the European Court of Human Rights.⁶
6. On 7 March 2013, the Trial Chamber authorised counsel representing the Detained

¹ ICC-01/04-01/07-3351, *Requête en mainlevée de la détention des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350*.

² ICC-01/04-01/07-3352, Decision on the request for release of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, paras. 24-25.

³ ICC-01/04-01/07-3354, Request for leave to submit Amicus Curiae Observations by mr.Schüller and mr. Sluiter, Counsel in Dutch asylum proceedings of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350.

⁴ ICC-01/04-01/07-3355, Report of the Registrar on the execution of the "Decision on the request for release of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350"

⁵ ICC-01/04-01/07-3355-Conf-Anx5.

⁶ ICC-01/04-01/07-3355-Anx2.

Witnesses in their asylum proceedings to file their observations by 14 March 2013 and invited the prosecution and the defence to file responses by 20 March.⁷

7. By their *Amicus Curiae Observations*⁸, filed on 14th March, counsel in the Dutch asylum applications brought by witnesses 236, 228 and 350 submitted their observations as to the current state of those applications and, in particular, their assessment of the likely time it will take for those applications to be resolved. In conclusion, they maintained that several factors required the Chamber to end the detention of the witnesses:

a) the duration of detention at the ICC for two years; b) the likelihood, bordering on certainty, that asylum proceedings -or other Dutch court proceedings which could end the detention- will not be finalized within a year from now, and can even take considerably longer; c) the fact that delays in the asylum proceedings are not caused by the witnesses; d) the absence of a valid Congolese court order which would continue to justify the detention in these exceptional circumstances.

8. The present motion is filed confidentially and *ex parte* since it contains information relative to *inter partes* disclosure.

Defence Submissions

9. On behalf of Germain Katanga, the defence makes no submission on the legal issues that are, in any event, beyond its competence. The defence is grateful for the efforts made by the Chamber in addressing this Gordian knot and its regard for the interests of the witnesses
10. The defence makes the following submissions.
11. Firstly, it is apparent that the personal situation of each witness verges on the tragic, given the time they have spent in custody without proper process. The three detained witnesses arrived in The Hague on the 27 March 2011 and their testimony was completed by the 3rd May 2011. More precisely, witness 236 testified from 30 March to 15 April 2011.⁹ Witness 228 testified from 18 April to the 2nd of May 2011.¹⁰ Witness 350 testified from the 2nd of May to the 3rd May 2011.¹¹ They have been in detention in The Hague for approximately two years. It should be noted that witnesses 236 and 228 were detained in the DRC from February 2005.¹² Neither of the two witnesses had been subject, in the defence submission, to lawful process in that time but rather to an arbitrary regime with wholly inadequate judicial oversight. The last

⁷ ICC-01/04-01/07-3357, Order authorising the submission of observations.

⁸ ICC-01/04-01/07-3358, *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, 14 March 2013.

⁹ ICC-01/04-01/07-T-242 to T-248.

¹⁰ ICC-01/04-01/07-T-249 to T-253.

¹¹ ICC-01/04-01/07-T-253 to T-254.

¹² See, *inter alia*, witness' 236's testimony, ICC-01/04-01/07-T-242-Red-ENG WT 30-03-2011, p. 37.

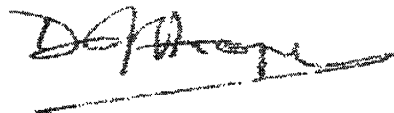
document justifying their detention is dated of 2007. Their detention history was reviewed in the course of their evidence before the Chamber.¹³

12. The DRC states that their detention is justified given that they remain accused, *inter alia*, of the murder of the nine MONUC soldiers killed in early 2005. This accusation appears to be without proper basis. [REDACTED].¹⁴ In the course of their detention in Kinshasa no evidence in support of that allegation was produced and throughout their six years of detention no trial was held in respect of it. The defence submits that the sole reason for their detention was and remains one of political convenience to remove them from activities in Eastern Congo.
13. Secondly, a significant contribution to the time spent in detention in The Hague has been the failure of the ICC to provide adequate modalities to meet the circumstances of such a situation. There was no effective agreement with the Government of the Netherlands as to the system and modalities to be invoked in dealing with such applications. This has led to a lengthy process to establish how such applications should be treated. The result has been an unnecessarily protracted period of detention inflicted on the witnesses.
14. Consequently, the defence submits, the ICC has, in addition to its responsibility to protect the interests of its witnesses, an added responsibility to intervene to mitigate the problem that has arisen.
15. It is undesirable to have them locked away at the detention centre or elsewhere. The only reasonable alternative is to order them not to be held further under the authority of the ICC but to order their release.
16. However, the defence is concerned to ensure that such release from ICC detention does not lead to their being held in worse conditions than those presently pertaining. The defence takes this opportunity of acknowledging the high degree of professionalism and exceptional work done by the ICC Detention Centre.
17. In a recent meeting with the witnesses the defence learnt that two of the witnesses expressed a reluctance to be transferred to a Dutch holding centre rather than to be detained in the ICC detention facility. It should be noted that witness 350 receives daily medical treatment which should be continued in the event of release or transfer. It is to be hoped that the witness's concerns are allowed to be fully expressed and taken into account.

¹³ See, *inter alia*, witness' 236's testimony, ICC-01/04-01/07-T-242-Red-ENG WT 30-03-2011, p. 37-39.

¹⁴ [REDACTED].

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D Hooper', written over a horizontal line.

David HOOPER Q.C.

Dated this 20 March 2013

At The Hague