

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: French

No.: ICC-01/04-02/12

Date: 7 April 2014

THE APPEALS CHAMBER

Before: Judge Sanji Mmasenono Monageng, President
 Judge Sang-Hyun Song
 Judge Cuno Tarfusser
 Judge Erkki Kourula
 Judge Ekaterina Trendafilova

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
 IN THE CASE OF
*THE PROSECUTOR v. MATHIEU NGUDJOLO CHUI***

**URGENT
 Public Document**

Request for implementation of Order ICC-01/04-02/12-158

Source: Duty Counsel for Witnesses DRC-D02-P0236, DRC-D02-P0228 and
 DRC-D02-P0350

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

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P0350**

Mr Ghislain M. Mabanga

States' Representatives

Host State

REGISTRY

Registrar

Mr Herman von Hebel

1. *Subject.* This request is submitted to the Appeals Chamber of the International Criminal Court (“the Appeals Chamber” and “the Court” respectively) on behalf and for the account of Witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350 (“the Detained Witnesses”) with a view to implementing the Appeals Chamber Order of 20 January 2014 (“the 20 January 2014 Order”), which states:

1. The Registrar shall take the necessary steps to return witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350, without delay, to the Democratic Republic of the Congo.
2. In implementing paragraph one above, the Registrar shall consult with the Netherlands and provide it with the opportunity to take any steps it determines to be necessary in respect of the pending asylum applications of witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350.
3. In the case that the Registrar considers that the protective measures in place pursuant to article 68(1) of the Statute in relation to witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350 are no longer adequate, the Registrar shall immediately inform the Appeals Chamber and shall consult with the relevant Congolese authorities.¹

2. *Urgency.* In the 20 January 2014 Order, the Appeals Chamber rightly considered it “appropriate and indeed necessary to resolve the situation of the Detained Witnesses, acting *proprio motu*. In this regard, the Appeals Chamber recalls that the Detained Witnesses have been in the Court’s detention unit for more than two years since the completion of their testimony”.² Whereas the duration of the Detained Witness’ detention was decisive in the Appeals Chamber’s decision to deal with their case *proprio motu*, the continuation of the detention, with no legal basis, requires urgent action by the Appeals Chamber with a view to implementing its order.

3. *Failure to implement the 20 January 2014 Order.* To date, more than two months later, the 20 January 2014 Order has not been implemented. The

¹ Order on the implementation of the cooperation agreement between the Court and the Democratic Republic of the Congo concluded pursuant to article 93(7) of the Statute, ICC-01/04-02/12-158., p. 3.

² Idem, para. 21. Emphasis added.

Detained Witnesses remain at the Court's Detention Centre in a state of the utmost uncertainty. They have legitimate fears that their detention will continue indefinitely.

4. *Unlawful detention at the Court of the witnesses as asylum seekers.* This *de facto* situation poses a problem because as of 27 March 2014, the Detained Witnesses have spent, in total, exactly three years in custody at the Court's Detention Centre. However, since Trial Chamber II held on 24 August 2011 that "the conditions for the return of the three detained witnesses have now been fulfilled",³ there has been no legal ground for their continued detention at the Court's Detention Centre. As the Appeals Chamber rightly stated, the Detention Centre "cannot serve as an administrative detention centre for asylum seekers or persons otherwise involved in judicial proceedings with the Host State or any other State".⁴
5. *The responsibility of the Dutch authorities.* Furthermore, the Appeals Chamber decided that "in the course of the implementation of article 93(7)(b) of the Statute, the Detained Witnesses will be under the control and in the physical custody of the Netherlands", meaning that the Netherlands must assume its responsibilities vis-à-vis the Detained Witnesses, given that the asylum proceedings concerning them are being conducted before the Dutch courts.
6. *Consequence of failure to implement the 20 January 2014 Order.* It follows that since the 20 January 2014 Order, every additional day spent by the Detained Witnesses at the Court's Detention Centre constitutes a serious violation of their right to personal freedom as their detention there is manifestly unlawful.
7. *Conclusion.* Consequently, the Detained Witnesses request the Chamber, ruling as a matter of urgency:

³ *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 ("the 24 August 2011 Decision"), para. 13.

⁴ 20 January 2014 Order, para. 27.

- o As a preliminary matter, **to order** the Registry to draw up a detailed report on implementation of the 20 January 2014 Order;
- o In the main, **to order** the Registry to hand over the Detained Witnesses without delay to the Host State in accordance with article 44(3) of the Headquarters Agreement, for transfer to the competent authorities which will advise as to the action to be taken, firstly, as regards the transfer of the Detained Witnesses in accordance with article 93(7)(b) and secondly, as regards the conduct of their asylum proceedings before the Dutch courts;
- o In the alternative,
 - **to hold** a status conference, pursuant to regulation 30 of the Regulations of the Court, to debate any legal and/or substantive issues raised by implementation of the 20 January 2014 Order;
 - **to state** that the representatives of the Host State, the Duty Counsel for the Detained Witnesses before the Court and counsel representing the Detained Witnesses in the Dutch domestic proceedings will be present at the status conference

[signed]

Ghislain M. Mabanga

Duty Counsel

Dated this 7 April 2014

At The Hague, The Netherlands