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No: ICC-01/04-02/12

Date: 28 May 2014

APPEALS CHAMBER

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

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

Public Document

URGENT

**Application for an Order to the Registrar to allow the Three Detained Witnesses to
be present at the Hearing before Dutch Courts**

SOURCE: Duty Counsel for Witnesses DRC-D02-P0236, DRC-D02-P0228
et DRC-D02-P0350

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

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Mr Ghislain M. Mabanga

States' Representatives.

The Host State
The Democratic Republic of the Congo

REGISTRY

Registrar

M. Herman von Hebel

1. On 26 May 2014, a hearing was held before the Dutch Council of State, the highest organ in asylum matters. At this hearing, the Netherlands sought permission to immediately expel the three witnesses to Congo, in spite of there being a prohibition to do so by the Court of Amsterdam.¹
2. The hearing took place at 14h00 before a Single Judge of the Council of State, in so called summary proceedings.
3. It goes without saying that this was a vital hearing for the three witnesses, because in case of a negative judgment they can face immediate expulsion to the DRC. It also is self-evident that all three witnesses strongly insisted on being present at this essential hearing.
4. The three witnesses would like to refer to the Orders of Trial Chamber II of 7 September 2012² and 17 October 2012.³ Especially in the last Order, the Trial Chamber requested the cooperation of the Netherlands to ensure the presence of the three witnesses at all future hearings in their proceedings before Dutch Courts:

*The Chamber finds it appropriate to request the Host State to cooperate with the transport of the detained witnesses to all future hearings in the current proceedings, if the detained witnesses express the wish to be present at such hearings and if such presence is permitted by the Dutch court in question.*⁴

5. The Trial Chamber thereby explicitly made it also clear to the Registrar that the three witnesses' presence at future hearings must be ensured.
6. Counsel for the witnesses in Dutch proceedings, Mr. Schüller and Mr. Sluiter, have at an early stage requested the Dutch State to ensure the presence of the witnesses for the hearing of 27 May 2014. Also the Single Judge of the Council of State has ordered the Netherlands to arrange for the presence of the witnesses.

¹ Court of Amsterdam, Decision of 14 October 2013

² ICC-01/04-01/07-3314

³ ICC-01/04-01/07-3318

⁴ ICC-01/04-01/07-3318 para. 6

7. The Netherlands has requested that Dutch counsel for witnesses sign a document in which, among other things, witnesses recognize that they fully in the jurisdiction of the ICC and do not fall under jurisdiction of the Netherlands and, moreover, that they do not challenge their detention at the ICC.

8. The statement reads, in full, as follows:

Namens mijn cliënten, de heer Sharif Manda Ndadza, Pierre-Célestin Mbodina Iribi en Floribert Ndjabu Ngabu bevestig ik u hierbij uitdrukkelijk en zonder voorbehoud dat zij het standpunt van de Staat accepteren, dat zij gedurende hun vervoer naar en van het Paleis van Justitie en gedurende hun verblijf in het Paleis van Justitie, waaronder de aanwezigheid in de zaal waar de zitting wordt behandeld, zich in hechtenis bij het Internationaal Strafhof bevinden en uitsluitend het Internationaal Strafhof gedurende die periode ten aanzien van hen rechtsmacht kan uitoefenen. Mijn cliënten zullen zich op geen enkele wijze verzetten tegen het overbrengen en terugkeer naar de detentiefaciliteit van het Internationaal Strafhof na afloop van de behandeling van het zitting. Mijn cliënten zullen voorts geen verzoek doen om aanwezig te mogen zijn bij de uitspraak.

9. The statement, among other things, compels the three witnesses to accept the legal position of the Dutch State and thereby undermines their position in the substantive asylum proceedings.

10. Therefore, and upon consultation with the Dean of the Dutch Bar Association, Dutch counsel for the witnesses are unable to sign the aforementioned declaration. Dutch counsel informed the counsel for the Netherlands on short notice of this position and urged the Netherlands to nevertheless arrange the presence of the witnesses.

11. At the hearing of 27 May 2014, the witnesses were not present. However, at that hearing, counsel for the Dutch State informed the Single Judge that it is the Registrar who refused to allow for the witnesses' transportation without a signed declaration.

12. This is from various respects puzzling, since the ICC Registrar cannot -should not have- any interest in the three witnesses formally accepting the position of the Dutch State. Moreover, it is clear that the Registrar cannot -and should not-

demand that the three witnesses waive their right under Dutch law to be present at the decision being pronounced in open court, which is also an element of the statement.

13. It is submitted that:

- a. There is no basis in law for the Registrar to have the witnesses sign the declaration cited above; the matter was never brought up in relation to Trial Chamber II's orders of 7 September 2012 and 17 October 2012 and is also not part of any condition imposed by the Trial Chamber related to the presence of the witnesses at hearings before Dutch Courts.
- b. The Registrar is under a continuing obligation to give effect to the Order of Trial Chamber II of 17 October 2012.
- c. It is known that other persons detained at the ICC have been present at Dutch hearings -and will be so in the (near) future- without having been forced to sign a similar declaration; as a result the Registrar is making an unjustified distinction between transporting detainees to Dutch court proceedings.

14. The three witnesses wish to observe that the Registrar's refusal to allow them to be present at a vital and critical hearing in their asylum case is a serious violation of their fundamental right to be present at hearings.

15. Moreover, the aforementioned violation of the witnesses' rights fits in what the witnesses perceive as a pattern on the part of the Registrar of failure to comply with Orders and Decisions of the Court related to this case.

16. In this respect it is pointed out that it transpired from the hearing before the Single Judge on 27 May 2014 that the Registrar and the Netherlands, in cooperation and coordination, have deliberately stalled the execution of the Appeals Chamber's Order of 20 January 2014. What is more, the Registrar has also failed to comply with this Chamber's Order of 21 May 2014. Almost a week after

that Order has been issued and the Appeals' Chamber has ordered its immediate execution, the witnesses are still detained at the ICC Detention Unit.

17. The three witnesses inform hereby the Appeals Chamber that on 5 June 2014 there is another essential hearing scheduled in their asylum case, before the plenary bench of the Council of State.
18. The three witnesses feel compelled to request this Chamber to issue an order to the Registrar, thereby ensuring their presence at this hearing.
19. As this may be the last filing by the three witnesses after they have spent three years in unlawful detention at the ICC, they would like to say a few 'final words'.
20. The witnesses pay their respect to the Judges of the Court and sincerely praise their commitment to the cause of international criminal justice. They would also like to express their gratitude to the staff of the ICC Detention Unit, in whose care the witnesses have been for more than three years.
21. However, the witnesses are deeply disappointed in and deeply concerned by the conduct of the Registrar in this case. At no point in time did the witnesses have the impression that the Registrar was genuinely and objectively interested in the protection of their safety and well-being; rather, under huge political pressure, the efforts of the Registrar appear to have been aimed at accommodating the demands and interests of both the DRC and the host-State.
22. The witnesses have no confidence at all in the so-called protective measures the Registrar has 'negotiated' in their case with the DRC. They are not genuine. Moreover, the DRC will violate its obligations towards the Court whenever this is (politically) convenient.⁵
23. If they are to be returned to the DRC, the witnesses will face serious human rights violations, even death.

⁵ ICC-02/05-01/09-195, Pre-Trial Chamber II, *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court*, 9 April 2014

24. The Duty Counsel respectfully submitted this application to request the Appeals Chamber to:

- a. Order the Registrar to ensure the presence of the three witnesses at the hearing in their respective asylum case, on 5 June 2014.



Ghislain M. Mabanga
Duty Counsel

Done on 28 May 2014.

At The Hague (The Netherlands)