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

Date: 2 June 2014

THE 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 OF
 THE PROSECUTOR *v.* MATHIEU NGUDJOLO CHUI**

URGENT

Public

With confidential annexes

Registry's Submission pursuant to the Appeals Chamber's "Order for submissions regarding the "Application for an Order to the Registrar to allow the Three Detained Witnesses to be present at the Hearing before Dutch Courts""

Source: The Registry

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
Ms Helen Brady

Counsel for Mathieu Ngudjolo Chui

Mr Jean Pierre Kilenda Kakengi Basila
Mr Jean Pierre Fofé Djofia Malew

Legal Representatives of the Victims

Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

Legal Representatives of the Applicants

States' Representatives

Democratic Republic of the Congo
Kingdom of The Netherlands

REGISTRY

Registrar

Mr. Herman von Hebel

Detention Section

Harry Tjonk

Other

Mr Ghislain Mabanga, Duty Counsel

The Registrar of the International Criminal Court (the “Court”)

NOTING the Appeals Chamber’s “Order for submissions regarding the "Application for an Order to the Registrar to allow the Three Detained Witnesses to be present at the Hearing before Dutch Courts";¹

NOTING the urgent “Application for an Order to the Registrar to allow the Three Detained Witnesses to be present at the Hearing before Dutch Courts” dated 28 May 2014;²

NOTING Trial Chamber II’s « Ordonnance relative aux requêtes du conseil de permanence relatives à la détention des témoins DRC-D02, P-0236, DRC-D02-P228, et DRC-P02-P-350 » dated 1 June 2012 («1st June 2012 Order »);³

CONSIDERING that in the 1st June 2012 Order, Trial Chamber II indicated that « The Chamber is of the view that it is necessary to facilitate arrangements to transfer, escort and guard the 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.»⁴

CONSIDERING article 93(7) of the Rome Statute, rule 192 of the Rules of Procedure and Evidence, regulations 23*bis*, 24*bis* and 90 of the Regulations of the Court (“the RoC”) and article 44 of the Headquarters Agreement;

CONSIDERING the circumstances surrounding the urgent request of the Duty Counsel before the Appeals Chamber;

¹ ICC-01/04-02/12-182

² ICC-01/04-02/12-181

³ ICC-01/04-01/07-3303. *See also* ICC-01/04-01/07-3314 and ICC 01/04-01/07-3318.

⁴ ICC-01/04-01/07-3303-tENG, par. 12.

CONSIDERING that, pursuant to regulation 23*bis* of the Regulations of the Court, the present observations are filed under the classification “Public” with two “Confidential” annexes. The two annexes are kept “Confidential” as they relate to correspondences between the Host State and the Court.

SUBMITS, respectfully, the following:

- 1- The 1st June 2012 Order of Trial Chamber II acknowledged the necessity to facilitate arrangements to transfer, escort and guard the Detained Witnesses for their participation in the proceedings before a Dutch court and ruled that the Registry should discuss with the host state “what arrangements may be implemented in optimal security conditions to transport and guard the Detained Witnesses before a Dutch court”.⁵
- 2- With a view to ensuring the appearance of the Detained Witnesses before the Dutch courts, two of the Registry’s proposals⁶ for the Detained Witnesses participation to a hearing have taken place so far, namely a video-link from the Detention Centre with the District Court of Amsterdam, and transportation to other courts when required with the assistance of the host State.
- 3- With respect to participation in hearings, the Registry started to request the host State for guarantees from the Dutch counsel for the Detained Witnesses back in 2012. To the Registry knowledge, the counsel for the host State in the asylum proceedings secured from the Dutch counsel for the Detained Witnesses the requested guarantees, after which transportation request was made by the Registry.

⁵ *Ibid.*, par. 13.

⁶ *Ibid.*, par. 8

- 4- These guarantees are necessary and important because the Detained Witnesses are under the custody of the Court under rule 192 of the Rules of Procedure and Evidence by extension of the custody of the Democratic Republic of the Congo which agreed with their transfer to the seat of the Court pursuant to Article 93(7) of the Rome Statute through the related Standard Operating Procedure Agreement⁷. The Registry submits that the guarantees are required to ensure the presence of the Detained Witnesses before Dutch courts and their return to the ICC Detention Centre. Indeed, the guarantees aim at preventing the Dutch counsel for the Detained Witnesses or any Dutch Judge from concluding or stating that the Detained Witnesses were under Dutch jurisdiction as transportation was ensured by the Dutch transport Police (DV&O) or because of their presence before a Dutch court.

- 5- As part of the arrangements for transfer (transportation), the Dutch counsel for the Detained Witnesses has consistently provided guarantees that the Detained Witnesses will remain under the custody of the International Criminal Court and comply with the transportation process from and to the Court's Detention Centre. While the 1st June 2012 Order and other subsequent orders provide a basis for the arrangements to be made, the Registry believes that the practicalities of such arrangements remain administrative matters for the discharge of its custodial functions and it is in that context that guarantees have been sought and given. The Registry submits that participation of the Detained Witnesses in Dutch hearings, even at their own request or the request of a Dutch court, is not automatic and is always subject to a request for transportation by the Registry to the host State once the guarantees have been secured.

⁷ See "Transfèrement des Témoins Détenus, Procédure de Fonctionnement Standard", 9 May 2011 ICC-01/04-01/06-2732-Conf-Exp-Anxl.

- 6- Such arranged guarantees for the implementation of the 1st June 2012 Order and all subsequent orders or requests for the Detained Witnesses attendance to hearings before a Dutch court have been secured again no later than last 20 May 2014 for a hearing scheduled on 21 May before a Dutch court.⁸
- 7- With respect to the most recent request to ensure the physical appearance of the Detained Witnesses to the hearing of 27 May 2014, the Registry was orally informed by the host State that the Dutch counsel for the Detained Witnesses was opposed to providing the requested guarantees. Consequently the Registry sent a *Note Verbale* to the host State⁹, emphasizing the need for such guarantees and, in the alternative, offering the possibility of a video-link from the Detention Centre to ensure the participation of the Detained Witnesses in the proceeding. No other explanation was given to the Registry on why the Dutch counsel opposed the arrangements that were complied with up to 20 May 2014 until the Duty Counsel submission to the Appeals Chamber¹⁰. It is worth highlighting that the Duty counsel was never involved in the provision of the requested guarantees; all communications pertaining to the provision of the guarantees occurred with the host State and did not involve any direct contact with the Dutch counsel either.
- 8- The Registry wishes to stress that it never refused to facilitate the attendance of the Detained Witnesses to hearings before the Dutch courts. The proposal made by the Registry to ensure participation in the Dutch proceedings, i.e. by way of video-link in the absence of the requested guarantees was never responded to, neither was it conveyed as far as the Registry is aware to the Council of State (*Raad van State*) before or during the 27 May 2014 hearing.

⁸ See Confidential annex 1 (in Dutch).

⁹ See Confidential annex 2

¹⁰ ICC-01/04-02/12-181

- 9- As to the Duty counsel submission that Dutch counsel has no obligation to provide such guarantees, the Registry maintains that such submission is not relevant as the guarantees are a condition set by the Court, which is not a party to the asylum proceedings and are thus necessary prior to their transportation for Dutch hearings.



Marc Dubuisson, Director of the Division of Court Services
on behalf of
Herman von Hebel, Registrar

Dated this 2 June 2014

At The Hague in The Netherlands