

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 4 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

Public Document

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



Decision 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 Mr Mathieu Ngudjolo Chui
Mr Jean Pierre Kilenda Kakengi Basila
Mr Jean Pierre Fofé Djofia Malewa

Legal Representatives of Victims
Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

Duty Counsel for witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350
Mr Ghislain M. Mabanga

States Representatives
Democratic Republic of the Congo
Kingdom of the Netherlands

REGISTRY

Registrar
Mr Herman von Hebel



The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Trial Chamber II entitled “Judgment pursuant to article 74 of the Statute” of 18 December 2012 (ICC-01/04-02/12-3-tENG),

Having before it the “Application for an Order to the Registrar to allow the Three Detained Witnesses to be present at the Hearing before Dutch Courts” of 28 May 2014 (ICC-01/04-02/12-181) by Duty Counsel for witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350,

Issues the following

DECISION

The “Application for an Order to the Registrar to allow the Three Detained Witnesses to be present at the Hearing before Dutch Courts” of 28 May 2014 (ICC-01/04-02/12-181) is rejected.

REASONS

I. PROCEDURAL HISTORY

1. On 28 May 2014, the Duty Counsel for Witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350 (hereinafter: “Duty Counsel” and “Detained Witnesses”, respectively) filed an application for the Appeals Chamber to order the Registrar to ensure the presence of the Detained Witnesses at a hearing on 5 June 2014 before a Dutch Court, the plenary bench of the Council of State, relevant to their respective asylum cases (hereinafter: “Request”).¹

2. The Duty Counsel submits that the Detained Witnesses did not attend a hearing that took place on 27 May 2014 before a single judge of the Council of State, due to the Registrar’s refusal to transport the Detained Witnesses without having received a

¹ “Application for an Order to the Registrar to allow the Three Detained Witnesses to be present at the Hearing before Dutch Courts”, ICC-01/04-02/12-181 (A), paras 17-18, 24.

signed declaration by them (hereinafter: “Guarantee”).² The Duty Counsel further submits that, prior to the 27 May 2014 hearing, The Netherlands requested that the Dutch counsel for the Detained Witnesses sign a Guarantee “in which, among other things, [the Detained W]itnesses recognize that their [*sic*] fully in the jurisdiction of the ICC and do not fall under [*sic*] jurisdiction of the Netherlands and, moreover, that they do not challenge their detention at the ICC”.³

3. The Duty Counsel argues that, by compelling the Detained Witnesses to sign a Guarantee in which they accept the legal position of the Netherlands, their position in the substantive asylum proceedings is undermined⁴ and, for this reason, the Dutch counsel for the Detained Witnesses informed the Netherlands that the Detained Witnesses were unable to sign the Guarantee, but nonetheless requested that The Netherlands arrange for their presence at the hearing.⁵ According to the Duty Counsel, at the hearing of 27 May 2014, “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”.⁶

4. The Duty Counsel further argues that the Registrar is under a continuing obligation to give effect to the orders of Trial Chamber II of 7 September 2012⁷ and 17 October 2012,⁸ wherein the Trial Chamber requested the cooperation of the Netherlands and the Registry in ensuring the presence of the Detained Witnesses at all future hearings in the proceedings of their asylum cases.⁹ In this respect, the Duty Counsel submits that the Guarantee does not have to be signed because it was not contained in the orders of Trial Chamber II or part of an imposed condition related to the presence of the Detained Witnesses at a hearing before the Dutch courts.¹⁰ Finally,

² Request, paras 6, 11.

³ Request, paras 7-8.

⁴ Request, para. 9.

⁵ Request, 10.

⁶ Request, para. 11.

⁷ “Ordonnance portant sur la requête du conseil de permanence relative au transfèrement des témoins DRC-D02-P-0236, DRC-D02-P-0228, et DRC-D02-P-0350 devant la Cour de district de La Haye (Article 44-3 de l’Accord de siège)”, ICC-01/04-01/07-3314.

⁸ “Order in relation to the request by duty counsel of DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 to be transferred to hearings before the Court of Appeals of The Hague”, ICC-01/04-01/07-3318.

⁹ Request, paras 4-5, 13.

¹⁰ Request, para. 13.

the Duty Counsel notes that other persons detained at the ICC have been present at Dutch hearings without having been required to sign a similar declaration.¹¹

5. On 2 June 2014, following an order of the Appeals Chamber,¹² the Registrar filed submissions on the Request¹³ (hereinafter: “Registrar’s Submissions”), arguing that: 1) he has requested guarantees from the Dutch counsel for the Detained Witnesses since 2012 and the Dutch counsel has “consistently provided” the requested guarantees;¹⁴ 2) the guarantees are “a condition set by the Court”¹⁵ and are required to ensure the presence of the Detained Witnesses before the Dutch courts as well as their return to the Court’s Detention Centre, which the Registrar must ensure pursuant to rule 192 of the Rules of Procedure and Evidence;¹⁶ 3) the practicalities of the arrangements ordered by Trial Chamber II are administrative matters that involve the discharge of the Registrar’s custodial functions and it is for this purpose that the guarantees have been requested;¹⁷ and 4) the participation of the Detained Witnesses in Dutch court proceedings “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”.¹⁸

6. Finally, the Registrar submits that he has complied with the 1 June 2012 order of Trial Chamber II “to facilitate arrangements to transfer, escort and guard the Detained Witnesses” for purposes of appearing before the Dutch courts¹⁹ in the past by transporting the Detained Witnesses to the relevant court and by arranging for a video-link from the Court’s Detention Centre. With respect to the hearing of 27 May 2014, the Registrar notes that he offered, as an alternative after the guarantees were not provided, to ensure the participation in the proceedings by arranging a video-link

¹¹ Request, para. 13.

¹² “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’”, 30 May 2014, ICC-01/04-02/12-182 (A).

¹³ “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’”, ICC-01/04-02/12-183 (A) with two confidential annexes.

¹⁴ Registrar’s Submissions, paras 3, 5; *see also* para. 6.

¹⁵ Registrar’s Submissions, para. 9.

¹⁶ Registrar’s Submissions, para. 4.

¹⁷ Registrar’s Submissions, para. 5.

¹⁸ Registrar’s Submissions, para. 5.

¹⁹ “Order on duty counsel’s requests concerning the detention of Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350”, ICC-01/04-01/07-3303-tENG, para. 12.

from the Detention Centre, an offer which was not responded to, nor, as far as the Registrar is aware, was it conveyed to the Dutch court.²⁰

II. DETERMINATION BY THE APPEALS CHAMBER

7. The Appeals Chamber notes that this Request relates to the specific issue of the Detained Witnesses' ability to temporarily leave the Court's custody in order to be present at domestic court proceedings related to their respective asylum requests and the Registrar's obligation to facilitate their appearance at those proceedings.

8. In this regard, the Appeals Chamber notes that, as argued by the Duty Counsel, the Registrar is under a continuing obligation to give effect to the orders of Trial Chamber II with respect to facilitating the presence of the Detained Witnesses at any domestic proceedings related to their asylum requests. The Appeals Chamber recalls that the Registrar is equally obliged to give effect to its orders, notably those of 20 January 2014 and 21 May 2014, i.e. to return the Detained Witnesses, without delay, to the Democratic Republic of the Congo. In order to facilitate these competing obligations, the Appeals Chamber recognises the Registrar's need to ensure the return of the Detained Witnesses into the Court's custody following their appearance at the domestic proceedings.

9. In this light, the Appeals Chamber is not persuaded by the Duty Counsel's argument that the Registrar cannot require the signing of the disputed Guarantees from the Detained Witnesses prior to their transport to the Dutch court simply because no explicit reference was made to acquiring such guarantees in the Trial Chamber's orders. The Appeals Chamber considers that it is within the Registrar's discretion, pursuant to the discharge of his custodial duties, to determine the manner in which to ensure that the Detained Witnesses' return to the Court's Detention Centre after their presence in the Dutch courts. In this respect, the Appeals Chamber finds the Registrar's requirement that the Guarantees be signed prior to any transport of the Detained Witnesses from the Court's Detention Centre to be reasonable and within his discretion. Furthermore, the Appeals Chamber is not able to discern from the Request how said Guarantees would undermine the Detained Witnesses' "position in the substantive asylum proceedings". A bare assertion without any argumentation or

²⁰ Registrar's Submissions, paras 7-8.

explanation is not sufficient to warrant the Appeals Chamber's intervention. Additionally, the Appeals Chamber considers that the manner in which *other* individuals in the Court's custody have been transported to the Dutch courts is irrelevant to the present situation.

10. Finally, in light of the Registrar's offer to provide a video-link from the Detention Centre if the Guarantees are not signed, the Appeals Chamber considers that the participation of the Detained Witnesses in the Dutch court proceedings is in any event adequately ensured.

11. For the above reasons, the Request is rejected.

Done in both English and French, the English version being authoritative.



Judge Sanji Mmasenono Monageng
Presiding Judge

Dated this 4th day of June 2014

At The Hague, The Netherlands