



Original: English

No.: ICC-01/04-02/12
Date: 27 August 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

Public redacted version of the “Registry submissions on the implementation of the
Order of 20 January 2014 (document 01/04-02/12-158)”
(ICC-01/04-02/12-174-Conf) dated 16 April 2014

Source: The Registry

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

The Office of the Prosecutor

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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Democratic Republic of the Congo

Kingdom of the Netherlands

Kingdom of Belgium

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Mr Ghislain Mabanga

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

NOTING the “Judgment pursuant to article 74 of the Statute” rendered by Pre-trial Chamber II on 18 December 2012 Mr. Ngudjolo Chui’s;¹

NOTING the “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” rendered by the Appeals Chamber on 20 January 2014;²

NOTING the document entitled “Requête aux fins d'exécution de l'Ordonnance ICC-01/04-02/12-158” submitted by the Duty Counsel for the Detained Witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350 and registered on 8 April 2014;³

NOTING the “Order for submissions in response to the Request for the execution of order ICC-01/04-02/12-158” rendered by the Appeals Chamber on 9 April 2014;⁴

CONSIDERING that the Registrar was ordered to file, by 16h00 on 16 April 2014, submissions containing a detailed report on the implementation of the order of 20 January 2014;⁵

CONSIDERING Regulations 23*bis* and 24*bis* of the Regulations of the Court (“the RoC”);

¹ ICC-01/04-02/12-3-tENG

² ICC-01/04-02/12-158

³ ICC-01/04-02/12-171

⁴ ICC-01/04-02/12-173

⁵ ICC-01/04-02/12-173, page 3

CONSIDERING that the present document contains sensitive information, the Registry classifies it as confidential.

SUBMITS, respectfully, the following observations:

A. Status questionis

1. In the order of 20 January 2014, the Registry was ordered to *“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 [whilst] consulting 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”*.

2. Following the order of 20 January 2014, the Registry has met with representatives of the Host State (from the Ministry of Justice and Security, the Immigration Department and the Ministry of Foreign Affairs, on 28 January and 4 March 2014 and has discussed on the implementations of the Appeals Chamber’s order.

3. As a matter of courtesy, the Registry has met with the Detained Witnesses, on 22 January 2014 and has discussed with them the context of the Appeals Chamber’s Order, the protection measures as ordered by Trial Chamber II, the circumstances and conditions regarding Mr [REDACTED]’s voluntary return to the Democratic Republic of the Congo (“DRC”) in October 2012 as well as the recent decision (conditional release) by the DRC government which Mr. [REDACTED] is benefiting from since September 2013.

4. A meeting was held with the Defence Counsel for Germain Katanga, calling party of the Detained Witnesses, and their Duty Counsel as Defence Counsel had informed the Registry about a possible voluntary return to the DRC by the Detained Witnesses.

5. The Registry has equally met with the Congolese authorities (*Procureur-général de la République*, the *Premier Avocat-général près de la Haute Cour Militaire* and a special adviser to the Presidency) on two occasions, namely on 11 and 12 February 2014.

6. During a recent mission to the DRC, a work meeting was held with the DRC authorities.

Standard operating Procedure between the ICC and the Democratic Republic of the Congo

7. The Registry, prior to the transfer of the Detained Witnesses to the seat of the Court, concluded a standard operating procedure with the Congolese authorities, indicating, *inter alia*, that, pursuant to article 93(7) of the Rome Statute, the Detained Witnesses are to be returned to the DRC “as soon as they have finished their testimony”.

8. Following the Appeals Chamber’s Order and as per the above-mentioned Standard Operating Procedure, the Registry stands ready to implement the immediate return of the Detained Witnesses to the DRC. In this regard, the Registry has recently visited the [REDACTED] where the Detained Witnesses will be detained, in the event of their return to the DRC (see below - paragraphs 18-20). This is in compliance with the decision by Trial Chamber II, dated 24 august 2011 and entitled “Decision of the Security Situation of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-350”.⁶

⁶ ICC-01/04-01/07-3128

Current State of Affairs (Asylum proceedings - Host State)

9. Detained Witnesses 228, 236 and 350 have all applied for asylum in the Netherlands in May 2011

10. On 14 October 2013, the Court of Appeal (Rechtbank Den Haag – zittingsplaats Amsterdam) ruled, for each of the detained witnesses that they would be refused asylum, based on Article 1 F of 1951 Convention Relating to the Status of Refugees, but that they cannot be returned to the Democratic Republic of the Congo as a fair trial in the DRC cannot be guaranteed (based on article 6 of the European Convention of Human Rights and more specific due to a “flagrant denial of justice”, “no guarantee for a fair trial” and “no real guarantee on the non-implementation of the death penalty”⁷ - principle of non-refoulement).

11. The Host State has appealed the 14 October 2013 decision and the case is currently pending before the *Raad van State*.

12. In relation the on-going asylum proceedings before the *Raad van State*, the Registry obtained a copy of the letter by counsel for the Detained Witnesses in the Dutch asylum proceedings (Mr. Schüller and Mr. Sluiter), dated 3 February 2014, addressed to the *Raad van State* and referring to a meeting between Court and the Detained Witnesses and indicating that the Court *inter alia* “advised the Detained Witnesses to withdraw their asylum applications” as well as the “rising pressure on [his] clients”.⁸

13. By letter of 10 February 2014, the Registry responded to Mr Schüller and Mr Sluiter’s letter indicating the exact topics which were discussed during the above-mentioned meeting and who had nothing to do with advice to withdraw asylum

⁷ ECLINLRBAMS20136688, Rechtbank Amsterdam, AWB span class=hl012-37364 en AWB 13-4669.mht ; ECLINLRBAMS20136692, Rechtbank Amsterdam, AWB span class=hl012-37371 en AWB 13-34466.mht; ECLINLRBAMS20136705, Rechtbank Amsterdam,.mht

⁸ Annex 1

applications or increasing pressure.⁹ However, no response was received from Counsel since.

14. The Registry deplores the intervention by Mr Sluiter before the *Raad van State* and would like to stress that all of its interventions have been made with the fullest respect of human rights and transparency.

B. Update on information received:

Relevant information as to the issue of the death penalty:

15. The Registry has received formal guarantees from the competent DRC authorities in relation to the non-implementation of the death penalty *vis à vis* Detained Witnesses 228, 236 and 350.¹⁰ In a letter from the *Procureur-général de la République*, the highest judicial authority in the DRC, it is indicated that «*je m'engage par la présente à garantir que la peine de mort ne sera pas requise à l'encontre des prévenus [...] et qu'en tout état de causes, elle ne sera pas mise en exécution*».

16. Understandably and logically, the condition for the non-implementation of the death penalty is that the presence in the Democratic Republic of the Congo of the persons concerned is required; “*la condition à cet effet est leur retour en République démocratique du Congo [...]*”.

17. The Registry was informed that similar guarantees have been used previously - and considered sufficient - by the competent authorities of the Kingdom of the Netherlands in relation to identical cases in relation to the death penalty. More in particular, identical guarantees, provided by the United States of America and the

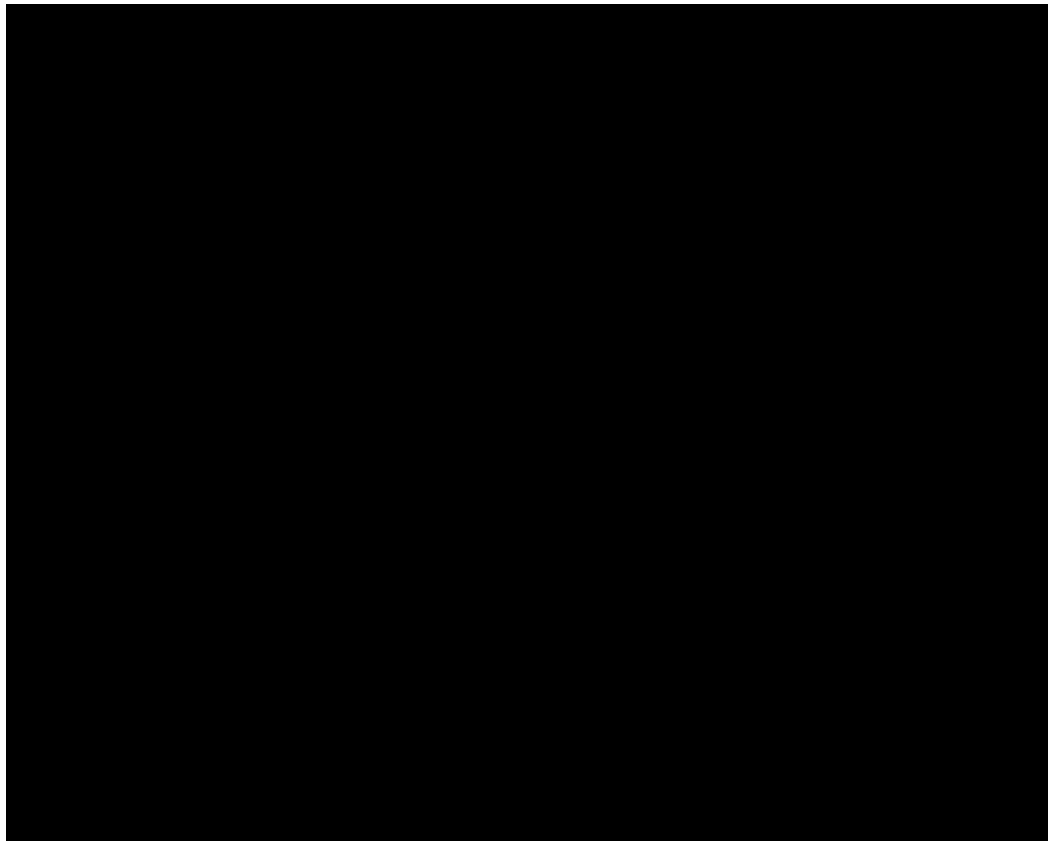
⁹ Annex 2

¹⁰ Annex 3

People's Republic of China were considered as adequate by the authorities of the Kingdom of the Netherlands in former extradition cases.

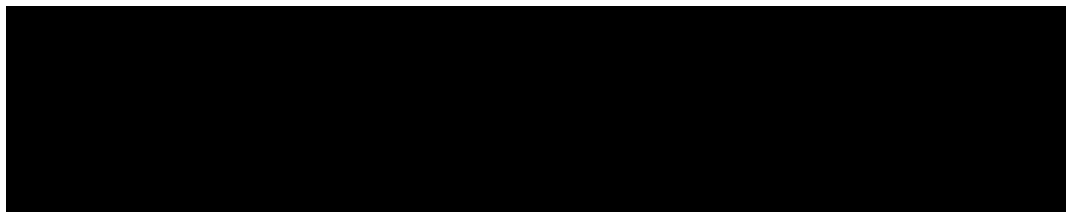
Relevant information as to the domestic proceedings (Democratic Republic of the Congo):

- **Regarding Detained Witness DRC-D02-P-0228:**



- Guarantees on the non-implementation of the death penalty with respect to Detained Witness 228 have been received from the competent authorities of the DRC.¹⁴

- **Regarding Detained Witness DRC-D02-P-0236:**

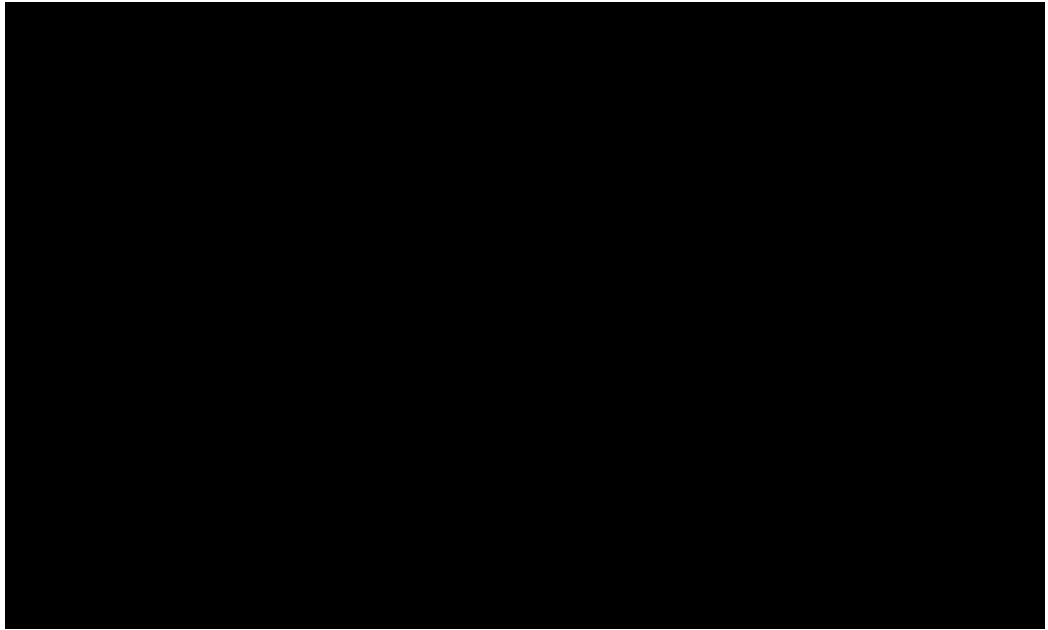


¹¹ Annex 4

¹² Annex 5

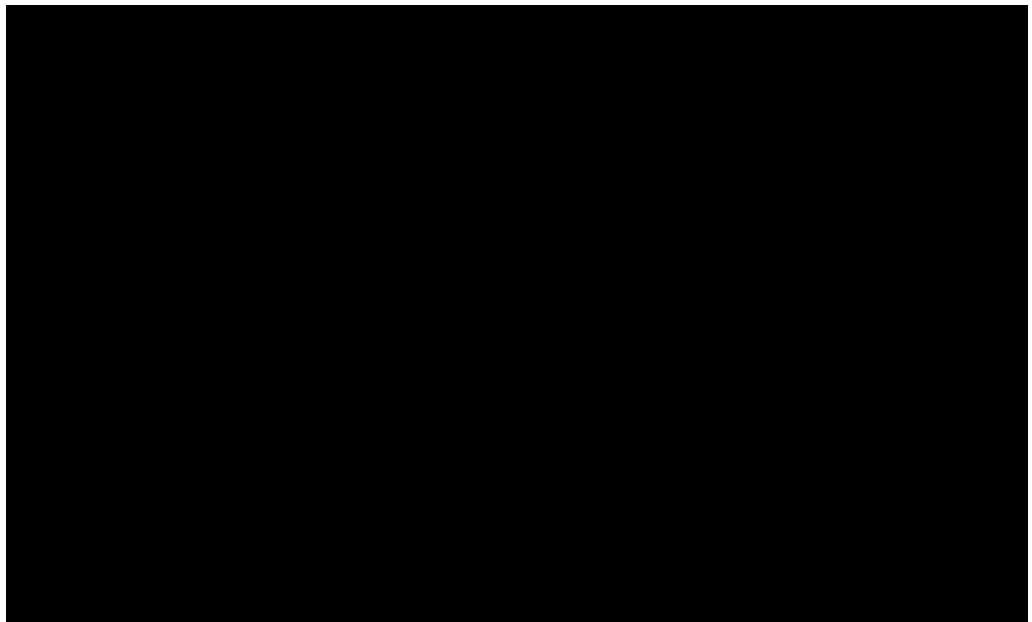
¹³ Annex 3, page 2

¹⁴ Ibidem



- Guarantees on the non-implementation of the death penalty with respect to Detained Witness 236 have been received from the competent authorities of the DRC.¹⁸

- **Regarding Detained Witness DRC-D02-P-0350:**



¹⁵ Annex 4

¹⁶ Annex 5

¹⁷ Annex 3, page 2

¹⁸ Ibidem.

¹⁹ Annex 6

²⁰ Annex 7

²¹ Annex 8



- Guarantees on the non-implementation of the death penalty with respect to Detained Witness 350 have been received from the competent authorities of the DRC.²⁴

As to the protective measures in place (SOP on return)

18. During its mission to the Democratic Republic of the Congo, the Registry has met with the DRC authorities and the latter have re-confirmed the various protective measures applicable to the Detained Witnesses in the event of a return to the DRC.

19. More in particular, the Registry has visited the [REDACTED] [REDACTED], the place where they should return to, based on an agreement between the DRC authorities and the Registry.

20. For reference, Detained Witness D-19, after having withdrawn his asylum application, was transferred back to the DRC [REDACTED]. No complaint regarding the implementation of the above-mentioned SOP was ever reported.

²² Annex 9

²³ Annex 3, page 2 «étant éligible à l'amnistie»

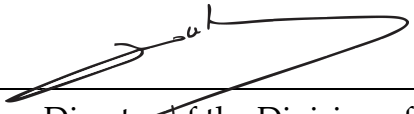
²⁴ Ibidem.

C. Conclusion

21. In light to the above, namely the guarantees regarding death penalty, provided by the highest judicial authority of the DRC and in the same way as other states, and the information provided on the progress in domestic cases, the Registry is of the view that all obligations, mentioned as grounds for non-return to the DRC in the October 2013 Appeal's judgment by the Dutch Judge, are fully met for the Registry to return, pro-actively and on the sole basis of article 93 (7) of the Rome Statute and the SOP with the DRC authorities, the Detained Witnesses to the Democratic Republic of the Congo, considering the newly received information.

22. The Registry will notify this document, including its annexes, to the Kingdom of the Netherlands, considering the asylum proceedings, as well as to the Kingdom of Belgium, who had assisted in the transfer of the Detained Witnesses, so the respective competent authorities are updated as to the exact situation at hand.

23. The Registry apologises for the late submission and respectfully requests acceptance of the present document.



Marc Dubuisson, Director of the Division of Court Services,
per delegation of
Herman von Hebel, Registrar

Dated this 27 August 2014

At The Hague in The Netherlands