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No.: ICC-01/04-01/07

Date: 15 June 2011

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

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

Public Document

Request for leave to appeal the *Decision on an Amicus Curiae application and on the "Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d'asile"*

Source: The Democratic Republic of the Congo

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

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Legal Representatives of the Victims

Mr Jean-Louis Gilissen
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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
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States' Representatives

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Mr Marc Dubuisson

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I. PRELIMINARY OBSERVATIONS

1. In the cases of *The Prosecutor v. Thomas Lubanga Dyilo* and *The Prosecutor v. Germain Katanga and Mathieu Ngujolo*, the Defence teams filed applications with the Court seeking to secure from the Congolese authorities “[TRANSLATION] **the extraction and temporary transfer to The Hague of four witnesses detained at Makala central prison in order for them to appear voluntarily as witnesses for the Defence**”.
2. The DRC authorities complied with that application, affording the four witnesses and the Registry’s Representatives every facility to enable them fully to effect the procedure. To that end, following a series of discussions, a consensus document entitled “**Standard Operating Procedure**” was adopted by the Congolese authorities and the Representatives of the Court Registry. It has its legal basis in articles 93(1)(f), 93(7) and 99 of the Rome Statute and governs all the practical aspects of the four witnesses’ journey from the DRC to The Hague and back. Point 7 of the document stipulates more clearly that “[TRANSLATION] **the ICC shall return the persons in custody to the DRC without delay after completion of their testimony**”.
3. The Congolese authorities were therefore greatly surprised suddenly to learn, at a meeting on 6 June 2010 with the representatives of the Registry of the Court, that “[TRANSLATION] **these witnesses had requested Trial Chamber II of the Court to present them, after their respective testimonies, to the Dutch authorities, to whom they intended to apply for asylum**”.
4. The Congolese authorities were even more surprised to learn that, in its decision of 9 June 2010, the Court “**suspend[ed] the immediate return of the three detained witnesses to the DRC**”, without first deigning to invite the Congolese authorities to submit their observations on this request, which manifestly exceeds

the ambit of the aforementioned provisions of the Rome Statute and the Standard Operation Procedure.

5. The Congolese authorities hereby lodge a formal appeal against this decision of the Court.
6. They would also like to take this opportunity to respond to the observations of Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 concerning the Order to provide further assurances regarding their security.

II. LEGAL BASIS

7. Firstly, the Congolese authorities wish to reiterate their commitment to observing scrupulously the provisions of the Rome Statute, which has led them to cooperate more closely with the Court than any other state Party so far.
8. They state, in particular, that they are wholly bound by the obligation to cooperate enshrined in articles 86 and 93(1)(j) of the Rome Statute, in article 24 of the Judicial Cooperation Agreement with the Office of the Prosecutor, and in the provisions of the Standard Operating Procedure negotiated with the Registry of the Court governing witness protection.
9. On the basis of the foregoing, the Congolese authorities would like to respond to the observations of the four witnesses concerning further assurances regarding their security.

III.OBSERVATIONS OF THE DRC AUTHORITIES

A. Verbal assurances

10. The Congolese authorities repeat all the verbal assurances they gave to the Representatives of the Registry, emphasising in particular the goodwill which must underpin relations between co-contracting parties. Without this tacit

goodwill clause, no agreement, including the Rome Statute, can be properly implemented.

11. The Congolese authorities recall, if there were any further need to do so, all the instances of their cooperation with the Court from the ratification of the Rome Statute to the current proceedings, and emphasise that at no time has the Court had cause to complain that the Congolese authorities have failed to keep their word, in particular regarding the protection of the Court's witnesses.
12. Regarding the reference to the “[TRANSLATION] **abduction**” from Makala central prison of a highly sensitive detainee, Mr Ibrahim Mangbama, the Congolese authorities state that this detainee was transferred to Kasapa high-security prison in Katanga province precisely for reasons of safety. His return to Kinshasa for trial is scheduled for this Wednesday, 15 June 2010.
13. As for the allegation of there being a hidden intention on the part of the Congolese authorities, manifested in their observations (ICC-01/04-01/07-2986-Conf-Anx, p. 2, para. 11), to take reprisals against the witnesses, this allegation is totally unfounded for the following reasons.
14. Firstly, the Congolese authorities are totally unaware of the contents of the testimonies of the four witnesses, as the Court took stringent measures to ensure their confidentiality. Moreover, the Congolese authorities gave their written undertaking to guarantee the immunity of those witnesses even in the event of self-incrimination during their testimony before the Court. Accordingly, it is pure fabrication to ascribe such sinister intentions to the Congolese authorities.
15. In actual fact, the Congolese authorities sought in their observations to remind the Court of their mutual obligations under the Rome Statute (articles 87(5)(a) and (b) and 87(7)) and the Standard Operating Procedure, as well as of the consequences that might ensue from a breach of those obligations, in particular a

breakdown in the mutual trust between the two parties. This in no way constitutes a threat of reprisals against the witnesses.

B. The protective measures proposed by the Congolese authorities

16. The Congolese authorities reiterate the guarantees they offered regarding the VIP section of Wing 11 of Makala central prison with the possible improvements suggested by the Representatives of the Registry.
17. Moreover, whilst emphasising, like the Defence, that the fears expressed by the witnesses regarding their safety are long-standing and continuing, they wish, nevertheless, to emphasise that at no time have these fears been realised by acts of reprisal.
18. The possibility of transferring the witnesses to Ndolo prison remains an option for the Congolese authorities. This rehabilitated prison currently provides accommodation which, within the limits of the capacities of the Congolese judicial system, which has been seriously affected by years of conflict, meets international standards and certainly offers higher standards than those in Makala. The Registrar of the ICC confirmed this in writing in the visitors' book of Ndolo prison at the end of her visit a year ago at the head of a Registry delegation. Moreover, contrary to the Defence's allegations, Ndolo prison is indeed the appropriate place to accommodate the four witnesses, since these witnesses are being prosecuted for serious crimes and are thus subject to the jurisdiction of the military courts.
19. Furthermore, the Congolese authorities remain committed to monitoring the situation of these witnesses once they have returned to the DRC, in accordance with a Protocol to be agreed upon with the Registry.
20. Concerning the strengthening of the security measures with material and human resources, this was a proposal by the representatives of the Registry. If the

Defence considers these measures to be discriminatory, the Congolese authorities are prepared to reconsider the proposal.

21. In response to the Defence's submission as to political obstacles, the Congolese authorities retort that these witnesses have always been held in the VIP section in Wing 11 of Makala prison, and that, despite all their previous statements, nothing has happened to them. Therefore, it would be inept, to say the least, of the Congolese authorities then to cause such a misfortune to occur after all the media attention created around this case by the Defence and the monitoring guarantees furnished by the Court.

C. The specific situation of Witness DRC-D02-P-0236

22. The Congolese authorities note that they requested that the travel ban affecting this witness be lifted specifically to enable him to testify before the Court in The Hague.
23. They recall that at all the working sessions involving the witnesses and the representatives of the Registry prior to the transfer to The Hague, their attention was drawn to the purpose of their journey. In respect of a person who is on the list of sanctions of the United Nations Sanctions Committee and who is being prosecuted for serious crimes before the Congolese courts, to take advantage of the facilities provided in order to seek political asylum is a further example of bad faith.

IV. IN LIGHT OF THE FOREGOING,

24. The Congolese authorities regret that Trial Chamber II violated its mandate in agreeing to entertain the application of the four witnesses seeking to be presented to the Dutch authorities for the purpose of filing their applications for asylum without consulting the Congolese authorities and without proposing an alternative solution that would have allowed the Chamber to meet its various legal obligations in a balanced manner.

25. They also regret that, by suspending the immediate return of the four witnesses following completion of their testimony, Trial Chamber II violated not only the provisions of the Rome Statute governing the temporary transfer of detained witnesses, but also those of the Standard Transfer Procedure negotiated by the Congolese authorities with the Registry of the Court.
26. The Congolese authorities continue to maintain that the protective measures they and the Registry proposed are amply sufficient and that nothing suggests that these individuals have been subjected to any risk or any threat whatsoever on the part of the Congolese authorities on DRC territory.
27. They point out that these witnesses are being prosecuted for serious crimes before the national courts and that the case of one of the witnesses has already been called before Kinshasa-Gombe garrison court. For that reason, the *Auditeur Militaire* [military prosecutor] sought and obtained a deferment of the judicial investigation, pending the return of this witness within the following month. The fact of the Court continuing to keep these four witnesses in The Hague means that implicitly it is granting them impunity, whereas the Court was established precisely to fight impunity for serious crimes.
28. Moreover, the Congolese authorities are considering whether, as this Chamber does not appear to consider the guarantees furnished in the present case to be sufficient, it might be appropriate more generally to review the cooperation between the DRC and the Court, particularly with regard to the numerous other witnesses, including certain detainees, whom the Congolese authorities have been safeguarding for many years on their territory in a manner which, until now, they have had no reason to believe did not meet their obligations to cooperate with the Court and to respect the rights of the individuals in question.
29. Accordingly, the Congolese authorities request that the Appeals Chamber order the immediate return of the four witnesses to the DRC.

Dated this 15 June 2010 at Kinshasa

For the DRC authorities

LUZOLO Bambi Lessa

[signed]

Minister for Justice and Human Rights

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Dated this 15 June 2011

At Kinshasa, Democratic Republic of the Congo