

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

**No. ICC-01/04-02/12 A
Date: 21 May 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

Decision on the “Registry’s urgent request for guidance” and further order in relation to the Appeals Chamber’s “Order on the implementation of the cooperation agreement between the Court and the Democratic Republic of the Congo concluded pursuant article 93 (7) of the Statute”

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 issued the “Order on the implementation of the cooperation agreement between the Court and the Democratic Republic of the Congo concluded pursuant article 93 (7) of the Statute” of 20 January 2014 (ICC-01/04-02/12-158) and the “Order for submissions in response to the Request for the execution of order ICC-01/04-02/12-158” of 9 April 2014 (ICC-01/04-02/12-173), the latter having been issued following the receipt of the “Request for implementation of Order ICC-01/04-02/12-158” dated 7 April 2014 and registered on 8 April 2014 (ICC-01/04-02/12-171-tENG) by Duty Counsel for witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350;

Having before it the “Registry submissions on the implementation of the Order of 20 January 2014 (document 01/04-02/12-158)” of 16 April 2014 (ICC-01/04-02/12-174-Conf), the “Registry’s update following the recent submissions on the Detained Witnesses” of 6 May 2014 (ICC-01/04-02/12-175-Conf-Exp), the “Requête additionnelle aux fins d’exécution de l’Ordonnance ICC-01/04-02/12-158” dated 7 May 2014 and registered on 8 May 2014 (ICC-01/04-02/12-176-Conf) by Duty Counsel for witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350, as well as the “Registry’s urgent request for guidance” of 14 May 2014 (ICC-01/04-02/12-178-Conf-Exp),

Renders the following

DECISION

- 1) The “Registry’s urgent request for guidance” of 14 May 2014 is rejected.
- 2) The Registrar is ordered to immediately implement the “Order on the implementation of the cooperation agreement between the Court and

the Democratic Republic of the Congo concluded pursuant article 93 (7) of the Statute” of 20 January 2014.

REASONS

1. On 20 January 2014, the Appeals Chamber issued the “Order on the implementation of the cooperation agreement between the Court and the Democratic Republic of the Congo concluded pursuant article 93 (7) of the Statute”¹ (hereinafter: “Order of 20 January 2014), *inter alia* ordering the Registrar 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”.² The Appeals Chamber also ordered the Registrar to “consult 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 said witnesses.³ Witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350 (hereinafter: “Witnesses”), who had testified in the case of *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, were at that moment in the custody of the Court because they had been transferred to the Court pursuant to an agreement concluded between the Court and the Democratic Republic of the Congo (hereinafter: “DRC”) under article 93 (7) of the Statute.⁴

2. On 7 April 2014, the Duty Counsel for the Witnesses filed the “Requête aux fins d’exécution de l’Ordonnance ICC-01/04-02/12-158”, which was registered on 8 April 2014⁵ (hereinafter: “Request of 7 April 2014”), bringing to the attention of the Appeals Chamber that the Order of 20 January had not yet been implemented and that the Witnesses continued to be in the detention of the Court.

¹ ICC-01/04-02/12-158.

² Order of 20 January, operative paragraph 1.

³ Order of 20 January, operative paragraph 2.

⁴ For a fuller procedural history in that regard *see* Order of 20 January 2014, paras 1-14.

⁵ ICC-01/04-02/12-171.

3. On 16 April 2014, and following an order by the Appeals Chamber,⁶ the Registrar filed the “Registry submissions on the implementation of the Order of 20 January 2014 (document 01/04-02/12-158)”.⁷

4. On 6 May 2014, the Registrar filed the “Registry’s update following the recent submissions on the Detained Witnesses”.⁸

5. On 7 May 2014, the Duty Counsel for the Witnesses filed the “Requête additionnelle aux fins d’exécution de l’Ordonnance ICC-01/04-02/12-158”⁹ (hereinafter: “Request of 8 May 2014”). In addition to repeating the request made in the Request of 7 April 2014, the Request of 8 May 2014 brought to the attention of the Appeals Chamber that one of the three Witnesses had commenced a hunger strike in order to protest his situation, as well as the fact that another one was considering doing so as well.¹⁰

6. On 14 May 2014, the Registrar filed before the Appeals Chamber the “Registry’s urgent request for guidance”¹¹ (hereinafter: “Request for Guidance”), *inter alia* detailing the problems the Registrar had encountered in implementing the Order of 20 January 2014 and seeking guidance from the Appeals Chamber regarding how he should proceed.

7. The Appeals Chamber is deeply concerned by the fact that – four months after the issuance of the Order of 20 January 2014 – the Witnesses continue to be in the Court’s detention centre. The Order of 20 January 2014 clearly and unambiguously instructed the Registrar to implement the cooperation agreement with the DRC and to return the Witnesses into its custody. The Appeals Chamber recalls that under article 44 (2) of the Headquarters Agreement, The Netherlands are under an obligation to carry out, at the request of the Court, the transport of a person in custody from the Court’s premises to the point of departure from the host State. Under article 44 (5) of the Headquarters Agreement, in situations where The Netherlands identifies problems

⁶“Order for submissions in response to the Request for the execution of order ICC-01/04-02/12-158”, 9 April 2014, ICC-01/04-02/12-173.

⁷ ICC-01/04-02/12-174-Conf.

⁸ ICC-01/04-02/12-175-Conf-Exp.

⁹ ICC-01/04-02/12-176-Conf. The filing was registered on 8 May 2014.

¹⁰ Request of 8 May 2014, paras 7-8.

¹¹ ICC-01/04-02/12-178-Conf-Exp.

in respect of a request by the Court, “it shall consult with the Court, without delay, *in order to resolve the matter*” (emphasis added).

8. As to the Registrar’s Request for Guidance, the Appeals Chamber considers that the Registrar’s task is to implement the Order of 20 January 2014. This is clearly stipulated by rule 192 (4) of the Rules of Procedure and Evidence, which provides that “[i]n accordance with article 93, paragraph 7 (b), when the purposes of the transfer have been fulfilled, the Registrar shall arrange for the return of the person in custody to the requested State”. The Appeals Chamber considers that the matters raised in the Request for Guidance are essentially administrative matters. It is not the role of the Appeals Chamber to provide guidance in this regard and the Request for Guidance is therefore rejected. Accordingly, the Appeals Chamber can do no more, but order the Registrar to *immediately* implement the Order of 20 January.

9. As a final point, it is noted that the present decision refers to certain filings that the Registrar made confidentially and on an *ex parte* basis. Nevertheless, the Appeals Chamber considers it necessary to mention these submissions in the present decision, in order to reflect the full procedural context. In addition, the Appeals Chamber considers that nothing in this decision necessitates that it be filed confidentially and as such it is filed as public.

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



Judge Sanji Mmasenono Monageng
Presiding Judge

Dated this 21st day of May 2014

At The Hague, The Netherlands