



COALITION FOR THE  
INTERNATIONAL CRIMINAL COURT

KATANGA / NGUDJOLO CHUI  
INFORMAL SUMMARY



<b>Situation Case</b>	Democratic Republic of Congo 01/04-01/07 The Prosecutor vs. Germain Katanga and Mathieu Ngudjolo Chui	<u>Germain Katanga</u> : born 1978 in Mambassa, Ituri district, Eastern Province; National of the DRC; Alleged commander of the <i>Force de résistance patriotique en Ituri</i> (FRPI).
<b>Hearing: Chamber:</b>	Trial Proceedings Judge Bruno Cotte (Presiding Judge), Judge Fatoumata Dembele Diarra, Judge Christine van den Wyngaert	<u>Mathieu Ngudjolo Chui</u> : born 1970 in Bunia, Ituri district, Eastern Province; National of the DRC; Alleged former leader of the <i>Front des nationalistes et intégrationnistes</i> (FNI).
<b>Parties:</b>	OTP: Mr Eric McDonald, Mr Garcia, Ms Dianne Luping, Mr Gilles Dutertre and team; Defence Mr Katanga: Mr. David Hooper, Mr. Andreas O'Shea and team; Defence Mr Ngudjolo: Mr. Jean-Pierre Kilenda Kakengi Basila, and team;	<b>Alleged crimes:</b> <u>Germain Katanga and Mathieu Ngudjolo Chui</u> allegedly jointly committed, through other persons:
<b>Participants</b>	363 victims represented by Legal Representatives for Victims: Mr. Fidel Nsita Luvengika and Mr. Jean-Louis Gilissen	<ul style="list-style-type: none"><li>○ <b>Crimes against humanity:</b> Murder, sexual slavery and rape;</li><li>○ <b>War crimes:</b> Using children under the age of 15 to take active part in hostilities; deliberately directing an attack on a civilian population as such or against individual civilians not taking direct part in hostilities; willful killing; destruction of property; pillaging; sexual slavery; rape.</li></ul>
<b>Start of Trial:</b>	24 November 2009	

### Introduction:

On Thursday, 12 May 2011, Trial Chamber II convened a Status Conference to discuss certain issues arising from Defence Witnesses 236, 228 and 351 intentions to apply to the authorities of the Netherlands for political asylum. The main issue involved the attempt to establish the legal status of the detained witnesses as from the moment of their entry into the Netherlands. Following a detailed introduction of the procedural history, all participants were provided the opportunity to express their views with respect to any measures which should be taken by the Court. The Chamber did not consider the merits of any application for asylum, and reiterated that it does not have jurisdiction to make any such determination on asylum.

### Presentation by the representative of the three witnesses - Counsel Mabanga:

*Special protective measures:* the Chamber is competent to determine matters of special protective measures. The current protective measures given to the witnesses are not sufficient to secure their safety upon return to the DRC.

*The power of the Netherlands to exercise its jurisdiction:* the Court is faced with two contradicting obligations - the obligation to return the witnesses back to their country of origin (article 93(7b) of the Rome Statute), and the obligation to ensure the safety of the witnesses (article 64(2) and article 68 of the Rome Statute). The Counsel therefore requested the Chamber to hand the witnesses over to the authorities of the Netherlands. No State can exercise its jurisdiction over persons that are under the

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jurisdiction of the Court, and therefore in the current situation, the Dutch authorities have no legal basis to examine the witnesses' applications for asylum. The laws of the Netherlands can only apply when these witnesses are transferred to the authority of the Netherlands. In practical terms, handing the witnesses over to the authorities of the Netherlands requires that they will be transferred from the ICC Detention Center to the Dutch Administrative Detention Center, pending the examination of their request for asylum (which is the ordinary procedure for all asylum seekers in the Netherlands).

*The legal basis:* rules 87, 88 of the Rules of Procedure and Evidence set the procedure to be followed in order to ensure the safety of witnesses, and Rule 88 specifically refers to special measures to be applied in particular circumstances. Rule 88 indicates that a Chamber may order special measures to facilitate the testimony of a traumatized witness, an elderly person, or a victim of sexual violence. This list of circumstances is, however, not exhaustive (by the indication of "measures such as, but not limited to..."). The risks facing the witnesses upon their return to the DRC are of such a nature that ordering "special measures" to facilitate their safety will be appropriate.

*The risk assessment:* first, the witnesses were testifying in the context of the attack on Bogoro, and indicated the Congolese authorities as taking a primary role in the preparation of the attack (through EMOI). These testimonies can therefore serve as the basis for initiating future investigations against other individuals. This may result in an attempt by future potentially accused persons to eliminate any incriminating evidence, the outcome of which might be a risk to the witnesses' safety and well-being in the DRC. Second, the witness will not receive a fair trial in the DRC. Accused persons who face trials of a political nature in the DRC, in which they are regarded as the opponents to those currently in power, do not receive fair trial guarantees. In trials of a political nature, military courts tend to function very rapidly, without any consideration to the rights of the accused. Accused persons who are considered to be the opponents of the current regime are either executed or being brought to summary trials with no actual guarantees for their rights.

#### **Presentation by the Defence of Germain Katanga - Counsel O'Shea:**

*Application for political asylum:* the Defence of Germain Katanga informed the Chamber that a Dutch law firm which practices refugee law have already been in contact directly with the three witnesses, and is now in the process of finalizing and submitting the witnesses' requests for asylum to the authorities of the Netherlands.

*The legal basis for the obligation of the Court to ensure the safety of the witnesses and protect their fair trial rights in the DRC:* article 4(1) of the Rome Statute refers to the Court as an international legal person. As such legal person, it is bounded by international customary law, including the obligation to protect international human rights. Therefore, the obligation of the Court to protect the human rights of the witnesses is connected to the obligation to provide protective measures, but it is in fact much broader than the obligation to provide protective measures; it derives from the legal personality of the Court.

**Presentation by the Defence of Mathieu Ngudjolo Chui - Counsel Kilenda:**

*Conditions for any request for asylum:* all the conditions for asylum have been met in the present case of the three witnesses.

*The legal basis for the protection of human rights:* the legal basis for any obligation of the Court to protect the human rights of the witnesses is the customary nature of any obligation to respect human rights. The Court indeed has the jurisdiction and authority to ensure the safety of the witnesses upon their return to the DRC.

**Presentation by the Office of the Prosecutor - Counsel Eric MacDonald:**

*Reliability of information:* the involvement of President Kabila in the attack on Bogoro and any related event should be left to the determination of this Chamber. The Court should not rely on information originating from untrustworthy websites and other sources.

*The legal status of the witnesses:* the three witnesses are Congolese detainees that the authorities of the DRC have agreed to temporarily transfer to the custody of the Court for the purpose of proving testimony. They remain under the jurisdiction of the DRC, and the authorities of the Netherlands are only responsible for facilitating their detention while in The Hague.

*Objective versus subjective risk:* the only relevant question which the Chamber should ask is whether there is an objective risk to the safety of the witnesses. There is no evidence for any risk or threat to these witnesses' lives or safety, and no evidence indicating they might be subjected to persecution. It had been known for several years now that they will be testifying before this Court, and the fact that there is no evidence to support their assertion regarding the risk they would face upon return, should be taken into account by the Chamber.

**Presentation by the Registry:**

*The legal framework for the transfer of the witnesses to the Court:* the Congolese authorities have accepted the Court's request for the temporary transfer of the three witnesses for the purpose of providing testimony in the case of the Prosecutor v. Katanga & Ngudjolo Chui. The consent of the Congolese authorities was given under certain conditions in accordance with article 93(7) of the Rome Statute. The issue at stake is therefore the delivering of responsibilities temporarily to the Court. There were no arrest warrants issued by the Court for these three individuals; the Court is simply a temporary custodian of these witnesses. Within the framework of the agreement with the Congolese authorities, the detained witnesses should be returned to the DRC as soon as they finish giving their testimony.

*The legal status of the detained witnesses while in the Netherlands:*

- (1) **The power of the Netherlands to exercise its jurisdiction:** the witnesses are detained by the Congolese authorities and only by the Congolese authorities. The Host State does not have the required jurisdiction over these witnesses. Under the provisions of the Host State Agreement, the authorities of the Netherlands cannot detain the witnesses, as they have immunity from criminal proceedings before the Dutch Courts. The conditions for asylum cannot apply,

- since under the Refugee Convention these conditions apply to persons who are illegally in the territory of the requested State. The witnesses are clearly not illegally in the territory of the Netherlands.
- (2) **The detained persons' status as witnesses:** article 93(7) clearly sets up the framework for the legal status of detained witnesses. As witnesses, they have immunity from criminal proceedings in the Netherlands; an immunity which, under the provisions of the Host State Agreement, can only be withdrawn by the Presidency. So far the Presidency was not seized of any submission for the waiver of such immunity.
  - (3) **The Court's obligations vis-à-vis the Congolese authorities:** under article 93(7b) the detainees must return to the DRC as soon as their testimony is concluded. The original date for their return was 13 May 2011. This is clearly not feasible at the moment. Thus the Congolese authorities can argue that the Court has violated its obligations under article 93(7). Should these people be released for the duration of the asylum procedure, the Congolese authorities can raise a second argument that the Court has violated its obligations, since article 93(7) specifically indicates that detained witnesses shall remain in custody while in The Hague.
  - (4) **Possible exception in relation to the jurisdiction of the Netherlands:** article 44 of the Host State Agreement discusses the transport of persons in custody, and indicates this situation as one to be carried out by the competent [Dutch] authorities in consultation with the Court. There is no contradiction between the observations made by the Registry with respect to the authority of the Netherlands over the witnesses and this particular article. The Registry therefore submits that although the witnesses may be on Dutch ground, they remain under Congolese authority. Finally, the representatives of the Registry argue that if every witness coming to The Hague would be able to request political asylum, it would result in future cases of unwillingness on the part of States to accept the Court's requests for temporary transfer of detained witnesses for the purpose of securing their testimony.

**Presentation by the Dutch Government - legal advisor for the Ministry of Foreign Affairs:**

*Responsibility for the protection of witnesses:* articles 64(2), 68 provide the legal basis for the protection of witnesses. The authorities of the Netherlands trust the Court to provide for the necessary measures to ensure the safety of the witnesses. The authorities of the Netherlands will not accept any responsibility for the protection of witnesses.

*The legal status of detained witnesses:* the three witnesses have been temporarily transferred to the Court. In accordance with the Host State Agreement, the legal

status of the detained witnesses is such that they are under the custody of the Court with the agreement of the Congolese authorities. They are not under the authority of the Netherlands under any circumstances.

*The issue of immunity:* the issue of immunity does not at all arise, since the authorities of the Netherlands have not initiated any proceedings.

*The jurisdiction of the Netherlands and article 44 of the Host State Agreement:* the transportation of witnesses within the Netherlands is inherently connected to their testimony before the Court. As such, it is part of the *curb out provision* and exclusively under the jurisdiction of the Court.

*The curb out provision:* articles 8(2) and 8(3) of the Host State Agreement reflect a priority. If the Court has made its own rules with regards to specific issues, these rules take priority over the laws of the Netherlands within the premises of the Court. If the issue of asylum arises, it is for the Court to decide on the key question of whether there is or is not a risk to the safety of the witnesses. This is an issue which falls under the rules of the Court on witness protection.

*Reviewing requests for asylum:* if a request for asylum is submitted to the authorities of the Netherlands, the request will be examined just like any other application for asylum. However, there will be no new assessment on the merits, and the Dutch authorities will rely on any decision made by the Court with respect to whether a risk to the safety of the witnesses exists or not. The Court is the competent authority to decide on the existence of such risk, not the Netherlands. If the Court decides that the safety of the witnesses cannot be ensured and it is therefore inappropriate to send them back to the DRC, a new situation will unfold, where the Court, in consultation with the 114 States parties, will have to take a decision. This is a matter to be dealt with through the rules providing for the protection of witnesses.

*The criteria for assessment:* the authorities of the Netherlands trust that the Court will make its assessment in light of a wide range of considerations, and take into account other factors as provided in article 21 of the Rome Statute.<sup>†</sup>

*The issue of refoulement:* the issue of refoulement is relevant to all States parties. There is nothing in international law that points specifically to any obligation on the part of the Host State in these circumstances.

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\* Article 8(2) determines that "except as otherwise provided in this Agreement, the laws and regulations of the host State shall apply on the premises of the Court"; and article 8(3) specifies that "the Court shall have the power to make rules, operative within its premises, as are necessary for the carrying out of its functions. The Court shall promptly inform the competent authorities upon the adoption of such rules. No laws or regulations of the host State which are inconsistent with rules of the Court under this paragraph shall, to the extent of such inconsistency, be enforceable within the premises of the Court".

† The Court has expressed its concern regarding the fact that different criteria for assessment might be employed: the Court does not make any determination with respect to the criteria required for asylum requests; it only makes its determination based on risk assessment criteria related to protective measures [the statements made by the authorities of the Netherlands imply that they regard article 21 of the Rome Statute as directing the Court to include a broader range of considerations in making its assessment].

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