Cour Pénale Internationale

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TRIAL CHAMBER II

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

SITUATION IN DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR v. GERMAN KATANGA

Public Document

Decision on the application for the interim release of detained Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350

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

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Trial Chamber II of the International Criminal Court ("the Chamber" and "the Court", respectively), acting pursuant to articles 21, 86, 87 and 93(7) of the Rome Statute ("the Statute") and rule 192 of the Rules of Procedure and Evidence ("the Rules"), decides the following.

I. Procedural Background

1. For a detailed procedural background concerning the situation of the three witnesses detained by the judicial authorities of the Democratic Republic of the Congo (DRC) — DRC-D02-P-0236, DRCD02-P-0228 and DRC-D02-P-0350 — and transferred to The Hague under a cooperation agreement concluded with the Congolese authorities in order to testify in the Katanga and Ngudjolo case pursuant to article 93(7) of the Statute ("the Detained Witnesses"), the Chamber expressly refers to its previous decisions, in particular those of 9 June 2011,[1] 22 June 2011,[2] 24 August 2011,[3] 1 March 2012[4] and 8 February 2013.[5] Nonetheless, it is expedient to recapitulate the main steps in the proceedings.

2. Called by the Defence, the three witnesses, held in pre-trial detention in connection with criminal proceedings in the DRC, were transferred to the Court pursuant to article 93(7) aforementioned and appeared before the Chamber between 30 March and 3 May 2011. Said provision mandates that a person thus transferred shall remain in custody and once the purposes of the transfer have been fulfilled, the

[1] *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*" (articles 68 and 93(7) of the Statute)*, 9 June 2011, ICC-01/04-01/07-3003-tENG ("9 June 2011 Decision").

[2] *Decision on the security situation of three detained witnesses in relation to their testimony before the Court (art. 68 of the Statute) and Order to request cooperation from the Democratic Republic of the Congo to provide assistance in ensuring their protection in accordance with article 93(1)(j) of the Statute*, 22 June 2011, ICC-01/04-01/07-3033 ("22 June 2011 Decision").

[3] *Decision on the Security Situation or witness DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350*, 24 August 2011, ICC-01/04-01/07-3128 ("24 August 2011 Decision").

[4] *Decision on the Urgent Request for Convening a Status Conference on the Detention of Witnesses DRC-D02-P-0236, DRC-D02-P-0228, and DRC-D02-P-0350*, 1 March 2012, ICC-01/04-01/07-3254, ("1 March 2012 Decision").

[5] *Decision on the request for release of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350*, 8 February 2013, ICC-01/04-01/07-3352 ("8 February 2013 Decision").

Court must return the person without delay to the requested State, in this instance the DRC. However, on 12 May 2011, their testimony completed, the witnesses applied to the competent Dutch authorities for asylum, claiming imperilment by the DRC authorities on account of their testimony, were they to return to the DRC. Hence, the question arose as to whether the Court could return the witnesses to the DRC, as article 93(7) of the Statute and rule 192(4) of the Rules prescribe.

3. By decision of 9 June 2011, the Chamber ruled that "the Statute unequivocally places an obligation on the Court to take all protective measures necessary to prevent the risk witnesses incur on account of their cooperation with the Court".[6] The Chamber also held that, whilst they had completed their testimony, it could delay only temporarily fulfilment of its obligation to return the witnesses, as it was duty-bound, under article 21(3) of the Statute, to interpret and apply article 93(7) in conditions consistent with internationally recognised human rights.[7] It pointed out that were the witnesses to be returned to the DRC immediately, it would be impossible for them to exercise their right to apply for asylum and they would be deprived of the fundamental right to an effective remedy. As such, and until it was decided who should have custody of the witnesses pending consideration of their asylum application, the Chamber stated that, although the witnesses were detained pursuant to orders issued by the Congolese authorities, it was prepared to retain them in its custody in accordance with article 93(7) of the Statute.[8]

4. On 24 August 2011, after receiving the DRC authorities' assurance of their implementation of the protective measures it had requested for the witnesses' return to Kinshasa,[9] the Chamber held that there was no longer any reason to delay further their return. However, as their asylum applications were still under consideration, the Chamber considered that their return remained temporarily impossible from a legal point of view.[10]

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[6] 9 June 2011 Decision, para. 61.
[7] 9 June 2011 Decision, para. 70.
[8] 9 June 2011 Decision, paras. 80, 81 and 85.
[9] See also 22 June 2011 Decision.
[10] 24 August 2011 Decision, para. 15.

5. Absent any Statutory provision governing such situation, the Chamber directed the Registrar to consult the competent Dutch and Congolese authorities in order to determine whether the witnesses should remain detained pending determination of their asylum application, and, if so, with whom lay responsibility for their detention.[11] In any event, given that the obligation of the Court to detain the three witnesses has now, in principle, come to an end, the Chamber underscored the utmost urgency of finding a solution.[12]

6. On 16 and 20 September 2011, the Registry filed two reports on the consultations which the Chamber had requested it to undertake with the Dutch[13] and Congolese[14] authorities, respectively. According to these reports, the host State considered that the witnesses had "to remain in custody of the Court during the asylum procedure",[15] that in the current circumstances, the Netherlands lacked jurisdiction to keep the witnesses in detention throughout consideration of their applications and that therefore consultations with the Court need not be held for the time being.[16] The Congolese authorities regarded the Court's request for consultations on whether the witnesses should remain in detention during consideration of their asylum applications as unfounded[17] and insisted on their return to the DRC once they had testified.[18]

7. On 1 March 2012, responding to a request of the Witnesses to convene a status conference on their continued detention,[19] the Chamber reiterated that their asylum

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[11] 24 August 2011 Decision, paras. 16 and 17.
[12] 24 August 2011 Decision, para. 17.
[13] Registry, "Registry's report submitted pursuant to decision ICC-01/04-01/07-3128", 16 September 2011, ICC-01/04-01/07-3158-tENG; See also Registry, "Registry's report submitted pursuant to decision ICC-01/04-01/07-3128", 16 September 2011, ICC-01/04-01/07-3158-Anx3- ("Note Verbale of 26 August 2011").
[14] Registry, "Second Registry report submitted pursuant to decision ICC-01/04-01/07-3128", 20 September 2011, ICC-01/04-01/07-3161-tENG.
[15] Note Verbale of 26 August 2011.
[16] Note Verbale of 26 August 2011.
[17] Registry, "Second Registry report submitted pursuant to decision ICC-01/04-01/07-3128", 20 September 2011, ICC-01/04-01/07-3161-Conf-Anx1-tENG.
[18] *Ibid*.
[19] Duty counsel, Philip-Jan Schüller and Göran Sluiter, "Urgent Request for Convening a Status Conference on the Detention of Witnesses DRC-D02-P-0236, DRC-D02-P-0228, and DRC-D02-P-0350 (Regulation 30 of the Regulations of the Court)", 30 January 2012, ICC-01/04-01/07-3224.

applications "must not cause the unreasonable extension of their detention under article 93(7) of the Statute" and that the Court "c[ould] not contemplate prolonging their custody indefinitely".[20] The Chamber then asked the Dutch authorities (1) whether they were in a position to assume custody of the witnesses pending the outcome of their asylum claims (and to ensure their return to the DRC, were the claims to be rejected), and (2) whether they considered themselves obliged to receive the witnesses pursuant to article 48 of the Headquarters Agreement between the Court and the host State, were the Court to find their continued detention under article 93(7) of the Statute unreasonable.[21]

8. In a note verbale of 15 March 2012, the Dutch authorities took the view that the witnesses were to remain in the custody of the Court pending consideration of their asylum applications and that article 48 of the Headquarters Agreement imposed no obligation upon the Netherlands to receive them.[22]

9. On 14 May 2012, duty counsel for the Detained Witnesses moved the Chamber, *inter alia*, to "adjudge and declare that at present the ongoing detention of the witnesses has also become the responsibility of the host-State and is no longer a matter within the exclusive jurisdiction of the Court."[23]

10. On 1 June 2012, the Chamber made express reference to its earlier decisions to continue holding the witnesses in its custody on the basis of article 93(7) of the Statute.[24] The Chamber reiterated the need to reach a consensus solution so as to resolve the unprecedented situation in which the witnesses found themselves and instructed the Registrar accordingly, whilst taking note of the unwavering stance of the Dutch Authorities in this regard.

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[20] 1 March 2012 Decision, para. 20.
[21] 1 March 2012 Decision, para. 21.
[22] Registry, "Registry's transmission of a note verbale received from the Host State in relation to Document ICC-01/04-01/07-3254 and other information", 4 April 2012, ICC-01/04-01/07-3267-Conf-Anx1 ("Note Verbale of 15 March 2012").
[23] Duty counsel, "Requests concerning the Detention of Witnesses DRC-D02-P-0236, DRC-D02-P-0228, and DRC-D02-P-0350", 14 May 2012, ICC-01/04-01/07-3291.
[24] *Order on duty counsel's requests concerning the detention of Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350*, 1 June 2012, ICC-01/04-01/07-3303, para. 14 ("1 June 2012 Decision").

II. The Request

11. On 4 February 2013, the Detained Witnesses filed a request ("the Request")[25] praying the Chamber to declare that their detention by the Court on the basis of article 93(7) of the Statute was no longer justified and to order their immediate release. In the alternative, they moved the Chamber to convene a status conference for the discussion of the legal problems raised in the Request.

12. In the Request, the Detained Witnesses submit that it is inconceivable for a court of law not to be empowered to order the release of persons from its custody when their detention violates internationally recognised human rights.[26] In this regard, they argue that given the Chamber's 24 August 2011 ruling that satisfaction of its security prerequisites allowed their return to the DRC, its obligation to keep custody of them had expired and that their continued detention was thenceforth unfounded in law.[27] Moreover, the Detained Witnesses further contend that the duration of their detention has become unreasonable for reasons essentially attributable to the Dutch State and the extreme slowness of asylum proceedings in the Netherlands.[28] As to the legal basis for their detention by the DRC, the Detained Witnesses submit, in essence, that there currently exists no valid Congolese court order to warrant their detention and that the evidence brought to substantiate the crimes with which they are charged in the DRC is, in any event, insufficient.[29]

13. To address the Request and decide whether the Court was still able to retain the three witnesses in its custody, the Chamber issued a decision on 8 February 2013 inviting full clarification from the host State and the DRC regarding the current situation of the three witnesses, in respect of the status of their asylum proceedings in the Netherlands and of their pre-trial detention in the DRC.[30]

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[25] Duty counsel, "*Requête en mainlevée de la détention des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350*", 4 February 2013, ICC-01/04-01/07-3351.
[26] Request, para. 29.
[27] Request, para. 34.
[28] Request, para. 37.
[29] Request, paras. 43-48 and 53.
[30] 8 February 2013 Decision.

14. On 1 March 2013, the Registry transmitted the two States' responses to the Chamber.[31] The Dutch authorities advised the Bench that the asylum applications of all three witnesses had been rejected by the Immigration and Naturalisation Service and that the decisions were currently being appealed before the competent judicial authorities of the Netherlands. They also stated that the end of national proceedings was not in sight and could not preclude that relief would subsequently be sought before the European Court of Human Rights.[32]

15. The Congolese authorities reaffirmed their view that the three witnesses remained in detention in connection with the proceedings instituted against them in the DRC, since their detention remains justified by the serious crimes of which they stand charged. They further emphasised that the witnesses' prolonged absence, "[TRANSLATION] despite the Court's undertakings to the Congolese authorities", undermines any prospect of bringing the proceedings against them to a close.[33]

16. Meanwhile, on 15 February 2013, Dutch counsel for the asylum seekers' sought leave to submit Amicus Curiae observations on the nature and possible duration of the Dutch asylum proceedings.[34] With the Chamber's leave,[35] they filed said observations on 14 March 2013,[36] and on 20 March 2013, the Defence teams for Mathieu Ngudjolo[37] and Germain Katanga[38] filed their respective observations. In

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[31] Registry, "Report of the Registrar on the execution of the 'Decision on the request for release of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350'", 1 March 2013, ICC-01/04-01/07-3355.

[32] Registry, "Report of the Registrar on the execution of the 'Decision on the request for release of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350'", 1 March 2013, ICC-01/04-01/07-3355-Conf-Anx2.

[33]Registry, "Report of the Registrar on the execution of the 'Decision on the request for release of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350'", 1 March 2013, ICC-01/04-01/07-3355-Conf-Anx5.

[34] Flip Schüller and Göran Sluiter, "Request for leave to submit Amicus Curiae Observations by mr. Schuller and mr. Sluiter, Counsel in Dutch asylum proceedings of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350", 15 February 2013, ICC-01/04-01/07-3354.

[35] *Order authorising the submission of observations*, 7 March 2013, ICC-01/04-01/07-3357.

[36] Flip Schüller and Göran Sluiter, "Amicus Curiae Observations by mr. Schüller and mr. Sluiter, Counsel in Dutch asylum proceedings of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350", 14 March 2013, ICC-01/04-01/07-3358 ("Amicus Curiae Observations").

[37] Defence for Mathieu Ngudjolo, "*Observations de l'Équipe de Défense de Mathieu Ngudjolo en réponse à l'ordonnance intitulée* « Order authorising the submission of observations » *(ICC-01/04-01/07-3357)*", 20 March 2013, ICC-01/04-01/07-3359.

their Amicus Curiae brief, Dutch counsel submitted that a combination of factors required the Chamber to end the witnesses' detention in discharge of its Statutory obligations arising from article 21(3): (i) the two-year detention at the Court; (ii) the likelihood and nigh-on certainty that the asylum proceedings or the other ongoing domestic proceedings which could end the detention would not be completed within a year and could even take considerably longer; (iii) the fact that the delays in the asylum proceedings were not occasioned by the witnesses; and (iv) the absence of a valid Congolese court order justifying the three witnesses' continued detention in these exceptional circumstances.[39]

III. Discussion

17. The Chamber has been confronted with an unprecedented situation for more than two years. It recalls that from the outset its decisions have made manifest its concern to find "urgently" a consensus solution. To this end, it first instructed the Registrar to consult the Dutch and Congolese authorities with a view to determining who should assume custody of the three witnesses during the asylum proceedings. Noting the particularly rigid approach[40] adopted by the Dutch authorities, it put specific questions to them.[41] However, the responses provided did not advance matters.[42] It would therefore appear that all efforts to arrive, by consultation, at a consensus solution to the issues raised by these witnesses' continued detention in The Hague have now failed. The host State maintains that the witnesses should

[38] Defence for Germain Katanga, "Defence Response to Amicus Curiae Observations by mr. Schuller and mr. Sluiter, Counsel in Dutch asylum proceedings of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350", 20 March 2013, ICC-01/04-01/07-3360-Conf-Exp.
[39] Amicus Curiae Observations, para. 23.
[40] Note Verbale of 15 March 2012; Registry, "Registry's transmission of a note verbale received from the Host State in relation to Document ICC-01/04-01/07-3254 and other information", 4 April 2012, ICC-01/04-01/07-3267-Conf-Anx1; Registry, "Registry's report submitted pursuant to decision ICC-01/04-01/07-3128", 16 September 2011, ICC-01/04-01/07-3158-tENG. See also Registry, "Registry's report submitted pursuant to decision ICC-01/04-01/07-3128", 16 September 2011, ICC-01/04-01/07-3158-Conf-Anx3 ("Note Verbale of 26 August 2011").
[41] 1 March 2012 Decision, para. 21.
[42] Registrar, "Registry's transmission of a note verbale received from the Host State in relation to Document ICC-01/04-01/07-3254 and other information", 4 April 2012, ICC-01/04-01/07-3267-Conf-Anx1.

remain in the Court's custody during the asylum proceedings.[43] As to the Congolese authorities, despite the Chamber's proposal for provision of technical and logistical assistance so that the criminal proceedings against these three individuals in the DRC may continue remotely[44] and thereby brought to completion, they maintain that the witnesses should have been returned to Congolese territory immediately upon completion of their testimony.[45]

18. Insofar as the 4 February 2013 Request now raises in the clearest of terms the issue of the three witnesses' release, the Chamber must first examine whether it is competent to adjudicate such a motion.

19. It bears recalling in this regard that the terms of article 93(7), which falls under the head of "International Cooperation and Judicial Assistance" in the Statute, prescribe that transferred persons – here, the three witnesses – shall remain in custody until they are returned, upon completion of their testimony, to the requested State, in this instance the DRC. Thus, article 93(7) imposes a twin obligation: to continue the witnesses' detention and to return them immediately.

The obligation of immediate return

20. Concerning the obligation of immediate return thus incumbent upon the Court, the witnesses' asylum applications led the Chamber, on 9 June 2011, to suspend and thereby postpone, on the foundation of article 21(3) of the Statute, the execution of this obligation: at stake was the principle of customary international law of *non-refoulement*, which any person is entitled to raise.[46] Suspension alone allowed application of article 93(7) in conditions consonant with this essential principle. In other words, had the Court decided to return the three Detained Witnesses without delay after their testimony, they would have been deprived of their right to avail themselves of this fundamental norm.

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[43] Note Verbale of 26 August 2011.
[44] 22 June 2011 Decision, para. 43; 1 March 2012 Decision, para. 19.
[45] *Ibid*.
[46] In this regard, see 9 June 2011 Decision, para. 67; UN High Commissioner for Refugees, "Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol", 26 January 2007, paras. 14-16.

21. It should be borne in mind that were the Detained Witnesses to be refused asylum and the Dutch authorities to find that they could be returned to the DRC without violating the principle of *non-refoulement*, the Court would then be duty-bound to execute its Statutory obligation to order the return of the three witnesses to Congolese territory. Conversely, were the Dutch authorities to grant the asylum sought and, consequently, receive the witnesses on their territory, the Court would be unable to return them to the DRC. As such, it would afford precedence to the Dutch courts' decision granting them asylum and issuing them a residence permit. In any event, and from a strict legal perspective, the Chamber would not, however, be required to order the witnesses' release: in the second scenario, it would merely transfer them to the Dutch authorities pursuant to their decision to grant them asylum.

The obligation of continued detention

22. Turning now to the obligation set out at article 93(7) of the Statute, to maintain transferred persons in detention, the positions adopted to date by both States have left the Court with very little room for manoeuvre, and it has, in effect, had no choice other than to continue to hold the three Detained Witnesses' custody.[47]

23. Nevertheless, the Chamber has considered it necessary to underline on a number of occasions, notably on 8 February 2013, that the processing of the witnesses' asylum applications could not be the cause of unreasonable extension of their detention in The Hague and that, pursuant to article 21(3), among others, the Court could not contemplate holding them in its custody indefinitely.[48] In so ruling, the Chamber was seeking to demonstrate how imperative it was, in its view, for the Dutch authorities to adjudge the asylum applications forthwith and to even consider, if necessary, taking on the witnesses' custody hitherto assumed ad interim by the Court. It should be noted in this regard that had the Dutch authorities requested the Court to hold the Detained Witnesses in custody, they would have

[47] 8 February 2013 Decision, para. 15.
[48] See, in particular, 9 June 2011 Decision, para. 85; 1 March 2012 Decision, para. 20; 8 February 2013 Decision, para. 22.

done so by virtue of a cooperation agreement adopted as a result of consultations between the Court, the Netherlands and the DRC. This "consensus solution",[49] favoured by the Chamber from its first decision of 9 June 2011, would thenceforth have bound all concerned, including the Court.

24. The Chamber must recall that it is not competent to review the necessity of the witnesses' continued detention in connection with the proceedings in the DRC, even though their detention by the judicial authorities of that State and the Court's continued custody of them are unquestionably linked. Furthermore, the Chamber has already adjudged this point in previous decisions, specifically in the 8 February 2013 Decision aforecited, issued further to the Request as an interlocutory ruling, wherein it made quite clear that it:

> ha[d] no authority to review the [continued] detention of the witnesses by the DRC. It is noteworthy, in this regard, that the Court has not been advised by the DRC of any change in their detention status since the witnesses have arrived in The Hague almost two years ago. In the absence of such notification by the Congolese authorities, the witnesses are to remain in detention as long as they are in the custody of the Court. […] Therefore, in order to allow the Chamber to determine whether the Court is still in a position to maintain the Detained Witnesses in custody on the basis of article 93(7) of the Statute, the Chamber deems it necessary to obtain some clarifications from the Host State and the DRC.[50]

One of the questions then put to the Congolese judicial authorities was whether they considered, "in light of the dates upon which the initial titles for the detention of the respective witnesses were delivered, that their continued detention is still warranted and justified".[51]

25. The Chamber points out that the Court did not issue the pre-trial detention orders which founded the basis for the witnesses' detention, in connection with the criminal proceedings against them in the DRC. Of further note is that since their arrival in The Hague, the Court has issued no decision ordering the continuation or extension of their detention. It has merely specified, as stated at paragraph 3 *supra*, that during the consultation process which it sought, the three witnesses "would

[49] See, for example, 1 June 2012 Decision, para. 14.
[50] 8 February 2013 Decision, paras. 21 and 23.
[51] 8 February 2013 Decision, para. 25.

remain in its custody", within the meaning intended by the founding texts and in the conditions and within the limits therein defined.

26. As already stated on various occasions, the Congolese judicial authorities ordered and then continued the three witnesses' detention − their response to a request from the Chamber so confirms.[52] Moreover, it is precisely because, in its view, the detention of the detained witnesses must be clearly distinguished from their custody[53] that the Chamber sought the views of the Congolese authorities on this matter. Article 93(7) of the Statute does not authorise the Court to release a person who has been transferred to it temporarily, since such a decision rests only with the State requested to make the transfer. Likewise, rule 192(3) of the Rules allows a detained person in the Court's custody to raise matters concerning the conditions of his or her detention with the relevant Chamber but in no wise permits the person to apply to it for release. The Chamber takes the view that article 93(7) of the Statute does not, therefore, constitute a detention order, that is to say a judicial act authorising the imprisonment of witnesses who are already detained.

27. Absent any measures restricting liberty ordered by the Dutch authorities, at this juncture only one detention order is amenable to review: that issued by the Congolese criminal courts. It does not lie with the Court to review the detention order, and, besides, it is not in a position to do so. Examination of an application for release would require scrutiny of the record of each case brought against the witnesses in the DRC, since any restriction on the right to liberty by definition requires justification. A decision in favour of release can only be contemplated after a careful examination of the specific circumstances of the case in light of stringent and rigorous legal criteria.[54] To that end, the Chamber would require disclosure of

[52] Registry, "Report of the Registrar on the execution of the 'Decision on the request for release of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350'", 1 March 2013, ICC-01/04-01/07-3355-Conf-Anx5.

[53] 1 March 2012 Decision, para. 18.

[54] The Chamber would need, for example, to consider factors such as the risk of absconding, guarantees of appearance, the risk of the accused's obstruction of the proper administration of justice, the risk of interference with witnesses, the risk of a repeat offence, etc. See, for example, Research Division of the European Court of Human Rights (ECtHR), "Guide on Article 5: Right to Liberty and Security Article 5 of the Convention", 2012, paras. 152-166.

all the relevant material by the Congolese judicial authorities so as to rule on the legality of the detention orders issued and of the continued detention, and to determine whether the deprivation of liberty imposed heretofore is still warranted. It would also have to seek the observations of the witnesses, their counsel and, naturally, the Congolese judicial authorities. In so doing, the Court would evidently be acting as a court of human rights – it was never conceived as such, and article 21(3) of the Statute does not require it to ensure that States Parties respect internationally recognised human rights in their domestic proceedings.[55]

28. The question may then arise as to whether, by virtue of its current custody of the three witnesses at the Court's Detention Centre and by reason of the attendant "physical control", the Chamber has not in a sense become *de facto*, at least since 24 August 2011, the competent authority to rule on applications for release. In this regard, article 93(7)(b) of the Statute, whose language is perfectly unambiguous, foresees no such possibility but instead mandates continued detention.[56] If custody of witnesses for a specified period under a cooperation agreement *simplicter* vested the Chamber with competence to rule on the merits of their detention, Statutory cooperation procedures would be eviscerated and the fundamental principle of State sovereignty, too, would be greatly eroded. As pointed out *supra*, the Chamber has no other "responsibilities" towards the Detained Witnesses than to decide on matters relating to their detention conditions, as rule 192 of the Rules provides; the Chamber's performance of a role of this nature at the Court's Detention Centre in no wise − and this must be underscored − confers upon it the gamut of powers vested in a judge charged with pre-trial detention matters, notwithstanding the consideration it has afforded to the witnesses' predicament by seeking, as soon as they claimed asylum, a consensus solution to their custody.

[55] See, in particular, 9 June 2011 Decision, para. 62.

[56] See, in particular, Claus Kreβ and Kimberly Prost, "Article 93: Other forms of cooperations" in O. Triffterer (Dir. Pub.), *Commentary on the Rome Statute of the International Criminal Court* (Nomos Verlagsgesellschaft, Baden-Baden, 1999, 2nd edition), pp. 1583-1584, paras. 48-52.

The Chamber's responsibility pursuant to article 21(3)

29. It also bears pointing out that article 21 of the Statute, entitled "Applicable law", enshrines in no uncertain terms the primacy of the Rome Statute as the founding text over the other sources of law enumerated by the provision. Whereas as early as 9 June 2011, the Chamber had ruled that temporary deferment of the discharge of its article 93(7) obligation of return was necessary, said ruling also implicitly foresaw that none of the obligations laid down by article 93(7) aforecited would be discharged, were the witnesses' asylum application in the Netherlands to succeed. In such eventuality, the Chamber would exceptionally afford precedence to internationally recognised human rights under article 21(3) – and as applied by the Dutch asylum court – over the Statute.

30. Ultimately, in the 9 June 2011 Decision, two decisive factors were at play: the risk of the immediate violation of a fundamental norm of international customary law whose peremptoriness finds increasing recognition among States and from which no derogation is permitted (*jus cogens*)[57] and the impossibility of applying the Statute in compliance with this norm. Otherwise stated, the only means to adhere to the peremptory norm of *non-refoulement* was to suspend article 93(7) of the Statute temporarily and not apply it should the asylum claims succeed.

31. In the instant case, the Detained Witnesses seek the right to a review of their detention by the Court, arguing the arbitrariness of their detention and *ergo* the necessity of their release. In the Chamber's view, the witnesses still have the opportunity to seek review of their detention from the competent Congolese judicial authorities, and manifestly were those authorities to decide to end the pre-trial detention, the Court would be duty-bound to execute such an order for release. In

[57] In this regard, see footnotes 35 and 36 of the Advisory Opinion of the UN High Commissioner for Refugees, cited at footnote 118 of the 9 June 2011 Decision; see also Organisation of American Sates, Cartagena Declaration on Refugees, 22 November 1984, OAS/Ser.L./V/II.66, doc. 10, rev. 1, pp. 190-193; UN High Commissioner for Refugees, *Executive Committee Conclusion No. 25 (XXXIII) "General Conclusion on International Protection"*, 20 October 1982, para. (b); UN High Commissioner for Refugees, *Executive Committee Conclusion No. 79 (XLVII) "General Conclusion on International Protection"* (1996), para. (i) ; Jean Allain, "The *Jus Cogens* nature of non-refoulement", 13(4) *International Journal of Refugee Law* (2002), pp. 533-558.

this regard, it bears noting that on 1 March 2012 the Chamber verified that the Detained Witnesses still had access to the Congolese courts and ordered the Registry to "provide all reasonable assistance required by the […] witnesses in order to facilitate the *exercise of their rights* under Congolese law".[58] In so doing, the Chamber did not find that such a course of action was *a priori* or *prima facie* inconsistent with the Detained Witnesses' claim before the Dutch authorities or that it was such as to threaten the success of their asylum request.[59]

32. Of further note is that in the Request counsel for the three witnesses argued for the first time,[60] that is approximately one year after the aforementioned decision, that "[TRANSLATION] an application to the Congolese authorities by the Detained Witnesses for their release at this stage would be tantamount to an act of deference which would in effect relegate them to the protection of the Congolese State, thus conclusively compromising their asylum claim". The 1 March 2012 Decision had in any case prompted no objection. Moreover, in the Chamber's view, this argument by the Detained Witnesses' counsel does not as such contest the Congolese authorities' competence to rule on the legality and continuation of their pre-trial detention, and as already noted, the Court remains bound by any decision by the Congolese authorities to release the witnesses. Hence, whilst it does not adjudicate matters of asylum and such is not its raison d'être, the Chamber is of the view that, in the very particular circumstances of the instant case, it cannot endorse the new argument counsel raises.

33. In light of the above, the Chamber finds that there is no impediment here to its continued application of article 93(7) of the Statute in accordance with internationally recognised human rights. Since there are numerous exceptions to the right to liberty (and its corollary, the prohibition on arbitrary arrest and detention), it cannot be considered an intransgressible or peremptory norm of international law. Furthermore, the Chamber observes that, in the instant case, the Court's review of

[58] See operative part of 1 March 2012 Decision (emphasis added).
[59] In this regard see Request, para. 25.
[60] Request, para. 25.

the Detained Witnesses' detention is not the sole procedural avenue available for the full exercise of their right to a ruling on their detention. Non-fulfilment of the article 93(7) obligation to maintain detention, the direct consequence of which is release, is thus not the sole means of upholding the Detained Witnesses' right to liberty.

34. As stated by the Chamber, the Detained Witnesses may still apply to the Congolese authorities for review of their detention. In the Chamber's view, this right to review includes the possibility of release: evidently, were the Congolese authorities to decide to end the witnesses' pre-trial detention, the Court would be obliged to execute the order to release them. The right to review is indeed meaningful, not purely procedural, and would lie within the purview of a Congolese judicial organ.

35. Furthermore, the Chamber considers that it cannot entirely be precluded that the Dutch court, specifically in disposing of the appeal against the 18 December 2012 judgment of The Hague court of appeal, will determine that the Dutch judicial authorities have competence and will emphasise their positive obligations to safeguard individual liberty.[61] As noted in various European Court of Human Rights (ECtHR) decisions,[62] States have the duty in certain circumstances to take the necessary measures to prevent or end a human rights violation on their territory, irrespective of whether the violation is the offspring of their own actions or, for instance, of those of another State. Otherwise put, were the Dutch authorities to find that continued detention by the DRC, for whatever reason, on their territory is

[61] It should further be noted in the instant case, in contrast to *Galić* before the ECtHR (ECtHR, *Stanislav Galić v. The Netherlands*, *Decision as to the admissibiliy of Application no. 22617/07*, 9 June 2009, paras. 43-46), the Detained Witnesses are not suspects under the Court's jurisdiction and therefore cannot argue the guarantees applicable to suspects, including in respect of review of their detention.

[62] ECtHR, *Storck v. Germany*, *Judgment*, 16 June 2005 Application no. 61603/00, para. 102; ECtHR, *Medova v. Russia*, *Judgment*, 15 January 2009 Application no. 25385/04, paras. 123-125; ECtHR (Grand Chamber), *Bosphorus v. Ireland*, *Judgment*, 30 June 2005 Application no. 45036/98, paras. 152-156; ECtHR, *Waite and Kennedy v. Germany*, *Judgment*, 18 February 1999 Application no. 26083/94, paras. 67-73. In this regard see also Human Rights Committee, *Draft General comment No. 35*, 29 January 2013, CCPR/C/107/R.3, paras. 9-10; Research Division, Counsel of Europe, "Guide on Article 5: Right to Liberty and Security Article 5 of the Convention", 2012, paras. 15-16.

antithetical to their international obligations, they could consider themselves duty-bound to take all appropriate measures.[63]

Conclusion

36. In conclusion and further to its analysis, the Chamber finds that the Court is not competent to rule on the release of the witnesses at issue. Furthermore, even were such competence to vest in the Court, it would be impelled, owing to the obligation to return still incumbent upon it, to attach stringent reporting conditions to any such release. Since such conditions could only be enforced on Dutch territory, it is difficult to conceive of their imposition on the authorities of that State without its consent.[64]

37. It now behoves the Dutch administrative and judicial authorities to take, to the extent that they are so empowered, any measure to bring the current proceedings

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[63] The Chamber is mindful that in its decision of 9 October 2012, the European Court of Human Rights ruled on the issue of "jurisdiction" within the meaning of article 1 of the Convention, in respect of the detention at the United Nations Detention Centre of a Congolese remand prisoner who was transferred to the custody of the Court (ECtHR, *Bède Djokaba Lambi Longa v. The Netherlands*, Decision of 9 October 2012, Application No. 33917/12). It notes, however, that the Court appeared to have confined its consideration of the issue to *ratione personae* jurisdiction alone:

> As regards the alleged insufficiency of human rights guarantees offered by the ICC, it had powers under Rules 87 and 88 of its Rules of Procedure and Evidence to order protective measures, or other special measures, to ensure that the fundamental rights of witnesses were not violated. It could not be decisive that the orders given by the Trial Chamber in the use of its said powers would not necessarily result in the applicant's release from detention by the authorities of the Democratic Republic of the Congo, as the applicant appeared to suggest. The Convention did not impose on a State that had agreed to host an international criminal tribunal on its territory the burden of reviewing the lawfulness of deprivation of liberty under arrangements lawfully entered into between that tribunal and States not party to it.
>
> The applicant's final argument was that since the Netherlands had agreed to examine his asylum request, it necessarily followed that the Netherlands had taken it upon itself to review the lawfulness of his detention on the premises of the ICC – and to order his release, presumably onto its territory, if it found his detention unlawful. The Court, for its part, failed to see any such connection in view of its well-established case-law, according to which the right to political asylum was not contained in either the Convention or its Protocols; the Convention did not guarantee, as such, any right to enter, reside or remain in a State of which one was not a national; and, finally, States were, in principle, under no obligation to allow foreign nationals to await the outcome of immigration proceedings on their territory.

ECtHR, *Information Note on the Court's case-law no 156*, October 2012, pp. 10-12. See <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"itemid":["002-7214"]}>.

[64] Appeals Chamber, *The Procureur v. Jean-Pierre Bemba Gombo, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa'*, 2 December 2009, ICC-01/05-01/08-631-Red, paras. 104-109.

to a prompt conclusion. It is imperative that the predicament of the three Detained Witnesses be resolved expeditiously.

FOR THESE REASONS, the Chamber, by majority,

DECLARES that it lacks competence and **FINDS** the Request inadmissible.

Judge Van den Wyngaert appends a dissenting opinion to this Decision.

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Christine Van den Wyngaert

Dated this 1 October 2013

At The Hague, The Netherlands

Dissenting opinion of Judge Christine Van den Wyngaert

1. Although I agree that the Court is placed in an "unprecedented" situation that has not been foreseen by the drafters of the Statute and the Rules, I am unable to agree with my colleagues that the Court is not competent to deal with this request for the immediate release of the Detained Witnesses.[1]

2. It is not contested between us that, if there had been no asylum request and subsequent procedure in The Netherlands, the Detained Witnesses would have been returned under article 93(7) of the Statute in August 2011. Yet, more than two years later, they still remain incarcerated in the ICC Detention Unit. This is so, despite the fact that the Chamber has, on multiple occasions and with specific reference to its human rights obligations under article 21(3) of the Statute, emphasised that the processing of the asylum applications "must in no way cause any unreasonable delay" to the detention of the Detained Witnesses and that "the Court cannot contemplate holding these witnesses in custody indefinitely".[2]

3. Despite the clear language of these previous decisions, my colleagues' view regarding the scope of article 21(3) seems to have changed. Indeed, according to the Majority, the impact of article 21(3) is limited to the

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[1] "Requête en mainlevée de la detention des témoins DRC-D02-P-0236, DRC-D02P-0228 et DRC-D02-P-0350", 4 February 2012, ICC-01/04-01/07-3351.

[2] "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*' (articles 68 and 93(7) of the Statute)", 9 June 2011, ICC-01/04-01/07-3003-tENG, para. 85; "Decision on the Urgent Request for Convening a Status Conference on the Detention of Witnesses DRC-D02-P-0236; DRC-D02-P-0228, and DRC-D02-P-0350", 1 March 2012, ICC-01/04-01/07-3254, para. 20; "Ordonnance relative aux requêtes du conseil de permanence relatives à la détention des témoins DRC-D02-P-0236; DRC-D02-P-0228, et DRC-D02-P-0350", 1 June 2012, ICC-01/04-01/07-3303; "Decision on the request for release of witnesses DRC-D02-P-0236; DRC-D02-P-0228, and DRC-D02-P-0350", 8 February 2013, ICC-01/04-01/07-3352, para. 22.

temporary suspension of the Court's obligation to return the Detained Witnesses to the DRC under article 93(7), in order to allow them to exercise their right to seek asylum and to respect the principle of *non-refoulement*.[3] They do not think article 21(3) goes any further than that. Notably, they believe that it does not authorise the Court to release a person who has been temporarily transferred to the Court under article 93(7) of the Statute. In particular, the judges of the Majority argue that the single fact of having the Detained Witnesses in custody for a determined amount of time on the basis of a cooperation agreement between the DRC does not suffice to give the Court jurisdiction to rule on the merits of their detention.[4] According to the Majority, such a view would undermine the essence of the cooperation regime and would affect the fundamental principle of state sovereignty.[5] It is thus out of the question, according to the Majority, that the Chamber could declare itself competent to deal with this request for release on the basis of article 21(3), especially since the Detained Witnesses still have the possibility of asking for the reconsideration of their detention by the Congolese authorities.[6]

4. The Majority's reasoning is based essentially on a distinction between the "detention" and the "custody" of the Detained Witnesses.[7] Whereas, according to the Majority, their *detention* is based on the original Congolese restriction of liberty, their continued *custody* in Scheveningen is in effect based on the fact that the Host State has not taken over the custody of the Detained Witnesses from the Court.[8] According to the Majority, the Chamber itself

[3] Majority Decision, para. 20.
[4] Majority Decision, para. 28.
[5] Majority Decision, para. 28.
[6] Majority Decision, para. 31.
[7] Majority Decision, para. 26.
[8] Majority Decision, paras 26-27.

never rendered any decision ordering the continued detention of the Detained Witnesses.[9]

5. With respect, I find this purported distinction between "custody" and "detention" artificial, especially in view of the fact that the Detained Witnesses are incarcerated at the ICC Detention Unit in Scheveningen. The Majority seems to suggest that this deprivation of liberty is done by the Court on behalf of the Congolese authorities and that the Court has absolutely no influence in this regard. Whereas this may have been the case when the witnesses were giving their testimony, I believe the position fundamentally changed when the Chamber decided – despite the express objection of the DRC – to delay the return of the Detained Witnesses until there is a final ruling on their asylum claim.[10] Although this decision may perhaps not constitute an independent legal basis for the continued 'detention' of the Detained Witnesses, it at least has the effect of making the Court co-responsible for what happens to the Detained Witnesses pending the outcome of the asylum proceedings for as long as they remain physically detained by the Court. Otherwise it is difficult to explain why the Chamber sought so desperately to find a solution for the continued detention of the Witnesses in consultation with the DRC and the Host State and why it insisted so strongly that their detention could not be prolonged indefinitely.[11]

6. Furthermore, the Majority does not convincingly explain why the Court's obligation under article 21(3) to apply article 93(7) in accordance with internationally recognised human rights sufficed to set aside the Court's

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[9] Majority Decision, para. 25.

[10] "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*' (articles 68 and 93(7) of the Statute)", 9 June 2011, ICC-01/04-01/07-3003-tENG.

[11] A point that is again repeated in the Majority Decision, para. 23, but now explained as being simply an incentive to the Host State to rule on the asylum applications quickly or take over the custody from the Court.

obligation to return the Detained Witnesses immediately after finishing their testimony in order to protect their fundamental right to seek asylum, but why this obligation is inapplicable in relation to the equally fundamental right not to be detained arbitrarily. This unequal treatment is especially difficult to understand in light of the fact that it would be the exact same legal provision – i.e. article 93(7) of the Statute – that would have to be suspended in order to give effect to the Chamber's obligations to respect fundamental human rights. In this regard, I strongly distance myself from the Majority's suggestion that the reason why article 21(3) prevailed in the first case but not in the second is because the former human right - i.e. the right to apply for asylum and the prohibition against *non-refoulement* - is a norm of *jus cogens* from which no derogations are permitted.[12] A lot could be said about such an argument, but I will simply note here that article 21(3) speaks of "internationally recognized human rights" and is thus not limited in its application to '*jus cogens*' or 'non-derogable' norms. Similarly, the Majority's argument that the right to liberty is not "intransgressible or peremptory", because there are "numerous exceptions" to it,[13] apart from being of doubtful legal merit, does not answer the question why *in this case* an exception to the right of liberty should be made.

7. Even if one accepts the tenuous distinction between "detention" and "custody" suggested by the Majority, I still fail to see how the Court could escape its responsibility under article 21(3) for depriving these three individuals of their liberty for more than two years. There is no solace in the argument that the Court is violating the Detained Witnesses' rights on behalf of the DRC. Indeed, it seems a fairly basic principle of law that one cannot simply invoke one's obligations towards one party to justify one's violation of

[12] Majority Decision, paras 29-30. By implication, the Majority seems to consider that the right to liberty is not of *jus cogens*.
[13] Majority Decision, para. 33.

the rights of another party. It was therefore in my view incumbent upon the Chamber to balance the Court's obligations vis-à-vis the DRC under article 93(7) against its obligations towards the Detained Witnesses under article 21(3). This would have been consistent with the Chamber's previous practice and particularly its decision of 9 June 2011.[14] Instead, the Majority's total deference to the state sovereignty of the DRC[15] not only completely ignores the Court's obligations under article 21(3) but also undermines international human rights law, which exists precisely in order to protect individuals against the powers of the state.

8. The Majority's suggestion, in this regard, that the Detained Witnesses should seek the review of their detention from the judicial authorities of the DRC[16] is totally misplaced, given the fact that it is precisely from those very authorities that the Detained Witnesses seek to be protected. Moreover, I disagree with the Majority's explanation as to why it refuses to engage with the argument raised by the Detained Witnesses that any such recourse to the Congolese authorities would fatally undermine their asylum applications in The Netherlands.[17] In particular, I find the suggestion that the Detained Witnesses should somehow have 'objected' back in March 2012 to the proposition that the DRC authorities could review the legality of their detention[18] unfair and beside the point. First, there was no right to appeal the decision of 1 March 2012, so it is difficult to see what procedural standing the Detained Witnesses would have had to 'object' or what the effect of such an

[14] "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*' (articles 68 and 93(7) of the Statute)", 9 June 2011, ICC-01/04-01/07-3003-tENG.
[15] Majority Decision, para. 28.
[16] Majority Decision, para. 31.
[17] According to the Detained Witnesses, if they addressed any request for release to the Congolese authorities, this would be considered as an act of allegiance that would have the effect of placing them back under the protection of the DRC and compromise their asylum claim in The Netherlands. "Requête en mainlevée de la detention des témoins DRC-D02-P-0236, DRC-D02P-0228 et DRC-D02-P-0350", 4 February 2012, ICC-01/04-01/07-3351, para. 25
[18] Majority Decision, para. 32.

objection would have been. More fundamentally, the Majority does not explain whether it would have made any difference to its present decision if the point had been raised earlier by the Detained Witnesses and, if not, why not. It should be stressed, in this regard, that the Majority is now effectively putting the Detained Witnesses in a dilemma: either to challenge the legality of their continued detention in the DRC and risk seeing their asylum applications being rejected for this reason, or to safeguard their asylum applications by refraining from exercising their fundamental human right to have the legality of their detention reviewed. No one should be put in such a situation, certainly not by a court of law that is duty-bound to always uphold internationally recognised human rights.

9. I am similarly unconvinced by my colleagues' suggestion that the Detained Witnesses could seek the protection from Dutch courts in relation to their 'detention' by the Congolese authorities.[19] On the contrary, I find the suggestion that the Host State authorities would be responsible for what happens to the Detained Witnesses because the Court itself fails to offer the necessary protection of their fundamental human rights [20] totally inappropriate. The implied 'inability' on which the Majority relies for making this argument is a direct consequence of its own overly formalistic and restrictive interpretation of article 93(7) and its disregard for the requirements of the Court's obligations under article 21(3). Moreover, even if it were true that the Court is unable to protect the fundamental human rights of persons that are being held in its own detention unit, I still do not see how the Court could ever be legally bound to comply with an order by a Dutch court to release persons from its custody, whether they are detained there on the basis of article 93(7) or any other legal basis.

[19] Majority Decision, para. 35.

[20] This is the only way in which I can interpret paragraph 35 and the references contained in footnote 62 of the Majority Decision. I admit that I do not understand footnote 63.

10. I note, in this regard, that the Majority's current position is difficult to reconcile with the Chamber's earlier decision of 8 February 2013, in which it asked the DRC and the Host State to reply to a number of questions with the express purpose of allowing the Chamber "to determine whether the Court is still in a position to maintain the Detained Witnesses in custody on the basis of article 93(7) of the Statute".[21] This formulation clearly suggests that the Chamber was at that point still considering the possibility of ordering an end to the 'custody' of the Detained Witnesses, which is why I concurred with my colleagues in the decision. It is obvious that the questions asked in the decision are of no relevance to the legal issue as to whether the Chamber is competent to rule on the legality of the continued deprivation of liberty of the Detained Witnesses. Given the Majority's position today, one may thus wonder why these procedural steps were taken at all or why the Detained Witnesses were not at least simultaneously pointed to the only competent authorities, who could, according to the Majority, order their immediate release.

11. In sum, I am not persuaded by the arguments of my colleagues as to why they think that this Chamber is not competent to rule on the request by the Detained Witnesses for their immediate release. I therefore consider that the Chamber does have jurisdiction for ruling on this request and think that they should be released at once for the reasons I will explain below. Two questions arise in this regard: first, whether the continued deprivation of liberty of the Detained Witnesses violates internationally recognised human rights standards and, second, what the legal implications of such a finding are.

[21] "Decision on the request for release of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350", 8 February 2013, ICC-01/04-01/07-3352, para. 23.

12. The substantive right to liberty has been enshrined for many decades, both in the International Covenant on Civil and Political Rights ("ICCPR")[22] and in regional human rights treaties all over the world.[23] The various treaties frame the right in the same way: liberty is the default rule, and detention is a deprivation which limits the right in exceptional circumstances, and which cannot be either arbitrary *or* unlawful.[24]

13. Related to the substantive right to liberty is the procedural right to review without delay of the lawfulness of detention.[25] The review "must include the possibility of ordering release"[26] and must "in its effects, [be] real and not merely formal".[27] The review must be undertaken by "a court"[28] which must be able to order release if the detention is unlawful.[29] As the court

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[22] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 United Nations Treaty Series 14668 ("ICCPR"), Article 9.

[23] *See* e.g.: *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 United Nations Treaty Series 26363, Article 6; *American Convention on Human Rights "Pact of San Jose, Costa Rica"*, 22 November 1969, 1144 United Nations Treaty Series 17955, Article 7; *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, as amended by Protocols No. 11 and No. 14, 213 United Nations Treaty Series 2889 ("ECHR"), Article 5.

[24] The UN Human Rights Committee has set out the view that unlawfulness is a subset of arbitrariness. [Human Rights Committee, CCPR General Comment No. 16, para 4.] Regionally, the European Court of Human Rights ("ECtHR") has stated that lawful detention must also be in keeping with the purpose of protecting individuals from arbitrariness [ECtHR, Grand Chamber, *Chahal v. The United Kingdom*, "Judgment", 15 November 1996, application no. 22414/93, para. 118.] and the Inter-American Court of Human Rights ("ICtHR") has interpreted arbitrariness to refer to legal detention which is nevertheless "unreasonable, unforeseeable or lacking in proportionality". [ICtHR, *Gangaram Panday v. Suriname*, "Judgment", 21 January 1994, Series C, no. 16, para. 47.]

[25] ICCPR, Article 9(4).

[26] Human Rights Committee, *A v. Australia*, "Views", 30 April 1997, communication no. 560/1993, para. 9.5.

[27] Human Rights Committee, *A v. Australia*, "Views", 30 April 1997, communication no. 560/1993, para. 9.5; upheld in Human Rights Committee, *C v. Australia*, "Views", 23 November 1999, communication no. 900/1999, para. 8.3. The "effectiveness" requirement in human rights law interpretation has been approved more generally by the Court (*see* e.g. ICC-01/04-01/07-3003-tENG, para. 69 or Presidency, *Prosecutor v. Germain Katanga and Mathiu Ngudjolo Chui*, 'Decision on "Mr Mathieu Ngudjolo's Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar's Decision of 18 November 2008"', 10 March 2009, ICC-RoR217-02/08-8, para 31).

[28] ICCPR, Article 9(4)

[29] ICCPR, article 9(4); A v Australia, para 9.5.

with physical control over the Detained Witnesses, I believe the ICC is competent under this formulation.

14. Crucially, a determination at the outset that the deprivation of liberty in a particular case is lawful and is not arbitrary does not last in perpetuity. Since the conditions under which the detention is lawful are liable to change or lapse, and since an initially lawful detention becomes arbitrary if it is upheld for longer than necessary, it must be possible for detained persons to have access to a court to determine the continued lawfulness of their detention on a periodic basis.[30]

15. There cannot be any doubt that the Detained Witnesses are entitled, by virtue of their fundamental human rights, to their liberty. The Court's initial constrainment of this right was justified as lawful on the basis of article 93(7) of the Statute, the application of which was, in turn, based on the *fact* that they were held in detention by the Congolese authorities at the time of their transfer to the ICC. Since 24 August 2011, the date on which the Chamber decided that there were no obstacles to return the Detained Witnesses to the DRC but for the asylum proceedings in The Netherlands,[31] these persons have been in the custody of the Court for the sole purpose of allowing the asylum procedure in the Netherlands to proceed. Formally speaking, their detention remains lawful, in that there continues to be a legal basis for it in article 93(7). However, the finding that the article 93(7) continues to provide a legal basis for detention does not answer the question whether the continued deprivation of liberty of the Detained Witnesses has become arbitrary. Any other view would reduce the review to a mere

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[30] Human Rights Committee, *A v. Australia*, "Views", 30 April 1997, communication no. 560/1993, para. 9.4.

[31] "Decision on the Security Situation of witnesses DRC-D02-P-0236; DRC-D02-P-0228, and DRC-D02-P-0350", 24 August 2011, ICC-01/04-01/07-3128.

formality, since the mere existence of a legal basis could be used to justify "lawful" detention in perpetuity.

16. It is therefore necessary to examine whether the continued detention in this situation is arbitrary despite the fact that there is a legal basis for it. One crucial factor in this regard is that the further duration of the detention of the Detained Witnesses is entirely unpredictable; the asylum proceedings in the Netherlands have progressed slowly and the remaining length of the detention cannot be foreseen. Its end is contingent on proceedings in a distinct jurisdiction, which are governed by a separate system of law and over which the Court can exercise no influence. Even the most informed account of the status of those proceedings cannot provide a clear date as to when they might end.[32] In fact, it is likely that the proceedings will continue for years.[33] A second factor is that the asylum proceedings themselves offer no justification for the detention of the Detained Witnesses. It is worth noting, in this regard, that even under Dutch law the maximum length of detention in asylum proceedings – which is exceptional and must be justified – is eighteen months.[34]

17. Since the original purpose behind the detention of the Detained Witnesses (i.e. their return to the DRC) ceased to exist in August 2011,[35] the sole justification for continued detention is Court-State cooperation, specifically the Court's obligations towards the DRC to return the Detained Witnesses in the event that their asylum applications are rejected. I believe it to be wholly disproportionate to subjugate the individual rights of the

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[32] "Amicus Curiae Observations by mr. Schüller and mr. Sluiter, Counsel in Dutch asylum proceedings of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350", 14 March 2013, ICC-01/04-01/07-3358, paras 21 and 23; Annex 2 to "Report of the Registrar on the execution of the 'Decision on the request for release of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350'", 1 March 2013, ICC-1/04-01/07-3355-Anx2, p. 2.

[33] ICC-01/04-01/07-3358, paras 21 and 23; ICC-1/04-01/07-3355-Anx2, p. 2.

[34] The Netherlands, *Vreemdelingenwet 2000*, Article 59, 23 November 2000.

[35] ICC-01/04-01/07-3128, para. 14.

Detained Witnesses for the benefit of the DRC's entitlement to have them returned in the event their asylum request is rejected. In other words, deciding not to release the Detained Witnesses because it *might* later be difficult to effectuate their return to the DRC *if* their asylum applications fail, unreasonably privileges the Court's cooperation agreement with the DRC and the DRC's rights as a state over the right of the individual Detained Witnesses to liberty. This conclusion is strengthened by the unjustifiable duration of this detention to date as well as the aforementioned impossibility to foresee its ending. It is important to remember, in this regard, that these three individuals have not been convicted of any crime and therefore continue to benefit from the presumption of innocence. Moreover, I believe that the interests of the DRC to have the Detained Witnesses returned in the event that their asylum claims are rejected can be sufficiently protected by imposing certain conditions upon the release.

18. For these reasons, I consider that the deprivation of liberty of the Detained Witnesses in the present circumstances has become arbitrary under international human rights law. This raises the question about the impact of this determination for the analysis of the request for immediate release. The answer to this question is dependent on the scope of the Court's human rights obligations under article 21(3) of the Statute.

19. Article 21(3) states that "[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights". It is uncontested that the right to liberty is a fundamental norm within the body of "internationally recognised human rights". In the present – unprecedented - circumstances, the continued application of article 93(7) would lead to indefinite detention as a consequence of the Court's prior co-operation agreement with the DRC coupled with the lengthy duration of the asylum proceedings. As pointed out earlier, I believe this is contrary to the

substance of the right to liberty: it renders the continued detention of the Detained Witnesses arbitrary and also vitiates the required procedural guarantees provided for the enforcement of that right in the relevant norms of international human rights law, as there is no provision within the plain words of article 93(7) for the possibility of effective review with the potential for release.[36] There is thus, in my view, a clear procedural and substantive gap in article 93(7) when applied to the current exceptional circumstances. For reasons explained earlier, I do not believe that the theoretical availability of either the DRC or the Dutch judicial authorities can remedy this shortcoming.

20. As the Court is under an obligation to apply and interpret the Statute in conformity with internationally recognised human rights norms in all circumstances, including when they are exceptional and unprecedented, it therefore seems necessary for the Court to review the arbitrariness of the continued detention of the Detained Witnesses itself. If this is correct, then this Chamber is, in my view, best placed to assume this responsibility.

21. As I conclude that in the particular circumstances of this case the continued detention of the Detained Witnesses violates their right to liberty, I consider that the Court is currently in breach of its obligations under article 21(3) of the Statute. The Court cannot tolerate such a situation to continue indefinitely. The only remedy for this continuing violation is the immediate release of the Detained Witnesses.

22. I am aware that, according to rule 185 of the Rules and article 48 of the Headquarters Agreement between the ICC and the Host State, the Court can only release individuals to a State that is either obliged to receive them or agrees to do so. The question arises, however, whether rule 185 is relevant to the situation at hand because the Detained Witnesses are already present in

[36] The Majority Decision implicitly acknowledges as much in para. 26.

the Host State in a manner distinguishable from other persons in the custody of the Court to whom the scheme of rule 185 does apply.

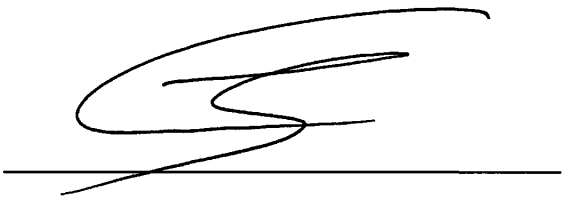
23. First, it is undisputed that the Detained Witnesses are already present on the territory of the Host State. Second, the Detained Witnesses are presently under the jurisdiction of the Host State, as is evidenced by the fact that its courts have been seized of, and clearly consider themselves competent to deal with, their asylum applications and related issues.[37] Third, as a consequence of its jurisdiction over them, the Host State has an obligation towards the Detained Witnesses, asylum seekers on its territory, to uphold the principle of *non-refoulement*.

24. This combination of factors – territorial, jurisdictional, and substantive – tying the Detained Witnesses to the Host State leads me to conclude that the Detained Witnesses, unlike those persons in the custody of the Court as envisaged by rule 185 of the Rules and article 48 of the Headquarters Agreement, have already been *de facto* and *de jure* received into the Host State. Moreover, there can be no doubt about the fact that the sole reason why the Detained Witnesses are still present on the territory of the Host State is the fact that their asylum applications are still pending before its authorities. Accordingly, I see no impediment to simply releasing the Detained Witnesses to the Host State until their asylum applications have been fully processed.

25. In sum, I would have declared this Chamber competent to rule on the request for immediate release of the Detained Witnesses and have ordered this immediate release, possibly with conditions. I would further have

[37] The determination that the Detained Witnesses are under the jurisdiction of the Host State for the purposes of their asylum application is not affected by the ECtHR's ruling that "[t]he fact that the applicant is deprived of his liberty on Netherlands soil does not...bring questions touching on the lawfulness of his detention within the 'jurisdiction' of the Netherlands" ECtHR, Third Section, *Djokaba Lambi Longa v. The Netherlands*, "Decision", 9 October 2012, application no. 33917/12, para. 73.

instructed the Registrar to transfer the Detained Witnesses to the Host State with the clear understanding that, if their asylum requests were to be definitively rejected and no obstacles of *non-refoulement* existed, the Court would assume responsibility for their return to the DRC.



Judge Christine Van den Wyngaert