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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. GERMAIN KATANGA

Public document

Decision on the admissibility of the appeal against the "Decision on the application for the interim release of detained Witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350"

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
Mr Fabricio Guariglia

Legal Representatives of Victims
Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

States Representatives
The Democratic Republic of the Congo
The Kingdom of the Netherlands

REGISTRY

Registrar
Mr Herman von Hebel

Counsel for the Defence of Germain Katanga
Mr David Hooper
Mr Andreas O'Shea

Counsel for the Defence of Mathieu Ngudjolo Chui
Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofé Djofia Malewa

Duty Counsel for witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350
Ghislain M. Mabanga

Defence Support Section

The Appeals Chamber of the International Criminal Court,

In the appeal against the decision of Trial Chamber II entitled "Decision on the application for the interim release of detained Witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350" of 1 October 2013 (ICC-01/04-01/07-3405-tENG),

After deliberation,

Renders by majority, Judge Sang-Hyun Song dissenting, the following

DECISION

1. The "Prosecution's request to provide observations to the admissibility of 'Acte d'appel des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350 contre la "Décision relative à la demande de mise en liberté des témoins détenus DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350" rendue par la Chambre de première instance II en date du 1er octobre 2013 (ICC-01/04-01/07-3405)'" (ICC-01/04-01/07-3409) is dismissed.

2. The "Corrigendum to the Brief in support of the 'Notice of appeal by Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 against the "Décision relative à la demande de mise en liberté des témoins détenus DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350" issued by Trial Chamber II on 1 October 2013 (ICC-01/04-01/07-3405)' (ICC-01/04-01/07-3408)" (ICC-01/04-01/07-3411-Corr-tENG) is accepted.

3. The request for suspensive effect is dismissed.

4. The above-mentioned appeal is dismissed as inadmissible.

REASONS

I. PROCEDURAL HISTORY

A. Proceedings before the Trial Chamber

1. In March 2011, three individuals were transferred to the Court for the purpose of testifying as witnesses called by Mr Germain Katanga[1] (hereinafter: "Detained Witnesses") pursuant to an agreement between the Court and the Democratic Republic of the Congo (hereinafter: "DRC") in accordance with article 93 (7) of the Statute.[2]

2. Prior to the transfer, the Detained Witnesses were detained in the DRC. In accordance with the first sentence of article 93 (7) (b) of the Statute, the Detained Witnesses were taken into custody in the Court's detention centre in order to temporarily maintain their detention during the period of their testimony.[3]

3. On 12 April 2011, the Detained Witnesses' duty counsel filed an application requesting, *inter alia*, that Trial Chamber II (hereinafter: "Trial Chamber") not immediately return the Detained Witnesses to the DRC after the conclusion of their testimony before the Court, as required by article 93 (7) (b) of the Statute, so that they could apply for asylum with the Dutch authorities (hereinafter: "Duty Counsel Application").[4]

4. The Detained Witnesses concluded their testimony on 3 May 2011.[5]

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[1] The Appeals Chamber notes that one of the individuals, witness DRC-D02-P0236, was a "joint witness", meaning that he was also listed as a witness (DRC-D03-11) for Mr Mathieu Ngudjolo Chui. *See* Annex C to "Jugement rendu en application de l'article 74 du Statut", 18 December 2012, ICC-01/04-02/12-3-AnxC-tENG, p. 2.

[2] "Décision relative à la requête de la Défense de Germain Katanga visant à obtenir la coopération de la République démocratique du Congo en vue de la comparution de témoins détenus", 7 January 2011, ICC-01/04-01/07-2640-Conf-Exp.

[3] Transcript of 12 May 2011, ICC-01/04-01/07-T-258-ENG (ET WT), p. 48, line 13, to p. 49, line 25.

[4] "Application for leave to present Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 to the authorities of the Netherlands for the purposes of asylum", ICC-01/04-01/07-2830-Conf-tENG.

[5] "Decision on the application for the interim release of detained Witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350", 1 October 2013, ICC-01/04-01/07-3405-tENG, para. 2. *See also* "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. 72.

5. On 12 May 2011, the Detained Witnesses filed an asylum request with the Dutch authorities.[6]

6. On 9 June 2011, the Trial Chamber rendered its decision on the Duty Counsel Application (hereinafter: "Decision of 9 June 2011"),[7] delaying their return to the DRC.[8]

7. On 24 August 2011, the Trial Chamber issued another decision wherein it held that the Detained Witnesses could not yet be returned to the DRC due to the pending asylum application (hereinafter: "Decision of 24 August 2011").[9]

8. On 4 February 2013, the Detained Witnesses filed a request (hereinafter: "Request for Release"),[10] in which they asked that the Trial Chamber declare that their detention pursuant to article 93 (7) of the Statute was no longer justified and order their immediate release, arguing that, since 24 August 2011, there was no legal basis for their detention[11] and that, even if originally legal, the duration of their detention had become unreasonable.[12]

9. On 1 October 2013, the Trial Chamber, by majority, Judge Van den Wyngaert dissenting,[13] rendered the "Decision on the application for the interim release of detained Witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350" (hereinafter: "Impugned Decision"),[14] in which it held that it did not have jurisdiction and therefore found the Request for Release inadmissible.[15]

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[6] *See* "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", 26 May 2011, ICC-01/04-01/07-2968, para. 2.
[7] "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)", ICC-01/04-01/07-3003-tENG.
[8] Decision of 9 June 2011, paras 70-73, 79-81.
[9] "Decision on the Security Situation of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350", ICC-01/04-01/07-3128.
[10] "Requête en mainlevée de la détention des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350", ICC-01/04-01/07-3351.
[11] Request for Release, para. 34.
[12] Request for Release, para. 37.
[13] Dissenting Opinion of Judge Christine Van den Wyngaert, dated 1 October 2013 and registered on 2 October 2013, ICC-01/04-01/07-3405-Anx.
[14] ICC-01/04-01/07-3405-tENG.
[15] Impugned Decision, para. 36.

B. Proceedings before the Appeals Chamber

10. On 7 October 2013, the Detained Witnesses filed their notice of appeal[16] (hereinafter: "Notice of Appeal") pursuant to article 82 (1) (b) of the Statute and rule 154 (1) of the Rules of Procedure and Evidence,[17] in which they also requested that suspensive effect be granted to the appeal.[18]

11. On 8 October 2013, the Prosecutor submitted that the Appeals Chamber should examine *in limine* the admissibility of the appeal.[19] The Prosecutor requested that, in doing so, the Appeals Chamber set a time frame for her to respond, as a "preliminary and separate issue",[20] to the submissions regarding admissibility anticipated to be contained in the Detained Witnesses' document in support of their appeal (hereinafter: "Prosecutor's Request").[21]

12. On 9 October 2013, the Detained Witnesses filed their document in support of the appeal,[22] to which they filed a corrigendum as an annex, which was dated the same day and registered the following day, 10 October 2013[23] (hereinafter: "Document in Support of the Appeal"). In the Document in Support of the Appeal, the Detained Witnesses argue that the appeal is admissible pursuant to article 82 (1) (b) of the Statute and, as a secondary basis, article 82 (1) (a) of the Statute,[24] as well as

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[16] "Notice of appeal by Witnesses DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350 against the 'Décision relative à la demande de mise en liberté des témoins détenus DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350' issued by Trial Chamber II on 1 October 2013 (ICC-01/04-01/07-3405)", 7 October 2013, ICC-01/04-01/07-3408-tENG.
[17] Notice of Appeal, para. 3.
[18] Notice of Appeal, para. 4.
[19] "Prosecution's request to provide observations to the admissibility of 'Acte d'appel des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350 contre la 'Décision relative à la demande de mise en liberté des témoins détenus DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350' rendue par la Chambre de première instance II en date du 1er octobre 2013 (ICC-01/04-01/07-3405)'", ICC-01/04-01/07-3409.
[20] ICC-01/04-01/07-3409, para. 4.
[21] Prosecutor's Request, paras 3-4.
[22] "Mémoire en appui de l' 'Acte d'appel des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350 contre la "Décision relative à la demande de mise en liberté des témoins détenus DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350" rendue par la Chambre de première instance II en date du 1er octobre 2013 (ICC-01/04-01/07-3405)' (ICC-01/04-01/07-3408)", ICC-01/04-01/07-3411.
[23] "Corrigendum to the Brief in support of the 'Notice of appeal by Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 against the "Décision relative à la demande de mise en liberté des témoins détenus DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350" issued by Trial Chamber II on 1 October 2013 (ICC-01/04-01/07-3405)' (ICC-01/04-01/07-3408)", ICC-01/04-01/07-3411-Corr-tENG with "Note explicative" as an annex, ICC-01/04-01/07-3411-Corr-Anx-tENG.
[24] Document in Support of the Appeal, paras 7-9.

arguing that they qualify as "parties" for purposes of having standing to bring an appeal under article 82 (1) of the Statute.[25]

13. On 15 October 2013, the Prosecutor filed her response to the Document in Support of the Appeal (hereinafter: "Response to the Document in Support of the Appeal"),[26] submitting, *inter alia*, that the appeal is inadmissible and should be dismissed *in limine*.[27]

II. PRELIMINARY ISSUES

A. The Prosecutor's Request

14. The Appeals Chamber recalls that the Prosecutor requests that the Appeals Chamber set a time frame for her to file a separate response addressing only the issue of admissibility.[28] Given that the Prosecutor included her arguments in relation to the admissibility of the appeal in her Response to the Document in Support of the Appeal, the Appeals Chamber considers that the Prosecutor's Request has been rendered moot, and therefore dismisses it.

B. The Detained Witnesses' Corrigendum to their Document in Support of the Appeal

15. The Appeals Chamber has previously held that the purpose of corrigenda is to correct typographical errors and that a corrigendum may not be used to add to or alter the substance of the submissions made in a document.[29] The Appeals Chamber considers that the Detained Witnesses' corrigendum to their Document in Support of the Appeal complies with its jurisprudence and therefore accepts the corrigendum.

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[25] Document in Support of the Appeal, paras 10-12.
[26] "Prosecution Response to 'Mémoire en appui de l'Acte d'appel des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350 contre la "Décision relative à la demande de mise en liberté des témoins détenus DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350"'", ICC-01/04-01/07-3413.
[27] Response to the Document in Support of the Appeal, paras 3, 19, 33, 36, 62.
[28] Prosecutor's Request, para. 4.
[29] *See Prosecutor 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 (OA 2), paras 37-39. *See also Prosecutor v. Callixte Mbarushimana*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'", 30 May 2012, ICC-01/04-01/10-514 (OA 4), para. 12; *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings", 14 December 2012, ICC-01/04-01/06-2953 (A A2 A3 OA 21).

C. The Detained Witnesses' failure to state article 82 (1) (a) of the Statute in their Notice of Appeal

16. In their Notice of Appeal, the Detained Witnesses listed only article 82 (1) (b) of the Statute as the provision under which they bring their appeal.[30] In the Document in Support of the Appeal, article 82 (1) (a) of the Statute was included as a secondary legal basis for their appeal.[31]

17. The Appeals Chamber recalls that regulation 64 (1) of the Regulations of the Court provides that an appeal filed under rule 154 of the Rules of Procedure and Evidence shall state, *inter alia*, "[t]he specific provision of the Statute pursuant to which the appeal is filed".[32] The Appeals Chamber also notes that the Prosecutor, while noting that article 82 (1) (a) of the Statute was not stated in the Notice of Appeal,[33] does not request that the arguments related to this provision be dismissed on this basis and makes substantive arguments in respect of the admissibility of the appeal pursuant to this statutory provision. The Appeals Chamber further notes that the same time limit for the filing of the notice of appeal applies to appeals under article 82 (1) (a) and (b) of the Statute.[34] Therefore, while not in compliance with regulation 64 of the Regulations of the Court, the Appeals Chamber considers that it is in the interests of justice to consider the merits of the Detained Witnesses' arguments in relation to article 82 (1) (a) of the Statute.[35]

III. SUBMISSIONS REGARDING THE ADMISSIBILITY OF THE APPEAL

A. Submissions of the Detained Witnesses

18. The Detained Witnesses submit that, while the present situation and the jurisdictional issues caused therefrom are not foreseen in the Statute, the novelty of the issue does not relieve the Appeals Chamber of its obligation to rule upon it.[36] In this respect, they note that, notwithstanding the absence of the appropriate legal

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[30] Notice of Appeal, para. 3.
[31] Document in Support of the Appeal, para. 9.
[32] Regulation 64 (1) (c) of the Regulations of the Court.
[33] Response to the Document in Support of the Appeal, para. 24.
[34] Rule 154 (1) of the Rules of Procedure and Evidence.
[35] *See* regulation 29 of the Regulations of the Court.
[36] Document in Support of the Appeal, para. 4.

provisions, the Court has nonetheless put in place jurisprudence that responds to diverse requests of detained witnesses.[37] Accordingly, they argue:

> [T]he Appeals Chamber therefore confronts, in this particular context, a situation not foreseen for by the drafters of the Court's basic texts but which nevertheless requires a judicial response in light of its implications for internationally recognised human rights, which the Court is bound to uphold applying by virtue of article 21 (3) of its Statute.[38]

19. In respect of article 82 (1) of the Statute, the Detained Witnesses submit that they are "parties" within the meaning of article 82 (1) of the Statute and thus have standing to appeal pursuant to this provision.[39] They argue that the notion of a "party" is relative and depends upon the specific proceedings at issue.[40] In this respect, they submit that the international criminal proceedings before the Court actually consist of complex and compartmentalised "proceedings" to which the relevant "parties" may not correspond to the "parties" in the overall proceedings.[41] They submit that one can be a "party" to a proceeding without necessarily being a party to the trial as such.[42]

20. Pointing to specific statutory provisions, the Detained Witnesses argue that States Parties have the status of "party" (and the corresponding right to appeal) in relation to discrete "proceedings", even though they are neither the Prosecutor nor an accused person.[43] Applying this reasoning to their situation, the Detained Witnesses recall that, in respect of a request for leave to appeal the Decision of 9 June 2011 by the Prosecutor, The Netherlands and the DRC, the Trial Chamber held that the decision consisted of "a decision that appears entirely discrete from the main proceedings".[44]

21. Regarding article 82 (1) (b) of the Statute, the Detained Witnesses submit that this provision provides the legal basis for the admissibility of their appeal.[45] While conceding that the provision refers to suspects and accused persons, the Detained

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[37] Document in Support of the Appeal, para. 4.
[38] Document in Support of the Appeal, para. 5.
[39] Document in Support of the Appeal, paras 10-12.
[40] Document in Support of the Appeal, para. 11.
[41] Document in Support of the Appeal, para. 11.
[42] Document in Support of the Appeal, para. 11.
[43] Document in Support of the Appeal, para. 11.
[44] Document in Support of the Appeal, para. 12, citing Trial Chamber II, "Decision on three applications for leave to appeal Decision ICC-01/04-01/07-3003 of 9 June 2011", 14 July 2011, ICC-01/04-01/07-3073-tENG, para. 8 (internal brackets omitted).
[45] Document in Support of the Appeal, para. 8.

Witnesses argue that this formulation was chosen because suspects and accused persons were, in the view of the drafters of the Statute, the only people who could find themselves detained at the Court's detention unit.[46] Therefore, they argue that the "spirit" of the provision was to provide an avenue to contest a decision related to the granting or denying of release to any person who could be subject to detention by the Court.[47] According to the Detained Witnesses, had the drafters realised that witnesses could potentially be detained for several years, they would have formulated the provision differently so as to permit "any person detained illegally and/or arbitrarily to challenge the legality of such detention before the competent chamber".[48] Second, the Detained Witnesses argue that, regardless of the original intention of the drafters in respect of the scope of article 82 (1) (b) of the Statute, the drafters also provided latitude to the Judges of the Court to give an evolving interpretation to the Statute by virtue of article 21 (3) of the Statute.[49] Therefore, the Detained Witnesses submit that, "by extending the scope of article 82 (1) (b) to witnesses illegally detained in the Court's Detention Centre",[50] the Appeals Chamber would not be violating the spirit of article 82 (1) (b) of the Statute,[51] but would rather be applying it in conformity with internationally recognised human rights as enshrined in article 21 (3) of the Statute, specifically in this instance, the right to liberty.[52]

22. As a secondary legal basis, the Detained Witnesses argue that the appeal is also admissible pursuant to article 82 (1) (a) of the Statute because the Impugned Decision is "manifestly a decision on the jurisdiction of the Court"[53] and because the general nature of the term "jurisdiction" used by the drafters does not permit a conclusion that the provision is limited only to decisions rendered pursuant to article 19 of the Statute.[54]

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[46] Document in Support of the Appeal, para. 8.
[47] Document in Support of the Appeal, para. 8.
[48] Document in Support of the Appeal, para. 8.
[49] Document in Support of the Appeal, para. 8.
[50] Document in Support of the Appeal, para. 8.
[51] Document in Support of the Appeal, para. 8.
[52] Document in Support of the Appeal, para. 8.
[53] Document in Support of the Appeal, para. 9.
[54] Document in Support of the Appeal, para. 9.

B. Submissions of the Prosecutor

23. The Prosecutor argues that the appeal is inadmissible.[55] In response to the first argument related to article 21 (3) of the Statute, the Prosecutor submits that this argument is misplaced because "[a]rticle 21 (3) is not a trump provision that permits the Chamber to ignore or to alter the statutory framework" and because the argument disregards the hierarchy of applicable sources of law if matters are not foreseen in the Statute provided by article 21 (1) of the Statute.[56] The Prosecutor distinguishes the decisions that respond to various requests of detained witnesses by noting that these all relate to administrative matters that are regulated in the Regulations of the Court, not in the Statute.[57] Finally, the Prosecutor submits:

> [T]he ICC's authority to review the merits of domestic decisions on detention of persons transferred under Article 93(7) – the core of the Witnesses' request before the Trial Chamber – is not a new issue which was inadvertently omitted by the drafters. On the contrary, it is an issue that simply does not fall within the jurisdiction of the Court.[58]

24. The Prosecutor does not make any submissions with respect to who is a "party" within the meaning of article 82 (1) of the Statute.

25. With respect to article 82 (1) (b) of the Statute, the Prosecutor submits that the clear meaning of the article "exhaustively regulates the right to appeal" under this provision[59] and that the Detained Witnesses are neither persons "being investigated or prosecuted", nor, referring to the Appeals Chamber's decision in *Lubanga* OA 8[60] (hereinafter: "*Lubanga* OA 8 Decision"), persons "subject to a warrant of arrest" issued by the Court.[61] Second, the Prosecutor submits that the Impugned Decision is not a decision denying release within the terms of article 82 (1) (b) of the Statute, with reference to the Appeals Chamber's jurisprudence on what determines whether a

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[55] Response to the Document in Support of the Appeal, paras 3, 19, 33, 36, 62.
[56] Response to the Document in Support of the Appeal, para. 21.
[57] Response to the Document in Support of the Appeal, para. 22.
[58] Response to the Document in Support of the Appeal, para. 23.
[59] Response to the Document in Support of the Appeal, para. 26.
[60] Response to the Document in Support of the Appeal, para. 27, citing "Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Décision sur la confirmation des charges' of 29 January 2007", 13 June 2007, ICC-01/04-01/06-926 (OA 8), para. 16.
[61] Response to the Document in Support of the Appeal, paras 27-28.

decision is a "decision denying release".[62] Based on these arguments, the Prosecutor submits that the appeal is filed *ultra vires* and is improperly characterised as an appeal under article 82 (1) (b) of the Statute, which in the past, she notes, has led the Appeals Chamber, to dismiss other appeals brought under this provision.[63]

26. With respect to article 82 (1) (a) of the Statute, the Prosecutor argues that the Impugned Decision does not fall within the scope of this article, citing to the Appeals Chamber's jurisprudence regarding the scope of the notion of "jurisdiction".[64]

IV. DETERMINATION BY THE APPEALS CHAMBER

27. Article 82 (1) (a) and (b) of the Statute provides, in relevant part, that "either party may appeal" a "decision with respect to jurisdiction" and a "decision granting or denying release of the person being investigated or prosecuted". The Appeals Chamber notes that the Detained Witnesses argue that article 21 (3) of the Statute requires it to interpret article 82 (1) of the Statue in such a manner that it can respond to their present situation.

28. The Appeals Chamber recalls that, in the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal"[65] (hereinafter: "*DRC* OA 3 Judgment"), it held that the "decisions that are subject to appeal are enumerated in articles 81 and 82 of the Statute. There is nothing in Part 8 [of the Statute] to suggest that a right to appeal arises except as provided thereunder".[66] On that basis, the Appeals Chamber found that "the Statute defines exhaustively the right to appeal"[67] and further held that the limitation of the right to bring interlocutory appeals to those subjects listed in article 82 of the Statute was fully consistent with internationally recognised human rights, which require that only the convicted person has a right to appeal final decisions on conviction or sentence.[68]

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[62] Response to the Document in Support of the Appeal, paras 31-32, citing therein to the Appeals Chamber's jurisprudence.
[63] Response to the Document in Support of the Appeal, para. 33.
[64] Response to Document in Support of the Appeal, paras 34-36, citing therein to the Appeals Chamber's jurisprudence.
[65] *Situation in the Democratic Republic of the Congo*, 13 July 2006, ICC-01/04-168 (OA 3).
[66] *DRC* OA 3 Judgment, para. 35.
[67] *DRC* OA 3 Judgment, para. 39.
[68] *DRC* OA 3 Judgment, para. 38.

29. The Appeals Chamber further recalls that it subsequently reaffirmed the above holdings in the context of appeals brought by the DRC and The Netherlands,[69] in relation to which Trial Chamber I had granted leave to appeal "on an exceptional basis" pursuant to article 64 (6) of the Statute.[70] In rejecting the appeals and finding that the granting of leave to appeal was an *ultra vires* act, the Appeals Chamber held that to consider the appeals would mean it would be "acting beyond the scope of the powers vested in it by the States Parties in the Statute".[71]

30. The Appeals Chamber considers that the Detained Witnesses' arguments regarding article 21 (3) of the Statute are misplaced. The Detained Witnesses do not identify, nor does the Appeals Chamber find, an internationally recognised human right to appeal that requires the Appeals Chamber to expand its limited subject-matter appellate jurisdiction under the Statute, beyond the scope of the powers vested in it by the States Parties.

31. Accordingly, for the Detained Witnesses' appeal to be admissible, the Appeals Chamber must determine whether the Impugned Decision falls under the terms of article 82 (1) (a) or (b) of the Statute and whether the Detained Witnesses are a "party" within the meaning of article 82 (1) of the Statute.

A. Article 82 (1) (a) of the Statute

32. The Appeals Chamber recalls that, in the "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006",[72] it held:

> The jurisdiction of the Court is defined by the Statute. The notion of jurisdiction has four different facets: subject-matter jurisdiction also identified by the Latin maxim jurisdiction *ratione materiae*, jurisdiction over persons, symbolized by the Latin maxim jurisdiction *ratione personae*, territorial jurisdiction - jurisdiction *ratione loci* - and lastly jurisdiction *ratione temporis*. These facets find expression in the Statute.[73]

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[69] "Decision on the 'Urgent Request for Directions' of the Kingdom of the Netherlands of 17 August 2011", 26 August 2011, ICC-01/04-01/06-2799 (OA 19) (hereinafter: "*Lubanga* OA 19 Decision").
[70] *Lubanga* OA 19 Decision, para. 3.
[71] *Lubanga* OA 19 Decision, para. 8.
[72] 14 December 2006, ICC-01/04-01/06-772 (OA 4) (hereinafter: "*Lubanga* OA 4 Judgment").
[73] *Lubanga* OA 4 Judgment, para. 21.

33. Further, in the "Decision on the admissibility of the 'Appeal of the Government of Kenya against the "Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence"'"[74] and reaffirmed in the "Decision on the admissibility of the 'Appeal Against Decision on Application Under Rule 103' of Ms Mishana Hosseinioun of 7 February 2012",[75] the Appeals Chamber held:

> 15. Article 82 (1) (a) of the Statute provides that either party may appeal "a decision with respect to jurisdiction or admissibility". The Appeals Chamber understands from the phrase "decision with respect to" that the operative part of the decision itself must pertain directly to a question on the jurisdiction of the Court or the admissibility of a case. It is not sufficient that there is an indirect or tangential link between the underlying decision and questions of jurisdiction or admissibility. [...]
>
> 16. The Appeals Chamber's reading of the plain meaning of article 82 (1) (a) of the Statute is also confirmed by its relationship with other provisions of the Statute. Article 82 (1) (a) of the Statute must be read in conjunction with articles 18 and 19 of the Statute. [...] Article 19 (6) of the Statute provides that "[d]ecisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82". In the view of the Appeals Chamber, the specific references to article 82 of the Statute and the use of identical language in articles 19 (6) and 82 (1) (a) of the Statute indicate that the right to appeal a decision on jurisdiction or admissibility is intended to be limited only to those instances in which a Pre-Trial or Trial Chamber issues a ruling specifically on the jurisdiction of the Court or the admissibility of the case.[76]

34. The Appeals Chamber considers that the Impugned Decision does not pertain to a question of the jurisdiction of the Court as previously defined by its jurisprudence. Accordingly, the Appeals Chamber finds that it cannot be appealed under article 82 (1) (a) of the Statute.

B. Article 82 (1) (b) of the Statute

35. Under article 82 (1) (b) of the Statute, a "decision granting or denying release of the person being investigated or prosecuted" may be appealed. The Appeals Chamber recalls that, in the "Decision on the admissibility of the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 28 July 2011 entitled

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[74] 10 August 2011, ICC-01/09-78 (OA) (hereinafter: "*Kenya* OA Decision").
[75] 9 March 2012, ICC-01/11-01/11-74 (OA) (hereinafter: "*Gaddafi* OA Decision").
[76] *Kenya* OA Decision, paras 15-16; *Gaddafi* OA Decision, para. 10.

'Decision on "Second Defence request for interim release"'",[77] it reaffirmed that "it is the nature or character of a decision and not its implications or effects which determine whether a party is entitled to bring an appeal pursuant to article 82 (1) (b) of the Statute".[78]

36. In the instant case, the Appeals Chamber notes that the Trial Chamber did not consider the merits of the Request for Release. Instead, the Trial Chamber found that it lacked competence to decide on it. Thus, the Impugned Decision did not address the question of whether the Detained Witnesses should be released. Accordingly, it could be said that the nature of the Impugned Decision is not one "granting or denying release".

37. Be this as it may, the Appeals Chamber considers that, in any event, the Detained Witnesses are not persons who are "being investigated or prosecuted" within the meaning of article 82 (1) (b) of the Statute. The Appeals Chamber considers that this term refers to persons under investigation or being prosecuted *by the Court*. This understanding is reflected in the *Lubanga* OA 8 Decision, where it held:

> The wording of article 82 (1) (b) of the Statute is explicit and as such it is the sole guide to the identification of decisions appealable under its provisions. There is no ambiguity as to its meaning, its ambit or range of application. *It confers exclusively a right to appeal a decision that deals with the detention or release of a person subject to a warrant of arrest.*[79] [Emphasis added.]

38. In the present case, the Detained Witnesses are not subject to a Court-issued warrant of arrest. Thus, the Appeals Chamber concludes that the Detained Witnesses cannot appeal the Impugned Decision under article 82 (1) (b) of the Statute.

39. Having found that the appeal does not fall within either article 82 (1) (a) or (b) of the Statute, the Appeals Chamber finds the Detained Witnesses' appeal to be inadmissible. It is dismissed accordingly. The Appeals Chamber does not consider it necessary to address the arguments in relation to whether the Detained Witnesses are "parties" within the meaning of article 82 (1) of the Statute.

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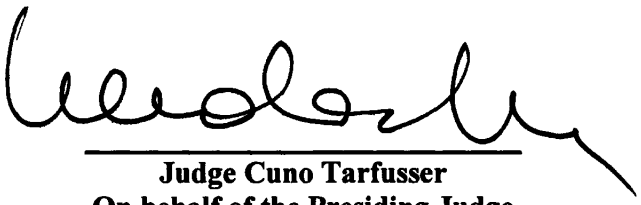
[77] 21 September 2011, ICC-01/04-01/10-438 (OA 2) (hereinafter: "*Mbarushimana* OA 2 Decision").
[78] *Mbarushimana* OA 2 Decision, para. 17.
[79] *Lubanga* OA 8 Decision, para. 16.

V. REQUEST FOR SUSPENSIVE EFFECT

40. Given that the appeal is inadmissible, the Detained Witnesses' request for suspensive effect is rendered moot and accordingly dismissed.

Judge Sang-Hyun Song appends a dissenting opinion to this decision.

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



Judge Cuno Tarfusser
On behalf of the Presiding Judge

Dated this 20th day of January 2014

At The Hague, The Netherlands