Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/04-01/07**
Date: **22 June 2011**

TRIAL CHAMBER II

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF

THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI

Public

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

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

The Office of the Prosecutor
Mr Luis Moreno-Ocampo
Ms Fatou Bensouda
Mr Eric MacDonald

Counsel for Germain Katanga
Mr David Hooper
Mr Andreas O'Shea

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

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

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

REGISTRY

Registrar
Ms Silvana Arbia

Counsel Support Section

Victims and Witnesses Unit
Ms Maria-Luisa Martinod-Jacome

Others
Democratic Republic of the Congo
Kingdom of the Netherlands
Me Mabanga Monga Mabanga

Trial Chamber II of the International Criminal Court ("the Chamber" and "the Court" respectively), acting pursuant to articles 68 and 93 of the Rome Statute ("the Statute") and rules 86, 87, 88 and 192 of the Rules of Procedure and Evidence ("the Rules"), decides as follows:

I. PROCEDURAL HISTORY

1. On 29 November 2010, the Defence for Mr. Katanga informed the Chamber of its intention to call four witnesses who were detained by the Democratic Republic of the Congo ("DRC") and requested the Chamber to order the Registrar to make arrangements for their transfer to the Court.[1]

2. The Chamber granted the request for cooperation on 7 January 2011.[2]

3. On 21 January 2011, the Defence asked the Chamber to vary its Decision, by substituting two witnesses from the original four persons listed with two different ones.[3] The Chamber granted this request on 25 January 2011 and ordered the Registry to transmit the amended list of witnesses to the DRC authorities.[4]

4. On 22 February 2011, the Registry submitted a report on the execution of the two abovementioned decisions.[5]

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[1] "Corrigendum of the Urgent Defence Request to Call Detained Defence Witnesses and for Cooperation from the DRC", 8 December 2010, ICC-01/04-01/07-2585-Conf-Exp-Corr

[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] "Urgent Defence Request to Vary the Chamber's 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", 21 January 2001, ICC-01/04-01/07-2659-Conf-Exp

[4] "Décision relative à la requête de la Défense de Germain Katanga tendant à l'amendement de la décision sur sa requête visant à obtenir la coopération de la République démocratique du Congo en vue de la comparution de témoins détenus", 25 January 2011, ICC-01/04-01/07-2660-Conf-Exp

[5] "Registry's report on the execution of Decisions 2640 and 2660", 22 February 2011, ICC-01/04-01/07-2724-Conf-Exp

5. On 1 March 2011, the Registry appointed Counsel Ghislain Mabanga Monga Mabanga to advise the four detained witnesses as to their rights and obligations under article 93(2) and rule 74.

6. On 10 March 2011, the Registry transmitted the observations of the DRC authorities in relation with the implementation of rule 74.[6] Annexed was a letter of the Minister of Justice of the DRC, which states, *inter alia*, that the Congolese authorities 'encourage' the Court to apply the measures provided for in rule 74. The relevant measures include: ordering that the evidence be given in camera; that the identity of the witness and the content of the evidence given shall not be disclosed; that the transcripts of the hearings be put under seal and to pronounce protective measures to ensure that the identity of the witnesses and the context of the evidence given are not disclosed.[7]

7. On 14 March 2011, the Defence for Mr. Katanga informed the Chamber that it no longer wished to maintain one of the four witnesses on its witness list. No reasons were given for this withdrawal.[8]

8. On 22 March 2011, a Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo ("UNSC Committee") authorised an exemption to a travel ban that had been imposed by the UNSC Committee on one of the witnesses in accordance with Security Council resolutions 1596 (2005) and 1649 (2005).[9]

9. On 21 March 2011, the Katanga Defence informed the Chamber that, contrary to what they had initially asked, the three witnesses no longer requested

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[6] "Registry's transmission of observations received from the DRC authorities", 10 March 2011, ICC-01/04-01/07-2767-Conf-Exp

[7] ICC-01/04-01/07-2767-Conf-Exp,-Anx1, para. 12

[8] "Disclosure of Additional Information on the Defence Witnesses", 14 March 2011, ICC-01/04-01/07-2770-Conf

[9] ICC-01/04-01/07-2809-Conf-Anx3

any procedural protective measures and wished to testify publicly.[10] The Defence argued that the witnesses only feared retaliation from the DRC authorities and that the latter were aware of the content of their testimony.[11] The Defence stated that the witnesses feared that the DRC authorities might delay their retaliatory actions in order to show their goodwill to the ICC.[12] The Defence further asked that the situation of the three witnesses be closely monitored after their return to the DRC and that "the Court engages in dialogue with, and asserts its influence on the DRC authorities to ensure that the detained witnesses will not be at any risk of wrongful charges, continued unlawful imprisonment or other harm after their return to the central prison in Kinshasa."[13]

10. On the same day, the Chamber ordered the Registry to file a report on the protective measures requested by the Defence for Mr. Katanga and invited the other parties and participants to submit their observations.[14]

11. On 25 March 2011, the VWU filed its report.[15] The Victims and Witnesses Unit ("VWU") stated that it did not object to the witnesses' intention to testify publicly.[16] The Unit also explained how the witnesses' status as detainees affected its ability to apply the standard procedure for witness protection. In particular, the VWU asserted that "[n]either the Registry nor the Court has the competency to exercise its influence on the Congolese authorities' management of a national detention centre."[17] However, the VWU indicated that it would maintain regular contacts with the witnesses during a significant period of time

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[10] "Defence Observations on the Protective Measures for DRC-D02-P-0350, DRC-D02-P-0236 and DRC-D02-P-0228", 21 March 2011, ICC-01/04-01/07-2790-Conf
[11] ICC-01/04-01/07-2790-Conf, para. 3-4
[12] ICC-01/04-01/07-2790-Conf, para. 5
[13] ICC-01/04-01/07-2790-Conf, para 6
[14] Instructions sent via email on 22 March 2011, at 12h02
[15] "Victims and Witnesses Unit's report on the 'Defence Observations on the Protective Measures for DRC-D02-P-0350, DRC-D02-P-0236 and DRC-D02-P-0228' (ICC-01/04-01/07-2790-Conf)", 25 March 2011, ICC-01/04-01/07-2799-Conf
[16] ICC-01/04-01/07-2799-Conf, para. 5
[17] ICC-01/04-01/07-2799-Conf, para. 3

to ensure that their testimonies would not expose them to harm. The VWU suggested that it might liaise with the International Committee of the Red Cross ("ICRC") about the specific situation of the three witnesses.[18]

12. On 27 March 2011, the three remaining witnesses were transferred to The Hague.[19] They all completed their testimony between 30 March 2011 and 3 May 2011.

13. On 29 March 2011, Counsel for witness DRC-D02-P-236 ("P-236") informed the Chamber that the witness was still concerned about his personal security when he would be returned to the DRC after finishing his testimony.[20] The witness pointed out that the envisaged protective measure could only protect his family, but not himself.[21] Furthermore, the witness asked the Court to verify that the DRC would not persecute his family members instead of him.[22]

14. The following day, the Chamber issued an oral decision in which it took note of the VWU's proposals with regard to the protection of P-236 and asked it to (a) keep the Chamber informed about any difficulties with regard to the implementation of the proposed protective measures at the central prison of Kinshasa, (b) continue discussions concerning adequate protection of family members, and (c) report back to the Chamber about protective measures taken to protect the latter.[23]

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[18] ICC-01/04-01/07-2799-Conf, para. 4

[19] "Registry's report on the transfer of the detained witnesses and accommodation at the Detention Centre", 29 March 2011, ICC-01/04-01/07-2809-Conf

[20] "Observations du témoin DRC-D02-P-0236 sur l'Ordonnance du 28 février 2011 relative à la mise en œuvre de l'article 93-2 du Statut et des règles 191 et 74 du Règlement de procédure et de preuve au profit des témoins de la Défense de Germain Katanga ", 29 March 2011, ICC-01/04-01/07-2808-Conf

[21] ICC-01/04-01/07-2808-Conf, para. 8

[22] ICC-01/04-01/07-2808-Conf, para. 18

[23] ICC-01/04-01/07-T-242-CONF-ENG, p. 20-23

15. On 1 April 2011, witness DRC-D02-P-0228 ("P-228") made a separate request for special protective measures.[24] The witness referred to the fact that the Minister of Justice and Human Rights of the DRC had brought a cameraman to film their departure to The Hague and had issued a public press release in which the names of the three witnesses were mentioned.[25] The witness alleged that there was a great possibility that the Congolese authorities would execute the witnesses upon their return, although these executions might be masked as ordinary crimes or attempted escapes.[26] Invoking rule 88 of the Rules, P-228 asked for special measures to protect his family's security as well as his own. He also requested to be heard in an *ex parte* hearing to explain his fears.

16. On 5 April 2011, the Chamber instructed Counsel for the detained witnesses to contact the VWU in order to explore which protective measure could possibly be put in place. It also asked Counsel to provide more specific information about the nature of the protective measures which were solicited from the Chamber.[27]

17. On 11 April 2011, Counsel for the detained witnesses informed the Chamber via email that P-228 asked the Chamber to present him to the authorities of the Netherlands in order to allow him to make a request for asylum.[28] P-228 alleged that his fears for retaliation were well-founded, as the DRC government had the material as well as the legal means to "eliminate" him.[29]

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[24] "Observations du témoin DRC-D02-P-0228 sur la mise en œuvre de l'article 93-2 du Statut et des règles 191 et 74 du Règlement et demande de mesures spéciales sur pied de la Règle 88 du Règlement", 1 April 2011, ICC-01/04-01/07-2812-Conf

[25] ICC-01/04-01/07-2812-Conf, para. 6

[26] ICC-01/04-01/07-2812-Conf, para 8

[27] Instructions sent by email, on 5 April 2011 at 17h04

[28] Email communication received on 11 April 2011 at 12h44

[29] Email communication received on 11 April 2011 at 12h44

18. On 12 April 2011, Counsel for the detained witnesses filed an additional request for protective measures, this time for all three detained witnesses ("Request").[30] The Request argued that the witnesses' fear of retaliation by the DRC was well-founded and submitted that the protective measures proposed by the VWU were inadequate to offer genuine protection. The three witnesses asked that they all be presented to the Dutch authorities in order to file a request for asylum and requested the Chamber to hear them *ex parte* in this regard.[31]

19. In response to the Chamber's instructions, the VWU filed its observations on the Request ("Observations").[32] The VWU restricted itself to pointing out that, to the VWU's knowledge, the DRC authorities had not yet attempted to harm the witnesses, even though their intention to implicate the Congolese authorities in the Ituri conflict had been public knowledge for a long time.[33] The VWU further drew attention to its assessment of the political situation in the DRC, both in terms of the upcoming elections and with regard to the country's efforts in implementing the Rome Statute.

20. On 15 April 2011, both the Prosecution and the Defence for Mr. Katanga filed their observations on the Request.[34]

21. On 21 April 2011, the Registry filed its observations regarding the legal issues raised by the Request.[35] The Registry pointed out that it had taken all

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[30] "Requête tendant à obtenir présentation des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350 aux fins d'asile", 12 April 2011, ICC-01/04-01/07-2830-Conf

[31] ICC-01/04-01/07-2830-Conf, para. 26

[32] "Observations de l'unité d'aide aux victims et aux témoins au sujet de la 'requête tendant à obtenir présentation des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350 aux fins d'asile' introduite par le Conseil de permanence des témoins détenus le 12 avril 2011", 14 April 2011, ICC-01/04-01/07-2834-Conf

[33] ICC-01/04-01/07-2834-Conf-Anx

[34] "Prosecution's Observations in response to 'Requête tendant à obtenir présentation des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350 aux fins d'asile'", 15 April 2011, ICC-01/04-01/07-2835-Conf; "Defence Observations on Requête tendant à obtenir présentation des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350 aux fins d'asile (ICC-01/04-01/07-2830-Conf) of 12 April 2011", 15 April 2011, ICC-01/04-01/07-2836-Conf

possible measures to evaluate and ensure the security of the detained witnesses, taking into consideration the objective differences of their situation compared with non-detained witnesses.[36]

22. On 4 May 2011, Counsel for the detained witnesses responded to the Registry, repeating that the Court's array of operational protective measures was not suited to witnesses detained by the very authorities from whom the threat emanated.[37] Counsel further pointed to what he described as 'objective elements', which, according to him, demonstrated the reality of the risk of persecution on behalf of the three detained witnesses.[38]

23. On 12 May 2011, the Chamber held a public status conference during which the situation of the three detained witnesses was discussed at length.[39] During this status conference, Counsel for the detained witnesses reiterated his earlier arguments in relation to the risk faced by the three witnesses on account of their testimony. First, he argued that concern on the part of the Congolese authorities that they might be prosecuted by the ICC for their involvement in the Ituri massacres "might prompt [them] to eliminate people who may become incriminating witnesses against them in the future."[40] Second, it was alleged that the Congolese President may have motives to silence the three witnesses, as their allegations against him might affect his success as a candidate for re-election.[41] One of the Representatives of the Registry informed the Chamber that the

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[35] "Observations du Greffe en relation avec la Requête ICC-01/04-01/07-2830-Conf", 21 April 2011, ICC-01/04-01/07-2849-Conf. On 3 May 2011 the Registry transmitted the position of the Host State on the matter "Observations complémentaires du Greffe en relation avec la Requête ICC-01/04-01/07-2830-Conf", 3 May 2011, ICC-01/04-01/07-2858-Conf

[36] ICC-01/04-01/07-2849-Conf, para. 9

[37] "Observations des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350 en réponse aux 'Observations du Greffe en relation avec la Requête ICC-01/04-01/07-2830-Conf '", 4 May 2011, ICC-01/04-01/07-2861-Conf, paras 5-10

[38] ICC-01/04-01/07-2861-Conf, paras 11-13

[39] ICC-01/04-01/07-T-258 ENG ET WT

[40] ICC-01/04-01/07-T-258 ENG ET WT, p. 18-20

[41] ICC-01/04-01/07-T-258 ENG ET WT, p. 20-22

Registry had received a communication from the authorities of the DRC in which they deplored that they were not invited to the status conference.[42]

24. Following this status conference, the Chamber asked the VWU whether the Unit's assessment of the risk which the detained witnesses ran on account of their testimony before the Court had changed in light of the arguments and pleadings of Counsel for the detained witnesses.[43]

25. On 17 May 2011, the Registry submitted a new risk assessment ("Risk Assessment").[44] The VWU reiterated its previous analysis of the situation and stressed that its mandate is limited to the evaluation of risks to which witnesses might be exposed as a consequence of their status as witnesses before the Court or on account of the content of their testimony.[45]

26. On 18 May 2011, the Defence for Mr. Katanga asked permission to respond to the Risk Assessment. The Chamber granted permission and imposed a deadline on all parties and participants who wished to submit observations.[46]

27. On 20 May 2011, Counsel for the detained witnesses submitted observations on the Registry's Risk Assessment.[47] Counsel questioned the Registry's affirmation that the DRC has always fully cooperated with the Court and points out that the Office of the Prosecutor and the Registry should not consider themselves as partners of the DRC.[48] The witnesses also repeated that they face a real and greater risk because they have directly implicated President

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[42] ICC-01/04-01/07-T-258 ENG ET WT, p. 47
[43] Instructions sent via email on 12 May 2011 at 18h25
[44] "Observations complémentaires du Greffe au sujet de la 'requête tendant à obtenir présentation des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350 aux autorités néerlandaises aux fins d'asile'", 16 May 2011, ICC-01/04-01/07-2900-Conf
[45] ICC-01/04-01/07-2900-Conf, p. 4
[46] ICC-01/04-01/07-T- 262-CONF-ENG ET, p. 3
[47] "Observations des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350 en réponse aux Observations complémentaires no 2900 du Greffe", 20 May 2011, ICC-01/04-01/07-2923-Conf
[48] ICC-01/04-01/07-2923-Conf, para. 5

Kabila personally in their testimony.[49] They also stressed that the publicity given to their testimony does not provide them with any protection.[50]

28. On the same day, the Defence for Mr. Katanga filed its observations on the Registry's Risk Assessment.[51] The Defence agreed with the detained witnesses that their testimonies were much more specific and detailed than what was previously known about its potential content.[52] According to the Defence, the fact that the witnesses have directly implicated the DRC government in the crimes committed at Bogoro is a new development which has profound political and personal consequences.[53] The Defence concluded by arguing that the evaluation of the security risks faced by the detained witnesses should be done by the relevant Dutch authorities and not by the Court Registry.[54]

29. On 24 May 2011, the Chamber ordered the Registry to enter into contact with the authorities of the DRC in order to discuss which measures could be implemented to contain the risk level and, especially, which measures could be envisaged in case of a changed risk assessment.[55]

30. On 7 June, the Registry submitted a report on the outcome of its consultations with the DRC. The Registry informed the Chamber that it had met with the focal point of the DRC for cooperation matters as well as with the Director of the *Centre pénitentiaire et de réhabilitation de Kinshasa* ("CPRK

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[49] ICC-01/04-01/07-2923-Conf, para. 8
[50] ICC-01/04-01/07-2923-Conf, para 9
[51] "Defence Observations on 'Observations complémentaires du Greffe au sujet de la 'requête tendant à obtenir présentation des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350 aux autorités néerlandaises aux fins d'asile'", 20 May 201, ICC-01/04-01/07-2924-Conf
[52] ICC-01/04-01/07-2924-Conf, para. 20
[53] ICC-01/04-01/07-2924-Conf, para. 24-25
[54] ICC-01/04-01/07-2924-Conf, para. 36
[55] "Order to provide further assurances regarding the security of DRC-D02-P0236, DRC-D02-P-0228 and DRC-D02-P-0350", 24 May 2011, OCC-01/04-01/07-2952

Makala").[56] Apart from housing all three witnesses in the *"aile 11"* of the CPRK Makala, the following proposals for protective measures were made:

- *La possibilité pour la Cour de rendre régulièrement visite aux témoins détenus dans la prison afin d'assurer des conditions de leur détention ;*
- *La possibilité de faire renforcer les portes des cellules des témoins détenus aux frais de la Cour, notamment par l'ajout de verrous supplémentaires ;*
- *Le recrutement et la formation aux standards de détention carcérale de surveillants supplémentaires pour l'aile 11 aux frais de la Cour ;*
- *L'ajout de 1 à 2 caméras pour surveiller les parties communes de l'aile 11 aux frais de la Cour ;*
- *L'amélioration des installations sanitaires dans l'aile 11 : le Greffe observe toutefois qu'une telle mesure est difficilement assimilable à une mesure de protection.*[57]

The Congolese authorities also raised the possibility of transferring the three detained witnesses to the officers' quarters of another, recently renovated, detention centre.[58]

31. The Report stated that, although the security risks which are inherent to a prison environment could not be excluded, they were not greater because of the fact that the witnesses had given testimony and that *"le niveau objectif de risque demeure inchangé par les témoignages."*[59] The Registry reiterated that the publicity and international attention for the case of the detained witnesses reinforced their

[56] "Rapport du Greffe soumis en vertu de l'Ordonnance ICC-01/04-01/07-2952", 7 June 2011, ICC-01/04-01/07-2989 ("the Report")
[57] ICC-01/04-01/07-2989, para. 10
[58] ICC-01/04-01/07-2989, para. 11
[59] ICC-01/04-01/07-2989, para. 12

security, especially in light of the *"nouvel engagement pris par les autorités congolaises s'agissant de la sécurité des témoins détenus."*[60]

32. On 9 June 2011, the Chamber issued a decision on the request of the three detained witnesses to have access to the Dutch asylum procedure.[61]

33. On 14 June 2011, the three detained witnesses submitted their observations on the Report by the Registry.[62] They argue that the Chamber should be careful with any verbal assurances given by the Congolese authorities.[63] With regard to the proposed additional protective measures, the witnesses argue that *"l'intention réelle des autorités congolaises rend peu crédible les mesures de protection qu'elles proposent."*[64] As far as the proposed regular visits by representatives of the Registry are concerned, the witnesses argue that *"rien n'oblige, une fois les témoins de retour à la prison de Kinshasa, les autorités congolaises d'autoriser les visites des représentants de la Cour."*[65] It was also stated that the civilian status of the three witnesses posed a legal impediment to their transfer to the prison of Ndolo or Angenga.[66] The witnesses further submit that the proposed measures are inadequate because they do not protect them from attempts to harm them emanating from the highest authorities of the DRC.[67] They claim, in this regard, that 'l'aile 11' falls under the immediate authority of

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[60] ICC-01/04-01/07-2989, para. 12
[61] "Décision sur une requête en amicus curiae et sur la 'requête tendant à obtenir présentation des témoins DRC-D02-P-0350, DRC-D02-P0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d'asile' (articles 68 et 93-7 du Statut", 9 June 2011, ICC-01/04-01/07-3003
[62] "Observations des témoins DRC-D02-P0236, DRC-D02-P-0228 et DRC-D02-P-0350 sur l'Ordre de fournir des assurances supplémentaires concernant la sécurité de DRC-D02-P0236, DRC-D02-P-0228 and DRC-D02-P-0350", 14 June 2011, ICC-01/04-01/07-3017
[63] ICC-01/04-01/07-3017, para. 11
[64] ICC-01/04-01/07-3017, para. 14
[65] ICC-01/04-01/07-3017, para. 22
[66] ICC-01/04-01/07-3017, para. 28
[67] ICC-01/04-01/07-3017, para. 29

the special security adviser of the President of the DRC and is guarded by *"des militaires relevant de l'état-major des renseignements militaries (ex-DEMIAP)."*[68]

34. In a filing dated 15 June 2011, but notified one day later, the Democratic Republic of the Congo made a number of submissions regarding the security situation of the three detained witnesses.[69] The DRC reiterates the verbal assurances which were given to the Registry and denies that the DRC authorities have any intention to take reprisals against the detained witnesses.[70] The DRC claims that it "sont dans l'ignorance totale du contenu des dépositions faites par les quatre témoins, dans la mesure où la Cour avait adopté à cet égard des mesures strictes assurant leur confidentialité. »[71] With regard to the protective measures proposed in the Registry's report, the DRC maintains that a transfer to the Ndolo prison is possible.[72] It also states that it is ready to conclude a protocol with the Court about a monitoring mechanism and accepts the practical protective measures proposed by the Registry.[73]

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[68] ICC-01/04-01/07-3017, para. 30

[69] "Demande d'autorisation d'interjeter appel de la Décision sur une requête en amicus curiae et sur la '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'", 16 June 2011, ICC-01/04-01/07-3023. This filing contains a request for leave to appeal as well as comments on the observations of the three witnesses dated 14 June 2011.

[70] ICC-01/04-01/07-3023, para. 10 et 13

[71] ICC-01/04-01/07-3023, para. 14

[72] ICC-01/04-01/07-3023, para. 18

[73] ICC-01/04-01/07-3023, para. 19

II. ANALYSIS

A. Preliminary remarks

35. The present decision deals exclusively with the question whether it is possible to return the detained witnesses to the DRC whilst guaranteeing them an appropriate level of protection against any security risk resulting from the fact that they have testified before the Court, in accordance with article 68 of the Statute. The Chamber notes, in this regard, that there is a fundamental disagreement between the VWU and the three detained witnesses as regards their security situation. In conformity with the jurisprudence of the Appeals Chamber, in such cases the Chamber has to decide on the appropriate protective measures.[74]

36. As the Chamber held in its Order of 24 May 2011, the Court has an obligation to protect the security of witnesses who have appeared before it, but that, to the extent possible, it must do so without infringing on other obligations and responsibilities which are incumbent upon it.[75] The purpose of the Order was thus to explore, in consultation with the DRC, whether modalities could be agreed which would allow the Court to honour its obligation under article 93(7) of the Statute, while at the same time offering adequate protection to the detained witnesses.

37. The Chamber can therefore only regret that the authorities of the DRC have interpreted its efforts to find a balanced solution to a novel and unforeseeable situation involving seemingly conflicting legal requirements, as violative of its mandate.[76] It must be noted, in this respect, that, for reasons explained in its decision of 9 June 2011, the Chamber, as a judicial body, has an *obligation* to weigh competing rights and interests and that it would be violating

[74] ICC-01/04-01/07-3003, para. 65
[75] ICC-01/04-01/07-2952, para. 34
[76] ICC-01/04-01/07-3023, para. 24

its mandate only if it disregarded relevant and applicable norms. Having said this, the Chamber appreciates the DRC's efforts to come to a solution.

B. Risk

38. The risk alleged by the detained witnesses is not defined with great precision. They identify several potential scenarios in which the authorities of the DRC might harm them directly or indirectly. In summary, they claim to fear (a) that zealous pro-government militants, ostensibly not under the control of the DRC authorities, might harm them;[77] (b) that they might be summarily executed or disappeared, possibly under the guise of an attempted escape, poisoning, villainous crime or vengeance by alleged victims or militants loyal to the authorities; (c) that they may be the subject of a show trial and be sentenced to the death penalty.[78] All these alleged potential threats are said to emanate, directly or indirectly, from the authorities of the DRC. However, the Chamber considers that in practice it will be impossible to determine whether any attempt to harm the detained witnesses will be linked to their testimony or indeed be made at the initiative of the DRC authorities. If the witnesses are to be returned to the DRC, they must therefore be protected against every potential source of danger that may be linked to their testimony before the Court.

39. As regards the alleged intention of the DRC authorities to retaliate against the three witnesses for implicating the government in certain crimes committed in Ituri in the period 2002-2003, the Chamber points out that, contrary to what was alleged by the DRC, the Court did not adopt "des mesures strictes assurant la confidentialité" of their testimony. [79] In fact, the three witnesses testified in public. The DRC authorities are thus perfectly capable of knowing the exact content of the testimonies of the three witnesses.

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[77] ICC-01/04-01/07-2830-Conf, para. 17
[78] ICC-01/04-01/07-2830-Conf, para. 18 and 19
[79] ICC-01/04-01/07-3023, para. 14

40. However, independent of whether the DRC authorities are aware of the content of the testimony of the three detained witnesses, the Chamber notes that the Congolese Minister of Justice and Human Rights, His Excellency LUZOLO Bambi Lessa, has solemnly and personally committed himself, on behalf of the highest authorities of the Congolese state, that no harm will befall the three witnesses if they are returned to the DRC.[80] Although such diplomatic assurances cannot substitute an independent risk-analysis by the Court under article 68 of the Statute, they must incontestably be treated with the greatest respect and must be presumed to have been made in good faith. The Chamber observes, in this regard, that the above-mentioned assurances are given within the general legal framework for cooperation between the Court and the DRC under Part IX of the Statute. As was correctly pointed out by the DRC, this framework is based on mutual trust and on the ultimate supervision and control of the Assembly of States Parties.[81] The formal assurances given by the DRC authorities therefore carry great weight, as they commit the DRC not only vis-à-vis the Court but also to the Assembly of States Parties.

C. Protective measures

41. As the Chamber observed, even if the DRC authorities have no intention of harming the detained witnesses, it is necessary to protect the witnesses against all potential sources of danger that may be related to the fact that they testified before the Court. The Chamber therefore considers that the following protective measures are in order until the end of their respective trials in the DRC:

- The witnesses shall be detained in a detention centre which, in terms of infrastructure and population, is most conducive to offering maximum protection. The VWU is instructed to consult with the DRC authorities to

[80] ICC-01/04-01/07-3023, para. 10 and 26
[81] ICC-01/04-01/07-3023, para. 15

identify whether this is the CPRK Kinshasa, the Ndolo prison, or any other detention centre where the witnesses can be legally detained.

- If the witnesses are transported or transferred to another location, the VWU must be informed in advance.

- The detained witnesses shall be held under conditions which protect them from possible aggression by co-detainees. However, this should not lead to their permanent isolation.

- There shall be permanent surveillance of the security of the detained witnesses by guards who are specifically selected and trained for this purpose in close consultation between the Congolese prison authorities and the VWU. These guards must be reachable at all times by the VWU.

- A member of the VWU must be able to visit each detained witness twice per week and must be allowed to speak with them confidentially.

- When the detained witnesses are to be tried, an observer of the Court must be allowed to attend the proceedings. The Registry must thus be informed in advance of the date and location of any legal proceedings involving one of the detained witnesses.

Once the trial of one of the detained witnesses has ended, the VWU shall evaluate his security situation again and determine on the appropriate protective measures, if any.

42. The Chamber instructs the Registry to dispatch a request under article 93(1)(j) of the Statute to the DRC as soon as possible and to report back when the protective measures are ready to be put in place. The Chamber considers that if the DRC complies with this request for cooperation and the measures are operational, the Court has fulfilled its obligation under article 68 of the Statute to

protect the detained witnesses against any harm that may result from the fact that they have testified before it. In principle, therefore, the detained witnesses can be returned as soon as the VWU confirms that the DRC has accepted to cooperate with the Court in this matter and all necessary preparation has been accomplished. However, the Chamber reminds the DRC that even if the above measures are in place, the Court will only be able to return the detained witnesses if their request for asylum has been rejected by the Dutch authorities.[82]

D. National criminal proceedings

43. The Chamber has taken note of the DRC's observations concerning the fact that the current situation is hindering ongoing legal proceedings against the three witnesses in the DRC.[83] In this regard, if the DRC considers that the detained witnesses, while remaining in the custody of the Court, are able to participate from the detention centre in any procedural step of the ongoing national proceedings, the Chamber invites the Congolese authorities to contact the Registry in order to explore any technical or logistical support that can reasonably be provided to facilitate such participation without violating their due process rights. If the witnesses need to communicate with their Congolese lawyers, the Court shall also facilitate this.

[82] ICC-01/04-01/07-3003, para. 83
[83] ICC-01/04-01/07-3023, para. 27

FOR THESE REASONS,

THE CHAMBER,

TAKES NOTE of the formal assurances provided by the DRC that no harm will be done to the detained witnesses on account of the fact that they have testified before the Court;

ORDERS the Registry to urgently dispatch a cooperation request to the DRC in order to put in place the protective measures detailed in paragraph 41 and to report back before 5 July 2011, indicating if and how soon the measures will be ready to be put in place; and

INVITES the DRC to enter into contact with the Registry in order to arrange the provision of technical or logistical assistance, as provided in paragraph 43.

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

Judge Bruno Cotte
Presiding Judge

Judge Fatoumata Dembele Diarra

Judge Christine Van den Wyngaert

Dated this 22 June 2011

At The Hague, The Netherlands