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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:

Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr Éric MacDonald, Senior Trial Lawyer

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 Victims
Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparations

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

Office of Public Counsel for the Defence

Amicus Curiae

REGISTRY

Registrar
Mr Herman von Hebel
Mr Marc Dubuisson

Counsel Support Section

Victims and Witnesses Unit

Other
Mr Ghislain Mabanga Monga Mabanga

Victims Participation and Reparations Section

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

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[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