Dissenting opinion of Judge Christine Van den Wyngaert

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

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

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

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

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

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

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

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

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

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

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

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[9] Majority Decision, para. 25.

[10] "Decision on an *Amicus Curiae* application and on the '*Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d'asile*' (articles 68 and 93(7) of the Statute)", 9 June 2011, ICC-01/04-01/07-3003-tENG.

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

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

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

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

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

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

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

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

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

[19] Majority Decision, para. 35.

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

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

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

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

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

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

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

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

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

[25] ICCPR, Article 9(4).

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

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

[28] ICCPR, Article 9(4)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

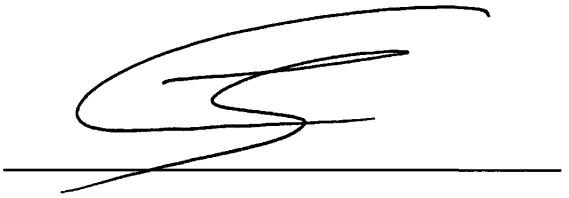
23. First, it is undisputed that the Detained Witnesses are already present on the territory of the Host State. Second, the Detained Witnesses are presently under the jurisdiction of the Host State, as is evidenced by the fact that its courts have been seized of, and clearly consider themselves competent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

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

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

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

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



Judge Christine Van den Wyngaert