

Dissenting Opinion of Judge Sang-Hyun Song

1. With the decision on the present appeal,¹ the majority of the Appeals Chamber considers the Detained Witnesses' appeal against the Impugned Decision to be inadmissible. I respectfully dissent from this decision for the reasons that follow.
2. In the Impugned Decision, the Trial Chamber held that it was not competent to review the legality of the detention of the Detained Witnesses or to release them from detention and accordingly dismissed their Request for Release as inadmissible.² The direct consequence of the Impugned Decision is that the Detained Witnesses remain in the Court's detention unit, where, I would note, they have been for more than two and a half years since the conclusion of their testimony before the Court.³ The second consequence of the Impugned Decision is that the Detained Witnesses have not been able and will not be able to challenge the lawfulness of their ongoing detention before *this Court*, unless the Appeals Chamber remedies the situation.
3. I consider that this raises important concerns regarding the internationally recognised human right to liberty and, in particular, the related right to have the lawfulness of one's detention reviewed. Article 9 of the International Covenant on Civil and Political Rights⁴ (hereinafter: "ICCPR") provides in relevant part:

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

[...]

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without

¹ "Decision on the admissibility of the appeal against the 'Decision on the application for the interim release of detained Witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350'".

² Impugned Decision, para. 36.

³ See Impugned Decision, para. 4, stating that the Detained Witnesses concluded their testimony on 3 May 2011.

⁴ 16 December 1966, 999 United Nations Treaty Series 14668.

shs

delay on the lawfulness of his detention and order his release if the detention is not lawful.

4. I note that, in finding the Request for Release inadmissible, the Trial Chamber distinguished between the “detention” and the “custody” of the Detained Witnesses. In the Trial Chamber’s view, the *detention* of the Detained Witnesses is based solely on a detention order from the Democratic Republic of the Congo (hereinafter: “DRC”);⁵ article 93 (7) of the Statute does not authorise it to incarcerate already detained witnesses or to release a detained person temporarily transferred to the Court.⁶ Accordingly, in the Trial Chamber’s view, the Court is only maintaining the *custody* of the Detained Witnesses. Based on this distinction, the Trial Chamber considered that responsibility for the Detained Witnesses’ human right to liberty and judicial review of their detention “lie[s] within the purview of a Congolese judicial organ” and, in the Trial Chamber’s view, the Detained Witnesses’ “may still apply” for review of their detention to these Congolese authorities.⁷

5. Thus, the Trial Chamber premised its decision to decline a review of the legality of the Detained Witnesses’ detention on the finding that the Court was not responsible for their detention. I cannot agree with this analysis.

6. I recall that in the Decision of 9 June 2011, the Trial Chamber decided to delay the return of the Detained Witnesses to the DRC on the following basis:

70. As provided in article 21(3) of the Statute, the Chamber must apply all of the relevant statutory or regulatory provisions in such a way as to ensure full exercise of the right to effective remedy, which is clearly derived from internationally recognised human rights.

[...]

72. [...] At this juncture, the Chamber considers that it must settle only the issue of whether an *immediate* application of article 93(7) of the Statute would not constitute a violation of the detained witnesses’ rights to apply for asylum.

73. As matters stand, the Chamber is unable to apply article 93(7) of the Statute in conditions which are consistent with internationally recognised human rights, as required by article 21(3) of the Statute. If the witnesses were to be returned to

⁵ Impugned Decision, para. 26.

⁶ Impugned Decision, para. 26.

⁷ Impugned Decision, para. 34.

Shs

the DRC immediately, it would become impossible for them to exercise their right to apply for asylum and they would be deprived of the fundamental right to effective remedy. [...]

[...]

79. [...] [T]he Chamber decides at this point to delay the return of the three detained witnesses, insofar as the issue of their protection within the meaning of article 68 of the Statute has not yet been resolved, and as their return “without delay” would breach internationally recognised human rights. [...]

80. For the time being, the witnesses under a detention order issued by the Congolese authorities shall remain detained in the custody of the Court pursuant to article 93(7) of the Statute and rule 192 of the Rules. [...] ⁸

7. Thus, in sum, the Trial Chamber decided not to immediately implement the second sentence of article 93 (7) (b) of the Statute (“the Court shall return the person without delay to the requested State”) due to concerns that this implementation would violate: 1) the Court’s other obligations under article 68 of the Statute and 2) the Detained Witnesses’ internationally recognised human rights to apply for asylum and to an effective remedy, as well as the principle of *non-refoulement*.⁹ The Trial Chamber then considered different scenarios in which one or the other of the above concerns were resolved, including the following scenario:

The question remains as to what should be decided in the event that the Court considers that the protective measures are satisfactory pursuant to article 68 of the Statute, but the decision of the Dutch authorities on asylum or *non-refoulement* is still pending. Once satisfied of the proposed protective measures, there would in principle be no reason for the Court to delay the witnesses’ return to the DRC any further. However, the fact that an asylum procedure is still ongoing does not in and of itself permit the Court to order a person’s return pursuant to article 93(7) of the Statute. Neither that article nor the Rules contemplate this unprecedented situation. Hence, a solution must be sought as soon as possible in consultations between the Court, the host State and the DRC in order determine whether these witnesses should remain in detention and, if so, in whose custody. During this consultation procedure, the witnesses will remain in the Court’s custody, in accordance with article 93(7) of the Statute. In any event, since their testimony is now complete and since the three asylum applicants are in detention, it is imperative that the Dutch authorities examine the applications as soon as possible, since the processing of their applications must in no way cause any unreasonable delay to their detention under article

⁸ Decision of 9 June 2011, paras 70, 72-73, 79-80.

⁹ Decision of 9 June 2011, paras 67-69.

Shs

93(7) of the Statute. For this last reason, the Chamber must emphasise that the Court cannot contemplate holding these witnesses in custody indefinitely.¹⁰

8. The above scenario, i.e. that the Trial Chamber would consider that the protective measures under article 68 of the Statute were satisfactory, but the asylum request would remain pending, is in fact what subsequently occurred.

9. In the Decision of 24 August 2011,¹¹ upon receipt of certain guarantees from the DRC, the Trial Chamber held that “[f]rom the Chamber’s point of view, the Court has fulfilled its obligations under article 68 of the Statute and there are no further grounds to delay the return of the three detained witnesses to the DRC”.¹² However, the Trial Chamber went on to hold that “for the reasons explained in its decision of 9 July 2011, so long as the request for asylum is still pending before the Dutch authorities, the Court cannot request that the Host State facilitate their return to the DRC. The fact that the asylum request is still pending makes their return temporarily impossible from a legal point of view”.¹³

10. Regarding the question of whether the Detained Witnesses should “remain detained pending the final outcome of their request for asylum in The Netherlands and, if so, who should assume responsibility for detaining them”, the Trial Chamber recalled its holding in the Decision of 9 June 2011 that “the Statute does not provide an answer to this question and ‘a solution must be sought as soon as possible in consultations between the Court, the host State and the DRC in order to determine whether these witnesses should remain in detention and, if so, in whose custody’”.¹⁴ The Trial Chamber therefore ordered the Registry to commence consultations, stating that “given that the obligation of the Court to detain the three witnesses has now, in principle, come to an end, the Chamber is of the view that a solution must be found urgently”.¹⁵

11. In light of the above, I am of the view that the Detained Witnesses are currently in detention as a result of a decision of this Court. While it is true that a witness who

¹⁰ Decision of 9 June 2011, para. 85.

¹¹ “Decision on the Security Situation of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350”, ICC-01/04-01/07-3128.

¹² Decision of 24 August 2011, para. 14.

¹³ Decision of 24 August 2011, para. 15, citing Decision of 9 June 2011, paras 64, 73.

¹⁴ Decision of 24 August 2011, para. 16, citing Decision of 9 June 2011, para. 85.

¹⁵ Decision of 24 August 2011, para. 17.

shs

is transferred to the Court pursuant to article 93 (7) of the Statute continues to be detained based on the relevant State's detention orders, which the Court cannot review, it cannot be said that the Detained Witnesses' detention is currently based on detention orders issued by the DRC. In this respect, I note that the Trial Chamber's analysis in the Decision of 9 June 2011 separates the two sentences of article 93 (7) (b) of the Statute into two distinct obligations of the Court, which, in its view, means that one obligation (the obligation to return the person without delay) can be suspended while the other (the obligation to maintain the person in custody) remains in effect. This notion of "severability" is not persuasive, particularly in light of the DRC's repeated objections to what has transpired since the Decision of 9 June 2011. In my view, the Decision of 9 June 2011 effectively suspended the entirety of the cooperation agreement concluded under article 93 (7) of the Statute with the DRC in respect of the Detained Witnesses and that, from that point on, the continued detention of the Detained Witnesses was in fact attributable to the Court.

12. I would also note the Trial Chamber's finding in paragraph 80 of the Decision of 9 June 2011 that the witnesses "**shall remain detained** in the custody of the Court" (emphasis added),¹⁶ as well as its finding (made in anticipation of the scenario that eventually came to pass) that "[d]uring this consultation procedure, the witnesses will remain in the Court's custody [...]".¹⁷ In its Decision of 24 August 2011, the Trial Chamber then recalled these findings and continued the detention of the Detained Witnesses on the basis of this prior reasoning.

13. In sum, I consider that, since the Decision of 9 June 2011, the Court is responsible for the detention of the Detained Witnesses and the Trial Chamber did, in fact, issue a judicial order of detention, one which was based on the Trial Chamber's independent determination that they should remain in detention during the consultation process, not on the DRC detention order. Accordingly, since the Witnesses are detained based on an order from this Court, it is the Court's responsibility to ensure their human right to judicial review of the lawfulness of their detention.

¹⁶ *Supra* para. 6.

¹⁷ Decision of 9 June 2011, para. 85.

14. Given that, in my view, the Detained Witnesses' current detention is attributable to the Court, I consider that the Trial Chamber's determination that it did not have jurisdiction to consider whether the detention of the Detained Witnesses was or had become unlawful was in error. This violates the Detained Witnesses' human right to judicial review of their detention, which must be remedied.

15. I recognise that the existence of an obligation to correct an ongoing human rights violation caused by the Impugned Decision does not necessarily answer the question of whether the Appeals Chamber has jurisdiction under article 82 (1) of the Statute to consider the appeal. The situation is unprecedented and seemingly falls outside of the Statute and Rules, as has been repeatedly stated by the Trial Chamber itself.¹⁸

16. Nevertheless, I consider that the appeal brought by the Detained Witnesses can and, in the circumstances of the case, must be, treated as an appeal under article 82 (1) (a) of the Statute against a "decision with respect to jurisdiction" because the Trial Chamber found that it lacked jurisdiction to review the Detained Witnesses' detention. Such a determination may be perceived to conflict with the Appeals Chamber's own holding in the *Lubanga* OA 4 Judgment, in which it held that Mr Lubanga's claim brought under article 21 (3) of the Statute (originally argued as an abuse of process) did not fall under article 82 (1) (a) of the Statute, characterising it instead as a "*sui generis* application".¹⁹ However, in my view, the *Lubanga* OA 4 Judgment can be distinguished because, in the present situation, the Trial Chamber held that it could not consider the legality of the detention of the Detained Witnesses, whereas, in the *Lubanga* OA 4 Judgment, the Trial Chamber did rule on Mr Lubanga's request that it relinquish jurisdiction due to alleged human rights violations. Thus, unlike in the *Lubanga* OA 4 Judgment, what is at issue is truly a question of the jurisdiction of the Court, and more specifically of the Trial Chamber to review the legality of the ongoing detention of the Detained Witnesses. In other words, the Impugned Decision limits the scope of the jurisdiction of the Court in respect of its human rights obligations to persons detained by a Court-issued judicial order in circumstances that were arguably not originally provided for in the Statute.

¹⁸ See, for example, Decision of 9 June 2011, para. 85, stating that "[n]either [the Statute] nor the Rules contemplate this unprecedented situation".

¹⁹ See *Lubanga* OA 4 Judgment, para. 24.

Further, in the *Lubanga* OA 4 Judgment, the Trial Chamber found that the alleged human rights abuses could not be attributed to the Prosecutor, a finding that the Appeals Chamber affirmed.²⁰ This is inapposite to the situation of the Detained Witnesses, whose human right to judicial review, in my view, was violated and continues to be violated by the Court itself in the Impugned Decision.

17. In my view, a narrow understanding of article 82 (1) (a) of the Statute would, in the circumstances of this case, be irreconcilable with article 21 (3) of the Statute, according to which the Court has to apply and interpret the Statute consistently with internationally recognised human rights. This is because if the appeal were found to be inadmissible, it would become impossible for the Detained Witnesses to exercise their right to judicial review of the legality of their detention. It would be an especially peculiar result for a court such as the ICC, which is meant to provide a forum to address the most serious human rights' violations, not to be able to address and remedy human rights violations for which it itself is responsible.

18. For the same reason, I consider that, in the specific circumstances of the present appeal and in order to remedy the ongoing violation of the Detained Witnesses' human right to judicial review of their detention, article 82 (1) of the Statute should be interpreted to include the Detained Witnesses as a "party". In this context, I note that pursuant to article 82 (1) (a) of the Statute, *States* that challenge the admissibility of a case may then also appeal "decisions with respect to [...] admissibility".²¹ This clearly demonstrates that the term "party" within the meaning of article 82 (1) of the Statute is not restricted to the parties in the "classical" sense, i.e. the Prosecutor and the Defence.

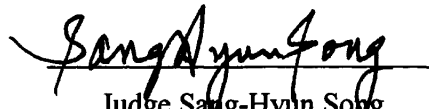
19. The conclusion that the appeal is admissible on the basis that the Impugned Decision created a human rights violation by denying the Detained Witnesses the right to judicial review of the lawfulness of their detention, which is attributable to the

²⁰ See *Lubanga* OA 4 Judgment, para. 42.

²¹ See *Prosecutor v. Uhuru Muigai Kenyatta et al.*, "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", 30 August 2011, ICC-01/09-02/11-274 (OA); *Prosecutor v. William Samoei Ruto et al.*, "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", 30 August 2011, ICC-01/09-01/11-307 (OA).

Court, necessarily impacts on the merits of the appeal. As stated above, it is my view that the Trial Chamber committed an error when finding that the Court was not responsible, or at least co-responsible, for the detention of the Detained Witnesses. This error materially affected the Impugned Decision because it was the basis for the Trial Chamber's conclusion that it was not competent to consider the Request for Release, specifically to review the lawfulness of the Detained Witnesses' detention.

20. I would therefore find the appeal admissible, reverse the Impugned Decision and remand the issue back to the Trial Chamber, with the specific instruction for the Trial Chamber to decide on the lawfulness of the detention of the Detained Witnesses.



Judge Sang-Hyun Song

Dated this 20th day of January 2014

At The Hague, The Netherlands