



Original: English

No.: ICC-01/04-01/07

Date: 24 May 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 CONGO**

**IN THE CASE OF**

***THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

**Public  
URGENT**

**Order to provide further assurances regarding the security of  
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:

**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**

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**Registrar**

Ms Silvana Arbia

**Counsel Support Section**

**Victims and Witnesses Unit**

Ms Maria-Luisa Martinod-Jacome

**Detention Section**

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court”), 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 Congo (“DRC”) and requested the Chamber to order the Registrar to make arrangements for their transfer to the Court.<sup>1</sup> The Defence informed the Chamber that the four witnesses had agreed to testify but that they wished to be “reassured that appropriate closed sessions will take place when dealing with what they identify are sensitive matters, that is to say, evidence concerning the participation in events of the elements close to and including President Kabila.”<sup>2</sup>

2. The Chamber granted the request for cooperation on 7 January 2011.<sup>3</sup> With regard to the security concerns expressed by the Defence on behalf of the four witnesses, the Chamber noted the vulnerable position in which the witnesses found themselves and asked the Victims and Witnesses Unit (“VWU”) to be closely involved in the transfer process and to propose an adequate set of protective measures.<sup>4</sup>

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<sup>1</sup> “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

<sup>2</sup> ICC-01/04-01/07-2585-Conf-Exp-Corr, para. 18

<sup>3</sup> “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

<sup>4</sup> ICC-01/04-01/07-2640-Conf-Exp, paras. 11-12

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.<sup>5</sup> Although the Defence did not expressly link the withdrawal of the two witnesses exclusively to concerns about their security, the Defence did once again raise the issue that the witnesses feared “retaliation from the DRC authorities who will necessarily have to be informed of their testimony in The Hague.”<sup>6</sup>

4. The Chamber granted this request on 25 January 2011 and ordered the Registry to transmit the amended list of witnesses to the DRC authorities.<sup>7</sup>

5. On 22 February 2011, the Registry submitted a report on the execution of the two abovementioned decisions.<sup>8</sup> In this report, it is mentioned that the following issues were addressed during a meeting held on 16 February 2011 between the Registry and the four detained witnesses:<sup>9</sup> “Reasons for return to the DRC after testimony; [...] The possibility of raising before the Court their detention in the DRC and the fact that they have been detained for over five years without trial; [...] Their personal protection in the Prison Central prior to and after their transfer to the Hague; [...] The protection of their family members prior to and after their transfer to The Hague; [...] Whether the DRC authorities will have access to the transcripts of the testimonies.”<sup>10</sup> In relation to the witnesses’ concerns about their security upon return to the DRC, the Registry undertook to raise this issue with the DRC authorities and to conduct an impact

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<sup>5</sup> “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 2011, ICC-01/04-01/07-2659-Conf-Exp

<sup>6</sup> ICC-01/04-01/07-2659-Conf-Exp, para. 4

<sup>7</sup> “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

<sup>8</sup> “Registry’s report on the execution of Decisions 2640 and 2660”, 22 February 2011, ICC-01/04-01/07-2724-Conf-Exp

<sup>9</sup> ICC-01/04-01/07-2724-Conf-Exp-Anx5

<sup>10</sup> ICC-01/04-01/07-2724-Conf-Exp, para. 8

study on the protective measures to be applied.<sup>11</sup> There is also mention of the wish of the DRC authorities that the testimony of the detained witnesses be given in closed session “for reasons of national security, including the good order in Ituri.”<sup>12</sup>

6. On 1 March 2011, the Registry appointed Maître Ghislain Mabanga Monga Mabanga to advise the four detained witnesses as to their rights and obligations under Article 93(2) and Rule 74.

7. On 10 March 2011, the Registry transmitted the observations of the DRC authorities in relation with the implementation of Rule 74.<sup>13</sup> 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.<sup>14</sup>

8. 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.<sup>15</sup>

9. 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

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<sup>11</sup> ICC-01/04-01/07-2724-Conf-Exp-Anx5

<sup>12</sup> ICC-01/04-01/07-2724-Conf-Exp-Anx5

<sup>13</sup> “Registry’s transmission of observations received from the DRC authorities”, 10 March 2011, ICC-01/04-01/07-2767-Conf-Exp

<sup>14</sup> ICC-01/04-01/07-2767-Conf-Exp,-Anx1, para. 12

<sup>15</sup> “Disclosure of Additional Information on the Defence Witnesses”, 14 March 2011, ICC-01/04-01/07-2770-Conf

the UNSC Committee on one of the witnesses in accordance with Security Council resolutions 1596 (2005) and 1649 (2005).<sup>16</sup>

10. On 21 March 2011, the Katanga Defence informed the Chamber that, contrary to what they had initially asked, the three witnesses no longer requested any procedural protective measures and wished to testify publicly.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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.”<sup>20</sup>

11. 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.<sup>21</sup>

12. On 25 March 2011, the VWU filed its report.<sup>22</sup> The VWU stated that it did not object to the witnesses’ intention to testify publicly.<sup>23</sup> The Unit also explained how the witnesses’ status as detainees affected its ability to apply the standard

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<sup>16</sup> ICC-01/04-01/07-2809-Conf-Anx3

<sup>17</sup> “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

<sup>18</sup> ICC-01/04-01/07-2790-Conf, para. 3-4

<sup>19</sup> ICC-01/04-01/07-2790-Conf, para. 5

<sup>20</sup> ICC-01/04-01/07-2790-Conf, para 6

<sup>21</sup> Instructions sent via email on 22 March 2011, at 12h02

<sup>22</sup> “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

<sup>23</sup> ICC-01/04-01/07-2799-Conf, para. 5

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 Democratic Republic of Congo (the “DRC”) authorities’ management of a national detention center.”<sup>24</sup> However, the VWU indicated that it would maintain regular contacts with the witnesses during a significant period of time 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.<sup>25</sup>

13. On 27 March 2011, the three remaining witnesses were transferred to The Hague.<sup>26</sup> They all completed their testimony between 30 March 2011 and 3 May 2011.

14. On 29 March 2011, witness DRC-D02-P-236 (“P-236”) informed the Chamber, through Counsel appointed to assist the three witnesses in matters concerning their transfer and issues of self-incrimination, that he was still concerned about his personal security when he would be returned to the DRC after finishing his testimony.<sup>27</sup> The witness pointed out that the envisaged protective measure could only protect his family, but not himself.<sup>28</sup> Furthermore, the witness asked the Court to verify that the DRC would not persecute his family members instead of him.<sup>29</sup>

15. 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

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<sup>24</sup> ICC-01/04-01/07-2799-Conf, para. 3

<sup>25</sup> ICC-01/04-01/07-2799-Conf, para. 4

<sup>26</sup> “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

<sup>27</sup> “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

<sup>28</sup> ICC-01/04-01/07-2808-Conf, para. 8

<sup>29</sup> ICC-01/04-01/07-2808-Conf, para. 18

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.<sup>30</sup>

16. On 1 April 2011, witness DRC-D02-P-0228 (“P-228”) made a separate request for special protective measures.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup> 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.

17. 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 employed. It also asked the Counsel to provide more specific information about the nature of the protective measures which were solicited from the Chamber.<sup>34</sup>

18. On 11 April 2011, Counsel for the detained witnesses informed the Chamber via email that P-228 has asked the Chamber to present the witness to the authorities of the Netherlands in order to allow him to make a request for

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<sup>30</sup> ICC-01/04-01/07-T-242-CONF-ENG, p. 20-23

<sup>31</sup> “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

<sup>32</sup> ICC-01/04-01/07-2812-Conf, para. 6

<sup>33</sup> ICC-01/04-01/07-2812-Conf, para 8

<sup>34</sup> Instructions sent by email, on 5 April 2011 at 17h04



asylum.<sup>35</sup> 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.<sup>36</sup>

19. On 12 April 2011, Counsel for the detained witnesses filed an additional request for protective measures, this time for all three detained witnesses (“Request”).<sup>37</sup> The request explained why the three witnesses’ fear for retaliation by the DRC was well-founded and argued that the protective measures proposed by the VWU were inadequate to offer genuine protection. The request asked that all three witnesses be presented to the Dutch authorities in order to file a request for asylum and asked the Chamber to hear them *ex parte* in this regard.<sup>38</sup>

20. In response to the Chamber’s instructions, the VWU filed its observations on the Request (“Observations”).<sup>39</sup> The VWU restricted itself to pointing out that, to the VWU’s knowledge, the DRC authorities has 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.<sup>40</sup> 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.

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<sup>35</sup> Email communication received on 11 April 2011 at 12h44

<sup>36</sup> Email communication received on 11 April 2011 at 12h44

<sup>37</sup> “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

<sup>38</sup> ICC-01/04-01/07-2830-Conf, para. 26

<sup>39</sup> “Observations de l’unité d’aide aux victimes 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

<sup>40</sup> ICC-01/04-01/07-2834-Conf-Anx

21. On 15 April 2011, both the Prosecution and the Defence for Mr. Katanga filed their observations on the Request.<sup>41</sup>

22. On 21 April 2011, the Registry filed its observations regarding the legal issues raised by the Request.<sup>42</sup> With regard to the risk assessment, the Registry referred back to the Observations of the VWU and concluded that there was no question of discrimination in terms of protective measures between detained and non-detained witnesses. The Registry pointed out that it had taken all 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.<sup>43</sup>

23. 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.<sup>44</sup> The 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.<sup>45</sup>

24. On 12 May 2011, the Chamber held a public status conference during which the situation of the three detained witnesses was discussed at length.<sup>46</sup>

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<sup>41</sup> "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

<sup>42</sup> "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

<sup>43</sup> ICC-01/04-01/07-2849-Conf, para. 9

<sup>44</sup> "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

<sup>45</sup> ICC-01/04-01/07-2861-Conf, paras 11-13

<sup>46</sup> ICC-01/04-01/07-T-258 ENG ET WT

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.”<sup>47</sup> 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.<sup>48</sup>

25. Following this status conference, the Chamber asked the VWU whether the Unit’s assessment regarding 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 the Counsel for the detained witnesses.<sup>49</sup>

26. On 17 May 2011, the Registry submitted a new risk assessment (“Risk Assessment”).<sup>50</sup> 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.<sup>51</sup>

27. 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.<sup>52</sup>

28. On 20 May 2011, Counsel for the detained witnesses submitted observations on the Registry’s Risk Assessment.<sup>53</sup> The Counsel questions the

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<sup>47</sup> ICC-01/04-01/07-T-258 ENG ET WT, p. 18-20

<sup>48</sup> ICC-01/04-01/07-T-258 ENG ET WT, p. 20-22

<sup>49</sup> Instructions sent via email on 12 May 2011 at 18h25

<sup>50</sup> “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

<sup>51</sup> ICC-01/04-01/07-2900-Conf, p. 4

<sup>52</sup> ICC-01/04-01/07-T- 262-CONF-ENG ET, p. 3

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.<sup>54</sup> The witnesses also repeat that they face a real and greater risk because they have directly implicated President Kabila personally in their testimony.<sup>55</sup> They also stress that the publicity given to their testimony does not provide them with any protection.<sup>56</sup>

29. On the same day, the Defence for Mr. Katanga also filed its observations on the Registry's Risk Assessment.<sup>57</sup> The Defence argues that the Registry has not based its risk evaluation on any investigation.<sup>58</sup> It also argues that the potential risk must be viewed "not merely in the light of the personal experiences of the witnesses, but in the context of the situation generally at Makala prison."<sup>59</sup> The Defence agrees with the detained witnesses that their testimonies were much more specific and detailed than what was previously known about the content.<sup>60</sup> 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 and has much more profound political and personal consequences.<sup>61</sup> The Defence concludes 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.<sup>62</sup>

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<sup>53</sup> "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

<sup>54</sup> ICC-01/04-01/07-2923-Conf, para. 5

<sup>55</sup> ICC-01/04-01/07-2923-Conf, para. 8

<sup>56</sup> ICC-01/04-01/07-2923-Conf, para 9

<sup>57</sup> "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 2011, ICC-01/04-01/07-2924-Conf

<sup>58</sup> ICC-01/04-01/07-2924-Conf, para. 16

<sup>59</sup> ICC-01/04-01/07-2924-Conf, para. 17

<sup>60</sup> ICC-01/04-01/07-2924-Conf, para. 20

<sup>61</sup> ICC-01/04-01/07-2924-Conf, para. 24-25

<sup>62</sup> ICC-01/04-01/07-2924-Conf, para. 36

## II. ANALYSIS

30. The Chamber has taken note of all the submissions above, in particular the Observations and the Risk Assessment of the Registry regarding the risk that the three detained witnesses run on account of their testimony before the Court.

31. The Chamber considers that it is a matter of great importance that risk assessments be carried out objectively and in accordance with the same criteria for all witnesses who appear before the Court.<sup>63</sup> The VWU's role is to be neutral and impartial in this regard. The fact that the present witnesses are detained by the DRC authorities and that their fear emanates from an alleged threat posed by those authorities, should not influence the Registry in its assessment of whether the individuals need to be protected.

32. The Chamber notes, in this regard, that the VWU considers that the physical security of the witnesses is not exposed to an *increased* risk because of the fact that they have testified before the Court.<sup>64</sup> Although the VWU does not explicitly confirm that the three witnesses are currently under *no* risk at all, the only conclusion which the Chamber can draw from the Risk Assessment is that the VWU is satisfied that, at present, there is no need for the Court to protect the detained witnesses. At the same time, the VWU considers that there is a need to monitor the situation by maintaining regular contacts with the detained witnesses once they are returned, in order to ensure that the fact that they have testified before the Chamber does not expose them to an increased risk for their security.<sup>65</sup> The Chamber concludes from this that the VWU considers that, although the risk is low at the moment, there is a possibility that it might increase

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<sup>63</sup> Appeals Chamber "Judgment on the appeal of the Prosecutor against the 'Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules' of Pre-Trial Chamber I", 26 November 2008, ICC-01/04-01/07-776, para. 92

<sup>64</sup> ICC-01/04-01/07-2900-Conf, para. 8

<sup>65</sup> ICC-01/04-01/07-2900-Conf, para. 9

in the future and for this reason it intends to put in place a monitoring mechanism.

33. The Chamber notes, in this regard, that once the witnesses are returned, the possibilities for the Registry to take protective measures, in case of increased risk, are severely limited. The Chamber further observes that putting in place any sort of effective protective measures at the Kinshasa prison will inevitably require the cooperation of the DRC, in accordance with article 93(1)(j). The Chamber therefore considers that it would be appropriate for the VWU to contact the authorities of the DRC in order to discuss, first, which measures, besides monitoring, will be implemented in order to contain the level of risk which the detained witnesses may face because of their testimony before the Court. Second, the VWU shall explore which protective measures can be put in place in collaboration with the DRC, in the event that such measures are deemed necessary by the VWU in light of a changed risk assessment. The objective for the VWU, which is the Court's competent organ in this regard,<sup>66</sup> is to be fully satisfied that the available measures are adequate to ensure an appropriate level of protection for the detained witnesses, in accordance with the relevant standards under articles 43(6) and 68. As soon as the VWU has concluded its discussions with the DRC, it shall report back to the Chamber and the parties and clearly indicate which specific measures can be put in place and whether they suffice to guarantee an adequate level of protection. Considering the urgency of this matter, the Chamber is of the view that this process should be finalised within 15 days.

34. The Chamber is aware that the implementation of an adequate protection mechanism for the three detained witnesses is delaying their return. However,

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<sup>66</sup> Article 43(6) of the Statute and Appeals Chamber "Judgment on the appeal of the Prosecutor against the 'Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules' of Pre-Trial Chamber I", 26 November 2008, ICC-01/04-01/07-776, para. 91-2

the Court has an obligation to ensure that, in abiding by its obligations under article 93(7), it fully respects its other responsibilities under the Statute. These include the Court's responsibility to protect the security of witnesses who have appeared before it. To the extent possible, article 93(7) should be complied with in such a way that it does not enter into conflict with other competing obligations weighing upon the Court.

35. Without considering the Registry's suggestion about the applicability *mutatis mutandis* of article 97 of the Statute to the present situation, the Chamber is confident that the Congolese authorities are aware that the implementation of the Court's obligations may on occasion raise unforeseen practical or legal obstacles, which are inevitably part of the dynamics of judicial proceedings.

36. As regards the request of the detained witnesses to be presented to the Dutch authorities in order to file a request for asylum, the Chamber will render its decision as soon as is practicable.

**FOR THESE REASONS,**

**THE CHAMBER,**

**ORDERS** the Registry to report back on the results of the discussions with the DRC as soon as possible and in no case later than Friday 7 June 2011; and

**ORDERS** that in case the detained witnesses or any of the parties or participants wish to respond to the Registry's report, they shall do so within seven days after being notified of it.

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 24 May 2011

At The Hague, the Netherlands