

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/07
Date: 15 October 2013

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Cuno Tarfusser
Judge Erkki Kourula
Judge Ekaterina Trendafilova

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. GERMAIN KATANGA

**Public
With public Annex**

Prosecution Response to “Mémoire en appui de l'Acte d'appel des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350 contre la ‘Décision relative à la demande de mise en liberté des témoins détenus DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-035’”

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Introduction

1. On March 2011, witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 (the “Witnesses”), who were held in detention in the Democratic Republic of the Congo (“DRC”), were transferred under Article 93(7) to the seat of the Court to testify in the *Katanga and Ngudjolo* case. After their testimony, the Witnesses requested asylum in The Netherlands. Due to the application of the principle of non-refoulement and the unwillingness of the Dutch authorities to assume their custody, the Court suspended their transfer until a final decision on the asylum request was rendered and maintained the custody of the Witnesses.
2. On 4 February 2013, the Witnesses requested their release on the basis that their detention under Article 93(7) was unjustified. On 2 October 2013, Trial Chamber II found that it had no jurisdiction to decide on the release of the Witnesses (“the Decision”). On 9 October 2013, the Witnesses appealed the Decision pursuant to Article 82(1)(a) and (b) (the “Appeal”).
3. The Prosecution submits that the Appeal is inadmissible and should be dismissed *in limine*. The Decision is not a decision on the jurisdiction of the Court or a decision denying release of persons “being investigated or prosecuted” by the Court. In the alternative, and should the Appeals Chamber decide to entertain the merits of the Appeal, the Prosecution submits that it should be similarly rejected. The Court finds itself in a peculiar situation where it has been forced to assume the custody of the Witnesses due to the unwillingness of the Dutch authorities to do so. Although Trial Chamber II correctly noted that it had no jurisdiction to rule on the release of the Witnesses, it nevertheless sought to ensure that their detention pursuant to DRC law was still necessary. It also conferred with the Dutch authorities on the status of the asylum applications and advised them to act without delay. The Chamber’s course of conduct was therefore in compliance with the applicable statutory provisions, interpreted in light of internationally recognized human rights, and the applicable treaties and general principles of law. The Prosecution submits that similar periodic reviews should be conducted by the Chamber to ensure the necessity of the detention according to DRC law and the expedited conduct of the asylum requests.

Procedural Background

4. The Witnesses were in detention in the DRC and were transferred to the seat of the Court under Article 93(7) to testify for the Defence of Germain Katanga and Mathieu Ngudjolo between 30 March 2011 and 3 May 2011.¹
5. On 12 May 2011, the Witnesses filed an application for asylum with the Government of The Netherlands.²
6. On 9 June 2011, Trial Chamber II granted the Witnesses' Duty Counsel's request to temporarily suspend the Witnesses' transfer to the DRC on the basis of the principle of non-refoulement until The Netherlands could examine the Witnesses' asylum applications. The Chamber, pursuant to its obligations under Article 68, also requested the DRC to provide information on the protective measures that would be implemented to address the risk resulting from the Witnesses' testimonies before the Court if the asylum was rejected and the Witnesses were transferred back to the DRC.³ The Chamber indicated that the Dutch authorities needed to examine the applications "as soon as possible"⁴ and that the Court "cannot contemplate holding these witnesses in custody indefinitely".⁵
7. On 22 June 2011, Trial Chamber II set out a number of protective measures it considered pre-requisites to any return of the Witnesses. The Chamber also offered the Court's technical or logistical assistance to allow domestic proceedings against the Witnesses to proceed while in ICC custody.⁶
8. On 24 August 2011, Trial Chamber II noted that the protective measures requested in its 22 June 2011 decision had been accommodated by the DRC and that the Chamber considered its obligation under Article 68 to be fulfilled. It also asked the Registry to initiate consultations with The Netherlands and the DRC

¹ ICC-01/04-01/07-3352, para.1.

² ICC-01/04-01/07-2968, para.2.

³ ICC-01/04-01/07-3003, paras.79-85.

⁴ ICC-01/04-01/07-3003, para.85.

⁵ Ibid.

⁶ ICC-01/04-01/07-3033, paras.35-43.

regarding the need to maintain custody of the Witnesses.⁷ The Chamber held that a solution “must be found urgently”⁸ and added that “[c]onsidering the importance of this issue, the Chamber wishes to be regularly informed about the progress of the consultations.”⁹

9. On 16 September 2011, the Registry reported that The Netherlands had indicated that the Witnesses should remain in the custody of the Court during the asylum procedure, noting that it lacked jurisdiction to keep them in custody during the processing of their applications.¹⁰ On 20 September 2011, the Registry reported that the DRC considered the ongoing detention of the Witnesses to be unfounded and demanded the Witnesses be returned as their testimony before the Court had ended.¹¹
10. On 1 March 2012, the Chamber reiterated that the Witnesses' asylum claims should "not cause the unreasonable extension of their detention under article 93(7) " and that the Court “could not contemplate prolonging their custody indefinitely”.¹² The Chamber again sought answers from The Netherlands as to their willingness to exercise custody over the Witnesses pending the outcome of their asylum claims and ordered the Registry to ensure the Witnesses were able to exercise their rights under Congolese law with respect to the domestic proceedings against them.¹³ On 15 March 2012, The Netherlands informed the Court that the Witnesses had to remain in the custody of the Court pending the outcome of their asylum applications.¹⁴
11. On 1 June 2012, the Chamber reiterated that the processing of the Witnesses' asylum applications should not cause the unreasonable extension of their detention under Article 93(7).¹⁵
12. On 4 February 2013, the Witnesses requested their release arguing that their

⁷ ICC-01/04-01/07-3128.

⁸ ICC-01/04-01/07-3128, para.17.

⁹ Ibid.

¹⁰ ICC-01/04-01/07-3158-Conf-Anx3.

¹¹ ICC-01/04-01/07-3161-Conf-Anxl.

¹² ICC-01/04-01/07-3254, para.20.

¹³ ICC-01/04-01/07-3128, p.11.

¹⁴ ICC-01/04-01/07-3267-Conf-Anxl.

¹⁵ ICC-01/04-01/07-3303, para.14.

detention under Article 93(7) was unjustified.¹⁶

13. On 8 February 2013, Trial Chamber II requested information from The Netherlands as to the status of the applications and the estimated duration of the proceedings, and from the DRC as to whether the ongoing detention of the Witnesses was still justified under its law.¹⁷ The Chamber reiterated that it “cannot contemplate keeping them in its custody indefinitely”.¹⁸

14. On 28 February 2013, The Netherlands indicated that the asylum requests had been rejected, that it was subject to appeal and that it was “doing its utmost” to speed up the asylum proceedings. However, it noted that the matter could be raised before the European Court of Human Rights (“ECtHR”).¹⁹ The DRC authorities responded on the same day stating that the reasons for the detention of the Witnesses continue to subsist.²⁰

15. On 1 October 2013, Trial Chamber II found that the Court did not have jurisdiction to decide on the Witnesses’ release (“the Decision”).²¹ Judge Van den Wyngaert dissented (“Dissenting Opinion”).²² The Chamber recalled that the suspension of its obligation to transfer the Witnesses “without delay” under Article 93(7)(b) due to the application of the principle of non-refoulement was the result of interpreting this provision in accordance with internationally recognised human rights.²³ The Court was, however, forced to maintain the custody of the Witnesses because (a) The Netherlands had refused to assume their custody, and (b) the Court was still obliged to transfer them back to the DRC under Article 93(7)(b) if and when the asylum applications were rejected.²⁴ It noted that the right to liberty was not an intransgressible or mandatory rule of international law and that it was subject to numerous derogations.²⁵ It also indicated that the

¹⁶ ICC-01/04-01/07-3351.

¹⁷ ICC-01/04-01/07-3352.

¹⁸ ICC-01/04-01/07-3352, para.22.

¹⁹ ICC-01/04-01/07-3355-Anx2.

²⁰ ICC-01/04-01/07-3355-Conf-Anx5.

²¹ ICC-01/04-01/07-3405.

²² ICC-01/04-01/07-3405-Anx.

²³ Decision, para.20.

²⁴ Decision, paras.22,27.

²⁵ Decision, para.33.

Witnesses were not detained on behalf of the Court,²⁶ and that the Chamber could not review the merits of the Witnesses' detention under DRC law;²⁷ but it added that the Witnesses could still seek this review before the DRC authorities.²⁸ The Court reiterated that it would not consider indefinite custody and stressed the importance of the asylum claim being decided quickly.²⁹

16. On 7 October 2013, the Witnesses filed the "Acte d'appel des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350 contre la 'Décision relative à la demande de mise en liberté des témoins détenus DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350' rendue par la Chambre de première instance II en date du 1er octobre 2013 (ICC-01/04-01/07-3405)" ("Notice") pursuant to Article 82(1)(b).³⁰ The Witnesses requested suspensive effect of the Decision.³¹

17. On 8 October 2013, the Prosecution requested the Appeals Chamber to examine *in limine* whether the Appeal was admissible before addressing any other issue on appeal.³²

18. On 9 October 2013, the Witnesses filed their "Mémoire en appui de l'Acte d'appel des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350 contre la 'Décision relative à la demande de mise en liberté des témoins détenus DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-035' ("Appeal").³³

Submissions

19. The Prosecution submits that the Appeal is without merit and should be dismissed. First, the Appeal is inadmissible because it was improperly filed under Article 82(1)(b) and Article 82(1)(a). Second, and in the event that the Chamber decides to entertain the merits of the Appeal, the Witnesses have failed to show that the

²⁶ Decision, paras.25-26.

²⁷ Decision, paras.24,27.

²⁸ Decision, para.31.

²⁹ Decision, para.23.

³⁰ ICC-01/04-01/07-3408OA14.

³¹ Appeal, para.4.

³² ICC-01/04-01/07-3409OA14. At the time of submission of this response the Appeals Chamber had not yet ruled on the Prosecution's request.

³³ ICC-01/04-01/07-3411OA14.

Trial Chamber erred in its Decision.

A. The novelty of the issue and Article 21(3)

20. The Witnesses submit that the novelty of the issue does not exempt the judges from ruling even if it is an issue not foreseen in the ICC legal framework. According to the Witnesses, the judges have an obligation to decide the matter due to its implications on the internationally recognised human rights that the Court has an obligation to apply under Article 21(3).³⁴
21. The Witnesses' submissions are misplaced. First, while the Prosecution acknowledges that the current situation - namely Witnesses transferred under Article 93(7) who apply for asylum before The Netherlands without the Dutch authorities assuming custody - is unprecedented, the Witnesses' reliance on Article 21(3) to deal with this situation is misplaced. Article 21(3) is not a trump provision that permits the Chamber to ignore or to alter the statutory framework; on the contrary, the Appeals Chamber has indicated that the applicable legal framework must be "interpreted and applied in accordance with internationally recognized human rights, as declared in article 21 (3)".³⁵ Moreover, the Witnesses disregard Article 21(1) which sets out a clear hierarchy of applicable law, including the applicable sources of law if matters are not foreseen in the statutory framework.
22. Second, the Witnesses argue that because certain provisions of the Court's regulations were applied to permit the Witnesses' access to a computer or to facilitate the preparation of their asylum applications, other provisions can similarly be applied to release them.³⁶ The comparison is misplaced as the former provisions refer to administrative matters. However, releasing the Witnesses in disregard of the Court's international obligations as regulated in the Statute cannot be consistent with Article 21(3). Similarly, applying Article 82(1) to overturn the Decision entails violating the ordinary, contextual and purposive meaning of these

³⁴ Appeal, para.5.

³⁵ ICC-01/04-168OA3, para.38; ICC-01/04-01/06-824OA7, para.16 Sep.Op.

³⁶ Appeal, para.4.

provisions.³⁷

23. Finally, the ICC's authority to review the merits of domestic decisions on detention of persons transferred under Article 93(7) – the core of the Witnesses' request before the Trial Chamber - is not a new issue which was inadvertently omitted by the drafters. On the contrary, it is an issue that simply does not fall within the jurisdiction of the Court. Rule 192(3) allows for persons transferred under Article 93(7) and in the custody of the ICC to raise matters concerning the conditions of their detention at the ICC with the relevant Chamber. Had the drafters intended that those persons could also challenge the merits of their domestic detention, they would have expressly included it.

B. The Appeal is inadmissible

24. Although the Witnesses filed their Notice under Article 82(1)(b),³⁸ they also referred to Article 82(1)(a) as an alternative legal basis in their Appeal.³⁹ Neither provision provides the legal support requested.

(a) Article 82(1)(b)

25. The Witnesses concede that Article 82(1)(b) refers to suspects and accused persons. According to the Witnesses, had the drafters foreseen that other persons could be held in the detention centre they would have drafted this provision to permit them to also challenge the legality of their detention.⁴⁰ Moreover, Article 21(3) provides flexibility to the judges to conduct an evolving interpretation of the provisions.⁴¹

26. This argument is speculative and disregards the clear meaning of Article 82(1)(b), which exhaustively regulates the right to appeal.

³⁷ The interpretation of the Statute is governed by Article 31 of the Vienna Convention. See inter alia ICC-01/04-01/06-1486OA13, para.40.

³⁸ Notice, para.3.

³⁹ Appeal, paras.7,9.

⁴⁰ Appeal, para.8.

⁴¹ Ibid.

(i) *The Witnesses are not persons being investigated or prosecuted by the Court*

27. Article 82(1)(b) allows “part[ies]” to appeal decisions “granting or denying release of [a] person being investigated or prosecuted”. The Appeals Chamber has indicated that Article 82(1)(b) “confers exclusively a right to appeal a decision that deals with the detention or release of a person *subject to a warrant of arrest*.”⁴²
28. The Witnesses are not persons being “investigated or prosecuted” by the ICC within the terms of Article 82(1)(b) nor are they detained as a result of an ICC arrest warrant. They were witnesses in the *Katanga and Ngudjolo* case.
29. Further, the Appeals Chamber has repeatedly stated that “[t]he decisions that are subject to appeal are enumerated in articles 81 and 82 [and] [t]here is no right to appeal ... except as provided thereunder”.⁴³ It has also held that “[A]rticle 82(1)(b) of the Statute defines succinctly the decisions subject to appeal, leaving no ambiguity as to the intentions of the makers of the Statute”.⁴⁴ The drafters consciously selected those decisions that could be subject to appeal. Consequently, applying Article 82(1)(b) to the Witnesses would be tantamount to acting *ultra vires*.
30. Finally, Article 21(3) means that the statutory provisions need to be interpreted according to internationally recognized human rights. Article 21(3) does not, however, confer authority on the Chambers to act as legislators and alter the clear meaning of the statutory provisions.⁴⁵

(ii) *The Decision is not a decision “denying release”*

31. Trial Chamber II held that it did not have the jurisdiction to rule on the release of the Witnesses. This does not turn the Decision into a ruling denying the release of the Witnesses within the terms of Article 82(1)(b).
32. The Appeals Chamber has held that “*it is the nature or character of a decision*

⁴² ICC-01/04-01/06-926OA8, para.16. Emphasis added.

⁴³ ICC-01/04-01/06-2799, para.7 quoting ICC-01/04-168OA3, para.35.

⁴⁴ ICC-01/04-01/06-926OA8, para.11.

⁴⁵ ICC-01/04-01/07-521OA5, para.19. Judge Pikis’ Diss.Op.

and not its implications or effects which determine whether a party is entitled to bring an appeal pursuant to Article 82(1)(b) of the Statute.”⁴⁶ The Decision is not - by its nature or character - a decision “denying release” within the terms of Article 82(1)(b).

33. In sum, the Appeal is filed *ultra vires* and improperly characterized as an appeal under Article 82(1)(b). The Appeals Chamber has previously dismissed other similar efforts to construe a decision as one from which direct appeal is permitted.⁴⁷

(b) Article 82(1)(a)

34. The Witnesses argue that the generality of the word “jurisdiction” in Article 82(1)(a) indicates that it does not solely apply to Article 19 decisions.⁴⁸ Thus, the Witnesses refer to Article 82(1)(a) as an alternative legal basis for their Appeal.

35. The Witnesses’ submission is incorrect. Although the Trial Chamber found that “*la Cour n’est pas compétente pour décider d’une mise en liberté des témoins en cause*”,⁴⁹ the Trial Chamber did not enter into an assessment of whether the requirements under Article 5 et seq. (namely, jurisdiction *personae*, *temporae*, *materiae* and *loci*) are met.⁵⁰ Further, the Appeals Chamber has construed the notion of “jurisdiction” narrowly.⁵¹

36. Even if assuming (but not conceding) the Decision had the same effect as a decision on the jurisdiction of the Court, the Witnesses’ arguments are similarly without merit. The same reasoning as with Article 82(1)(b) above applies to this case and, as the Appeals Chamber has noted, the “effect or implications of a decision [...] do not qualify or alter the character of the decision”.⁵² Hence, the Decision does not fall within the scope of Article 82(1)(b).

⁴⁶ ICC-01/04-01/10-438OA2, para.17. Emphasis added.

⁴⁷ ICC-01/09-02/11-250OA2, para.4; ICC-01/09-78OA, paras.18-21; ICC-01/04-01/10-438OA2, para.17.

⁴⁸ Appeal, para.9.

⁴⁹ Decision, para.36.

⁵⁰ ICC-01/04-01/06-772OA4, paras.21-22. Cassese, A.(ed.), *The Rome Statute of the International Criminal Court: a Commentary*, vol.II, (Oxford University Press:2011), p.1548.

⁵¹ ICC-01/09-02/11-425OA4, para.38; ICC-01/04-01/06-772OA4, para.24.

⁵² ICC-01/04-01/06-926OA8, para.15; ICC-01/09-78OA, para.17; ICC-01/11-01/11-74OA, para.11.

C. The Witnesses failed to demonstrate that the Trial Chamber erred in the Decision

37. The Witnesses do not identify the type of errors that the Chamber purportedly committed and only advanced three arguments which are a reproduction of the Dissenting Opinion. The Witnesses argue that (a) the Trial Chamber erred in its interpretation of Article 93(7); (b) the Decision infringed Article 21(3) when it found that the DRC is the sole authority to decide on the release, and (c) the Decision was inconsistent with a prior decision of the Chamber. The crux of the Witnesses' argument is that they are detained under Article 93(7) and this is unjustified. The right to liberty, applicable in light of Article 21(3), mandates their release.
38. The Witnesses' submissions are based on erroneous premises. First, the Witnesses are detained pursuant to DRC law and not Article 93(7). Second, the statutory framework does not permit the Witnesses to challenge the legality of the DRC detention before the ICC, nor this is consistent with the purpose of the Statute. Third, Article 93(7), interpreted in light of Article 21(3), permits the temporary suspension of the Witnesses' transfer until the asylum applications are decided; however, it still mandates transfer if the asylum is rejected.
39. Finally, the Chamber concluded that it had no jurisdiction to rule on the release of the Witnesses; however, the Chamber did not remain a passive observer. It reviewed whether there were still grounds to maintain the Witnesses in detention in the DRC, and monitored the development and expected duration of the Dutch proceedings. Therefore, and as is developed below, the Chamber's interpretation and application of Article 93(7) is in compliance with Article 21(1) and (3).

(a) The Trial Chamber correctly interpreted Article 93(7)

40. The Witnesses argue that the Chamber erroneously distinguished between the Witnesses' detention by the DRC and the Court's custody over them;⁵³ that the Chamber should have interpreted Article 93(7) in light of the internationally

⁵³ Appeal, paras.14,16.

recognized right to liberty and therefore release the Witnesses;⁵⁴ and that the Decision is inconsistent with the Chamber's 9 of June 2011 decision, whereby it suspended the transfer of the Witnesses due to the principle of non-refoulement.⁵⁵

(i) The Chamber correctly found that the Witnesses were not detained on behalf of the Court

41. The Trial Chamber correctly distinguished between the Witnesses' detention in the DRC in application of DRC law, and their custody by the ICC after they were transferred to the seat of the Court in application of Article 93(7). The Chamber noted that the Witnesses are not held on behalf of the ICC and as a result of an ICC order,⁵⁶ nor does Article 93(7) constitute a judicial act authorising the detention of the Witnesses.⁵⁷

42. Article 93(7) is a provision in Part IV of the Statute that seeks to facilitate the temporary transfer of a person in custody, from the State where they are held, to provide testimony. Respect for this provision, which is foreseen in many mutual assistance schemes, is important to ensure cooperation of States with the Court.⁵⁸ Further, if – as the Chamber noted – Article 93(7) is interpreted as permitting the Court to examine the merits of the state's detention, the essence of the procedures of cooperation would be undermined and the states' sovereignty severely affected.⁵⁹ To the contrary, had the Witnesses been detained by virtue of an ICC arrest warrant because they were suspects or accused, the Chamber would review their detention pursuant to Articles 58 and 60.

(ii) The Trial Chamber interpreted Article 93(7) in accordance with Article 21

⁵⁴ Appeal, para.16.

⁵⁵ Decision, paras.15-16.

⁵⁶ Decision, para.25.

⁵⁷ Decision, para.26.

⁵⁸ Triffterer, O.(ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nded., (Verlag C.H.Beck:2008), pp.1583-4; Schabas, W., *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press:2010), p.1022.

⁵⁹ Decision, para.28.

43. The Trial Chamber correctly noted that the right to liberty has exceptions.⁶⁰

Article 5 of the European Convention of Human Rights (“ECHR”) and Article 9 of the International Covenant on Civil and Political rights (“ICCPR”) indeed foresee certain limitations.⁶¹ The jurisprudence of ECtHR provides useful guidance. For example, in *Stanev v Bulgaria* the Grand Chamber held that in order to comply with Article 5(1) of the ECHR the detention must be “lawful” pursuant to national law including in accordance with a procedure prescribed by law.⁶² Further, the detention of an individual must be necessary in light of the concrete circumstances because other less severe measures have been considered and found to be insufficient to safeguard the individual or public interest.⁶³

44. In the present appeal, the facts accord with the above jurisprudence. The Witnesses are being detained pursuant to the national law of the DRC and the Trial Chamber assumed custody in application of Article 93(7) until their testimony concluded. The prolongation of the Witnesses’ custody appears necessary in order to fulfill the ICC’s obligations to the DRC and as a result of the Dutch’s unwillingness to assume custody. As evinced by the record, the Chamber actively explored whether other, less severe measures were available, such as the Dutch assuming custody and the possibility of release due to the lack of necessity under DRC law. The Chamber also sought to expedite the DRC proceedings facilitating the required logistics from the detention center. However, and in light of the submissions of both states, the Chamber found that no other alternatives were available.

45. Moreover, the ECtHR noted in *Amuur v France*⁶⁴ that in order to determine whether there was a violation of Article 5 “the starting-point must be his concrete situation, and account must be taken of a whole range of criteria such as the type,

⁶⁰ Decision, para.33.

⁶¹ See for example Article 5(1)(b)-(c) and (f) of the ECHR that foresee the detention “of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law” or “for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so”, and “to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

⁶² *Stanev v Bulgaria* ECHR (Grand Chamber) 36760/06, 17 January 2012, para.143.

⁶³ Ibid.

⁶⁴ This reasoning has been upheld by the Grand Chamber in numerous judgments such as *Medvedyev v France* ECHR (Grand Chamber) 3394/02, 29 March 2010.

duration, effects and manner of implementation of the measure in question.”⁶⁵

Amuur was a case dealing with an asylum seeker held indefinitely in the international zone at an airport. During this time, the asylum seeker was denied the resources to make an effective application. The ECtHR considered that he had been held in a legal vacuum and noted that “such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, particularly under the 1951 Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights.”⁶⁶

46. The Prosecution notes that in the current context, the Chamber has ensured that the Witnesses are not in a legal vacuum: it has remained committed to providing the Witnesses with the resources needed to lodge their applications for asylum and sought alternatives to end the custody of the Chamber.

47. Further, a cursory review of different domestic jurisdictions indicate that restrictions to the right to liberty can be similarly found in their texts, such as a limited period time to determine whether a person can be charged with the commission of a crime;⁶⁷ where an accused has been charged with an offence and is awaiting a court appearance;⁶⁸ where an accused is awaiting the confirmation of charges⁶⁹ or trial and subject to court-ordered detention;⁷⁰ where an accused has been found guilty of a criminal offence and is sentenced to a term of imprisonment;⁷¹ and detention for the purpose of expulsion, deportation, or exclusion⁷² until deportation can be effected, or for such a time as is needed for an application for entry to be made and considered.⁷³

48. Thus, although the Trial Chamber considered itself incompetent to rule on the release, it did not remain inactive. First, the Chamber suspended the transfer of the

⁶⁵ *Amuur v. France* ECHR (Chamber) 19776/92, 25 June 1996, para.42.

⁶⁶ *Ibid.*, para.43.

⁶⁷ Spain: Article 17(2) Constitution. Canada: *Criminal Code*, R.S.C.1985, c.C-46, s.495. Australia: *Crimes Act 1914* (Cth) s3W.

⁶⁸ Canada: *Criminal Code*, R.S.C. 1985, c.C-46, s.503.

⁶⁹ France: Articles 143-1 to 148-8 Code de Procédure Pénale.

⁷⁰ Canada: *Criminal Code*, R.S.C.1985, c.C-46., s.515. Australia: *Chu Kheng Lim and Ors v The Minister for Immigration, Local Government and Ethnic Affairs and Anor* [1992] HCA64, para.24. Spain: Articles 503-505 Criminal Procedure Law.

⁷¹ Canada: *Criminal Code*, R.S.C.1985, c.C-46., ss.743,787. Australia: *Chu Kheng Lim*, para.24. Spain: Article 25 Constitution.

⁷² Australia: *Chu Kheng Lim*, para.30; *Al Al-Kateb v. Godwin* [2004] HCA 37, para.255.

⁷³ *Chu Kheng Lim*, para.32.

Witnesses by applying Article 93(7) in light of the principle of non-refoulement.⁷⁴

Second, the Chamber sought to ensure that the competent Dutch authorities assumed custody of the Witnesses⁷⁵ and, upon receiving their negative response, it advised that the asylum applications be examined as soon as possible.⁷⁶ Third, it offered the DRC authorities the possibility of continuing the proceedings involving the Witnesses from the Court by facilitating any required logistics.⁷⁷

49. Most notably, in its decision of 8 February 2013, the Chamber consulted with the DRC authorities as to whether the detention was still necessary, and with the Dutch authorities about the state of the asylum proceedings and its estimated duration. The Chamber's course of action entails a *de facto* review of the Witnesses' detention in compliance with Article 21(1) and (3). The Prosecution submits that the Chamber, pursuant to Article 64(6)(f), should conduct similar periodic reviews of the Witnesses' detention examining, *inter alia*, the necessity of the detention according to DRC law and the progress of the asylum applications. The Chamber does not have to enter into an assessment on the correctness of the detention under DRC law. As the Chamber correctly noted,⁷⁸ the ICC is not a human rights court, nor a second instance tribunal that reviews the correctness of domestic decisions. The Chamber may however consider seeking from the DRC further detail regarding the grounds and necessity of the Witnesses' detention.

(iii) There is no inconsistency with respect to the Chamber's 9 June 2011 decision

50. The Witnesses submit that the Chamber has been selective and inconsistent when applying Article 93(7). They claim that the Chamber disregarded Article 93(7) in its 9 June 2011 decision when it decided to temporarily suspend the Court's obligation to return the Witnesses to the DRC in order to allow them to exercise their right to seek asylum. Conversely, the Chamber decided not to violate the same provision when it was requested to release the Witnesses. The Witnesses

⁷⁴ ICC-01/04-01/07-3003, paras.79-85.

⁷⁵ ICC-01/04-01/07-3254, para.21.

⁷⁶ ICC-01/04-01/07-3254, para.20.

⁷⁷ ICC-01/04-01/07-3033, para.43; ICC-01/04-01/07-3254, para.19.

⁷⁸ Decision, para.27.

submit that such an interpretation is not in accordance with Article 21(3).⁷⁹

51. There is no inconsistency in the approach taken by the Chamber. The Chamber has interpreted the statutory framework in accordance with Article 21(3) throughout the proceedings. In its 9 June 2001 decision, the Chamber decided to temporarily suspend the return of the Witnesses to the DRC in application of the internationally recognized and non-derogable principle of non-refoulement because the Witnesses had already applied for asylum in The Netherlands.⁸⁰ If and when the Dutch authorities granted the asylum requests, the Witnesses would be released to The Netherlands; if the applications were rejected, they would be transferred without delay to the DRC. The Chamber correctly considered that this interpretation of Article 93(7) was consistent with the “internationally recognized human rights” cited in Article 21(3).

52. Further, in the Decision, the Chamber continued to suspend the immediate transfer of the Witnesses but noted that the Witnesses should continue in custody due to the Court’s obligation to return them to the DRC if the asylum requests were rejected.⁸¹ The Chamber indicated that the right to liberty is subject to derogation and it sought to ascertain whether there were still grounds justifying the Witnesses’ detention, and the DRC authorities responded in the affirmative. Hence and contrary to the Witnesses’ submission, the Chamber did interpret Article 93(7) in light of Article 21(3). The fact that the Witnesses disagree with the Chamber’s conclusion does not render the Decision erroneous.

(b) The Chamber’s finding that the DRC authorities can still be seized to

⁷⁹ Appeal, paras.15-16.

⁸⁰ ICC-01/04-01/07-3003, paras.79-85. Under the principle of non-refoulement, states have an obligation to refrain from deporting persons within their control to any country where there is a real risk that the individuals will face treatment contrary to Article 3 ECHR (*T.I. v. The United Kingdom*, Appl.No.43844/98, Council of Europe: ECtHR, 7 March 2000; Reid, K., *A Practitioner’s Guide to the European Convention on Human Rights* (Sweet&Maxwell Ltd:2008)). The ECtHR has held that the non-refoulement prohibition flows directly from the prohibition on torture under Article 3 ECHR and customary international law and is a non-derogable protection (*Jamaa et al v.Italy*, Appl.No.27765/09, Council of Europe: ECtHR, 23 February 2012). The only recognised exception to the non-refoulement is that found in Article 33(2) of 1951 Refugee Convention, which permits expulsion of a refugee where “there are reasonable grounds for regarding [the applicant] as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”

⁸¹ Decision, paras.24,27.

reassess the Witnesses' detention did not violate Article 21(3)

53. The Witnesses argue that the Decision violates Article 21(3) in finding that the sole competent authority to decide on the Witnesses' release is the DRC.⁸²

54. The Witnesses do not accurately represent the Decision. Firstly, the Chamber noted that the Witnesses still have the possibility to request the review of their detention to the DRC.⁸³ The Court further noted that it is bound by any decision taken by the DRC to release the Witnesses⁸⁴ and indicated that in its decision of 1 March 2012 the Registry had been ordered to provide all reasonable assistance to facilitate the DRC proceedings from the Court.⁸⁵ Secondly, the Chamber indicated that the Witnesses could also seek relief before the Dutch authorities in light of recent jurisprudence indicating that The Netherlands have the duty to adopt measures to prevent or put an end to human rights violations within its territory.⁸⁶ Thirdly, the Witnesses ignore all the measures that the Chamber has undertaken to ensure the necessity of their detention and the expedited process of their applications.

55. Moreover, the Witnesses' argument that seeking a review of their detention before the DRC may be considered an act of allegiance or a voluntary request for protection pursuant to Article 1(C) of the 1951 Refugee Convention depriving them of their protection is unsupported.⁸⁷ On its face, requiring the review of their detention is not the same as "voluntarily re-avail[ing] [one]self of the protection of the country".

56. Finally, the Chamber's statement that the Witnesses did not object to its 1 March 2012 decision, where the Chamber already noted that the Witnesses could request a review of detention before the DRC, was not determinative of its final decision. It was a comment made in passing that had no impact on the Chamber's final

⁸² Application, para.17 referring to Decision, para.31.

⁸³ Decision, paras.31,34.

⁸⁴ Decision, para.32.

⁸⁵ ICC-01/04-01/07-3254, para.19.

⁸⁶ Decision, para.35.

⁸⁷ Appeal, paras.18,22.

determination.

(c) There is no inconsistency between the Decision and the 8 February 2013 decision

57. The Witnesses further argue that the Decision is inconsistent with the approach taken by the Chamber in its decision of 8 February 2013 where the Chamber directed several questions to The Netherlands and the DRC regarding the duration of the asylum proceedings and the necessity of the Witnesses' detention, respectively.⁸⁸ According to the Witnesses, if the Chamber was not competent to rule on the legality of the Witnesses' current detention, there was no need to raise these questions.⁸⁹

58. These instructions are, however, evidence of the Chamber's diligence in examining whether the Witnesses' right to liberty was unduly limited or prolonged in accordance with Article 21(1) and (3). While the Chamber correctly noted that it could not review the validity of the DRC's legal basis for detention of the suspects,⁹⁰ it sought to ascertain whether the detention was still necessary pursuant to DRC law. What the Witnesses characterize as "incoherence" constitutes an interpretation and application of the statutory framework in accordance with internationally recognized human rights.

59. Moreover, even if one assumes that there is some inconsistency between the decision of 8 February 2013 and the Decision, the Witnesses have not established that such an inconsistency renders the Decision in error.

D. Suspensive Effect

60. In the Notice, the Witnesses requested suspensive effect on the grounds that the date of delivery of the Appeals Chamber's judgment is unknown and if rendered after a final determination of the relevant asylum applications, the Witnesses will have already been returned to the DRC, despite the fact that the judgment may set aside the Decision and order their release.⁹¹

⁸⁸ Appeal, para.25.

⁸⁹ Appeal, para.25.

⁹⁰ Decision, para.24.

⁹¹ Notice, para.4.

61. In light of the approximate timelines set out by both counsel for the Witnesses in the Dutch asylum proceedings,⁹² and by The Netherlands,⁹³ it is unlikely that the Appeals judgement will be issued after a final determination of the asylum applications. Hence the implementation of the Decision will not create an “irreversible situation” or defeat the purpose of the appeal.⁹⁴ There is therefore no “compelling reason”⁹⁵ to suspend the implementation of the Decision.

Conclusion

62. For the reasons set out above, the Prosecution requests that the Appeals Chamber find the Appeal inadmissible. In the alternative and if the Appeals Chamber admits the Appeal, the Prosecution submits that Trial Chamber II did not err in the Decision and that it should be directed to conduct periodic assessments on the necessity of the Witnesses’ detention according to DRC law and the status of the asylum proceedings.



Fatou Bensouda
Prosecutor

Dated this 15th day of October 2013

At The Hague, The Netherlands

⁹² ICC-01/04-01/07-3358.

⁹³ ICC-01/04-01/07-3355-Anx2.

⁹⁴ ICC-01/04-01/07-3344OA13, para.6.

⁹⁵ ICC-01/09-02/11-401, para.10.