Cour Pénale Internationale

International Criminal Court

Original: French

No.: **ICC-01/04-01/07**
Date: **9 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 Document

Corrigendum to the
Brief in support of the "Notice of appeal by Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 against the *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* issued by Trial Chamber II on 1 October 2013 (ICC-01/04-01/07-3405)"
(ICC-01/04-01/07-3408)

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I. Introduction

1. *Purpose* - This brief is filed with the Appeals Chamber of the International Criminal Court ("the Appeals Chamber" and "the Court") in accordance with regulation 64 of the Regulations of the Court. It ensues from the appeal lodged by Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 ("the Detained Witnesses") on 7 October 2013.[1] The appeal was lodged against the 1 October 2013 decision, notified on 2 October 2013, whereby a majority of Trial Chamber II of the International Criminal Court ("the Trial Chamber"), Judge Christine Van den Wyngaert ("the Dissenting Judge") dissenting,[2] found inadmissible the 4 February 2013 application for release of the Detained Witnesses ("the Application for Release")[3] on the ground that it was lodged before a court lacking the jurisdiction to adjudge it.[4] Accordingly, this brief is intended to set out the grounds of appeal relied on by the detained witnesses as well as the legal and/or factual arguments supporting each of the grounds.

2. *Structure*.- The Detained Witnesses are aware that prior to any examination on the merits, the Appeals Chamber must, in view of the particularity of the matter at hand (II), adjudge the admissibility of their appeal (III). They will therefore first address admissibility before arguing the grounds in support of their appeal (IV).

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[1] Duty Counsel, "Notice of appeal by Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 against the *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* issued by Trial Chamber II on 1 October 2013 (ICC-01/04-01/07-3405)", 7 October 2013, ICC-01/04-01/07-3408-tENG.

[2] Judge Christine Van den Wyngaert, *Dissenting opinion of Judge Christine Van den Wyngaert*, 2 October 2013, ICC-01/04-01/07-3405-Anx ("Dissenting Opinion").

[3] Duty Counsel, "*Requête en mainlevée de la détention des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350*", 4 February 2013, ICC-01/04-01/07-3351.

[4] Trial Chamber II, *Décision relative à la demande de mise en liberté des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350*, 1 October 2013, ICC-01/04-01/07-3405, p. 21.

II. Particularity of the matter at hand

3. The impugned decision states that "[TRANSLATION] the [Trial] Chamber has been confronted with an unprecedented situation for more than two years".[5] The Dissenting Judge further emphasised the particularity of the matter at hand, holding that "the Court is placed in an 'unprecedented' situation that has not been foreseen by the drafters of the Statute and the Rules"[6]. This is because on 27 March 2011, when the Detained Witnesses were transferred from the Kinshasa Penitentiary and Re-education Centre in the Democratic Republic of the Congo ("the DRC") to the Court's Detention Centre, they were the very first detained witnesses of the Court. Having in the course of their various testimonies accused the Congolese authorities, the Detained Witnesses observed that the protection programme instituted by the Registry, which had been designed only for witnesses at liberty, was not sufficient to provide them with effective protection against the Congolese authorities in the event of their return to the DRC. Hence on 12 April 2011, they moved the Trial Chamber to present them, after their testimonies, to the Dutch authorities to which they intended to apply for asylum.[7] By decision of 9 June 2011 ("the 9 June 2011 Decision") the Trial Chamber granted the application, suspending the immediate return of the Detained Witnesses to the DRC until the outcome of their application for asylum.[8]

   The Detained Witnesses' application for asylum and the ensuing long detention in the Court's Detention Centre, together with all the legal problems it raises, are undoubtedly issues which the drafters of the Court's basic texts could not have anticipated.

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[5] Impugned Decision, para. 17.
[6] Dissenting Opinion, para. 1.
[7] Duty Counsel, "Application for leave to present Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 to the authorities of the Netherlands for the purposes of asylum", 12 April 2011, ICC-01/04-01/07-2830-Conf-tENG.
[8] Trial Chamber II, *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.

4. Nonetheless, the novelty or difficulty of a matter does not absolve the bench of its obligation to adjudicate matters. Hence, in the absence of appropriate instruments, the judges of the Court have gradually established jurisprudence which responds to the various applications of the Detained Witnesses, in particular by drawing a parallel with the situation of the suspects and accused persons detained in the Court's Detention Centre. Accordingly, it has, *inter alia*, been held and rightly so, as follows:

   - "[…] article 44(3) of the Headquarters Agreement, which is duly applied to transfers carried out between the Detention Centre and the Court and, which may therefore, henceforth, *mutatis mutandis*, indeed apply to the situation at issue in the present request".[9]
   - The use of computers in the Detention Centre was not primarily intended for the preparation of the defence in a case before the Court and therefore could also be made available to the Detained Witnesses: "The entitlement to a computer pursuant to regulation 99(1)(e) is not connected to the need to prepare a defence, but is, rather, linked to the entitlement of all detained persons to access social, educational and recreational opportunities".[10]
   - The Detained Witnesses had the right to receive documents relating to the case in order to prepare their defence in respect of proceedings outside the Court, in this case the asylum proceedings before the authorities of the host State.[11]

5. The Appeals Chamber therefore confronts, in this particular context, a situation not foreseen for by the drafters of the Court's basic texts but which nevertheless requires a judicial response in light of its implications for internationally

[9] Trial Chamber II, *Order in relation to the request by the duty counsel on the transport of Witnesses DRC-D02-P-0236, DRC-D02-P-0228, and DRC-D02-P-0350 to the District Court of The Hague (Article 44(3) of the Headquarters Agreement)*, 7 September 2012, ICC-01/04-01/07-3314-tENG, para. 7.
[10] Presidency, *Decision on the application for judicial review dated 5 April 2012*, 20 April 2012, ICC-RoR221-02/12-4-Conf-Exp, para. 23.
[11] Trial Chamber II, *Order on Duty Counsel's requests concerning the detention of Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350*, 1 June 2012, ICC-01/04-01/07-3303, paras. 9-10.

recognised human rights, which the Court is bound to uphold by virtue of article 21(3) of its Statute.

III. Admissibility of the appeal of the Detained Witnesses

6. Firstly the legal basis of the appeal *(A)* will be discussed, followed by the standing of the Detained Witnesses to move the Appeals Chamber *(B)*.

A. The legal basis of the appeal of the Detained Witnesses

7. In support of their appeal, the Detained Witnesses rely as a main submission on article 82(1)(b) and in the alternative on article 82(1)(a).

8. *Main submission, article 82(1)(b)*.- The Detained Witnesses submit, in the main, that their appeal is founded on article 82(1)(b), which provides: "Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: […] (b) A decision granting or denying release of the person being investigated or prosecuted".

   Without a doubt, a "person being investigated or prosecuted" refers primarily to suspects and accused persons. This article is so worded because the Statute's drafters considered that the only persons who could be detained in the Court's Detention Centre and therefore likely to challenge a decision granting or denying release would be suspects and accused persons.[12] There is no shadow of a doubt that if they had contemplated the possibility that thirteen years after the adoption of the Statute, witnesses would be incarcerated in the Court's Detention Centre for many years, they might have worded this provision differently so as to allow

[12] This is perfectly reasonable given that in their Rules of Procedure and Evidence, even the judges of the International Criminal Tribunal for the former Yugoslavia had initially restricted the right to counsel to suspects and accused persons (articles 44 and 45). However, having subsequently realised that in addition to suspects and accused persons, other persons whose detention had been ordered by the Tribunal, as well as temporarily transferred detained witnesses, were held at that Tribunal's Detention Unit, they decided by amendments of 25 June and 5 July 1996 to include in the Rules article 45 *bis* extending the right to counsel to these new categories of detainees.

any person detained illegally and/or arbitrarily to challenge the legality of such detention before the competent chamber.

However, in their wisdom, the drafters of the Statute left it to the judges to undertake an evolutive interpretation of the statutory provisions, stipulating at article 21(3) that "[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights". In the matter at hand, by extending the scope of article 82(1)(b) to witnesses illegally detained in the Court's Detention Centre for more than two years now, the Appeals Chamber would in no wise violate the spirit of this statutory provision. Quite the contrary: it would be applying the provision in accordance with internationally recognized human rights, specifically the right to liberty in the matter at hand.[13]

9. *In the alternative, article 82(1)(a)*.- Article 82(1)(a) states: "Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: (a) A decision with respect to jurisdiction or admissibility".[14]

In the Impugned Decision, the Trial Chamber asserts that "[TRANSLATION] [i]nsofar as the 4 February 2013 Request now raises in the clearest of terms the issue of the three witnesses' release, the Chamber must first examine whether it is competent to adjudicate such a motion".[15] In the final analysis, it finds "[TRANSLATION] that it is not competent to review the necessity of the witnesses' continued detention in connection with the proceedings in the DRC, even though their detention by the judicial authorities of that State and the Court's continued custody of them are unquestionably linked".[16]

[13] See, in particular, article 3 of the Universal Declaration of Human Rights; article 9 of the International Covenant on Civil or Political Rights; article 5 of the European Convention on Human Rights; article 6 of the African Charter on Human and People's Rights; article 7 of the American Convention on Human Rights; article 17 of the DRC Constitution of 18 February 2006, as amended.
[14] Emphasis added.
[15] Impugned Decision, para. 18. Emphasis added.
[16] *Idem*, para. 24. Emphasis added.

Hence the Impugned Decision is manifestly a decision on the jurisdiction of the Court. The general nature of the term "jurisdiction" employed by the drafters of the Statute does not support the view that it is restricted solely to the eventualities contemplated in article 19. The Detained Witnesses are therefore within their rights also to move the Appeals Chamber on the basis of article 82(1)(a) to set aside a decision which clearly rules on the jurisdiction of the Court.

B. The standing of the Detained Witnesses to move the Appeals Chamber

10. After these clarifications, the question still remains as to whether the Detained Witnesses can be considered as "either party" within the meaning of article 82. Two grounds can be advanced to support an answer in the affirmative.

11. *The relativity of the notion of a party before the Court*.- Firstly, it is important to note that article 82 uses the term "party" alone and not "party to the trial". International criminal trials before the Court are unique in that proceedings before the Court are complex and compartmentalised – beyond its main prerogative of repressing international crimes, the Court also has jurisdiction over matters entirely unrelated to repression.[17] Hence the status of party is relative and essentially depends on the proceedings instituted. Article 50(3) therefore uses the apt expression "party to a proceeding" and not "party to the trial", signifying that it is possible to be a party to a proceeding and not to others.

The dispute as to admissibility and jurisdiction better illustrates this argument. It is known that "[t]he State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82".[18] However, rule 156(5) provides that "When filing the appeal, the party appealing may request that the appeal have suspensive effect in accordance with article 82, paragraph 3."[19] It is inconceivable that in these particular proceedings, which at the pre-trial stage only involve the Prosecutor and the State concerned,

[17] See, in this regard, Gilbert Bitti, "*Commentaire (sur l'intervention de Anne-Marie La Rosa)*", in H. Ruiz Fabri and J.-M. Sorel (eds.), *Le tiers à l'instance devant les juridictions internationales*, Pedone, Paris, 2005, p. 191.
[18] Article 18(4).
[19] Emphasis added.

that the State should not be considered as the "party appealing" when it appeals against a decision of the Pre-Trial Chamber.

Another example can be found in rule 155(1):

> When a party wishes to appeal a decision under article 82, paragraph 1 (d), or article 82, paragraph 2, that party shall, within five days of being notified of that decision, make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal.[20]

However, the challenges contemplated in this provision concern in particular the Pre-Trial Chamber's decision referred to in article 57(3)(d), in regard to which it is expressly provided that it "may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber". Since the Defence does not yet intervene at this stage of the proceedings, it is undeniable that the expression "a party" as used here refers both to the Prosecutor and the State concerned.

Hence, whilst it cannot reasonably be argued that the State concerned at the pre-trial stage is a "party to the trial" before the Pre-Trial Chamber, it is undeniably a "party to a proceeding" before the Pre-Trial Chamber and a "party appealing" before the Appeals Chamber.

12. *Application to the case of the Detained Witnesses*.- Applying this reasoning to the issue of the Detained Witnesses, it is worth noting firstly that in rejecting an application for leave to appeal filed by the Prosecutor, the Netherlands and the DRC against the 9 June 2011 decision, the Trial Chamber had held that it was "a decision that appears entirely discrete from the [main] proceedings".[21]

In the same line, the same Chamber had held in another decision that the Registry had erred in failing to notify the Detained Witnesses of a report containing the response of a State (the DRC) to questions put to it by the Chamber following the

[20] Emphasis added.
[21] Trial Chamber II, *Decision on three applications for leave to appeal Decision ICC-01/04-01/07-3003 of 9 June 2011*, 14 July 2011, ICC-01/04-01/07-3073-tENG, para. 8.

Application for Release. In the view of the Trial Chamber, "the report in question is solely concerned with the proceedings related to the Detained Witnesses, not with the main proceedings in the case. The Chamber considers that counsel for the Detained Witnesses should be notified of the report and its annexes".[22]

The drafters of the Statute cannot be criticised for failing to anticipate that thirteen years after the adoption of this instrument, persons other than the Prosecutor, States, suspects and accused persons might seize the Court in respect of proceedings which are discrete from the main proceeding and which by that token might entail appealable decisions. If, as the Detained Witnesses submit at paragraphs 8 and 9 above, the Appeals Chamber were to consider that the present appeal is sufficiently founded on rule 82, it will have no difficulty in finding that since they are undeniably parties in the discrete proceedings they have instituted, the Detained Witnesses have the appropriate standing to refer subsequent decisions to the Appeals Chamber. Indeed, the relativity of the notion of "party" makes it possible to state that whilst they are manifestly not "parties to the trial", the Detained Witnesses are certainly "parties to all the proceedings" that they have brought before the Court. Clearly, they therefore have the appropriate standing to appeal against decisions rendered in these proceedings and thus to be designated as "parties appealing".

[22] Trial Chamber II, *Order authorising the submission of observations*, 7 March 2013, ICC-01/04-01/07-3357, para. 17. Emphasis added.

IV. Grounds of appeal

13. The Impugned Decision should be set aside *firstly* because it misinterprets article 93(7) by holding that this provision prohibits it from adjudging the Application for Release *(1)*; *secondly*, because it breaches article 21(3) of the Statute by designating the Congolese authorities as having sole jurisdiction to consider the merits of such an application and consequently inviting the Detained Witnesses to apply to them instead *(2)*; and *thirdly*, the Trial Chamber is inconsistent in refusing to act in full accordance with an interlocutory decision it rendered on 8 February 2013 *(3)*.

1/ The Impugned Decision misinterprets article 93(7)

14. To find that it lacks jurisdiction to adjudge the Application for Release, the Trial Chamber reasons its decision thus:

> [TRANSLATION] […] the detention of the detained witnesses must be clearly distinguished from their custody that the Chamber sought the views of the Congolese authorities on this matter. Article 93(7) of the Statute does not authorise the Court to release a person who has been transferred to it temporarily, since such a decision rests only with the State requested to make the transfer. Likewise, rule 192(3) of the Rules allows a detained person in the Court's custody to raise matters concerning the conditions of his or her detention with the relevant Chamber, but in no wise permits the person to apply to it for release. The Chamber takes the view that article 93(7) of the Statute does not, therefore, constitute a detention order, that is to say a judicial act authorising the imprisonment of witnesses who are already detained.[23]

15. *The legitimate transgression of article 93(7) by the Trial Chamber*.- Article 93(7) deals with the temporary transfer of detained witnesses from the detention centres of requested States to the Court's Detention Centre. No part of this provision deals with the "custody" of this category of witnesses. Instead, the provision deals with their detention, not in the requested State, but in the Court's Detention Centre. This subtle distinction which the Trial Chamber is attempting to draw between "detention" and "custody" therefore appears to be immaterial in that it does not appear in the statutory provision that the Chamber claims to apply. In fact, article

[23] Impugned Decision, para. 26. Emphasis added.

93(7)(b) provides that "The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State".[24]

In an application dated 12 April 2011, the Detained Witnesses had requested the Trial Chamber to present them to the Dutch authorities, after they had completed their testimony, for the purposes of seeking asylum.[25] The issue then raised before the Trial Chamber was whether the adverbial phrase "without delay" used by the drafters of the Statute would authorise it to delay the return of these witnesses until their asylum proceedings had been completed. In the view of the Trial Chamber, "If the witnesses were to be returned to 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."[26] Hence it decided to "GRANT […] Duty Counsel's Application and […] suspend the immediate return of the three detained witnesses to the DRC".[27]

The adverbial phrase "without delay" being wholly unambiguous, it is manifest that the Trial Chamber had deliberately decided to breach article 93(7) of the Statute by suspending the immediate return of the Detained Witnesses to the DRC after their respective testimonies. But it had held, and rightly so, that the non-application of this provision was sufficiently justified by the respect for internationally recognised human rights, specifically the right of the Detained Witnesses to seek asylum: "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."[28] In truth, in acting thus, the Trial Chamber had correctly interpreted article 93(7), in light of article 21(3) which, as publicists have underscored, creates a sort of "international super-legality" of internationally recognised human rights norms to the extent that, in

[24] Emphasis added.
[25] See *supra*, para. 3, footnote 7.
[26] 9 June 2011 Decision, para. 73.
[27] *Idem*, p. 34.
[28] 9 June 2011 Decision, para. 73.

keeping with such rights, an international criminal judge may be led deliberately to breach all the sources of law applicable to the Court, including the Court's own Statute.[29]

16. *The Trial Chamber's unjustified refusal to breach article 93(7)*.- The issue which confronted the Trial Chamber after it received the Application for Release is on all points identical to the one brought before it through the 12 April 2011 application of the Detained Witnesses, save that the interpretation of article 93(7) concerns not the adverbial phrase "without delay" but the phrase "the person being transferred shall remain in custody".[30] But the issue remains the same: is the Chamber "[able] 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"? In this instance, the Trial Chamber has answered in the negative in the belief that it had discerned in this article a distinction between "detention", which is under the jurisdiction of the requested State and "custody", which is within the purview of the Court.

To anyone surprised that the Chamber does not rely on article 21(3) to consider the legality of the detention of persons held in its own Detention Centre, the Chamber offered an unexpected and startling answer. In its view, only "*jus cogens*" human rights, in this instance the right to asylum and the principle of *non-refoulement*, are affected by article 21(3).[31] All other human rights are excluded, including the right to liberty, especially as this right "[TRANSLATION] cannot be considered an intransgressible or peremptory norm of international law".[32]

As the Dissenting Judge appropriately noted, it would be futile to seek a legal basis for such a distinction which appears neither in the spirit nor in the letter of

[29] See, in this regard, Alain Pellet, "Applicable Law", in A. Cassese, P. Gaeta and J.R.W.D. Jones (dir.), *The Rome Statute of the International Criminal Court: A commentary*, Oxford University Press, Oxford, 2002, vol. II, pp. 1079-1080.
[30] Article 93(7)(b).
[31] Impugned Decision, para. 30.
[32] Impugned Decision, para. 33.

article 21(3).[33] Such an interpretation, which results in the disregard of a human right recognised by many treaties and conventions, to the point of countenancing the illegal deprivation of liberty of persons in a detention centre of an international criminal court, is manifestly antithetical to article 21(3).

In light of the foregoing, in deciding that article 93(7) authorises it merely to hold the Detained Witnesses in "custody" and not to rule on the legality of their "detention", the Trial Chamber misapplied this provision by declining to interpret it in the light of article 21(3). Its decision should therefore be set aside on this basis.

2/ The impugned decision breaches article 21(3) in that it designates the Congolese authorities as being exclusively vested with the competence to adjudge the merits of the Application for Release.

17. The Trial Chamber did not restrict itself to finding that it was not competent to rule on the merits of the Application for Release. It also designated the Congolese authorities as being exclusively vested with the competence in the matter at hand and accordingly invited the Detained Witnesses to apply to said authorities: "[TRANSLATION] in the view of the Chamber, the witnesses still have the opportunity to seek review of their detention from the competent Congolese judicial authorities, and manifestly were these authorities to decide to end the pre-trial detention, the Court would then be duty-bound to implement this order for release.[34]

a) Legal impossibility of applying to the Congolese authorities.

18. *Reasoning of the Impugned Decision.-* It is difficult to comprehend this reasoning given that the Detained Witnesses are applying for asylum and that in light of

[33] Dissenting Opinion, para. 6.
[34] Impugned Decision, para. 31.

article 1(A)(2) of the 28 July 1951 Geneva Convention Relating to the Status of Refugees, they are therefore presumed not to wish to seek the protection of the Congolese State. Article 1(C) of the Convention states: "This Convention shall cease to apply to any person falling under the terms of section A if: (1) He has voluntarily re-availed himself of the protection of the country of his nationality.[35]

In the matter at hand, the Detained Witnesses argued "[TRANSLATION] that an application to the Congolese authorities by the Detained Witnesses for their release at this stage would be tantamount to an act of deference which would in effect relegate them to the protection of the Congolese State, thus conclusively compromising their asylum claim".[36]

The Trial Chamber did not accept this argument, on the ground that it was new. In its view, then, since the Detained Witnesses had failed to raise an objection to a previous decision by which it had ordered "the Registry to provide all reasonable assistance required by the detained witnesses in order to facilitate the exercise of their rights under Congolese law",[37] it follows that it cannot "[TRANSLATION] endorse the new argument advanced by counsel".[38] Put differently, the Impugned Decision appears to hold firstly that the Detained Witnesses' reliance on the Geneva Convention of 1951 to sustain their argument that it was impossible for them to move the Congolese authorities for their release is inadmissible on account of its lateness; and secondly that the Detained Witnesses had, in failing to object, "acquiesced" in the 1 March 2012 decision. The Appeals Chamber should not endorse the Trial Chamber's view.

19. *Refutation. 1°/ Lack of legal basis of the impugned ground*.- Firstly because there is absolutely no legal basis for finding the ground advanced by the Detained

[35] Emphasis added.
[36] Application for Release, para. 25.
[37] Trial Chamber II, *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, p. 12.
[38] Impugned Decision, para. 32.

Witnesses inadmissible. Indeed, it would be futile to search in any of the basic texts of the Court for the legal basis for such inadmissibility.

20. *2°/ The problem of "objecting" to Court decisions*.- Secondly because, as the Dissenting Judge so clearly emphasised, Court decisions are not intended to attract "objections", but to be challenged through the appropriate channels.[39] Allowing that the Detained Witnesses were able to appeal such a decision before the Appeals Chamber, their not lodging an appeal cannot be considered in any way to be "acquiescence" given that in fact, more than one year later, they never approached the Registry with a view to availing themselves of the measures contemplated by the Trial Chamber.

21. *3°/ The incompatibility of the Impugned Decision with the 9 June 2011 decision*.- Finally, the right to asylum is indubitably consubstantial with the norms that the Trial Chamber itself considers to be part of "*jus cogens*" and therefore applicable by virtue of article 21(3). Hence, any ground advanced in this connection is incontrovertible and may as such be raised in any event, including for the first time on appeal. Accordingly, the absence of an objection on the part of the Detained Witnesses can in no wise be considered as a waiver on their part of their right to raise a peremptory international norm in support of their Application for Release.

b) Effects of the Impugned Decision on the Detained Witnesses.-

22. What is more, if faced with an application by the Detained Witnesses to the Congolese authorities, the Dutch authorities would simply confine themselves to noting the existence of an act of deference impeding continued consideration of their application for asylum under the aforementioned article 1(C)(1) of the Geneva Convention, without concerning themselves with the existence or otherwise of any "objection" to a decision rendered by the Court. It is therefore

[39] Dissenting Opinion, para. 8.

obvious that, as the Dissenting Judge rightly argues, the Impugned Decision confronts the Detained Witnesses with an agonising dilemma: they must either apply to the Congolese authorities for their release, in which case they risk rejection of their application for asylum, or they must refrain from doing so, in which case their detention will be extended *sine die*. The Court, which is expected to apply and interpret all the sources of law applicable before it in accordance with internationally recognised human rights, should not countenance such a situation.

23. *Conclusion of this ground*.- In light of all the foregoing, none of the statutory provisions can be interpreted as authorising the indefinite detention of persons at the Court's Detention Centre. Hence, by designating the Congolese authorities as being exclusively competent to rule on the merits of the Detained Witnesses' Application for Release, whereas the witnesses are legally unable to bring the matter before the Congolese authorities, the Trial Chamber manifestly breached article 21(3), which obligates it to apply and interpret all the sources of applicable law in accordance with internationally recognised human rights.

3/ The impugned Decision is inconsistent

24. *Reasoning of the Impugned Decision*.- The Appeals Chamber will note that before rendering the Impugned Decision, the Trial Chamber rendered an interlocutory decision on 8 February 2013, wherein it held that "in order to allow the Chamber to determine whether the Court is still in a position to maintain the Detained Witnesses in custody on the basis of article 93(7) of the Statute, the Chamber deems it necessary to obtain some clarifications from the Host State and the DRC".[40] It then went on to put a number of questions to both States mainly for two reasons: to verify the reasonableness of the duration of the detention[41] and the existence of a valid detention order in the DRC,[42] it being understood that

[40] Trial Chamber II, *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.
[41] *Idem*, para. 24.
[42] *Id*., para. 25.

both questions were those which the Detained Witnesses had submitted to the Trial Chamber.[43]

The responses provided by these two States can be summarised as follows. The host State's response shows that without prejudice to the rights of the witnesses to apply to the European Court of Human Rights in the event domestic remedies were exhausted, all the national proceedings could last for months, or even years.[44] The DRC quite simply evaded all the questions put to it,[45] particularly the following: "Do the competent judicial authorities of the DRC consider, in light of the dates upon which the initial titles for the detention of the respective witnesses were delivered, that their continued detention is still warranted and justified?"[46] And yet this question was crucial in that it was the logical outcome of the ground advanced, together with evidence, by the Detained Witnesses, *viz.*, that the order for detention issued by the DRC on 10 April 2007 was only valid for a limited period of 60 days and that upon expiry of this time limit, no other detention order replaced the first one, so that when the matter was brought before the Trial Chamber, there was no extant valid detention order issued by the Congolese authorities.[47]

25. *Criticism of the Impugned Decision*.- The Trial Chamber was therefore in possession of all the information to enable it to, as it wished, "[TRANSLATION] decide whether the Court is in a position to maintain its custody of the witnesses under article 93(7) of the Statute". Acting in respect of the unpredictable length of domestic proceedings in the Netherlands and the absence of a valid detention order in the DRC, it could, under article 21(3) of the Statue, at the very least have ruled on the merits of the Application for Release, even if only to deny it if it did not consider it to be well-founded. By finding that it lacked the jurisdiction to adjudge the

[43] Application for Release, paras. 38, 42 and 53.
[44] ICC-01/04-01/07-3355-Anx2.
[45] ICC-01/04-01/07-3355-Conf-Anx5.
[46] ICC-01/04-01/07-3352, para. 25(b). Emphasis added.
[47] Application for Release, para. 55.

matter, the Trial Chamber has tainted its decision with manifest inconsistency in light of its 8 February 2013 decision. What would have been the use of inquiring from these States as to the reasonable duration and legality of the detention if it lacked the jurisdiction to consider the answers it would have received and act accordingly?

26. *Conclusion of this ground*.- The Appeals Chamber is therefore prayed to act, in lieu of the Trial Chamber, in accordance with the 8 February 2013 decision by granting the Application for Release on the factual and legal bases which were amply argued in the said Application, which should be taken to be resubmitted herein *in extenso*.

For these reasons

27. Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 respectfully pray the Appeals Chamber to:

- **Find admissible** as to form the appeal of the Detained Witnesses and rule it well-founded;

And therefore,

- **Set aside** the Impugned Decision in its entirety;

And;

Ruling anew and as it behoved the Trial Chamber;

- **Order** the release of the Detained Witnesses.

[signed]
Ghislain M. Mabanga
Duty Counsel

Done this 9 October 2013.

At Paris, France