



Original: French

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

Date: 9 June 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 THE CONGO
IN THE CASE OF
THE PROSECUTOR *v.* GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI**

Public Document

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)

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
Mr Éric 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 Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Host State
Democratic Republic of the Congo

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Counsel Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other

Division of Court Services

Mr Marc Dubuisson
Mr Ghislain Mabanga Monga Mabanga

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TRIAL CHAMBER II of the International Criminal Court (“the Chamber” and “the Court” respectively), having been seized of:

– an application filed on 12 April 2011 by counsel for three detained witnesses seeking an order for the detained witnesses to be “presented” to the Dutch authorities for the purposes of asylum, arguing that the protective measures proposed by the Registry with respect to their circumstances are inadequate, and requesting the Chamber not to return the detainees immediately to the Democratic Republic of the Congo (“Duty Counsel’s Application” and “the DRC” respectively);¹

– an application filed on 30 May 2011 by Mr Göran Sluiter and Mr Flip Schüller, on the basis of rule 103 of the Rules of Procedure and Evidence (“the Rules”), for the Chamber’s leave to submit an *Amicus Curiae* application (“the *Amicus Curiae* Application”);²

– hereby decides the following pursuant to articles 21, 68, and 93(7) of the Statute and rules 87, 88, 103 and 192 of the Rules.

¹ Duty Counsel, “*Requête tendant to obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d’asile*”, 12 April 2011, ICC-01/04-01/07-2830-Conf.

² Flip Schüller and Göran Sluiter, “Request for Leave to submit Amicus Curiae Observations by Mr. Schüller and Mr. Sluiter, Counsel in Dutch asylum proceedings of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350”, 30 May 2011, ICC-01/04-01/07-2968.

I. PROCEDURAL BACKGROUND

A. Cooperation Requests

1. On 29 November 2010, the Defence for Germain Katanga informed the Chamber of its intention to call four witnesses who were detained by the DRC authorities. It also requested that the necessary arrangements be made for their transfer to the Court and highlighted the fears the witnesses had expressed regarding their safety.³

2. The Chamber granted the Defence request on 7 January 2011, and sought the assistance of the DRC authorities for the temporary transfer of the witnesses.⁴ In its decision, the Chamber recalled its duty under article 68(1) of the Statute to take appropriate measures to guarantee the protection and safety of witnesses. It requested the Registrar to ensure that the Victims and Witnesses Unit (“the VWU”) was closely involved in the consultations on the conditions of the requested transfers and to propose a range of appropriate and consistent protective measures.

3. On 21 January 2011, the Defence for Germain Katanga requested the Chamber to modify the list of exculpatory witnesses in order to replace two of the witnesses it had originally proposed.⁵ Whilst it did not link the withdrawal of

³ Defence for Germain Katanga, *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.

⁴ *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. See the public redacted version of the *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* (ICC-01/04-01/07-2640-Conf-Exp), 3 May 2011, ICC-01/04-01/07-2640-Red3.

⁵ Defence for Germain Katanga, “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-

those two witnesses exclusively to safety concerns, the Defence once again indicated that the witnesses feared that they would suffer retaliation by the DRC.⁶ The Chamber granted this request on 25 January 2011, and instructed the Registrar to notify the modified witness list to the Congolese authorities.⁷

4. On 22 February 2011, the Registry submitted to the Chamber a report on the implementation of the aforementioned decisions.⁸ In that filing and in the minutes of a meeting held on 16 February 2011 between the Registry, the DRC authorities and the four detained witnesses,⁹ it is stated that the discussions between the representatives of the Registry and the witnesses had included the following points: “[r]eason for return to the DRC after testimony; [...] [t]he possibility of raising before the Court their detention in the DRC and the fact that they have been detained for over five years without a trial; [...] [t]heir personal protection in the Prison Central prior to and after their transfer to the Hague; [t]he protection of their family members prior to and after their transfer to The Hague; [and] [w]hether the DRC authorities will have access to the transcripts of their testimonies”.¹⁰ In light of the fears the witnesses expressed regarding their

01/07-2659-Conf-Exp. See also “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*”, 18 March 2011, ICC-01/04-01/07-2659-Conf-Red.

⁶ ICC-01/04-01/07-2659-Conf-Red, para. 4.

⁷ *Décision relative to 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. See also the public redacted version of the *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* (ICC-01/04-01/07-2660-Conf-Exp), 3 May 2011, ICC-01/04-01/07-2660-Red3.

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

⁹ ICC-01/04-01/07-2724-Conf-Anx5.

¹⁰ ICC-01/04-01/07-2724-Conf, para. 8.

return to the DRC after their testimony, the Registry made arrangements to raise this issue with the competent authorities and to conduct a study of the protective measures to be implemented.¹¹

B. Protective Measures

5. On 1 March 2011, the Registry appointed Mr Ghislain Mabanga Monga Mabanga as Duty Counsel for the four detained witnesses for the purposes of notifying rule 74 of the Rules to them and providing them with qualified and independent legal assistance (“Duty Counsel”). For its part, the Defence for Germain Katanga informed the Chamber on 14 March 2011 that one of the four witnesses on its list had been withdrawn, although it did not indicate the reasons for the withdrawal.¹²

6. On 21 March 2011, the Defence for Germain Katanga further reported that the remaining three detained witnesses did not request special protective measures during their testimony, with the exception of DRC-D02-P-0228, who requested authorisation to testify in closed session when the names of certain persons were mentioned.¹³ The Defence for Germain Katanga also requested the Court to engage in dialogue and use its influence with the Congolese authorities to ensure that the witnesses would not suffer retaliation on their return to the Kinshasa central prison.

¹¹ ICC-01/04-01/07-2724-Conf-Anx5.

¹² Defence for Germain Katanga, “Disclosure of Additional Information on the Defence Witnesses”, 14 March 2011, ICC-01/04-01/07-2770-Conf.

¹³ Defence for Germain Katanga, “Defence Observations on the Protective Measures for DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228”, 21 March 2011, ICC-01/04-0107/2790-Conf.

7. On 25 March 2011, the VWU submitted a report on the aforementioned observations of the Defence for Germain Katanga wherein it set out the protective measures for the detained witnesses that it considered feasible.¹⁴ On 30 March 2011, the Chamber rendered an oral decision noting the proposals thus made.¹⁵

8. In his observations of 1 April 2011, Witness DRC-D02-P-0228, through Duty Counsel, requested the Chamber's authorisation to testify *ex parte*, arguing that the assurances provided for in article 93(2) of the Statute and the guarantees set out in rule 74 of the Rules did not allow him to testify without fear of retaliation, or for his safety and that of his family.¹⁶

9. In an e-mail sent on 5 April 2011, the Chamber invited Duty Counsel to contact the VWU so that it could explain to the witness in Duty Counsel's presence what protective, procedural and operational measures could be implemented to protect his safety and that of his family.

10. At a meeting held on 11 April 2011, the VWU confirmed the protective measures proposed in its report of 25 March 2011.

¹⁴ Registry, "Victims and Witnesses Unit's Report on the 'Defence observations on the protective measures for DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 (ICC-01/04-01/07-2790-Conf)", 25 March 2011, ICC-01/04-01/07-2799-Conf.

¹⁵ ICC-01/04-01/07-T-242-CONF-FRA ET 30-03-2011, p. 19, lines 7-22.

¹⁶ Duty Counsel, "*Observations du témoin DRC-D02-P-0228 sur la mise en œuvre de l'article 93-2 du Statut et des règles 191 and 74 et demande de mesures spéciales sur pied de la règle 88 du Règlement*", 1 April 2011, ICC-01/04-01/07-2812-Conf, para. 8.

C. Proceedings concerning asylum requests

11. As noted above, in an application filed on 12 April 2011, Duty Counsel requested the Chamber to “present” the three detained witnesses to the Dutch authorities for the purposes of asylum, submitting that the protective measures proposed by the Registry were inadequate for their situation. On 14 April 2011, at the Chamber’s direction,¹⁷ the VWU submitted its observations on this application.¹⁸

12. On 15 April 2011, the Defence for Germain Katanga submitted its observations on the said application (“the First Observations of the Defence for Germain Katanga”),¹⁹ as did the Prosecutor, on the same date.²⁰ The Registry submitted its observations on 21 April 2011 (“the Registry’s First Observations”),²¹ and filed further observations on 3 May 2011.²²

13. On 4 May 2011, Duty Counsel filed a fresh submission in response to the Registry’s First Observations²³ and, on 5 May 2011, petitioned the Chamber *inter*

¹⁷ ICC-01/04-01/07-T-246-CONF-FRA ET 13-04-11, p. 2, line 3 to p. 6, line 12.

¹⁸ Registry, “*Observations de l’Unité d’aide aux victimes and aux témoins au sujet de la « 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 » introduite par le Conseil de permanence des témoins détenus le 12 avril 2011*”, 14 April 2011, ICC-01/04-01/07-2834-Conf.

¹⁹ Defence for Germain Katanga, “*Defence Observations on ‘Requête tendant à obtenir présentation des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d’asile (ICC-01/04-01/07-2830-Conf)’ of 12 April 2011*”, ICC-01/04-01/07-2836-Conf.

²⁰ Office of the Prosecutor, “*Prosecution’s Observations in response to ‘Requête tendant à obtenir présentation des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d’asile’*”, 15 April 2011, ICC-01/04-01/07-2835-Conf.

²¹ Registry, “*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.

²² Registry, “*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.

²³ Duty Counsel, “*Observations des témoins DRC-D02-p-0236, DRC-D02-P-0228 and 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.

alia to instruct the Registry with a view to appointing a lawyer specialised in asylum law to replace him and to defend the interests of the three witnesses.²⁴

14. In light of all these submissions, and considering that a number of issues remained to be elucidated to enable it to rule in full knowledge of the facts, the Chamber convened a status conference for 10 May 2011, to which the host State authorities were invited.²⁵

15. At the request of the host State authorities,²⁶ the Chamber agreed to postpone the status conference to 12 May 2011. On 11 May 2011, in anticipation of the hearing, Duty Counsel indicated that he wished to provide the Chamber, the parties and the participants with three documents which, in his view, would support the witnesses' request.²⁷ These documents consisted of a report of a legal observation mission carried out by the International Federation for Human Rights in the DRC, an article from the newspaper *Le Potentiel*, and a press release issued by the association *La Voix des Sans Voix* [the Voice of the Voiceless].²⁸ On 12 May 2011, in an e-mail also sent to all the parties and participants following the status conference held on that same day, the Chamber requested the VWU to submit its observations on the three documents provided by Duty Counsel, as well as on Duty Counsel's submissions at the status conference. In particular, the Chamber asked the VWU to state whether the assessment of the risk to which the

²⁴ Duty Counsel, "*Observations du Conseil de permanence sur l'instruction de la Chambre du 2 mai 2011 relative aux courriers du témoin DRC-D02-P-0228*", 5 May 2011, ICC-01/04-01/07-2865-Conf-Exp.

²⁵ *Order convening a status conference (regulation 30 of the Regulations of the Court)*, 5 May 2011, ICC-01/04-01/07-2868-tENG.

²⁶ Registry, "*Requête présentée par l'Etat hôte en relation avec l'audience du 10 mai 2011*", 9 May 2011, ICC-01/04-01/07-2875-Conf.

²⁷ Duty Counsel, "*Communication des pièces des témoins DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 en prévision de la Conférence de mise en état du 12 mai 2011*", 11 May 2011, ICC-01/04-01/07-2886.

²⁸ ICC-01/04-01/07-2886-Anx1, ICC-01/04-01/07-2886-Anx2 and ICC-01/04-01/07-2886-Anx3.

detained witnesses were exposed on account of their testimony before the Court had changed in light of the three documents.²⁹

16. On 16 May 2011, the Registry filed a new report (“the Registry’s Third Observations”)³⁰ and, on 17 May 2011, Duty Counsel submitted an urgent communication to the Chamber.³¹ In an e-mail dated 18 May 2011, following a request from Mr Hooper in this regard, the Chamber invited the parties and participants to submit their final observations by 20 May 2011. By that date, Duty Counsel and the Defence for Germain Katanga had filed their submissions (“the Second Observations of the Defence for Germain Katanga”).³²

D. Interim Order

17. On 24 May 2011, the Chamber issued an order stating that:

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

²⁹ E-mail sent by a legal officer of the Chamber to the parties and participants on 12 May 2011 at 18.25.

³⁰ Registry, “*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.

³¹ Duty Counsel, “*Communication urgente des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350 à la Chambre*”, 17 May 2011, ICC-01/04-01/07-2901.

³² Duty Counsel, “*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; Defence for Germain Katanga, “*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.

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.³³

18. On 25 May 2011, the Registry brought to the Chamber's attention three documents which, in its view, were relevant to Duty Counsel's Application.³⁴ These documents included a letter, dated 23 May 2011, from Mr John Hocking, Registrar of the International Criminal Tribunal for the former Yugoslavia, to the ICC Registrar and another letter, dated 24 May 2011, sent to the Director of the Division of Court Services by Mr Göran Sluiter and Mr Flip Schüller, lawyers in Amsterdam.

19. On 26 and 27 May 2011, Duty Counsel filed two documents, one transmitting to the Chamber an article from the newspaper *Afrique Rédaction* about the situation of Colonel Richard Beiza,³⁵ and the other submitting his observations on the documents transmitted by the Registry on 25 May 2011.³⁶

20. Also on 27 May 2011, the Registry submitted an additional filing bringing to the Chamber's attention the exchange of letters between the Director of the Division of Court Services and Mr Göran Sluiter and Mr Flip Schüller prior to the aforementioned letter of 24 May 2011.³⁷

³³ See *Order to provide further assurances regarding the security of DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350*, 24 May 2011, ICC-01/04-01/07-2952.

³⁴ Registry, "*Transmission de documents en relation avec la Requête ICC-01/04-01/07-2830-Conf*", 25 May 2011, ICC-01/04-01/07-2958-Conf (with annex ICC-01/04-01/07-2958-Conf).

³⁵ Duty Counsel, "*Communication urgente des témoins DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 à la Chambre*", 26 May 2011, ICC-01/04-01/07-2963.

³⁶ Duty Counsel, "*Observations des témoins DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 en réponse à la « Transmission de documents en relation avec la Requête ICC-01/04-01/07-2830-Conf »*", 27 May 2011, ICC-01/04-01/07-2965.

³⁷ Registry, "*Transmission additionnelle de documents et informations en relation avec la Requête ICC-01/04-01/07-2830-Conf*", 27 May 2011, ICC-01/04-01/07-2966-Conf-Exp.

21. On 7 June 2011, the Chamber received the DRC's observations³⁸ and on the same day, pursuant to the Chamber's order of 24 May 2011, the Registry filed a new report on the protective measures that could be implemented, with the cooperation of the DRC authorities, should the three detained witnesses return to their country of origin.³⁹

E. *Amicus Curiae* Application

22. On 30 May 2011, Mr Göran Sluiter and Mr Flip Schüller requested the Chamber's leave to submit *Amicus Curiae* observations on the basis of rule 103 of the Rules.⁴⁰ In their application, they expressed the wish to submit written observations on the nature of Dutch asylum law and proceedings, the current state of affairs in the proceedings initiated by the three witnesses with the Dutch authorities, and the difficulties encountered by Mr Göran Sluiter and Mr Flip Schüller in contacting, and thus effectively representing, their clients who are detained at the Detention Centre in Scheveningen.

³⁸ Registry, "*Observations de la République démocratique du Congo en relation avec les témoins détenus transférés par les autorités congolaises*", 7 June 2011, ICC-01/04-01/07-2986-Conf.

³⁹ Registry, "*Rapport du Greffe soumis en vertu de l'Ordonnance ICC-01/04-01/07-2952*", 7 June 2011, ICC-01/04-01/07-2989.

⁴⁰ Flip Schüller and Göran Sluiter, "Request for Leave to submit *Amicus Curiae* Observations by Mr. Schüller and Mr. Sluiter, Counsel in Dutch asylum proceedings of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350", 30 May 2011, ICC-01/04-01/07-2968.

II. SUBMISSIONS OF THE PARTIES AND PARTICIPANTS

A. Duty Counsel's application

23. The main purpose of Duty Counsel's application⁴¹ is to explain the legitimacy of the fears that the detained witnesses feel at the prospect of their return to the DRC, to demonstrate the inadequacy of the protective measures proposed by the Registry in light of their situation, and to propose a more appropriate form of protection to the Chamber: the presentation of the witnesses to the Dutch authorities for asylum.

24. The witnesses emphasise that they are not requesting the Court to rule on their eligibility for refugee status and agree that this is not a matter for the Court. Indeed, Duty Counsel again took care to emphasise this position during the status conference, recalling that all the witnesses seek of the Chamber is to present them, at the end of their testimony, to the competent Dutch authorities for a ruling on their applications for refugee status.⁴²

25. Responding firstly to the question of why he had not filed an application for asylum on behalf of the three detained witnesses directly with the Dutch authorities, Duty Counsel stated that the direct filing of such an application with the Dutch authorities was, in his view, beyond the scope of his mandate to represent the witnesses before the Court.⁴³

26. Secondly, with regard to the measures actually requested, Duty Counsel stated that he wished the Chamber firstly to suspend the application of article 93(7) of the Statute, and secondly to transfer the witnesses to the Dutch

⁴¹ See the introduction of the present decision.

⁴² Duty Counsel's application, para. 24.

⁴³ ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011, p. 8, lines 1-9.

authorities so that these authorities could exercise their jurisdiction and the asylum application process could be conducted before them. He emphasised that his clients did not intend to evade justice⁴⁴ and that it would be advisable for them to be held in the detention or holding centre for asylum seekers who are not yet authorised to enter Dutch territory.⁴⁵

27. In the view of Duty Counsel, the Court would be failing in its obligation to protect witnesses if, on the ground that it was scrupulously applying article 93(7)(b) of the Statute, it were to return them “[TRANSLATION] to a country where it is aware that it is more than probable that their right to life and security risks being violated”.⁴⁶ In his opinion, the protective measures proposed by the VWU are patently inadequate⁴⁷ because the Registry’s protection programme was designed for people at liberty⁴⁸ and, in his view, it is not possible to put in place an effective procedure in the DRC. He further recalled that the Statute does not provide an exhaustive list of protective measures that the Court can apply for victims and witnesses. By refusing to return them to the DRC and by transferring them to the Dutch authorities so that they can explain their fears, the Chamber would thus only be adopting a special protective measure within the meaning of rule 88 of the Rules.⁴⁹

28. As regards alleged risks incurred by the witnesses as a result of their testimony, Duty Counsel recalled that, during their testimony before the Chamber, all three of the witnesses emphasised the involvement of the most

⁴⁴ ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011, p. 13, lines 4-6.

⁴⁵ ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011, p. 10, line 3 to p. 11, line 25 and p. 14, lines 3-8.

⁴⁶ Duty Counsel’s application, para. 24; ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011, p. 15, line 1 to p. 16, line 15.

⁴⁷ ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011, p. 8, lines 17 and 18.

⁴⁸ ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011, p. 15, lines 19 and 20.

⁴⁹ ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011, p. 16, lines 6-15.

senior authorities of Kinshasa in the Bogoro attack and that the witnesses might be investigated for the statements they had made at the hearing.⁵⁰ In the view of Duty Counsel, the Congolese authorities might therefore wish to “eliminate persons who could act as incriminating witnesses against [them]”.⁵¹

29. Duty Counsel further stated that the detained witnesses feared that they would not be granted a fair trial⁵² within the meaning of article 6 of the European Convention on Human Rights (ECHR) and of the International Covenant on Civil and Political Rights.⁵³ Duty Counsel underscored the fact that the witnesses are opponents of the current government⁵⁴ and recalled the “flaws from detention until sentencing”⁵⁵ in the trial of one of these opponents, Mr M. Firmin Yangambi, going on to discuss the case of the Chebeya trial.⁵⁶ He stated that, conversely, persons close to the current political regime were afforded “all the clemency, all the attention of the Congolese military criminal courts”.⁵⁷

30. Finally, Duty Counsel submitted that all opponents of the current government are “molested” in Makala prison and that, were the detained witnesses to be returned to the DRC, their right to physical integrity would be flouted not only because of their status as political opponents, but also because of the testimony they had given before the Court.⁵⁸

⁵⁰ ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011, p. 17, line 17 to p. 19, line 9.

⁵¹ ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011, p. 19, line 9.

⁵² ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011, p. 20, line 20.

⁵³ ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011, p. 22, lines 11-13.

⁵⁴ ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011, p. 22, line 25.

⁵⁵ ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011, p. 23, line 28.

⁵⁶ ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011, p. 24, line 28 to p. 25, line 11.

⁵⁷ ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011, p. 24, line 27.

⁵⁸ ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011, p. 25, lines 24-27.

B. The observations of the Defence for Germain Katanga

31. The Defence for Germain Katanga concurs with the position of Duty Counsel. In its First Observations, it submits, first of all, that the Court is not an ordinary international criminal court in that, as an international organization with a separate legal personality, it is bound by customary international law, including generally accepted international human rights norms.⁵⁹ According to Germain Katanga's Defence, the Court therefore has the duty to promote and protect human rights, and the Rome Statute does grant it the authority to take measures for the protection of human rights that are not inconsistent with its basic functions.⁶⁰ The Trial Chamber, it is argued, has an inherent power, which devolves to the Court, to ensure that the Court's international obligations as an international legal person are respected. In the view of the Defence, the Statute is sufficiently broad in its terms to cater for the situation at hand.⁶¹

32. The Defence for Germain Katanga considers that the problem raised by the Duty Counsel's application goes beyond the protection of witnesses, and is in fact a "question of humanity".⁶² It takes the view that when, when humanitarian issues arise in relation to witnesses testifying before the Court, the Court "has to put on its bigger hat [...] and question itself on its [...] obligations [which are] shared with the Dutch state and other states within the international community."⁶³ It considers that, once the detainees arrive in The Hague to testify as witnesses, the Court is obliged to protect them.

⁵⁹ First Observations of the Defence for Germain Katanga, para. 4.

⁶⁰ First Observations of the Defence for Germain Katanga, paras. 6 and 7.

⁶¹ First Observations of the Defence for Germain Katanga, paras. 8 and 10.

⁶² ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011, p. 30, line 28.

⁶³ ICC-01/04-01/07-T-258-ENG ET WT 12-05-2011, p. 35, lines 12-17.

33. The Defence for Germain Katanga argues that, in order for the Chamber to entertain the Duty Counsel's application, it need only satisfy itself that the Dutch authorities are competent to address the issue, and that international obligations apply in relation to the treatment of such asylum applications under international human rights law. It considers that "If so, the legal personality of the Court and its duty to promote international human rights and power to protect witnesses militates in favour of the Chamber granting the present request."⁶⁴

34. As concerns the competence of the Dutch authorities, the Defence for Germain Katanga notes that the detained persons are at least in part under the control of the Dutch legal order and that, in this context, the relevant Dutch authorities have jurisdiction to rule on their applications for asylum.⁶⁵ It considers that the detainees are therefore not in the sole custody of the Court, but are also under the control, at least in part, of the host State, which therefore has jurisdiction over the matter in question.⁶⁶ It adds that, although it is for the host State and not for the Court to determine the asylum application, it is worth noting the subjective and objective elements of the fears as set out in Duty Counsel's application.⁶⁷

35. Finally, the Defence for Germain Katanga recalls that The Netherlands is bound by obligations under the ECHR and that the transfer of powers from a State to an international organisation established on its territory does not necessarily exclude that State's responsibility to ensure that these powers are

⁶⁴ First Observations of the Defence for Germain Katanga, para. 11.

⁶⁵ First Observations of the Defence for Germain Katanga, para. 13.

⁶⁶ First Observations of the Defence for Germain Katanga, para. 16.

⁶⁷ First Observations of the Defence for Germain Katanga, para. 19.

exercised in accordance with the ECHR.⁶⁸ Put differently, the host State may transfer powers to an organisation established on its territory provided the rights and freedoms guaranteed in the ECHR continue to be secured.⁶⁹ The Defence argues that the Dutch authorities must therefore examine the consequences of return to the DRC in light of their ECHR obligations to interpret and apply the rights and freedoms enumerated in the ECHR in a manner which is both a practical and effective⁷⁰. The Defence argues that:

The expectation, then, of the host State that the Court will not, either directly or indirectly, let a person that has expressed fear of being persecuted or treated inhumanely leave for a State that has not obliged itself to respect the prohibition of *refoulement*, cannot prevent it from admitting the detainees into the asylum procedure. Such a denial would render obsolete the protection of the detained witnesses from serious human rights violations.⁷¹

36. In its Second Observations, the Defence for Germain Katanga recalls that, in its view, the question of the security of the witness must not be viewed exclusively in light of their in-court testimony.⁷² It notes that no provision in the basic texts explicitly limits the mandate of the VWU to protecting witnesses only from the risks they incur by participating in the proceedings.⁷³ It goes on to underscore that the protection of witnesses is intended to ensure that they can testify in complete safety, given that it is entirely possible that the fear they feel may exceed the actual scope of their testimony.⁷⁴ It further considers that the

⁶⁸ First Observations of the Defence for Germain Katanga, para. 25.

⁶⁹ First Observations of the Defence for Germain Katanga, para. 26.

⁷⁰ First Observations of the Defence for Germain Katanga, para. 27.

⁷¹ First Observations of the Defence for Germain Katanga, para. 30.

⁷² Second Observations of the Defence for Germain Katanga, para. 12.

⁷³ Second Observations of the Defence for Germain Katanga, para. 13.

⁷⁴ Second Observations of the Defence for Germain Katanga, para. 14.

Registry's assessment of the risks faced by the three witnesses as a result of their testimonies has proved inadequate.⁷⁵

C. The observations of the Defence for Mathieu Ngudjolo

37. The Defence for Mathieu Ngudjolo did not file any observations. However, during the status conference, it was keen to emphasise that, in its view, there was every reason for the witnesses to be presented to the competent Dutch authorities for their asylum application. It recalled that, under established case law, the applicants need only prove their fear of persecution and establish that such fear may be objective and subjective.

D. The response of the Office of the Prosecutor

38. The Office of the Prosecutor submits that the legal status of the three witnesses is clear: they are Congolese citizens who were detained by the Court after agreeing to come to testify and the Congolese authorities consented to their transfer. These witnesses, in the Prosecutor's submission, do not lose their status as Congolese detainees in the detention centre, and the Dutch authorities are merely facilitating their detention in The Hague.⁷⁶

39. The Prosecutor further submits that no specific objective risk was identified in regard to the witnesses.⁷⁷ He recalls that the witnesses never faced any threats from the Congolese authorities and that, in the case of Floribert

⁷⁵ Second Observations of the Defence for Germain Katanga, paras. 15-35.

⁷⁶ ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011, p. 37, line 19 to p. 38, line 1.

⁷⁷ ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011, p. 40, lines 4 and 5.

Ndjabu Ngabu and Pitchou Iribi, their position on the involvement of the Congolese authorities in the Bogoro attack has been well known since 2005, 2006 and 2007.⁷⁸ He maintains that the Chamber could return the detainees to the DRC without fearing for their safety.⁷⁹

E. The observations of the Registry

40. As regards the legal status of the three witnesses, the Registry argues that they are still detained by the Congolese authorities, which agreed to transfer them to appear before the Court solely for the purposes of their testimony, under article 93(7) of the Statute.⁸⁰ In the Registry's opinion, this state of affairs has three main consequences: neither the Court nor the host State has a justification for their detention;⁸¹ all acts performed by three persons from the time they were transferred into the Court's custody until their return to the DRC are considered to fall within the ambit of their testimony;⁸² they must therefore return forthwith to the DRC as soon as the purpose of their transfer is attained.⁸³

41. The Registry considers the allegation that the various protective measures applied discriminate against detained witnesses⁸⁴ to be groundless. It argues that the distinction between the measures applicable to witnesses at liberty and those applicable to detained witnesses rests on an objective difference in the situation

⁷⁸ ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011, p. 39, lines 7-16.

⁷⁹ ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011, p. 40, lines 1-3.

⁸⁰ ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011, p. 47, lines 7-9.

⁸¹ ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011, p. 47, lines 17-27; p. 52, lines 20-24; p. 53, lines 1-8.

⁸² ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011, p. 48, line 28 to p. 49, line 3.

⁸³ ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011, p. 50, lines 3-6.

⁸⁴ Registry's First Observations, para. 6.

relating to their detention, citing, in this context, case law from the European Court of Human Rights.⁸⁵

42. As to the evaluation of the level of risk to which the witnesses would be exposed as a result of their testimony in case of their return to the detention centre in Kinshasa, the Registry recalls that the Congolese authorities have neither attempted to prevent the witnesses from testifying nor attempted to visit violence on them or intimidate them, although the authorities were aware that the witnesses intended to implicate them in the planning of the crimes committed in Bogoro.⁸⁶ The Registry recalls that the Congolese authorities cooperated effectively with the Court to organize the transfer of these witnesses.⁸⁷

43. The VWU which, under article 43(6) of the Statute, is the neutral Registry organ responsible for the protection of victims and witnesses, argues that the testimonies of the three witnesses did not elicit any new material unknown to the Congolese authorities that would increase the risk to which the witnesses were exposed.⁸⁸ The VWU further states that the documents filed by Duty Counsel in no way supports the argument that there is a threat to the witnesses' safety.⁸⁹ The Registry recalls that it has taken all possible measures to evaluate and ensure the safety of the witnesses⁹⁰ and states that it has undertaken to maintain contact

⁸⁵ Registry's First Observations, para. 7 and footnote 16.

⁸⁶ Registry's First Observations, para. 8 ; Registry, Registry's Third Observations, paras. 1 and 2.

⁸⁷ Registry's Third Observations, para. 5; ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011, p. 43, line 13; p. 47, lines 12-14.

⁸⁸ Registry's Third Observations, para. 3.

⁸⁹ Registry's Third Observations, para. 7.

⁹⁰ Registry's First Observations, para. 9.

with them after their return to Kinshasa, in order to ascertain that their testimony before the Court does not expose them to greater risk.⁹¹

44. Regarding the evaluation of the “[TRANSLATION] risk of increasing the sentences of the witnesses on account of their testimony”⁹² the VWU takes the view that this issue does not fall within its mandate.⁹³ The Registry, however, emphasises that observer status may be requested on the basis of cooperation with the DRC to ensure that the trial in the DRC is properly conducted.⁹⁴

45. The Registry also informed the Chamber of its concern regarding the possible consequences of the Court’s failure to honour its commitment to ensure the return of the detainees in accordance with article 93(7)(b) of the Statute on the willingness of the Congolese authorities to continue cooperating with the Court.⁹⁵ It also expressed regret that the Congolese authorities were not consulted as to the legal status of the three witnesses or on Duty Counsel’s application.⁹⁶

46. The Registry further emphasised that it is not for the Chamber to determine the competence of the Dutch authorities to rule on the asylum application, and that this is a matter solely for the Dutch authorities themselves.⁹⁷

47. Regarding the travel ban imposed on Witness DRC-D02-P-0236 by resolution 1533 (2004) of the Security Council, the Registry recalled that the

⁹¹ Registry’s Third Observations, para. 9.

⁹² Registry’s Third Observations, p. 8.

⁹³ Registry’s Third Observations, para. 10.

⁹⁴ Registry’s Third Observations, para. 10.

⁹⁵ Registry’s Third Observations, para. 11.

⁹⁶ Registry’s Third Observations, para. 11.

⁹⁷ Registry’s First Observations, para. 10.

temporary lifting of the ban, which was requested by the Dutch authorities, was specifically limited to the witness's appearance before the Court.⁹⁸

48. Finally, the Registry argued that the absolute immunity from jurisdiction that the witnesses enjoy by virtue of article 26 of the Headquarters Agreement between the International Criminal Court and the host State, which came into force on 1 March 2008,⁹⁹ is a barrier to the exercise of jurisdiction by the Dutch authorities.¹⁰⁰ In the Registry's opinion, any acts performed by the detained witnesses during their transfer and their stay, including their application for asylum, are covered by the immunity from jurisdiction. The processing of an application for asylum involving legal proceedings before the Dutch authorities, the Registry argues, cannot occur unless the Presidency lifts such immunity from jurisdiction pursuant to article 30(2)(b)(iii) of the Headquarters Agreement. The immunity having been granted in the interests of the proper administration of justice, and not to confer an advantage, the Registry takes the view that the witnesses themselves are not empowered to waive such immunity, nor is it for the Dutch authorities to decide whether it is a barrier to the exercise of their jurisdiction.¹⁰¹ The Registry noted that in order to allow the Chamber to rule on

⁹⁸ Registry's First Observations, para. 12.

⁹⁹ ICC-BD/04-01-08.

¹⁰⁰ Registry's First Observations, paras. 14-24 ; ICC-01/04-01/07-T-258 ET WT 12-05-2011, p. 49, line 4 to p. 50, line 2.

¹⁰¹ In the view of the Registry, "[TRANSLATION][i]mmunity is not a right of the person to whom it is granted. Immunity is a procedural barrier to a judicial authority's exercise of its jurisdiction – where the point at issue is jurisdictional authority – but it also applies to other forms of immunity. Accordingly, it may be a barrier to the exercise of a right by a person [...] If the immunity from jurisdiction which applies to transferred detained witnesses could not serve as a barrier to the application which [...] is made, this would mean that potentially, any detained witness in the same circumstances could enter an application for asylum and evade the jurisdiction of the requested State". See ICC-01/04-01/07-T-258 ET WT 12-05-2011, p. 57, lines 4-8 and lines 19-23.

Duty Counsel's application, the persons concerned should therefore first request the Presidency to lift their immunity.¹⁰²

F. The observations of the representatives of the host State

49. During the status conference, the Dutch authorities underscored that the responsibility for protecting the witnesses lies primarily with the Court, and that it is not for The Netherlands, as the host State, to decide this issue.¹⁰³ They also noted that, if they were seized of an application for asylum, they would consider it an obligation to process it¹⁰⁴ in light of the Court's preliminary assessment of the risks to which the witnesses were exposed.¹⁰⁵ They are therefore of the opinion that they must comply with the risk evaluation conducted by the Court,¹⁰⁶ and that it would be inappropriate for them to revisit such evaluation.¹⁰⁷

50. In the opinion of the Dutch authorities, the detained witnesses are, and remain, under the jurisdiction of the Court for the duration of their temporary detention in The Netherlands, in accordance with the cooperation agreement entered into with the DRC, and the witnesses cannot, in any event, be considered to be under their authority or their jurisdiction.¹⁰⁸

¹⁰² Registry's First Observations, para. 24.

¹⁰³ ICC-01/04-01/07-T-258 ET WT 12-05-2011, p. 64, lines 11-18.

¹⁰⁴ ICC-01/04-01/07-T-258 ET WT 12-05-2011, p. 65, lines 20-22.

¹⁰⁵ ICC-01/04-01/07-T-258 ET WT 12-05-2011, p. 67, lines 21-28; p. 68, lines 21-25; p. 69, line 17 to p. 70, line 13; p. 77, lines 10-23.

¹⁰⁶ ICC-01/04-01/07-T-258 ET WT 12-05-2011, p. 68, lines 23-25; p. 69, lines 17-23.

¹⁰⁷ ICC-01/04-01/07-T-258 ET WT 12-05-2011, p. 70, lines 9-13; p. 72, lines 23 and 24; p. 75, lines 12-14; p. 77, lines 10-12.

¹⁰⁸ ICC-01/04-01/07-T-258 ET WT 12-05-2011, p. 64, line 19 to p. 65, line 13.

51. Moreover, the Dutch authorities stated that they would abide by the Court's decision on protective measures, and that they would cooperate in the transportation of the detained witnesses if their relocation were ordered.¹⁰⁹ In the event that this did not occur, the Dutch authorities took the view that it would be incumbent upon all the States Parties to the Statute to find a solution to ensure their protection and that, in the interim, the witnesses would remain in the custody at the Court's detention centre.¹¹⁰

52. Regarding the Registry's argument based on the immunity enjoyed by the witnesses, the Dutch authorities took the view that that the immunity was not at issue, since the Dutch authorities had not instituted any proceedings against the witnesses.¹¹¹ In their opinion, immunity comes into play only when proceedings are instituted against a person who actually enjoys immunity from jurisdiction, and on no account could they deny the person recourse to law in a personal capacity.¹¹²

III. DISCUSSION

G. *Amicus Curiae* Application

53. To rule on an application for leave to participate as *amicus curiae*, the Chamber must determine, at its discretion, whether the observations which the applicant proposes to submit will be useful for a proper determination of the

¹⁰⁹ ICC-01/04-01/07-T-258 ET WT 12-05-2011, p. 66, lines 8-13.

¹¹⁰ ICC-01/04-01/07-T-258 ET WT 12-05-2011, p. 66, lines 19-25.

¹¹¹ ICC-01/04-01/07-T-258 ET WT 12-05-2011, p. 65, lines 17-19.

¹¹² ICC-01/04-01/07-T-258 ET WT 12-05-2011, p. 67, lines 4-9.

case.¹¹³ It must therefore be satisfied that Counsel's proposals may assist it in ruling on the case.¹¹⁴

54. At the current stage of the proceedings, and in light of the filings which it has already received, the Chamber does not consider that the submissions of Mr Göran Sluiter and Mr Flip Schüller would be of indispensable assistance, or would provide information that it could not procure by other means. Accordingly, the Chamber is not required, for the proper determination of the case, to grant the application.

H. Duty Counsel's Application

55. Duty Counsel is requesting the Chamber to "[TRANSLATION] present" the three detained witnesses to the Dutch authorities. By "presentation", Mr Mabanga in actual fact means that the Chamber should: (1) order the suspension of the application of article 93(7) of the Statute; (2) allow the three witnesses to file an application for asylum; (3) authorise the three witnesses to communicate with their Dutch counsel from the Detention Centre and (4) order that the witnesses be handed over to the Dutch authorities to allow them to exercise jurisdiction so that the asylum application procedure before them may follow its course.

¹¹³ Trial Chamber I, *Decision Inviting Observations from the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict*, 18 February 2008, ICC-01/04-01/06-1175, para. 7.

¹¹⁴ Appeals Chamber, *Decision on "Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence"*, 22 April 2008, ICC-01/04-01/06-1289, para. 8; Appeals Chamber, *Decision on the application of 14 September 2009 for participation as an amicus curiae*, 9 November 2009, ICC-01/05-01/08-602, para. 11.

56. Duty Counsel's Application is essentially a request for the Court to adopt effective protective measures for the benefit of the detained witnesses, pursuant *inter alia* to article 68 of the Statute. He considers that the most effective protective measure in this instance would be for the Chamber to present the witnesses to the Dutch authorities for the purposes of asylum, while noting that the Chamber can in no way replace the said authorities on this matter. The Chamber has also sought to reiterate the same position on several occasions, underscoring that it would not analyse the arguments likely to be advanced before the Dutch authorities responsible for considering the asylum applications.

57. At the outset, the Chamber notes that the three witnesses are now being assisted by a law firm which will advise them on the asylum procedure and that an application for asylum has already been submitted to the Dutch authorities. Hence the Chamber can take no further action to enable the witnesses to make a formal application to the said authorities, and it considers that a ruling on this specific point is no longer required.

58. In light of the recent developments in the case, the Chamber will therefore address only those matters which remain unresolved, namely:

- What is the precise scope of the duty to protect witnesses, as enshrined, *inter alia*, in article 68 of the Statute?
- In the current situation, is an immediate application of the provisions of article 93(7) of the Statute consistent with internationally recognised human rights? and
- Is the prohibition of contact between the detained witnesses and their Dutch lawyers, which was decided by the Registry pursuant to

regulation 179 of the Regulations of the Registry, consistent with internationally recognised human rights?

1. *What is the precise scope of the duty to protect witnesses as enshrined, inter alia, in article 68 of the Statute?*

a. Necessary distinctions

59. At the status conference, the Chamber stressed the distinction which must be made between measures which the Court may take pursuant to article 68 of the Statute in order to protect witnesses on account of their cooperation with the Court, and those which it is requested to take in order to protect them against potential or proven human rights violations in the broad sense of the term. The Chamber adds that these two types of measures should not be confused with those which, more specifically, protect asylum applicants from the risk of persecution they might suffer if they returned to their country of origin.

60. These distinctions form the theoretical underpinning of this decision. While the Chamber is cognisant of how the overall human rights situation, in the broad sense of the term, of a given country may influence the assessment of the risks faced by witnesses as a result of their cooperation with the Court, the three types of risks set out above must not be conflated, so as not to misconstrue the Court's mandate with respect to witness protection.

61. In the Chamber's view, the Statute unequivocally places an obligation on the Court to take all protective measures necessary to prevent the risk witnesses incur on account of their cooperation with the Court. That is the one and only appropriate interpretation of article 68 of the Statute, which is a framework provision on the matter. Furthermore, although rule 87 of the Rules and

regulation 96 of the Regulations of the Registry do not state so explicitly, a logical and joint reading of these two provisions supports the view that the role of the Court is restricted to protecting witnesses from the risk they face on account of their testimony.

62. Contrary to the submissions of Duty Counsel and the Defence for Germain Katanga, the Chamber is of the view that it is not duty-bound to protect witnesses against risks which they might face not only as a result of their testimony but also as a result of human rights violations by the DRC. By virtue of its mandate, the Court protects witnesses from risks arising specifically from their cooperation with it, not those arising from human rights violations by the authorities of their country of origin. Article 21(3) of the Statute does not place an obligation on the Court to ensure that States Parties properly apply internationally recognised human rights in their domestic proceedings. It only requires the Chambers to ensure that the Statute and the other sources of law set forth at article 21(1) and 21(2) are applied in a manner which is not inconsistent with or in violation of internationally recognised human rights.

63. Nor is the Court duty-bound to assess the risks of persecution faced by witnesses who are applying for asylum. In this respect, the Chamber reiterates its observation at the status conference that the criteria for considering an application for asylum, in particular those pertaining to the risk of persecution incurred by the applicants, are not identical to the criteria applied by the Court to assess the risks faced by witnesses on account of their testimony before the Court.

64. Accordingly, it cannot endorse the host State's argument that the Chamber should conduct an assessment of the risks faced by the witnesses in

light of the principle known as “*non-refoulement*” [prohibition of expulsion or return] which is enshrined in several international instruments, including article 33 of the Geneva Convention of 28 July 1951. Admittedly, as an international organisation with a legal personality, the Court cannot disregard the customary rule of *non-refoulement*. However, since it does not possess any territory, it is unable to implement the principle within its ordinary meaning, and hence is unlikely to maintain long-term jurisdiction over persons who are at risk of persecution or torture if they return to their country of origin. In the Chamber’s view, only a State which possesses territory is actually able to apply the *non-refoulement* rule. Furthermore, the Court cannot employ the cooperation mechanisms provided for by the Statute in order to compel a State Party to receive onto its territory an individual invoking this rule. Moreover, it cannot prejudge, in lieu of the Host State, obligations placed on the latter under the *non-refoulement* principle. In this case, it is therefore incumbent upon the Dutch authorities, and them alone, to assess the extent of their obligations under the *non-refoulement* principle, should the need arise.

b. Role of the Chamber

65. Currently faced with the disagreements between the VWU and Duty Counsel, the Chamber has not yet ruled on the need to implement operational protective measures, within the meaning of article 68 of the Statute, for the three detained witnesses in order to obviate the risks they face on account of their testimony. The Chamber notes that, on 24 May 2011, it ordered the VWU, on the basis, *inter alia*, of discussions with the authorities of the DRC, to conduct a final assessment of the risks those witnesses might incur and of the protective measures which might be implemented for them. A report on the discussions

and the possible resulting proposals was filed by the Registrar on 7 June 2011.¹¹⁵ In the event of disagreement between the party calling the witness and the Registry after the parties and participants have made their submissions, the Chamber will, in accordance with a previous Appeals Chamber judgment,¹¹⁶ issue a decision on instituting the operational protective measures which it considers it may adopt within the scope of its mandate.

66. However, in light of the distinction established above, that decision cannot prejudice the ongoing asylum procedure before the Dutch authorities. The Chamber will now address the asylum procedure.

2. *Is an immediate application of the provisions of article 93(7) of the Statute consistent with internationally recognised human rights?*

67. As for any other individual, whether detained or not, the three witnesses in question are afforded the right to submit an application for asylum. In addition to the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the Status of Refugees, article 14 of the Universal Declaration of Human Rights of 1948 provides that everyone has the right to seek and to enjoy in other countries asylum from persecution. Furthermore, the United Nations General Assembly has adopted a Declaration on Territorial Asylum enshrining the right to seek and to enjoy asylum.¹¹⁷ The Chamber also notes that article 18 of

¹¹⁵ See para. 21 of this decision.

¹¹⁶ 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. 93.

¹¹⁷ Resolution adopted by the United Nations General Assembly on 14 December 1967 [resolution 2312 (XXII)].

the Charter of Fundamental Rights of the European Union adopted on 7 December 2000 guarantees the right to asylum with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community, and that article 19(2) of that Charter recalls that no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. The Chamber further notes that the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 sets forth a similar rule to that contained in the Geneva Convention of 1951 and, although narrower in scope, has acquired customary status. It prohibits a State from expelling or extraditing a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

68. The “*non-refoulement*” principle is considered to be a norm of customary international law¹¹⁸ and is an integral part of international human rights protection. All individuals are entitled to enjoy its application by a State.

69. The Chamber cannot therefore disregard the importance of the rights invoked in Duty Counsel’s Application. In addition to the aforementioned right to apply for asylum, the Chamber must also pay particular attention to the right to effective remedy, as enshrined *inter alia* in article 8 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, article 13 of the European Convention on Human Rights,

¹¹⁸ See, *inter alia*, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, UN High Commissioner for Refugees, 26 January 2007, paras. 14-16. See <http://www.unhcr.org/cgi-bin/tehis/vtx/refworld/rwmain?docid=45f17a1a4>.

article 7 of the African Charter of Human and Peoples' Rights, and article 25 of the American Convention on Human Rights. The Chamber cannot disregard this fundamental rule and stresses that, in order for the asylum procedure to be effective, there must be open recourse to it, both in law and in practice, and that there must be no obstacles to the entering of an application for asylum as a result of acts or omissions that may be imputed to the Court.

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

71. In the matter at hand, the three detained witnesses were transferred to the Court pursuant to article 93(7) of the Statute for the purposes of giving testimony. Article 93(7) further provides that the transferred person shall remain in custody and that when the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State – in this case, the DRC.

72. The witnesses completed their testimony on Tuesday, 3 May 2011. At this juncture, the Chamber considers that it must settle only the issue of whether an *immediate* application of article 93(7) of the Statute would not constitute a violation of the detained witnesses' rights to apply for asylum.

73. As matters stand, the Chamber is unable to apply article 93(7) of the Statute in conditions which are consistent with internationally recognised human rights, as required by article 21(3) of the Statute. If the witnesses were to be returned to 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. Furthermore, were the Chamber to decide to oblige the Host State to cooperate with the Court in order to return the witnesses to the DRC immediately by transporting them to the airport, it would be constraining the Netherlands to violate the witnesses' rights to invoke the *non-refoulement* principle.

74. Moreover, the Chamber is of the view that it need not rule on the issue of the witnesses' legal status, which has been discussed at length. In this respect, the Dutch authorities have clearly indicated on several occasions that, in the event that an application for asylum is submitted to them – as has already happened in the instant case – they would be obliged to consider it.¹¹⁹ Indeed, they also confirmed, as did the Registry,¹²⁰ that article 44 of the Headquarters Agreement applies in this case.¹²¹ Nor is it necessary, in the Chamber's view, to rule on the alleged legal effects of the immunities which the witnesses enjoy, since it considers this argument to be unfounded.

3. *Is the prohibition of contact between the detained witnesses and their Dutch lawyers, which was decided by the Registry in accordance with regulation 179 of the Regulations of the Registry, consistent with internationally recognised human rights?*

75. It would appear that the Registry, applying its discretion pursuant to regulation 179 of the Regulations of the Registry, has denied the Dutch counsel assisting the three witnesses authorisation to visit them at the Detention Centre

¹¹⁹ ICC-01/04-01/07-T-258 ET WT 12-05-2011, p. 65, lines 20 to 22; p. 67, lines 21 and 22; p. 68, lines 21-25 and p. 70, lines 6-8.

¹²⁰ ICC-01/04-01/07-T-258 ET WT 12-05-2011, p. 54, lines 21 and 22.

¹²¹ ICC-01/04-01/07-T-258 ET WT 12-05-2011, p. 65, lines 5-8.

in Scheveningen. It would also appear that the conditions of these three witnesses' detention were determined in a cooperation agreement concluded between the services of the Registry and the Congolese authorities prior to the witnesses' transfer to the Court. It was agreed at that time that, throughout their stay on the territory of the Netherlands for the purpose of testifying, the Court would bear full responsibility for all aspects of the witnesses' stay, including measures taken for their transportation, well-being and safety, and that any request related to telephone contact with their family or any other person was to be addressed to the competent Congolese authorities.¹²²

76. Therefore, as matters stand, and in view of the terms of the aforementioned cooperation agreement, since their arrival in the Netherlands, the witnesses have been unable to contact persons outside the Detention Centre by telephone without the prior authorisation of the Congolese authorities. In the Chamber's view, this situation cannot continue in light of the asylum procedure which has now been initiated before the Dutch authorities.

77. The Chamber is aware that, under the Regulations of the Registry, the conditions of access to detained persons come under the sole purview of the Chief Custody Officer and the Registrar or, in case of appeal, of the Presidency. That being said, however, under article 21(3) of the Statute, the Court – which encompasses all of its constituent organs – must apply the relevant texts in a manner which is consistent with internationally recognised human rights without any adverse distinction. Access to the asylum authorities, which, the Chamber repeats, is unequivocally derived from said human rights, cannot be said to exist if the applicants are unable to meet and correspond with the lawyers

¹²² ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011, p. 46, lines 17 and 18; p. 53, lines 4-6.

of their choice. Furthermore, the mere fact that these three witnesses are in detention cannot justify the restrictions on contact which are in force, as a result of which the witnesses are currently deprived of their right – afforded to any other person or witness – to effective remedy before the Dutch asylum authorities.

78. Accordingly, the Chamber considers that it is now incumbent upon the Registrar to authorise contact between the detained witnesses and their Dutch counsel within the Detention Centre as soon as possible.

I. Conclusion and consequences

79. For all of the aforementioned reasons, the Chamber decides at this point to delay the return of the three detained witnesses, insofar as the issue of their protection within the meaning of article 68 of the Statute has not yet been resolved, and as their return “without delay” would breach internationally recognised human rights. Accordingly, it instructs the Registry to inform the United Nations Security Council of the situation of Witness DRC-D02-P-0236 and to notify it of this decision.

80. For the time being, the witnesses under a detention order issued by the Congolese authorities shall remain detained in the custody of the Court pursuant to article 93(7) of the Statute and rule 192 of the Rules. The Chamber does not

endorse the Registry's argument that their continued detention would have no legal basis now that they have completed their testimony before the Court.¹²³

81. In the Chamber's view, the legal instruments cited above authorise the Court to maintain the witnesses in its custody. Those provisions shall continue to apply until such time as the Chamber has ruled on the critical issue of whether the obligation under article 93(7) of the Statute to return the witnesses can be implemented without contravening the Court's other obligations under article 68 of the Statute and without violating the three witnesses' internationally recognised human rights.

82. Once it is in possession of all of the information pertaining to the protective measures which may be implemented for them, the Chamber will consider several possible scenarios.

83. The first scenario would be to return the detained witnesses to the DRC in accordance with article 93(7) of the Statute. In light of the arguments set forth in the preceding paragraphs, the witnesses could be returned only on condition that (i) the Chamber considers that the protective measures proposed as a result of the discussions it ordered in its order of 24 May 2011 are satisfactory; and that (ii) the application for asylum is denied by the Dutch authorities.

84. The second scenario would be not to return the detained persons to the DRC. This would apply if the Chamber were to consider that the proposed protective measures are definitely insufficient to satisfy the requirements of article 68 of the Statute. In such case, the Court would then have to seek a

¹²³ ICC-01/04-01/07-T-258 ET WT 12-05-2011, p. 46, lines 1-5. See also Registry, "*Transmission de la « procédure de fonctionnement standard » dans le cadre du transfèrement des témoins détenus*", 7 June 2011, ICC-01/04-01/07-2994-Conf-Exp.

solution with one or, if necessary, more States Parties which would afford the witnesses effective protection. This scenario would also apply in the event that the Dutch authorities grant the application for asylum, or consider that under the *non-refoulement* principle the detained witnesses cannot be returned to their country of origin. In this case, it would be impossible for the Court to return them to the DRC.

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

FOR THESE REASONS,

GRANTS Duty Counsel's Application and **DECIDES** to suspend the immediate return of the three detained witnesses to the DRC;

NOTES that the three detained witnesses have already submitted an application for asylum to the Dutch authorities and **CONSIDERS** that it is no longer necessary to rule on this particular point;

REJECTS the *Amicus Curiae* Application;

CONSIDERS that it is now for the Registrar to authorise contact between the detained witnesses and their Dutch counsel within the Detention Centre as soon as possible;

INSTRUCTS the Registry to inform the United Nations Security Council of the situation of Witness DRC-D02-P-0236 and to notify it of this decision; and

ORDERS the Registry to notify Mr Göran Sluiter and Mr Flip Schüller of this decision as soon as possible.

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Christine Van den Wyngaert

Dated this 9 June 2011,
At The Hague, The Netherlands