

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

**No. ICC-01/04-02/12 A  
Date: 20 January 2014**

**THE APPEALS CHAMBER**

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**IN THE CASE OF THE PROSECUTOR v. MATHIEU NGUDJOLO CHUI**

**Public Document**

**Order on the implementation of the cooperation agreement between the Court  
and the Democratic Republic of the Congo concluded pursuant article 93 (7) of  
the Statute**

**Order to be notified in accordance with regulation 31 of the Regulations of the Court to:**

**The Office of the Prosecutor**  
Ms Fatou Bensouda, Prosecutor  
Mr Fabricio Guariglia

**Counsel for Mr Mathieu Ngudjolo Chui**  
Mr Jean Pierre Kilenda Kakengi Basila  
Mr Jean Pierre Fofé Djofia Malewa

**Legal Representatives of Victims**  
Mr Jean-Louis Gilissen  
Mr Fidel Nsita Luvengika

**Duty Counsel for witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350**  
Ghislain M. Mabanga

**States Representatives**  
Democratic Republic of the Congo  
Kingdom of the Netherlands

**REGISTRY**

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**Registrar**  
Mr Herman von Hebel



The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Trial Chamber II entitled “Judgment pursuant to article 74 of the Statute” of 18 December 2012 (ICC-01/04-02/12-3-tENG),

Noting 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)” of 7 October 2013 (ICC-01/04-01/07-3408-tENG), as well as the “Decision on the admissibility of the appeal against the ‘Decision on the application for the interim release of detained Witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350’” (ICC-01/04-01/07-3424) issued today, both filed in the case of *Prosecutor v. Germain Katanga* (ICC-01/04-01/07),

*Issues*, by majority, Judge Song dissenting, the following

## ORDER

1. The Registrar shall take the necessary steps to return witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350, without delay, to the Democratic Republic of the Congo.
2. In implementing paragraph one above, the Registrar shall consult with The Netherlands and provide it with the opportunity to take any steps it determines to be necessary in respect of the pending asylum applications of witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350.
3. In the case that the Registrar considers that the protective measures in place pursuant to article 68 (1) of the Statute in relation to witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350 are no longer adequate, the Registrar shall immediately inform the Appeals Chamber and shall consult with the relevant Congolese authorities.



## REASONS

### I. PROCEDURAL HISTORY

1. On 24 November 2009, Trial Chamber II (hereinafter: “Trial Chamber”) began the hearing of the joint case of *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.<sup>1</sup>

2. In March 2011, three individuals (hereinafter: “Detained Witnesses”) were transferred to the Court for the purpose of testifying as witnesses in the joint case pursuant to an agreement between the Court and the Democratic Republic of the Congo (hereinafter: “DRC”) concluded under article 93 (7) of the Statute (hereinafter: “Standard Operating Procedure Agreement”).<sup>2</sup> In accordance with the first sentence of article 93 (7) (b) of the Statute, the Detained Witnesses were taken into custody in the Court’s detention unit.

3. The Detained Witnesses concluded their testimonies on 3 May 2011.<sup>3</sup>

4. On 12 May 2011, the Detained Witnesses filed asylum claims with The Netherlands.<sup>4</sup>

5. On 9 June 2011, the Trial Chamber rendered a decision delaying the return of the Detained Witnesses to the DRC<sup>5</sup> (hereinafter: “Decision of 9 June 2011”). In relation to the second sentence of article 93 (7) (b) of the Statute, which provides that “the Court shall return the person without delay to the requested State”, the Trial Chamber held that the immediate application of this statutory provision would violate:

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<sup>1</sup> ICC-01/04-01/07-T-80-ENG.

<sup>2</sup> See “Transfèrement des Témoins Détenus, Procédure de Fonctionnement Standard”, 9 May 2011, ICC-01/04-01/06-2732-Conf-Exp-Anx1.

<sup>3</sup> See “Decision on the application for the interim release of detained Witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350”, 1 October 2013, ICC-01/04-01/07-3405-tENG, para. 2. See also “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, para. 72.

<sup>4</sup> See “Request for leave to submit *Amicus Curiae* Observations by mr. Schuller and mr. Sluiter, Counsel in Dutch Asylum proceedings of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350”, 26 May 2011, ICC-01/04-01/07-2968, para. 2.

<sup>5</sup> “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)”, ICC-01/04-01/07-3003-tENG.

1) the Court's obligations under article 68 of the Statute; and 2) the Detained Witnesses' internationally recognised human right to apply for asylum, the principle of *non-refoulement*, and their right to an effective remedy.<sup>6</sup> Therefore, the Trial Chamber held that, "as matters stand", it was "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".<sup>7</sup>

6. In a decision of 24 August 2011<sup>8</sup> (hereinafter: "Decision of 24 August 2011"), upon the receipt of certain guarantees from the DRC, the Trial Chamber held that the Court's obligations under article 68 of the Statute had been fulfilled.<sup>9</sup> Nevertheless, the Trial Chamber noted:

[F]or the reasons explained in its decision of 9 July 2011, so long as the request for asylum is still pending before the Dutch authorities, the Court cannot request that the Host State facilitate their return to the DRC. The fact that the asylum request is still pending makes their return temporarily impossible from a legal point of view.<sup>10</sup>

7. Final oral submissions in the case were presented between 15 and 23 May 2012.<sup>11</sup>

8. On 21 November 2012, the Trial Chamber rendered the "Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons"<sup>12</sup> (hereinafter: "Severance Decision"), in which it, *inter alia*, severed the proceedings against Mr Germain Katanga (hereinafter: "Mr Katanga") from those against Mr Mathieu Ngudjolo Chui (hereinafter: "Mr Ngudjolo").<sup>13</sup>

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<sup>6</sup> See Decision of 9 June 2011, paras 67-81.

<sup>7</sup> Decision of 9 June 2011, para. 73.

<sup>8</sup> "Decision on the Security Situation of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350", ICC-01/04-01/07-3128.

<sup>9</sup> Decision of 24 August 2011, para. 14.

<sup>10</sup> Decision of 24 August 2011, para. 15, citing Decision of 9 June 2011, paras 64, 73.

<sup>11</sup> ICC-01/04-01/07-T-336-ENG, ICC-01/04-01/07-T-337-ENG, ICC-01/04-01/07-T-338-ENG, ICC-01/04-01/07-T-339-ENG, and ICC-01/04-01/07-T-340-ENG.

<sup>12</sup> ICC-01/04-01/07-3319-tENG/FRA.

<sup>13</sup> Severance Decision, paras 9, 59, 62 and p. 30.

9. On 18 December 2012, the Trial Chamber rendered the “*Jugement rendu en application de l’article 74 du Statut*”,<sup>14</sup> acquitting Mr Ngudjolo (hereinafter: “*Acquittal Decision*”).

10. On 20 December 2012, the Prosecutor filed an appeal against the *Acquittal Decision*.<sup>15</sup>

11. On 4 February 2013, the Detained Witnesses filed a request<sup>16</sup> before the Trial Chamber in the case of *Prosecutor v. Germain Katanga*, in which they asked that the Trial Chamber declare that their detention pursuant to article 93 (7) of the Statute was no longer justified and order their immediate release (hereinafter: “*Request to be Released*”), arguing that, since 24 August 2011, there is no legal basis for their detention<sup>17</sup> and that, even if originally legal, the duration of their detention had become unreasonable.<sup>18</sup>

12. On 1 October 2013, the Trial Chamber issued a decision,<sup>19</sup> finding by majority, Judge Van den Wyngaert dissenting,<sup>20</sup> that it was not competent to consider the Detained Witnesses’ *Request to be Released* and rejecting the *Request* as inadmissible (hereinafter: “*Decision on the Request to be Released*”).

13. On 7 October 2013, the Detained Witnesses appealed the *Decision on the Request to be Released*.<sup>21</sup> The Appeals Chamber rejected their appeal as inadmissible in a decision filed today.<sup>22</sup>

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<sup>14</sup> ICC-01/04-02/12-3.

<sup>15</sup> ICC-01/04-02/12-10 (A).

<sup>16</sup> Duty Counsel, “*Requête en mainlevée de la détention des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350*”, ICC-01/04-01/07-3351.

<sup>17</sup> *Request for Release*, para. 34.

<sup>18</sup> *Request for Release*, para. 37.

<sup>19</sup> *Prosecutor v. Germain Katanga*, “*Decision on the application for the interim release of detained Witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350*”, ICC-01/04-01/07-3405-tENG.

<sup>20</sup> Dissenting Opinion of Judge Christine Van den Wyngaert, dated 1 October 2013 and registered on 2 October 2013, ICC-01/04-01/07-3405-Anx.

<sup>21</sup> *Prosecutor v. Germain Katanga*, “*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-tENG (OA 14).

<sup>22</sup> *Prosecutor v. Germain Katanga*, “*Decision on the admissibility of the appeal against the ‘Decision on the application for the interim release of detained Witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350’*”, ICC-01/04-01/07-3424 (OA 14) (hereinafter: “*Katanga OA 14 Decision*”), p. 3.

14. From the time of their transfer to the Court in March 2011 to date, the Detained Witnesses have remained in the Court's detention centre.

## II. MERITS

15. Article 64 (6) of the Statute provides, in relevant part, that a Trial Chamber may, as necessary: "(e) [p]rovide for the protection of the accused, witnesses and victims; and (f) [r]ule on any other relevant matter".

16. Article 68 (1) of the Statute provides that "[t]he Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses".

17. Article 93 (7) of the Statute provides as follows:

(a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:

(i) The person freely gives his or her consent to the transfer; and

(ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) 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.

18. The situation of the Detained Witnesses was brought to the Appeals Chamber's attention by their appeal against the Decision on the Request to be Released, which the Appeals Chamber has dismissed as inadmissible in a decision issued today.<sup>23</sup>

19. While the Detained Witnesses filed their appeal against the Decision on the Request to be Released in the case of *Prosecutor v. Germain Katanga*, the Appeals Chamber notes that they are also witnesses in the case of *Prosecutor v. Mathieu Ngudjolo Chui* because they testified in the joint case of *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*. All three individuals are listed as witnesses in the Acquittal Decision and witness DRC-D02-P0236 was a "joint witness", listed for

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<sup>23</sup> *Katanga* OA 14 Decision, p. 3.

both Mr Katanga and Mr Ngudjolo.<sup>24</sup> The Appeals Chamber recalls that the Prosecutor has appealed the Acquittal Decision and that the appeal is currently pending before the Appeals Chamber. It follows that the Appeals Chamber has jurisdiction to address not only the appeal itself, but also, within the legal framework of the Court, any matter related to that case. This is confirmed by article 83 (1) of the Statute, which provides that, “[f]or the purposes of proceedings under article 81 [of the Statute] and this article, the Appeals Chamber shall have all the powers of the Trial Chamber”, as well as by rule 149 of the Rules of Procedure and Evidence, which provides, in relevant part, that rules governing proceedings in the Trial Chambers “shall apply *mutatis mutandis* to proceedings in the Appeals Chamber”.<sup>25</sup> Thus, the Appeals Chamber has the power to rule on the matter of the Detained Witnesses in accordance with the Statute and the Rules of Procedure and Evidence. The Appeals Chamber may exercise this power *proprio motu*, if necessary.

20. The Appeals Chamber notes that the situation in the present case is unusual because, as recalled above, the case of *Prosecutor v. Mathieu Ngudjolo Chui* was joined with the case of *Prosecutor v. Germain Katanga* until the Trial Chamber’s Severance Decision of 21 November 2012. The proceedings before the Trial Chamber in relation to the latter case are not yet concluded. So far, the Trial Chamber has addressed matters relating to the Detained Witnesses in a series of decisions,<sup>26</sup> culminating in the Decision on the Request to be Released. In this context, the Appeals Chamber notes that the Trial Chamber found that it was not competent to deal with the Request to be Released.<sup>27</sup>

21. Accordingly, the Appeals Chamber considers it appropriate and indeed necessary to resolve the situation of the Detained Witnesses, acting *proprio motu*. In this regard, the Appeals Chamber recalls that the Detained Witnesses have been in the Court’s detention unit for more than two years since the completion of their testimony

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<sup>24</sup> Annex C to Acquittal Decision, 18 December 2012, ICC-01/04-02/12-3-AnxC-tENG, p. 2. The Appeals Chamber notes that witness DRC-D02-P0236 is also witness DRC-D03-11.

<sup>25</sup> See also “Decision on further submissions regarding the anonymous victims in the appeal”, 11 November 2013, ICC-01/04-02/12-154 (A), para. 9; *Situation in the Democratic Republic of the Congo*, “Order on the Reclassification of Documents”, dated 26 January 2011 and registered 27 January 2011, ICC-01/04-592 (OA), para. 7; *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on Mr Thomas Lubanga’s request for disclosure”, 11 April 2013, ICC-01/04-01/06-3017 (A5 A6), para. 9.

<sup>26</sup> See Decision on the Request to be Released, para. 1.

<sup>27</sup> See Decision on the Request to be Released, para. 36.



before the Court. The Appeals Chamber considers that the situation of the Detained Witnesses raises serious concerns in respect of the Court's authority to detain individuals, as well as its obligations to States Parties that cooperate with the Court pursuant to article 93 (7) of the Statute. The Appeals Chamber also notes the fact that the Detained Witnesses have applied for asylum and that those proceedings are occurring under the purview of the competent authorities of The Netherlands. This unusual aspect of the present situation also raises serious concerns regarding the interaction of the obligations entered into between the Court and The Netherlands, on the one hand, and the human rights obligations of The Netherlands pursuant to its national legislation and international commitments, on the other. The Appeals Chamber considers that these concerns, raised by the situation of the Detained Witnesses, have to be addressed.

22. The Appeals Chamber notes that the Standard Operating Procedure Agreement was entered into in order to obtain the testimony of the Detained Witnesses, which is a purpose explicitly permitted under article 93 (7) (a) of the Statute. Once the Detained Witnesses concluded their testimony in May 2011, the statutory "purpose" of maintaining their custody ceased to exist. Pursuant to the Court's obligations under article 93 (7) (b) of the Statute, rule 192 (4) of the Rules of Procedure and Evidence and Section 7 (a) of the Standard Operating Procedure Agreement, the Detained Witnesses, in the normal course of events, would have been transferred to the DRC upon the conclusion of their testimony before the Trial Chamber.

23. The Appeals Chamber notes that the continued non-implementation of the second sentence of article 93 (7) (b) of the Statute, which provides that "[w]hen the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State", is premised on a perceived conflict between its implementation and article 21 (3) of the Statute, according to which the application and interpretation of the Statute must be consistent with internationally recognised human rights. Thus, the Appeals Chamber will first address the relevant internationally recognised human rights at issue and the Court's obligations thereto.

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24. The right to apply for asylum and the principle of *non-refoulement*,<sup>28</sup> as well as the right to an effective remedy<sup>29</sup> are internationally recognised human rights. The Court, however, has no jurisdiction over the Detained Witnesses' asylum claims as they fall within the sole purview of The Netherlands. In this context, the Appeals Chamber notes that the Detained Witnesses' respective asylum claims are currently being considered by the competent Dutch administrative and judicial bodies.<sup>30</sup> Further, the Appeals Chamber considers that the right to an effective remedy is also solely an obligation of The Netherlands vis-à-vis the Detained Witnesses, not of this Court. However, the Appeals Chamber must take note of the specific circumstances of this situation, particularly that the Detained Witnesses are in the physical custody of the Court in The Netherlands, which, in the Appeals Chamber's view, could impact upon the Detained Witnesses' internationally recognised human right to an effective remedy from The Netherlands in respect of their asylum claims. Thus, the Appeals

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<sup>28</sup> See *Convention Relating to the Status of Refugees*, 28 July 1951, 189 United Nations Treaty Series 2545; *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 United Nations Treaty Series 8791; United Nations, General Assembly, *Universal Declaration of Human Rights* (hereinafter: "Universal Declaration"), 10 December 1948, A/810, art. 14; *Convention on the Rights of the Child*, 20 November 1989, 1577 United Nations Treaty Series 27531, art. 22; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (hereinafter: "Torture Convention"), 10 December 1984, 1465 United Nations Treaty Series 24841, art. 3; *International Covenant on Civil and Political Rights* (hereinafter: "ICCPR"), 16 December 1966, 999 United Nations Treaty Series 14668, art. 7, as interpreted by the United Nations Human Rights Committee in its *General Comment 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, para. 9; *African Charter on Human and Peoples' Rights* (hereinafter: "African Charter on Human Rights"), 27 June 1981, 1520 United Nations Treaty Series 26363, art. 12; *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 United Nations Treaty Series 45, art. 2; Inter-American Commission on Human Rights (hereinafter: "Inter-American Commission"), *American Declaration of the Rights and Duties of Man*, 2 May 1948, 1 Annals of the Organisation of American States 130, art. 27; *American Convention on Human Rights "Pact of San Jose, Costa Rica"*, 22 November 1969, 1144 United Nations Treaty Series 17955, art. 22 (7), (8); Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, *Cartagena Declaration on Refugees*, 22 November 1984, Section III, para. 5, available at <http://www.unhcr.org/45dc19084.html>; *Consolidated version of the Treaty on the Functioning of the European Union*, 26 October 2012, Official Journal of the European Union C 326/47, art. 78; *Charter of Fundamental Rights of the European Union* (hereinafter: "European Charter of Fundamental Rights"), 7 December 2000, Official Journal of the European Union C 364/01, art. 18, 19; *Convention for the Protection of Human Rights and Fundamental Freedoms* (hereinafter: "European Convention on Human Rights"), 4 November 1950, as amended by Protocol 11, 213 United Nations Treaty Series 2889, art. 3, as interpreted by the European Court of Human Rights (hereinafter: "ECtHR"), sitting as Grand Chamber, in the case of *Chahal v. United Kingdom*, "Judgment", 15 November 1996, application no. 22414/93.

<sup>29</sup> See Universal Declaration, art. 8; ICCPR, art. 2 (3), 14 (1); African Charter on Human Rights, art. 7; American Convention on Human Rights, art. 25; European Convention on Human Rights, art. 13; European Charter of Fundamental Rights, art. 47.

<sup>30</sup> See The Netherlands, Tribunal de la Haye, 14 October 2013, l'affaire n° AWB 12/37364 et AWB 13/4669; The Netherlands, Tribunal de la Haye, 14 October 2013, l'affaire n° AWB 12/37371 et AWB 13/34466; The Netherlands, Tribunal de la Haye, 14 October 2013, l'affaire n° AWB 12/40033 et AWB 13/6945.

Chamber considers that, in this specific situation, the Court should not frustrate The Netherlands' ability to give effect to the Detained Witnesses' human right to an effective remedy in respect of their asylum claims.

25. At the outset and for the reasons that follow, the Appeals Chamber does not consider that the current situation, i.e. the non-implementation of the second sentence of article 93 (7) (b) of the Statute and the continued detention of the Detained Witnesses in the Court's detention centre is an appropriate solution.

26. First, article 21 (3) of the Statute requires that article 93 (7) of the Statute be applied and interpreted in conformity with internationally recognised human rights; it does not require the Court to *violate* its obligations pursuant to article 93 (7) (b) of the Statute. Furthermore, such an interpretation would seriously damage the Court's ability to enter into future cooperation agreements with States, which would undermine the Court's ability to obtain needed testimony and evidence and render it more difficult to establish the truth in the cases before it.

27. Second, the Appeals Chamber considers that the Court's authority to detain individuals is limited to situations where the detention is related to judicial proceedings *before the Court*. The Court cannot serve as an administrative detention unit for asylum seekers or persons otherwise involved in judicial proceedings with the Host State or any other state. The Appeals Chamber does not consider that article 21 (3) of the Statute requires, or even permits, the Court to detain individuals beyond what is provided in the Statute. Furthermore, such an interpretation would raise other serious concerns, including potentially interfering with the Host State's domestic asylum proceedings.

28. Thus, the question before the Appeals Chamber is how the second sentence of article 93 (7) (b) of the Statute should be interpreted and applied so that it does not frustrate the Detained Witnesses' right to an effective remedy from The Netherlands with respect to their asylum claims.

29. In this regard, the Appeals Chamber notes that rule 192 of the Rules of Procedure and Evidence, as well as article 44 of the Headquarters Agreement between the International Criminal Court and the Host State (hereinafter "Headquarters

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Agreement”<sup>31</sup> regulate the transport of individuals in the custody of the Court. Under these provisions and in the course of the implementation of article 93 (7) (b) of the Statute, the Detained Witnesses will be under the control and in the physical custody of The Netherlands. Accordingly, the Appeals Chamber considers that it is for The Netherlands to determine whether the Detained Witnesses’ asylum claims make it necessary for it to intervene in order to take control of the Detained Witnesses until their respective claims have been finally adjudicated. In this regard, the Appeals Chamber acknowledges that The Netherlands may be faced with conflicting obligations, namely those with the Court, pursuant to the Headquarters Agreement, and those pursuant to The Netherlands’ international and domestic legal obligations in relation to the pending asylum claims. However, the Appeals Chamber is firmly of the view that the resolution of these conflicting obligations lies with The Netherlands. In this respect, the Appeals Chamber stresses that article 21 (3) of the Statute does not require the Court to interpret its legal texts so as to avoid situations where The Netherlands may consider it necessary to take independent steps in order to fulfil its own legal obligations in relation to the Detained Witnesses.

30. Based on the above, the Appeals Chamber considers that the second sentence of article 93 (7) (b) of the Statute can be implemented in conformity with article 21 (3) of the Statute, specifically in respect of the Detained Witnesses’ right to an effective remedy in respect of their asylum claims. Therefore, the Appeals Chamber orders the Registrar to implement, without delay, the second sentence of article 93 (7) (b) of the Statute in respect of the Standard Operating Procedure Agreement entered into between the Court and the DRC regarding the Detained Witnesses. The Registrar is also ordered to consult with The Netherlands in order to establish a procedure for this implementation that permits the Host State to determine whether it is necessary to intervene based on its own obligations in relation the Detained Witnesses’ asylum claims.

31. Finally, in respect of the Court’s obligation to provide for the protection of witnesses, including their safety, physical and psychological well-being, dignity and privacy, the Appeals Chamber recalls that, in its Decision of 24 August 2011, the

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<sup>31</sup> 1 March 2008, ICC-BD/04-01-08, *available at*: <http://www.icc-cpi.int/NR/rdonlyres/99A82721-ED93-4088-B84D-7B8ADA4DD062/280775/ICCBD040108ENG1.pdf>.



Trial Chamber held that its obligations pursuant to article 68 of the Statute had been fulfilled.<sup>32</sup> The Appeals Chamber has not been notified of any change in circumstances by the Registrar that would necessitate reconsidering this determination. However, in accordance with its own obligations under article 68 (1) of the Statute, the Appeals Chamber orders the Registrar, prior to the implementation of article 93 (7) (b) of the Statute, to inform the Appeals Chamber immediately and to consult with the relevant Congolese authorities, if the Registrar considers that the protective measures pursuant to article 68 (1) of the Statute are no longer adequate.

Judge Sang-Hyun Song appends a dissenting opinion to this decision.

Done in both English and French, the English version being authoritative.



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**Judge Cuno Tarfusser**  
**On behalf of the Presiding Judge**

Dated this 20th day of January 2014

At The Hague, The Netherlands

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<sup>32</sup> Decision of 24 August 2011, para. 14.