

Cour
Pénale
Internationale



International
Criminal
Court

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

Date: 26 May 2011

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA AND MATHIEU NGUDJOLO
CHUI*

Public Document

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

Source: Flip Schüller and Göran Sluiter

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
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

The host State

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other

Mr Marc Dubuisson
Mr Ghislain Mabanga Monga Mabanga

Introduction

1. Pursuant to Rule 103 of the Rules of Procedure and Evidence (“the Rules”) Flip Schüller and Göran Sluiter (“the applicants”), counsel in Dutch asylum proceedings on behalf of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 (“three witnesses”) in the case of *The Prosecutor v. Katanga and Ngudjolo*, seek leave to submit, as amicus curiae, written observations on the nature of Dutch asylum law and proceedings, the current state of affairs in the ongoing asylum proceedings of our clients and the difficulties in effectively representing our clients who are detained at the ICC Detention Center.

Application for Leave

2. The applicants are counsel with Böhler Attorneys, Amsterdam, and are specialized in (international) asylum/refugee law and international criminal law, respectively. They have been instructed by the three witnesses, and have filed on their behalf an application for asylum with the competent Dutch authorities on 12 May 2011.
3. Rule 103 (1) of the Rules permits application by a State, organization or individual for leave to submit observations by providing:

At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.

4. For the reasons set forth below, the applicants request that they be granted leave to submit a proposed amicus curiae brief.

Relevant Procedural History

5. The concern for the three witnesses’ well-being and safety has given rise to several filings and has been addressed at hearings. Below we just offer a very short summary, without being complete.

6. On 5 May 2011 Trial Chamber II issued an Order convening a status conference (regulation 30 of the Regulations of the Court).¹ The order is the result –to put it simply- of the increasing concern of the three witnesses for their well-being and safety upon return to the DRC, where they have been detained for a significant number of years. They face a real risk of persecution upon return.
7. In this light, Duty Counsel for the three witnesses, mr. Mabanga, filed on 12 April 2011 an application to seek leave from the Chamber for the three witnesses to be presented to the Dutch authorities for the purposes of asylum.²
8. The status conference took place on 12 May 2011.³ Representatives of the Dutch authorities participated in this status conference and presented views on behalf of the Dutch government. Mr. Mabanga represented the three witnesses and submitted views on their behalf.
9. On 17 May 2011 duty counsel mr. Mabanga filed with the Chamber a ‘communication urgente des témoins DRC-D02-P-236, DRC-D02-P-0228 et DRC-D02-P-350 à la Chambre’,⁴ in which he submitted additional information in respect of the risks the three witnesses would face upon return to the DRC.
10. On 24 May 2011 the Trial Chamber issued an ‘Order to provide further assurances regarding the security of DRC-D02-P-0326, DRC-D02-P-0228 and DRC-D02-P-0350’.⁵ The purpose of this order is to receive a report from the Registry on the assurances that could be put in place in the DRC in respect of the protection of the three witnesses. The Registry is ordered to report back as soon as possible and in no case later than Friday 7 June 2011; upon notification of the Registry’s report the detained witnesses or any of the parties or participants have seven days to respond.

The Proposed Amicus Curiae Brief Will Inform the Trial Chamber on Important Aspects of Dutch Asylum Law and on Ongoing Proceedings in respect of the Three Witnesses

11. It is our position that the well-being and safety of the three witnesses raise issues of responsibility of both the Court and the host-State, the Netherlands. The applicants are

¹ ICC-01/04-01/07-2868.

² ICC-01/04-01/07-2830-Conf.

³ ICC-01/04-01/07-T-258-ENG

⁴ ICC-01/04-01/07, 17 May 2011.

⁵ ICC-01/04-01/07-2952.

in principle exclusively concerned with the role and responsibility of the Netherlands in respect of the asylum applications of our clients, but we acknowledge in this respect the relationship with proceedings at the ICC.

12. It is to be expected –and currently the official position of the Dutch immigration authorities in respect of our clients’ asylum applications- that findings of the ICC in relation to the well-being and safety of the three witnesses will influence the position of the Dutch authorities. The Dutch authorities have declared that the admissibility of the asylum applications cannot be decided upon until the findings of the ICC are known. This position is incompatible with the right to ask for asylum and the right to access to asylum procedure under national asylum law which has incorporated the European Asylum Directives.
13. We can –by way of amicus observations- assist the Chamber in the proper determination of this case. We propose submissions on the following topics, although this is by no means an exhaustive list and we are fully available to inform the Chamber on any other issue, if so invited by the Chamber.
 - a. The proposed brief will, to start with, focus on Dutch asylum law and practice with regard to the obligation of non refoulement, with special emphasis on a. the relationship between the host-State and the ICC and b. the host-state’s obligations under international human rights law. We have read with great interest the transcripts of the hearing of 12 May 2011.⁶ We have carefully analysed the submissions from the representative of the Netherlands.⁷ We are concerned about the manner in which the Court has been informed by the host-State. It has been provided a one-sided analysis, which does not accurately and evenhandedly reflect Dutch asylum law and practice and thus does not offer the Court a balanced view as to how the Netherlands considers the relationship with the Court and the possible impact of conflicting human rights obligations in that respect. In our brief we would supplement –and counterbalance- the views of the Dutch representative with (recent) relevant national and international case law and parliamentary documents. It would be regrettable if the Court –being faced for the first time with such a fundamental question going at the heart of its mandate, protection of human

⁶ ICC-01/04-01/07-T-258-ENG.

⁷ Id., especially pp. 69 – 73.

rights- would base its subsequent decisions on information which warrants elaboration .

- b. As a second matter we intend to inform in our brief the Court about the current state of affairs in the ongoing asylum proceedings. We have, as mentioned, filed the asylum application on 12 May 2011 and have since then been corresponding with the competent Dutch authorities. We are concerned –and find confirmation for that concern in this correspondence- that the Dutch authorities will in their treatment of the applications ‘hide’ as much as possible behind the ICC and seek to minimize –even relinquish- their own responsibility in this respect. The Dutch authorities have for example not addressed the issue of the possibilities and obligations for a Dutch national court to evaluate and assess the pending asylum request, independently of the findings of the ICC .From the perspective of the Court, however, there is obviously a strong interest in the protection of well-being and security of its witnesses and if this can also be secured through asylum proceedings in the host-State, it should be made aware of it. In the interests of our clients, we fear that these two-track proceedings, both at the ICC and in the Netherlands, might lead to shifting the responsibility from one track to the other. This risk can be reduced by fully informing and being fully transparent towards the Court about how the Netherlands is treating the asylum requests.
- c. The final aspect of our proposed brief will concern the access of our clients to their Dutch counsel and their access to Dutch courts in general. We have requested the Registrar to visit our clients, in relation to their asylum applications which have already been submitted to the Dutch authorities. We have until this day been denied such access both as ‘counsel’ and also as ‘other visitors’, in the sense of Regulation 180 of the Regulations of the Registry.
Needless to say that access to counsel is essential for the three witnesses’ Dutch asylum proceedings. In our proposed amicus brief, we will argue that this refusal has no basis in the law and may seriously damage the asylum applications, and ultimately the well-being and safety of the three witnesses. Informing the Chamber of this problem will assist it in adopting a more comprehensive approach to the matter. Our position in this respect is that –although the ICC has its own role and responsibility in respect of the three witnesses- it cannot deny the three witnesses access to alternative remedies which might enable them to secure their safety.

Applicants' Focused Observations Satisfy the Content and Purpose of Rule 103

14. The Court's case law in respect of amicus applications has not always been consistent over the years. There are examples of a relatively low threshold when it was said that the amicus application concerns issues that 'the Chamber may find useful'.⁸ In cases where applications were rejected a more stringent test appears to be applied, namely that amicus curiae observations are only resorted to on an exceptional basis, when such observations are needed on particular topics, and subject to the Chamber's consideration that this is desirable for the proper determination of the case.⁹
15. It is submitted that even under the most stringent test, this application fully satisfies Rule 103. We are aware that even when the application satisfies Rule 103, it remains at the discretion of the Chamber to grant leave. However, without this proposed amicus brief, it is our conviction that the Chamber will be deprived of vital factual and legal information for the determination of the complex question how to adequately protect the well-being and safety of these three witnesses.
16. Since this is an urgent matter, we can commit to a swift delivery of our amicus brief. In addition we can be available at hearings, if needed, and can, for example, provide the Chamber with a direct update on the ongoing asylum proceedings.

Applicants Are Appropriate Individuals to Act as Amicus Curiae in the Present Matter

17. Applicants fulfill the criterion of 'persons' under Rule 103. Because of our role as counsel for the three witnesses in Dutch asylum proceedings, there can be no doubt that we are qualified to inform the Chamber effectively on the issues proposed.

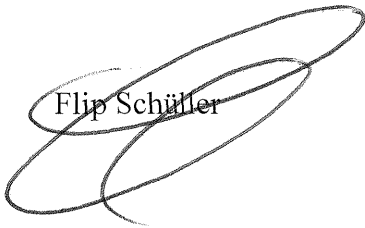
Conclusion

18. For the reasons set forth above, mr. Schuller and mr. Sluiter respectfully request that they be granted leave to submit the proposed amicus curiae brief –or to submit views

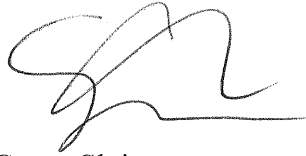
⁸ E.g. Decision on Application for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, *Prosecutor v. Bemba*, case No. ICC-01/05-01/08, 9 April 2009.

⁹ E.g. Decision on the "Request for leave to submit Amicus Curiae Observations on behalf of the Kenyan Section of the International Commission of Jurists Pursuant to Rule 103 of the Rules of Procedure and Evidence", *Prosecutor v. Ruto and others*, Case No. ICC-01/09-01/11, 11 May 2011, para. 9.

orally- on these matters pursuant to Rule 103 of the Rules, within any time-limit fixed by the Chamber.

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Flip Schüller

A handwritten signature with a prominent, large 'G' at the beginning, followed by several loops and a long horizontal stroke at the end.

Göran Sluiter

Dated this 26 May 2011

At Amsterdam, The Netherlands