

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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Date: **7 June 2011**

TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
v. THOMAS LUBANGA DYILO**

Confidential

**Prosecution's Submissions on the Chamber's "Order on the application from DRC-
D01-WWWW-0019 of 1 June 2011"**

Source: Office of the Prosecutor

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

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Background

1. On 3 June 2011, Trial Chamber I ("Chamber") ordered the Prosecution to file submissions on two issues: (1) whether the evidence reveals any risks to defence witness 19's safety, physical and psychological well-being if he is returned to custody in the DRC, and (2) whether he should be allowed to pursue an asylum request.¹
2. The Chamber directed the Victims and Witnesses Unit (VWU) to file a report on whether defence witness 19 faces any such risks and, if so, whether measures can be implemented to remove identified risks.² The Chamber also invited submissions from the Dutch government.³

Prosecution's Submissions

3. The Prosecution notes that in April 2011, three detained witnesses in the case against Germain Katanga and Mathieu Ngudjolo Chui ("*Katanga* case") filed an application for additional protective measures and requested that the Chamber present them to the Dutch authorities so that they could file a request for asylum.⁴ The VWU filed two assessments of the security situation of the three detained witnesses.⁵
4. The issue as to whether defence witness 19 in this case faces security risks should he return to the DRC is inextricably linked to the issue of a possible application for asylum. During the status conference in the *Katanga* case, representatives of the Dutch government advised that if an application for asylum is submitted on behalf of the three detained witnesses in that case, the Netherlands will render a decision on the application but will rely entirely on

¹ ICC-01/04-01/06-2749-Conf, para. 7.

² ICC-01/04-01/06-2749-Conf, para. 7.

³ ICC-01/04-01/06-2749-Conf, para. 7.

⁴ Reference to the Confidential application is made in Trial Chamber II's public decision, ICC-01/04-01/07-2962, para.19 and during a public status conference, ICC-01/04-01/07-T-258 ENG ET WT.

⁵ Reference to the two Confidential VWU filings is made in Trial Chamber II's public decision, ICC-01/04-01/07-2962, para.20 and 26

the Court's assessment as to whether security risks exist for the applicants should they return to the DRC.⁶

5. Trial Chamber II's decision on the request of the detained witnesses to be presented to the Dutch authorities in order to file a request for asylum is still pending. In the meantime, Trial Chamber II ordered the VWU to contact the authorities of the Democratic Republic of the Congo ("DRC") to discuss, first, which measures besides monitoring will be implemented to contain the level of risk which the detained witnesses may face because of their testimony and, second, which protective measures the VWU can implement in collaboration with the DRC if any such measures are deemed necessary by the VWU.⁷
6. The Prosecution submits that requests for asylum should only be made where the VWU has assessed and the Court has determined that identifiable security risks to a witness exist on account of his or her testimony before the Court, where such risks cannot be reduced or controlled through the implementation of protective measures. Such cases should be rare.
7. The possibility that defence witness 19, as with the three detained witnesses in the *Katanga* case, may now claim asylum implicates substantial interests of all organs of the Court and also of the host State. Defence witness 19 was transferred to the ICC's detention centre pursuant to a request under Article 93(7)(a) of the Rome Statute. The Netherlands allowed him, and the other detained witnesses, to be temporarily transferred to testify pursuant to the Headquarters Agreement between the ICC and the host State. The Netherlands, as host State, accepted the temporary transfer with the understanding that upon completion of testimony, the detained witnesses would be returned without delay to the DRC. The obligation to return also raises legitimate expectations in the DRC, the requested State.

⁶ ICC-01/04-01/07-T-258 ENG ET WT, page 75, lines 12-14, p.76, lines 10-13, p.77, lines 4-11.

⁷ ICC-01/04-01/07-2962, para. 33.

8. It is in the Court's interest that detained persons with relevant evidence be available to testify, regardless of the party calling them. The Prosecution is concerned that if persons transferred here under Article 93(7) successfully delay or even avoid their return, it might make it more difficult in future to secure the temporary transfer of other detained persons.
9. Defence witness 19's request swiftly followed the same request from the three detained witnesses in the *Katanga* case, thereby raising serious concerns that complaints for security and requests for asylum will become the norm for all detained witnesses appearing before the Court. If all of these asylum requests are submitted to the Dutch authorities, the sending States and the host State will become increasingly hesitant to facilitate such transfers in the future. As a result, the parties and the Court will face real problems securing the attendance of witnesses to give evidence.
10. Security risks facing a witness, whether detained or not, must be specific, objectively identifiable and connected to and a consequence of the witness's testimony. The potential risks cannot be general in nature or independent of the witness's cooperation with the Court. The Prosecution is skeptical about the basis for defence witness 19's claim for protection. He was not compelled to testify. He expressly consented to his voluntary appearance as a witness before the Chamber.⁸ His testimony was public. He made no advance request for protective measures to minimize any potential security impact; for instance, he did not request that any part of his testimony be heard in private session.
11. Moreover, to the Prosecution's knowledge, despite being detained since March 2005 there is no evidence of threats against him or persecution by the DRC authorities.⁹ No specific past or future threats have been identified to

⁸ Defence witness 19 acknowledged that he committed himself freely and voluntarily to testify before the Court: ICC-01/04-01/06-T-346 ENG ET WT, p. 57, lines 20-21.

⁹ Defence witness 19 complained only of being filmed as he was being transported to The Hague for testimony: ICC-01/04-01/06-T-346 ENG ET WT, pp.57-63.

support a finding that the DRC authorities will, on account of his testimony at the ICC, now pose a security risk to defence witness 19.

12. As a State Party to the Rome Statute, the DRC has co-operated with the Court since its referral of the situation of the DRC in 2004. There is no evidence that the DRC authorities will ignore their responsibilities. Given the public debate on this issue and the concerns of both Chambers regarding these detained witnesses, the DRC authorities are reminded to ensure their protection.

Conclusion

13. The Prosecution has no evidence to support defence witness 19's assertion that he will face persecution if he returns to the DRC due to his testimony at the Court. The Prosecution agrees that the VWU has its own expertise which will assist the Chamber in its assessment of security risks to defence witness 19 on account of his testimony.
14. If the Chamber determines that defence witness 19 might face increased security risks as a result of his testimony, all possible protections should be considered and implemented to facilitate his safe return so that requests for asylum do not become routine. To this end, the Prosecution requests that the Chamber proceed in the same manner as Trial Chamber II by directing the VWU to communicate with the DRC authorities to discuss and collaborate on enhanced security measures to ensure the safety of defence witness 19 upon his return to the DRC.



Luis Moreno-Ocampo,
Prosecutor

Dated this 7th day of June 2011
At The Hague, The Netherlands