

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/06

Date: 8 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

Registrar's Further Observations under Order ICC-01/04-01/06-2949

Source: Registrar

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

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**Victims Participation and Reparations
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Mr. Ghislain Mabanga Monga Mabanga

THE REGISTRAR of the International Criminal Court (the "Court"),

NOTING the "Requête tendant à l'obtention des mesures de protection spéciales au profit du témoin DRC-D01-WWWW-019",¹ filed by the Counsel for witness DRC-D01-WWWW-019 on 1 June 2011 (the "Request") ;

NOTING the "Order on the application from DRC-D01-WWWW-0019 of 1 June 2011",² issued by Trial Chamber I (the "Chamber") on 3 June 2011 (the "Order"),

NOTING the "Observations du Greffe soumises en vertu de l'Ordonnance n° ICC-01/04-01/07-2949",³ filed by the Registry on 7 June 2011 (the "Initial Observations"),

NOTING Articles 21(1)(b), 21(3) and 93(7) of the Rome Statute, Rule 192 of the Rules of Procedure and Evidence (the "RPE"), Regulation 23*bis* of the Regulations of the Court and Article 26 and 30 of the Headquarters Agreement,

RESPECTFULLY SUBMITS

1. The present observations are submitted in complement to the Initial Observations filed in compliance with the Chamber's Order. The Registrar requests the Chamber to consider both sets of observations together. In the Initial Observations, the Registrar addressed two legal issues raised, in her view, by the Request. The Registrar further finds necessary to draw the attention of the Chamber to the two additional issues below.

¹ ICC-01/04-01/06-2745-Conf

² ICC-01/04-01/06-2749-Conf

³ ICC-01/04-01/06-2754-Conf.

Legal Issue with respect to the Prohibition of "Refoulement"

2. Under Article 33(1) of 1951 Geneva Convention relating to the Status of Refugees (the "Geneva Convention"), "[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of the territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". This provision applies to both refugees and asylum seekers, as defined under Article 1 of the Geneva Convention.
3. At the current stage and as long as the Chamber does not authorize DRC-D01-WWWW-019 to approach the Host State and seek asylum, the Registrar's view is that the Geneva Convention does not apply to him.
4. DRC-D01-WWWW-019 is currently detained under the authority of the Democratic Republic of Congo (the "DRC") under the supervision of the Registrar pursuant to Rule 192(2) of the RPE.
5. Under its Article 1(A)(2) as amended by the Protocol relating to the Status of Refugees of 31 January 1967, the Geneva Convention applies to "any person who [...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country" (emphasis added). Being currently detained by Congolese authorities, DRC-D01-WWWW-019 is still under their protection, which has been delegated, for the time of his transfer, to the supervision of the Registry by virtue of Article 93(7) of the Statute and Rule 192 of the RPE. The Registrar thus observes that there is no issue whether he is unable or unwilling to avail himself of the protection of the Congolese authorities, since he is currently under their protection. Articles 1(C)(1), (4) and

- (5) of the Geneva Convention further confirm its inapplicability to persons who are under the protection of their State of nationality at the time of their application for the refugee status.
6. The inapplicability of the Geneva Convention at the current stage makes that the prohibition of "refoulement" under Article 33 of that Convention inapplicable. Should DRC-D01-WWWW-019 be returned to DRC, this would constitute a return after transfer under Article 93(7) of the Rome Statute and not a "refoulement".
 7. However, should the Chamber grant the authorization for leave to apply for asylum before the Host State's authorities, the Registrar considers that this ruling would make the Geneva Convention applicable to DRC-D01-WWWW-019. The immediate consequence would be the prohibition to return DRC-D01-WWWW-019 to DRC. This prohibition would conflict with the Court's obligation towards DRC to return DRC-D01-WWWW-019 under Article 93(7)(b) of the Rome Statute. The only possibility the Court would have to try to solve this predicament without a major impact on the cooperation of the DRC, but also other States Parties, with the Court would be to enter into consultation with DRC.
 8. The Registrar's view is that the Geneva Convention could be made applicable to DRC-D01-WWWW-019 by virtue of a Chamber's ruling authorizing him to approach the Host State's authorities and seek asylum only. Only such ruling could waive the supervision of the Court over DRC-D01-WWWW-019's detention by the Congolese authorities under Rule 192(2). In the absence of such ruling, it is the Registrar's view that, even in the case where DRC-D01-WWWW-019 would approach the Host State's authorities and seek asylum without the Chamber's prior authorization, the Geneva Convention would remain inapplicable and he could be returned to DRC without infringing the prohibition of "refoulement".

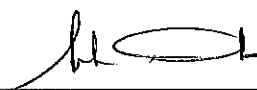
Legal Issue with respect to Detention

9. DRC-D01-WWWW-019 is currently detained under the authority of the DRC and the temporary supervision of the Registrar under Rule 192(2) of the RPE.
10. As explained above, should the Chamber issue a ruling authorizing him to approach the Host States' authorities and seek asylum, this ruling would trigger the applicability of the Geneva Convention to him. Under Article 26 of the Geneva Convention, refugees and asylum seekers shall enjoy freedom of movement. By lifting the Registrar's supervision over DRC-D01-WWWW-019 under Rule 192(2), the ruling may also have for consequence that the Court would have no legal basis to detain DRC-D01-WWWW-019 any longer. DRC-D01-WWWW-019 is under no warrant of arrest issued by the Court. The Court would not be in a position to comply any longer with its obligation to keep the witness in detention and return him to DRC under Article 93(7)(b) of the Rome Statute, since the above prohibition of "refoulement" would anyway prohibit his return to DRC.
11. In such a circumstance, the Registrar's view is that, unlike the Chamber would find a proper legal basis to keep DRC-D01-WWWW-019 in detention, he would have to be released on the territory of the Host State.
12. Should this happen, it is the Registrar's view that the Host State would have no solution but to let DRC-D01-WWWW-019 free on its territory, unless he commits a penal offence. First, as an asylum seeker, he would enjoy freedom of movement under Article 26 of the Geneva Convention. Second, DRC-D01-WWWW-019 entered legally on the territory of the Host State, which issued a document authorizing him to enter the territory for the purpose of his appearance before the Court. As such, he cannot be considered a "refugee unlawfully in the country of refuge" under Article 31 of the Geneva Convention, which means that restrictions

of movement under the second paragraph of this provision do not apply to him. Third, DRC-D01-WWWW-019 enjoys, as a witness of the Court, immunity from personal arrest or detention or any other restriction of his liberty under Article 26(4)(a) of the Headquarters Agreement. Such immunity could only be waived by the Presidency of the Court under Article 30(2)(b)(iii) of the Headquarters Agreement. This immunity would prohibit arrest, detention and restrictions of movement under Article 31(1) of the Geneva Convention alike.

CONCLUSION

13. These and the legal issues already addressed in the initial Observations are the legal predicaments raised by the Request that the Registrar was able to identify. These predicaments were identified at the request of the Chamber and in order to assist it in achieving the best possible ruling in response to the highly sensitive legal, but also human issue raised. The Registrar remains fully aware of and concerned by both the legal and humanitarian aspects of the Request. As to whether the Request should be granted, the Registrar once again has no view to express and leaves the matter to the wisdom of the Chamber.



Silvana Arbia, Registrar

Dated this 8 June 2011

At The Hague, The Netherlands