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TRIAL CHAMBER II

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

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

***IN THE CASE OF
THE PROSECUTOR v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI***

Public Document

**Prosecution's Application for Leave to Appeal Trial Chamber II's "Décision sur
une requête en *amicus curiae* et sur 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" (ICC-01/04-01/07-3003)**

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Introduction

1. On 9 June 2011 Trial Chamber II issued its « Décision sur une requête en *amicus curiae* et sur 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 ‘ (articles 68 et 93-7 du Statut) ». ¹ The Chamber, faced with a request for asylum from three prisoners in DRC custody who were transferred to testify as Defence witnesses with the assurance that they would be returned to the DRC, determined that such return cannot take place pending a decision from the Dutch authorities on asylum. The Prosecution, which has a direct interest in ensuring that the Court’s process is one that allows for the effective investigation and prosecution of crimes, including the necessary State cooperation, ² is seeking leave to appeal this particular aspect from the Decision.
2. The Prosecution submits that the Court has a statutory duty to return a prisoner “without delay to the requested State” under Article 93(7)(b) and should not halt this process due to an eventual asylum request. This matter should be decided primarily by the Host state authorities, which can request the Chamber to suspend the return of the prisoners if they consider it to be necessary for the purposes of the asylum determination.
3. The Prosecution submits that absent an indication that the prisoners will be harmed because of their cooperation with the Court (Article 68(1)), the Court should inform the Host state authorities of the request for asylum and provide them a short period of time to receive their submissions as to how to proceed further. It should not, however, indefinitely halt the return of the prisoners, as it

¹ ICC-01/04-01/07-3003 (hereinafter, “Decision”).

² In accordance with article 54(1)(b) “the Prosecutor shall... take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court”. The Prosecution is also aware of the fact that an application for leave to appeal filed by the Defence is very unlikely, and also that the affected States (the DRC and The Netherlands) may not be able to seek leave to appeal if a narrow interpretation of the statutory provisions granting standing to appeal is taken. Thus, absent an application for leave to appeal being filed by the Prosecution, it may not be possible to obtain appellate review of a decision that has significant institutional implications.

did in this case. The decision affects the future cooperation of DRC Government in this and other cases, including the protection of Prosecution witnesses. Such protection is the responsibility of the same DRC authorities that, it is alleged, could violate the human rights of Witnesses DRC-D02-P-0228, DRC-D02-P-0236 and DRC-D02-P-0350 .

Procedural Background

4. At the request of the Defence, the DRC agreed to transfer three prisoners in detention in the DRC --Witnesses DRC-D02-P-0228, DRC-D02-P-0236 and DRC-D02-P-0350 -- to the seat of the Court to testify at trial. None of the witnesses made requests for asylum. The witnesses were not compelled to testify and each signed a written consent for their voluntary appearance as witnesses before the ICC.³
5. While the process of taking their testimony was being completed, the detained witnesses alleged that if they were returned to their place of custody in the DRC they would face serious violations of their human rights.⁴ They thus requested Trial Chamber II to prohibit the Registry from returning them to the DRC and instead allow them to present to the Dutch authorities their requests for asylum, due to the allegedly insufficient nature of the protective measures proposed by the Registry.⁵
6. On 12 May 2011, the Trial Chamber held a status conference to discuss the issues of security of the witnesses and their evinced intention to seek asylum in The Netherlands. The Dutch authorities were present at the conference and made representations, as did the Office of the Prosecutor, the Defence and the Duty Counsel.

³ ICC-01/04-01/07-2724-Conf-Anx5.

⁴ ICC-01/04-01/07-2830-Conf, para. 15. See also ICC-01/04-01/07-T-258-ENG ET WT 12-05-2011, p. 11, line 7, clarifying that the alleged risk is one of “persecution”.

⁵ ICC-01/04-01/07-2830-Conf. See also ICC-01/04-01/07-T-246-CONF-FRA ET 13-04-11, pp. 2-6, cited in the Decision, para. 11.

7. On 9 June 2011, the Chamber issued the Decision.

The Issue for which leave to appeal is sought

8. The Prosecution seeks leave to appeal the following issue:

Whether the Trial Chamber erred by halting the return of the three detained DRC prisoners pending a determination by the Dutch authorities on their asylum request ("Issue").

9. The Issue arises out of the Decision:⁶ the Chamber found that even if the Court decided pursuant to Article 68 that no additional measures were required to protect the three prisoners, the Chamber would be prevented from returning the witnesses to the DRC until the Dutch asylum procedure had concluded.⁷ As a result, the Chamber halted their return to the DRC.⁸

10. The Issue also constitutes an appealable one pursuant to Article 82(1)(d).⁹ The Prosecution considers that the Decision can seriously affect its ability to receive cooperation from the DRC authorities. A perceived denial by the Court to honour its statutory duties vis-à-vis States which are cooperating with the Court can seriously damage the relationship of trust between the DRC authorities and all organs of the Court, including the Prosecution, thereby discouraging it to cooperate with the Court's investigations and prosecutions.

11. Given the Chamber's recognition that the Statute and the Rules do not provide for the scenario regulated by the Decision,¹⁰ and its conclusion that the intent to seek asylum creates a potential tension between the Court's duty to return prisoners to States under Article 93(7)(b) and its obligation to act in a manner consistent with international human rights under Article 21(3), it is imperative that the Appeals

⁶ See Decision, paras. 83-84, p. 40.

⁷ Decision, para. 84.

⁸ Decision, p. 40.

⁹ ICC-01/04-168 OA3, paras. 9-10. See also, ICC-01/04-01/06-1433 OA11, Diss. Op. Judge Song, para. 4.

¹⁰ Decision, para. 84.

Chamber be permitted to resolve the Issue. It must be permitted to do so now as there is no realistic likelihood that the Issue can otherwise ever be reviewed in an appeal from a final judgment.

The Issue meets the criteria for leave to appeal

12. As established by the jurisprudence of the Court, the correctness of a decision is irrelevant to an application for leave to appeal under Article 82(1)(d). The sole question is whether the issues involved in the Decision meet the criteria set out in that provision.¹¹
13. Rather, an issue is appealable if it meets the statutory criteria for leave to appeal. They include that the “decision ... involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”¹²
14. This is, at the same time, a unique situation. While the Chamber might disagree that the issue currently affects the fair and expeditious conduct or the outcome of *this* proceeding, it must acknowledge that the issue undoubtedly could affect the fair and expeditious conduct and potentially the outcome of *future* ones, including future proceedings in this case. At a minimum, if the Chamber is bound to halt the return of a transferred prisoner to permit him to make an asylum or non-refoulement claim, despite the Court’s prior promise to the DRC, it could refuse to continue its cooperation with the Prosecution in the current case and in other cases. The DRC authorities have made this point very clear to the Prosecution.

¹¹ ICC-02/04-01/05-20-US-Exp, para. 22. Issues equivalent to the First Issue and the Third Issue were previously found to be appealable (see ICC-01/05-01/08-75, paras. 63 and 46).

¹² Article 82(1)(d).

This can affect even the current protection of the witnesses in this case if DRC withdraws its cooperation.

The Issue affects the fairness of the proceedings

15. “Fairness” within the terms of Article 82(1)(d) incorporates fairness towards the accused, the victims and the Prosecution. It requires respect for the procedural and substantive rights and obligations of all participants.¹³ It “means that the Prosecutor must be able to exercise the powers and fulfil the duties listed in Article 54”.¹⁴ “Purging the pre-trial process for errors consequential to unfairness is designed as a safeguard of the integrity of the proceedings.”¹⁵ Fairness is also linked to the ability of a party to present its case.¹⁶

16. The Decision affects the fairness of the proceedings in different ways. First, it creates a situation of unfairness vis-à-vis the requested State (the DRC), which agreed to transfer its prisoners to the seat of the Court to testify in the legitimate expectation that the Court would honour its reciprocal duty under Article 93(7)(b) to return the prisoners “without delay” once they were done. As the Prosecution will argue before the Appeals Chamber, if leave to appeal is granted, by halting in its entirety the process of returning the prisoners to the DRC pending a decision by the Dutch authorities on asylum or non-refoulement – which could take months or years – the Decision adversely affected the DRC’s rights under the Statute. It unduly privileged the Court’s general duty to interpret and apply the law in a manner consistent with internationally recognized human rights over its specific obligation to return the prisoners to the DRC under Article 93(7)(b). Instead, the Trial Chamber should have sought to reconcile both duties and establish a system that allowed for a proper opportunity for the prisoners to make

¹³ ICC-01/04-141, para. 48; ICC-02/04-01/05-212, paras. 10-11; ICC-01/04-135-tEN, para. 38. Fairness has also been held to include respect for the principles of equality and adversarial proceedings.

¹⁴ ICC-01/04-135-tEN, paras. 38-39.

¹⁵ *Ibid.*

¹⁶ ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), para. 24.

asylum or non-refoulement claims while still providing for the necessary certainty and celerity for the purposes of the return of the prisoners to the DRC.

17. The Decision also has the potential to cause unfairness to the parties, and in particular the Prosecution, in these and also future proceedings. As a result of this, the DRC and other States may be reluctant to actively cooperate with the Office. States seized with requests for the temporary transfer of prisoners under Article 93(7)(a)(ii) may decline to cooperate if they believe that their prisoners will not be returned, notwithstanding assurances and obligations to do so. The inability to live up to the Court's commitments can have serious detrimental consequences for the Prosecution's ability to present its evidence, and thus its ability to prove guilt beyond a reasonable doubt. The very serious consequences of the Chamber's approach thus affects fairness towards the Prosecution.

The Issue affects the expeditious conduct of the proceedings

18. This Trial Chamber has previously granted leave to appeal after finding only that an issue "may significantly affect" or "clearly has a bearing on" the fairness of the proceedings and therefore "the first requirement of Article 82(1)(d) of the Statute is met".¹⁷ Hence, once a party has demonstrated that an issue affects the fair conduct of the proceedings, then any further showing that the issue also affects the expeditious conduct of the proceedings is superfluous for the purposes of obtaining leave to appeal under Article 82(1)(d).¹⁸ Nonetheless, the Prosecution

¹⁷ ICC-01/04-01/07-2032, para. 28; ICC-01/04-01/07-1859, para. 18. Trial Chamber III has also granted leave to appeal finding that the issue affects the fairness of the proceedings – without making any independent finding on expeditiousness. See ICC-01/05-01/08-1169, para. 35.

¹⁸ This reflects the consistent position of the Prosecution: see in particular ICC-01/04-141, paras. 49-52; ICC-01/04-103, footnote 5; ICC-01/04-01/06-125, footnote 30. The Prosecution considers that this requirement mirrors the obligation to ensure that proceedings are fair and expeditious (see e.g. Article 64(2)). In the same manner that once proceedings are no longer fair or no longer expeditious, they are no longer "fair and expeditious"; so once an issue affects the fair conduct of the proceedings, or affects the expeditious conduct of the proceedings, it affects the "fair and expeditious conduct of the proceedings". The jurisprudence of the ICTY and ICTR, adjudicating on the same text as is found in Article 82(1)(d), supports this proposition (see authorities set out in ICC-01/04-141, paras. 49-52).

submits that the Issue in this Decision also affects the expeditious conduct of the proceedings.

19. The “expeditious conduct” means timely and efficient conduct of proceedings and is intimately connected with the efficient administration of international justice.¹⁹ This principle requires that decisions at all stages do not unnecessarily delay the overall determination of responsibility.²⁰

20. As noted previously, the Decision has substantial ramifications for the DRC’s cooperation with the Court in this and other cases. It could affect the security of the witnesses currently under the protection of the DRC authorities, who should be relocated delaying the current proceedings. It could also affect the availability of evidence for subsequent phases of this trial, including evidence that the Prosecution may need for the purposes of testing the Defence case and also for sentencing. Trial Chamber I has confirmed that an issue affecting the evidence and the subject matters canvassed during a trial has the ability to affect the expeditious conduct of the proceedings.²¹

Immediate resolution of the Issues by the Appeals Chamber may materially advance the proceedings

21. As stated by the Appeals Chamber, this requirement means that “prompt reference of the issue to the court of appeal” and its “authoritative determination” will help the proceedings “‘move forward’ by ensuring that the proceedings follow the right course.”²² The Appeals Chamber has also confirmed that proceedings are “not confined to the proceedings in hand but extends to the

¹⁹ See *Prosecutor v Norman et al*, SCSL-2004-07, 08 and 09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003, paras. 6 and 25); *Prosecutor v Milosevic*, IT-02-54-T, Decision on Two Prosecution Requests for Certification of Appeal Against Decision of the Trial Chamber, 6 May 2003.

²⁰ The prompt determination of responsibility is not just an interest of the defence, but also of the prosecution, victims, and the international community as a whole. See e.g. *Prosecutor v Norman et al*, SCSL-2004-07, para. 8; and Terrier, Powers of the Trial Chamber in Cassese, Gaeta and Jones (ed) (2002) 1259 at 1264-65.

²¹ ICC-01/04-01/06-1191, para. 48.

²² ICC-01/04-168, paras. 14-15, 18.

proceedings prior and subsequent thereto.”²³ In addition to the direct impact on the present proceedings, the prompt resolution of this issue will also assist to advance all other proceedings before this Court.²⁴

22. Immediate resolution of this Issue will materially advance these and future proceedings, primarily by ensuring that cooperation between the Court and the authorities of any State, but in particular the DRC are dealt with according to the Statute and that the Prosecution and the Court as a whole can continue to rely on the full cooperation of the DRC authorities.

23. Legal certainty is essential to the Court’s proper functioning. Without such legal certainty on a key aspect of cooperation under the Statute, States may be reluctant to offer their continued cooperation, which will ultimately have an impact on the Court’s ability to fulfil its mandate under the Statute. Legal certainty in this context further demands that critical issues going to the heart of the fairness of the Court’s proceedings are treated in accordance with the applicable law and in a consistent manner. Since the Chamber itself has acknowledged that the situation referred to in the Issue is not provided for in the Statute or the Rules,²⁵ there is a need that the Appeals Chamber deliver an authoritative decision which will ensure that the law and practice of the Court on a core issue such as cooperation evolves in a coherent and standardised manner, and will provide guidance to this Chamber and to other Chamber to the correct interpretation and application of

²³ ICC-01/04-168, para. 12; see also para. 17: “The term ‘proceedings’ in the second part of article 82(1)(d) of the Statute can have no different meaning from the one ascribed to it in the first part of the paragraph, encompassing the proceedings in their entirety.”

²⁴ While the impact of immediate resolution of the issue on other proceedings may not itself be sufficient to sustain a grant of leave under Article 82(1)(d), it is a factor to be weighed in deciding whether to grant leave. Pre-Trial Chamber II has previously recognised that in certain circumstances, the potential impact on other proceedings may be “invoked as an additional argument in support of the alleged significant impact on the current proceedings” See ICC-01/05-20-US-Exp, para. 54 (unsealed pursuant to ICC-02/04-01/05-52). See also *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecutor’s Motion for Certification to Appeal the Trial Chamber’s Decisions on Protection of Defence Witnesses, 28 September 2005, para. 5; *Prosecutor v Mrksic*, IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003.

²⁵ Decision, para. 84.

the law.²⁶ This need is particularly acute in the present case, which involves different statutory duties and poses the fundamental question of how such duties must be balanced. Immediate intervention by the Appeals Chamber will accordingly materially advance the proceedings as it will “settle the matter posing for decision through its authoritative determination”.²⁷

24. At the same time, the Prosecution notes that the issue is separate from the trial itself, and thus consideration of this issue on appeal will not itself delay in any respect the ongoing trial proceedings.

Relief sought

25. For the reasons set out above, the Prosecution requests that the Trial Chamber grant leave to appeal the specific aspect of the Decision identified above. It also requests that pending a final determination by the Appeals Chamber, the Trial Chamber takes steps to ensure that the witnesses remain in custody with a view to ensuring that the Court remains at all times in a position to timely comply with its duty under Article 93 (7) (b).



Luis Moreno-Ocampo,
Prosecutor

Dated this 15th day of June, 2011
At The Hague, The Netherlands

²⁶ See e.g. *Prosecutor v. Krnojelac*, IT-97-25-A, Judgement, 17 September 2003, para. 7: one concern of the Appeals Chamber “is to ensure the development of the Tribunal’s case-law and the standardisation of the applicable law”. See also *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgement, 24 March 2000, para. 113(ii): “The fundamental mandate of the Tribunal [...] cannot be achieved if the accused and the Prosecution do not have the assurance of certainty and predictability in the application of the applicable law”.

²⁷ ICC-01/04-168 OA3, paras. 14 and 18. See also e.g. *Prosecutor v. Blagojević et al*, IT-02-60-PT, Decision on Joint Defence Motions, 10 February 2003.