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

Public document

**Observations of Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350
on the applications for leave to appeal Decision ICC-01/04-01/07-3003 of 9 June 2011
(regulation 65(3) of the Regulations of the Court)**

Source: Duty Counsel

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

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I. Background

1. By an application dated 12 April 2011 (“the Application of 12 April 2011”), Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 (“the Witnesses”) requested Trial Chamber II of the International Criminal Court (“the Chamber” or “the Court”) to present them, on completion of their respective testimonies, to the authorities of the Netherlands, to whom they intended to apply for asylum.¹
2. By an order dated 5 May 2011, the Chamber convened a status conference for 9 o’clock on 10 May, “to be attended by the parties, participants, Duty Counsel, the host State authorities, the Victims and Witnesses Unit and any other relevant Registry services”.²
3. At the request of the host State authorities, the status conference was postponed and took place on 12 May 2011.³
4. On 24 May 2011, the Chamber issued an interim Order in which it considered that it would be appropriate:

for the VWU to contact the authorities of the DRC in order to discuss, first, which measures, besides monitoring, will be implemented in order to contain the level of risk which the detained witnesses may face because of their testimony before the Court. Second, the VWU shall explore which protective measures can be put in place in collaboration with the DRC, in the event that such measures are deemed necessary by the VWU in light of a changed risk assessment.⁴

¹ “Requête tendant à obtenir présentation des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350 aux autorités néerlandaises aux fins d’asile”, ICC-01/04-01/07-2830-Conf.

² Order convening a status conference (regulation 30 of the Regulations of the Court), 5 May 2011, ICC-01/04-01/07-2868, p. 7.

³ Public transcript, 12 May 2011.

⁴ 24 May 2011, Order to provide further assurances regarding the security of DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, ICC-01/04-01/07-2952, p. 15, para. 33.

5. On 9 June 2011, the Chamber issued a decision granting the Application of 12 April 2011, and in particular postponing the Witnesses' immediate return to the Democratic Republic of the Congo ("the Decision of 9 June 2011").⁵
6. On 15 June 2011, the Kingdom of the Netherlands ("the host State"),⁶ the Democratic Republic of the Congo ("the DRC")⁷ and the Prosecutor⁸ applied to the Chamber for leave to appeal that decision.
7. In accordance with regulation 65(3) of the Regulations of the Court, the Witnesses hereby present their observations on those three applications, both as to the procedure (II) and as to the substance (III).

II. Procedure

8. The Kingdom of the Netherlands wishes to appeal the Decision of 9 June 2011 under article 82(1)(d) of the Statute. In its view, the fact that it intervened in the process of the witnesses' temporary transfer, in particular concerning the temporary lifting of the travel ban imposed on Witness DRC-D02-P-0236, and the fact that it submitted written and oral observations to the Chamber on the witnesses' legal status, make it a "party" within the meaning of article 82(1) of the Statute.⁹

⁵ 9 June 2011, *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, p. 40.

⁶ "Application for Leave to Appeal the Trial Chamber's Decision ICC-01/04-01/07-3003 dated 9 June 2011", 15 June 2011, ICC-01/04-01/07-3020 ("the host State's Application").

⁷ "Demande d'autorisation d'interjeter appel de la 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 »", 15 June 2011, ICC-01/04-01/07-3023 ("the DRC's Application").

⁸ "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)'" ("the Prosecutor's Application").

⁹ The host State's observations, *op. cit.*, paras. 8 and 9.

9. The part of the DRC's Application entitled "[TRANSLATION] Review of the legal basis" does not contain any legal basis for its application for leave to appeal.¹⁰ Nevertheless, it can be presumed that the DRC's Application, too, is filed under article 82(1)(d) of the Statute, since, under rule 155, the impugned decision is one which is subject to the Chamber's prior authorisation.

10. Article 82(1)(d) of the Statute reads as follows:

Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: (d) A decision that 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.¹¹

11. Can the Kingdom of the Netherlands and the DRC be considered to be either party? The Appeals Chamber's jurisprudence is now sufficiently settled on this matter, holding that the only parties before the Court are the Prosecutor and the Defence. Two judgments, ruling *inter alia* on victim status in the proceedings, are relevant here:

o Judgment of 11 July 2008:

The Appeals Chamber considers it important to underscore that the right to lead evidence pertaining to the guilt or innocence of the accused and the right to challenge the admissibility or relevance of evidence in trial proceedings lies primarily with the parties, namely, the Prosecutor and the Defence. The first sentence of article 69 (3) is categorical: "[t]he parties may submit evidence relevant to the case, in accordance with article 64." It does not say "parties and victims may".¹²

o Judgment of 19 December 2008:

Participation pursuant to article 68 (3) of the Statute is confined to proceedings before the Court, and aims to afford victims an opportunity to voice their

¹⁰ Observations of the DRC, *op. cit.*, paras. 7 and 8.

¹¹ Emphasis added.

¹² Appeals Chamber, 11 July 2008, *The Prosecutor v. Thomas Lubanga Dyilo, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008*, ICC-01/04-01/06-1432, para. 93, pp. 31-32.

views and concerns on matters affecting their personal interests. This does not equate them, as the case law of the Appeals Chamber conclusively establishes, to parties to the proceedings before a Chamber, restricting their participation to issues arising therein touching upon their personal interests, and then at stages and in a manner not inconsistent with the rights of the accused and a fair and impartial trial.¹³

12. These two States' applications for leave to appeal pursuant to article 82(1)(d) of the Statute cannot therefore be entertained, especially since the Statute is clear on the right to appeal afforded to States. Indeed, article 82(2) allows a State to lodge an appeal against a decision of the Pre-Trial Chamber authorising the Prosecutor to investigate on its territory without having secured its cooperation. A State may also appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber authorising the Prosecutor to investigate on its territory whereas the State requested the Prosecutor defer to its own investigation into its nationals or other persons under its jurisdiction for criminal acts which may constitute crimes falling within the jurisdiction of the Court.¹⁴

13. Apart from these specific circumstances, States are not entitled to appeal decisions issued by the various chambers of the Court, even when they are, as the host State was, invited by the Chamber to present their observations at stages of the proceedings considered appropriate. In the same way that a victim presenting his or her views and concerns to the competent Chamber does not become a party before it, a State presenting its observations – even at the Chamber's invitation – does not become a party before the Chamber. What applies to the host State applies even more to the DRC, which neither participated nor was called in the proceedings.

¹³ Appeals Chamber, 19 December 2008, *Situation in the DRC, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007*, ICC-01/04-556, para. 55.

¹⁴ Article 18(4) of the Statute.

14. Consequently, it behoves the Chamber to dismiss these two States' applications for leave to appeal as they are inadmissible.

III. Substance

15. If the Chamber does entertain the two States' applications for leave to appeal, it should nevertheless rule that they – like the Prosecutor's – do not satisfy all of the substantive requirements of article 82(1)(d) of the Statute.

16. Firstly, the DRC's Application should be dismissed, since the Congolese authorities – more concerned by the response to be given to the Witnesses' observations on the additional assurances concerning their safety¹⁵ – appear to have overlooked the fact that an appeal under rule 155 cannot succeed as long as it does not satisfy the three substantive conditions of article 82(1)(d) of the Statute.

17. In respect of the applications submitted by the host State and the Prosecutor respectively, the Chamber must consider whether the following conditions are satisfied: (A) the issues involved would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (B) an immediate resolution by the Appeals Chamber may materially advance the proceedings.

¹⁵ "Observations des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350 sur l'Ordre de fournir des assurances supplémentaires concernant la sécurité de DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350", ICC-01/04-01/07-2986-Conf. The Witnesses reserve the right to respond to this part of the DRC's Application in the appropriate circumstances.

A. Whether the issues involved would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

1) The host State's Application

18. The Appeals Chamber has set forth the principle that “the object of paragraph (d) of article 82(1) of the Statute is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”.¹⁶ The host State contends that insofar as it is concerned, the question of the fairness of the proceedings arises because the impugned decision causes it prejudice, “as set out above”.¹⁷ Yet an attempt to determine the actual prejudice caused to the host State by the impugned decision would prove fruitless. Although it submits that “the decision is particularly prejudicial to the Netherlands and without leave the appeal it would be left without a remedy before the Court”,¹⁸ it pleads such prejudice insufficiently, hence its application for leave to appeal cannot succeed.

19. If, by prejudice, the host State means that the impugned decision would prevent it from complying with its obligations towards the Court of transporting detained persons every time the *non-refoulement* rule prohibited it from so doing,¹⁹ the host State cannot be considered to have suffered prejudice in that its non-compliance with its obligations towards the Court would be sufficiently warranted by compliance with other obligations incumbent on the Court. As the impugned decision rightly states, the Chamber must apply article 93(7) “in conditions which are consistent with internationally recognised human rights, as required by article 21(3) of the Statute”.²⁰

¹⁶ Appeals Chamber, 13 July 2006, *Situation in the DRC, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal*, ICC-01/04-168, para. 19.

¹⁷ The host State's Application, para. 15.

¹⁸ *Id.*, para. 9.

¹⁹ *Id.*, para. 12.

²⁰ Decision of 9 June 2011, *op. cit.*, para. 73.

20. Secondly, the host State submits that the Decision of 9 June 2011 is prejudicial to the right of the accused to call witnesses, if they have insufficient protection within the meaning of article 68.²¹ Over and above the fact that the host State is not qualified to act on behalf of the accused in this case, the Chamber will note that the accused's right to call witnesses has in no way been breached as a result of the Decision of 9 June 2011 – quite the contrary. Indeed, by reserving the right to rule on the risks faced by the Witnesses on account of their cooperation with the Chamber, and by allowing the host State the leeway “to assess the extent of their obligations under the *non-refoulement* principle, should the need arise”,²² the Chamber is in actual fact granting the witnesses dual protection. Thus if the Chamber were ever to consider the additional security guarantees provided by the DRC to be sufficient, it could still not compel the host State to return the Witnesses to their country if the host State were to invoke the *non-refoulement* rule.

21. Accordingly, the Chamber cannot find the host State's arguments to be persuasive, and its application should be dismissed.

2) *The Prosecutor's Application*

22. The Prosecutor is keen to emphasise that the issue of procedural fairness in no way concerns the ongoing trial proceedings, much less the outcome of the trial: “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”.²³

23. In his view, the issue mainly pertains to future proceedings. He submits that he would be unable to conduct future proceedings properly if the DRC were to

²¹ The host State's Application, *op. cit.*, para. 16.

²² Decision of 9 June 2011, *idem*, para. 64, *in fine*.

²³ Prosecutor's Application, *op. cit.*, para. 24.

refuse to cooperate with the organs of the Court, in particular with the Prosecutor, as a result of the impugned decision.²⁴

24. By taking such a stance, the Prosecutor is lapsing into speculation, since no one can anticipate the DRC's future cooperation with the Court. This is because, in this instance, States' cooperation depends on their leaders' attitude towards human rights. Rulers who respect human rights would have nothing to fear from cooperating with the Court, since they would know that any asylum proceedings would be doomed to failure.

25. However, States whose leaders take too many liberties with internationally recognised human rights would have everything to fear from cooperating with the Court in this area. The issue therefore arises from pure speculation, since the attitude of those in power in the DRC towards human rights in the months or years to come is unpredictable.

26. Accordingly, the Court was right to hold that "the appealable issue, as defined by the Appeals Chamber, has to be an issue that emanates from the ruling of the decision concerned and does not merely represent an abstract question or a hypothetical concern".²⁵ The Prosecutor's Application for leave to appeal, which is based on speculation, should therefore be dismissed.

²⁴ Prosecutor's Application, *op. cit.*, para. 14.

²⁵ Pre-Trial Chamber III, 25 August 2008, *The Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure*, ICC-01/05-01/08-75, para. 11. Emphasis added.

B. Whether an immediate resolution by the Appeals Chamber may materially advance the proceedings

27. In its Judgment of 13 July 2006, the Appeals Chamber defined this test as follows:

“A wrong decision on an issue in the context of article 82 (1) (d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process”.²⁶

28. Supposing the decision in question is fraught with error, how would that error, unless soon remedied, cloud or unravel the judicial process? The host State does not answer this question, and instead merely states that “the Appeals Chamber is in a position to safeguard the fairness of the proceedings by rulling on the extent of human rights protection of the detained witness by the Court and, therefore, its intervention is warranted”.²⁷ It does not specify why the intervention of the Appeals Chamber is absolutely necessary at this point in time.

29. The Prosecutor sets out two arguments in support of an immediate resolution of the issue by the Appeals Chamber. Firstly, he submits that such resolution would ensure effective cooperation between the Court and States, and the DRC in particular. As was stated at point A above, in the case of the DRC, such an argument is clearly based on pure speculation. As for other States, it is hard to believe that States with a democratic political system applying international human rights protection standards would hesitate to cooperate with the Court in transferring detained persons solely because the Decision of 9 June 2011 recognises the right to asylum as an internationally recognised human right.

30. The Prosecutor’s second argument relies on the unprecedented nature of the procedure triggered by the Application of 12 April 2011 and on the fact that Trial

²⁶ Appeals Chamber, 13 July 2006, *op. cit.*, para. 16.

²⁷ The host State’s Application, *op. cit.*, para. 22.

Chamber I too is currently seised of a similar issue. In the Prosecutor's view, these two situations require the immediate intervention of the Appeals Chamber in order to achieve a standardisation of the law.

31. This role, which is generally the preserve of the higher-level courts, is not set forth anywhere at all in the Statute of the Court. The Appeals Chamber itself has held that "[t]he Pre-Trial and Trial Chambers of the International Criminal Court are in no way inferior courts in the sense that inferior courts are perceived and classified in England and Wales".²⁸

32. Yet, however desirable it may be for the Appeals Chamber to settle this problematic issue, the Prosecutor does not show how an immediate resolution by that Chamber would materially advance the proceedings. Accordingly, there is nothing to preclude the Appeals Chamber from issuing a ruling in due course. This is a further reason why the Prosecutor's Application should be dismissed as being devoid of merit.

IV. In light of the foregoing,

33. Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 respectfully request the Chamber:

- To deny the applications for leave to appeal submitted by the host State and the DRC on the grounds of inadmissibility;
- In the event that those applications are entertained, to dismiss them, along with the Prosecutor's application, for being devoid of merit.

²⁸ Appeals Chamber, 13 July 2006, *op. cit.*, para. 30.

[signed]

Ghislain M. MABANGA
Duty Counsel

Dated 20 June 2011

At The Hague, The Netherlands