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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

Public Document

Request for leave to submit Amicus Curiae Observations by mr. Schüller and mr. Sluiter, Counsel in Dutch asylum proceedings of witness 19 (with annexes)

Source: Philip-Jan Schüller and Göran Sluiter

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

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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 witness 19 (“the witness”) in the case of *The Prosecutor v. Lubanga Dyilo*, seek leave to submit, as amicus curiae, written observations on the progress of Dutch asylum proceedings, the role of the ICC Registrar in ongoing domestic litigation and the use of the ICC detention situation by the host State to deprive the witness of the protection of Dutch asylum law.

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 witness, and have filed on his behalf an application for asylum with the competent Dutch authorities.
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 witness’ well-being and safety has given rise to several filings, has been addressed at hearings, and has resulted in a number of decisions and orders from this Trial Chamber. In addition, Trial Chamber II has issued a number of decisions in the Katanga case in respect of three other witnesses, who have also sought asylum in the Netherlands and whom we also represent in their asylum proceedings. The latter

decisions, although not coming from this Chamber, are of relevance to the position of the witness as well, as the Netherlands has on different occasions given decisions regarding all four witnesses in reaction to the decisions of both Trial Chambers.

6. In short, in a thoroughly reasoned decision of 5 August 2011 this Trial Chamber has ruled that witness 19 should be provided with a real –as opposed to a merely theoretical- opportunity to make his request for asylum to the Dutch government before he is returned to the Democratic Republic of Congo (DRC).¹ This emphasis on an effective asylum procedure has been reiterated in the established case law of the European Court of Human Rights.
7. It follows from an order of 15 August 2011 from this Trial Chamber that pending his asylum application the witness has to be transferred into the control of the Netherlands and the Registrar has been ordered to consult with the host State with a view to implementation of that order.²
8. The Netherlands has consistently and repeatedly refused to take over control of the witness, as becomes clear from correspondence between the host State and the Court.³
9. Domestic litigation is ongoing on various aspects of the asylum procedure. In light of this Chamber's clear and unequivocal instruction to transfer the witness to the host State, the witness has raised the issue and title of his detention at the ICC Detention Unit before The Hague District Court (sitting in Rotterdam). During the hearing of 20 October 2011 counsel for the State has submitted into evidence a declaration from the ICC Registrar, which had been prepared at the request of the defendant -the State- in the case (annex 1). The Hague District Court ruled in favour of the defendant by decision of 28 October 2011, on the basis of –among other things- the Registrar's declaration (annex 2). The decision from The Hague District Court will be appealed by the plaintiff at the Council of State which is the highest judicial body in the Netherlands in immigration matters.

The Proposed Amicus Curiae Brief Will Inform the Trial Chamber on Three Aspects of the Witness's Asylum Procedures

¹ ICC-01/04-01/06-2766-Red 05-08-2011, para. 86.

² ICC-01/04-01/06-2785-Conf-tFRA 26-08-2011, reclassified public on 12 September 2011.

³ ICC-01/04-01/06-2801-Conf-Anx2, reclassified public on 12 September 2011.

10. The further conduct of the asylum proceedings in the host State, including the possible duration of these proceedings, might be a relevant matter for this Trial Chamber, as long as the witness remains detained at the ICC Detention Unit. The matter of well-being and security of the witness is still pending for this Chamber and we believe we can assist the Chamber in its future decisions and orders, by informing it of, inter alia, the following.

Progress of Dutch asylum proceedings

11. In our proposed Amicus Brief we can inform the Chamber of the progress in national asylum proceedings. The Dutch immigration service at this stage –in violation of Dutch law and inconsistent with the Decision of 5 August 2011 in this case- withholds from the witness the ‘ordinary’ asylum procedure and instead offers a procedure without proper safeguards and protection and most importantly without any legal base in Dutch law. The authorities have chosen to ‘create’ an extrajudicial procedure to cater for the specific position of the witness without legal safeguards and without the full rule of law.
12. A hearing is scheduled for 6 December 2011 to deal with the question whether the asylum request of the witness should be processed under the regular national asylum procedure. The delay is primarily brought about by the immigration authorities which –after they had initially allowed the witness into the ordinary asylum procedure- have changed their position and now only want to use the extra-judicial quasi-asylum procedure with less safeguards, protection and no possibility of legal redress to a Court.
13. It is only appropriate that the Trial Chamber is openly and even-handedly informed of the scope and possible duration of ongoing procedures. Moreover, it is important to avoid any misunderstanding, in that any delay in the procedure is exclusively caused by the host State, which refuses to properly implement decisions and orders from the ICC. Our client has repeatedly indicated that he fully cooperates in his *asylum* procedure.

The intervention of the ICC Registrar in ongoing domestic litigation in support of the host State

14. As annex 1 to this application is attached a memo/note from the ICC Registrar. The statement or declaration carries no name and no legible signature. But it refers numerous times to the Registry and we thus have to assume it has been written by the Registrar or one of her staff members, at least under the authority and responsibility of the Registrar. The declaration is addressed to the protocol department of the Ministry of Foreign Affairs of the host State. The Declaration was faxed to us on 19 October 2011 after 17h00 and was tendered into evidence by counsel for the Dutch State the next day at the hearing of The Hague District Court.
15. The Registry has written this declaration at the direct request of the host State with the apparent view to support the position of the Netherlands in ongoing national litigation. The Registrar did not seek the opportunity to communicate with counsel of the witness on the drafting or content of this document. It seems to us that this intervention, at the direct request of one of the litigating parties, in ongoing national legal proceedings by an organ of the Court, may undermine the Court's impartiality and independence.
16. It follows from the decision of The Hague District Court of 28 October 2011 (annex 2) that the declaration from the Registrar has played an important –if not decisive- role in the outcome of the litigation. In paragraph 2.6 the District Court cites a large portion of the declaration and in paragraph 3.3.3 it is stated that the District Court has no doubt that the declaration is accurate. Moreover, because of the Registrar's declaration, The Hague District Court sees no reason to further investigate several matters which are directly relevant for the proper transfer of the witness into the control of the host State.
17. The problem is furthermore that the Registrar's declaration is not accurate, at least provides for a one-sided, selective and incomplete interpretation of this Trial Chamber's orders and decisions relating to witness 19. The Registrar has thus not only directly supported one of the parties in domestic litigation, she has directly influenced the outcome of national proceedings, but has also done so on the basis of what we perceive as a questionable representation of the Chamber's decisions and orders.
18. In particular we would like to draw your attention to the part in the Registrar's declaration where it is mentioned that this Chamber has ordered the Registry to also consult with the Dutch authorities on the transfer of the witness into the control of the host State pending its decision on the asylum application. But what the Registrar fails to mention –and which was crucial in litigation at The Hague District Court- is that in

these consultations the Registrar has requested the Netherlands to take over control of the witness and that the Netherlands has refused any cooperation. It is this refusal to cooperate by the host State that the Registrar should have mentioned in the declaration if the intention was to provide a balanced account as to what objectively has transpired in relation to witness 19. Hence, the Registrar's declaration shied away from highlighting the direct causal link between the conduct of the host State and witness 19's ongoing detention at the ICC Detention unit.

19. It seems likely that a proper and comprehensive declaration by the Registrar in pursuance of and in reaction to the refusal of cooperation by the host State with the ICC, could have resulted in an expeditious transferal of the control of the witness, instead of causing further legal complications. This intervention by the Registrar can thus be regarded as at odds with the interest of the witness and of the Court, which had unequivocally ruled that the witness should be transferred into the control of the Netherlands.
20. We are ready to provide this Trial Chamber with further information and analysis regarding the matter of the Registrar's intervention in our proposed amicus brief and/or in an oral hearing which might guide the Court in its decision making with regard to the aspect of the Dutch asylum procedure. We also have additional information in our possession, unavailable to the Registrar, that could assist this Trial Chamber in its further dealings with this matter.

Using the ICC detention situation to place the witness outside the full protection of Dutch asylum law

21. The well-being and security of the witness has become a matter of shared responsibility between the ICC and the host-State. There is inevitably the risk in situations of shared responsibility that eventually no one feels responsible. In effect, involvement of a multiplicity of actors may lead to the following paradox of shared responsibility:

‘as the responsibility for any given instance of conduct is scattered among more people [or institution], the discrete responsibility of every individual [or institution] diminishes proportionately.’⁴

⁴ M Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organizations* (Cambridge University Press, 1998), p. 46.

In the interest of the well-being and security of the witness –and thus also in the interests of other ICC witnesses and thereby the functioning of the Court as a whole- in our view there is an (unfortunate) need for the Chamber to be more transparently and openly informed about the current position of the host-State.

22. The Netherlands has emphasized in correspondence with the ICC that it is necessary to continue to detain the witness –and also the three witnesses in the Katanga case- at the ICC Detention Unit in order to be able to deal with the asylum applications. There is under Dutch law no legal basis for this assertion. Moreover, the authorities have not been able to give a satisfactory justification why the witness could not be detained in the regular detention centre for asylum seekers. Thus, the rationale of the refusal by the Netherlands seems to be to avoid the national judicial bodies being able to offer judicial redress, which would be the consequence of transferring the witness into the control of the Netherlands. This Chamber should furthermore be informed of the fact that in correspondence and interaction with the witness and his counsel, the Dutch authorities refer to and use the detention situation of the witness at the ICC Detention Unit as the sole and decisive factor for denying him –as a result of the alleged non or limited applicability of Dutch law at the ICC Detention Unit- access to the regular asylum procedure.
23. It is evident from the different –even conflicting- positions adopted towards the Court and towards us, that the host State uses the detention situation of the witness at the ICC Detention Unit to have him placed outside the full protection of the law. However, this Chamber clearly envisaged to provide the witness with a real –as opposed to a merely theoretical- opportunity to make his request for asylum. We believe the ICC should be fully aware of the extent and implications of the Dutch position. We request you to allow us to inform you in more detail on this matter in our proposed amicus brief.

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

24. The Court's case law in respect of amicus applications can be regarded as casuistic 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'.⁵ In cases

⁵ 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.

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.⁶

25. 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 the witness and how to expeditiously deal with matters related to his protection.
26. Since this is becoming an increasingly urgent matter, we can commit to a swift delivery of our amicus brief. In addition we can be available at hearings.
27. We also wish to emphasise the additional value of a hearing as the Court may want to be further informed of views on Dutch asylum proceedings, other than coming from the host State and/or the Registrar. The Court has in its past decisions underlined the individual rights of the witness. One could argue that the host State, the Democratic Republic of Congo and also the Registrar have been opposed from the beginning to this Chamber's –and the Katanga Chamber's- decisions/orders and their general approach in relation to the witnesses. Instead of cooperating in good faith with the Chambers and loyally executing their decisions, in accordance with their letter and spirit, it appears that efforts are being made to prevent the proper and loyal execution of decisions and orders of this Chamber and the Katanga Chamber. This is not only in violation of our client's rights and interests but also damages the authority of the Court.

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

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

⁶ 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.

Conclusion

29. For the reasons set forth above, mr. Schüller and mr. Sluiter respectfully request that they be granted leave to submit the proposed amicus curiae brief –or to submit views orally- on these matters pursuant to Rule 103 of the Rules, within any time-limit fixed by the Chamber.



Philip-Jan Schüller



Göran Sluiter

Dated this 31 October 2011

At Amsterdam, The Netherlands