

Cour
Pénale
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International
Criminal
Court

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

Date: 6 December 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*

Public Redacted Version of
Registry response pursuant to the Order authorising the submission of
observations (ICC-01/04-01/06-2821)

Source: The Registrar

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

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Amicus Curiae

REGISTRY

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**Victims Participation and Reparations
Section**

Other

Mr Philip-Jan Schüller
Mr Göran Sluiter
Mr Ghislain Mabanga Monga Mabanga

The Registrar of the International Criminal Court (the “Court”);

NOTING the “Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application” rendered by Trial Chamber I on 4 July¹.

NOTING the “Application for Leave to Appeal the Trial Chamber's Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application (ICC-01/04-01/06-2766-Conf) dated 4 July 2011”, submitted by the authorities of the Kingdom of the Netherlands (the Host State) on 13 July 2011;²

NOTING [REDACTED];³

NOTING the “Decision on two requests for leave to appeal the “Decision on the request by DRC-D01- WWW-0019 for special protective measures relating to his asylum application” issued by the Chamber on 4 August 2011;⁴

NOTING the “Report of the Registrar on the execution of decision ICC-01/04-01/06-2766-Conf” submitted on 5 August 2011;⁵

NOTING the “Order on the Report of the Registrar on the execution of decision ICC-01/04-01/06-2766-Conf” issued by the Chamber on 15 August 2011;⁶

¹ ICC-01/04-01/06-2766-Conf. Its public redacted version ICC-01/04-01/06-2766-Red was issued by the Chamber on 5 August 2011.

² ICC-01/04-01/06-2768-Conf. This submission was reclassified ‘public’ pursuant to the Trial Chamber instruction of 2 September 2011.

³ [REDACTED].

⁴ ICC-01/04-01/06-2779-Conf. This submission was reclassified ‘public’ pursuant to the Trial Chamber instruction of 25 October 2011.

⁵ ICC-01/04-01/06-2781-Conf. This submission was reclassified ‘public’ pursuant to the Trial Chamber instruction of 25 October 2011.

⁶ ICC-01/04-01/06-2785-Conf. This submission was reclassified ‘public’ pursuant to the Trial Chamber instruction of 12 September 2011.

NOTING the “Requête aux fins de reconsidération de l’ Order on the Report of the Registrar on the execution of decision ICC-01/04-01/06-2766-Conf” submitted by duty counsel on 17 August 2011;⁷

NOTING [REDACTED];⁸

NOTING [REDACTED];⁹

NOTING [REDACTED];¹⁰

NOTING the “Order on the Request for Reconsideration of Order ICC-01/04-01/06-2785-Conf” issued by the Chamber on 1 September 2011;¹¹

NOTING the “Request for leave to submit Amicus Curiae Observations by mr. Schüller and mr. Sluiter, Counsel in Dutch asylum proceedings of witness 19”, dated 31 October 2011;¹²

NOTING the “Order authorising the submission of observations” issued by the Chamber on 15 November 2011;¹³

⁷ ICC-01/04-01/06-2787-Conf. Its public redacted version ICC-01/04-01/06-2787-Red was filed in the case record on 20 September 2011.

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ [REDACTED].

¹¹ ICC-01/04-01/06-2804-Conf. Its public redacted version ICC-01/04-01/06-2804-Red was issued on 25 October 2011.

¹² ICC-01/04-01/06-2816.

¹³ ICC-01/04-01/06-2821. The corrigendum thereof ICC-01/04-01/06-2821-Corr was issued on 18 November 2011.

NOTING the “Amicus Curiae Observations by mr. Schüller and mr. Sluiter, Counsel in Dutch asylum proceedings of witness 19 (with annexes)” submitted on 23 November 2011;¹⁴

NOTING Article 93(7)(b) of the Rome Statute, Rule 192(4) of the Rules of Procedure and Evidence and Regulations 23*bis* and 35 of the Regulations of the Court;

CONSIDERING that the Registrar was instructed by the Chamber to file a response by 4 pm on 30 November 2011 which is to include a comprehensive account of “*the measures that have been taken to return defence Witness 19 to the DRC or to transfer custody to the Host State*”;¹⁵

CONSIDERING that, on 30 November 2011, the Registrar requested¹⁶ and obtained¹⁷ an extension of the above deadline until the 6 December 2011, in accordance with Regulation 35 of the Regulations of the Court;

CONSIDERING that the present observations are filed under the classification “CONFIDENTIAL” because of the confidential information [REDACTED]. A public redacted version is filed jointly.

RESPECTFULLY TRANSMITS for the attention of the Chamber the following observations:

1. The Registrar takes notes of the *Amicus Curiae* brief filed by mr. Schüller and mr. Sluiter. Before answering to specific allegations made by the respected

¹⁴ ICC-01/04-01/06-2827.

¹⁵ ICC-01/04-01/06-2821, at p. 7, para. 10.

¹⁶ E-mail to the Chamber, dated 30 November 2011, 12.52 p.m.

¹⁷ E-mail from the Chamber, dated 30 November 2011, 5.54 p.m.

counsels in their submissions, the Registrar finds useful to make some preliminary observations.

2. First of all, the Registrar observes that some of the submissions made by counsels¹⁸ are related to proceedings before the Host State's national Courts. The Registrar considers that she has no competency as to these domestic proceedings and will refrain from making any observations on these, but to question the relevance of the counsels' submissions on this issue. The Registrar was particularly interested by the counsels' summary of domestic proceedings, in particular the information that the Dutch immigration authorities ruled on 29 September 2011 that the asylum applications made by the detained witness was no longer to be regarded as national asylum requests because the Dutch asylum procedure was no longer considered to be applicable. The Registrar wonders what are the consequences of this judicial development on Trial Chamber I's earlier finding that the detained witness shall "not leave the country until the authorities have had a proper opportunity to consider the [asylum] application"¹⁹ and uses the opportunity of the present observations to seek guidance from the Chamber as to the impact of this new information on its earlier ruling.

3. The Registrar further observes that the *Amicus Curiae* brief contains numerous inaccuracies and misrepresentations of the Chamber's decisions and orders, including the following, to take only a few:
 - Par. 6: Counsels write that the Trial Chambers had ruled that the four witnesses had the right to ask for asylum: this statement is inaccurate. Both Trial Chambers limited themselves to take note that asylum applications had been made before the Dutch authorities and consequently ruled that

¹⁸ ICC-01/04-01/06-2827, par. 11-16.

¹⁹ ICC-01/04-01/06-2766-Conf, par. 87.

the request for authorization to make such requests had thus become moot,²⁰ which is quite different: the asylum requests were taken as a *fait accompli* by both Trial Chambers;

- Par. 19: Counsels write that the fact that the Dutch authorities find the asylum application sufficiently meritorious “is undeniably the case”, whereas it revealed at par. 8 that the same authorities had found that the Dutch asylum procedure was no longer applicable. The same misconstruction appears again at paragraph 39;
- Par. 27-29: Counsels complain that the Registrar had drawn up a document clarifying certain matters relating to witnesses’ ongoing detention at the ICC. They add, “for sake of transparency”, in a footnote that the Registrar also sent by e-mail an equivalent note to the respected counsels, but complain that this e-mail did not reach the status of an official report as produced at the request of the Dutch authorities. First of all, the *note verbale*²¹ was not sent to the Dutch authorities at their requests but on the initiative of the Registrar. Its only aim was to seek clarifications as to the reason of the cancellation of the appointments made by the Immigration authorities with the detained witnesses at the Detention Centre. The fact that the detained witnesses remained under ICC custody was reminded in order to support the idea that the ICC should have been notified such cancellation and was entitled to know the rationales thereof. Second, *notes verbales* are the usual way of official communication between the Court and States Parties. As such, the Registry had no option but to address its official request by way of such *note verbale*. Communication with counsels does not require the same level of formality and a *note verbale* in no way can be considered an appropriate channel of communication with counsels. The Registrar did exactly what the counsels had requested her to do and is surprised to discover that counsels now complain about her

²⁰ ICC-01/04-01/06-2766-Conf. par. 73 ; ICC-01/04-01/07-3003-Conf. p. 41..

²¹ ICC-01/04-01/06-2827-Anx2.

cooperativeness. The Registrar further observes that neither the e-mail communication sent to counsels nor the *note verbale* addressed to the Host State aimed at being used for the purpose of the proceedings before the domestic Courts.;

- Par. 30: Counsels allegedly quote paragraph 88 of the Chamber's decision ICC-01/04-01/06-2766-Conf, but deliberately omit to mention that the quoted sentence started by "if", thus impacting significantly on the true meaning of the quotation. The same misconstruction appears again at paragraph 37. It is the Registrar's respectful submission that counsels should be warned that such a gross misrepresentation of the Chamber's decisions is not the standard of argumentation expected from counsels before the Court, especially in the context of an *amicus curiae* brief;
- Par. 32: The Registrar obviously objects to the allegation that her office did not adequately advance the situation of the four witnesses and will provide the Chamber with further details on actions taken in the observations below;
- Par. 36: Counsels complain that, as the result of the position and conduct of the Dutch authorities, they have not even managed to properly start the asylum procedure, whereas, based on the information stemming from the *amicus curiae* brief and from the information obtained from the Host State, the asylum procedure was found not applicable by the Dutch authorities and the applicants themselves cancelled their appointments with Immigration authorities;

On the measures taken by the Registrar

4. In compliance with the Trial Chamber decision of 1 September 2011, and more specifically in relation to paragraphs 14 and 15 thereof²² the Registry

²² ICC-01/04-01/06-2804-Conf:

proceeded to contact the Medical Officer of the ICC Detention Centre in order to receive his medical opinion as to whether Witness 19 was, from a medical point of view, fit to travel back to the DRC. On 2 September 2011, the ICC Detention Centre confirmed that the Medical Officer had declared Witness 19 fit to travel.

5. In view of this the Registrar began to explore the various options concerning the transfer operation and tentative dates were considered. At this time the relevant authorities from a cooperating State were approached by the Registrar with a formal request for assistance in the transfer of Witness 19 back to the DRC. The targeted transfer date was set for 17 October 2011. The relevant State held an internal coordination meeting with the relevant domestic departments and concluded that further information was required from the Court before being able to implement the Registrar's request for assistance.
6. At the same time, namely around the date of 21 September 2011, the Dutch immigration service informed the Registrar that a meeting with Witness 19 had been scheduled for 11 October 2011.
7. [REDACTED] By this time, the travel arrangements were inconclusive as due to the various legal questions being debated within the State from whom the Registry had sought assistance, it had not been possible to set a more realistic

"14. It follows the Registry should proceed with regard to defence Witness 19 in the way specified in Article 93(7)(b) of the Statute and Rule 192(4) of the Rules. These arrangements are only to be implemented [REDACTED].

15. In the event that travel is appropriate [REDACTED], the Registrar should inform the Host State of the intended departure date of defence Witness 19 to the DRC. If at any time before he finally leaves for the DRC the Dutch authorities indicate that they intend to take control of the witness, the Registrar is to cooperate in the transfer of defence Witness 19 to the Host State."

departure date. Consequently, the Registrar had been unable to inform the Host State of the intended date of departure.

8. On 10 October 2011, the Dutch immigration authorities informed the Registrar that the interview with Witness 19 was cancelled until further notice. At this point in time the Registrar was provided with no explanation.
9. On 12 October 2011, [REDACTED]. In view of this, the Registrar ceased to continue any efforts in trying to secure transfer arrangements back to the DRC.
10. During the period of time described above, the Host State authorities did not inform the Registrar of any intention from their part to take control of Witness 19.
11. Lastly, on 18 October 2011, the Dutch immigration authorities informed the Registrar that the interviews of the detained witnesses in the case *The Prosecutor v. Mathieu Ngudjolo Chui and Germain Katanga* were also cancelled until further notice.

On the assertions made by Mr. Schüller and Mr. Sluiter in relation to the role of the Registrar²³

A. That the Registrar has not properly consulted with the Dutch authorities, in the sense that she has not undertaken all possible efforts to persuade the Dutch authorities to comply with this Trial Chamber's Decisions and Orders

²³ ICC-01/04-01/06-2827, p. 9, para. 18.

12. All relevant decisions of Trial Chamber I on the matter of witness 19 have been officially notified to the Host State authorities in compliance with the orders of this Chamber and the Court's legal texts.

13. On every occasion on which the Chamber has ordered the Registrar to consult with the Host State authorities, the Registrar has approached them in compliance with these orders. In this regard the Chamber has been kept duly informed of all relevant developments as regards the relevant consultations and of the responses received from the Host State, this is reflected in the relevant Registry submissions.²⁴

B. That the Registrar has not informed the Trial Chamber properly of the consultations with the Netherlands, especially of the fact that the asylum application was considered sufficiently meritorious to start a procedure for protection and of the Dutch refusal to cooperate in good faith with the ICC in this matter

14. At the outset, the Registrar observes that the argument is misconstrued since the counsels themselves inform the Chamber, at paragraph 8 of the *amicus curiae* brief, that the Dutch authorities found that the applicant was not eligible to the application of the asylum procedure.

15. On the specific subject matter of the asylum application of Witness 19, the Registrar has had no involvement or consultations with the relevant authorities as the substance of the asylum application and the modalities under which it is being treated by the Dutch authorities is a matter that falls outside of the competence of the Court. The Registrar's role has been limited

²⁴ ICC-01/04-01-06-2781-Conf : ICC-01/04/01-06-2801-Conf.

at facilitating the visiting arrangements at the ICC Detention Centre or witness 19 and the immigration authorities, which were cancelled on request from the applicant. As previously mentioned the immigration authorities simply informed the relevant Registry services that the meeting was cancelled and no further specifics were provided. This lack of explanation triggered the *note verbale* annexed by the counsels.

RESPECTFULLY TRANSMITS the present submission as 'confidential' as it refers to information which is available to the public only in redacted form;

RESPECTFULLY SEEKS guidance from the Trial Chamber as to the impact of the finding of the Dutch immigration authorities that the Dutch asylum procedure was found not to be applicable any longer to the witness, as reported at paragraph 8 of the of the *Amicus Curiae* brief, on the Chamber's earlier ruling that the detained witness shall "not leave the country until the authorities have had a proper opportunity to consider the [asylum] application";²⁵

REMAINS available to the Chamber for further clarification;



Silvana Arbia, Registrar

Dated this 6 December 2011

At The Hague, The Netherlands

²⁵ ICC-01/04-01/06-2766-Conf, par. 87.