

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/06
Date: 7 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***

Confidential

Order on the medical reports relating to defence Witness 19

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

The Office of the Prosecutor

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Ms Fatou Bensouda

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Mr Jean-Marie Biju Duval

Legal Representatives of the Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Joseph Keta Orwinyo
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Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms Paolina Massida

The Office of Public Counsel for the Defence

States Representatives

Kingdom of the Netherlands
Democratic Republic of the Congo

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

Mr Patrick Craig

Victims Participation and Reparations Section

Other

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

Trial Chamber I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court" or "ICC"), in the case of *The Prosecutor v. Thomas Lubanga Dyilo* ("*Lubanga case*"), delivers the following Order on the medical reports relating to defence Witness 19:

1. On 4 July 2011, the Chamber issued its Decision on the request by DRC-D01-WWWW-0019 ("defence Witness 19") for special protective measures relating to his asylum application.¹ The Chamber concluded that the Court's responsibility under Article 21 of the Rome Statute ("Statute") is, first, that defence Witness 19 is provided with a real (as opposed to a theoretical) opportunity to make his asylum request and, second, that the Dutch authorities are afforded a proper opportunity to consider the application, before the witness is returned to the Democratic Republic of the Congo ("DRC").²
2. On 4 August 2011, the Chamber issued its "Decision on two requests for leave to appeal the 'Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application'", wherein the Chamber granted leave to appeal to the Kingdom of the Netherlands ("Netherlands") and the DRC.³ On a request for directions by

¹ Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application, 4 July 2011, ICC-01/04-01/06-2766-Conf. A public redacted version was issued on 5 August 2011, ICC-01/04-01/06-2766-Red.

² Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application, 4 July 2011, ICC-01/04-01/06-2766-Conf. A public redacted version was issued on 5 August 2011, ICC-01/04-01/06-2766-Red, paragraphs 86 and 87.

³ Decision on two requests for leave to appeal the "Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application", 4 August 2011, ICC-01/04-01/06-2779-Conf. The Netherlands had submitted an 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, 13 July 2011, ICC-01/04-01/06-2768-Conf;

the Netherlands as to how to proceed,⁴ the Appeals Chamber decided that the Trial Chamber's grant of leave to appeal the Decision of 4 July 2011 was *ultra vires* and therefore improper.⁵ In the circumstances, it refused the request for directions from the Netherlands because it lacked a sustainable foundation.⁶

3. On 15 August 2011, the Chamber issued its Order on the Report of the Registrar on the execution of decision ICC-01/04-01/06-2766-Conf ("Implementation Order"), in which it instructed the Registry to consult with the Dutch authorities on the transfer of the witness into the "control" of the Netherlands in the event that the Host State decided to defer his departure pending its decision on the asylum application.⁷
4. On 1 September 2011, the Chamber refused defence Witness 19's request⁸ for reconsideration of its order dated 15 August 2011.⁹ The Chamber stressed that it was for the Host State, to whom the asylum application is directed, to decide whether it is necessary to intervene in order to take control of the witness until such time as the application and any appellate

the DRC had submitted a letter that was treated as an application for leave to appeal by the Chamber (Registry transmission of observations received from the DRC authorities in relation to document ICC-01/04-01/06-2766-Conf, 15 July 2011, ICC-01/04-01/06-2770-Conf-Anx1).

⁴ Urgent Request for Directions, 17 August 2011, ICC-01/04-01/06-2788-Conf.

⁵ Decision on the Urgent Request for Directions" of the Kingdom of the Netherlands of 17 August 2011, 26 August 2011, ICC-01/04-01/06-2799-Conf, paragraph 8.

⁶ ICC-01/04-01/06-2799-Conf, paragraph 8.

⁷ Order on the Report of the Registrar on the execution of decision ICC-01/04-01/06-2766-Conf, 15 August 2011, ICC-01/04-01/06-2785-Conf. The order was reclassified as public pursuant to the Chamber's instructions of 12 September 2011.

⁸ 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", 17 August 2011, ICC-01/04-01/06-2787-Conf. A public redacted version was filed on 20 September 2011, ICC-01/04-10/06-2787-Red.

⁹ Order on the Request for Reconsideration of Order ICC-01/04-01/06-2785-Conf, 1 September 2011, ICC-01/04-01/06-2804-Conf. A public redacted version was issued on 25 October 2011, ICC-01/04-01/06-2804-Red.

phase in those proceedings are determined, and concluded that once defence Witness 19 is medically fit to travel to the DRC, the Registry should proceed in the way specified in Article 93(7)(b) of the Statute and Rule 192(4) of the Rules of Procedure and Evidence ("Rules").¹⁰

5. On 31 October 2011, counsel representing defence Witness 19 in his asylum proceedings before the Dutch authorities requested leave to submit *amicus curiae* observations to the Chamber.¹¹ On 15 November 2011, the Chamber granted this request and set deadlines for the submission of observations by counsel, the parties and the Registry.¹² Counsel representing defence Witness 19 submitted their observations on 23 November 2011.¹³ On a request from the Registrar,¹⁴ the Chamber granted an extension of the deadline for the submission of her report to 6 December 2011.¹⁵ The observations by counsel representing defence Witness 19 in the asylum proceedings, and the related Registry report, will be addressed in a separate decision.

¹⁰ Order on the Request for Reconsideration of Order ICC-01/04-01/06-2785-Conf, 1 September 2011, ICC-01/04-01/06-2804-Conf paragraphs 13 and 14. A public redacted version was issued on 25 October 2011, ICC-01/04-01/06-2804-Red.

¹¹ Request for leave to submit Amicus Curiae Observations by mr. Schüller and mr. Sluiter, Counsel in Dutch asylum proceedings of witness 19, 31 October 2011, ICC-01/04-01/06-2816.

¹² Order authorising the submission of observations, 15 November 2011, ICC-01/04-01/06-2821. A corrigendum was issued on 18 November 2011, ICC-01/04-01/06-2821-Corr. A French translation was made available the same day, ICC-01/04-01/06-2821-Corr-tFRA.

¹³ Amicus Curiae Observations by mr. Schüller and mr. Sluiter, Counsel in Dutch asylum proceedings of witness 19 (with annexes), 23 November 2011, ICC-01/04-01/06-2827.

¹⁴ Email communication to the Chamber through a Legal Officer of the Trial Division on 30 November 2011.

¹⁵ Email communication to the Registry through a Legal Officer of the Trial Division on 30 November 2011.

6. On 2 December 2011, duty counsel for defence witness 19 submitted a request for the medical records relating to defence Witness 19,¹⁶ and a particular order is sought instructing the Registry to provide a copy of the medical report dated 17 October 2011 that was prepared by the doctor at the detention centre following his examination of defence Witness 19.¹⁷ Counsel also seeks an updated medical report on defence Witness 19's state of health, along with (1) the opinion of an independent specialist on defence Witness 19's ability to travel to the DRC and (2) an assessment of defence Witness 19's effective access to any necessary medical care in the DRC, taking into account the existing infrastructure, the availability of appropriate treatment and the fact that defence Witness 19 is a detainee.¹⁸
7. Duty counsel suggests that the Registry refused to provide a copy of the medical report of 17 October 2011 because of its allegedly confidential nature.¹⁹ He argues that in order to ensure the interests of defence Witness 19, he is entitled to a copy of the medical report of 17 October 2011 as well as an independent assessment of his health, in advance of steps being taken to return him to the DRC.²⁰ Duty counsel observes that since 1 September 2011, defence Witness 19's state of health has deteriorated considerably and the doctors have prepared him for the likelihood of extensive treatment.²¹ It is suggested that the various requests outlined above are necessary to ensure compliance with Article 68(1) of the Statute

¹⁶ Requête tendant à obtenir production de documents relatifs à l'état de santé du témoin DRC-D01-WWWW-0019, 2 December 2011, ICC-01/04-10/06-2828-Conf.

¹⁷ ICC-01/04-10/06-2828-Conf, paragraph 24.

¹⁸ ICC-01/04-10/06-2828-Conf, paragraph 24.

¹⁹ ICC-01/04-10/06-2828-Conf, paragraph 10.

²⁰ ICC-01/04-10/06-2828-Conf, paragraph 18.

²¹ ICC-01/04-10/06-2828-Conf, paragraph 17.

(the Chamber's obligation to ensure the witness's physical and psychological wellbeing, as well as his human dignity).²²

8. Rule 17 of the Rules provides that the Victims and Witnesses Unit shall, *inter alia*, assist witnesses and victims in obtaining medical, psychological and "other appropriate assistance". The Rome Statute framework does not contain any provision that permits the Registrar to withhold the (written) results of examinations in this context from a witness, whatever the underlying issue. In the instant situation, defence Witness 19 was examined for the purposes of establishing whether or not he is fit to travel, although he has also received extensive medical attention on account of his apparent poor state of health. Apart from the argument that the report is "confidential", the Registry has failed to provide any justification to duty counsel for refusing to disclose it to defence Witness 19. In particular, it has not been argued that it would be harmful for defence Witness 19 to read the contents of the report.

9. The issue of medical records are addressed, at least to an extent, in Rule 73 of the Rules, which provides for the disclosure of privileged communications and information. Rule 73 of the Rules recognises that the communication between an individual and his or her doctor, psychiatrist, psychologist or counsellor is privileged, and disclosure depends on the individual's consent or his voluntary disclosure to another. Although this provision deals with disclosure issues in the context of "communications" between an individual and particular professionals or others where

²² ICC-01/04-10/06-2828-Conf, paragraph 21.

confidentiality is properly to be recognised, it clearly reveals that the protected relationship is between the individual and (in this context) his doctor, rather than the latter and the Registrar. Furthermore, the suggestion that a doctor's report can be withheld legitimately from his patient fundamentally undermines the proper relationship that should exist between a doctor and the person he is treating, given the latter is ordinarily entitled to a full report (whether it is oral or in writing) as to his or her medical condition.²³ The sole difference in the present situation is that a witness is in detention pending his removal to the DRC. The Registry's contention that the report is confidential is without legal basis, and the Chamber would be in breach of its obligations to protect the physical wellbeing of witnesses if it permitted the Registry to withhold critical information about this individual's health.

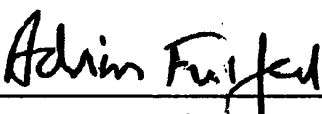
10. Therefore, pursuant to Article 68(1) and Article 64(2) and (6)(f) of the Statute, the Chamber instructs the Registry to provide defence Witness 19 with a copy of the medical report dated 17 October 2011 that was prepared by the doctor at the detention centre forthwith.

11. Given that duty counsel has informed the Chamber of a significant change in defence Witness 19's state of health, the Chamber instructs the Registry to provide the Chamber and defence Witness 19 with an updated medical report that is to be prepared by the doctor or doctors currently treating him. This report is to address his present state of health, any prognosis

²³ Rules 113 and 135 of the Rules allow the Pre-Trial Chamber or the Trial Chamber to order a medical, psychiatric or psychological examination of a potential suspect or the accused, but these provisions similarly do not suggest that the results of any examination should be withheld from the person concerned.

and whether, on medical grounds, he is not fit to travel. The Chamber is persuaded that the present medical staff will be able to provide any relevant information and expertise in this regard and it is unnecessary to order an independent examination. Pursuant to Article 68(1) and Article 64(2) and (6)(f) of the Statute, the Chamber instructs the Registry to provide this updated report by 12 December 2011.

Done in both English and French, the English version being authoritative.



Judge Adrian Fulford

Judge Elizabeth Odio Benito

Judge René Blattmann

Dated this 7 December 2011

At The Hague, The Netherlands