

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 8 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 Document

Application from Amicus Curiae Philip-Jan Schüller and Göran Sluiter for Leave to Submit Additional Observations and to Respond to the Registry's Response of 6 December 2011

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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Unrepresented Victims

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(Participation/Reparation)**

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Mr Ghislain Mabanga Monga Mabanga

1. Counsel for Witness 19 have taken note of the Registry Response of 6 December 2011¹ pursuant to this Chamber's Order authorising our amicus observations. Counsel for the Witness would respectfully contend that it might be useful for the Trial Chamber to obtain the response of Counsel to the viewpoint and assertions of the Registrar, albeit that a reaction via an additional amicus brief might be considered unorthodox. It is submitted –as was recognized by this Chamber-² that it is within the discretion of this Chamber to authorise us to file additional comments with a view of acquiring a comprehensive oversight of the increasingly complex issues at stake. The response would contain observations on the pending national proceedings from the perspective of the ICC and would react to certain inaccuracies and assertions on the part of the Registrar.

2. Our reaction and additional observations would concentrate on the following points, which could assist this Chamber in its further approach and understanding of the matters at hand, especially regarding the current status quo of the current national proceedings regarding the asylum application .

3. First, it transpires from the response of the Registrar that there might be a fundamental misunderstanding in respect of the scope and content of ongoing procedures of all the Congolese witnesses, including the case of Witness 19. The current national litigation concerns the principal question whether the Dutch immigration authorities are to abide by the Dutch asylum law or whether they are allowed to fabricate an extra judicial procedure. In the meantime the situation of counsel for the witness and the immigration authorities is at a deadlock. So far the asylum request has properly been submitted but no interviews have taken place. The crucial question presently being adjudicated is: should the Congolese witnesses be forced to engage in an extra judicial procedure *contra legem* or should the immigration authorities abide by national law ? At the hearing of 6 December 2011 the Amsterdam Court acknowledged the existence of a lawfully and properly submitted asylum request of an individual present on Dutch territory. The court will subsequently have to rule on the question whether the Dutch law allows the immigration authorities to make use of an extra judicial procedure outside of the applicable Dutch and EU law on asylum procedures. There are no indications or legal arguments to indicate that Dutch authorities could lawfully apply a non-existent procedure outside the realm of the Refugee Act (*Vreemdelingenwet*). It was also acknowledged by the Amsterdam court that the Dutch authorities never formally rejected the application and never ordered, for example, the applicant to file a new application, using a

¹ ICC-01/04-01/06-2829-Red 07-12-2011.

² ICC-01/04-01/06-2821 15-11-2011, para. 8.

different procedure. As a result, the original asylum application is still pending and the Dutch courts will pronounce themselves on the applicable law regarding that duly filed and lawful asylum application. Thus, the asylum procedure is still in place and applicable.

4. It is true that the Dutch immigration authorities at some point in time decided to treat the asylum request as a request for protection (but again: never rejected it). At the hearing of 6 December 2011 counsel for the Minister of Immigration explained the motives behind this. The regular asylum procedure entitles the Witness to lawfully reside in the Netherlands in case of acceptance of his claim of non-refoulement. With inventing some sort of a special procedure the Minister seeks to prevent such title of residence in the Netherlands. This means that in case the immigration authorities would decide that non-refoulement applies and that the Witness cannot be sent to the DRC, there is the need to assess the situation anew. It was admitted that in that scenario the host-State would push for fair burden-sharing among the ICC States-parties, and –apparently- would wish to send the Witness to another ICC State-party (obviously not being the DRC), which is not possible in case of the ordinary asylum procedure. While a proper solution may have to be found for these cases in the future, Counsel would assert that it is clear that this Witness cannot become the victim of ad hoc, arbitrary and highly uncertain procedures without a proper basis in Dutch law, and that he has a legitimate right to challenge the position of the Dutch immigration authorities with the Dutch courts.

5. Having provided this clarification, it must have been clear to the Registrar that the Dutch immigration authorities offer an alternative procedure, that is not (yet) the ordinary asylum procedure. That alternative procedure –on the legality of which the courts still have to rule- has obviously been triggered by an asylum application that is sufficiently meritorious, even if it would ultimately not lead to a residence title in the Netherlands. The Registrar is therefore incorrect when referring to this as a misconstruction on our part (Response of the Registrar, p. 7 and also para. 14). It is puzzling that the Registrar engages in this type of ‘black letter lawyering’ and thereby attaches greater importance to the specific name of the procedure –asylum or not- than the substance of the procedure, being aimed at the protection of the Witness and triggered by an asylum application that is sufficiently meritorious. It is the more puzzling that the Registrar, being an organ of a Court, attaches such significance to a finding of the Dutch immigration authorities in the knowledge that no Dutch Court has pronounced itself yet on the legality of this contention .

6. With a view to provide this Chamber with additional information, we could elaborate in our additional observations on most recent developments in Dutch asylum proceedings.

The hearing of 6 December could not be properly finalised, because the Dutch Ministry of Foreign Affairs refused to transport two of the four witnesses to the Amsterdam District Court, in spite of a specific request to that end from the Amsterdam Court and full cooperation on the part of the Registrar. The hearing was adjourned, although the available time was used to exchange arguments, until 21 December, after which the District Court has to deliver a decision within 6 weeks on the applicability of Dutch asylum law. This Chamber of the Amsterdam District Court is at present only competent to rule on the applicability of Dutch asylum law, the Refugee Act (*Vreemdelingenwet*) and not on the proper content of the decision making regarding the substantive asylum motives. The view on the part of the Registrar that the Congolese witnesses on instruction of counsel are obstructing asylum procedure is not correct; counsel have requested the adjournment of the interviews pending the outcome of the appeal at the District Court of Amsterdam. This request has not been rejected by the immigration authorities nor has any adverse consequences arisen from this request. We can, of course, not predict or speculate on the outcome of the hearings of 6 and 21 December, but it is a fact that a) the Amsterdam asylum court did not declare itself immediately incompetent in the asylum procedure, and b) ordered another hearing on 21 December. Counsel will be able to elaborate further on these developments and the issue of an effective asylum procedure as human right standard.

7. Second, the response of the Registrar contains several allegations which warrant a reaction in respect of the inaccuracies brought forward by the Registrar, which we would like to address in additional observations. For example, counsel for the witness have taken note of the position by Counsel for the Dutch State at the court hearing of 20 October 2011 on the detention of Witness 19, indicating that the Registrar's note verbale of 19 October 2011 was produced by the Registrar at the request of the Dutch authorities the day before the hearing. Counsel for the State had requested clarification in order for him to prepare his pleadings. These facts are seemingly at odds with the current position of the Registrar claiming that the note verbale was not sent to the Dutch authorities at their requests but on initiative of the Registrar (p. 7 of the Registry response). Moreover, whereas the Registrar claims that the purpose of the note verbale was to *seek* clarifications on the cancellation of the appointments made by the Immigration Authorities (p. 7 of the Registry response), the note verbale only *gives* 'clarifications', and on issues which were precisely at stake in the hearing of 20 October 2011 at The Hague District Court and which are irrelevant in respect of the cancellation of the hearings. The important material point is that the information provided by the Registrar resulted in a decision of the District Court of The Hague which relied extensively on the note

verbale. Whereas the Registrar has accused counsel of ‘gross misrepresentation of the Chamber’s decisions’ –and we disagree with that assertion for reasons we could elaborate on in further submissions-, it is counsels’ respectful submission that the Registrar, as an organ of the ICC, should inform and approach the Chamber openly and with candor.

8. We are aware of the fact that this is becoming an increasingly complex matter. With a view to assisting the Chamber, we are available to further explain and discuss all the issues and problems at a hearing, which may be more helpful in finding a solution than continuing exchange of views and arguments in writing.

Conclusion

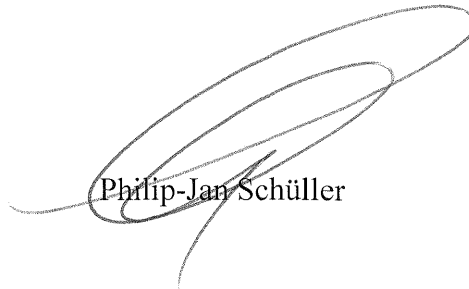
The Trial Chamber is respectfully requested to grant the amicus curiae leave to file a reaction to the Registry Response of 6 December 2011,

Respectfully submitted

Amsterdam, 8 December 2011



Göran Sluiter



Philip-Jan Schüller