

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/06
Date: 15 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

**Decision on the observations submitted by counsel representing defence Witness
19 in the Dutch asylum proceedings**

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

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Kingdom of the Netherlands
Democratic Republic of the Congo

Amicus Curiae

REGISTRY

Registrar

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Mr Patrick Craig

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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"), in the case of *The Prosecutor v. Thomas Lubanga Dyilo* ("Lubanga case"), issues the following Decision on the observations submitted by counsel representing defence Witness 19 in the Dutch asylum proceedings:

I. Background and Submissions

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. The Chamber concluded that its obligations under Article 68 of the Rome Statute ("Statute") did not prevent the return of defence Witness 19 to the Democratic Republic of the Congo ("DRC"), where he is detained pending the determination of domestic criminal proceedings. However, as defence Witness 19 had submitted an asylum claim to the Dutch authorities, the Chamber also decided that, in accordance with Article 21(3) of the Statute, the Court can only fulfil its obligation to return defence Witness 19 to the DRC once the Dutch authorities have been afforded a proper opportunity to consider the merits of his asylum application. The Chamber held that if the Dutch Government considers that the applicant has presented a sufficiently meritorious request that justifies deferring his departure from the Netherlands, the Court will immediately relinquish custody of defence Witness 19 to the Dutch authorities.¹
2. The procedural history is otherwise set out in the Decision on the two requests for leave to appeal the 'Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum

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 redacted version was issued on 5 August 2011, ICC-01/04-01/06-2766-Red.

application”² and the Order on the Request for Reconsideration of Order ICC-01/04-01/06-2785-Conf.³

3. 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.⁴ On 15 November 2011, the Chamber granted this request and set deadlines for the submission of observations by counsel, the parties and the Registry.⁵
4. Counsel representing defence Witness 19 submitted their observations on 23 November 2011.⁶ With reference to the Chamber’s finding that it is necessary to “ensure that defence Witness 19 is 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 DRC”,⁷ counsel describe the progress of the Dutch asylum proceedings following the initial asylum request of 1 June 2011 in detail and argue that it does not meet the standards required under international law.⁸
5. Counsel further suggest that the Registrar of the Court is not assisting the progress of defence Witness 19’s asylum application.⁹ Counsel claim that “a) the Registrar has not properly consulted with the Dutch authorities, in the sense that she has not undertaken all possible effort to persuade the Dutch authorities to comply with this Trial Chamber’s Decisions and Orders, b) the

² 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 (the decision was reclassified as public pursuant to the instructions of the Chamber dated 25 October 2011).

³ 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.

⁴ 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.

⁵ 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.

⁶ 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 with 5 annexes.

⁷ ICC-01/04-01/06-2766-Red, paragraph 86.

⁸ ICC-01/04-01/06-2827, paragraphs 4 – 16.

⁹ ICC-01/04-01/06-2827, paragraph 17.

Registrar has not informed this Trial Chamber properly of the consultations with the Netherlands, especially of the fact that the asylum application was considered sufficiently meritorious [*sic*] to start a procedure for protection and of the Dutch refusal to cooperate in good faith the ICC in this matter, and c) the Registrar has informed in the course of ongoing litigation the Dutch national court in an improper manner of this Trial Chamber's Decisions and Orders."¹⁰ Counsel criticise the approach of the Registrar with respect to the consultations with the Dutch authorities, and claim that the Chamber has not been kept sufficiently informed.¹¹ They suggest that on account of the ongoing national proceedings, defence Witness 19's departure must necessarily be deferred and he should be transferred into the custody of the Dutch authorities.¹²

6. Counsel claim that the Registrar inappropriately intervened in the proceedings before the Dutch courts in support of the Dutch authorities.¹³ They are of the view that the Registrar produced a document at the request of the Dutch authorities that did not accurately reflect either the circumstances or the decisions and orders of the Chamber.¹⁴ This document is said to have significantly affected the outcome of proceedings before The Hague District Court, in essence improperly leading to the continued detention of defence Witness 19 at the ICC detention centre instead of enabling a transfer of custody to the Dutch authorities.¹⁵
7. Counsel rehearse the position of the Host State that the witness should remain in the custody of the Court during the asylum procedure, and suggest that the Dutch authorities are thereby "deliberately depriving" the detained witnesses of protection under Dutch law, and they ask whether the Chamber is

¹⁰ ICC-01/04-01/06-2827, paragraph 18.

¹¹ ICC-01/04-01/06-2827, paragraphs 19 – 21 and 23 – 26.

¹² ICC-01/04-01/06-2827, paragraph 22.

¹³ ICC-01/04-01/06-2827, paragraphs 27 – 32.

¹⁴ ICC-01/04-01/06-2827, paragraphs 28, 30 and 31.

¹⁵ ICC-01/04-01/06-2827, paragraphs 27, 29 and 32.

“prepared to accept this type of abuse of ICC detention facilities”.¹⁶ Counsel suggest that defence Witness 19 should not be returned to the DRC; that he has submitted a meritorious asylum application; and that the proceedings should not be conducted from the ICC detention centre, as contemplated by the Dutch authorities.¹⁷ Counsel further submit that defence Witness 19’s detention in the DRC is unlawful, thereby affecting the legality of his detention at the ICC detention unit.¹⁸

8. As regards the protective measures the Trial Chamber has sought to implement for the return of the witness to the DRC, counsel rely on jurisprudence of the European Court of Human Rights to the effect that assurances given by a State do not absolve the Court from examining whether, in their application, they will provide a sufficient guarantee of protection.¹⁹ Counsel raise concerns about the safety of the witness on his return to the DRC and they rely on threats allegedly directed at the families of the four detained witnesses.²⁰ In particular, an attack by four soldiers of the Congolese army is described that allegedly took place on 5 November 2011, resulting in the death of a 13 year old relative of one of the witnesses (although it is not indicated whether the family of defence Witness 19 was a target of this attack).²¹ It is suggested that Article 68 of the Statute operates to prohibit the return of the witnesses to the DRC.²²

9. As a potential solution, counsel suggest that defence Witness 19 should be released, as any form of detention that lacks a proper basis ought immediately

¹⁶ ICC-01/04-01/06-2827, paragraphs 33 – 35.

¹⁷ ICC-01/04-01/06-2827, paragraphs 36 and 38 – 40.

¹⁸ ICC-01/04-01/06-2827, paragraphs 41 – 49. Counsel also inform the Chamber of a complaint against the DRC for unlawful detention, to be filed with the Human Rights Committee, which is attached as annex 5 to the application.

¹⁹ ICC-01/04-01/06-2827, paragraphs 50 – 52.

²⁰ ICC-01/04-01/06-2827, paragraphs 53 – 55.

²¹ ICC-01/04-01/06-2827, paragraph 56.

²² ICC-01/04-01/06-2827, paragraph 57.

to be brought to an end.²³ It is argued that in these circumstances the Dutch authorities would be able to detain him under domestic law, pursuant his asylum application.²⁴ Additionally, it is contended that if the asylum application is refused and the witness is immediately expelled, this would meet the “suspended obligation under Article 93(7)” of the Statute and satisfy any legitimate concerns on the part of the DRC.²⁵

10. Counsel thus invites the Trial Chamber to revoke its order for the return of defence Witness 19 to the DRC and to order his release, with any necessary conditions.²⁶ In the event that the witness remains in detention, counsel request the Chamber to direct the Registrar to make defence Witness 19 available for hearings before the Dutch courts and to assist in his transfer in order to attend them, if necessary ordering his temporary release for that purpose.²⁷ In addition, counsel request the Chamber to order the Registrar to assist in arranging family visits and as a matter of urgency to request the DRC “to put an immediate end to intimidation, threats and killings of family members of the Congolese witnesses who have sought asylum in the Netherlands, to bring to justice those responsible for such actions and to offer adequate compensation to the victims.”²⁸

11. On 6 December 2011 the Registrar submitted her response.²⁹ She has not advanced any submissions on the national proceedings, but in light of the information that the witnesses are no longer regarded by the Netherlands as asylum applicants under domestic law, she seeks guidance from the Chamber

²³ ICC-01/04-01/06-2827, paragraphs 58 – 61.

²⁴ ICC-01/04-01/06-2827, paragraphs 62 and 63.

²⁵ ICC-01/04-01/06-2827, paragraphs 64 and 65.

²⁶ ICC-01/04-01/06-2827, paragraph 69.

²⁷ ICC-01/04-01/06-2827, paragraph 69.

²⁸ ICC-01/04-01/06-2827, paragraph 69.

²⁹ Registry response pursuant to the Order authorising the submission of observations (ICC-01/04-01/06-2821), 6 December 2011, ICC-01/04-01/06-2829-Conf. A public redacted version was filed on 7 December 2011, ICC-01/04-01/06-2829-Red. On 30 November the Chamber had granted an extension of the deadline for these submissions (Email communication to the Registry through a Legal Officer of the Trial Division on 30 November 2011).

on the impact this may have on the Chamber's instruction that defence Witness 19 should "not leave the country until the authorities have had a proper opportunity to consider the [asylum] application".³⁰ The Registrar identifies various "inaccuracies and misrepresentations of the Chamber's decisions and orders" within the observations submitted by counsel, arguing that she sent the *note verbale* in question to the Dutch authorities on her own initiative and had not intended for it to be used in the proceedings before the Dutch courts.³¹ She describes the measures taken by the Registry to enable the return of defence Witness 19 to the DRC. These were halted on 12 October 2011 when the Medical Officer at the ICC detention centre decided that defence Witness 19 was not fit to travel and required further medical attention.³² The Registrar informs the Chamber that during October 2011 the Dutch authorities cancelled the interviews with all the detained witnesses until further notice, without providing any explanation, and additionally the Netherlands has not made any attempt to take control of defence Witness 19.³³ The Registrar rejects the allegations that she failed adequately to consult with the Dutch authorities or to keep the Trial Chamber properly informed.³⁴

12. On 8 December 2011, counsel representing defence Witness 19 sought leave to submit additional observations and to respond to the Registrar's observations.³⁵ The application was refused by the Chamber.³⁶

³⁰ ICC-01/04-01/06-2829-Red, paragraph 2, referring to ICC-01/04-01/06-2766-Conf, paragraph 87.

³¹ ICC-01/04-01/06-2829-Red, paragraph 3.

³² ICC-01/04-01/06-2829-Conf, paragraphs 4 – 7 and 9.

³³ ICC-01/04-01/06-2829-Conf, paragraphs 8 and 10 – 11.

³⁴ ICC-01/04-01/06-2829-Conf, paragraphs 12 – 15.

³⁵ 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, 8 December 2011, ICC-01/04-01/06-2831.

³⁶ Order rejecting the application to submit additional observations and a response to the Registry's observations, 9 December 2011, ICC-01/04-01/06- 2832.

II. Relevant provisions

13. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered the following provisions:

Article 64 of the Statute

Functions and powers of the Trial Chamber

[...]

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

[...]

(f) Rule on any other relevant matters.

[...]

Article 68 of the Statute

Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

[...]

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.

[...]

Article 93 of the Statute

Other forms of cooperation

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

[...]

(e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;

(f) The temporary transfer of persons as provided in paragraph 7;

[...]

(j) The protection of victims and witnesses and the preservation of evidence;

[...]

7. (a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:

(i) The person freely gives his or her informed consent to the transfer; and

(ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.
[...]

Rule 87 of the Rules

Protective measures

1. Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.
[...]

Rule 192 of the Rules

Transfer of a person in custody

1. Transfer of a person in custody to the Court in accordance with article 93, paragraph 7, shall be arranged by the national authorities concerned in liaison with the Registrar and the authorities of the host State.
2. The Registrar shall ensure the proper conduct of the transfer, including the supervision of the person while in the custody of the Court.
3. The person in custody before the Court shall have the right to raise matters concerning the conditions of his or her detention with the relevant Chamber.
4. In accordance with article 93, paragraph 7 (b), when the purposes of the transfer have been fulfilled, the Registrar shall arrange for the return of the person in custody to the requested State.

III. Analysis and Conclusions

14. Addressing first the submissions on the extraordinary character of the asylum proceedings as advanced by counsel for defence Witness 19, the Chamber does not have authority to review decisions of the domestic authorities as regards their implementation of national laws.

15. The Chamber considers that the witness has clearly been provided with appropriate representation by counsel, in that the latter submitted an asylum application on his behalf on 1 June 2011.³⁷ The Dutch immigration authorities

³⁷ ICC-01/04-01/06-2827, paragraph 5.

confirmed, on 8 September 2011, that his request would be processed under national asylum law.³⁸ It follows that defence Witness 19 has had a real opportunity to make his asylum request, and the later decision by the Dutch immigration authorities (communicated to counsel on 29 September 2011) that the asylum application was to be treated as a “request for protection” on the grounds that Dutch asylum law was no longer considered applicable,³⁹ is a matter for the national authorities to determine. The Chamber has no power to review this decision by the Netherlands.

16. It should also be noted that the Chamber did not unconditionally rule that “the witness should be transferred into the control of the host-State”, as is submitted by counsel.⁴⁰ The Chamber ruled that:

87. The asylum application is directed at the Dutch authorities and it is for them 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 phase in those proceedings are determined.

88. The Chamber stresses that if the Dutch Government considers that the applicant has presented a sufficiently meritorious asylum application to justify deferring his departure from the Netherlands, the Court will necessarily hand over the custody of defence Witness 19 immediately to the Dutch authorities, particularly given the ICC will have no continuing power to detain him.⁴¹

17. Thereafter, the Chamber urged the Host State “to consider without delay whether it intends to defer defence Witness 19’s departure from the Netherlands”, and ordered the Registry to consult “with the Dutch authorities on the transfer of the witness into the “control” of the Netherlands if the Host

³⁸ ICC-01/04-10/06-2827, paragraph 7.

³⁹ ICC-01/04-10/06-2827, paragraph 8.

⁴⁰ ICC-01/04-01/06-2827, paragraph 9.

⁴¹ ICC-01/04-01/06-2766-Red, paragraphs 87 and 88.

State intends to defer his departure pending its decision on the asylum application.”⁴²

18. In a subsequent order, the Chamber instructed the Registrar to proceed with the arrangements to return defence Witness 19 to the DRC in the event that he is fit to travel, but to cooperate with the Dutch authorities if they indicated that they intend to take control of the witness until such time as the application and any appellate phase in those proceedings are determined.⁴³

19. The Court’s Order on the Request for Reconsideration of Order ICC-01/04-01/06-2785-Conf remains in force.⁴⁴ The Chamber reiterates its instructions to the Registry to prepare for the return of defence Witness 19 once he is fit to travel, pursuant to Article 93(7)(b) of the Statute and Rule 192(4) of the Rules. It is for the Dutch authorities to determine whether it necessary to intervene in order to take control of him for the purposes of conducting any extant national proceedings.

20. Until defence Witness 19 returns to the DRC, he is to remain in detention on the basis of Article 93(7)(b) of the Statute, unless custody is transferred to the Dutch authorities at the latter’s request. The Chamber has no competence to review any decision by the DRC to detain the witness once he has arrived back in that country, and it is to be noted that in the Decision of 4 July 2011 the Chamber examined its responsibilities, based on Article 68(1) of the Statute, as regards the return of defence Witness 19 to the DRC.⁴⁵

⁴² 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, paragraph 10. The order was reclassified as public on instruction of the Chamber dated 12 September 2011.

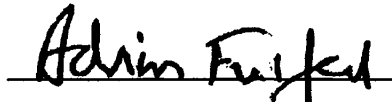
⁴³ ICC-01/04-01/06-2804-Red, paragraphs 13 – 15.

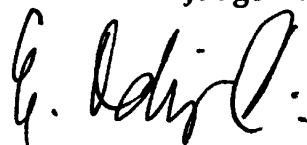
⁴⁴ Order on the Request for Reconsideration of Order ICC-01/04-01/06-2785-Conf, 1 September 2011, ICC-01/04-01/06-2804-Conf. A redacted version was issued on 25 October 2011, ICC-01/04-01/06-2804-Red, paragraphs 13 – 15.

⁴⁵ 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 redacted version was issued on 5 August 2011, ICC-01/04-01/06-2766-Red.

21. Addressing the submissions on the security of the families of the detained witnesses, the Chamber, pursuant to Article 68(1) of the Statute and Rule 87(1) of the Rules, instructs the Victims and Witnesses Unit ("VWU") to liaise with counsel for defence Witness 19 in order to establish whether it is appropriate for assistance to be provided to the family of defence Witness 19. The VWU is to report any decisions in this regard to the Chamber.
22. Given the significant possibility that defence Witness 19 will not be able to travel within the immediate future, pursuant to Article 68(1) of the Statute, the Chamber instructs the Registry to investigate whether a video link with one of the field offices would reasonably enable defence Witness 19 to talk with his family. This course should only be followed if the costs and the necessary arrangements are reasonable and proportionate.

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


Judge Adrian Fulford


Judge Elizabeth Odio Benito


Judge René Blattmann

Dated this 15 December 2011

At The Hague, The Netherlands