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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***

Confidential

**Observations of Witness DRC-D01-WWWW-0019 on the Application by the
Kingdom of the Netherlands for Leave to Appeal Decision ICC-01/04-01/06-2766-
Conf of 4 July 2011 (Regulation 65(3) of the Regulations of the Court)**

Source: Duty Counsel

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

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I. Background

1. By an application dated 1 June 2011 (“Application of 1 June 2011”), Witness DRC-D01-WWWW-0019 (“Witness”) requested Trial Chamber I (“Chamber”) of the International Criminal Court (“Court”) to order special protective measures consisting, in particular, of the stay of his removal to the Democratic Republic of the Congo (DRC) and the facilitation of his asylum application to the Dutch authorities.¹
2. On 3 June 2011, the Chamber ordered a stay of the Witness’s removal to the DRC and instructed the parties and the Registry, and invited the Kingdom of the Netherlands, to make submissions on the Application of 1 June 2011.²
3. On 7 June 2011, the Prosecution³ and the Defence⁴ filed their respective submissions.
4. On the same day, the Registry,⁵ the Kingdom of the Netherlands,⁶ and the DRC,⁷ which had not been invited to do so, also made their submissions to the Chamber.
5. On 8 June 2011, the Registry filed further observations.⁸

¹ “Request for Special Protective Measures for Witness DRC-D01-WWWW-0019”, 1 June 2011, ICC-01/04-01/06-2745-tENG.

² “Order on the application from DRC-D01-WWWW-0019 of 1 June 2011”, 3 June 2011, ICC-01/04-01/06-2749, pp. 5-6.

³ “Prosecution’s Submissions on the Chamber’s ‘Order on the application from DRCD01-WWWW-0019 of 1 June 2011’”, 7 June 2011, ICC-01/04-01/06-2752.

⁴ “Observations de la Défense sur la ‘Requête tendant à l’obtention des mesures de protection spéciales au profit du témoin DRC-D01-WWWW-0019’”, 7 June 2011, ICC-01/04-01/06-2753.

⁵ “Observations du Greffe soumises en vertu de l’Ordonnance no. ICC-01/04-01/06-2949”, 7 June 2011, ICC-01/04-01/06-2754.

⁶ “Observations of the Host State pursuant to Decision ICC-01/04-01/06-2749-Conf”, 7 June 2011, ICC-01/04-01/06-2755-Conf, with Annexes ICC-01/04-01/06-2755-Anx2 and ICC-01/04-01/06-2755-Anx3.

⁷ “Observations des autorités de la République démocratique du Congo (« RDC »)”, 6 June 2011, ICC-01/04-01/06-2751-Conf-Anx.

⁸ “Registrar’s Further Observations under Order ICC-01/04-01/06-2949”, 8 June 2011, ICC-01/04-01/06-2757.

6. On 10 June 2011, the Duty Counsel, acting for and on behalf of the Witness, filed the first submission on the Witness's condition of health⁹ and, on 15 June 2011, he filed the second submission, in response to filings by the parties and participants.¹⁰
7. On 4 July 2011, the Chamber issued the "Decision of 4 July 2011", whose operative part reads as follows:

The Trial Chamber hereby instructs the Registry to:

 - (a) afford defence Witness 19 reasonable access to the lawyers representing him on the asylum application;
 - (b) file a report by 29 July 2011, in consultation with the Dutch authorities, on the procedure that needs to be followed in order for the Host State to be able to discharge its obligations pursuant to this asylum request before defence Witness 19 is returned to the DRC (unless the request is granted);
 - (c) liaise with the Congolese authorities, prior to any return of defence Witness 19 to the DRC, in order to determine the extent of, and to implement, any protective measures that the Registry considers necessary. A report on these issues is to be filed by 29 July 2011; and
 - (d) monitor the position of defence Witness 19 following his return to the DRC.¹¹
8. On 13 July 2011, the Kingdom of the Netherlands applied for leave to appeal that decision ("Host State's Application").¹²
9. In accordance with regulation 65(3) of the Regulations of the Court, the Witness hereby presents observations on the application, both as to the procedure (II), and as to the substance (III).

⁹ "Observations du Conseil de permanence sur l'état de santé du témoin DRC-D01-WWW-0019", 10 June 2011, ICC-01/04-01/06-2760-Conf.

¹⁰ "Observations du témoin DRC-D01-WWWW-0019 en rapport avec l' 'Order on the application from DRC-D01-WWWW-0019 of 1 June 2011'", 15 June 2011, ICC-01/04-01/06-2762-Conf with annexes.

¹¹ "Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application", 15 July 2011, ICC-01/04-01/06-2766-Conf, para. 89.

¹² "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, "Host State's Application".

II. Procedure

A. *Inadmissibility of the application for leave to appeal for lack of locus standi*

10. The Kingdom of the Netherlands wishes to appeal the Decision of 4 July 2011 under article 82(1)(d) of the Statute. In its view, the fact that it intervened in the process of the witness's temporary transfer, and the fact that, at the invitation of the Chamber, it submitted observations on, *inter alia*, the witness's legal status, makes it a "party" within the meaning of article 82(1) of the Statute.¹³ The Chamber will reject the State's argument.

11. Article 82(1)(d) of the Statute reads as follows:

Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: [...] (d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings [Emphasis added.]¹⁴

12. Can the Kingdom of the Netherlands be considered to be "either party"? The Appeals Chamber's jurisprudence is now sufficiently settled on this matter, holding that the only parties before the Court are the Prosecutor and the Defence. Two judgments, ruling, *inter alia*, on victim status in the proceedings, are relevant here:

- Judgment of 11 July 2008

The Appeals Chamber considers it important to underscore that the right to lead evidence pertaining to the guilt or innocence of the accused and the right to challenge the admissibility or relevance of evidence in trial proceedings lies primarily with the parties, namely, the Prosecutor and the Defence. The first sentence of article 69 (3) is categorical: "[t]he parties may submit evidence relevant to the case, in accordance with article 64."

It does not say: "parties and victims may".¹⁵

¹³ Observations of the Host State, op.cit., paras 9-10.

¹⁴ The original text is not underlined.

¹⁵ "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008", 11 July 2008, ICC-01/04-01/06-1432 para. 93, p. 33.

○ Judgment of 19 December 2008:

Participation pursuant to article 68 (3) of the Statute is confined to proceedings before the Court, and aims to afford victims an opportunity to voice their views and concerns on matters affecting their personal interests. This does not equate them, as the case law of the Appeals Chamber conclusively establishes, to parties to the proceedings before a Chamber, restricting their participation to issues arising therein touching upon their personal interests, and then at stages and in a manner not inconsistent with the rights of the accused and a fair and impartial trial.¹⁶

13. It follows that the application by the Kingdom of the Netherlands for leave to appeal under article 82(1)(d) of the Statute cannot be entertained, especially since the Statute is clear on the right to appeal afforded to States. Indeed, article 82(2) allows a State to lodge an appeal against a decision of the Pre-Trial Chamber authorizing the Prosecutor to investigate on its territory without securing its cooperation. A State may also refer to the Appeals Chamber a decision of the Pre-Trial Chamber authorizing the Prosecution to investigate on its territory where it has requested the Prosecution to defer its own investigation into its nationals or other persons under its jurisdiction for criminal acts which may constitute crimes falling within the Court's jurisdiction.¹⁷

14. Apart from these specific circumstances, States are not entitled to appeal the decisions issued by various Chambers of the Court even if, as the Host State was, they are invited by a Chamber to present their observations at stages of the proceedings considered appropriate. In the same way that a victim presenting his or her views and concerns to the competent Chamber does not become a party before it, a State presenting its observations – even at the Chamber's invitation – does not become a party before the Chamber.

¹⁶ "Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007", 19 December 2008, ICC-01/04-556, para. 55.

¹⁷ Article 18(4) of the Statute.

15. Consequently, it behoves the Chamber to find the application by the Kingdom of the Netherlands for leave to appeal inadmissible for want of *locus standi*.

B. The application for leave to appeal is inadmissible for lack of a legal basis

16. For an application for leave to appeal to be found admissible, it must relate to an interlocutory decision in accordance with article 82(1)(d) of the Statute, i.e. a decision directly related to the main proceedings. The Chamber's role in this case is to determine whether such an appeal is likely to materially advance the main proceedings pending before it. In this instance, however, the application for leave to appeal concerns a decision on special protective measures in connection with an asylum procedure. It has no direct link, therefore, to the main proceedings in *Lubanga*, which is in the final phase and is not affected in any way by the action triggered by the Application of 1 June 2011.

17. When seized of similar applications submitted by the Prosecution, the Kingdom of the Netherlands, and the DRC in *Katanga/Ngudjolo*, Trial Chamber II rightly found them to be inadmissible on the grounds that:

The Chamber therefore considers that it would overstep its vested powers in agreeing to examine applications for leave to appeal submitted in respect of decisions which, by their nature, do not fall under article 82(1)(d) of the Statute. Accordingly, the Chamber can only grant or refuse leave for such appeals if it considers, subject to their admissibility, that they can be lodged directly with the Appeals Chamber without its authorization.¹⁸

III. Substance

18. If the Chamber does entertain the application by the Kingdom of the Netherlands for leave to appeal, it should nevertheless rule that it does not satisfy all of the substantive requirements of article 82(1)(d) of the Statute. At this stage, the

¹⁸ "Decision on three applications for leave to appeal Decision ICC-01/04-01/07-3003 of 9 June 2011", 14 July 2011, ICC-01/04-01/07-3073, para. 9.

Chamber must consider whether the following conditions are satisfied: (A) the issues raised significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial; and (B) an immediate resolution by the Appeals Chamber may materially advance the proceedings.

A. Whether the issues raised would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial

19. The Appeals Chamber has set forth the principle that “the object of paragraph (d) of article 82(1) of the Statute is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”.¹⁹ The host State contends that, insofar as it is concerned, the question of the fairness of the proceedings arises because the impugned decision causes it prejudice “as set out above”.²⁰ Yet an attempt to determine the actual prejudice caused to the host State by the impugned decision would prove fruitless. Although it submits that “the Decision is particularly prejudicial to the Netherlands and without leave to appeal it would be left without a remedy before the Court”,²¹ it pleads such prejudice insufficiently – hence its application for leave to appeal cannot succeed.

20. Admittedly, the State is objecting, in particular, to the fact that the Chamber failed to act in full accordance with article 21(3) of the Statute by leaving to the host State alone the responsibility of determining the appropriateness of applying the *non-refoulement* rule with respect to the asylum procedure pending before its competent courts. In fact, the State contends that

if the court were to properly assume its obligations under Article 21(3) of the Statute and decide on the risk of refoulement, then, as said, this would greatly assist the Netherlands in dealing with the asylum request and related litigation in an efficient way.²²

¹⁹,”Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, ICC-01/04-168, para. 19.

²⁰ Host State’s Application, para. 20.

²¹ *Ibid.*, para. 10.

²² Host State’s Application, op. cit., para. 23.

21. Although this seems to be a legitimate concern, the host State fails to demonstrate how the issues raised significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. In any event, the Kingdom of the Netherlands is a sovereign State, which, without having to rely on a decision taken by the Court, is sufficiently equipped and capable, not only of assessing all the risks faced by the Witness having regard to his asylum application, but also of applying in full the *non-refoulement* rule based on its own prior assessment of the risks.
22. The Kingdom of the Netherlands further contends that the Decision of 4 July 2011 is prejudicial to the right of the accused to call witnesses if they have insufficient protection within the meaning of article 68.²³ It contends, lastly, that “the Decision creates unfairness vis-à-vis witnesses who agreed to provide evidence in the Court’s criminal process on the understanding that the Court would protect them accordingly”.²⁴
23. Over and above the fact that the host State is not qualified to act on behalf of the accused in this case, the Chamber will note that the right of the accused to call witnesses has in no way been breached as a result of the Decision of 4 July 2011 – quite the contrary. In fact, in that decision, the Chamber was of the view:

that it is exclusively for the Host State to decide whether the VWU’s assessment, pursuant to Article 68 of the Statute, of the risks faced by defence Witness 19 on his return to the DRC addresses all the matters relevant to the merits of an asylum application made to the Dutch national authorities. Hence, it is for the Host State to determine whether, for instance, the witness’s submissions concerning the principle of *non-refoulement* have merit and whether his fear of reprisals, including judicial retribution (*viz.* an unfair trial and bad conditions of detention) are properly addressed by the Registry in its report and by way of the suggested protective measures. These are claims that come within the scope of Articles 3, 5, 6 and 7 of the ECHR, Articles 7 and 14 of the ICCPR and Article 3 of the Torture Convention. Similarly, it is for the Dutch authorities to determine whether, in the circumstances, returning the witness to the

²³ *Ibid.*, para. 21.

²⁴ *Ibid.*, para. 22.

DRC would amount to inhuman and degrading treatment under Article 7 of the ICCPR and Article 3 of the ECHR.²⁵

24. The Witness notes that such a decision allows the host State to act against the Chamber's decision to return him to his country of origin in accordance with article 93(7) should that State consider either that the asylum application is founded or that the *non-refoulement* rule or his condition of health do not allow it to do so.
25. The Witness considers that such a decision affords adequate protection insofar as it allows the host State to apply the case law of the European Court of Human Rights, which is sufficiently settled on all these matters.²⁶
26. The Chamber cannot find the host State's arguments to be persuasive, and its application should be dismissed.

B. Whether an immediate resolution by the Appeals Chamber may materially advance the proceedings

27. In the Judgment of 13 July 2006, the Appeals Chamber defined this test as follows:

A wrong decision on an issue in the context of article 82 (1) (d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process.²⁷

28. Supposing that the decision in question is fraught with error, how would that error, unless soon remedied, cloud or unravel the judicial process? The host State does not answer this question, and merely asserts that "the Appeals Chamber is

²⁵ Decision of 4 July 2011, op. cit., para. 83.

²⁶ See, in particular, *X. Y. v. Switzerland*, 14 July 1997, Application No. 7289/75 and 7349/76, D.R. 9, p. 57; *Etienne Tête v. France*, 9 December 1987, No. 11123/84; *Soering v. The United Kingdom*, 7 July 1989, Application No. 14038/88; *Melcher & Co. v. the Federal Republic of Germany*, 9 February 1990, Application No. 13258/87; *Autronic AG v. Switzerland*, Application No. 12726/87, 22 May 1990; *Matthews v. United Kingdom*, Application No. 24833/94, 18 February 1999; *Beer and Regan v. Germany*, Application No. 28934/95, 18 February 1999.

²⁷ Appeals Chamber, 13 July 2006, op. cit., para. 16.

in a position to safeguard the fairness of the proceedings by ruling on the extent of human rights protection of the detained witness by the Court and, therefore, its intervention is warranted".²⁸ It does not specify why the immediate intervention of the Appeals Chamber is absolutely necessary.

29. Yet, however desirable it may be for the Appeals Chamber to settle this delicate and unprecedented issue, the Kingdom of the Netherlands fails to demonstrate how an immediate resolution by the Chamber would materially advance the proceedings. Accordingly, there is nothing to preclude the Appeals Chamber from issuing a ruling in due course. This is a further reason why the State's application for leave to appeal should be dismissed as being devoid of merit.

IV. In the light of the foregoing,

30. Witness DRC-D01-WWWW-0019 respectfully requests the Chamber, to:

- Find the application for leave to appeal filed by the Kingdom of the Netherlands to be inadmissible.
- In the event that the application is nevertheless found to be admissible, dismiss it for being devoid of merit.

[signed]

Ghislain M. Mabanga
Duty Counsel

Dated this 18 July 2011

At Paris, France

²⁸ Host State's Application, para. 25.