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No.: ICC-01/04-01/07

Date: 15 June 2011

**TRIAL CHAMBER II**

**Before:** Judge Bruno Cotte , Presiding Judge  
Judge Fatoumata Dembele Diarra  
Judge Christine Van den Wyngaert

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**IN THE CASE OF**

***THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

**Public Document**

**Application for Leave to Appeal the Trial Chamber's Decision  
ICC-01/04-01/07-3003 dated 9 June 2011**

**Source:** The Government of the Kingdom of the Netherlands

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

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## Introduction

1. The Government of the Kingdom of the Netherlands respectfully submits this application before Trial Chamber II under Article 82(1)(d) of the Statute for leave to appeal the Trial Chamber's decision ICC-01/04-01/07-3003 dated 9 June 2011 (the "Decision").
2. The issue in the Decision that gives rise to this request for leave to appeal is the Chamber's holding that under Article 68 of the Statute, in connection with the ICC's responsibility to decide on the return of detained witnesses to their country of origin, the ICC is only required to ensure the protection of the witnesses against risks in connection with their testimony, and that it is not otherwise required to evaluate the risks of violations of their human rights, including violation of the rule of "non-refoulement".

## Procedural background

3. By note verbale of 21 April 2011, the Registry of the Court informed the Government of the Netherlands that detained defense witnesses intended to lodge a request for asylum in the Netherlands. At the request of the Chamber, the Registry inquired as to the position of the Government of the Netherlands in respect of this request. By note verbale dated 2 May 2011, the Government of the Netherlands informed the Court accordingly.
4. On 5 May 2011, the Chamber ordered the Registry to invite the Government of the Netherlands to be represented at a status conference in order to address, in particular, the relationship between the Netherlands and the Court and to address issues relating to the exercise of the right to asylum in the Netherlands. Further to the invitation of the Registry, the Government of the Netherlands did so during a status conference on 12 May 2011.
5. Also on 12 May 2011, local counsel for the detained witnesses submitted asylum requests to the Netherlands on behalf of these witnesses.

6. On 9 June 2011, the Registry notified the Netherlands of the Chamber's Decision.

**The Netherlands qualifies as a “party” in the sense of**

**Article 82(1)(d) of the Statute**

7. The Netherlands has been closely involved in the proceedings concerning the detained witnesses under Article 93(7) of the Statute in which these witnesses raised human rights concerns.
8. To begin with, the transfer of the detained witnesses from the Democratic Republic of the Congo (the “DRC”) to the International Criminal Court (the “ICC” or “Court”) in the Netherlands has been carried out in close coordination with the Dutch authorities. Furthermore, the Netherlands has arranged for the temporary lifting of the United Nations Security Council travel ban imposed on one of the witnesses. When the witnesses informed the Chamber of their human rights concerns if returned to the DRC and requested the Chamber to be presented to the Dutch authorities for purposes of requesting asylum, the involvement of the Netherlands intensified. The Netherlands has submitted observations to the Chamber, including orally during the status conference on 12 May 2011. These observations, among others, concerned the legal status of the detained witnesses in the Netherlands and the question what jurisdiction, if any, the Netherlands exercises over these witnesses.
9. Consequently, the Netherlands submits that it has become a party to this subset of proceedings concerning the detained witnesses under Article 93(7) of the Statute in which the witnesses raised human rights concerns and, therefore, the Netherlands qualifies to request leave to appeal in the case in point under Article 82(1)(d) of the Statute. This is exceptional for the Netherlands in relation to the ICC. However, the Decision is particularly prejudicial to the Netherlands and without leave to appeal it would be left

without a remedy before the Court. Moreover, the Decision has broad implications for the relationship between the Netherlands and the Court and, consequently, for the functioning of the Court in the Netherlands.

10. In this respect, the Netherlands recalls that, as explained during the status conference on 12 May 2011, under the Headquarters Agreement between the International Criminal Court and the host State (the "Headquarters Agreement") the Netherlands accepted that Dutch laws and regulations remain without effect insofar as necessary for the ICC to function on its territory. Under Article 44 of the Headquarters Agreement, the Netherlands is obliged to transport the detained witnesses "directly and without impediment" to the point of departure from the host State. This allows the Court to implement Article 93(7)(b) of the Statute, which provides that "[w]hen the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State."
11. It is in the interest of the ICC that the Netherlands has agreed to the aforementioned limitation of its jurisdiction and to its obligations towards the Court. This reflects the importance which the Netherlands attaches to international criminal justice. At the same time, it reflects the confidence which the Netherlands has in the ICC to dispense justice in accordance with the highest standards of justice. These standards include internationally protected human rights. The Netherlands has a legitimate expectation to this effect in view of Article 21(3) of the Statute.
12. The holding that Article 68 must *not* be interpreted in accordance with the rule of non-refoulement runs contrary to said expectation of the Netherlands. More importantly, it would preclude the Netherlands from complying with its obligations towards the Court to transport the detained witnesses whenever non-refoulement would prohibit the Netherlands from doing so. Such a consequence would be very problematic.

13. Consequently, it is of great importance for the Government of the Netherlands to be able to argue the matter before the Appeals Chamber in order for the Court to reconsider its position. A ruling by the Appeals Chamber will conclusively settle the matter of the human rights protection of detained witnesses, which has also arisen in the case of *The Prosecutor v. Thomas Lubanga Dyilo* before Trial Chamber I.

**The Decision involves an issue that significantly affects the fair and expeditious conduct of the proceedings**

14. For the conduct of the proceedings to be fair in the sense of Article 82(1)(d) of the Statute, the procedural and substantive rights and obligations of all participants must be respected.<sup>1</sup>
15. The aforementioned issue in the Decision affects the fairness of the proceedings under Article 93(7) of the Statute in several ways. First, as to the Netherlands, the conduct of these proceedings is unfair in light of the prejudice caused to the Netherlands, as set out above.
16. As to the accused, fairness in the sense of Article 82(1)(d) of the Statute has been linked to the ability of a party to present its case.<sup>2</sup> The accused must be able to call witnesses in accordance with Article 67(1)(e) of the Statute, including detained witnesses under Article 93(7) of the Statute. To ensure the appearance of such witnesses, the Court must afford them protection in accordance with Article 68 of the Statute.
17. Under Article 21(3) of the Statute, the application and interpretation of said provisions “must be consistent with internationally recognized human rights”.

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<sup>1</sup> ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), para. 24; ICC-01/04-141, para. 48; ICC-02/04-01/05-212, paras. 10-11; ICC-01/04-135-tEN, para. 38.

<sup>2</sup> ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), para. 24.

The Chamber has confirmed that non-refoulement is a rule of customary international law and a rule of international human rights law.<sup>3</sup>

18. Accordingly, the fairness of the conduct of the proceedings is affected by the holding of the Chamber that under Article 68 of the Statute, it is only required to ensure the protection of the detained witnesses against risks in connection with their testimonies, and that the Chamber is not otherwise required to evaluate the risks of violations of their human rights, including violation of the rule of “non-refoulement”.
19. Moreover, 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. The importance of the issues at stake and the impact of the Decision on the fairness of the proceedings cannot be disputed, considering the paramount importance of witness protection and the principle, under Article 68 of the Statute, “to ensure, as a matter of the highest priority, that witnesses are appropriately protected”.<sup>4</sup>
20. Finally, as said, the Decision precludes the Netherlands from assisting the Court by transporting the witnesses whenever non-refoulement would prohibit the Netherlands from doing so. Thus, the Decision frustrates the expeditious conduct of the proceedings concerning the detained witnesses.

**Immediate resolution by the Appeals Chamber may materially advance the proceedings**

21. The immediate resolution by the Appeals Chamber is warranted when it will “[rid] [...] the judicial process of possible mistakes that might taint [...] the fairness of the proceedings”.<sup>5</sup>

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<sup>3</sup> Decision, para. 68.


<sup>4</sup> ICC-01/04-01/07-776 OA7, para. 101.


<sup>5</sup> ICC-01/04-168, 13 July 2006, para. 14.

22. As stated above, the issue of the human rights protection of the detained witnesses affects the fairness of the proceedings. The Appeals Chamber is in a position to safeguard the fairness of the proceedings by ruling on the extent of human rights protection of the detained witnesses by the Court and, therefore, its intervention is warranted.

### Conclusion

23. For these reasons the Government of the Kingdom of the Netherlands respectfully requests the Trial Chamber to grant leave to appeal the Decision. This application is made without prejudice to the rights of the Kingdom of the Netherlands under the Headquarters Agreement.

  
 E. Lijzard  
 Legal Adviser of the Ministry of Foreign Affairs  
 on behalf of  
 the Government of the Kingdom of the Netherlands



Dated this 15 June 2011

At The Hague, the Netherlands