

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 15 August 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 Report of the Registrar on the execution of decision ICC-01/04-01/06-
2766-Conf**

Order 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

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Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
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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 Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Host State
Democratic Republic of the Congo

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

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Mr Anders Backman

**Victims Participation and Reparations
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Other

Mr Ghislain Mabanga Monga Mabanga

Trial Chamber I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court" or "ICC"), in the case of *Prosecutor v. Thomas Lubanga Dyilo* ("Lubanga case"), issues the following Order on the Report of the Registrar on the execution of decision ICC-01/04-01/06-2766-Conf ("Report").¹

I. Background and Submissions

1. On 4 July 2011, after duty counsel for witness DRC-D01-WWWW-0019 ("defence Witness 19") had submitted an application² for special protective measures and Trial Chamber I temporarily ordered³ the stay of his removal to the Democratic Republic of the Congo ("DRC") until further order, the Chamber issued its "Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application".⁴ The Chamber ordered the Registry, *inter alia*, 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) ("Dutch Consultation Report"); and
- (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 ("DRC Consultation Report").⁵

¹ Report of the Registrar on the execution of decision ICC-01/04-01/06-2766-Conf, 5 August 2011, ICC-01/04-01/06-2781-Conf.

² Requête tendant à l'obtention des mesures de protection spéciales au profit du témoin DRC-D01-WWWW-0019, 1 June 2011, ICC-01/04-01/06-2745-Conf with 11 confidential annexes.

³ Order on the application from DRC-D01-WWWW-0019 of 1 June 2011, 3 June 2011, ICC-01/04-01/06-2749-Conf.

⁴ 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.

⁵ ICC-01/04-01/06-2766-Red, paragraph 89.

2. On 13 July 2011, the Government of the Kingdom of the Netherlands ("Netherlands") sought leave to appeal the Decision.⁶ In a letter to the Registrar dated 13 July 2011, the DRC indicated that it took issue with the Decision.⁷ The Chamber treated the DRC's letter as an application for leave to appeal.⁸
3. 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 both applications for leave to appeal.⁹
4. On 5 August 2011, the Registry transmitted to the Chamber its DRC Consultation Report.¹⁰ On the same day, the Registry transmitted to the Chamber its Dutch Consultation Report.¹¹ The Registry annexed a letter from the Ministry of Foreign Affairs of the Netherlands, dated 2 August 2011 ("MFA Letter").

II. Analysis

5. In the Decision on the request by defence Witness 19 for special protective measures relating to his asylum application,¹² the Chamber held that, pursuant to Article 93(7)(b) of the Rome Statute ("Statute"), the Chamber is

⁶ 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.

⁷ ICC-01/04-01/06-2770-Conf-Anx 1.

⁸ 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, paragraph 5.

⁹ ICC-01/04-01/06-2779-Conf, paragraph 24.

¹⁰ With Confidential *Ex parte* Annex 1 Registry only and Confidential Annex 2, Registry's report on the implementation of ICC-01/04-01/06-2766, 5 August 2011, ICC-01/04-01/06-2782-Conf.

¹¹ Report of the Registrar on the execution of decision ICC-01/04-01/06-2766-Conf, 5 August 2011, ICC-01/04-01/06-2781-Conf.

¹² ICC-01/04-01/06-2766-Red.

obliged to return the witness to the DRC.¹³ However, given defence Witness 19 has lodged an application for asylum, and pursuant to its obligations under Article 21(3) of the Statute, the Chamber needed to be satisfied that the return of the witness would not violate internationally recognised human rights.¹⁴

6. The Chamber held that the limit of the Court's responsibility under Article 21(3) of the Statute is to ensure that defence Witness 19 has a real – as opposed to a merely theoretical – opportunity to make his request for asylum to the Dutch authorities before his return to the DRC.¹⁵ As the Chamber stated in its Decision, the return of defence Witness 19 to the DRC could not be effected until the Dutch authorities had a proper opportunity to consider the asylum application.¹⁶
7. To this end, the Chamber stated in paragraph 84 that, “[...] the Court should not seek to limit the opportunity of the Host State to assess an asylum claim, not least given the terms of Article 21(3) of the Statute”,¹⁷ and as a result, the Court has ensured that it has neither impeded defence Witness 19's access to the lawyer(s) who are representing him on the asylum application nor limited the opportunity for the Netherlands to assess his asylum claim since the Decision was filed on 4 July 2011.
8. The Chamber notes the submissions of the Kingdom of the Netherlands that:

First, the Immigration and Naturalisation Service will need access to the detained witness at the ICC Detention Centre to conduct Interviews to obtain Information regarding, for example, the detained witness's Identity, his background and the risks and treatment the detained witness fears to receive upon return. During these Interviews an Interpreter Interpreting into Dutch

¹³ ICC-01/04-01/06-2766-Red, paragraph 71.

¹⁴ ICC-01/04-01/06-2766-Red, paragraph 72.

¹⁵ ICC-01/04-01/06-2766-Red, paragraph 86.

¹⁶ ICC-01/04-01/06-2766-Red, paragraph 86.

¹⁷ ICC-01/04-01/06-2766-Red, paragraph 84.

would be required. Thereafter, the Immigration authorities will conduct an assessment of the facts and circumstances in connection with the asylum request. Further investigations may, and are likely to, be part of that assessment. Insofar as the Immigration authorities intend not to grant the asylum request, the detained witness will have the opportunity to present his views. Following a formal decision, the detained witness may seek judicial review of this decision, which may be followed by further litigation.

The foregoing administrative and judicial proceedings may take considerable time and the Netherlands requires the detained witness to remain at the ICC Detention Centre throughout. For the sake of good order, the foregoing is without prejudice to the pending request of the Netherlands to the Trial Chamber for leave to appeal the Trial Chamber's said decision.¹⁸

9. The Chamber has already indicated that its obligation (resulting from Article 21(3) of the Statute) to provide the Netherlands with a proper opportunity to consider the matter, does not have the result that the detained witness is to remain at the ICC Detention Centre throughout the administrative and judicial proceedings before the Dutch authorities:

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.¹⁹

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.²⁰

10. As set out by the Chamber, it is for the Dutch Authorities to decide whether, according to its national and international obligations, it will take control of the witness until such time as the asylum application and any appellate phase in those proceedings are determined.²¹ The Host State is urged to consider

¹⁸ ICC-01/04-01/06-2781-Conf-Anx2.

¹⁹ ICC-01/04-01/06-2766-Red, paragraph 87.

²⁰ ICC-01/04-01/06-2766-Red, paragraph 88.

²¹ ICC-01/04-01/06-2766-Red, paragraph 87.

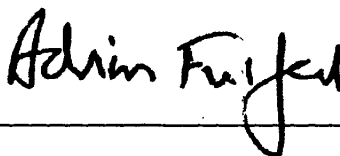
without delay whether it intends to defer defence Witness 19's departure from the Netherlands. The Registry is to consult with the Dutch authorities on the transfer of the witness into the "control" of the Netherlands if the Host State intends to defer his departure pending its decision on the asylum application. A reasonable timeframe for the transfer is to be arranged between the Registry and the Host State.

11. The Chamber notes that although it granted the requests for leave to appeal filed by the Netherlands and the DRC, suspensive effect of the "Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application", pursuant to Article 82(3) of the Statute and Rule 156 of the Rules of Procedure and Evidence, has not been requested or granted. In the result, the appeal has not suspended the effect of the Chamber's Decision, which is to be enforced.

12. Pursuant to the above, the Chamber therefore orders the Registry to:

- (i) consult with the Dutch authorities on the transfer of the witness into the "control" of the Netherlands if the Host State intends to defer his departure pending its decision on the asylum application;
- (ii) consult with the Dutch authorities in order to establish a reasonable timeframe for the transfer of the witness.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 15 August 2011

At The Hague, The Netherlands