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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***

**Urgent
Confidential
With ... Confidential Annexes**

Request for Special Protective Measures for Witness DRC-D01-WWWW-0019

Source: Duty Counsel

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

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I. Preliminary remarks

1. Invited by Trial Chamber I of the International Criminal Court (“Chamber” and “Court”) to make a closing statement at the end of his testimony, Witness DRC-D01-WWWW-0019 (“Witness”), in the public hearing of 7 April 2011, stated the following:

[TRANSLATION] And now, if I were to find myself back in the country, I’m wondering how able the International Criminal Court will be to protect me. That is a real concern. Above all, because in this case here, the players in the tragic history of Ituri all belong to the great presidential family, what we call the Presidential Majority Alliance.

All of them. They are in power. And we are in the run-up to the elections in my country. I don’t know what it’s going to be like. So my biggest concern has to do with my protection and also my family’s protection.¹

2. By letter of 21 May 2011 sent to the Director, Division of Court Services, the witness asked that a counsel be assigned to provide legal assistance.
3. By email of 24 May 2011, the Chief, Counsel Support Section, asked the witness to explain whether the legal assistance he was requesting was directly related to the potential consequences of his testimony in view of his possible return to the Democratic Republic of the Congo.
4. By letter of the same day, the witness confirmed that the request for legal assistance was “[TRANSLATION] directly related to the detrimental consequences of [his] testimony for [his] safety in the event [he] returned, now, to the Democratic Republic of the Congo”.
5. On 25 May 2011, the Registry appointed Mr Ghislain Mabanga Monga Mabanga (“Duty Counsel”) to provide this legal assistance.
6. On 27 May 2011, the Duty Counsel met with the witness, who told him of the legitimate fears he had for his own safety and that of his family after having given testimony implicating dignitaries of the regime in place in the Democratic Republic of the Congo.

¹ Transcript of hearing, 7 April 2011, ICC-01/04-01/06-T-346-FRA ET WT, p. 54, lines 14-21.

7. Following this meeting, the witness gave the Duty Counsel the authority to submit to the Chamber a request for special protective measures pursuant to rule 88(1) of the Rules of Procedure and Evidence. In this context, he wishes to explain to the Chamber the risks he faces in the event of a return to his country (II), before inviting it to take the special measures necessitated by his situation (III).

II. Assessment of risks in the event of the witness's return to the Democratic Republic of the Congo (DRC)

8. The witness's testimony, heard from 30 March to 7 April 2011, is particular in that it seriously implicated influential individuals in President Kabila's regime (A), who have great capacity to endanger the safety of the witness and of his family (B).

A. Implicating the Congolese authorities

9. This section will, above all, describe the individuals implicated (1) and the plausible motives they have for organizing reprisals against the witness (2).

1) Individuals implicated

10. During his examination-in-chief of 30 March 2011, the witness personally implicated a number of influential Congolese figures of the regime in place, whose reprisals he can legitimately fear. These figures include Mr Mbusa Nyamwisi, Mr Molondo Loponde and Mr Luzolo Bambi Lessa.
11. *Mr Mbusa Nyamwisi and Mr Molondo Loponde.* President of the RCD/K-ML at the time, Mr Antipas Mbusa Nyamwisi was described by the witness as a figure "[TRANSLATION] who had a certain moral ascendancy over Lendu fighters".² Mr Molondo Loponde was his military governor for Ituri. Although aware of the abuses and massacres that the Lendu fighters were regularly committing

² Transcript of hearing, 30 March 2011, ICC-01/04-01/06-T-340-FRA CT WT, p. 34, lines 14-15.

against the civilian Hema population, they did not take any steps to stop them. The witness gave the specific example of Mr Molondo Lopondo, finding it unfortunate “[TRANSLATION] [that he] made absolutely no effort, assigned absolutely no soldiers to go into this region”.³ He moreover attributes the resignation of Mr Thomas Lubanga Dyilo, then Defence Minister of the RDC/K-ML, to the complacency of these two figures in reaction to the tragic events being endured by the Hema people:

[TRANSLATION] And such a work environment was less than fulfilling for Thomas, and he felt that he shouldn’t have to bear the responsibility for this tragedy, this massacre, this insecurity in Ituri. And he realized that he needed only to withdraw from this alliance, this organization, this union, between the RCD and the UPC – and the UPC.⁴

12. Meanwhile, however, these two figures joined the Kinshasa regime under which they are currently enjoying protection, the former having been minister several times⁵ and the latter appointed as the second-in-command at the *Détection militaire des activités anti-patrie* (DEMIAP) [Military Detection of Unpatriotic Activities], the Congolese military intelligence service, his last known post.⁶
13. *Mr Emmanuel-Janvier Luzolo Bambi Lessa*. Minister of Justice and Human Rights, Mr Luzolo was described by the witness as his “[TRANSLATION] tormentor”, “[TRANSLATION] [who] is not doing his job”, and whose incompetence is “[TRANSLATION] an embarrassment to the Democratic Republic of the Congo”.⁷ The witness especially condemns his failure to act – even though the matter was referred to him several times – on his six-year preventive detention with no prospect of a trial. This detention has become completely unlawful because, since 10 April 2007 when an order was issued extending the witness’s

³ Transcript of hearing, 30 March 2011, ICC-01/04-01/06-T-340-FRA CT WT, p. 35, lines 23-25.

⁴ *Id.*, p. 37, lines 5-9.

⁵ He served successively as Minister of Regional Cooperation and Foreign Affairs Minister. Since 27 October 2008, he has been Minister for Decentralization and Land Use Planning.

⁶ Transcript of hearing, 7 April 2011, *op. cit.*, p. 54, lines 5-7.

⁷ Transcript of hearing, 7 April 2011, *op. cit.*, p. 52.

provisional detention by 60 days, no other order has been issued. As a result, since 10 June 2007, in other words for four years now, the witness has been held without legal basis. This minister's failure to act is even more surprising given that, in his ministry, he is presented as a prominent Congolese authority on the very subject of detention:

[TRANSLATION] A man of reflection, Bambi Lessa Luzolo is an academic reference on Congolese detention law (the topic of his doctoral thesis was preventive detention in Congolese criminal procedure), law of civil and criminal procedure and organization of the judicial system. His papers and lectures on justice reform, prison reform, transitional justice and international criminal justice are authoritative.⁸

Like the two other aforementioned figures, he is also a dignitary of the regime who was in the long-time service of President Kabila's office⁹ before being appointed to the post he has occupied since 26 October 2008.

2) Plausible motives for reprisals

14. All these close collaborators and protected figures of the regime may fear the repercussions of the witness's testimony, owing to the judicial and political consequences that could ensue.
15. *Judicial consequences of the witness's testimony.* As the crimes under the Court's jurisdiction are not subject to any statute of limitations,¹⁰ Mr Mbusa and Mr Lopondo may fear subsequent prosecution by the Court, in particular on the basis of article 28 of the Statute, were it to be proved that the armed groups who were placed under their effective command and control, or under their effective authority and control, as the case may be, perpetrated crimes that are within the jurisdiction of the Court.

⁸ Biographical note on His Excellency the Minister of Justice and Human Rights, Professor Emmanuel-Janvier Luzolo Bambi Lessa, Ministry of Justice and Human Rights, http://www.justice.gov.cd/j/index.php?option=com_content&task=view&id=72&Itemid=9

⁹ He was successively research officer in the office of the Head of State, Deputy Commissioner General responsible for the reintegration of persons displaced by war and adviser to the Administrative and Legal Board of the office of the Head of State.

¹⁰ Article 29 of the Statute.

In addition, during the hearing of 7 April 2011, the witness reported having received threats in 2004 when he had named these persons during a television programme.¹¹ The risk of these threats being acted upon is even greater today insofar as these figures of the regime were implicated during a public hearing before the Chamber, which was followed by the entire country.

16. *Political consequences of the witness's testimony.* The witness's testimony may compromise the immediate political future of the individuals cited, but also of the Head of State himself. For example, Mr Mbusa Nyamwisi is a politician and a prospective candidate in the next presidential election (**annex 1**). Being described as a warlord who allowed civilian Hema populations to be massacred could seriously tarnish his image and compromise his chances of winning the next elections, whether presidential or legislative, given that he is touted as a steadfast defender of the reunification and pacification of Ituri: "[TRANSLATION] Overall, the political and diplomatic action of Mr Antipas Mbusa Nyamwisi constituted the primary pillar of the reunification process of the DRC" (**annex 2**).
17. Moreover, the electoral campaign of President Kabila himself, who is seen as Mr Mbusa Nyamwisi's protector, may be seriously compromised, especially in the Ituri electoral constituency. The first time he ran for leader of the DRC in 2006, President Kabila's billed himself as "[TRANSLATION] the candidate for peace", which explains why he performed very well in the parts of the country ravaged by armed conflict. In fact, outside of Katanga Province – where he hails from and where he was credited with 2,424,975 votes – it was in the provinces of Orientale, of which Ituri is part (1,574,552 votes), North-Kivu (1,776,660 votes) and South-Kivu (1,340,854 votes) where he performed extremely well, allowing him to win the presidential election (**annex 3**).

¹¹ Transcript of hearing, 7 April 2011, *op. cit.*, pp. 53-54.

However, it is these electoral constituencies which, during his term of office, suffered the most from armed conflicts and insecurity in all forms. This electorate might therefore penalize this candidate who is seen to be the protector of war criminals such as Nyamwisi and Lopondo.

18. It is evident, therefore, that with his testimony, the witness can be considered to be an opponent disrupting the electoral campaigns of Congolese dignitaries generally and of President Kabila specifically, all the more so since he is an opponent of the regime in place. The Kinshasa authorities therefore have plausible reasons to retaliate against him. The witness's fears thus become legitimate, as it is known that this regime has an unprecedented capacity to do harm.

B. The Congolese authorities' capacity to do harm

19. Any informed observer knows that the Congolese authorities spare no means to neutralize those who are considered to be their political adversaries. For that purpose, they have all the means not only to carry out attacks on the lives and physical integrity of opponents (1), but also to organize judicial reprisals (2).

1. Attacks on the lives and physical integrity of opponents

20. *Opponents in general.* Nothing, not even international public opinion, seems to stop the Congolese authorities when they are determined to physically remove their opponents. Thus:
 - President Kabila did not hesitate to attack the home of his political adversary Jean-Pierre Bemba on 20 August 2007, knowing that the latter was hosting European and African diplomats at that time. Their lives were saved only thanks to the personal intervention of the UN Secretary-General, who was informed of the attack. The Human Rights Watch report on that incident is rather explicit:

A group of diplomats from 14 Western and African countries, members of the International Committee Accompanying the Transition (*Comité international d'accompagnement de la transition*, CIAT), were taken aback at the violence during such a crucial time in the election and hurried to mediate the crisis, going first to meet Bemba at his home. During the meeting with Bemba, the Republican Guard and army soldiers surrounded Bemba's house and his offices nearby, exchanging fire with Bemba's guard and pinning the diplomats down for six hours. There was a flurry of phone calls between Kabila, then-UN Secretary-General Kofi Annan, and others. Kabila's troops then withdrew a short distance and allowed MONUC and EUFOR soldiers (part of a force provided by the European Union to assist MONUC during the electoral period) to surround Bemba's residence and extract the trapped diplomats.¹²

- In early June 2010, Floribert Chebeya, an activist for internationally recognized human rights, was summarily executed along with his driver while on his way to meet with the inspector general of the Congolese national police at his invitation. This assassination took place less than one month before the national holiday, to which King Albert II of Belgium had been invited as the guest of honour. The Belgian authorities had, at one point, seriously considered cancelling the royal visit in protest.¹³
- On 29 September 2010, a Congolese opponent residing in Belgium and visiting Kinshasa threw a stone at the presidential motorcade. The national and international press reported on his arrest. He was sentenced to only seven days' imprisonment for having, "[TRANSLATION] even without malicious intent, unlawfully destroyed or damaged trees, crops, agricultural implements or *other movable or immovable property*",¹⁴ in this case, a vehicle of the presidential motorcade. On 1 October 2010, however, an official announcement was issued on the suspect's death by "suicide" while in detention. This alleged suicide did not convince anyone, and even prompted a reaction from the UN Mission in the DRC (MONUSCO) which expressed, in diplomatic language, "its deepest concern over the death of Armand Tungulu

¹² Human Rights Watch report, November 2008: "We Will Crush You", p. 18, para. 1 (annex 4).

¹³ "Meurtre de Floribert Chebeya en RDC: quand la communauté internationale s'en mêle", <http://www.rfi.fr/afrique/20100609-meurtre-floribert-chebeya-rdc-quand-communaute-internationale-s-mele>

¹⁴ Article 113 of the Congolese Penal Code, emphasis added.

Mudiandambu, who died in military detention at a camp in Kinshasa the night of 1 and 2 October 2010” (**annex 5**).

21. *Former allies in particular.* Kinshasa’s retaliation against its allies accused – rightly or wrongly – of treason, is always the same: summary execution of, or at the very least, serious bodily harm to its victims. For example:

- On 1 May 2011, General Floribert Kisembo, former UPC officer who entered the ranks of the national army and was later to become second-in-command of the 7th Military Region, was, on Kinshasa’s orders, summarily executed by his soldiers. While the official reason for this summary execution was General Kisembo’s alleged attempt to foment a new rebellion,¹⁵ other sources affirm, to the contrary, that the assassination was politically motivated and related, *inter alia*, to the case of *The Prosecutor v. Katanga and Ngudjolo* pending before Trial Chamber II. Specifically, by virtue of his new role in the Congolese army, this former rebel was privy to compromising military secrets pertaining to the involvement of Congolese in the armed conflict in Ituri. An article published by **Obède Bahati** on *Beni-Lubero Online* states:

[TRANSLATION] According to all these sources, since 2001, Congolese President Joseph Kabila and other Congolese dignitaries of his various governments are directly or indirectly involved in the massacres in Ituri. It is worth noting that these accusations come just before the testimony of ICC informers. Are the former allies of the government trying to incriminate the government in order to escape unscathed? (**annex 6**).

This version of the facts is moreover corroborated by another article in the newspaper *Le Millénaire Info*, which reports:

[TRANSLATION] Floribert Kisembo is among those who knew the real truth of the massacres perpetrated in Ituri, as he was one of the informed actors and witnesses. It is no secret in Bunia that Floribert Kisembo was manipulated by Kinshasa and Monusco, through Madame Macadam, to oppose his brother Thomas Lubanga who was at the head of the UPC. He had created his UPC/K before going to Kinshasa where he was promoted to the rank of general (**annex 7**).

¹⁵ There was, however, nothing to prevent the Congolese authorities from opening a judicial investigation into the illegal raising of armed forces or armed participation in an insurrectional movement (articles 140 and 138 of the Congolese Military Penal Code), even if it meant he might die in combat while resisting the execution of a summons in due form.

- The example of Colonel Richard Beiza is even more revealing. While he was enjoying refugee status in Uganda as of 2009, he made the mistake of revealing, in early May 2011, that the Congolese authorities were involved “[TRANSLATION] in the Bogoro massacres in 2002, for which Mathieu Ngujolo and Germain Katanga (two other former militiamen from Ituri) are currently being prosecuted by the International Criminal Court” (**annex 8**). The reaction of the Congolese authorities following this revelation did not delay in coming. After an agreement with the Ugandan authorities, Beiza’s refugee status was withdrawn and he was then arrested by the Ugandan security forces. Following his arrest, he was subjected to torture and abuse to the point where today he is reported to be hovering between life and death (**annex 9**).

22. All these facts give rise to the witness’s dread of a similar fate in the event of his return to the DRC.

2. Judicial reprisals

23. Reprisals against the witness can also occur under the guise of judicial proceedings. They can concern both criminal proceedings and detention conditions.

- *Procedural reprisals.* To retaliate, the Congolese authorities can expedite the existing procedure for sentencing the witness to the death penalty or, at the very least, life imprisonment following a trial that would be neither just nor fair. For an idea of the trials initiated against opponents of the regime, the Chamber need only take note of a judicial observation mission report by the FIDH in the DRC entitled: “*La justice congolaise met Firmin Yangambi dans les couloirs de la mort* [Congolese courts place Firmin Yangambi on death row]”.

This observation report points out the procedural irregularities that marred the trial, as a result of which, on 3 March 2010, the Kinshasa-Gombe military

court handed down the death sentence to an opponent and human rights activist for illegal possession of weapons of war and attempted uprising. The report states, *inter alia*:

[TRANSLATION] All the witnesses called by the *Auditorat militaire* were called by the Military Court while none of the witnesses named by Firmin Yangambi were accepted. In addition, all the submissions presented by the defence, some of which are not even referred to in the trial judgment, were systematically rejected (**annex 10**).

- *Detention conditions.* To retaliate, Congolese authorities can also make the witness's detention conditions harsher. They might thus have their allies in prison commit brutal attacks on opponents or simply watch passively as opponents are attacked by other detainees. In the first scenario, they are aided by a Makala Prison "Supervisory Committee", a pro-government group composed of detainees who, with impunity, assault all those whom they consider to be opponents of the regime. Even their counsel are publicly assaulted (**annex 11**).

In the second scenario, prison authorities watch passively as opponents are assaulted by other detainees. For example, during the night of 18 and 19 April 2011, the reverend Kutino Fernando was savagely attacked by other detainees; his right leg was broken and all his personal possessions were looted. Not only were the perpetrators of these acts untroubled, but worse yet, the victim was transferred to an unsanitary cell, jeopardizing his already fragile state of health.¹⁶

III. Need to implement special protective measures

24. Given the objective risks the witness faces in the event of a return to his country of origin, the Chamber is requested to take "measures to protect the safety [of

¹⁶ On this subject, read "AGRESSION CONTRE KUTINO AU CPRK La piste d'un commanditaire extérieur pas écartée", <http://afriqueredaction.over-blog.com/article-agression-contre-kutino-au-cprk-la-piste-d-un-commanditaire-exterieur-pas-ecartee-72645827.html>

the witness]”.¹⁷ For that purpose, however, it is clear that the protective measures implemented by the VWU are ineffective (A) which, consequently, will require the Chamber to remedy this through special protective measures (B).

A. Ineffectiveness of the protective measures implemented by the VWU

25. In a report dated 25 March 2011 submitted to Trial Chamber II on the protective measures implemented for witnesses after their testimony, the VWU summarizes its activities in the following terms:

The standard procedure for witness protection after completion of appearance provides as follows:

(i) After completion of his/her appearance, the witness receives a de-briefing and completes a security questionnaire, with the assistance of the VWU;

(ii) The witness is given an opportunity to contact his/her family, relatives and other trusted sources to find out any potential reactions to his/her appearance that might have to be taken into consideration when planning the witness’ return;

(iii) The VWU updates its risk assessment in light of any new information to determine if the witness can return to his/her location of residence. The VWU will also assess whether further follow-up support measures are required and inform the calling party;

(iv) Where a witness is exposed to security risk, he/she shall go through a cooling down period, that may entail remaining in a No. ICC-01/04-01/07 517 25 March 2011 ICC- 01/04-01/07-2799-Conf 25-03-2011 5/7 SL T safe holding area instead of returning immediately to the location of residence;

(v) The witness shall return to his/her location of residence as soon as possible, ideally within ten calendar days of their testimony, unless safety circumstances require otherwise;

(vi) Should security concerns at the location of residence persist, the VWU informs the calling party, provides advice on suitable protective measures and, if necessary, implements these.

(vii) The VWU continues to monitor the security situation of the witness.¹⁸

¹⁷ Article 68(1) of the Statute.

¹⁸ “Victims and Witnesses Unit’s report on the ‘Defence Observations on the Protective Measures for DRC-D02-P-0350, DRC-D02-P-0236 and DRC-D02-P.0228”(ICC-01/04-01/07-2790-Conf)”, 25 March 2011, ICC-01/04- 01/07-2799-Conf, pp. 5-6.

26. However, with regard to detained witnesses, the VWU submits the following reservations:

2. In the specific situation of the three Defence witnesses who are detained, some of the above steps cannot apply. In particular, Article 93(7)(b) requires that the detained witnesses being transferred shall remain in custody and return without delay to the requested State when the purposes of the transfer have been fulfilled. These specific requirements prevent the application of the cooling down period (step (iv)). It is also possible that implementation of step (ii) - contact with family, relatives and other trusted sources - may be restricted as a consequence of their status as detainees. The Registry will seek instructions from DRC authorities on whether and to what extent such contacts may be permitted.

3. With respect to step (vi), the fact that the persons are detained indeed impacts on the VWU's capacity to advise or implement protective measures.

Neither the Registry nor the Court has the competency to exercise its influence on the Democratic Republic of Congo (the "DRC") authorities' management of a national detention center.¹⁹

27. It is patent then that the witness's detainee status precludes him from enjoying effective protective measures that the VWU puts in place for witnesses who are not in detention, even though he is more exposed than they are to reprisals by the Congolese authorities. The witness therefore has grounds to request the implementation of special protective measures from the Chamber.

B. Measures proposed by the witness

28. Rule 88(1) sets forth the following:

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, taking into account the views of the victim or witness, order special measures such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, 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 special measure is sought prior to ordering that measure.²⁰

¹⁹ "Victims and Witnesses Unit's report on the 'Defence Observations on the Protective Measures for DRC-D02-P-0350, DRC-D02-P-0236 and DRC-D02-P.0228'(ICC-01/04-01/07-2790-Conf)", 25 March 2011, ICC-01/04- 01/07-2799-Conf, p. 6.

²⁰ Emphasis added.

29. The use of “such as, but not limited to” in this text means that the list of special measures that may be ordered by the Chamber is not exhaustive; accordingly, it falls to the Chamber, on a case-by-case basis, to design and/or put in place measures that it considers to be appropriate in the applicant’s situation. In the matter at hand, the witness proposes to the Chamber the following measures: the stay of removal to the Democratic Republic of the Congo (1) and the facilitation of his asylum application (2).

1) Stay of removal to the DRC

- Article 93(7)(b) makes it binding on the Chamber to return the detained witness promptly to the requested State once the purpose of the transfer has been fulfilled. A reservation must nonetheless be made to this principle, as set forth in article 21(3):

The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

In this specific matter, it has sufficiently been shown that, in the event of return to the RDC, the risk that the witness’s right to life and physical integrity – which are internationally recognized human rights – will be violated is very high. Accordingly, refusing to hand him over to the Congolese authorities after his testimony constitutes a proper application of article 21(3).

2) Facilitation of the witness’s asylum application

30. While it is true that, under article 21(1)(a), the Statute is the primary source of law applied by the Court, it is no less true that is not the only source of applicable law before the Court – far from it. Indeed, article 21(1)(b) provides that the “Court shall apply [i]n the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict”.

In the current matter, the Court is asked to have regard to the Geneva Convention of 28 July 1951 Relating to the Status of Refugees. In fact, the personal circumstances of the witness show that he satisfies all of the conditions to claim refugee status. Since he is currently outside his country of origin, he can be seen, justifiably, to fear persecution there on account of his political opinions. Hence, having good reason now to decline the protection of the Democratic Republic of the Congo, he has engaged a Dutch law firm to expedite an asylum application before the relevant authorities of the Kingdom of the Netherlands.

31. However, his status as a detainee at the Court's detention centre would not facilitate this procedure, especially given the Registry's systematic refusal to allow other detained witnesses in similar situations to have contact with their counsel. Furthermore, the cooperation of the host State and the UN High Commissioner for Refugees (UNHCR) is required for an asylum application in so specific a case to succeed.

The Chamber is therefore requested:

- *As regards the Registrar:* (a) to instruct the Registry to facilitate all contact between the witness and his counsel and to not obstruct in any way whatsoever the asylum application initiated by the witness; and (b) to direct the Registry to take all appropriate measures, through the VWU, to ensure the protection of all the witness's family members still in the country, who risk suffering, not only from the witness's testimony, but also from his asylum application.
- *As regards the host State:* that, as the Court does not have jurisdiction to rule on the witness's asylum application, it cooperate with the Dutch authorities on the procedure initiated by the witness, in particular by providing it with the

objective information on the assessment of risks that the witness faces in the event of a return to the DRC, especially given that, during a status conference held by Trial Chamber II on 12 May 2011, the Dutch authorities repeatedly stated that it was for the Court to perform the risk assessment with which they would then comply.²¹

- *As regards the UNHCR:* that, if the Chamber endorses the risk assessment made by the witness, it cooperate with the UNHCR to facilitate the asylum application initiated by the witness. In a similar case, the International Criminal Tribunal for Rwanda, faced with a situation where Defence witnesses were in danger of being arrested in Kenya and sent back to Rwanda, ruled in the same vein:

The Tribunal is aware that it is not empowered to order the UNHCR or any State to grant refugee status to a witness. However, taking into account its above mentioned decisions in the cases of *The Prosecutor versus Rutaganda* (Case No. ICTR-96-3-T), and of *The Prosecutor versus Ndayambaje* (Case No. ICTR-96-8-T), the Tribunal is of the opinion that it is mandated to solicit the co-operation of States and the UNHCR in the implementation of protective measures for witnesses.²²

IV. Therefore,

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

- Take formal note of his decision to apply for asylum in the Netherlands;
- Stay the witness's removal to the DRC;
- Order the Registrar to refrain from adopting measures that could cause the witness's asylum application to be rejected, in particular those which would obstruct him from meeting with his Dutch counsel;
- Order the Registrar to take all appropriate measures to ensure the safety of the witness's family members in the DRC;

²¹ Trial Chamber II, 12 May 2011, *The Prosecutor v. Katanga and Ngudjolo*, Transcript of hearing, p. 67, paras. 26-28; p. 69, para. 19; p. 75, paras. 1-5; p. 77, paras. 14-18.

²² ICTR, Chamber 1, 13 March 1998, *The Prosecutor v. Pauline Nyiramasuhuko*, Case No. ICTR-97-21-T, p. 5, para. 20.

- Cooperate with the host State and the UNHCR in the witness's asylum application, in particular by providing them with information in its possession and its own assessment of the risks that the witness would face in the event of his return to the DRC;
- Order, if appropriate, that the witness – assisted or represented by Duty Counsel – be heard *ex parte* before it rules on the instant request, pursuant to rule 88(2) of the Rules of Procedure and Evidence.

[signed]

Ghislain M. Mabanga
Duty Counsel

Dated this 1 June 2011,
At The Hague, Netherlands