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Pénale
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**International
Criminal
Court**

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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

**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**

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 I under Article 82(1)(d) of the Statute 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 (the "Decision").
2. The issue in the Decision that gives rise to this request for leave to appeal is the Chamber's holding that, in the context of the obligation of the Court to return defence Witness 19 (the "witness") to the Democratic Republic of the Congo (the "DRC") without delay under Article 93(7) of the Statute,

*"[t]he limit of the Court's responsibility under Article 21(3) [...] is 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."*¹

As set out below, the position of the Netherlands is that this is an overly limited interpretation of the responsibility of the International Criminal Court (the "ICC" or "Court") in this respect.

Procedural background

3. On 1 June 2011, duty counsel for the witness submitted an application to Trial Chamber I requesting special protective measures, including a stay on his removal to the DRC and the facilitation of the asylum procedure in the Netherlands.²

¹ Decision, para 86.

² ICC-01/04-01/06-2745-Conf.

4. Also on 1 June 2011, local counsel for the witness submitted an asylum request to the Netherlands on behalf of the witness.
5. By note verbale of 6 June 2011, the Registry of the Court informed the Netherlands of its "Order on the application from DRC-D01-WWWW-0019 of June 2011" dated 3 June 2011. The Trial Chamber invited the Netherlands to make submissions in this respect.³
6. By note verbale dated 7 June 2011, the Government of the Netherlands informed the Court accordingly. The Netherlands referred to the recent observations which it made in regard to the same issue in the case of the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* before Trial Chamber II, including during a status conference on 12 May 2011.⁴
7. On 7 July 2011, the Registry notified the Netherlands of the Decision.

**The Netherlands qualifies as a "party" in the sense of
Article 82(1)(d) of the Statute**

8. The Netherlands has been closely involved in the proceedings concerning the detained witness under Article 68 and Article 93(7) of the Statute in which the witness raised human rights concerns.
9. To begin with, the transfer of the detained witness from the DRC to the Court in the Netherlands has been carried out in close coordination with the Dutch authorities. The involvement of the Netherlands intensified when the witness informed the Chamber of his human rights concerns if returned to the DRC and requested special protective measures, including that the removal procedure under Article 93(7) of the Statute be cancelled and that the Court facilitate the asylum procedure in the Netherlands. The Chamber invited the

³ ICC-01/04-01/06-2749-Conf.

⁴ ICC-01/04-01/07-T-258-ENG.

Netherlands to make submissions in this respect. The Netherlands did so by referring to its recent observations submitted in regard to the same issue in the *Katanga and Chui* case, including orally during the status conference on 12 May 2011. These observations, among others, concerned the legal status of detained witnesses in the Netherlands and the question what jurisdiction, if any, the Netherlands exercises over such witnesses.

10. Consequently, the Netherlands submits that it has become a party to this subset of proceedings concerning the witness under Article 68 and Article 93(7) of the Statute in which the witness 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.
11. In this respect, the Netherlands recalls that, as explained during the status conference on 12 May 2011 in the *Katanga and Chui* case, 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 on behalf of the Court the detained witness "directly and without impediment" from the point of arrival into the host State to the premises of the Court or from the premises of the Court 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.”

12. 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, including internationally recognized human rights. The Netherlands has a legitimate expectation to this effect in view of Article 21(3) of the Statute. The Appeals Chamber has reiterated the importance and implications of this provision on several occasions. For example, in the present case it ruled that “[h]uman rights underpin the Statute; every aspect of it”.⁵ According to the Appeals Chamber, the provisions of the Statute

*“must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute (see Articles 64 (2), 67 (1) and (5) of the Statute), the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety”.*⁶

In the present case, the position of the Netherlands is that the Court has failed to properly discharge its obligations with respect to human rights.

13. The Netherlands is faced with an asylum application by a person who was able to lodge this application due to his presence in the Netherlands for purposes of the Court. As set out in its submissions before the Court, the

⁵ ICC-01/04-01/06-772, para. 37 (emphasis added).

⁶ *Ibid.* (emphasis added).

Netherlands will decide on the asylum application. Importantly, however, the decision on the asylum application, including the assessment as to whether the person can be returned to the DRC in light of the rule of “non-refoulement”, has to be distinguished from the independent application of that rule.

14. The rule of non-refoulement prohibits the removal of an individual to a State where he runs a real risk of being subjected to inhuman or degrading treatment. As Trial Chamber II confirmed in the *Katanga and Chui* case, the rule applies as a matter of customary international law.⁷ The primary purpose of the rule is to protect individuals and, thus, the rule confers onto individuals a right to protection. This is evident from, for instance, Article 3 of the European Convention on Human Rights, according to which “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment”. Furthermore, the European Court of Human Rights has stated that “the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment”.⁸ The right to non-refoulement must be observed not only by States, but also by international organisations when they decide on the return of persons to a State. Under Article 21(3) in conjunction with Article 93(7) of the Statute, this applies *a fortiori* to the ICC, irrespective of the Chamber’s conclusion that it lacks jurisdiction over the asylum application as such.⁹

15. In the present case, as said, the Chamber ruled that the witness must merely be provided with an opportunity to make his request for asylum to the Dutch

⁷ See also ICC-01/04-01/07-3003-tENG, para. 68.

⁸ *Chahal v. United Kingdom*, 15 November 1996, para 79 (emphasis added); See also *Saadi v. Italy*, 28 February 2008, para 127.

⁹ Decision, para. 86.

Government before he is returned to the DRC. However, by deferring exclusively to the Netherlands as a "safety net" with respect to non-refoulement, the Chamber denied the Court's own responsibility under Article 21(3) of the Statute.

16. Accordingly, the Netherlands seeks to argue before the Appeals Chamber that the Court must itself apply the rule of non-refoulement and determine on the basis of that rule whether a person can be returned under Article 93(7) of the Statute. In doing so, the Court should consider all risks of human rights violations of the witness and not only those risks that arise in connection with his testimony before the ICC. In this respect, the Netherlands notes that, in the context of Article 68(1) of the Statute, "the Chamber has concluded that any risks that may exist for defence Witness 19 will have arisen solely on account of his evidence before the Court".¹⁰ At the same time, however, the Chamber also refers to "matters raised by the witness *and not considered by this Court*."¹¹ The Netherlands submits that the Court is obliged to consider *all matters* raised by the witness.

17. Moreover, the Court, including its Victims and Witnesses Unit, is uniquely positioned to assess any fears expressed by witnesses and, therefore, to decide on refoulement risks. If the Court were to decide that there is a risk of refoulement, then on authority of the Court the witness shall not be returned and the matter must be resolved by the Court and all States Parties to the Rome Statute.¹² If, on the other hand, the Court were to find that there is no refoulement risk, then this would authoritatively guide the Netherlands in its

¹⁰ Decision, para. 66.

¹¹ Decision, para. 84 (emphasis added).

¹² The relocation of witnesses is a shared responsibility between the Court and the States Parties to the Statute, as discussed during the Status Conference of 12 May 2011, ICC-01/04-01/07-T-258-ENG, pp. 78-80.

own determination in the context of the asylum proceedings, including in any related litigation.

18. Consequently, it is of great importance for 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, as said, has also arisen in the *Katanga and Chui* case before Trial Chamber II.¹³

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

19. 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.¹⁴
20. The aforementioned issue in the Decision affects the fairness of the proceedings under Article 68 and 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.
21. 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.¹⁵ 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 21(3) of the Statute.

¹³ The Netherlands notes that it has also requested leave to appeal the decision of that Trial Chamber on the same matter, see ICC-01/04-01/07-3020.

¹⁴ 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.

¹⁵ ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), para. 24.

22. 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 accordingly.
23. Finally, as said, the Decision leaves the Netherlands exclusively to decide on the risk of refoulement in the context of the asylum application. 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. By denying these obligations, thus, the Decision frustrates the expeditious conduct of the proceedings concerning the return of the witness.

Immediate resolution by the Appeals Chamber may materially advance the proceedings

24. 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".¹⁶
25. As stated above, the issue of the human rights protection of the detained witness 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 witness by the Court and, therefore, its intervention is warranted.

¹⁶ ICC-01/04-168, 13 July 2006, para. 14.

Conclusion

26. 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.



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on behalf of
The Government of the Kingdom of the Netherlands



Dated this 13 July 2011

At The Hague, the Netherlands

