

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 4 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

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"

Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Trial Chamber I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court"), in the case of The Prosecutor v. Thomas Lubanga Dyilo, issues the following 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":

I. Background and Submissions

1. On 4 July 2011, the Chamber issued its Decision on the request by DRC-D01-WWWW-0019 ("defence Witness 19") for special protective measures relating to his asylum application ("Decision"). The Chamber concluded that its obligations under Article 68 of the Rome Statute ("Statute") did not stand in the way of the return of defence Witness 19 to the Democratic Republic of the Congo ("DRC"), where he is detained pending the determination of domestic criminal proceedings. However, given that the witness has submitted an asylum claim to the Dutch authorities, the Chamber also determined that, in accordance with Article 21(3) of the Statute, the Court can only fulfil its obligation to return defence Witness 19 to the DRC once the Dutch authorities have been afforded a proper opportunity to consider the merits of his asylum application. The Chamber held that if the Dutch Government considers that the applicant has presented a sufficiently meritorious request that justifies deferring his departure from the Netherlands, the Court will immediately relinquish custody of defence Witness 19 to the Dutch authorities.¹
2. On 13 July 2011, the Government of the Kingdom of the Netherlands ("Netherlands") sought leave to appeal the following aspect of the Chamber's Decision:²

¹ 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.

² 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. As the Government of the Kingdom of the Netherlands was

[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.³

3. The Netherlands submits that under Article 82(1)(d) of the Statute it is a party to an aspect of the proceedings, to the extent that they (i) concern the detained witness; and (ii) relate to issues that arise under Articles 68 and 93(7) of the Statute.⁴ It is argued that the Court failed properly to discharge its human rights obligations with respect to the principle of *non-refoulement*.⁵ The Netherlands submits that the criteria for granting leave to appeal are met,⁶ and that it will be left without a remedy before the Court in relation to a particularly prejudicial Decision if leave is not granted.⁷ It contends that the Decision has broad implications for the relationship between the Netherlands and the Court and, consequently, for the future functioning of the ICC in the Netherlands.⁸
4. On 14 July 2011, the Registry informed the Chamber that the Decision had not been notified officially to the DRC, as the French translation would only become available on 15 July 2011.⁹ However, the Registry also attached a letter dated 13 July 2011 from the DRC indicating that it takes issue with the Decision of 4 July 2011 and intends to lodge an appeal.¹⁰ The Chamber was referred to the submissions in the case of *The Prosecutor v Germain Katanga and*

notified of the decision on 7 July 2011, the application was submitted within the time limits set out in Rule 155 of the Rules of Procedure and Evidence ("Rules").

³ ICC-01/04-01/06-2768-Conf, paragraph 2, referring to ICC-01/04-01/06-2766-Conf, paragraph 86.

⁴ ICC-01/04-01/06-2768-Conf, paragraphs 8 - 10.

⁵ ICC-01/04-01/06-2768-Conf, paragraphs 12 – 16.

⁶ ICC-01/04-01/06-2768-Conf, paragraphs 8 – 25.

⁷ ICC-01/04-01/06-2768-Conf, paragraph 10.

⁸ ICC-01/04-01/06-2768-Conf, paragraph 10.

⁹ Registry transmission of observations received from the DRC authorities in relation to document ICC-01/04-01/6-2766-Conf, 14 July 2011 (notified on 15 July 2011), ICC-01/04-01/06-2770-Conf.

¹⁰ ICC-01/04-01/06-2770-Conf-Anx 1.

Mathieu Ngudjolo Chui ("Katanga and Ngudjolo case").¹¹ These submissions are summarised between paragraphs 20 and 22 of the Decision of 4 July 2011.

5. The letter from the DRC is not a formal request for leave to appeal that fulfils the conditions of Rule 155(1) of the Rules of Procedure and Evidence ("Rules") and Regulation 65 of the Regulations of the Court ("Regulations"). However, given the DRC has clearly expressed its wish to appeal the Decision and bearing in mind the particular circumstances leading to the Decision, the Chamber has treated the DRC's letter as an application for leave to appeal.
6. On 19 July 2011, duty counsel for defence Witness 19 submitted observations on the request for leave to appeal by the Netherlands.¹² Counsel submits that the application is inadmissible as the Netherlands is not a party to the proceedings and therefore lacks *locus standi*.¹³ Counsel submits that the impugned Decision is not linked to the main proceedings and therefore cannot be the subject of an interlocutory appeal.¹⁴ The recent decision of Trial Chamber II (in relation to three similarly placed witnesses) is relied on, to the effect that the Chamber does not have the power to determine applications for leave to appeal in these circumstances, and that the Netherlands should therefore petition the Appeals Chamber.¹⁵
7. Counsel for defence Witness 19 submits that if the Chamber rules that the application is admissible, it is nevertheless unfounded, in that the requirements of Article 82(1)(d) of the Statute are not met. In particular, it is argued that the Netherlands has failed to demonstrate that an issue has been

¹¹ ICC-01/04-01/06-2770-Conf-Anx2.

¹² Observations du témoin DRC-D01-WWWW-0019 sur la demande d'autorisation d'appel du Royaume des Pays-Bas contre la Décision ICC-01/04-01/06-2766-Conf du 4 juillet 2011 (Norme 65-3 du Règlement de la Cour), 18 July 2011 (notified on 19 July 2011), ICC-01/04-01/06-2774-Conf.

¹³ ICC-01/04-01/06-2774-Conf, paragraphs 10 – 15.

¹⁴ ICC-01/04-01/06-2774-Conf, paragraph 16.

¹⁵ ICC-01/04-01/06-2774-Conf, paragraph 17, referring to Décision relative à trois demandes d'autorisation d'interjeter appel de la Décision ICC-01/04-01/07-3003 du 9 juin 2011, 14 July 2011, ICC-01/04-01/07-3073, paragraph 9.

raised affecting the fair and expeditious conduct of the proceedings or the outcome of the trial.¹⁶ It is contended that as a sovereign State, it is unnecessary for the Netherlands to rely on a decision of the Court in order to assess the risks for the witness when determining Witness 19's asylum application and considering the consequences, if any, of the application of the principle of *non-refoulement*.¹⁷ Counsel resists the suggestion that the Chamber, in its Decision, has been unfair to the witness.¹⁸ Finally, counsel submits that the Netherlands has not specified how the immediate resolution of this issue by the Appeals Chamber will materially advance the proceedings.¹⁹

8. On 19 July 2011, the Office of the Prosecutor ("prosecution") submitted a response to the Netherlands' request for leave to appeal.²⁰ The prosecution submits that the application, which is made by a State that is immediately affected by the Decision, demonstrates that the issues that arise are of particular importance and complexity.²¹ In all the circumstances, the prosecution does not oppose the application for leave to appeal the Decision.²²

II. Relevant provisions

9. In accordance with Article 21(1) of the Rome Statute ("Statute"), the Trial Chamber has considered the following provisions:

¹⁶ ICC-01/04-01/06-2774-Conf, paragraphs 19 – 21.

¹⁷ ICC-01/04-01/06-2774-Conf, paragraphs 21 and 23 – 24.

¹⁸ ICC-01/04-01/06-2774-Conf, paragraphs 21 – 25.

¹⁹ ICC-01/04-01/06-2774-Conf, paragraphs 27 – 29.

²⁰ Prosecution's Response to the Kingdom of the Netherlands' "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", 19 July 2011, ICC-01/04-01/06-2775-Conf.

²¹ ICC-01/04-01/06-2775-Conf, paragraph 3.

²² ICC-01/04-01/06-2775-Conf, paragraph 4.

Article 64 of the Statute

Functions and powers of the Trial Chamber

[...]

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

[...]

(f) Rule on any other relevant matters.

[...]

Article 82(1)(d) of the Statute

Appeal against other decisions

1. 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.

III. Submissions and Analysis

A. Leave to appeal under Article 82(1)(d) of the Statute

10. On applications under Article 82(1)(d) of the Statute, the Chamber's assessment of the merits of the proposed appeal is an irrelevant consideration. Instead, the Chamber must simply focus on whether a party to the proceedings has raised an "appealable issue", in the sense that the decision "[...] 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".²³

11. Although the Statute does not define the term "party" to the proceedings, the fact that certain provisions²⁴ in the Statute specifically enable a State to appeal particular decisions strongly suggests that the term "party to the proceedings" does not encompass a State Party. In addition, when dealing

²³ ICC-01/04-01/06-2463, paragraph 5.

²⁴ See Articles 18(4), 19(6) and 82(2) of the Statute.

with an appeal concerning the participation of victims during the proceedings, the Appeals Chamber decided that the term "parties" in Article 69 of the Statute refers to the defence and the prosecution only:

93. 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." [...]²⁵

12. It follows that the Netherlands and the DRC are not "parties" to the proceedings for the purposes of Article 82(1)(d) of the Statute, and this provision is therefore unavailable to the Netherlands when it seeks to appeal a "subset of proceedings concerning the witness under Article 68 and Article 93(7) of the Statute in which the witness raised human rights concerns [...]"²⁶

13. Although the obligation of the Chamber (under Article 68 of the Statute) to consider protective measures for Witness 19 has arisen in the proceedings in the *Lubanga* case, the resolution of this issue will not affect the outcome of the trial (particularly given the evidence relevant to the Article 74 Decision closed on 20 May 2011).²⁷ The Chamber notes that Trial Chamber II decided, when considering requests for leave to appeal in the linked proceedings in the *Katanga and Ngudjolo* case,²⁸ that decisions in this context do not directly affect the trial proceedings, but instead relate to applications for asylum addressed to the Dutch authorities by witnesses who have testified before the ICC in The Hague.

²⁵ 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, paragraph 93.

²⁶ ICC-01/04-01/06-2768-Conf, paragraph 10.

²⁷ Transcript of hearing on 20 May 2011, ICC-01/04-01/06-T-355-ENG ET, page 6, lines 14 – 16.

²⁸ ICC-01/04-01/07-3073, paragraph 7.

14. It follows that these applications do not satisfy the criteria of Article 82(1)(d) of the Statute.

B. Leave to appeal on an exceptional basis under Article 64(6)(f) of the Statute

15. The present Decision concerning defence Witness 19 has considerable significance given, first, the position of the witness (*viz.* he is due to be returned directly into the custody of the authorities in the DRC where he awaits trial) and, second, it may have an impact on the cooperation agreements between the Court and the two states who are principally concerned, the Netherlands and the DRC. Indeed, this latter issue could affect cooperation in the future between the Court and members of the Assembly of States Parties.

16. It is apparent that the drafters of the Statute endeavoured to ensure that when State Parties are seriously affected by proceedings before the Court they are able to appeal or to intervene in other ways. Examples of this include:

- i) Article 82(2) of the Statute expressly allows a State to appeal a decision under Article 57(3)(d) (when the prosecution is authorised to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9);
- ii) Article 18(4) of the Statute expressly allows a State that is concerned to appeal a Pre-Trial Chamber's preliminary ruling regarding admissibility;
- iii) Article 72(4) allows a State to intervene when (i) information or documents of the State are being, or are

likely to be, disclosed at any stage of the proceedings; and

(ii) the State is of the opinion that disclosure would prejudice its national security interests; and

iv) Under Article 93(3) States are required to consult with the Court when the execution of a request for assistance is prohibited in the requested State.

17. However, the particular critical situation currently facing the Court was not apparently contemplated by the drafters of the Statute, and as a result they did not include a specific provision enabling interested State Parties to appeal Decisions in the present context.

18. In the judgment of the Chamber, the State that agreed to transfer a detainee in order to enable him to testify before the Court in The Hague has a strong interest in being able to appeal a first-instance decision that arguably vitiates the agreement on cooperation between the Court and the State. Equally, the Netherlands has a substantial interest in securing a definitive decision from the Appeals Chamber as to the scope of the Court's protective obligations towards witnesses under Articles 68 and 21(3), in the context of Witness 19's asylum application. This issue is of direct relevance to the Netherlands when it seeks to fulfil its obligations as Host State and as a signatory to various human rights treaties.

19. The impugned Decision raises issues that need to be reconciled between the regime for cooperation established by the Rome Statute and the ICC's human rights obligations, and in particular those based on Article 21(3). The Decision has the potential to alter, or even undermine, the current level of cooperation that exists between the Court, the Netherlands and the DRC, particularly when it is necessary to bring witnesses to The Hague to give evidence as part of the ICC's proceedings. As Trial Chamber II has noted, it is highly unlikely

that this Decision will be reviewed on any appeal that may follow the Article 74 Decision.²⁹

20. The Chamber has a fundamental obligation under Article 64(2) of the Statute to ensure that the trial is conducted with due regard for the protection of witnesses, whose well-being – indeed, whose lives – may be at risk. In order to discharge this responsibility in an appropriate manner, it is necessary for the Chamber to be able to grant permission to appeal when the matter at hand is of sufficient seriousness that a review by the Appeals Chamber is necessary. In the present situation, the DRC and the Netherlands raise critical issues (that are arguable) relating to the way in which Witness 19 is to be treated, in the context of his asylum claim to the Host State. There are a number of ancillary matters, such as whether he is to remain in the custody of the Court for the duration of any asylum application, that are of considerable importance and equally merit appellate determination.

21. In addition, as set out in Article 93(3) of the Statute and Article 44(5) of the Headquarters Agreement between the International Criminal Court and the Host State (“Headquarters Agreement”)³⁰, the Chamber is obliged to take into consideration problems that may arise when the host State is executing requests for assistance from the ICC. Article 93(3) of the Statute addresses the situation when the execution of a particular measure of assistance (in the instant case, the transfer of the witness to the airport for the purpose of his return to the DRC) “is prohibited in the requested State on the basis of an existing fundamental legal principle of general application”. The Court is obliged by Article 93(3) of the Statute to consult and to give consideration to whether assistance can be rendered in another manner or subject to conditions (possibly leading to the modification of the request). Similarly,

²⁹ ICC-01/04-01/07-3073, paragraph 8.

³⁰ Headquarters Agreement between the International Criminal Court and the Host State, ICC-BD/04-01-08, entry into force: 1 March 2008.

Article 44(5) of the Headquarters Agreement requires consultation between the Court and the host State if the latter receives, for instance, a request relating to the transport of individuals in custody and it identifies problems in relation to the execution of the request.

22. The Netherlands has submitted that the Court should conduct a comprehensive review of the witness's situation under Article 21(3) of the Statute, which ought to include any factors that relate to the prohibition against *refoulement*, irrespective of whether or not they arise out of the testimony of the witness. The Chamber held that the Court's responsibility under Article 21(3) of the Statute "[...] 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".³¹ The Decision expressly envisages that the Dutch Government may defer the departure of the witness to the DRC if it has not completed its assessment relating to the issue of *non-refoulement* or if a final decision on the asylum request has not been reached. This, in turn, may create significant uncertainties for the Dutch authorities as to how it is to deal with the witness prior to the conclusion of the internal proceedings. Therefore, in order to ensure that the Court has properly fulfilled its responsibilities towards the host State, it is necessary that the Chamber is able to grant leave to appeal when it is arguable that a decision of a Chamber has placed a State Party in the position of have to resolve apparently conflicting obligations to the ICC, on the one hand, and to individuals in the custody of the Court who raise fundamental human rights concerns that require determination by the State Party, on the other.

23. In order to give full effect to Article 64(2) of the Statute (and without attempting to provide an exhaustive definition of when leave to appeal an

³¹ ICC-01/04-01/06-2766-Conf, para 86

interlocutory decision should be granted outside the framework of Article 82), the Chamber's authority "to rule on any other relevant matters" under Article 64(6)(f) includes the ability to grant permission to appeal whenever an arguable and critical issue is raised that affects the protection of witnesses. Similarly, leave to appeal should be granted on an interlocutory basis under Article 64(6)(f) when it is arguable that a decision of a Chamber has placed a State Party in the position of having to resolve apparently conflicting obligations to the ICC, on the one hand, and to individuals in the custody of the Court who raise fundamental human rights concerns that require determination by the State Party, on the other.

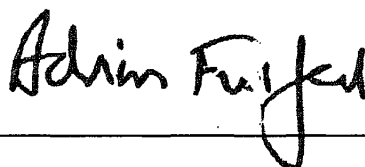
24. For these reasons, both applications for leave to appeal are granted.

25. The questions for consideration by the Appeals Chamber are:

- i) Whether the 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 ("the Netherlands Question"); and
- ii) Whether the Court is obliged to return defence Witness 19 to the DRC without further delay ("the DRC Question").

26. The Chamber recognises that the two questions, although differently formulated, raise the same essential issue.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 4 August 2011

At The Hague, The Netherlands