

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/06
Date: 15 November 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***

Public

Order authorising the submission of observations

Decision/Order/Judgment 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 Catherine Mabilie
Mr Jean-Marie Biju Duval

Legal Representatives of the Victims

Mr Luc Walley
Mr Franck Mulenda
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Mr Joseph Keta Orwinyo
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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 Massida

The Office of Public Counsel for the Defence

States Representatives

Kingdom of the Netherlands
Democratic Republic of the Netherlands

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

Mr Anders Backman

Victims Participation and Reparations Section

Other

Mr Philip-Jan Schüller
Mr Göran Sluiter
Mr Ghislain Mabanga Monga Mabanga

Trial Chamber I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court" or "ICC"), in the case of *The Prosecutor v. Thomas Lubanga Dyilo* ("*Lubanga* case"), delivers the following Order authorising the submission of observations:

1. Witness DRC-D01-WWWW-0019 (defence Witness 19), who was detained in relation to criminal proceedings in the Democratic Republic of the Congo ("DRC"), was brought to The Hague to give evidence in person in the *Lubanga* case. He testified on 30 March, 31 March, 1 April and 4 – 7 April 2011. He raised security concerns in relation to his return to the DRC on numerous occasions and he submitted an asylum application to the Dutch authorities.
2. On 4 July 2011, the Chamber issued its Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application.¹ The Chamber concluded that the Court's responsibility under Article 21 of the Rome Statute ("Statute") is, first, that defence Witness 19 is provided with a real (as opposed to a theoretical) opportunity to make his asylum request and, second, that the Dutch authorities are afforded a proper opportunity to consider the application, before the witness is returned to the DRC.² The Chamber decided that it is for the Dutch authorities to decide whether it is necessary for the Host State to intervene

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. A public redacted version was issued on 5 August 2011, ICC-01/04-01/06-2766-Red.

² 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, paragraphs 86 and 87.

in order to take control of the witness until such time as the application and any appellate phase in those proceedings are determined.³

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 leave to appeal to the Kingdom of the Netherlands (“Netherlands”) and the DRC.⁴ On a request for directions by the Netherlands on how to proceed,⁵ the Appeals Chamber decided that the Trial Chamber’s grant of leave to appeal the Decision of 4 July 2011 was *ultra vires* and therefore improper.⁶ In the circumstances, it refused the request for directions from the Netherlands because it lacked a sustainable foundation.⁷

4. On 15 August 2011, the Chamber issued its Order on the Report of the Registrar on the execution of decision ICC-01/04-01/06-2766-Conf (“Implementation Order”), in which it instructed 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

³ ICC-01/04-01/06-2766-Red, paragraph 87.

⁴ 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. The Netherlands had submitted an 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; the DRC had submitted a letter that was treated as an application for leave to appeal by the Chamber (Registry transmission of observations received from the DRC authorities in relation to document ICC-01/04-01/06-2766-Conf, 15 July 2011, ICC-01/04-01/06-2770-Conf-Anx1).

⁵ Urgent Request for Directions, 17 August 2011, ICC-01/04-01/06-2788-Conf.

⁶ Decision on the Urgent Request for Directions” of the Kingdom of the Netherlands of 17 August 2011, 26 August 2011, ICC-01/04-01/06-2799-Conf, paragraph 8.

⁷ ICC-01/04-01/06-2799-Conf, paragraph 8.

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.⁸

5. On 1 September 2011, the Chamber refused defence Witness 19's request⁹ for reconsideration of its order dated 15 August 2011.¹⁰ The Chamber stressed that it has discharged its obligations under Article 21(3) of the Statute and it is now for the Host State, to whom the asylum application is directed, 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. The Chamber concluded that once defence Witness 19 is medically fit to travel to the DRC, the Registry should proceed in the way specified in Article 93(7)(b) of the Statute and Rule 192(4) of the Rules of Procedure and Evidence ("Rules").¹¹

6. On 31 October 2011, counsel representing defence Witness 19 in his asylum proceedings before the Dutch authorities requested leave to submit *amicus curiae* observations to the Chamber.¹² Counsel seek to inform the Chamber on (1) the progress of the Dutch asylum proceedings;

⁸ Order on the Report of the Registrar on the execution of decision ICC-01/04-01/06-2766-Conf, 15 August 2011, ICC-01/04-01/06-2785-Conf, paragraph 12. The order was reclassified as public pursuant to the Chamber's instructions of 12 September 2011.

⁹ Requête aux fins de reconsidération de l' "Order on the Report of the Registrar on the execution of decision ICC-01/04-01/06-2766-Conf", 17 August 2011, ICC-01/04-01/06-2787-Conf. A public redacted version was filed on 20 September 2011, ICC-01/04-10/06-2787-Red.

¹⁰ Order on the Request for Reconsideration of Order ICC-01/04-01/06-2785-Conf, 1 September 2011, ICC-01/04-01/06-2804-Conf. A public redacted version was issued on 25 October 2011, ICC-01/04-01/06-2804-Red.

¹¹ Order on the Request for Reconsideration of Order ICC-01/04-01/06-2785-Conf, 1 September 2011, ICC-01/04-01/06-2804-Conf paragraphs 13 and 14. A public redacted version was issued on 25 October 2011, ICC-01/04-01/06-2804-Red.

¹² Request for leave to submit Amicus Curiae Observations by mr. Schüller and mr. Sluiter, Counsel in Dutch asylum proceedings of witness 19, 31 October 2011, ICC-01/04-01/06-2816.

(2) the alleged intervention by the Registrar of the Court in ongoing domestic litigation, in which she has supported the host State; and (3) the risk that defence Witness 19's continued detention at the Court's detention centre places him outside of the protection of Dutch asylum law.¹³

7. Counsel argue that the Court has a continuing obligation to ensure the security and well-being of defence Witness 19, and they submit that the information to be provided will assist the Chamber in fulfilling that obligation.¹⁴

8. As set out by the Appeals Chamber, leave for any State, Organisation or person to submit observations is "discretionary".¹⁵ In order to rule on the application, the Chamber must determine whether the observations which the applicant proposes to submit will be useful in order to reach a proper determination.¹⁶ Bearing in mind the Chamber's responsibility under Article 68(1) of the Statute to take appropriate measures to protect the safety, physical and psychological of witnesses, the Chamber is satisfied that it is appropriate for counsel to submit observations on the identified issues pursuant to Rule 103(1) of the Rules. New information that is relevant under Article 68(1) of the Statute may be useful in order to reach a proper determination.

¹³ ICC-01/04-01/06-2816, paragraphs 10 – 23.

¹⁴ ICC-01/04-01/06-2816, paragraphs 10 and 25.

¹⁵ Decision on "Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence", 22 April 2008, ICC-01/04-01/06-1289, paragraph 8.

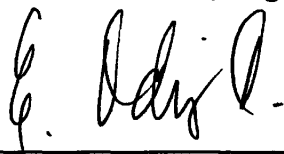
¹⁶ Decision Inviting Observations from the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict, 18 February 2008, ICC-01/04-01/06-1175, paragraph 7.

9. Pursuant to Rule 102(1) of the Rules, the Chamber therefore grants authorisation to counsel for defence Witness 19 file their observations by 4 pm on 23 November 2011.
10. A response from the Registry is to be filed by 4 pm on 30 November 2011, which is to include a comprehensive account of the measures that have been taken to return defence Witness 19 to the DRC or to transfer custody to the Host State.
11. Pursuant to Rule 103(2) of the Rules, the prosecution and the defence may also file responses by 4 pm on 30 November 2011.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 15 November 2011

At The Hague, The Netherlands