



Original: **French**

No.: ICC-01/04-01/07

Date: 14 July 2011

**TRIAL CHAMBER II**

**Before:** Judge Bruno Cotte, Presiding Judge  
Judge Fatoumata Dembele Diarra  
Judge Christine Van den Wyngaert

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO  
IN THE CASE OF  
*THE PROSECUTOR v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI***

**Public**

**Decision on three applications for leave to appeal  
Decision ICC-01/04-01/07-3003 of 9 June 2011**

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

**The Office of the Prosecutor**

Mr Luis Moreno-Ocampo, Prosecutor  
Mr Éric MacDonald, Senior Trial Lawyer

**Counsel for Germain Katanga**

Mr David Hooper  
Mr Andreas O'Shea

**Counsel for Mathieu Ngudjolo Chui**

Mr Jean-Pierre Kilenda Kakengi Basila  
Mr Jean-Pierre Fofé Djofia Malewa

**Legal Representatives of the Victims**

Mr Jean-Louis Gilissen  
Mr Fidel Nsita Luvengika

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

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

**States' Representatives**

The Kingdom of the Netherlands  
The Democratic Republic of the Congo

*Amicus Curiae*

**REGISTRY**

**Registrar**

Ms Silvana Arbia

**Counsel Support Section**

**Deputy Registrar**

Mr Didier Preira

**Division of Court Services**

Mr Marc Dubuisson

**Victims and Witnesses Unit**

Ms Maria-Luisa Martinod-Jacome

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

Mr Ghislain Mabanga Monga Mabanga

The Appeals Chamber

**TRIAL CHAMBER II** of the International Criminal Court (“the Chamber” and “the Court” respectively), acting pursuant to article 82(1)(d) of the Rome Statute (“the Statute”), decides the following.

## I. Background

1. By decision of 9 June 2011, the Chamber ruled on an application lodged by three people, who were detained in the Democratic Republic of the Congo (“the DRC”) and who had been transferred temporarily for the purposes of appearing before the Court as witnesses in accordance with article 93(7) of the Statute. The purpose of the application was to secure their presentation to the Dutch authorities for asylum as a protective measure within the meaning of article 68 of the Statute (“the Decision”).<sup>1</sup> After having noted that an application for asylum had already been filed with the Dutch authorities, the Chamber, *inter alia*, decided to suspend the immediate return of these three witnesses detained in the DRC pending a decision by the Dutch authorities on their asylum request and the adoption of satisfactory protective measures, within the meaning of the aforementioned article 68.<sup>2</sup> It made it clear in this regard that in applying this article the Court was only required to assess the security risks faced by the witnesses because of their testimony before the Court, and that in no circumstances is it for the Court to assess the risk of persecution that they were facing within the meaning of the instruments governing the right to asylum and the principle of *non-refoulement*.<sup>3</sup>

2. On 15 June 2011, the Office of the Prosecutor (“the Prosecutor”) sought leave to appeal the decision on the basis of article 82(1)(d) of the Statute.<sup>4</sup> The government

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<sup>1</sup> *Decision on an Amicus Curiae application and on the “Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d’asile” (articles 68 and 93(7) of the Statute)*, 9 June 2011, ICC-01/04-01/07-3003-tENG.

<sup>2</sup> *Ibid.*, paras. 57, 66-74, and 79-85. See also the dispositive part of the decision.

<sup>3</sup> *Ibid.*, paras. 59-65.

<sup>4</sup> Office of the Prosecutor, “Prosecution’s Application for Leave to Appeal Trial Chamber II’s ‘Décision sur une requête en *amicus curiae* et sur la « requête tendant à obtenir présentations des témoins DRC-

of the Kingdom of the Netherlands (“the host State”) also submitted an application to the Chamber to that effect, on the same basis.<sup>5</sup> The following day, the authorities of the Democratic Republic of the Congo submitted a filing entitled “*Demande d’autorisation d’interjeter appel de la Décision [...]*”, wherein, without specifying the provision upon which they intended to rely in seeking remedy, they request that the Appeals Chamber order the immediate return of the four witnesses to the DRC.<sup>6</sup>

3. On 20 June 2011, the Prosecutor filed a submission in response to the applications of the two States wherein, without explicitly supporting them, he underscored that they confirm the importance of the issue raised in his own application for leave to appeal, and the need for a review by the Appeals Chamber.<sup>7</sup> On that same day, the duty counsel appointed by the Registry to assist the three detained witnesses (“Duty Counsel”) submitted the observations of the witnesses requesting that the above-mentioned applications be denied.<sup>8</sup> In the view of Duty Counsel, the applications submitted by the two States are inadmissible and, furthermore, like the Prosecutor’s application, are without legal basis in light of article 82(1)(d) of the Statute.

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D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d’asile’ (ICC-01/04-01/07-3003)” rendered by Trial Chamber II, 15 June 2011, ICC-01/04-01/07-3021.

<sup>5</sup> Government of the Kingdom of the Netherlands, “Application for Leave to Appeal the Trial Chamber’s Decision ICC-01/04-01/07-3003 dated 9 June 2011”, 15 June 2011, ICC-01/04-01/07-3020.

<sup>6</sup> The authorities of the Democratic Republic of the Congo, “*Demande d’autorisation d’interjeter appel de la Décision sur une requête en amicus curiae et sur la « requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d’asile »*”, 16 June 2011, ICC-01/04-01/07-3023.

<sup>7</sup> Office of the Prosecutor, “Prosecution’s consolidated response to the applications for leave to appeal by the authorities of the Netherlands and the Democratic Republic of the Congo against the ‘*Décision sur une requête en amicus curiae et sur la « requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d’asile »*’”, 20 June 2011, ICC-01/04-01/07-3026.

<sup>8</sup> Duty Counsel, “Observations of Witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 on the applications for leave to appeal Decision ICC-01/04-01/07-3003 of 9 June 2011 (regulation 65(3) of the Regulations of the Court)”, 20 June 2011, ICC-01/04-01/07-3028-tENG.

## II. Discussion

4. Since, irrespective of the grounds advanced, all three applications seek leave from the Chamber to appeal the Decision, it is worth considering whether an appeal against the said decision is in fact subject to the Chamber's leave. In this regard, the Chamber notes that article 82(1)(d) of the Statute is the sole provision pursuant to which it may grant leave to appeal.

5. The Chamber wishes to recall the analysis of this article by the Appeals Chamber and the power that it confers upon the Trial Chamber:<sup>9</sup>

Article 82(1)(d) of the Statute does not confer a right to appeal interlocutory or intermediate decisions of either the Pre-Trial or the Trial Chamber. A right to appeal arises only if the Pre-Trial or Trial Chamber is of the opinion that any such decision must receive the immediate attention of the Appeals Chamber. This opinion constitutes the definitive element for the genesis of a right to appeal. In essence, the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue.

Whilst the provisions of article 82(1) of the Statute, taken as a whole, indicate that a Trial Chamber may grant leave to appeal all its interlocutory decisions, other than those which are expressly set out in paragraphs 1(a), (b) and (c) of the said article, the Chamber is of the view that the impugned decision must be interlocutory or intermediate within the meaning of article 82(1)(d) as interpreted by the Appeals Chamber.

6. The Chamber emphasises that the article deals with what is termed "interlocutory appeals", that is, appeals against decisions termed "intermediate" that may, in any event, generally be contested in an appeal on the merits. Recalling that "the object of paragraph (d) of article 82 (1) of the Statute is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial",<sup>10</sup> the Chamber considers that appeals against such decisions are subject to the leave of the Trial Chamber because only the Trial Chamber is in a position to determine whether an immediate resolution of an issue by the Appeals

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<sup>9</sup> Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, para. 20.

<sup>10</sup> Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, para. 19.

Chamber is necessary to advance the proceedings. This mechanism ensures that appeals on issues that could be addressed, where necessary, only in an appeal against a final judgment, do not unduly delay the proceedings. Hence, this article unequivocally concerns decisions falling within the ambit of the conduct of the trial.

7. However, in the view of the Chamber, the impugned decision does not fall directly within the ambit of the proceedings in *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo*. In fact, it was rendered at the request of the witnesses – and not the parties who called them – in connection with the asylum claim proceedings addressed to the Dutch authorities. The application was undoubtedly submitted to the Chamber pursuant to article 68 of the Statute, which concerns issues intrinsic to the proceedings. However, it can only be underscored that in the Decision, the Chamber made a clear distinction between matters pertaining to the asylum claim and those pertaining to witness protection,<sup>11</sup> which latter issue was not resolved in the Decision. Yet, the three applications for leave to appeal concern the part of the Decision dealing with the impact of the asylum proceedings taking place in the Netherlands on the return of the witnesses to the DRC. The application to appeal by the Netherlands certainly concerns the question of whether “under Article 68 of the Statute [...], the ICC is only required to ensure the protection of the witnesses against risks in connection with their testimony, and that it is not otherwise required to evaluate the risks of violations of their human rights, including violation of the rule of “non-refoulement”.”<sup>12</sup> However, the Chamber notes that the host State is not acting in the interest of the protection of the witnesses, but in fact raises the question of the respective jurisdiction of the Court and the Netherlands posed by the ongoing asylum proceedings, an aspect of the Decision that is not within the scope of the *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo* proceedings.

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<sup>11</sup> ICC-01/04-01/07-3003-tENG, paras. 59-66.

<sup>12</sup> ICC-01/04-01/07-3020, para. 2.

8. Furthermore, the Chamber deems it significant that the parties and the participants in the proceedings did not express their opinion on this matter,<sup>13</sup> or merely expressed their opinion for humanitarian reasons, as the Defence team for Germain Katanga did,<sup>14</sup> or for reasons linked to the *modus operandi* of the Court, in particular, cooperation between it and the States, as the Prosecutor did.<sup>15</sup> Finally, it must indeed be acknowledged that individuals or organs and institutions on which this decision has a direct impact may not appeal against it when appeals against the final judgment are lodged. The Prosecutor rightly emphasises, in fact, that there is no realistic likelihood that the Decision can be reviewed within the framework of an appeal against a final judgment.<sup>16</sup> This is therefore a decision that seems entirely discrete from the proceedings.

9. The Chamber therefore considers that it would overstep its vested powers in agreeing to examine applications for leave to appeal submitted in respect of decisions which, by their nature, do not fall under article 82(1)(d) of the Statute. Accordingly, the Chamber can only grant or refuse leave for such appeals if it considers, subject to their admissibility, that they can be lodged directly with the Appeals Chamber without its authorisation.

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<sup>13</sup> This was the case for the Defence for Mathieu Ngudjolo (see e-mail sent by the Defence to the Chamber on 14 April 2011, at 2.51 p.m., wherein it submits that it defers to the discretion of the Chamber) and for the Legal Representatives of the Victims.

<sup>14</sup> See the oral submissions of the Defence for Germain Katanga at the status conference of 12 May 2011: ICC-01/04-01/07-T-258-FRA ET WT 12-05-2011 1/82 SZ T, pp. 30-31.

<sup>15</sup> See, in particular, The Office of the Prosecutor, "Prosecution's Observations in response to '*Requête tendant à obtenir présentation des témoins DRC-D02-P-0236, DRC-D02-P-0228 et DRC-D02-P-0350 aux autorités néerlandaises aux fins d'asile*'", 15 April 2011, ICC-01/04-01/07-2835-Conf, para. 1.

<sup>16</sup> ICC-01/04-01/07-3021, para. 11.

**FOR THESE REASONS, the Chamber:**

**DECLARES** the three applications for leave to appeal inadmissible.

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

[signed]  
**Judge Bruno Cotte**  
**Presiding Judge**

[signed]  
**Judge Fatoumata Dembele Diarra**

[signed]  
**Judge Christine Van den Wyngaert**

Dated this 14 July 2011

At The Hague, The Netherlands