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**International
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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*

Public

**Redacted 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" or "ICC"), in the case of the *Prosecutor v. Thomas Lubanga Dyilo* ("Lubanga case"), issues the following Decision on the request by DRC-D01-WWWW-0019 ("defence Witness 19") for special protective measures relating to his asylum application:

I. Background and Submissions

1. On 27 March 2011, defence Witness 19 was transferred to The Hague, at the request of counsel for the accused, to testify voluntarily in the present trial.
2. Although he had been detained in the Democratic Republic of the Congo ("DRC") pending the determination of criminal proceedings against him, the Congolese authorities agreed to his transfer, subject to certain conditions in the Standard Operating Procedure that they negotiated with the Registry of the Court ("Registry"). The DRC undertook to respect defence Witness 19's privilege against self-incrimination.¹ He was transferred together with three other detained witnesses: DRC-D02-P-0236 ("Witness 236"), DRC-D01-P-0228 ("Witness 228") and DRC-D02-P-0350 ("Witness 350") who have each testified before Trial Chamber II.
3. On his arrival in the Netherlands, defence Witness 19 was sent to the United Nations Detention Unit ("UNDU") of the International Criminal Tribunal for the Former Yugoslavia in Scheveningen, where he was detained at the request of the Court.

¹ Annex to Observations des autorités congolaises en relation avec le témoin DRC-D01-WWWW-0019, 7 June 2011, ICC-01/04-01/06-2751-Conf-Anx, paragraph 4.

4. Defence Witness 19 gave evidence on various days between 30 March and 7 April 2011.² In his testimony he addressed a range of subjects including his role within the *Union des Patriotes Congolais* ("UPC"), the position of the accused during the conflict in Ituri and the conduct of the UPC. Prior to his testimony, the defence informed the Chamber that defence Witness 19 wished to testify in public without protective measures (although this was to be confirmed on his arrival).³ Thereafter, protective measures were not requested until the present application.
5. On 30 March 2011, on the first day of his testimony, defence Witness 19 indicated he wished to address the Court about some of his notable "concerns".⁴ On 7 April 2011, having been provided with an opportunity by the Chamber to express these concerns,⁵ defence Witness 19 stated that he had been filmed by Congolese officials whilst boarding the aircraft prior to leaving for Europe, and that the footage had been shown on national television.⁶ Moreover, he alleged he had been threatened in October 2004 as a result of comments that he made during a Congolese television programme.⁷ He concluded with the following statement:

So what I am raising is an issue that is also linked to my protection as a witness, because I did not feel sufficiently protected when I arrived, first of all. And now when I go home, I'm starting to wonder to what extent the International Criminal Court will be able to protect me. That is a real concern. Above all, because in this case here the - the players in the tragic history of Ituri all belong to the great presidential family, the ones we call the alliance of a presidential majority. All of them. All of them. They are in power. And we are in the run-up to elections in my country. I

² See Transcript of hearing on 30 March 2011, ICC-01/04-01/06-T-340-ENG CT WT; Transcript of hearing on 31 March 2011, ICC-01/04-01/06-T-341-ENG ET WT; Transcript of hearing on 1 April 2011, ICC-01/04-01/06-T-342-ENG ET WT; Transcript of hearing on 4 April 2011, ICC-01/04-01/06-T-343-Red-ENG CT WT; Transcript of hearing on 5 April 2011, ICC-01/04-01/06-T-344-Red-ENG WT; Transcript of hearing on 6 April 2011, ICC-01/04-01/06-T-345-ENG CT WT; and Transcript of hearing on 7 April 2011, ICC-01/04-01/06-T-346-ENG ET WT.

³ Email communication from the defence to the Chamber through a Legal Officer of the Trial Division on 25 March 2011.

⁴ ICC-01/04-01/06-T-340-ENG CT WT, page 52, lines 6 – 13.

⁵ ICC-01/04-01/06-T-346-ENG ET WT, page 56, line 20 to page 57, line 10.

⁶ ICC-01/04-01/06-T-346-ENG ET WT, page 58, line 15 to page 62, line 6.

⁷ ICC-01/04-01/06-T-346-ENG ET WT, page 62, lines 6 – 25.

don't know what it's going to be like. So my biggest concern has to do with my protection and protecting my family as well.⁸

6. Following an order from the Chamber,⁹ on 9 May 2011 the Registrar filed the "Report of the Registrar on the matters raised by witness DRC-D01-WWWW-0019" ("Registrar's Report"), which confirmed *inter alia* that the witnesses had been covertly filmed whilst boarding the aircraft.¹⁰
7. On 10 May 2011, the defence expressed its concerns about defence Witness 19's security during an *ex parte* hearing, during which the Chamber instructed the defence to set out its concerns in writing to the Registry (with a copy to be provided to the Chamber).¹¹
8. On 12 May 2011, Trial Chamber II held a public status conference in the case of the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ("Katanga and Ngudjolo case") in order to address the analogous situation for Witnesses 228, 236 and 350 ("status conference of 12 May 2011").¹²
9. On 25 May 2011, following requests from defence Witness 19 and the defence, the Registry assigned duty counsel for defence Witness 19 to assist him with any issues arising out his evidence. Counsel for the defence submitted it would be inappropriate for the defence to act on his behalf in this regard.¹³
10. On 31 May 2011, the Registry informed the Chamber that it was necessary to transfer defence Witness 19 immediately from the UNDU to the Court's Detention Centre, and that he was to return to the DRC at the earliest feasible opportunity. The Registry asked the Chamber to indicate whether the

⁸ ICC-01/04-01/06-T-346-ENG ET WT, page 63, lines 1 – 11.

⁹ Transcript of hearing on 18 April 2011, ICC-01/04-01/06-T-352-CONF-ENG ET, page 17, lines 10 – 22.

¹⁰ Report of the Registrar on the matters raised by witness DRC-D01-WWWW-0019, 9 May 2011, ICC-01/04-01/06-2732-Conf-Exp, paragraph 19.

¹¹ Transcript of hearing on 10 May 2011, ICC-01/04-01/06-T-353-CONF-EXP-ENG ET, page 7, lines 12 – 15.

¹² Transcript of hearing on 12 May 2011, ICC-01/04-01/07-T-258-ENG ET WT.

¹³ Email communication from the defence to the Registry on 24 May 2011.

restrictions it had imposed on contact and communication between defence Witness 19 and certain other individuals should continue since he had completed his evidence.¹⁴ The Chamber revoked the relevant order because the entirety of the evidence in the case concluded on 20 May 2011.¹⁵

11. On 1 June 2011, defence Witness 19 filed a request for special protective measures, pursuant to Rule 88(1) of the Rules of Procedure and Evidence (“Rules”), in which he described his security concerns and requested the Court, *inter alia*, to stay his removal to the DRC and to facilitate his asylum application before the courts of the Kingdom of the Netherlands.¹⁶
12. On 3 June 2011, the Chamber ordered the Registry to stay the removal of defence Witness 19 to the DRC, and further ordered the Office of the Prosecutor (“prosecution”), the defence and the Registry to file submissions on: (1) the assessment of any risk posed to defence Witness 19 in the event that he is returned to the DRC; and (2) whether he is entitled to make a request for asylum.¹⁷
13. The Chamber subsequently was informed that defence Witness 19 has filed a claim for asylum before the Dutch courts.¹⁸
14. Upon an enquiry from the Registry, on 14 June 2011, the Chamber indicated that the Dutch asylum lawyers should be permitted to visit defence Witness 19.¹⁹

¹⁴ Implementation of Presidency Decision ICC-01/04-01/07-2971-Conf-Exp, 31 May 2011. ICC-01/04-01/06-2742-Conf-Exp.

¹⁵ Email communication from the Chamber to the Registry through a Legal Officer of the Trial Division on 31 May 2011.

¹⁶ Requête tendant à l’obtention des mesures de protection spéciales au profit du témoin DRC-D01-WWWW-0019, 1 June 2011. ICC-01/04-01/06-2745-Conf.

¹⁷ Order on the application from DRC-D01-WWWW-0019 of 1 June 2011, 3 June 2011, ICC-01/04-01/06-2749-Conf.

¹⁸ Email communication from duty counsel to the Chamber through a Legal Officer of the Trial Division on 8 June 2011.

The request for special protective measures

15. The request sets out the alleged security risks for defence Witness 19 and his family in the event that he is returned to the DRC.²⁰ It is submitted that in his testimony he “seriously challenged” influential individuals within the current Congolese government of President Kabila who have a “great capacity to endanger the security of the witness and his family”.²¹ Various extracts from his testimony are cited, in which he referred to three particular individuals, namely Mbusa Nyamwisi, Molondo Lompondo and Luzolo Bambi Lessa.²² It is suggested that these individuals were mentioned “among others”.²³

16. In this connection, it is submitted that there are “plausible motives” for reprisals against defence Witness 19.²⁴ Various legal and political consequences are identified which, it is argued, may result from his testimony.²⁵ It is suggested that as a result of defence Witness 19’s evidence, two individuals may now fear the possibility of prosecution before the Court;²⁶ it is argued there is an increased risk that the threats defence Witness 19 received in 2004 may be acted upon;²⁷ and the possibility is raised that the

¹⁹ Email communication from the Chamber to the Registry through the Legal Adviser to the Trial Division on 14 June 2011. Trial Chamber II, which had to deal with similar applications from three detained witnesses that had been temporarily transferred from the DRC for the purposes of giving evidence in the *Katanga and Ngudjolo* case, held that it is now incumbent upon the Registrar to authorise contact between the detained witnesses and their Dutch counsel. 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, paragraph 78.

²⁰ ICC-01/04-01/06-2745-Conf, paragraphs 14 – 23.

²¹ ICC-01/04-01/06-2745-Conf, paragraph 8. The quotations are unofficial translations of the filing originally submitted in French.

²² ICC-01/04-01/06-2745-Conf, paragraphs 10 – 13.

²³ ICC-01/04-01/06-2745-Conf, paragraph 10.

²⁴ ICC-01/04-01/06-2745-Conf, paragraph 1 and paragraphs 14 – 18.

²⁵ ICC-01/04-01/06-2745-Conf, paragraphs 1 and 14.

²⁶ ICC-01/04-01/06-2745-Conf, paragraph 15.

²⁷ ICC-01/04-01/06-2745-Conf, paragraph 15.

political careers of various individuals within the Congolese government, including the President himself, have been compromised.²⁸

17. Defence Witness 19 asserts that he has a legitimate fear of reprisals because the Congolese “system has an unprecedented capacity to inflict harm”.²⁹ It is alleged that the Congolese authorities are able to neutralise their political opponents, for instance by endangering their health and life, and by way of judicial reprisals.³⁰ To this end, a number of examples and documents affecting individuals other than defence Witness 19 are relied on.³¹ Defence Witness 19 fears that he could face similar reprisals if he is returned to the DRC.³²

18. Given these alleged risks, the Chamber is requested to implement appropriate measures to protect the safety of defence Witness 19, pursuant to Article 68(1) of the Rome Statute (“Statute”).³³ It is submitted that the protective measures currently applied by the Victims and Witnesses Unit (“VWU”) are ineffective because defence Witness 19’s status as a detainee hampers their effective implementation.³⁴ Special protective measures, pursuant to Rule 88(1) of the Rules, are requested:³⁵ (1) the cancellation of the removal procedure to the DRC (in this regard, the defence stresses the Court’s duty, under Article 21(3) of the Statute, to apply and interpret the applicable law consistently with internationally recognised human rights), and (2) that the Court facilitates the asylum procedure initiated by the witness, by way of specific orders aimed at regulating the conduct of the Court, the Registry and the VWU.³⁶

²⁸ ICC-01/04-01/06-2745-Conf, paragraphs 16 – 17.

²⁹ ICC-01/04-01/06-2745-Conf, paragraph 18. The quotation is an unofficial translations of the filing originally submitted in French.

³⁰ ICC-01/04-01/06-2745-Conf, paragraph 19.

³¹ ICC-01/04-01/06-2745-Conf, paragraphs 20 – 23.

³² ICC-01/04-01/06-2745-Conf, paragraphs 22 – 23.

³³ ICC-01/04-01/06-2745-Conf, paragraph 24.

³⁴ ICC-01/04-01/06-2745-Conf, paragraphs 25 – 27.

³⁵ ICC-01/04-01/06-2745-Conf, paragraphs 28 – 31.

³⁶ ICC-01/04-01/06-2745-Conf, paragraphs 31 – 32.

The submissions of the DRC authorities

19. On 6 June 2011, the DRC authorities submitted their observations relating to the asylum applications of the four detained witnesses.³⁷
20. The DRC authorities submit that Articles 93(1)(f), 93(7) and 99 of the Statute form the legal basis for the Standard Operating Procedures relating to the detained witnesses, and they emphasise that Point 7 of these Procedures obliges the Court to return the detained witnesses to the DRC without delay once they have completed their evidence.³⁸
21. The DRC authorities assert that they continue to **detain** the witnesses throughout the entirety of the procedure, and that **custody** alone is (temporarily) transferred, highlighting that Point 6(c) of the Standard Operating Procedures requires that all requests by the detained witnesses for contact with their families are addressed to the Congolese authorities.³⁹
22. The DRC authorities remind the Court that they agreed to the temporary transfer of the witnesses in good faith, and it is highlighted that they could have insisted that a different procedure was used, such as a video link.⁴⁰ They challenge the suggestion that the provisions of the Convention relating to the Status of Refugees of 28 July 1951 and the Protocol of 31 January 1967 (“Geneva Convention of 1951 and Protocol of 1967”) should be accorded primacy over the Statute and, particularly, Article 93 of the Statute.⁴¹ Furthermore, they argue that if asylum is granted, it would create an unfortunate precedent; it would call into question the principle of

³⁷ Observations des autorités congolaises en relation avec le témoin DRC-D01-WWWW-0019, 7 June 2011. ICC-01/04-01/06-2751-Conf: with confidential annex ICC-01/04-01/06-2751-Conf-Anx.

³⁸ ICC-01/04-01/06-2751-Conf-Anx, paragraph 5, citing the Standard Operating Procedures: “que la Cour renvoie les personnes détenues en RDC sans délai, dès que celles-ci ont fini de témoigner.”

³⁹ ICC-01/04-01/06-2751-Conf-Anx, paragraph 6.

⁴⁰ ICC-01/04-01/06-2751-Conf-Anx, paragraph 9.

⁴¹ ICC-01/04-01/06-2751-Conf-Anx, paragraph 10.

complementarity; and it would send a negative signal to the States Parties, because of the suggested lack of confidence.⁴²

The submissions of the defence

23. On 7 June 2011, the defence provided its observations on defence Witness 19's request for special protective measures.⁴³

24. The defence fully supports the submissions as to the risks to this individual's security, and physical and psychological well being, if he is returned to the DRC.⁴⁴ The defence emphasises the severity of defence Witness 19's health problem,⁴⁵ which it is suggested place him at grave risk if he is returned to the DRC because of the lack of access to appropriate medical treatment, and it is argued this would amount to inhuman and degrading treatment contrary to Article 7 of the International Covenant on Civil and Political Rights ("ICCPR") and Article 3 of the European Convention on Human Rights ("ECHR").⁴⁶

25. As to the suggested right to make an asylum application, the defence submits that everyone is entitled to be protected against *refoulement* if there are serious reasons for believing that he will be submitted to torture or other cruel, inhuman or degrading treatment or punishment.⁴⁷ This right is founded in a number of international instruments such as the Geneva Convention of 1951 and the Protocol of 1967, Article 3 of the ECHR (as interpreted by the European Court of Human Rights), Article 7(1) of the ICCPR, Article 5 of the Universal Declaration of Human Rights ("Universal Declaration") and Article

⁴² ICC-01/04-01/06-2751-Conf-Anx, paragraphs 11 and 13.

⁴³ Observations de la Défense sur la "Requête tendant à l'obtention des mesures de protection spéciales au profit du témoin DRC-D01-WWWW-0019" transmise le [*sic*], 7 June 2011, ICC-01/04-01/06-2753-Conf.

⁴⁴ ICC-01/04-01/06-2753-Conf, paragraph 2.

⁴⁵ ICC-01/04-01/06-2753-Conf, paragraphs 3 – 5.

⁴⁶ ICC-01/04-01/06-2753-Conf, paragraphs 3 and 6.

⁴⁷ ICC-01/04-01/06-2753-Conf, paragraph 7.

3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention").⁴⁸ It is argued that in accordance with Article 21(3) of the Statute, Article 93(7) of the Statute is to be interpreted in light of this right or principle.⁴⁹ The Chamber is reminded of its obligation to protect witnesses, under Article 68 of the Statute.⁵⁰

26. In all the circumstances, the defence submits that if the Chamber finds that defence Witness 19 is at risk of serious persecution or inhuman or degrading treatment, within the meaning of the instruments set out above, it would be necessary for the Chamber to refuse to apply Article 93(7) of the Statute and to decline to transfer the witness.⁵¹ The defence argues that defence Witness 19 should be permitted to request asylum.⁵²

The submissions of the prosecution

27. The prosecution's submissions on the Chamber's "Order on the application from DRC-D01-WWWW-0019" were submitted on 7 June 2011.⁵³

28. The prosecution initially addresses whether defence Witness 19 is entitled to make an asylum application, although it is submitted that this should in any event only occur after an assessment by the VWU and a finding by the Court that there are identifiable security risks for the witness on account of what he or she said in evidence, which cannot be reduced or controlled by protective measures.⁵⁴

⁴⁸ ICC-01/04-01/06-2753-Conf, paragraph 7.

⁴⁹ ICC-01/04-01/06-2753-Conf, paragraph 8.

⁵⁰ ICC-01/04-01/06-2753-Conf, paragraph 10.

⁵¹ ICC-01/04-01/06-2753-Conf, paragraph 9.

⁵² ICC-01/04-01/06-2753-Conf, paragraph 11.

⁵³ Prosecution's submissions on the Chamber's "Order on the application from DRC-D01-WWWW-0019 of 1 June 2011", 7 June 2011, ICC-01/04-01/06-2752-Conf.

⁵⁴ ICC-01/04-01/06-2752-Conf, paragraph 6.

29. The prosecution has addressed the consequences if witnesses who testify before the Court make asylum applications. Concern is raised that if they routinely take this step in order to delay or avoid their return, it will endanger the willingness of countries in the future to agree to the temporary transfer of detainees and the willingness of the Host State to facilitate such transfers.⁵⁵
30. As to the substance of defence Witness 19's application, the prosecution submits that the security risks faced by a witness, whether detained or not, must be specific, objectively identifiable, and connected to and a consequence of the witness's testimony. They submit that the risks to be taken into account should not be general in nature or unconnected with the witness's cooperation with the Court.⁵⁶
31. The prosecution doubts the basis for defence Witness 19's claim for protection, given his voluntary appearance as a witness and the fact he made no advance request for protective measures.⁵⁷ The prosecution suggests that "despite being detained since 2005 there is no evidence of threats against him or persecution by the DRC authorities".⁵⁸ Equally, no past or future threats have been identified to support a finding that the DRC authorities now pose a security risk to defence Witness 19, following his testimony.⁵⁹
32. The prosecution accepts that if the Chamber determines that he faces increased security risks as a result of his testimony, protective steps should be considered and implemented to facilitate his safe return.⁶⁰

⁵⁵ ICC-01/04-01/06-2752-Conf, paragraphs 7 – 9.

⁵⁶ ICC-01/04-01/06-2752-Conf, paragraph 10.

⁵⁷ ICC-01/04-01/06-2752-Conf, paragraphs 10 and 13.

⁵⁸ ICC-01/04-01/06-2752-Conf, paragraph 11.

⁵⁹ ICC-01/04-01/06-2752-Conf, paragraph 11.

⁶⁰ ICC-01/04-01/06-2752-Conf, paragraph 14.

The submissions of the Dutch authorities

33. The Host State's observations in relation to this case were received by the Registry on 7 June 2011, and are appended to the Registry's filing of the same date as Annex 2. The Registry's request and the Host State's response in relation to the similar application made by three witnesses in the *Katanga and Ngudjolo* case is to be found at Annex 3.⁶¹

34. The Host State refers the Chamber, in Annex 2, to their observations made on the same issue in the *Katanga and Ngudjolo* case, including those submitted during the status conference of 12 May 2011 before Trial Chamber II.⁶²

35. In its *note verbale* submitted to Trial Chamber II in the *Katanga and Ngudjolo* case, the Host State suggests that given the concerns raised by the witnesses arise out of their evidence, this appears to be an internal ICC matter. Accordingly, the Netherlands Government suggests that they should be resolved by the Court's own procedures, such as the arrangements for witness protection.⁶³

36. During the status conference of 12 May 2011 the Host State submitted that it has confidence that the ICC will follow the standards laid down in Article 21 of the Statute and that it will apply the principles and rules of international law consistently with internationally recognized human rights norms (e.g. those that are relevant in the context of human rights appeals).⁶⁴ The representative for the Netherlands argued that Articles 68 and 64(2) of the Statute place the Court, through the VWU, in a uniquely advantageous

⁶¹ Observations of the Host State pursuant to Decision ICC-01/04-01/06-2749-Conf, 7 June 2011, ICC-01/04-01/06-2755-Conf; with confidential annexes, ICC-01/04-01/06-2755-Conf-Anx2 and ICC-01/04-01/06-2755-Conf-Anx3.

⁶² ICC-01/04-01/06-2755-Conf-Anx2, referring to the *note verbale* of 12 May 2011 contained in ICC-01/04-01/06-2755-Conf-Anx3 and the transcript of hearing on 12 May 2011 ICC-01/04-01/07-T-258-ENG ET WT.

⁶³ ICC-01/04-01/06-2755-Conf-Anx3.

⁶⁴ ICC-01/04-01/07-T-258-ENG ET WT, page 70, lines 11 – 18.

position to assess the fears expressed by witnesses.⁶⁵ The Host State submitted that the Netherlands will not accept responsibility for the protection of detained witnesses as this would exceed the obligations and responsibility of the Host State and the terms of the Headquarters Agreement between the International Criminal Court and the Host State⁶⁶ (“Headquarters Agreement”).⁶⁷

37. By reference to Article 93(7) of the Statute and Article 44(1) of the Headquarters Agreement,⁶⁸ the Host State submitted that the detainees are presently in the temporary custody of the Court with the agreement of the DRC, and that they will not at any stage be in the custody of the Government of the Netherlands. In those circumstances, it is submitted that the Host State does not have jurisdiction over the detained witnesses.⁶⁹

38. However, it is conceded that if an application for asylum reaches the Host State, the Minister for Immigration and Asylum will consider and resolve the application,⁷⁰ whatever the result.⁷¹

39. The Host State indicated that it will not conduct an independent assessment of the contents of the application, in the sense that it will defer to the assessment of the ICC as to whether the witnesses can be returned safely to the DRC.⁷²

⁶⁵ ICC-01/04-01/07-T-258-ENG ET WT, page 70, line 19 to page 71, line 4.

⁶⁶ Headquarters Agreement between the International Criminal Court and the Host State, ICC-BD/04-01-08, entry into force: 1 March 2008.

⁶⁷ ICC-01/04-01/07-T-258-ENG ET WT, page 71, lines 6 – 9.

⁶⁸ ICC-01/04-01/07-T-258-ENG ET WT, page 71, line 23 and page 72, line 1.

⁶⁹ ICC-01/04-01/07-T-258-ENG ET WT, page 72, lines 5 – 10, page 77, lines 16 – 19.

⁷⁰ ICC-01/04-01/07-T-258-ENG ET WT, page 72, lines 16 – 17.

⁷¹ ICC-01/04-01/07-T-258-ENG ET WT, page 75, lines 2 – 9.

⁷² ICC-01/04-01/07-T-258-ENG ET WT, page 73, lines 8 – 9 and page 76, lines 10 – 13.

40. The Host State submitted that any safety risks identified by the Court should be resolved under the witness protection program and that in the meantime the witness should continue to be detained by the ICC.⁷³

41. On the Registry's submissions concerning jurisdiction and immunities, the Host State submitted that the privileges and immunities enjoyed by witnesses at the Court under Article 26 of the Headquarters Agreement are only engaged if action is initiated against a witness and that in the current situation immunities are not necessarily a relevant issue.⁷⁴

The submissions of the Registry

42. On 7 June 2011, the Registry filed its observations pursuant to the Chamber's order of 1 June 2011 addressing the witness's concerns about his security situation and medical condition, and his asylum application.⁷⁵

43. It is noted that prior to the witness's transfer to The Hague, he had not reported any incidents of violence or intimidation whilst in detention.⁷⁶ Furthermore, the Registry does not accept the witness's own assessment that he poses a threat to the DRC government as a political opponent.⁷⁷ It is submitted that there is no information that tends to reveal that members of the UPC are targeted by the DRC authorities following their contact with the Court.⁷⁸ The Registry highlights the DRC's commitment to cooperate with the ICC and in particular to ensure the safety of all witnesses who have testified before the Court on their return to the DRC.⁷⁹

⁷³ ICC-01/04-01/07-T-258-ENG ET WT, page 73, lines 18 – 25.

⁷⁴ ICC-01/04-01/07-T-258-ENG ET WT, page 72, lines 9 – 15 and page 74, lines 7 – 21.

⁷⁵ Observations du Greffe soumises en vertu de l'Ordonnance no. ICC-01/04-01/06-2949, 7 June 2011, ICC-01/04-01/06-2754-Conf.

⁷⁶ ICC-01/04-01/06-2754-Conf, paragraph 4.

⁷⁷ ICC-01/04-01/06-2754-Conf, paragraph 5.

⁷⁸ ICC-01/04-01/06-2754-Conf, paragraph 6.

⁷⁹ ICC-01/04-01/06-2754-Conf, paragraphs 7 and 8.

44. It is submitted that his evidence before the Court has not increased the risks to defence Witness 19 in the event of his return to the DRC, even if those inherent in the precarious security conditions at a detention centre cannot be excluded.⁸⁰ It is further argued that the international attention generated by the circumstances of these four detained witnesses in the *Lubanga* and *Katanga and Ngudjolo* cases has the effect of enhancing their security, as the Congolese authorities would be in a particularly difficult situation if any harm befell them following their return to the DRC.⁸¹ Accordingly, it is suggested that the standard procedures followed by the VWU are sufficient in these circumstances, and it is emphasised that the Registry will continue to monitor defence Witness 19's position once he is in the DRC (a step that is taken with all witnesses).⁸² The Registry suggests that the follow up would enable the witness's concerns about his health after his return to the DRC to be taken into consideration.⁸³

45. Although the Registry does not advance any submissions on whether the witness should be permitted to file an asylum application since this falls within the exclusive jurisdiction of the Chamber, it raises certain questions of law in order to assist the Chamber.⁸⁴

46. The Registry submits that if the return of defence Witness 19 is further delayed, the DRC authorities may conclude that the Court has violated its obligations under Article 93(7)(b) of the Statute (namely, to return the detainee without delay once the purposes of the transfer have been fulfilled).⁸⁵

47. Underpinning the arguments of the Registry is its principal contention that the immunity granted to defence Witness 19 under Article 26(1)(c) of the

⁸⁰ ICC-01/04-01/06-2754-Conf. paragraph 9.

⁸¹ ICC-01/04-01/06-2754-Conf. paragraph 9.

⁸² ICC-01/04-01/06-2754-Conf. paragraph 9.

⁸³ ICC-01/04-01/06-2754-Conf. paragraph 10.

⁸⁴ ICC-01/04-01/06-2754-Conf. paragraph 13.

⁸⁵ ICC-01/04-01/06-2754-Conf. paragraph 20.

Headquarters Agreement prevents the Dutch authorities from exercising jurisdiction over the asylum application.⁸⁶ The Registry submits that only the Presidency of the Court can waive the witness's immunity and if it remains in place, the application should be withdrawn.⁸⁷

48. On 8 June 2011, the Registry filed further observations,⁸⁸ and it is argued that pursuant to Article 1(A)(2) and Article 33(1) of the Geneva Convention of 1951 (as amended by the Protocol of 1967), the Refugee Convention does not apply to defence Witness 19 unless the Chamber permits him to make an asylum application to the Host State.⁸⁹ The Registry submits that defence Witness 19 remains detained by the DRC authorities and he is under their protection, only being under temporary supervision of the Registrar pursuant to Rule 192(2) of the Rules.⁹⁰ Accordingly, it is suggested that Article 1(C)(1), Article 1(C)(4) and Article 1(C)(5) of the Geneva Convention of 1951 and the Protocol of 1967 are engaged and that the rights provided in the Convention and the Protocol do not apply.⁹¹ In consequence, it is contended that the prohibition against "*refoulement*" under Article 33 of the Geneva Convention of 1951 and the Protocol of 1967 does not apply in the current situation.⁹²

49. The Registry expresses its concern that if defence Witness 19 is allowed to claim asylum, the Geneva Convention of 1951 and the Protocol of 1967 would apply to him, leading to conflict with the Court's obligations to return defence Witness 19 to the DRC under Article 93(7)(b) of the Statute.⁹³ It suggests that the only means of resolving this predicament, in order to avoid an adverse

⁸⁶ ICC-01/04-01/06-2754-Conf. paragraphs 21 – 24.

⁸⁷ ICC-01/04-01/06-2754-Conf. paragraphs 26 – 28.

⁸⁸ Registrar's Further Observations under Order ICC-01/04-01/06-2949, 8 June 2011, ICC-01/04-01/06-2757-Conf.

⁸⁹ ICC-01/04-01/06-2757-Conf. paragraphs 2 – 5 and 8.

⁹⁰ ICC-01/04-01/06-2757-Conf. paragraphs 5 and 9.

⁹¹ ICC-01/04-01/06-2757-Conf. paragraph 5.

⁹² ICC-01/04-01/06-2757-Conf. paragraph 6.

⁹³ ICC-01/04-01/06-2757-Conf. paragraph 7.

impact on future cooperation by the DRC and other State Parties, is to enter into consultation with the DRC.⁹⁴

50. The Registry also notes that Article 26 of the Geneva Convention of 1951 and the Protocol of 1967 affords refugees with freedom of movement. The Registry suggests that if the Chamber authorizes the witness to submit an asylum application, this could result in his release as there may no longer be a sustainable legal basis to continue to detain him. It is submitted that his immunity under Article 26 of the Headquarters Agreement would nonetheless remain effective.⁹⁵

Counsel for defence Witness 19

51. On 10 June 2011, Counsel for defence Witness 19 filed the “Observations of Duty Counsel on the medical condition of Witness DRC-D01-WWWW-0019.”⁹⁶

52. Counsel notes that three years ago the witness was diagnosed with a [REDACTED] requiring medical care. Because he was in detention and unable to finance his own health care, it remained untreated. On arrival in The Hague, a doctor diagnosed a [REDACTED], which was operated on and the witness received [REDACTED] treatment. It is suggested that the [REDACTED] may return, resulting in the need for similar assistance in the future.⁹⁷

53. Counsel submits therefore that the witness has a serious medical condition and his lack of access to medical care in the DRC should be taken into

⁹⁴ ICC-01/04-01/06-2757-Conf, paragraph 7.

⁹⁵ ICC-01/04-01/06-2757-Conf, paragraphs 10 – 12.

⁹⁶ Observations du Conseil de permanence sur l'état de santé du témoin DRC-D01-WWWW-0019, 10 June 2011, ICC-01/04-01/06-2760-Conf.

⁹⁷ ICC-01/04-01/06-2760-Conf, paragraphs 2 – 5.

consideration under Article 21(1)(b) and 21(3) of the Statute, when deciding on whether to return the witness to the DRC under Article 93(7)(b) of the Statute.⁹⁸

54. Generally, counsel submits that returning the witness to the DRC would violate his internationally recognized right not to be submitted to inhuman or degrading treatment.⁹⁹

55. Duty counsel refers back to his initial application in which he suggests the following approach, namely that: (a) the witness's return is stayed; (b) the Registry facilitates contact between the witness and his lawyers, and it does not hinder the asylum application; (c) the VWU takes appropriate protective measures to ensure the protection of defence Witness 19's family; (d) the Court cooperates with the Dutch authorities on the asylum procedure, in particular by providing an objective evaluation of the risks in the event that defence Witness 19 is returned to the DRC; and (e) if the Chamber agrees that defence Witness 19 is at risk, it cooperates with the UN High Commissioner for Refugees in facilitating the asylum procedure.¹⁰⁰

56. In addition, on 15 June 2011, having requested¹⁰¹ and received authorisation from the Chamber,¹⁰² duty counsel filed a reply to the submissions of the parties and the Registry.¹⁰³

57. Duty counsel submits therein that the Registry's risk assessment relating to the Congolese authorities is incorrect. He suggests that they had not

⁹⁸ ICC-01/04-01/06-2760-Conf, paragraph 6.

⁹⁹ ICC-01/04-01/06-2760-Conf, paragraph 7.

¹⁰⁰ ICC-01/04-01/06-2760-Conf, paragraph 9, referring to ICC-01/04-01/06-2745-Conf.

¹⁰¹ Observations du témoin DRC-DO1-WWWW-0019 en rapport avec l' "Order on the application from DRC-DO1-WWWW-0019 of 1 June 2011", 9 June 2011, ICC-01/04-01/06-2759-Conf.

¹⁰² Email communication from the Chamber to Duty Counsel through a Legal Officer of the Trial Division on 13 and 14 June 2011.

¹⁰³ Observations du témoin DRC-DO1-WWWW-0019 en rapport avec l' "Order on the application from DRC-DO1-WWWW-0019 of 1 June 2011", 15 June 2011, ICC-01/04-01/06-2762-Conf with confidential annexes.

anticipated that the witness would implicate members of President Kabila's government given this would potentially have an adverse impact on the outcome of the national criminal proceedings that are ongoing against the witness.¹⁰⁴ Duty counsel further suggests that the Registry's assessment of the consequences of defence Witness 19's testimony for President Kabila's political career is erroneous because the allegation that he was involved in war crimes could undermine his re-election prospects, regardless of the present political standing of the UPC.¹⁰⁵ Duty counsel observes that the witness's asylum application has already been submitted to the Dutch authorities and as a result some of the submissions of the Registry are based on an incorrect premise.¹⁰⁶ He contests the Registry's argument on jurisdictional immunity on the basis that this immunity, which is afforded to employees and witnesses of the Court, is not designed to prevent an individual from exercising his or her own rights.¹⁰⁷ Duty counsel argues that the Geneva Convention of 1951 applies in this situation, and he takes issue with the Registry's submission that the witness is currently under the protection of the DRC.¹⁰⁸

58. Duty counsel challenges the prosecution's contention that asylum requests should only be made following a judicial determination that the witness's evidence has created a risk, and that the VWU should in any event liaise with the Congolese authorities to discuss possible security measures. It is argued that it has been demonstrated that the security measures proposed by the Registry in relation to the three detained witnesses in the *Katanga and Ngudjolo* case following their discussions with the Congolese authorities are insufficient.¹⁰⁹

¹⁰⁴ ICC-01/04-01/06-2762-Conf, paragraphs 11 – 14.

¹⁰⁵ ICC-01/04-01/06-2762-Conf, paragraphs 15 and 16.

¹⁰⁶ ICC-01/04-01/06-2762-Conf, paragraphs 8 and 9.

¹⁰⁷ ICC-01/04-01/06-2762-Conf, paragraphs 18 – 22.

¹⁰⁸ ICC-01/04-01/06-2762-Conf, paragraphs 23 – 28.

¹⁰⁹ ICC-01/04-01/06-2762-Conf, paragraphs 29 – 33.

59. It is suggested that the observations of the Congolese authorities amount to a barely veiled threat to the Chambers dealing with the issue.¹¹⁰ Finally, it is reiterated that defence Witness 19 would be denied access to effective medical care if he is returned to the DRC.¹¹¹

II. Applicable law

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

Article 21 of the Statute

Applicable law

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In 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;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

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.

Article 68 of the Statute

Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

¹¹⁰ ICC-01/04-01/06-2762-Conf, paragraphs 34 and 35.

¹¹¹ ICC-01/04-01/06-2762-Conf, paragraphs 36 – 40.

[...]

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.

[...]

Article 93 of the Statute

Other forms of cooperation

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

[...]

(e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;

(f) The temporary transfer of persons as provided in paragraph 7;

[...]

(j) The protection of victims and witnesses and the preservation of evidence;

[...]

7. (a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:

(i) The person freely gives his or her informed consent to the transfer; and

(ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.

[...]

Rule 17 of the Rules

Functions of the Unit

1. The Victims and Witnesses Unit shall exercise its functions in accordance with article 43, paragraph 6.

2. The Victims and Witnesses Unit shall, inter alia, perform the following functions, in accordance with the Statute and the Rules, and in consultation with the Chamber, the Prosecutor and the defence, as appropriate:

(a) With respect to all witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses, in accordance with their particular needs and circumstances:

(i) Providing them with adequate protective and security measures and formulating long- and short-term plans for their protection;

(ii) Recommending to the organs of the Court the adoption of protection measures and also advising relevant States of such measures;

[...]

Rule 87 of the Rules

Protective measures

1. 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 order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness 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 protective measure is sought prior to ordering the protective measure.

[...]

Rule 88 of the Rules

Special measures

1. 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.

[...]

Rule 192 of the Rules

Transfer of a person in custody

1. Transfer of a person in custody to the Court in accordance with article 93, paragraph 7, shall be arranged by the national authorities concerned in liaison with the Registrar and the authorities of the host State.

2. The Registrar shall ensure the proper conduct of the transfer, including the supervision of the person while in the custody of the Court.

3. The person in custody before the Court shall have the right to raise matters concerning the conditions of his or her detention with the relevant Chamber.

4. In accordance with article 93, paragraph 7 (b), when the purposes of the transfer have been fulfilled, the Registrar shall arrange for the return of the person in custody to the requested State.

Article 3 of the Universal Declaration

Everyone has the right to life, liberty and security of person.

Article 5 of the Universal Declaration

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment

Article 8 of the Universal Declaration

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 14 of the Universal Declaration

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 3 of the ECHR

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5 of the ECHR

1. Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6 of the ECHR

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and the facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7 of the ECHR

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

Article 13 of the ECHR

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 7 of the ICCPR

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 3 of the Torture Convention

1. No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

III. Analysis and Conclusions

The security and health concerns of defence Witness 19

61. The Court is required, pursuant to Article 68(1) of the Statute, to "take appropriate measures to protect the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses". Article 68(4) of the Statute sets out that the VWU may provide advice to the Chamber concerning "appropriate protective measures, security arrangements, counselling and

assistance". Rule 87 of the Rules authorises a Chamber to order measures so as to protect a witness at risk on account of his or her testimony, and Rule 88 of the Rules gives the Chamber the authority to order "special measures" as necessary.

62. As the prosecution has submitted, defence Witness 19 did not request any protective measures before or during his evidence. It was only once he had completed his testimony that he filed a request (on 1 June 2011) for the Chamber to exercise its powers under Rule 88 of the Rules to implement "special measures" and he sought an order for the immediate cancellation of his return to the DRC, on the basis of his suggestion that there may be reprisals from the Congolese authorities as a result of his testimony before the Court.¹¹² The witness refers to three individuals in particular from whom he fears retribution: Mbusa Nyamwisi, Molondo Lompondo and Luzolo Bambi Lessa.¹¹³ The witness relies on threats he received in 2004 after speaking about Messrs Mbusa Nyamwisi and Molondo Lompondo during a television programme, and he submits that the risk that these threats will be acted upon has now increased as a result of his testimony before the Chamber.¹¹⁴

63. In response to the Chamber's 3 June 2011 Order to file a report on whether defence Witness 19 faces risks to his safety, and physical and psychological well-being, if he is returned to the DRC,¹¹⁵ the VWU has carried out a risk assessment on the issue of protective measures for him and the three related witnesses in the *Katanga and Ngudjolo* case, which has included reviewing the transcripts of their testimony, evaluating the current political situation in the DRC and meeting with the director of the Makala detention centre.¹¹⁶ The VWU has concluded that following his return to the DRC, defence Witness 19

¹¹² ICC-01/04-01/06-2745-Conf.

¹¹³ ICC-01/04-01/06-2745-Conf, paragraphs 10 – 11.

¹¹⁴ ICC-01/04-01/06-2745-Conf, paragraph 15.

¹¹⁵ ICC-01/04-01/06-2749-Conf.

¹¹⁶ ICC-01/04-01/06-2754-Conf.

would not be exposed to any additional risk to his security or psychological or physical well-being as a result of his testimony before the Court.¹¹⁷ As to the specific fears expressed by defence Witness 19 that his testimony about influential figures in President Kabila's regime puts him at risk if he is returned to the DRC, the VWU expresses the view that the witness in his testimony did not reveal anything to the Congolese authorities of which they were unaware. Moreover, as indicated by the Registry, "the desire of the witness to implicate the Congolese authorities, and particularly President Kabila, is public knowledge".¹¹⁸ The VWU concluded that it is unlikely that his evidence would have an impact on politics within the DRC such as to lead to reprisals.¹¹⁹

64. The Registry observes that the Congolese authorities have provided assurances that defence Witness 19 will receive adequate protection upon his return to the DRC. The Registry has held discussions with the relevant Congolese authorities as to additional protective measures that could be implemented at the Makala detention centre, including reinforced cell doors, increased surveillance or his transfer to another detention centre. The Registry submits that notwithstanding this possible additional security, his safety will be sufficiently secured by continued monitoring by the VWU once he has returned to Makala detention centre.¹²⁰

65. In addition to the security issues set out above, the defence and duty counsel for defence Witness 19 have suggested his medical condition is an obstacle to his return to the DRC.¹²¹ Concerns about his health caused the Registry to delay his return to the DRC once he had completed his testimony. However, the Registry submits that the witness has received medical treatment in

¹¹⁷ ICC-01/04-01/06-2754-Conf, paragraphs 3 – 12.

¹¹⁸ ICC-01/04-01/06-2754-Conf, paragraph 4. The quotation is an unofficial translation of the filing originally submitted in French.

¹¹⁹ ICC-01/04-01/06-2754-Conf, paragraph 5.

¹²⁰ ICC-01/04-01/06-2754-Conf, paragraphs 7 – 8.

¹²¹ ICC-01/04-01/06-2753-Conf, paragraphs 3 – 6; ICC-01/04-01/06-2760-Conf.

accordance with the Registrar's obligation under Rule 17(2)(a)(iii) of the Rules and the competent doctor has reported that the witness is able to travel back to the DRC.¹²² In all the circumstances, the Chamber accepts this assessment.

66. The Chamber has examined the risks to the security of defence Witness 19 in the context of its obligations under Article 68 of the Statute to take measures to protect the safety and well-being of witnesses. It needs to be stressed at the outset that some issues concerning the interpretation of this provision that arise out of the submissions of counsel (and which may require resolution in due course) are, on analysis, immaterial to the present application. In particular, the Chamber does not need to address whether the protection to "the safety [and] physical and psychological well-being" afforded to victims and witnesses under Article 68(1) of the Statute is limited to the consequences of his evidence or whether the Court's protective obligation is not restricted in this way. This does not require resolution because 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. Although the witness has been detained in the DRC for a substantial period of time, it is not suggested that his safety and well-being have been materially compromised at any stage (beyond the fact of his extended imprisonment and the health issues that are discussed below). As set out above, given that the doctor has indicated that the witness has been treated and is now able to travel, it is unnecessary to investigate further whether health issues raised by the witness and the defence do not constitute a risk under Article 68 of the Statute.¹²³ Although there is an unquantified risk that at some stage in the future the condition may return, this possibility is essentially speculative. The Chamber must decide the matter on the basis of the present facts, and its duty under Article 68 of the Statute does not include an open-ended responsibility for

¹²² ICC-01/04-01/-6-2754-Conf, paragraphs 10 and 18.

¹²³ ICC-01/04-01/06-2754-Conf, paragraph 10.

illnesses that may unfortunately befall the witness in the future, whether as a result of a potentially recurring condition or otherwise.

67. Turning to the merits of the present application, the Chamber is unpersuaded by the prosecution's apparent scepticism as to whether defence Witness 19's claim for protection is genuine. The fact that he appeared before the Chamber "voluntarily" and he elected to give evidence in public cannot *ipso facto* undermine his claim for protection. The Chamber encourages witnesses to give evidence in public and it will be reluctant to interpret a witness's cooperation in this regard as demonstrating that a later claim for protection is unwarranted:

68. Pursuant to Article 68(4) of the Statute, "[t]he Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6", and by Rule 17(2)(a)(ii) of the Rules, the Unit shall "[recommend] to the organs of the Court the adoption of protection measures and also advis[e] relevant States of such measures". Therefore, the VWU is the body within the Court that is equipped with the necessary qualified staff and professional expertise¹²⁴ to conduct risk assessments and to make recommendations on the security of victims and witnesses, and the Chamber is entitled to rely on its advice when reaching decisions on protective measures. Having investigated the matters raised by defence Witness 19, the VWU concluded:

For all of the reasons listed above, the Registry is of the view that the fact of having testified before the Court did not increase the risk to the witness's security in the event of his return to the DRC. The Registry considers that if an inherent security risk to the witness, inherent in the precarious security conditions of the detention centre, cannot be excluded, the testimony of DRC-D01-WWWW-0019 had no impact on the objective level of risk he is susceptible of being exposed to. The Registry further considers that the international attention generated by the particular case of

¹²⁴ See in particular Rules 17 – 19 of the Rules.

these four detained witnesses in the *Lubanga* and *Katanga and Ngudjolo* cases has the effect of reinforcing their security, as the Congolese authorities would be in a particularly delicate situation in the event that any harm befell the witnesses after their return to the DRC. The Registry considers therefore that following the standard procedures of the VWU applied after witnesses are returned to their place of residence will be sufficient in the present case. The Registry will follow up on the situation of the witness after his return to the Makala detention centre in order to ensure that there is no worsening of his security situation as a result of his testimony – as is done for all witnesses.¹²⁵

69. The Registry has submitted that it will ensure that the circumstances of his imprisonment at the Makala detention centre are such that in any event he will be safe from retribution following his return, and the Registry intends to monitor his position. In all the circumstances, and taking into account, in particular, the assessment of the Registry (including the report from the VWU), the Chamber is satisfied that the Court has complied with its obligations under Article 68 of the Statute. Pursuant to Rules 87 and 88 of the Rules, the Chamber instructs the Registry to liaise with the Congolese authorities to determine what, if any, additional security measures (including “special measures”) should be implemented at the Makala detention centre and to request their implementation. After his return, the Registry is to monitor the witness’s well-being generally.

Defence Witness 19’s family

70. Included in the application submitted on behalf of defence Witness 19 is a request for protective measures for his family. The Chamber notes that within the Registrar’s Report it has described the security measures that have been implemented in order to address the concerns regarding members of his family. In particular, [REDACTED], and it is of note that no threats or

¹²⁵ ICC-01/04-01/06-2754-Conf, paragraph 9. The quotation is an unofficial translation of the filing originally submitted in French.

relevant incidents have been reported.¹²⁶ The Chamber is of the view that at present additional measures are not necessary in this regard.

The Court's obligation to return the witness

71. The Court has an obligation pursuant to Article 93(7)(b) of the Statute and Rule 192(4) of the Rules, as well as Section 7(a) of the Standard Operating Procedures (as agreed between the Congolese authorities and the Registry),¹²⁷ to return defence Witness 19 to the relevant State when the purposes of the transfer have been fulfilled.¹²⁸ He was brought to the seat of the Court in order to testify in the present case and this took place over a period of seven days between 30 March 2011 and 7 April 2011.¹²⁹ Thus, the purpose of the witness's transfer was completed on 7 April 2011.¹³⁰

72. However, Article 21(3) of the Statute stipulates that the application and interpretation of the applicable law must be consistent with internationally recognized human rights. The obligation to return defence Witness 19 to the DRC without delay under Article 93(7)(b) of the Statute and Rule 192(4) of the Rules cannot, therefore, be discharged without an assessment of whether internationally recognized human rights may be violated. This leads the Chamber to consider the implications of his asylum claim.

¹²⁶ Report of the Registrar on the matters raised by witness DRC-D01-WWWW-0019, 9 May 2011, ICC-01/04-01/06-2732-Conf-Exp, paragraph 26.

¹²⁷ Transfèrement des Témoins Détenus, Procédure de Fonctionnement Standard, 9 May 2011, ICC-01/04-01/06-2732-Conf-Exp-Anx1, page 4.

¹²⁸ See also Rule 192(4) of the Rules.

¹²⁹ See ICC-01/04-01/06-T-340-ENG CT WT; ICC-01/04-01/06-T-341-ENG ET WT; ICC-01/04-01/06-T-342-ENG ET WT; ICC-01/04-01/06-T-343-Red-ENG CT WT; ICC-01/04-01/06-T-344-Red-ENG WT; ICC-01/04-01/06-T-345-ENG CT WT; and ICC-01/04-01/06-T-346-ENG ET WT.

¹³⁰ The Registry notes that the return of defence Witness 19 to the DRC following his testimony in the *Lubanga* case was initially delayed due to concerns about his health and thereafter his departure was delayed again in order to coordinate his return with that of the three detained witnesses in the *Katanga and Ngudjolo* case. See ICC-01/04-01/06-2754, paragraphs 10 and 18.

The asylum application

73. The Host State has indicated that if a request for asylum reaches the Minister for Immigration and Asylum it will consider and resolve the application.¹³¹ Defence Witness 19 has submitted his asylum application to the Dutch authorities and accordingly, the Chamber does not need to take any steps to facilitate the presentation of this request. However, in view of the novel circumstances of defence Witness 19's application for this institution, the Chamber needs to address the separate responsibilities of the Court, on the one hand, and the Host State, on the other.

74. The extent to which detained witnesses are outwith the Dutch legal order while in the custody of the Court has not been expressly addressed in any of the relevant documents, namely the Statute, the Rules, the Headquarters Agreement, the Dutch legislation implementing their obligations to cooperate and assist under the Statute ("Implementation Act"),¹³² and the bilateral agreements signed by the Congolese authorities and the Registry of the Court.

75. While Article 6 of the Headquarters Agreement establishes the inviolability of the premises of the Court, Article 8(1) and (2) of that agreement stipulates that although the premises of the Court are "under the control and authority of the Court", except as otherwise provided under the Headquarters Agreement, "the laws and regulations of the host State shall apply on the premises of the Court."

76. The representative of the Kingdom of the Netherlands has suggested that Article 8(3) of the Headquarters Agreement, which provides that "[t]he Court

¹³¹ ICC-01/04-01/07-T-258-ENG ET WT, page 72, lines 16 – 17.

¹³² Rijkswet van 20 juni 2002 tot uitvoering van het Statuut van het Internationaal Strafhof met betrekking tot de samenwerking met en bijstand aan het Internationaal Strafhof en de tenuitvoerlegging van zijn vonnissen (Uitvoeringswet International Strafhof), Staatsblad (2002) 314, entry into force on 1 July 2002. An English version can be found at: <http://www.icrc.org/ihl-nat.nsf/a24d1cf3344e99934125673e00508142/b7883c35b0a31661c1256d79005c007c!OpenDocument>.

shall have the power to make rules, operative within its premises as are necessary for the carrying out of its functions” and “[n]o laws or regulations of the host State which are inconsistent with rules of the Court under this paragraph shall, to the extent of such inconsistency, be enforceable within the premises of the Court”, leads to a “carve out of Dutch jurisdiction” which “applies in particular to persons detained in the Court’s detention centre.”¹³³ It is submitted, therefore, that the Netherlands does not exercise jurisdiction over detained witnesses.¹³⁴

77. Article 46(1) of the Headquarters Agreement sets out that the “host State shall cooperate with the Court to facilitate the detention of persons and to allow the Court to perform its functions within the detention centre”. As to the position when detained witnesses are transferred, Rule 192 of the Rules sets out that the “[t]ransfer of a person in custody to the Court in accordance with Article 93, paragraph 7, shall be arranged by the national authorities concerned in liaison with the Registrar and the authorities of the host State [...] The Registrar shall ensure the proper conduct of the transfer, including the supervision of the person while in the custody of the Court.” Article 44 of the Headquarters Agreement specifies that the transport of individuals in the custody of the Court from the point of arrival to the premises of the Court (and similarly on departure) “shall be carried out by the competent authorities” on the request of and in consultation with the Court. This is reflected in the Implementation Act, which states that the transit of those individuals who are brought or come to the Netherlands at the request of the Court, and the transportation of those who are in custody pursuant to an order of the Court within the Netherlands but outside the limited areas which come under the Court’s authority, shall be effected on the authority of the Court by Dutch officials.¹³⁵ The Dutch officials are competent to take all

¹³³ ICC-01/04-01/07-T-258-ENG ET WT, page 71, lines 18 – 20.

¹³⁴ ICC-01/04-01/07-T-258-ENG ET WT, page 72, lines 9 and 10.

¹³⁵ Section 85(2) and (3) of the Implementation Act.

measures necessary to ensure the safety of the persons concerned and to prevent them from absconding.¹³⁶

78. Article 51 of the Headquarters Agreement limits the exercise of jurisdiction by the Host State and determines that “[t]he host State shall not exercise its jurisdiction or proceed with a request for assistance or extradition from another State with regard to persons surrendered to the Court in accordance with Part 9 of the Statute, persons granted interim release or persons who appear before the Court voluntarily or pursuant to a summons, for any acts, omissions or convictions prior to the surrender, the transfer or the appearance before the Court except as provided for in the Statute and the Rules of Procedure and Evidence.” While this provision generally prohibits the Dutch authorities from interfering with the transfer process on account of the individual’s prior acts, omissions or convictions (so as to ensure the proper functioning of the Court), it does not contain any provisions that purport to prevent the Dutch authorities from discharging the State’s human rights obligations towards witnesses.

79. Therefore, as set out above, the Kingdom of the Netherlands argues that Dutch asylum law does not apply to witnesses detained by the Court, and it is contended that this exclusion covers the period when they are *de facto* under the control of Dutch officers during transportation.¹³⁷ Furthermore, it is suggested that the Host State will not seek to review a decision of the ICC to the effect that it is appropriate to return a witness to the DRC.¹³⁸ However, the representative of the Dutch Government simultaneously indicated that the Minister for Immigration and Asylum will determine any request for asylum that is received by the Dutch authorities.¹³⁹

¹³⁶ Section 85(4) of the Implementation Act.

¹³⁷ ICC-01/04-01/07-T-258-ENG ET WT, page 71, lines 15 – 22; page 72, lines 18 – 23; page 77, lines 17 – 19.

¹³⁸ ICC-01/04-01/07-T-258-ENG ET WT, page 73, lines 8 – 14.

¹³⁹ ICC-01/04-01/07-T-258-ENG ET WT, page 72, lines 16 – 18.

80. The Congolese authorities have submitted that they only transferred **custody** of the detained witnesses as opposed to their powers of **detention** generally. It is argued that this is reflected in the Standard Operating Procedure that dictates that all requests for telephone contact between the witnesses and their families, or others, are to be addressed to the competent Congolese authorities. However, in the judgment of the Chamber an agreement reached between the Congolese authorities and the Registry cannot oust the obligations of the Host State, and therefore this document does not answer the question as to the jurisdiction of the Dutch authorities over detained witnesses in the context of an asylum application.

81. The Registry has argued that the Dutch authorities have no power to consider an asylum application because of the immunity afforded to witnesses under Article 26 of the Headquarters Agreement. In the Chamber's judgment, while the Host State is limited in the exercise of its jurisdiction vis-à-vis the ICC (as an international organization), the fact that witnesses are afforded immunity from proceedings when coming to testify before the Court has no bearing on their right to seek protection under the applicable human rights provisions.¹⁴⁰ The purpose of granting immunity in these circumstances is to ensure the proper functioning of the Court (*viz.* to enable it to hear evidence), and this safeguard is irrelevant to the determination of whether a detained witness can apply to the Dutch authorities for asylum. It is to be noted that this reflects the submissions of the Host State.¹⁴¹

82. Defence Witness 19 is *de facto* on Dutch territory, even if he is under the control of the Court and on Court premises, and he will be under the supervision of Dutch officers prior to his return to the DRC. Representatives

¹⁴⁰ Trial Chamber II also considered the argument on the alleged legal effects of the immunities which the witnesses enjoy to be unfounded, ICC-01/04-01/07-3003-tENG, paragraph 74.

¹⁴¹ ICC-01/04-01/07-T-258-ENG ET WT, page 72, lines 9 – 15 and page 74, lines 7 – 21.

of the Kingdom of the Netherlands will have overall responsibility for his departure.

83. The right to make an asylum application is enshrined in the Geneva Convention of 1951 and the Protocol of 1967, as well as Article 14 of the Universal Declaration and this important legal process exists wholly independently of the functions of this Court. Given the Chamber's obligation to interpret the Statute consistently with internationally recognized human rights under Article 21(3) of the Statute, the Court is bound to assess the steps (if any) that need to be taken in order to enable the Dutch government to discharge its obligations under national and international law as regards this asylum request. In the present context although there is undoubted overlap between the issues that fall to be considered under Article 68 of the Statute and the asylum claim (see paragraph 66), the Chamber is of the view that it is exclusively for the Host State to decide whether the VWU's assessment, pursuant to Article 68 of the Statute, of the risks faced by defence Witness 19 on his return to the DRC addresses all the matters relevant to the merits of an asylum application made to the Dutch national authorities. Hence, it is for the Host State to determine whether, for instance, the witness's submissions concerning the principle of *non-refoulement* have merit and whether his fear of reprisals, including judicial retribution (*viz.* an unfair trial and bad conditions of detention) are properly addressed by the Registry in its report and by way of the suggested protective measures.¹⁴² These are claims that come within the scope of Articles 3, 5, 6 and 7 of the ECHR, Articles 7 and 14 of the ICCPR and Article 3 of the Torture Convention. Similarly, it is for the Dutch authorities to determine whether, in the circumstances, returning the witness to the DRC

¹⁴² Trial Chamber II held that the criteria for considering an application for asylum, in particular those pertaining to the risk of persecution incurred by the applicants, are not identical to the criteria applied by the Court to assess the risks faced by witnesses on account of their testimony before the Court. ICC-01/04-01/07-3003-tENG, paragraph 63.

would amount to inhuman and degrading treatment under Article 7 of the ICCPR and Article 3 of the ECHR.¹⁴³

84. Given the Court has no jurisdiction to address the merits of defence Witness 19's asylum application, only the Kingdom of the Netherlands, as the signatory to the various human rights instruments, is able to determine whether any of the matters raised by the witness, and not considered by this Court, have merit. The Chamber is aware of the apparent tension between the Court's obligation to return the witness once the purpose of the transfer is fulfilled and the Host State's obligation under the Geneva Convention of 1951 and the Protocol of 1967, but the Court should not seek to limit the opportunity of the Host State to assess an asylum claim, not least given the terms of Article 21(3) of the Statute.

85. As to the Registry's submissions on the applicability of the Geneva Convention of 1951 and the Protocol of 1967 to defence Witness 19, it is for the Dutch authorities to make this determination and, more generally, as to which provisions are relevant to the application.

The procedure to be adopted

86. Given the Chamber's lack of jurisdiction over the asylum application, and bearing in mind that the security of defence Witness 19 under Article 68 of the Statute will be sufficiently addressed by implementing the protective measures the Registry has discussed with the DRC authorities, the obligation of the Court is to return defence Witness 19 without delay under Article 93(7) of the Statute, to the extent that this step conforms with Article 21(3) of the Statute. The limit of the Court's responsibility under Article 21(3) (in this context) is to ensure that defence Witness 19 is provided with a real – as

¹⁴³ ICC-01/04-01/06-2753-Conf, paragraph 6; ICC-01/04-01/06-2760-Conf, paragraph 7.

opposed to a merely theoretical – opportunity to make his request for asylum to the Dutch government before he is returned to the DRC. Therefore, he is to be afforded reasonable access to the lawyers representing him on this application and he is not to leave the Netherlands until a proper opportunity has been provided to the Dutch authorities to consider the matter. Thereafter, it is for the Kingdom of the Netherlands to control the proceedings (if any) arising out of the asylum request.

87. Therefore, in accordance with Article 21(3) of the Statute the Court must assess the steps (if any) that it needs to take in order to enable the Dutch government to discharge its obligations under national and international law as regards this asylum request and it must ensure that the witness does not leave the country until the authorities have had a proper opportunity to consider the application.¹⁴⁴ To summarise, given the ICC has no power to consider the asylum application, once it has discharged its responsibility under Article 21(3) of the Statute it has no authority to deal with or detain the witness for that purpose, and instead it is obliged to return defence Witness 19 to the relevant State (since the purposes of the transfer have been fulfilled). The asylum application is directed at the Dutch authorities and it is for them 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 therefore orders the Registry, in consultation with the Dutch authorities, to file a report on the procedure that needs to be followed in order for the Host State to be able to discharge its international obligations pursuant to this asylum request before defence Witness 19 is returned to the DRC (unless the request is granted). Put

¹⁴⁴ Trial Chamber II held that Article 21(3) of the Statute does not place an obligation on the Court to ensure that States Parties properly apply internationally recognised human rights in their domestic proceedings. It only requires the Chambers to ensure that the Statute and other sources of law set forth at Article 21(1) and 21(2) of the Statute are applied in a manner which is not inconsistent with, or in violation of, internationally recognised human rights, ICC-01/04-01/07-3003-tENG, paragraph 62.

otherwise, the Court needs to be informed as to the steps that are necessary to give the Dutch authorities a proper opportunity to consider the application.

88. The Chamber stresses that if the Dutch Government considers that the applicant has presented a sufficiently meritorious asylum application to justify deferring his departure from the Netherlands, the Court will necessarily hand over the custody of defence Witness 19 immediately to the Dutch authorities, particularly given the ICC will have no continuing power to detain him.

IV. Orders of the Chamber

89. The Trial Chamber hereby instructs the Registry to:

(a) afford defence Witness 19 reasonable access to the lawyers representing him on the asylum application;

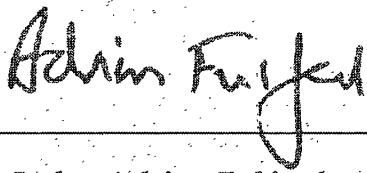
(b) file a report by 29 July 2011, in consultation with the Dutch authorities, on the procedure that needs to be followed in order for the Host State to be able to discharge its obligations pursuant to this asylum request before defence Witness 19 is returned to the DRC (unless the request is granted);

(c) liaise with the Congolese authorities, prior to any return of defence Witness 19 to the DRC, in order to determine the extent of, and to implement, any protective measures that the Registry considers necessary. A report on these issues is to be filed by 29 July 2011;¹⁴⁵ and

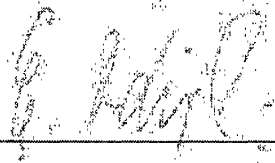
(d) monitor the position of defence Witness 19 following his return to the DRC.

¹⁴⁵ To the extent necessary, pursuant to its ongoing obligations under Article 68 of the Statute, the Chamber will assess any issues that arise from the two reports.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 5 August 2011

At The Hague, The Netherlands