

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

**No. ICC-01/04-01/06 OA 19**

**Date: 26 August 2011**

**THE APPEALS CHAMBER**

**Before:**

**Judge Sang-Hyun Song, Presiding Judge**

**Judge Erkki Kourula**

**Judge Anita Ušacka**

**Judge Daniel David Ntanda Nsereko**

**Judge Sanji Mmasenono Monageng**

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**IN THE CASE OF THE PROSECUTOR v. THOMAS LUBANGA DYILO**

**Confidential**

**Decision on the “Urgent Request for Directions” of the Kingdom of the  
Netherlands of 17 August 2011**

*shs*

**No: ICC-01/04-01/06 OA 19**

1/6

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

**The Office of the Prosecutor**

Ms Fatou Bensouda, Deputy Prosecutor  
Mr Fabricio Guariglia

**Counsel for the Defence**

Ms Catherine Mabile  
Mr Jean-Marie Biju-Duval

**States Representatives**

Ms Liesbeth Lijnzaad, the Kingdom of the  
Netherlands  
The Democratic Republic of the Congo

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

Having before it the "Urgent Request for Directions" of 17 August 2011 (ICC-01/04-01/06-2788-Conf),

*Renders* unanimously the following

## DECISION

The "Urgent Request for Directions" is rejected.

### REASONS

#### I. PROCEDURAL HISTORY

1. On 4 July 2011, Trial Chamber I (hereinafter: "Trial Chamber") issued the "Decision on the request by DRC-D01-WWW-0019 for special protective measures relating to his asylum application"<sup>1</sup> (hereinafter: "Decision of 4 July 2011").

2. On 13 July 2011, the Kingdom of the Netherlands (hereinafter: "the Netherlands") requested leave to appeal, pursuant to article 82 (1) (d) of the Statute, the Decision of 4 July 2011.<sup>2</sup> On 13 July 2011, the Democratic Republic of the Congo informed the Registry by letter that it decided to appeal the Decision of 4 July 2011.<sup>3</sup>

3. On 4 August 2011, the Trial Chamber issued the "Decision on two requests for leave to appeal the 'Decision on the request by DRC-D01-WWW-0019 for special protective measures relating to his asylum application'"<sup>4</sup> (hereinafter: "Decision on Leave to Appeal"). The Trial Chamber found that neither the request of the Netherlands nor the letter from the Democratic Republic of the Congo, which it treated as an application for leave to appeal,<sup>5</sup> met the requirements for leave to appeal

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<sup>1</sup> ICC-01/04-01/06-2766-Conf. A public redacted version of the decision was issued on 5 August 2011. ICC-01/04-01/06-2766-Red.

<sup>2</sup> "Application for Leave to Appeal the Trial Chamber's 'Decision on the request by DRC-D01-WWW-0019 for special protective measures relating to his asylum application' (ICC-01/04-01/06-2766-Conf) dated 4 July 2011", ICC-01/04-01/06-2768-Conf.

<sup>3</sup> ICC-01/04-01/06-2770-Conf-Anx1.

<sup>4</sup> ICC-01/04-01/06-2779-Conf.

<sup>5</sup> Decision on Leave to Appeal, para. 5.

under article 82 (1) (d) of the Statute.<sup>6</sup> However, the Trial Chamber granted the Netherlands and the Democratic Republic of the Congo leave to appeal “on an exceptional basis” under article 64 (6) (f) of the Statute. The Trial Chamber found:

In order to give full effect to Article 64(2) of the Statute (and without attempting to provide an exhaustive definition of when leave to appeal an interlocutory decision should be granted outside the framework of Article 82), the Chamber's authority “to rule on any other relevant matters” under Article 64(6)(f) includes the ability to grant permission to appeal whenever an arguable and critical issue is raised that affects the protection of witnesses. Similarly, leave to appeal should be granted on an interlocutory basis under Article 64(6) (f) when it is arguable that a decision of a Chamber has placed a State Party in the position of having to resolve apparently conflicting obligations to the ICC, on the one hand, and to individuals in the custody of the Court who raise fundamental human rights concerns that require determination by the State Party, on the other.<sup>7</sup>

4. On 17 August 2011, the Netherlands submitted the “Urgent Request for Directions”<sup>8</sup> in which it noted the unprecedented nature of the Decision on Leave to Appeal and the lack of provisions governing appeals under article 64 (6) (f) of the Statute and requested directions on the procedure to follow and applicable time limits for such appeals.

5. On 23 August 2011, the Prosecutor filed the “Prosecution’s Response to the Government of the Kingdom of the Netherlands ‘Urgent Request for Directions’”<sup>9</sup> in which he did not oppose the Urgent Request for Directions.

6. On 25 August 2011, pursuant to an order of the Appeals Chamber, the Prosecutor and the Netherlands set out the factual and legal basis for filing as confidential their respective submissions as required by regulation 23 *bis* (1) of the Regulations of the Court.<sup>10</sup>

## II. MERITS

7. The Appeals Chamber recalls that it dealt exhaustively with the question of whether appeals may be brought outside of the context of articles 81 and 82 of the

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<sup>6</sup> Decision on Leave to Appeal, paras 10-14.

<sup>7</sup> Decision on Leave to Appeal, para. 23.

<sup>8</sup> ICC-01/04-01/06-2788-Conf.

<sup>9</sup> ICC-01/04-01/06-2792-Conf.

<sup>10</sup> “Prosecution’s Provision of Information Pursuant to the Appeals Chamber’s ‘Order in relation to confidential filings’, ICC-01/04-01/06-2796-Conf; “Response to ‘Order in relation to confidential filings’ (ICC-01/04-01/06-2794-Conf)”, ICC-01/04-01/06-2797.

Statute in its “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”.<sup>11</sup> In that judgment, the Appeals Chamber noted that “[t]he decisions that are subject to appeal are enumerated in articles 81 and 82 of the Statute. There is nothing in Part 8 to suggest that a right to appeal arises except as provided thereunder.”<sup>12</sup> The Appeals Chamber found, on the basis of the Statute and the Rules of Procedure and Evidence, that “[t]he inexorable inference is that the Statute defines exhaustively the right to appeal against decisions of first instance courts, namely decisions of the Pre-Trial or Trial Chambers”.<sup>13</sup> The Appeals Chamber found this conclusion was confirmed by the *travaux préparatoires* which indicated that States Parties had specifically rejected a proposal to provide for a broader scope for appeal.<sup>14</sup> Finally, the Appeals Chamber found that the limitation of the right to bring interlocutory appeals to those situations specified in article 82 of the Statute was fully consistent with internationally recognized human rights as the latter required the appeal only of “final decisions of a criminal court determinative of its verdict or decisions pertaining to the punishment meted out to the convict”.<sup>15</sup>

8. The Appeals Chamber therefore finds that the Trial Chamber’s grant of leave to appeal the Decision of 4 July outside of the context of articles 81 and 82 of the Statute was *ultra vires*. The Appeals Chamber recognizes that the Decision of 4 July may have concerned issues of such significance or complexity that the Trial Chamber considered review by the Appeals Chamber necessary. However, the fact that the granting of appeal may, in the eyes of the Trial Chamber, be desirable or even necessary does not justify departure from the clearly enumerated grounds of appeal in the Statute. If the Appeals Chamber were now to hear or to conduct proceedings related to an appeal on the basis of the Decision on Leave to Appeal, it would be acting beyond the scope of the powers vested in it by the States Parties in the Statute. As leave to appeal was improperly granted, the Urgent Request for Directions in relation to proceedings on appeal is without foundation and must be rejected.

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<sup>11</sup> *Situation in the Democratic Republic of the Congo*, 13 July 2006, ICC-01/04-168 (OA 3).

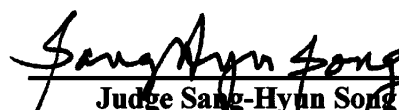
<sup>12</sup> *Ibid.*, para. 35.

<sup>13</sup> *Ibid.*, para. 39.

<sup>14</sup> *Ibid.*, paras 40-41.

<sup>15</sup> *Ibid.*, para. 38.

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

  
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Judge Sang-Hyun Song  
Presiding Judge

Dated this 26th day of August 2011

At The Hague, The Netherlands