

**Cour
Pénale
Internationale**



**International
Criminal
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 Order on the Request for Reconsideration of Order ICC-01/04-01/06-
2785-Conf**

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda

Counsel for the Defence

Ms Catherine Mabilie
Mr Jean-Marie Biju Duval

Legal Representatives of the Victims

Mr Luc Walley
Mr Franck Mulenda
Ms Carine Bapita Buyangandu
Mr Joseph Keta Orwinyo
Mr Paul Kabongo Tshibangu
Mr Hervé Diakiese

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

Ms Paolina Massidda

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

States Representatives

Host State
Democratic Republic of the Congo

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

Mr Anders Backman

**Victims Participation and Reparations
Section**

Other

Mr Ghislain Mabanga Monga Mabanga
Appeals Chamber

Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”), in the case of *Prosecutor v. Thomas Lubanga Dyilo* (“Lubanga case”), issues the following Order on the request for reconsideration of Order ICC-01/04-01/06-2785-Conf (“Order”):¹

I. Background and Submissions

1. On 4 July 2011, after duty counsel for witness DRC-D01-WWWW-0019 (“defence Witness 19”) submitted an application² for special protective measures and Trial Chamber I temporarily ordered³ the stay of the witness’s removal to the Democratic Republic of the Congo (“DRC”) until further order, the Chamber issued its Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application (“Decision of 4 July 2011”) and concluded that the Court’s responsibility under Article 21 of the Statute is first, that defence Witness 19 is provided with a real (as opposed to a theoretical) opportunity to make his asylum request and, second, that the Dutch authorities are afforded a proper opportunity to consider the application, before the witness is returned to the DRC.⁴ The Chamber decided that it is for the Dutch authorities to decide whether it is necessary for the Host State 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.⁵ It stressed that:

[...] if the Dutch Government considers that the applicant has presented a sufficiently meritorious asylum application to justify deferring his departure from the

¹ Requête aux fins de reconsidération de l’“Order on the Report of the Registrar on the execution of decision ICC-01/04-01/06-2766-Conf”, 17 August 2011, ICC-01/04-01/06-2787-Conf with a confidential annex.

² 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 with 11 confidential annexes.

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

⁴ Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application, 4 July 2011, ICC-01/04-01/06-2766-Conf. A public redacted version was issued on 5 August 2011, ICC-01/04-01/06-2766-Red, paragraphs 86 and 87.

⁵ ICC-01/04-01/06-2766-Red, paragraph 87.

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.⁶

2. On 4 August 2011, the Chamber issued its “Decision on two requests for leave to appeal the ‘Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application’”, wherein the Chamber granted leave to appeal to the Kingdom of the Netherlands (“Netherlands”) and the DRC.⁷ On a request for directions by the Netherlands on how to proceed,⁸ the Appeals Chamber decided that the Trial Chamber’s grant of leave to appeal the Decision of 4 July 2011 was *ultra vires* and therefore improper.⁹ It therefore refused the request for directions from the Netherlands because it lacked foundation.¹⁰

3. On 5 August 2011, the Registry submitted its DRC Consultation Report with details on how the rights of the witness could be ensured on his return to the DRC.¹¹ On the same day, the Registry provided its Dutch Consultation Report setting out the procedures the Dutch authorities need to follow in order to deal with the asylum application.¹²

⁶ ICC-01/04-01/06-2766-Red, paragraph 87.

⁷ Decision on two requests for leave to appeal the “Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application”, 4 August 2011, ICC-01/04-01/06-2779-Conf. The Netherlands had submitted an Application for Leave to Appeal the Trial Chamber’s “Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application” (ICC-01/04-01/06-2766-Conf) dated 4 July 2011, 13 July 2011, ICC-01/04-01/06-2768-Conf; the DRC had submitted a letter that was treated as an application for leave to appeal by the Chamber (Registry transmission of observations received from the DRC authorities in relation to document ICC-01/04-01/06-2766-Conf, 15 July 2011, ICC-01/04-01/06-2770-Conf-Anx1).

⁸ Urgent Request for Directions, 17 August 2011, ICC-01/04-01/06-2788-Conf.

⁹ Decision on the Urgent Request for Directions” of the Kingdom of the Netherlands of 17 August 2011, 26 August 2011, ICC-01/04-01/06-2799-Conf, paragraph 8.

¹⁰ ICC-01/04-01/06-2799-Conf, paragraph 8.

¹¹ With Confidential *Ex parte* Annex 1 Registry only and Confidential Annex 2, Registry’s report on the implementation of ICC-01/04-01/06-2766, 5 August 2011, ICC-01/04-01/06-2782-Conf.

¹² Report of the Registrar on the execution of decision ICC-01/04-01/06-2766-Conf, 5 August 2011, ICC-01/04-01/06-2781-Conf.

4. On 15 August 2011, the Chamber issued the Order on the Report of the Registrar on the execution of decision ICC-01/04-01/06-2766-Conf (“Implementation Order”), in which it instructed the Registry to
- i. consult with the Dutch authorities on the transfer of the witness into the “control” of the Netherlands if the Host State intends to defer his departure pending its decision on the asylum application;
 - ii. consult with the Dutch authorities in order to establish a reasonable timeframe for the transfer of the witness.¹³
5. On 16 August 2011, the Chamber ordered the Registry to liaise with the Dutch authorities on an urgent basis.¹⁴
6. On 17 August 2011, duty counsel for defence Witness 19 submitted a request for reconsideration of the Implementation Order (“Request for reconsideration”).¹⁵ Duty counsel informed the Chamber [REDACTED].¹⁶ The results of this procedure were outstanding at the time of the application.¹⁷ Counsel suggests that this constitutes a new element that would have led to a different outcome if the Chamber had considered it at the relevant time.¹⁸ Defence Witness 19 fears that the Implementation Order will endanger his health as the Host State has suspended the asylum proceedings pending a decision from the Appeals Chamber.¹⁹ The witness is concerned that if he is transferred to the control of the Dutch authorities, they may not afford him all the rights usually accorded to “ordinary” asylum seekers while the Appeals Chamber resolves his legal status.²⁰ Counsel submits that under Article 68 of the Statute, the Chamber has the responsibility of ensuring that

¹³ Order on the Report of the Registrar on the execution of decision ICC-01/04-01/06-2766-Conf, 15 August 2011, ICC-01/04-01/06-2785-Conf, paragraph 12.

¹⁴ Email communication from the Chamber to the Registry through a Legal Officer of the Trial Division on 16 August 2011.

¹⁵ ICC-01/04-01/06-2787-Conf.

¹⁶ ICC-01/04-01/06-2787-Conf, paragraph 8.

¹⁷ ICC-01/04-01/06-2787-Conf, paragraph 8 and ICC-01/04-01/06-2787-Conf-Anx.

¹⁸ ICC-01/04-01/06-2787-Conf, paragraphs 6 and 9.

¹⁹ ICC-01/04-01/06-2787-Conf, paragraph 10.

²⁰ ICC-01/04-01/06-2787-Conf, paragraph 10.

defence Witness 19 continues to have access to appropriate health care until the end of the asylum proceedings.²¹ Counsel refers to Article 21(2) of the Statute and indicates that the Chamber has previously reconsidered its decisions, and he asks the Chamber to reconsider the Implementation Order as regards the immediate transfer of defence Witness 19 into the control of the Host State.²²

7. The Chamber was informed on 16 August 2011 that the Registry was to liaise with the Dutch authorities on an urgent basis.²³
8. However, on 18 August 2011, the Chamber instructed the Registry to liaise with the Host State in order to receive the latter's observations by 24 August 2011 on the Request for reconsideration.²⁴ On 24 August 2011, the Registry informed the Chamber that the Dutch authorities were unable to meet the deadline and it sought the Chamber's approval to submit their observations on the request for reconsideration two days out of time, in order to facilitate an evaluation of the request for reconsideration at the same time as the Chamber's instructions set out in its order ICC-01/04-01/06-2785, described in paragraph 3 above.²⁵
9. On 29 August 2011, two notes verbales from the Netherlands were sent to the Chamber.²⁶ The Netherlands repeats the submission that defence Witness 19 ought to remain at the ICC Detention Centre (*viz.* in the custody of the Court) throughout the asylum proceedings.²⁷ It is argued that defence Witness 19 was temporarily transferred into the custody of the Court on the basis of an

²¹ ICC-01/04-01/06-2787-Conf, paragraph 11.

²² ICC-01/04-01/06-2787-Conf, paragraph 12.

²³ Email communication from the Chamber to the Registry through a Legal Officer of the Trial Division on 16 August 2011.

²⁴ Email communication from the Chamber to the Registry through a Legal Officer of the Trial Division on 18 August 2011.

²⁵ Email communication from the Registry to the Chamber through a Legal Officer of the Trial Division on 24 August 2011.

²⁶ ICC-01/04-01/06-2801-Conf-Anx2, pages 2 – 4.

²⁷ ICC-01/04-01/06-2801-Conf-Anx2, page 2.

agreement with the Democratic Republic of the Congo (“DRC”) to facilitate prosecutions at the ICC, and that this does not include an obligation on the Netherlands to accept undocumented or illegal foreigners into their territory, particularly given it was not a party to the relevant bilateral agreement.²⁸ The Host State submits that the Court does not have the authority to transfer custody of defence Witness 19 and it is submitted that the Netherlands is not under an obligation to accept such a transfer. Moreover, it is noted that the Host State lacks jurisdiction to remand defence Witness 19 in custody while his asylum application is under consideration.²⁹ The government submits that it does not intend to defer the departure of the witness.³⁰ It is submitted that the Court’s responsibility, based on its decision of 4 July 2011, is to delay transferring defence Witness 19 to the DRC until the asylum request is determined.³¹ Given its central argument that defence Witness 19 ought to remain in the custody of the Court throughout the asylum proceedings, the Netherlands declines to consult with the Registry or to provide further observations on the Request for reconsideration.³²

II. Analysis

10. In the Implementation Order, the Chamber reiterated that:

10. As set out by the Chamber, it is for the Dutch Authorities to decide whether, according to its national and international obligations, it will take control of the witness until such time as the asylum application and any appellate phase in those proceedings are determined. The Host State is urged to consider without delay whether it intends to defer defence Witness 19’s departure from the Netherlands. The Registry is to consult with the Dutch authorities on the transfer of the witness into the “control” of the Netherlands if the Host State intends to defer his departure pending

²⁸ ICC-01/04-01/06-2801-Conf-Anx2, page 1.

²⁹ ICC-01/04-01/06-2801-Conf-Anx2, page 1.

³⁰ ICC-01/04-01/06-2801-Conf-Anx2, page 2.

³¹ ICC-01/04-01/06-2801-Conf-Anx2, pages 2 and 3.

³² ICC-01/04-01/06-2801-Conf-Anx2, pages 3 and 4.

its decision on the asylum application. A reasonable timeframe for the transfer is to be arranged between the Registry and the Host State.³³

11. Accordingly, as set out in paragraph 3 above, the Chamber ordered the Registry to (i) consult with the Dutch authorities on the transfer of the witness into the "control" of the Netherlands if the Host State intends to defer his departure pending its decision on the asylum application; and (ii) consult with the Dutch authorities in order to establish a reasonable timeframe for the transfer of the witness.
12. As the Host State has now informed the Chamber that it does not intend to defer the transfer of defence Witness 19 back to the DRC and it has declined to consult with the Registry on the transfer of custody to the Host State, the Request for reconsideration of the Chamber's Implementation Order is moot.
13. The judges are of the view that the Chamber has provided the Registry with clear guidance, namely that deferring the departure of defence Witness 19 was subject to the condition that custody of the witness is transferred to the Host State pending the latter's decision on the asylum application. The Chamber has discharged its obligations under Article 21(3) of the Statute and it is now for the Host State, to whom the asylum application is directed, to decide whether it is necessary to intervene in order to take control of the witness until such time as the application and any appellate phase in those proceedings are determined.
14. It follows the Registry should proceed with regard to defence Witness 19 in the way specified in Article 93(7)(b) of the Statute and Rule 192(4) of the Rules. These arrangements are only to be implemented [REDACTED].

³³ ICC-01/04-01/06-2785-Conf, paragraph 10.

15. In the event that travel is appropriate [REDACTED], the Registrar should inform the Host State of the intended departure date of defence Witness 19 to the DRC. If at any time before he finally leaves for the DRC the Dutch authorities indicate that they intend to take control of the witness, the Registrar is to cooperate in the transfer of defence Witness 19 to the Host State.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 25 October 2011

At The Hague, The Netherlands