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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 Document

Amicus Curiae Observations by mr. Schüller and mr. Sluiter, Counsel in Dutch asylum proceedings of witness 19 (with annexes)

Source: **Philip-Jan Schüller and Göran Sluiter**

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

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Introduction

1. Pursuant to Rule 103 of the Rules of Procedure and Evidence ("the Rules") Philip-Jan Schüller and Göran Sluiter, counsel in Dutch asylum proceedings on behalf of witness 19 ("witness 19") in the case of *The Prosecutor v.Lubanga Dyilo*, have on 31 October 2011 sought leave to submit, as amicus curiae, written observations on the progress of Dutch asylum proceedings, the role of the ICC Registrar in ongoing domestic litigation and the use of the ICC detention situation by the host State to deprive the witness of the protection of Dutch asylum law.
2. By order of 15 November 2011 –as amended by Corrigendum of 18 November 2011- the Trial Chamber granted authorization to counsel for witness to file their observations as amicus curiae, and to do so by 4 pm on 23 November 2011.[1]
3. We hereby respectfully submit the following observations. They follow the structure as indicated in our application for leave, but also contain a number of additional observations, informing the Chamber of the most recent developments.

I Progress of the Dutch Asylum Proceedings

4. The observations on the progress of the Dutch asylum proceedings are structured as follows. First, an overview and description of the Dutch asylum proceedings pursuant to the initial asylum request of 1 June 2011 will be given. Secondly, we will submit the reasons why this 'extra ordinary' or 'extra-legal' asylum procedure, which lacks a legal base in Dutch national law, does not meet the basic standards of an effective asylum procedure under international law. The absence of the required safeguards results in a procedure that should be regarded as theoretical due to a lack of judicial redress. Then, we will elaborate on the standard of what an effective asylum procedure under international law actually entails and how this works out for the witness in practice. We are fully aware of the fact that the Court has no power (nor desire) to pass judgment on the nature and scope of Dutch procedures in respect of witness 19. However, this Chamber has ruled that it is its responsibility '(...) to ensure that defence Witness 19 is provided with a real –as opposed to a merely theoretical- opportunity to make his request for asylum to the Dutch government before he is

[1] ICC-01/04-01/06-2816 01-11-2011.

returned to the DRC'.[2] It is in this light that the Chamber should consider our observations below.

The current situation as regards the extra ordinary asylum procedure

5. On the 30th of May 2011 the witness submitted a written statement on his asylum motives which together with the formal asylum request and the legal submissions, was lodged by counsel f with the immigration authorities in accordance with the Dutch immigration law (*Vreemdelingenwet 2000*). Following the application of the asylum request, the Dutch immigration authorities informed counsel for the witness on 1 June 2011 that the request would be joined to the case of the other three Congolese ICC witnesses. The immigration authorities reiterated that a definitive position with regard to commencing and admissibility of the procedure was dependent on the views to be adopted by the ICC in respect of the need for protection of the Congolese witnesses. The three witnesses in the Katanga case had applied for asylum earlier in May 2011 and were still waiting for their application procedure to commence despite their detention. Moreover, the immigration authorities stated unequivocally that the relevant ICC-decisions would be decisive as to the manner in which the Dutch authorities would proceed further with their asylum request (**annex 1**). The immigration authorities accordingly responded in the case of witness 19 that they could not yet confirm the actual processing of the asylum request as the Netherlands was still awaiting relevant ICC-decisions. Taking into account the relevant decisions of this Trial Chamber, counsel for the witness approached the Dutch immigration authorities again in order to obtain clarity with regard the progress of the asylum request and to attain their position as to the consequences of this decision of the Court.
6. Because both ICC Trial Chambers had earlier ruled that the four witnesses had the right to ask for asylum, counsel drew attention to the need for a prompt reply and an expedient start of the procedure with the Dutch immigration authorities l in the following months, both by telephone and in writing. Despite the multiple findings of the Court on this issue which led to the decision of 15 August 2011 counsel waited in vain for answers from the immigration authorities. Counsel for the witness thus submitted on 31 August 2011 a written and motivated request to the Dutch immigration authorities to be informed about the consultations this Chamber had

[2] ICC-01/04-01/06-2766-red 05-08-2011, para. 86.

ordered to take place between the Registry of the ICC and the Netherlands, with a view to arrange the transfer of witness 19 into the control of the host-State. The need to be informed about these consultations also arose out of the fact that counsel needed to prepare the witness for the forthcoming asylum procedure and due to the deteriorating health condition of witness 19.

7. On 8 September 2011 the Dutch immigration authorities confirmed that the asylum request would be processed under national law. The immigration authorities approached counsel about setting concrete dates in order for specific asylum hearings to take place, in accordance with the national asylum procedure. Given the complexity of the current situation in the DRC, and in light of the health condition of witness 19, the Dutch immigration authorities and counsel tried to expediently find appropriate dates. This turned out to be a complex issue as there were four persons to be interviewed at least twice whilst affording them the right to submit 'corrections and supplements' under Dutch asylum law. At that time, the Dutch immigration authorities still did not dispute that the asylum applications were to be processed under Dutch asylum law. Counsel and witness 19 had to wait several weeks before some form of clarity was given, in the meanwhile the immigration authorities offered another reason for the further delay : the Netherlands needed to negotiate further with the Registry of the ICC. No mention was made at this moment of an 'extra legal' or 'extra ordinary' quasi-asylum procedure.

8. On 29 September 2011 the Dutch immigration authorities informed counsel that the asylum applications of the Congolese witnesses were 'no longer' to be regarded as national asylum requests but instead the requests were to be regarded as 'requests for protection', because the Dutch asylum procedure was no longer considered to be applicable (**annex 2**). The Dutch immigration authorities informed counsel that the interviews should take place at the ICC Detention Centre. Counsel for the applicant submitted -in vain- the argument to the immigration authorities that it was already acknowledged that the national asylum procedure had commenced, and, as a result, the Netherlands should be considered to have accepted full jurisdiction under the asylum law. Furthermore, counsel for the witness in a written submission of 6 October 2011 raised several practical questions with regard to this new 'extra ordinary' quasi asylum procedure. First of all, were all the normal procedural safeguards applicable? Is the common European Asylum System applicable? Will the Congolese witnesses be able to get effective protection via a refugee status if the well-founded fear of persecution

was established? Would the Congolese witnesses be able to attend a hearing if the need for judicial review arose? Would an appeal have suspensive effect in conformity with international standards of asylum procedures? Finally, why should an administrative court declare itself competent to pass judgment on an asylum procedure with absolutely no formal basis in Dutch or international law? This last pivotal point was highlighted by the fact that the contested decision to opt for an 'extra ordinary' quasi asylum procedure rather than the regular asylum procedure, was not supported by any legal reasoning or adequate motivation. In other words, despite several formal requests to that end, the Netherlands was - and still is- unable to give a legally relevant justification to avert from the prescribed way in which asylum requests are normally processed. Finally, the aforementioned decision is at odds with the prior position of the Netherlands that, before but also subsequent to, his 'ICC detention' the witness would be afforded an opportunity to submit an asylum request under Dutch national law. If that is the case, it begs the question why the immigration authorities, in absence of any justification, did not allow the witness to enter the Dutch asylum procedure in the first place.

9. Since the Dutch authorities continued to insist on continuing detention of witness 19 at the ICC Detention Unit, while this Chamber ruled that the witness should be transferred into the control of the host-State, counsel for the witness sought judicial review of the detention. They requested the District Court of The Hague (sitting in Rotterdam) to declare itself competent as a habeas corpus judge in asylum matters and to rule on the issue of the on-going detention. Counsel for the witness argued, among other things, that the Netherlands should comply with Decisions and Orders from this Chamber and cooperate with the Court in good faith. The District Court of The Hague ruled, however, in favour of the defendant, the State, relying on the ICC Registrar's intervention in the proceedings. On 1 November 2011 counsel for the applicant submitted an appeal to the Council of State, the highest judicial organ in this type of cases; this appeal is still pending.

10. Lastly, counsel for the witness would like to inform the Court that a hearing at the District Court of Amsterdam will take place on 6 December 2011 on behalf of the other three Congolese witnesses. Counsel first lodged an administrative appeal with the immigration authorities and consequently with the administrative (asylum) court regarding the rejection to process the asylum request under national law. Counsel for the witnesses will further challenge the assertion of the immigration authorities that

the Netherlands has a choice in ignoring relevant ICC decisions and orders, and that it has a choice to apply national law or not. If there is indeed an obligation, as argued, to apply national law, their cases could not have been struck out in this manner and a national procedure should take place. Furthermore, the District Court will rule on a second issue which is the fact that the decision making process in their asylum procedure has already exceeded the national time limit without it even having been commenced. A decision by the District Court of Amsterdam is to be expected within six weeks, i.e. ultimately before 17 January 2012.

The 'extra-ordinary' quasi asylum procedure and the basic standards of an effective asylum procedure under international law

11. Counsel for the witness will limit their observations primarily to the requirements under the ECHR, rather than elaborate on the more specified provisions of the European Union's Qualification and Asylum Procedures Directives and the European Charter of fundamental rights or other international treaties. The reason is that the ECHR forms the back bone of the Common European Asylum System. In accordance with the European Court of Human Rights's standing jurisprudence, Article 13 "guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief" (see Chahal v. the United Kingdom, 15 November 1996, § 145, Reports of Judgments and Decisions 1996-V).
12. In the present case, where, inter alia, the material ECHR right at issue is Article 3, the European Court of Human Rights has specified that given the irreversible nature of the harm which might occur if the alleged risk of torture or ill-treatment materialised, and the importance which the European Court of Human Rights attaches to Article 3, the notion of an effective remedy under Article 13 requires the following: (i) independent and rigorous scrutiny of a claim that there exist substantial grounds for believing that there was a real risk of treatment contrary to Article 3 in the event of the witness's expulsion to the DRC, and (ii) a remedy with automatic suspensive effect (see, for instance, Muminov v. Russia, no. 42502/06 , § 101, 11 December 2008). See also

Jabari v. Turkey in which the European Court of Human Rights found that "the notion of effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned". The European Court of Human Rights came to the same conclusion in D. and others v. Turkey.

13. Counsel for the witness submit that the present procedure of protection which the Netherlands envisages does not given any certainty as to providing access to any judicial body, nor to a remedy with automatic suspensive effect. As a result, no judicial redress is guaranteed, if the Netherlands choses to reject the asylum application or not to grant any form of protection upon establishing a well-founded fear of persecution. The 'extra-ordinary' quasi asylum procedure gives the Netherlands complete discretion in the manner in which it will deal with the witness, following the establishment of the well-founded fear or that there exist substantial grounds for believing that there was a real risk of treatment contrary to Article 3 ECHR. Counsel would assert that there is no need or justification for this inferior treatment of the asylum request of the witness, especially as the current request can be processed whilst the witness is detained in a Dutch detention centre, Indeed many asylum requests are presently processed at specialised detention centres for asylum seekers. The reception conditions in these centres cater particularly for the specific needs of asylum seekers.
14. Counsel for the witness do not dispute the right of the Netherlands to make special provisions in order to deal with the specific issues involved with ICC witnesses but would like to reiterate that the manner in which the asylum procedure is conducted is prescribed by law and is in conformity with the national asylum law and thus within the requirements of Article 13.
15. What matters, however, is not the theory but the practice. As the European Court of Human Rights has found on numerous occasions, including in Salah Sheekh v. Netherlands, a remedy which is available in theory but which in practice has "virtually no prospect of success" or no judicial redress does not count as an effective remedy – neither within the meaning of Article 35 of the Convention nor within the meaning of Article 13. More recently, the European Court of Human Rights confirmed that a remedy must be "effective in practice as well as in law" (Abdolkhani & Karimnia v. Turkey).

16. The duty not to refoul, directly or indirectly, applies to all asylum-seekers whose status has not yet been determined. This incorporates any measure attributable to a State which could have the effect of returning a person to the place where he risks persecution. Counsel would assert, as further described below, that the situation in the DRC is such that the witness has prima facie met the threshold of an arguable claim. Such arguable claim should result in a rigorous scrutiny by the Dutch immigration authorities in a comprehensive asylum procedure as prescribed by law with an effective legal remedy in case of a rejection.

II Role of the Registrar

17. Counsel for the witness infer from the past conduct of the Registrar that she has from the beginning been opposed to enabling Witness 19 –and the other three Congolese witnesses- to apply for asylum in the Netherlands, and the effect this inevitably has on the return of the witness to the DRC. In the course of an oral hearing in the Katanga case dealing with the protection and asylum claims of the three witnesses in that case, representatives of the Registrar have strongly argued in favour of immediate return of the witnesses.[3] It has been stated on the part of the Registrar that '[t]he Congolese authorities can even claim that the Court has already violated their obligations vis-a-vis the Congolese authorities under Article 93 (7)'.[4] At that hearing, the Registrar also emphasised that '[t]he DRC is a state party and has been cooperating fully with the Court'.[5] Also the DRC itself underlined that for five years it has maintained excellent relations with the ICC Registrar, in its Observations to the Court from 22 August 2011.[6]
18. Counsel for the witness would like to put forward a number of substantiated assertions on the role of the Registrar, namely a) the Registrar has not properly consulted with the Dutch authorities, in the sense that she has not undertaken all possible efforts to persuade the Dutch authorities to comply with this Trial Chamber's Decisions and Orders, b) the Registrar has not informed this Trial Chamber properly of the consultations with the Netherlands, especially of the fact that the asylum application was considered sufficiently meritious to start a procedure for protection and of the

[3] ICC-01/04-01/07-T-258-ENG ET WT 12-05-2011, pp. 47 – 63.
[4] Id., p. 54
[5] Id., p. 47.
[6] ICC-01/04-01/07-3123-Anx1 23-08-2011, para. 6.

Dutch refusal to cooperate in good faith with the ICC in this matter, and c) the Registrar has informed in the course of ongoing litigation the Dutch national Court in an improper manner of this Trial Chamber's Decisions and Orders.

19. Counsel for the witness has not been present at the consultations between the Registrar and the Dutch authorities. However, we have received information on these consultations in the course of the asylum proceedings. To put it simply, the Dutch authorities appear to have taken the view that these consultations did not carry with them any urgent and direct request in relation to the four witnesses; in other words, the Dutch authorities were –and are- of the opinion that the position of this Trial Chamber could simply be ignored. In the asylum proceedings the Dutch authorities fully acknowledge that they have refused all cooperation in the context of the 'consultations'. While the term 'consultations' might be open to different interpretations, it must be viewed in light of this Chamber's clear and urgent Decisions and Orders. In fact, this Chamber's position can be simply summarised as follows: in case the Dutch authorities regard the asylum application as sufficiently meritious to start procedures –which is undeniably the case-, and on that basis the return of the witness to the DRC is suspended, the applicant must be transferred into the control of the Netherlands.[7] The 'consultations' between the Registrar and the Dutch authorities are the vehicle to reach that result. The Registrar should have made that crystal-clear to the Dutch authorities. This does not seem to have occurred, at least the Dutch authorities continue to portray in domestic proceedings the 'consultations' as a noncommittal and voluntary matter. Questions have been raised in Dutch parliament on 11 October 2011 about the treatment of the witness's asylum application by the Dutch government and the position that the Netherlands have taken in relation to the Decisions and Orders of the Court. In his recent answers of 16 November 2011 to Parliament, the Minister for Immigration and Asylum, mr Leers, does not mention the consultations with the Registrar, let alone the relevant Decisions and Orders from this Chamber (**annex 3**); this Ministerial reaction will be addressed in more detail below in respect of the current Dutch position.

20. It is submitted that the Registrar should have informed this Chamber in more detail on the Dutch position and that a more critical approach towards the host-State would have resulted in a more cooperative attitude on the part of the Dutch authorities,

[7] ICC-01/04-01/06-2785-Conf-tFRA 26-08-2011, reclassified as public on 12 September 2011, para 12. See also ICC-01/04-01/06-2804-Red 25-10-2011, para. 13.

possibly preventing the need for these amicus curiae observations. Until now, the Registrar has only referred to the letters of the Dutch Ministry of Foreign Affairs, which indicate the Dutch position.[8] We are not aware of any report in which the Registrar has provided this Chamber with a full account of the meetings in which the asylum matter was discussed. Counsel for the witness would suggest that , the Registrar should disclose the minutes or other notes of this meeting to this Trial Chamber, if necessary on a confidential basis in order to advance the decision-making by the Court.

21. Counsel for the witness would contend, in the light of the above, that in order to obtain the desired result of transfer of witness 19 into the control of the host-State, the Registrar should have critically inquired with the Dutch authorities on their substantive grounds justifying refusal of cooperation and should have insisted on concrete answers and explanations, at least on the following issues.

22. First, it is clear on the basis of Orders and Decisions from this Chamber that ongoing proceedings in the Netherlands triggered by witness 19's asylum application which result in deferring the departure of witness 19 –or even annulling such departure altogether- must result in transfer of the witness to the Dutch authorities. The obvious question to be put by the Registrar to the Dutch authorities during the consultations is thus whether indeed a procedure has started that results in deferring the departure of the witness. The only answer possible is that a procedure of protection triggered by the asylum request has started –but that there is litigation pending on the nature and scope of these proceedings, as explained above-. In his recent Letter to Dutch parliament the Minister for Immigration and Asylum also confirmed the existence of an ongoing procedure (**annex 3**, p. 2). Clearly, this ongoing procedure –in which the investigating stage has not been reached -, implies that witness 19's departure to the DRC must be suspended for now and may in the future never materialise.

23. Moreover, the Registrar could have requested adequate reasons on the part of the Dutch authorities if and why it is required –from the perspective of Dutch law- that all applicants remain detained at the ICC detention unit throughout their asylum/protection procedure rather than transfer them to one of several specialised detention asylum centres. We can inform this Chamber that no such reasons has been brought forward by the Netherlands either in or out of national court.

[8] ICC-01/04-01/06-2801-Conf-Anx2 30-08-2011, reclassified as public on 12 September 2011, annexed to a report of the Registrar.

24. Another issue which has not been addressed is that the Registrar could have asked the Dutch authorities to give an estimation of the duration of the procedure and should have requested them if there would be a point in time –for example after a certain number of months- in which the Dutch authorities would be prepared to take over the control over witness 19 .

25. Finally, the Registrar could have inquired about relevant Dutch law and documents on the legal position of ICC witnesses asking for asylum; if she would have done so, she would have been provided with the Ministerial Letter of 2002 –already cited above and attached in **annex 4** - in which the Dutch national asylum procedure has been deemed by the government itself as fully accessible to ICC-witnesses.

26. If these important matters would have been properly addressed in the consultations and would have comprehensively been reported to this Chamber, the Court would have been far better informed at a much earlier stage, instead of having to learn about these matters by means of amicus curiae observations or by other means. Hence counsel for the witness would conclude that the nature and duration of the Dutch procedure related to witness 19 may not have been addressed at all in the consultations between the Registrar and the host-State, or were not reported to this Chamber.

27. The second issue counsel for the witness would like to draw attention to is the intervention of the Registrar in ongoing litigation before Dutch Courts. The relevant Decision of The Hague District Court (sitting in Rotterdam) of 27 October 2011 has already been attached as annex to our Application for Leave of 31 October.[9] At the request of the immigration authorities, the Registrar has drawn up a document clarifying certain matters related to the witnesses' ongoing detention at the ICC.[10] The document prepared by the Registrar was produced the day before the public hearing. One can conclude from the Decision taken by The Hague District Court that this document prepared by the Registrar played an important –if not decisive role- in the outcome of this procedure.[11] The matter is currently the subject of appellate proceedings, as was already mentioned above. Both the content and the manner in

[9] ICC-01/04-01/06-2816-Anx 1 01-11-2011.
[10] For sake of transparency, counsel for witness 19 in the Dutch asylum proceedings have also contacted the Registrar and have –by email- received summary information in respect of the witness's Detention situation. However, this information did not reach the status of an official report and/or clarification, as was produced by the Registrar at the request of the Dutch authorities.
[11] Id., para. 3.3.3 of the Decision.

which the documents was used, warrants bringing forward the following observations.

28. First, it is clear –and not disputed in the proceedings before the Hague District Court- that the said document was created solely at the request of the Dutch State in support of its position in proceedings against witness 19. It must also have been clear to the Registrar that such an official document, especially when adduced into evidence by the State, is likely to play an important role in national proceedings. For ordinary national administrative courts the ICC law and case law are highly complex and not easily accessible. Counsel for the witness have observed that the District Court gladly make use of a simple, short and recent document, even preferring its use over the original Trial Chamber decisions and orders. National courts may also not be fully aware of the exact meaning of all the terminology that the Court uses and also not aware of the internal structure of the ICC. In addition there is the –unfortunate- risk of confusion in that views and positions of the Registrar tend to be regarded as the official position of 'the Court', even in its sense as a judicial organ. The Registrar should have been aware of these risks and problems and should have been more cautious in providing one of the parties in ongoing litigation with an official document indicating the official position of the Court, or which can be perceived as such.
29. The Registrar's intervention in this way is the more puzzling in light of the matter in litigation. It must have been clear to the Registrar –at least she should have inquired into the matter when requested to support the position of the Dutch State- that the ultimate aim of the relevant proceedings initiated by witness 19 was to seek enforcement of this Chamber's Decisions and Orders; The Hague District Court was requested to end the ICC detention of witness 19 by ordering the Dutch authorities to take over the control over the witness, which s had been after all the object and purpose of Orders coming from this Chamber.[12] It is estranging to observe that the document of the Registrar has been used in support of the Dutch State in these proceedings and has been instrumental in continuing witness's 19 detention at the ICC, whereas this Chamber has provided the Registrar with clear instructions to obtain the exact opposite result.
30. It is also in light of these clear instructions coming from this Chamber, that counsel for the witness would like to bring forward a number of observations regarding the content of the Registrar's document. Firstly , the document fails to mention relevant

[12] See *supra* note 7.

important information related to the consultation process, such as the fact that the Dutch State has persistently and without any valid reason refused to cooperate with the Court in taking over the control over witness 19. The document secondly provides an –in our view- incorrect analysis of the title of witness 19's detention and the respective approaches of Trial Chambers I and II. Regarding the title of detention it is stated in the note that the witness is detained at the ICC 'under the exclusive authority of the DRC'. However, this statement fully ignores this Trial Chamber's ruling of 5 August 2011 that in case 'the applicant has presented a sufficiently meritious 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*' (emphasis added).[13] In light of this ruling, the Registrar could not have bluntly stated with certainty that witness 19 is still detained at the ICC on the basis of a Congolese title of detention. This statement may have have misled the Dutch Court.

31. The Registrar has also, in our view, misrepresented the position of this Chamber when it is stated that 'the ICC judges have, at no stage, issued any decision requesting the Host State to assume the custody of the four detained witnesses' (annex , to Application for Leave, p. 1). This Chamber by contrast has ordered consultations between the host-State and the Registrar with one objective only, to ensure that the host-State assumes custody over witness 19. To simply conclude, as the Registrar did, that there is no such decision does not do justice to the clearly formulated and unequivocal instructions coming from this Trial Chamber.
32. In conclusion on the role of the Registrar, counsel for the witness would contend that the office of the Registrar has not adequately advanced the situation of the four witnesses and their asylum applications. It is hard to establish whether genuine efforts were undertaken to implement the Decisions and Orders from this Chamber. Moreover, counsel would argue that the Registrar has in fact underermined the proper and prompt implementation of this Chamber's Decisions and Orders by intervening in Dutch Court proceedings in support of the party that has persistently refused to cooperate in good faith with the Court in the resolution of this matter.

III Position of the host-State and use of the ICC Detention Unit to deprive Witness 19 of the protection under Dutch law

[13] ICC-01/04-01/06-2766-Red 05-08-2011, para. 88.

33. In its interactions with the ICC, the host-State has repeatedly indicated that the asylum applications of the four ICC-witnesses can only be processed as long as they remain detained at the ICC Detention Center.[14] It is clear that only as a result of this position witness 19 is still detained at the ICC Detention Unit..
34. With reference to the observations above, counsel acknowledges that this Trial Chamber cannot pass judgment on the manner in which the Netherlands organizes the asylum proceedings in these Congolese cases. However, the Trial Chamber has emphasized the importance of real and effective asylum proceedings, instead of them being merely theoretical and illusory.[15] Hence the Court appears concerned that procedures are effective. As a result, this Chamber also has an interest in knowing whether the Dutch authorities have organized, acting in good faith, genuine asylum proceedings.
35. The manner in which the Dutch authorities have handled the asylum applications has been described in detail in the first part of these Amicus Curiae observations. It seems obvious from the overview of the procedure until now and it is the contention of counsel that the Dutch authorities insist on continuing detention of the witnesses at the IC Detention Unit with a view to deliberately depriving them of the protection under Dutch law. There is no other objective explanation, let alone justification. The question therefore for this Chamber to consider is whether it is prepared to accept this type of abuse of ICC detention facilities, especially in light of the bad faith refusal on the part of the Netherlands to cooperate with the Court in this matter.
36. It is clear and has not been contested that there is a sufficiently meritious asylum application. This notion is also recognized by the Netherlands, in the sense that some sort of protection procedure is put in place, and that hearings are scheduled within the ICC Detention Unit for the end of November and the month of December. This Chamber has already indicated –and rightly so- that such procedures have no place at the ICC Detention Unit. Indeed, the ICC Detention Unit should not serve as the asylum and refugee center for the Dutch authorities. Moreover, it is an untenable situation for the long term. The witnesses have been detained for about 8 months at the ICC Detention Center, a very long period, which –as was recognized by this Chamber in its Decision of 5 August 2011- cannot continue. It must in this respect be borne in

[14] ICC-01/04-01/06-2801-Conf-Anx2 30-08-2011, reclassified as public on 12 September 2011.
[15] ICC-01/04-01/06-2766-Red 05-08-2011, para. 86.

mind that as a result of the position and conduct of the Dutch authorities we have not even managed to properly start the (asylum) procedure. In fact, the Dutch authorities until this day still have to be informed about the substantive security risks and foreseeable human rights violations awaiting the four witnesses in the DRC. The decision-making process, including appeals and other forms of review, when necessary, risks to be of considerably long duration.

37. On 16 November, the Dutch Minister for Immigration and Asylum, mr Leers, offered the official Government in response to questions from members of parliament related to the asylum requests from the four witnesses (**Annex 3**). Regrettably, he has rather selectively and thus inadequately informed Dutch parliament in a number of respects. In his answer to questions 2, 4, 6 and 8 the Minister does not provide an accurate and even-handed interpretation of the respective positions of Trial Chambers I and II. There is no reference to this Chamber's rulings that the control over witness 19 should be transferred to the host-State. The Minister makes it seem as if the ICC has not adopted at all a series of important decisions and orders and as if the Dutch authorities have not been requested in any manner to cooperate with the Court in the transfer of witnesses. Furthermore, the position of the Minister is both legally and factually incorrect when he claims that this Court has ruled that the witnesses must return to their DRC after their testimonies; the purpose of the ongoing (asylum) procedures is to find out whether such return should materialise or not. In other words, contrary to the Dutch position, the return of the witnesses to the DRC is still uncertain at this stage and fully depends on the outcome of the Dutch asylum procedure. Another problem is that the Minister informed parliament that the witnesses are on trial in the DRC. As will be further explored below, the witnesses have been detained for 6 and a half year, without any form of process. Their detention is exemplary of the nature and scale of human rights violations in the DRC, but has nothing or little to do with a proper criminal trial. Finally, it is worth noting that the Minister makes reference to the Ministerial Letter of 2002, which indicates the official Dutch position on 'ICC and asylum', which we have attached as **annex 4** to these observations. Plainly, the statement of the Minister is not accurate when he indicates that the approach in the present situation is consistent with the Ministerial Letter of 2002. As already indicated above, this Letter opens the ordinary asylum procedure to witness 19 and does not mention the detention condition as barring the witness from a national asylum procedure.

38. In light of the Dutch refusal to cooperate in good faith with the Court in respect of witness 19's asylum application, it is understandable that this Chamber might have started to lose its patience and has ordered the return of the witness to the DRC.[16] It is respectfully submitted that the witness should not be returned to the DRC.
39. The problem is that the return of the witness to the DRC as envisaged by this Chamber is based on two premises which are problematic. First, contrary to what appears to be the perception of this Chamber, there is a meritious asylum application submitted to the Dutch authorities, in the sense that proceedings have started, and this asylum application results in deferring the departure of witness 19 to the DRC; the issue is that the Dutch authorities wish to hold these proceedings within the ICC Detention Unit. Instead of ending these proceedings altogether, it might be useful to explore the possibilities of increasing the efforts to remove these proceedings from the ICC Detention Center. Second, the other premise appears to be that from the perspective of the ICC, the witnesses can still be safely sent back to the DRC. However as it will be demonstrated below, this is not or no longer the case, these witnesses face –as a result of their testimonies- still great security risks. Assurances provided by the DRC in this respect have no value, as a recent serious incident demonstrates.
40. Counsel would like to suggest that there are alternatives to ordering the return of witness 19 to the DRC. These alternatives will do more justice to the case at hand and will result in the removal of witness 19 from the ICC Detention Center, while ensuring his right to an effective asylum procedure and also ensuring his return to the DRC in case his asylum application is rejected. We will offer and discuss these alternatives below, under the heading 'reflection on further steps'.

IV Title of Witness 19's Detention

41. It is still a matter pending before Dutch Courts what precisely is currently the title for the detention of witness 19. Pursuant to Article 88 of the Dutch law on cooperation with the ICC (*Uitvoeringswet Internationaal Strafhof*), Dutch *habeas corpus* protection is not applicable to persons who are detained at the ICC Detention Unit on the basis of an ICC title of detention. In case such title no longer exists –or if its existence is obscure- the individual concerned, being detained on Dutch territory,

[16] ICC-01/04-01/06-2804-Red 25-10-2011.

comes within the *habeas corpus* protection of both Article 15 of the Dutch Constitution and also Articles 1 and 5 of the European Convention of Human Rights.

42. This Chamber has already in its Decision of 5 August 2011 indicated that the ICC will have no continuing power to detain witness 19.[17] However, the Registrar has maintained in its declaration to the Dutch Court that witness 19 is currently detained on the exclusive authority of the DRC.[18] There is thus uncertainty in respect of the current title of detention of the r witnes.
43. It is our position that in case a witness is not immediately returned to the country of origin because of a sufficiently meritious asylum application –as is the case here- there is reason to reconsider carefully continuing detention at the ICC Detention Unit. Indeed, the mechanism of Article 93 (7) of the ICC Statute is based on the envisaged and ordinary situation of immediate return. When such return cannot be materialized because of –among other things- the human rights situation in the sending State, this unique scenario calls for reconsideration of the original title of detention.
44. In respect of such reconsideration it is inevitable that the detaining institution –the ICC- no longer fully relies on the *de facto* detention in the DRC, but also reviews the substantive factual and legal basis of such detention. Pursuant to Article 9 of the ICCPR also the ICC itself must in these unique circumstances be satisfied that the witnesses continue to be detained in accordance with the law. It is in this light imperative to inquire whether witnesses were lawfully detained in the DRC. If the Congolese title of detention has served –and continues to serve- as the basis for months of detention at the ICC Detention Unit, its legality needs to be ascertained.
45. Three of the four Congolese witnesses, currently detained at the ICC Detention Unit, including witness 19, have been detained in the DRC since March 2005 –and since March 2011 at the ICC Detention Unit-, on unsubstantiated charges, for which they have never seen any evidence. Their arrest and detention is in violation of Article 9 of the ICCPR and Article 5 of the ECHR. This is best exemplified by the fact that in April 2007 the competent Military Court in the DRC has prolonged for the last time the detention of the three witnesses, for a period of not more than 60 days. There has never been any prolongation of detention since that date. The witnesses have tried to plead their cause with lawyers and politicians, but without any success. Three of the Congolese witnesses have been detained for almost four and a half years, without any

[17] ICC-01/04-01/06-2766-Red 05-08-2011, para. 88.
[18] ICC-01/04-01/06-2816-Anx 2 01-11-2011.

title. It is submitted that this Court cannot be associated –under the present circumstances of a meritious asylum application- with continuation of this blatant violation of Article 9 of the ICCPR.

46. It is not uncommon that the DRC authorities incarcerate without proper process individuals –especially political opponents- for very long periods. There is case law from the ICCPR's Human Rights Committee in which –without much ado- the DRC was held to have violated Article 9 of the ICCPR in an identical situation, although the period of detention was considerably shorter.[19] In that case, the Committee said that '[i]n general, the detention of civilians by order of a military court for months on end without possibility of challenge must be characterized as arbitrary detention within the meaning of article 9, paragraph 1, of the Covenant.'[20]

47. Also other sources confirm a relative widespread practice of arbitrary arrest and detention within the DRC. For example, in the United States country report on the DRC it is said that '[t]he law prohibits arbitrary arrest or detention; however, state security forces routinely arbitrarily arrested and detained persons', and it is confirmed that there were at least 200 political prisoners in detention in the DRC at the end of 2009.[21]

48. Counsel for the witness would like to seek the opportunity to inform this Chamber that the three ICC witnesses have prepared a complaint against the DRC for the many years of unlawful detention, to be filed with the Human Rights Committee. This complaint is attached to these amicus observations, as **annex 5** and it can inform this Chamber in more detail about the violation of Article 9 of the ICCPR by the DRC in respect of the Congolese witnesses. We wish to underline that, because of the urgency of the situation, we have not exhaustedly dealt at this stage in our complaint with human rights violations, other than covered by Article 9 of the ICCPR. However, as will be submitted and substantiated in the asylum procedure, they have been the victim –and risk to become again the victim upon return- of other human rights violations as well.

49. The absence of a valid title for the witnesses' detention, even worse the fact that the witnesses have been the victim of serious violation of Article 9 of the ICCPR, should have consequences for this Chamber's future decisions and orders on the detention of

[19] *Willy Wenga Ilombe and Nsii Luanda Shandwe v. Democratic Republic of the Congo*, Communication No. 1177/2003, U.N. Doc. CCPR/C/86/D/1177/2003 (2006).
[20] Id., para. 6.5.
[21] See http://www.state.gov/g/drl/rls/hrrpt/2010/af/154340.htm, consulted on 22 November 2011.

the witnesses at the ICC Detention Unit. We will offer our concrete suggestions below.

V Increasing Security Threats in the DRC

50. We are aware of the efforts of the respective Trial Chambers to put in place protective measures, applicable in case of the witnesses' return to the DRC. Upon request of Trial Chamber II and after consultations with the Registrar, the DRC offered a number of assurances and guarantees in respect of the protection of the three witnesses in the Katanga case.[22] Trial Chamber II was satisfied with these assurances, in the sense that '[t]he conditions for the return of the three detained witnesses have now been fulfilled'.[23] However, Trial Chamber II also explicitly ruled that '(...) the current finding that the requirements of article 68 of the Statute have been met is limited to risks related to the cooperation of the witnesses with the Court'.[24] Also in the present case the Registrar has submitted in a report similar assurances and guarantees on the part of the DRC.[25]
51. The witness appreciates the difference between the Court's protective role under Article 68 and the broader scope of the ongoing (asylum) procedure in the Netherlands. Nevertheless, there is reason to reconsider the acceptance of the Congolese assurances as a result of a recent incident of intimidation and physical attack against the family members of one of the witnesses.
52. Before offering to this Chamber the facts that have been reported to us, counsel would first like to make a few observations on the danger of being satisfied too easily by Congolese assurances. In general, on the basis of standard human rights case law, it becomes apparent that states –and also the ICC- should exercise a great deal of caution in accepting verbal assurances. The European Court of Human Rights has in this regard in the case of *Saadi v. Italy* ruled that : '(...) it should be pointed out that even if, as they did not do in the present case, the Tunisian authorities had given the diplomatic assurances requested by Italy, that would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the

[22] ICC-01/04-01/07-3123-Anx1.
[23] ICC-01/04-01/07-3128 24-08-2011, para. 13.
[24] Id., para. 14.
[25] ICC-01/04-01/06-2804-Red 25-10-2011.

risk of treatment prohibited by the Convention (see Chahal, cited above, § 105). The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time.'[26]

53. Counsel for the Iwitness would submit that the relevant circumstances in relation to the DRC are that a) it has a deplorable human rights record; for a number of decades it has violated on a large scale fundamental human rights and there is no sign of improvement; b) the DRC has a reputation for specifically targeting political opponents, like the four Congolese witnesses currently detained at the ICC Detention Unit. Upon request from this Chamber counsel for the witness can submit the relevant reports and evidence relating to human rights abuses in the DRC in detail which has been collected for the asylum procedure.
54. An additional relevant circumstance is that three of the four witnesses have been unlawfully detained in the DRC for many years now, as has been indicated above and which is analysed in detail in **annex 5**.
55. Besides these general concerns in respect of the Congolese assurances, we have received detailed information on continuing threats and attacks on family members of the four witnesses, on account of their testimony given at the ICC. The four Congolese witnesses and their families have been and continue to be the victims of threats, intimidations and physical attacks by the Congolese authorities. One of the witnesses' wife had already been threatened twice in the town of Mongwalo, by individuals belonging to Kabila's party and regime; the attackers have specifically referred to the role and current position of the witnesses at the ICC.
56. A very recent incident confirms the gravity of the risks in the DRC, and illustrates that the assurances provided by the Congolese authorities in respect of the witnesses' security have no value. We have received detailed information that on 5 November 2011 four soldiers of the Congolese army, FARDC, in the town of Mongwalo violently entered the home of one of the witnesses. As a result of the acts of violence in the course of this attack, Freddy Imbala -a boy of around 13 years of age and a family member of one of the witnesses, who was at the time of the attack present in his home- died in the hospital of Goma on or around 11 November 2011.
57. In light of the aforementioned incident, this Chamber is urgently requested to reconsider the assurances of the DRC and to urgently request the DRC to refrain from intimidation, threats and attacks against family members of the four witnesses. There

[26] Saadi v. Italy, ECtHR 28 February 2008, appl.no, 37201/06, para. 148.

can, in our view, no longer be any serious doubt that the witnesses cannot be sent back to the DRC, also not from the perspective of Article 68 of the Statute.

VI Reflection on Further Steps

58. Counsel for the witness would like to offer some suggestions on further steps to be taken in this case. The observations below are by no means a complete analysis, and as was already indicated in our Application for Leave, we are available to elaborate our views and to provide the Chamber with further information, either at a hearing or in writing.
59. We are fully aware of the complexities of this case, which involves three actors, the DRC, the ICC and the host-State. It is the perception of our clients that, with the exception of this Chamber and the Katanga Chamber, none of the State actors involved have demonstrated in practice to care about their well-being and security. They increasingly feel they are the victims of political manipulation among different actors. They have taken significant risks –and still do so- by assisting the Court with their testimonies, but increasingly regret having done so. The Congolese witnesses have communicated to counsel that they suffer physically and mentally from their present situation of great uncertainty and detention, which lasts for months and months.
60. The r views below are based on the need to find the most expeditious and most practical solution, which does justice to both witness 19's obvious need for protection and his arguable asylum claim as well as the legitimate interests of the State actors. Moreover, counsel would like to take as the starting point that a Dutch procedure for protection –whether or not this will materialize into a full asylum procedure- has been initiated and that it is most practical to concentrate on that procedure. It is also relevant for finding a solution that the four witnesses have not been lawfully detained for more than four years in the DRC and that there is also no longer any title for their continuing detention at the ICC Detention Unit.
61. In light of the foregoing, this Chamber is urged to order the immediate release of Witness 19. Clearly, under these unique and exceptional circumstances, there is no applicable law in the ICC's legal framework governing this particular type of release. What is important, is the human rights standard –also incorporated in Article 21 (3) of the Statute- that without a proper basis, any form of detention should promptly be

ended . We will deal next with the respective positions and views of the Netherlands and the DRC.

62. The Netherlands might not appreciate an order for the Witness's immediate release. However, we would like to advance the following reasons which should outweigh any anticipated objection on the part of the host-State. First, it is not a requirement for any order of release that the host-State accepts the released person; it is an inevitable consequence of serving as the host-State for international criminal tribunals that one may be confronted with released persons. Furthermore, by having initiated procedures for the protection of Witness 19, the host-State has accepted the presence of Witness 19 on its territory. In other words, it is unreasonable to use the ICC's Detention Unit to conduct further asylum procedure. It is therefore also impossible for the Dutch authorities to maintain that they would be compelled by the Court to accept an 'illegal alien'. The very nature of ongoing (asylum) procedures establishes a connection with the host-State, fully justifying the release of the witness into Dutch territory. Another consideration might be that the lack of good faith cooperation on the part of the host-State and its abuse of the ICC Detention Unit also leaves this Chamber no other choice than to release the witness.

63. In case of an order for the release of the witness, there are possibilities –as was already mentioned- for the Dutch authorities to order the detention of the asylum seeker on the basis of Dutch asylum law. Counsel for the witness will gladly liaise with the Dutch authorities to determine if they wish to make use of this possibility. If this is not the case, counsel will ensure that the witness is transported privately from the ICC Detention Center and delivered to the designated asylum center. The witness has in addition expressed his keen desire to cooperate in respect of any condition accompanying a possible order for release.

64. To the extent that this Chamber might be worried about fulfilling the duty to return the witness to the DRC in case of a rejection of the asylum application of the witness, we can provide the following information. There is an increasingly strict Dutch policy to expel any illegal alien on its territory. We are confident that especially in this situation rejection of the asylum application will trigger the witness's immediate expulsion to the DRC, in particular if the detnion is maintained under national (alien) law. By doing so the suspended obligation under Article 93 (7) of the ICC Statute will also be met.

65. In respect of the position of the DRC, it can be mentioned that release from the ICC Detention Unit by no means implies that the witness is outside the control of the ICC and the Dutch authorities. As was already mentioned, rejection of the asylum application will result in the expulsion of the witness to the DRC and should thus also satisfy any legitimate concern on the part of the DRC.
66. Should this Chamber decide that the witness is to remain in the custody of the ICC throughout his asylum/protection procedure, we would urge it to deal with a number of problems occasioned by this detention. To start with, the Dutch authorities have as a result of the ongoing detention of the witness at the ICC Detention Unit not undertaken any effort to ensure his presence at court hearings in his asylum procedure. Our client has a keen desire to be present at such hearings. This Chamber is requested to order the Registrar to assist in ensuring the presence of witness 19 at Dutch court hearings.
67. Another problem we are facing is that the four witnesses are detained for 8 months and deeply miss their families. Indeed, they are very much isolated in their detention and receive to our knowledge no visits. If they are going to be continued to be detained it seems to us that –like other ICC-detainees- they are entitled to support from the Court in ensuring family visits. In case of continuing detention this Chamber is therefore requested to order the Registrar to assist witness 19 in ensuring family visits.
68. Finally, and needless to say, the witnesses are deeply concerned about the security of their families within the DRC and request this Chamber to urge the DRC to refrain from any intimidation, threats or attacks against their families.

Conclusion

69. On the basis of the above, we respectfully observe and recommend the Trial Chamber to do the following:

a. Annul –in the interests of the well-being and security of the witness, and as a result of ongoing proceedings in the Netherlands for the 'protection' of witness 19- the order for the return of Witness 19 to the DRC;
b. Order the release of witness 19 from the ICC's Detention Unit, if necessary with conditions.

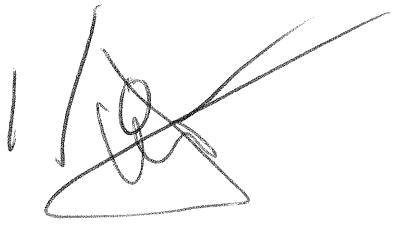
In case Witness 19 remains detained at the ICC Detention Unit

c. Order the Registrar to make available for hearings in Dutch court proceedings witness 19 and to assist in his transfer to such hearings, and –if necessary- order the temporary release of Witness 19 to that effect;
d. Order the Registrar to assist in arranging family visits to Witness 19;

In relation to the security and protection of the family of Witness 19

e. Urgently request the Democratic Republic of Congo to put an immediate end to intimidation, threats and killings of family members of the Congolese witnesses who have sought asylum in the Netherlands, to bring to justice those responsible for such actions and to offer adequate compensation to the victims.

Respectfully submitted,



Philip-Jan Schüller

Göran Sluiter

Dated this 23 November 2011
At Amsterdam, The Netherlands

ANNEX 1

Immigratie- en Naturalisatiedienst
Ministerie van Binnenlandse Zaken en Koninkrijksrelaties

INGEKOMEN - 7 JUNI 2011

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Unit	1SZ
Doorkiesnummer(s)	070 - 779 5275
Datum	1 juni 2011
Uw verzoek	30 mei 2011
Uw kenmerk	20110590
Betreft	Ndjabu Ngabu, Mbodina Iribi en Manda Ndadza Dz'na

Geachte heer Schüller,

Hierbij bevestig ik u de ontvangst van uw brief van 30 mei jl. waarin u verzoekt voor 3 juni 2011 schriftelijk te bevestigen of de door bovengenoemde vreemdelingen ingediende asielaanvraag in behandeling wordt genomen en op welke wijze invulling gegeven zal worden aan het vervolg van de procedure.

Zoals bij u bekend is door Nederland tijdens de zitting op 12 mei jl. van de Strafkamer van het Internationaal Strafhof (ISH) een uitleg gegeven wat de juridische positie is van getuigen in Nederland, in welke mate Nederland rechtsmacht over hen uitoefent en wat hun asielrechtelijke positie in Nederland is. Gesteld is dat het aan het ISH is om te beoordelen of het veilig is voor getuigen om terug te keren (eventueel onder beschermende maatregelen). Het oordeel van het ISH is bepalend voor de vraag of Nederland uw verzoek als een asielaanvraag zal moeten behandelen. Daarbij is opgemerkt dat het voor Nederland hierbij van belang is dat het ISH in ruime zin toetst of het veilig is voor de getuigen om terug te keren. Daar het nog niet duidelijk is hoe het ISH hierover denkt acht ik het voor het innemen van een definitief standpunt van belang het standpunt van het ISH af te wachten.

In aanvulling op het voorgaande wijs ik u, wellicht ten overvloede, ter informatie op de brief van de toenmalig Minister van Justitie aan de voorzitter van de Tweede Kamer der Staten-Generaal d.d. 3 juli 2002 betreffende de uitvoering van het Statuut van het Internationaal Strafhof (Tweede Kamer, Vergaderjaar 2001-2002, 28 098 (R1704) en 28 099, nr. 13).

Voorts heeft het ISH op 24 mei jl. een beslissing genomen betreffende het verzoek van getuigen om aanvullende beschermingsmaatregelen. In deze uitspraak wordt, onder verwijzing naar rechtsoverweging 33, de Victims and Witnesses Unit (VWU) opgedragen nader onderzoek te plegen over eventuele aanvullende beschermingsmaatregelen. De resultaten van dit onderzoek dienen voor 7 juni 2011 aan het ISH te worden gecommuniceerd waarna een nader oordeel zal plaatsvinden. Daarnaast geeft het ISH, onder verwijzing naar rechtsoverweging 36, aan zo spoedig

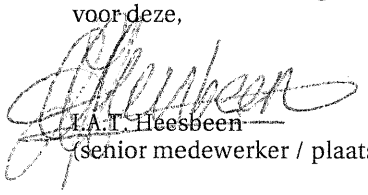
mogelijk met een reactie te komen op het door getuigen ingediende verzoek om gepresenteerd te worden bij de Nederlandse autoriteiten voor het indienen van een asielverzoek.

Gelet op het voorgaande deel ik u mede dat ik, in navolging op mijn eerdere brieven, daarom nog altijd geen definitieve uitspraak kan doen over uw verzoek.

Ik vertrouw erop u hiermee voldoende te hebben geïnformeerd.

Hoogachtend,

de Minister voor Immigratie en Asiel,
voor deze,



I.A.T. Heesbeen
(senior medewerker / plaatsvervangend unitmanager)

ANNEX 2

Immigratie- en Naturalisatiedienst
Ministerie van Binnenlandse Zaken en Koninkrijksrelaties

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Unit	1SZ
Doorkiesnummer(s)	070-7795275
Datum	
Dossiernummer	1107-13-1342 / 1107-13-1353 / 1107-13-1356 / 1107-13-1346
V-nummer	275.812.4753 / 275.812.5201 / 275.812.5347 / 275.812.4924
Uw brief	28 september 2011
Uw kenmerk	20110685
Betreft	Bede Djokoba Lambi Longa, geboren op 27 mei 1966, Pierre Celestin Mbodina Iribi, geboren op 5 september 1974, Charif Manda Ndadza Dz'na, geboren op 6 juni 1974 en Floribert Ndjabu Ngabu, geboren op 23 mei 1971, allen van Congolese nationaliteit.

Geachte heer Schüller,

Naar aanleiding van uw brief d.d. 28 september jl, deel ik u het volgende mede.

In uw brief geeft u aan dat u al sinds mei bezig bent om duidelijkheid te verkrijgen over de te voeren procedures inzake bovengenoemde vreemdelingen. U verwijt de Immigratie- en Naturalisatiedienst (verder IND) onzorgvuldig en onbehoorlijk handelen daar geweigerd wordt om informatie te geven over de juridische kaders en de feitelijke modaliteit waarbinnen de procedure plaatsvindt. U vraagt mij z.s.m. te reageren.

Allereerst bied ik u mijn excuses aan voor de verlate reactie.

Daarnaast deel ik u mede dat uw klacht binnen de daartoe geldende termijnen zal worden behandeld. Ik stuur u hieromtrent zo spoedig mogelijk een ontvangstbevestiging met een klachtnummer.

Voorts deel ik u mede dat ik in mijn brief d.d. 26 september jl. heb aangegeven dat betrokkenen zich niet in de rechtsmacht van Nederland bevinden. Gelet hierop zijn de aanvragen van betrokkenen niet langer aangemerkt als asielaanvraag maar als verzoeken tot bescherming daar de Nederlandse asielprocedure hier niet van toepassing kan zijn. Dit betekent dat een, zoals u het noemt, niet-Nederlandse asielprocedure gestart zal worden. Inzake de verzoeken tot bescherming zal door de Nederlandse staat getoetst worden aan het refoulementverbod zoals dat voorvloeit uit internationale verdragen als het Vluchtelingenverdrag en (artikel 3 van) het

EVRM, daarbij vanzelfsprekend rekening houdend met de omstandigheid dat betrokkenen zich thans niet in de Nederlandse rechtsmacht bevinden.

Om deze toetsing op juiste wijze te kunnen verrichten is het noodzakelijk nadere informatie te verzamelen. In dat kader willen we betrokkenen horen. Het eerste gesprek (met de heer Iribi) hieromtrent staat, zoals bij u bekend, gepland voor morgen. Tijdens dit gehoor zal onder andere gevraagd worden naar identiteit- en nationaliteitsgegevens, naar eventuele familieleden en carrièreverloop. Mogelijk dat betrokkene, afhankelijk van de beschikbare tijd, tevens in de gelegenheid gesteld worden te verklaren over de gestelde vrees bij terugkeer naar het land van herkomst. Vanwege de beschikbare tijd valt te voorzien dat een tweede gesprek in de rede ligt. In dit tweede gesprek zullen nadere vragen worden gesteld. U wordt daarna in de gelegenheid gesteld correcties en aanvullingen in te dienen alvorens een besluit genomen zal worden.

Ik vertrouw erop u hiermee voldoende te hebben geïnformeerd.

Hoogachtend,

de Minister voor Immigratie en Asiel,
voor deze,

(senior medewerker)

ANNEX 3

Tweede Kamer der Staten-Generaal

2

Vergaderjaar 2011–2012

Aanhangsel van de Handelingen

Vragen gesteld door de leden der Kamer, met de daarop door de regering gegeven antwoorden

674

Vragen van de leden **Spekman** en **Timmermans** (PvdA) aan de ministers voor Immigratie en Asiel en van Buitenlandse Zaken over *de weigering door Nederland om op instigatie van het Internationaal Strafhof vier Congolese getuigen toe te laten tot de Nederlandse asielprocedure* (ingezonden 11 oktober 2011).

Antwoord van minister **Leers** (Immigratie en Asiel), mede namens de ministers van Buitenlandse Zaken en van Veiligheid en Justitie (ontvangen 16 november 2011)Zie ook Aanhangsel Handelingen, vergaderjaar 2011–2012, nr. 534.

Vraag 1
Heeft u kennisgenomen van het artikel «Getuigen ICC uit asielprocedure geweerd»?[1]

Antwoord 1
Ja.

Vraag 2, 4, 6 en 8
Klopt het dat deze vier Congolese getuigen niet zijn toegelaten tot de Nederlandse asielprocedure? Klopt het dat de Immigratie- en Naturalisatiedienst(IND) eerder heeft aangegeven dat deze vier Congolezen wel tot de asielprocedure zouden worden toegelaten? Klopt het dat het Internationaal Strafhof Nederland meerdere malen heeft opgedragen deze Congolezen in de asielprocedure op te nemen? Waarom worden deze vier getuigen niet toegelaten tot de Nederlandse asielprocedure?
Deelt u de mening dat Nederland, door de uitspraak van het Internationaal Strafhof te negeren, de internationale rechtsorde schoffeert?
Wat is de rol van het ministerie van Buitenlandse Zaken in het, na een eerdere toezegging van de IND om de Congolezen wel toe te laten tot de Nederlandse asielprocedure, nu niet toelaten van de Congolezen?
Bent u bereid de uitspraak van het Internationaal Strafhof alsnog te respecteren en de Congolezen alsnog toe te laten tot de Nederlandse asielprocedure?

[1] Telegraaf, 6 oktober 2011
http://www.telegraaf.nl/binnenland/10675322/__Getuigen_ICC_geweerd__.html?sn=binnenland

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Antwoord 2, 4, 6 en 8
Het is niet juist dat het Internationaal Strafhof (hierna «ISH» of «Hof») Nederland heeft opgedragen de vier Congolese getuigen in de Nederlandse asielprocedure op te nemen. Het Hof heeft bepaald dat deze gedetineerde getuigen na afloop van hun getuigenis dienen terug te keren naar de Democratische Republiek Congo («DRC») in overeenstemming met het ISH Statuut en de toepasselijke afspraak tussen het Hof en de DRC. Hierbij heeft het ISH maatregelen opgelegd ter bescherming van de getuigen tegen represailles na terugkeer in de DRC vanwege hun getuigenis. De getuigen hebben het ISH echter laten weten asiel te willen aanvragen in Nederland. Het ISH heeft Nederland hierop uitgenodigd om te reageren. Het ministerie van Buitenlandse Zaken, dat de contacten onderhoudt met het ISH en met de DRC, heeft daarop aangegeven dat de verzoeken in behandeling zullen worden genomen. Hierbij zal worden getoetst aan het verbod op refoulement onder het internationaal recht, waaronder artikel 3 van het EVRM. De Nederlandse Vreemdelingenwet 2000 is op de getuigen niet van toepassing (zie ook het antwoord op vraag 5). Het betreft hier namelijk getuigen die in de DRC terecht staan en daar gedetineerd zijn. In overeenstemming met eerdergenoemde afspraak tussen het ISH en de DRC bevinden zij zich in het ISH Detentie Centrum. Op grond van het zetelverdrag tussen Nederland en het ISH, en de Nederlandse uitvoeringswetgeving ISH, verkeren zij buiten de Nederlandse rechtsmacht.
De positie van Nederland is hierin consistent geweest en in overeenstemming met de positie die Nederland ten tijde van de vestiging van het ISH in Nederland heeft ingenomen ten aanzien van ISH en asiel. Ik verwijs in dit verband naar de brief van de toenmalige Minister van Justitie aan uw Kamer van 3 juli 2002 (Kamerstukken II, vergaderjaar 2001–2001, 28 098 (R1704), nr. 13).

Vraag 3 en 7
Vindt u het verantwoord om deze Congolezen uit te zetten terwijl zij onder meer verklaringen hebben afgelegd over de betrokkenheid van president Kabila bij grootschalige mensenrechtenschendingen? Deelt u de mening dat Nederland artikel 3 van het Europees Verdrag tot bescherming van de Rechten van de Mens en fundamentele vrijheden(EVRM) zou schenden door de Congolezen uit te zetten?
Deelt u de mening dat het essentieel is voor het kunnen functioneren van het Internationaal Strafhof, dat getuigen voldoende worden beschermd?

Antwoord 3 en 7
De vier Congolese getuigen zijn op verzoek van het ISH naar Nederland gekomen om hier te getuigen in strafprocessen voor het ISH. Getuigenbescherming is essentieel voor het functioneren van het ISH. Het ISH is hiervoor verantwoordelijk en neemt die verantwoordelijkheid zeer serieus. Dit blijkt ook uit de gang van zaken bij het ISH ter zake van deze getuigen en de door het ISH opgelegde beschermende maatregelen bij terugkeer van de getuigen naar de DRC. De procedure in Nederland loopt nog en er is in dit stadium van die procedure nog geen oordeel te geven over de vraag of de getuigen bij terugkeer een reëel risico lopen te worden onderworpen aan een met artikel 3 EVRM strijdige behandeling of dat anderszins sprake zal zijn van schending van het non-refoulementsbeginsel.

Vraag 5
Wat houdt de alternatieve procedure met betrekking tot behoefte om bescherming in, die de Congolezen nu door de IND zou zijn aangeboden?

Antwoord 5
De omstandigheid dat de Vreemdelingenwet 2000 niet van toepassing is, laat onverlet dat in de onderhavige procedure getoetst zal worden aan het geldende internationale kader inzake non-refoulement. Bij de behandeling van de verzoeken door Nederland, is de Nederlandse overheid – handelend als een bestuursorgaan – gehouden aan de toepasselijke bepalingen van de Algemene wet bestuursrecht. Dit is ook gedeeld met de gemachtigden van deze personen. Daarmee is een zorgvuldige procedure gewaarborgd en is ook de toegang tot de Nederlandse rechter verzekerd.

ANNEX 4

Tweede Kamer der Staten-Generaal

2

Vergaderjaar 2001–2002

28 098 (R 1704) **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 Internationaal Strafhof)**

28 099 **Aanpassing van het Wetboek van Strafrecht, het Wetboek van Strafvordering en enige andere wetten aan de Uitvoeringswet Internationaal Strafhof**

Nr. 13 **BRIEF VAN DE MINISTER VAN JUSTITIE**

Aan de Voorzitter van de Tweede Kamer der Staten-Generaal

Den Haag, 3 juli 2002

Op 11 maart 2002 heb ik met de vaste commissie voor Justitie van uw Kamer overleg gevoerd over twee voorstellen ter uitvoering van het Statuut van het Internationaal Strafhof, respectievelijk betreffende de Uitvoeringswet Internationaal Strafhof (een voorstel van rijkswet, Kamerstukken I 2001/2002, 28 098 (R 1704)) en de desbetreffende Aanpassingswet (Kamerstukken II 2001/2002, 28 099). Tijdens dit overleg heb ik de Kamer toegezegd haar bij brief nader te zullen informeren over de kwestie van «Internationaal Strafhof en asiel». Ter uitvoering van deze toezegging doe ik u bijgaande notitie toekomen.

De Minister van Justitie,
A. H. Korthals

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Notitie

Internationaal Strafhof en asiel

1. Inleiding

Op 11 maart 2002 heb ik met de vaste commissie voor Justitie van de Tweede Kamer overleg gevoerd over twee voorstellen ter uitvoering van het Statuut van het Internationaal Strafhof, respectievelijk betreffende de Uitvoeringswet Internationaal Strafhof (een voorstel van rijkswet, Kamerstukken I 2001/2002, 28 098 (R 1704)) en de desbetreffende Aanpassingswet (Kamerstukken II 2001/2002, 28 099). Het verslag van dit wetgevingsoverleg is gepubliceerd in Kamerstukken II 2001/2002, 28 098 (R 1704) en 28 099, nr. 12. Tijdens dit overleg is uitvoerig van gedachten gewisseld over de kwestie of een persoon (verdachte, getuige of anderszins) die voor het Internationaal Strafhof in Den Haag moet verschijnen, een asielverzoek kan indienen bij Nederland en welk gevolg Nederland aan zo'n verzoek dient te geven. In dit verband was over verschillende vragen discussie: bevindt betrokkene zich voor de toepassing van het Vluchtelingenverdrag in de Nederlandse *rechtsmacht?;* moet een verdachte wel in staat worden gesteld om een asielaanvraag te doen?; zo ja, stuit zo'n aanvraag niet per definitie af op artikel 1F van het Vluchtelingenverdrag?; doorkruist een eventuele Nederlandse procedure niet de strafprocedure voor het Strafhof? Naar aanleiding van deze discussie heb ik de Kamer toegezegd haar bij brief nader te zullen informeren. Tegelijk werd vastgesteld dat dit niet in de weg hoefde te staan aan een verdere behandeling van de onderhavige wetsvoorstellen, die inmiddels dan ook, tegelijk met het Statuut van het Strafhof zelf, op 1 juli in werking zijn getreden.
De discussie met de vaste commissie is aanleiding geweest voor nader overleg over de onderhavige materie binnen mijn ministerie en met het Ministerie van Buitenlandse Zaken. Dit overleg heeft geleid tot een nadere uitwerking van eerder tijdens de behandeling gegeven standpunten. In deze notitie stel ik u daarvan in kennis. Ik hoop dat de gerezen vragen hiermee naar bevrediging worden beantwoord.

2. Juridisch kader

De problematiek van «Strafhof en asiel» is gecompliceerd vanwege de verschillende juridische posities van Nederland en het Strafhof en vanwege de samenloop van verschillende internationale verplichtingen van Nederland in deze. Hierbij komt dat onderscheid moet worden gemaakt tussen verschillende situaties: tussen die van verdachten, veroordeelden en zonder veroordeling vrijgelaten personen enerzijds en de situatie van personen die om andere reden naar het Strafhof komen, zoals getuigen en deskundigen; tussen personen die naar het Strafhof in Den Haag toekomen (de heenweg) en personen van wie de aanwezigheid bij het Strafhof niet langer is vereist (de terugweg). In het navolgende zal de aandacht eerst uitgaan naar de (gewezen) verdachten. Ook de discussie in de Kamer ging in hoofdzaak over deze categorie van personen.
Allereerst is het nodig het juridisch kader uiteen te zetten. Dit geschiedt puntsgewijs:

a) Asielrechtelijk is van belang dat Nederland onder andere gebonden is aan het VN-Vluchtelingenverdrag en de daarin vervatte verplichtingen. Het verdrag bevat geen recht op asiel of op het doen van een verzoek daartoe. Wèl dient Nederland ten aanzien van vluchtelingen het verbod tot uitzetting of terugleiding (*refoulement*) te respecteren, dat is neergelegd in artikel 33: «Geen der Verdragsluitende Staten zal, op welke wijze dan ook, een vluchteling uitzetten of terugleiden naar de grenzen van een grondgebied waar zijn leven of vrijheid bedreigd zou worden

op grond van zijn ras, enz.» Daarnaast is Nederland gebonden aan het folterverbod neergelegd in artikel 3 van het Europees Verdrag tot bescherming van de rechten van de mens en de fundamentele vrijheden (EVRM) en artikel 3 van het VN-Verdrag tegen Foltering en andere wrede onmenselijke of onterende behandeling of bestraffing; beide bepalingen houden mede een refoulementverbod in, zij het specifiek gerelateerd aan het risico van foltering.

b) Artikel 1 onder F van het Vluchtelingenverdrag bepaalt dat de bepalingen van dat verdrag niet van toepassing zijn op een persoon ten aanzien van wie er ernstige redenen zijn om te veronderstellen dat hij een ernstig misdrijf heeft begaan. Onder «ernstig misdrijf» worden in ieder geval oorlogsmisdrijven en misdrijven tegen de menselijkheid begrepen, beide misdrijven waarover het Internationaal Strafhof rechtsmacht heeft. Artikel 1F kan niet alleen worden tegengeworpen in asielprocedures maar ook in procedures over aanvragen om verblijfsvergunningen op andere gronden (zie artikelen 3.77 en 3 107 Vreemdelingenbesluit 2000). De toetsing aan artikel 1F maakt deel uit van de inhoudelijke behandeling van een aanvraag. Een negatieve uitkomst leidt dus niet tot een buitenbehandelingstelling of iets dergelijks (hierover bestond in het wetgevingsoverleg enige onduidelijkheid). Voor toepassing van artikel 1F is geen bewijs in strafrechtelijke zin vereist; een vrijspraak door bijvoorbeeld het Internationaal Strafhof sluit op zichzelf dan ook niet uit dat artikel 1F op de betrokken persoon wordt toegepast.

c) De zetel van het Internationaal Strafhof, waartoe ook de detentieruimten van dat Hof behoren, bevindt zich in Nederland. Uitgangspunt daarbij is, overeenkomstig hetgeen gebruikelijk is met betrekking tot internationale organisaties, dat het Strafhof in het gastland de immuniteiten geniet die noodzakelijk zijn voor de vervulling van zijn taken. Dit betekent onder andere dat op de activiteiten, de functionarissen en de lokatie van het Strafhof Nederlands recht slechts van toepassing is voor zover dat verenigbaar is met de taakuitoefening door het Strafhof; deze relatie zal nader moeten worden uitgewerkt in het nog tussen Nederland en het Strafhof te sluiten Zetelverdrag. Dit uitgangspunt van beperkte toepassing van Nederlands recht is ondere andere, specifiek voor de voorlopige hechtenis in de detentieruimten van het Strafhof, neergelegd in artikel 88 van de Uitvoeringswet Internationaal Strafhof: «De Nederlandse wet is niet van toepassing op vrijheidsontneming ondergaan op last van het Strafhof binnen in Nederland aan het Strafhof ter beschikking gestelde ruimten» (zie ook artikel 17 van de Uitvoeringswet voor het Joegoslaviëtribunaal).

d) Als gastland is Nederland verantwoordelijk voor een vlot transport, inclusief beveiliging, van verdachten naar het Strafhof en van veroordeelden van het Strafhof naar het land waar de straf ten uitvoer zal worden gelegd, dit alles uiteraard slechts vanaf en tot de Nederlandse grens. Gelijke doorvoerverplichtingen bestaan ten aanzien van andere personen van wie de aanwezigheid bij het Strafhof vereist is (geweest). Deze bewegingen van personen op weg van en naar het Strafhof, buiten de detentieruimten van het Hof, vinden plaats buiten de rechtsmacht van het Strafhof. Zoals de Uitvoeringswet aangeeft, handelen de Nederlandse ambtenaren die belast zijn met het vervoer, weliswaar in opdracht van het Strafhof, maar op aanwijzing en onder verantwoordelijkheid van de Nederlandse Minister van Justitie (artikelen 85 en 86 Uitvoeringswet); bovendien vindt het vervoer op Nederlands grondgebied, buiten de lokatie van het Strafhof, plaats.

e) Het Internationaal Strafhof zelf is formeel niet gebonden aan het Vluchtelingenverdrag, noch aan het EVRM, het VN-Verdrag tegen Foltering of het Internationaal Verdrag inzake burgerrechten en politieke rechten. Dit laat onverlet dat blijkens de totstandkomingsgeschiedenis en de inhoud van het Statuut ISH de oprichters van het Strafhof zich terdege

bewust waren van de inhoud van de relevante mensenrechtenverdragen en het belang daarvan voor de legitimiteit van het Strafhof. Deze «informele» binding van een supranationale rechterlijke instantie als het Strafhof is bijvoorbeeld in de Naletilic-zaak erkend door het Europees Hof voor de rechten van de mens. Dit ging er in die zaak vanuit dat het Joegoslaviëtribunaal alle waarborgen voor een eerlijke behandeling biedt die het EVRM vereist (EHRM 4 mei 2000, gepubliceerd in NJCM-Bulletin jrg. 26 (2001) nr. 1); ook het Joegoslaviëtribunaal zelf acht zich blijkens zijn eigen jurisprudentie gebonden aan de eisen die het EVRM stelt. Aangenomen moet worden dat het Joegoslaviëtribunaal en het Strafhof zich ook gebonden zullen achten aan het in de verschillende verdragen vervatte refoulementverbod.

f) Als een verdachte door het Strafhof tot een gevangenisstraf wordt veroordeeld, dient het Hof te bepalen naar welke staat hij of zij zal worden overgebracht voor de tenuitvoerlegging van de straf. Bij de aanwijzing van de staat van tenuitvoerlegging dient het Strafhof rekening te houden met onder meer de mening en de nationaliteit van de veroordeelde en met alle overige factoren met betrekking tot het misdrijf en de veroordeelde die relevant kunnen zijn (artikel 103, derde lid, Statuut ISH). Daartoe behoort mijns inziens in een voorkomend geval ook de omstandigheid dat de veroordeelde heeft aangegeven niet te kunnen of willen terugkeren naar het land van herkomst. Is de betrokkene eenmaal overgebracht naar de staat van tenuitvoerlegging, dan houdt het Strafhof toezicht op de wijze van tenuitvoerlegging. De veroordeelde kan het Strafhof te allen tijde verzoeken hem over te doen brengen naar een gevangenis in een andere staat (artikel 104 Statuut ISH). Na de tenuitvoerlegging van de straf kan de veroordeelde, overeenkomstig het nationale recht van de staat van tenuitvoerlegging, worden uitgezet, tenzij de staat van tenuitvoerlegging de veroordeelde toestemming geeft op zijn grondgebied te verblijven. Ook hierbij wordt rekening gehouden met de wensen van de veroordeelde (artikel 107 Statuut ISH).

g) Indien de verdachte om enige reden zonder strafoplegging wordt vrijgelaten, dient het Strafhof passende maatregelen te treffen voor de overbrenging van de betrokkene naar een derde land dat hem of haar moet of wil toelaten of waaraan hij of zij wordt uitgeleverd, waarbij rekening wordt gehouden met de zienswijze van de betrokkene (regel 185 van het Reglement van Proces- en Bewijsvoering). De taak van het gastland strekt in dit geval niet verder dan, zoals regel 185 zegt, het faciliteren van de overbrenging naar het derde land te.

3. De rechtsmacht van Nederland met betrekking tot asielaanvragen van verdachten

Tijdens het wetgevingsoverleg ontstond enige verwarring over het begrip «rechtsmacht» en de vraag of de verdachte die zich in detentie bij het Strafhof (of het Joegoslaviëtribunaal) bevindt dan wel op doorvoer naar het Strafhof is (of, als veroordeelde of vrijgelatene, daarvan terugkeert), zich *in de rechtsmacht van Nederland* bevindt, in de zin dat hij of zij een asielaanvraag bij de Nederlandse autoriteiten zou kunnen indienen. Uit de nota naar aanleiding van het verslag (Kamerstukken II 2001/2002, 28 098 (R 1704), nr. 6, p. 3) zou men een ontkennende beantwoording van deze vraag kunnen afleiden, uit mijn opmerkingen tijdens het wetgevingsoverleg een bevestigende beantwoording. Verduidelijking is hier derhalve gewenst.
Onderscheid moet worden gemaakt tussen de situatie van detentie en de situatie van doorvoer. Indien en zolang de verdachte zich in detentie bij het Strafhof bevindt, verkeert hij in de rechtsmacht van het Strafhof en niet in die van Nederland. Zoals hierboven in paragraaf 2 onder c is aangegeven, is het Nederlandse recht in beginsel niet van toepassing op

de zetel van het Strafhof, in het bijzonder niet op de detentieruimten van het Hof. Dit betekent dat in die situatie de Vreemdelingenwet 2000, en de daarin vervatte regeling van een asielaanvraag, niet van toepassing zijn. Zou wèl toepasselijkheid worden aangenomen, dan zou de verdachte door het indienen van een asielaanvraag bij Nederland, met de daaraan gekoppelde procedure en rechtsmiddelen, de strafprocedure op onaanvaardbare wijze kunnen bemoeilijken, terwijl van de Nederlandse autoriteiten een oordeel zou worden gevraagd over een kwestie – waar gaat betrokkene heen na zijn berechting door het Strafhof? – die door het Statuut ISH en het Reglement voor Proces- en Bewijsvoering aan het Strafhof is voorbehouden (zie in paragraaf 2 onder f en g).
Relevant is dus alleen de fase van de doorvoer van de verdachte naar het Strafhof of van de doorvoer van de veroordeelde dan wel vrijgelatene vanaf het Strafhof. In de nota naar aanleiding van het verslag merkte de regering daarover op dat de betrokkene zich naar het oordeel van de regering in die fase *niet* in Nederlandse rechtsmacht bevindt. Dit oordeel moet ik enigszins nuanceren. Weliswaar brengt de verplichting tot onverwijlde doorvoer die Nederland op grond van het Statuut ISH heeft, mee dat het Nederlandse recht niet onverkort tijdens de doorvoer van toepassing is. Zoals in paragraaf 2 onder d is aangegeven, is er in de Uitvoeringswet ISH echter bewust voor gekozen om de verantwoordelijkheid voor de wijze en begeleiding van het vervoer bij de Minister van Justitie te leggen en niet bij het Strafhof. Gesteld zou kunnen worden dat de betrokkene zich wel in de Nederlandse rechtsmacht bevindt maar dat Nederland zijn rechtsmacht slechts in beperkte mate uitoefent, op grond van de specifieke rol die het ten behoeve van het Strafhof speelt. De vraag is derhalve of de Vreemdelingenwet 2000 en relevante internationale verdragen, gelet op deze specifieke positie en beperkte rol van Nederland als gastland van het Strafhof, ertoe verplichten om de betrokken (doorgevoerde) persoon tot het indienen van een asielaanvraag in de gelegenheid te stellen, wanneer hij daartoe de wens te kennen geeft bijvoorbeeld onmiddellijk na aankomst op Schiphol of een andere luchthaven. Het antwoord luidt naar mijn oordeel ontkennend. Doorslaggevend hierbij is dat het Vluchtelingenverdrag en het EVRM naar mijn oordeel geen verplichting inhouden om de betrokken personen toe te laten tot de Nederlandse asielprocedure en om daarvoor het vervoer te onderbreken met het oog op het indienen van een formele asielaanvraag. Een dergelijke verplichting zou slechts moeten worden aangenomen als door de doorvoer, direct of indirect, refoulement van de betrokkene, zoals verboden door het Vluchtelingenverdrag en de andere onder 2 genoemde verdragen, zou dreigen. Evenwel valt niet in te zien dat hangende de procedure bij het Strafhof of na afloop van die procedure een dergelijk risico van refoulement bestaat. Zoals hierboven aangegeven biedt de procedure bij het Strafhof alle waarborgen die daaraan moeten worden gesteld in het licht van de mensenrechtenverdragen. In het bijzonder kan worden uitgesloten dat verdachten aldaar worden onderworpen aan behandelingen als verboden door artikel 3 EVRM. Voorts is aangegeven dat wanneer het Strafhof een eindbeslissing heeft genomen – hetzij inhoudend een veroordeling hetzij leidend tot definitieve vrijlating –, het aan het Strafhof is voorbehouden om te beslissen naar welk land de betrokkene zal worden overgebracht; aangegeven is tevens welke factoren het daarbij in aanmerking heeft te nemen. Ik acht het ondenkbaar dat het Strafhof zal bepalen dat de straf van een veroordeelde die aangeeft asiel te willen, ten uitvoer wordt gelegd in een land dat zich niet aan de refoulementverboden zal houden. Als gastland van het Internationaal Strafhof mag Nederland er op vertrouwen dat het Strafhof een verdachte of veroordeelde die aangeeft in het eigen land vervolging of onmenselijke behandeling te vrezen, niet zonder meer, direct of indirect, zal laten vertrekken naar dat land of enig ander land dat zich niet heeft verplicht de desbetreffende refoulementverboden in acht te nemen. Dat derde land hoeft overi-

gens niet zelf partij te zijn bij het Vluchtelingenverdrag, het EVRM of het VN-Verdrag tegen Foltering, maar kan zich ook op grond van enig ander verdrag hebben verplicht de refoulementverboden na te leven. De rol van Nederland bij het transport van verdachten, veroordeelden en vrijgelatenen is op dat vertrouwen gebaseerd.
Volgt uit de relevante verdragen dus geen verplichting om verdachten c.s., in doorvoer van en naar het Strafhof, tot de asielprocedure toe te laten, ook de Vreemdelingenwet 2000 verplicht er niet toe om de doorgevoerde persoon, na zijn aankomst in Nederland, langs een voor de indiening van asielaanvragen bestemd aanmeldcentrum te geleiden. Het moge verder duidelijk zijn dat ook het belang van de veiligheid zich verzet tegen het onderbreken van deze transporten.
Tijdens het wetgevingsoverleg stelde ik dat verdachten op weg naar of in hechtenis bij het Strafhof, dan wel veroordeelden of vrijgelaten personen, een asielaanvraag kunnen indienen en dat Nederland verplicht is deze in behandeling te nemen en overeenkomstig de Vreemdelingenwet 2000 af te doen. Hierbij tekende ik overigens aan ervanuit te gaan dat zo'n aanvraag op inhoudelijke gronden zou worden afgewezen. Uit het bovenstaande blijkt evenwel dat, en waarom, ik bij nader inzien van oordeel ben dat de betrokken personen niet in Nederland tot de asielprocedure behoeven te worden toegelaten.
Dat de bedoelde personen niet in de gelegenheid behoeven te worden gesteld om overeenkomstig de Vreemdelingenwet 2000 een asielaanvraag in te dienen, laat onverlet dat de verdachte zich, net als andere vreemdelingen, na aankomst op de zetel van het Strafhof (tijdens zijn verblijf in detentie) schriftelijk tot de Nederlandse overheid kan wenden met het verzoek om verblijf in Nederland na zijn eventuele invrijheidstelling. Deze mogelijkheid kan niet worden uitgesloten en reeds om redenen van fatsoen dient de Nederlandse overheid op zo'n verzoek te reageren. Ik ben dan ook voornemens een dergelijk verzoek in beginsel analoog te behandelen aan de wijze waarop verzoeken worden behandeld die buiten Nederland worden ingediend. Zo'n verzoek is geen asielaanvraag in de zin van artikel 28 Vreemdelingenwet 2000 maar moet worden aangemerkt als een verzoek om toelating tot en verblijf in Nederland. Op het verzoek zal vanwege de Minister van Justitie een beslissing worden genomen, waartegen de gebruikelijke rechtsmiddelen (op grond van de Algemene wet bestuursrecht) openstaan. Bij de beslissing zal uiteraard rekening worden gehouden met het feit dat de vreemdeling van bijzonder ernstige misdrijven wordt verdacht en de mogelijke overbrenging naar een derde land door tussenkomst van het Strafhof. Dit zal in de praktijk betekenen dat, hangende de procedure bij het Strafhof, het verzoek reeds op grond van artikel 1F van het Vluchtelingenverdrag kan worden afgewezen.

4. De positie van getuigen e.a. en de mogelijkheid van een asielaanvraag

Getuigen e.a.

Tot nu toe is met name gesproken over het geval van een verdachte die op weg is naar het Strafhof dan wel daar voorlopig is gehecht, alsmede van een persoon die na zijn berechting (hetzij na veroordeling hetzij na vrijlating) naar een derde-land wordt overgebracht. De conclusie was dat hun geen toegang tot de asielprocedure behoeft te worden verleend, hetzij omdat ze (als voorlopig gehechten) in de rechtsmacht van het Strafhof verkeren, hetzij omdat ze ten behoeve van het Strafhof in doorvoer zijn. Dit ligt anders voor andere categorieën van personen, die in een andere hoedanigheid dan die van verdachte naar het Strafhof in Den Haag komen. Hierbij kan allereerst worden gedacht aan getuigen en voorts aan deskundigen, raadslieden van verdachten, familieleden van gedetineerden e.d. Kenmerkend voor deze categorieën van personen is dat hun aanwe-

zigheid bij het Strafhof slechts berust op vrijwillige basis. Zij bevinden zich als zodanig dan ook niet in de rechtsmacht van het Strafhof en kunnen zich in beginsel (behoudens beperkingen die het gastland hun bij de toelating tot Nederland heeft gesteld) in Nederland vrij bewegen. Het Statuut ISH en het daarop berustende Reglement van Proces- en Bewijsvoering leggen de verantwoordelijkheid voor een veilig heenkomen van deze personen, na afloop van hun bezigheden bij het Strafhof, (hetzij naar het land van herkomst hetzij naar een ander land) ook niet bij het Strafhof (anders dan bij de verdachten, zie paragraaf 2). Tegen deze achtergrond is er geen reden om deze personen anders te behandelen dan iedere andere vreemdeling die zich op Nederlands grondgebied bevindt en een beroep wil doen op het Vluchtelingenverdrag. Zoals ik tijdens het wetgevingsoverleg al heb aangegeven zullen getuigen e.a. dan ook een asielaanvraag kunnen indienen en zal die volgens de normale procedure worden behandeld.
In dit verband zij gewezen op regel 16 van het Reglement van Proces- en Bewijsvoering. Dit voorziet in de mogelijkheid van zogenoemde *relocation agreements* tussen het Strafhof en derde-landen. Hierbij komen getraumatiseerde of bedreigde slachtoffers, getuigen en anderen die aangeven door hun getuigenis gevaar te lopen, door tussenkomst van het Strafhof in aanmerking voor hervestiging in een bepaald land. Het Joegoslaviëtribunaal maakt van dergelijke overeenkomsten gebruik en het ligt voor de hand dat het Strafhof dat ook voor zijn getuigen zal doen. Dit zal uiteraard de noodzaak van asielaanvragen bij Nederland en van asielverlening verminderen. In dit verband zij voorts nog vermeld dat in de praktijk van het Joegoslaviëtribunaal slechts hoogst zelden door bijvoorbeeld een getuige een asielverzoek aan Nederland is gedaan.

Gewezen verdachten die wèl een asielaanvraag kunnen indienen

Er zijn twee specifieke categorieën van gewezen verdachten die, anders dan normaal gesproken voor verdachten c.s. geldt (zie paragraaf 3), wèl een asielaanvraag kunnen indienen en dus in zoverre op één lijn moeten worden gesteld met de genoemde getuigen e.a. Ten eerste is er de veroordeelde voor wie geen land voor de tenuitvoerlegging van de straf kan worden aangewezen. In een dergelijk geval wordt de straf in Nederland ten uitvoer gelegd (artikel 103, vierde lid, van het Statuut ISH) en is er dus geen sprake van een situatie van doorvoer, waarbij de betrokkene wordt overgebracht naar een ander land. Hoewel de toegang van de veroordeelde tot Nederland formeel geweigerd blijft (artikel 7 van de Vreemdelingenwet 2000), is de indiening van een formele asielaanvraag in dat geval mogelijk. Inhoudelijke beoordeling daarvan is noodzakelijk om de verenigbaarheid van uitzetting naar het land van herkomst met de refoulementverboden van het EVRM en het Verdrag tegen Foltering te beoordelen. De aanvraag kan weliswaar met toepassing van artikel 1F van het Vluchtelingenverdrag worden afgewezen op grond van de veroordeling wegens bijzonder ernstige misdrijven, maar Nederland blijft uiteraard gehouden aan naleving van de «notstandsfeste» artikelen 3 EVRM en 3 Verdrag tegen Foltering. De afwijzing van de asielaanvraag op grond van artikel 1F van het Vluchtelingenverdrag heeft tot gevolg dat Nederland de veroordeelde niet zal toestaan om na tenuitvoerleging van de straf in Nederland te verblijven. Dat betekent dat de vreemdeling na de tenuitvoerlegging overeenkomstig het Nederlandse vreemdelingenrecht in beginsel zal worden overgebracht naar het land van herkomst. Ingeval van een refoulementverbod kan hij eventueel worden overgebracht naar een derde-land dat bereid is om hem toe te laten.
Denkbaar is verder het geval waarin een (gewezen) verdachte die om enige reden zonder strafoplegging is vrijgelaten, aangeeft wegens vrees voor vervolging of onmenselijke behandeling niet naar het land van herkomst terug te kunnen keren en niet op grond van regel 185 van het

Reglement van Proces- en Bewijsvoering door het Strafhof aan een ander land kan worden overgedragen. Ook in zo'n geval zal de indiening van een formele asielaanvraag in Nederland tot de mogelijkheden behoren. Beoordeeld moet immers worden of terugzending naar het land van herkomst strijdt met de refoulementverboden. In dergelijke gevallen sluit het enkele feit dat de vreemdeling zonder strafoplegging is vrijgelaten, toepassing van artikel 1F van het Vluchtelingenverdrag uiteraard niet uit.

5. Tot slot

In het voorgaande zijn zo goed mogelijk de vragen van de Tweede Kamer beantwoord en gerezen onduidelijkheden opgehelderd. Samenvattend worden twee groepen potentiële «asielzoekers» bij het Internationaal Strafhof onderscheiden:

- De verdachten op doorvoer naar of in detentie bij het Strafhof, alsmede veroordeelden en vrijgelaten personen die op doorvoer zijn van het Strafhof naar een derde-land. Deze personen worden niet toegelaten tot de Nederlandse asielprocedure. Mocht een verdachte zich, tijdens zijn detentie bij het Strafhof, schriftelijk tot de Nederlandse autoriteiten wenden met een verzoek om verblijf in Nederland na zijn eventuele invrijheidstelling, dan is dit geen asielaanvraag in de zin van artikel 28 Vreemdelingenwet 2000. Wèl zal op het verzoek een beslissing moeten worden genomen; in de praktijk zal het verzoek van een verdachte reeds op grond van artikel 1F Vluchtelingenverdrag kunnen worden afgewezen.
- Andere personen die naar het Strafhof in Den Haag komen, zoals getuigen, deskundigen, raadslieden e.d. Dezen kunnen tijdens hun verblijf in Nederland volgens de normale procedure ingevolge de Vreemdelingenwet 2000 een asielaanvraag indienen.

Ik meen dat hiermee een duidelijke scheiding van verantwoordelijkheden tussen het Internationaal Strafhof en het gastland Nederland is aangebracht. Tevens worden de procedures en rechtsingangen bij het Strafhof en bij de Nederlandse autoriteiten duidelijk gescheiden. In het bijzonder wordt voorkomen dat verdachten door het instellen van een asielprocedure in Nederland de strafprocedure bij het Strafhof kunnen bemoeilijken, hetgeen niet zou stroken met de verplichtingen die Nederland als gastland heeft.

De Minister van Justitie,
A.H. Korthals

ANNEX 5

Böhler

****REDACTED COPY****

Complaint under the Optional Protocol to the International Covenant on Civil and Political Rights

Date: 22 November 2011

Petitions Team

Office of the High Commissioner for Human Rights

United Nations Office at Geneva

1211 Geneva 10, Switzerland

Fax: +41 22 917 9022

I. Information on the authors

Name author I: [ ]

First names: [ ]

Nationality: Congolese (DRC)

Date of birth: [ ]

Address: detained in The Hague, the Netherlands

Name author II: [ ]

First names: [ ]

Nationality: Congolese (DRC)

Date of birth: [ ]

Address: detained in The Hague, the Netherlands

Name author III: [ ]

First names: [ ]

Nationality: Congolese (DRC)

Date of birth: [ ]

Address: detained in The Hague, the Netherlands

Represented by:

Mr. A.W. Eikelboom

Mr. P.J. Schüller

Prof. G. Sluiter

all attorneys-at-law, admitted at the bar in the Netherlands

Address for correspondence on this complaint:

Böhler Advocaten

Keizersgracht 560-562

1017 EM Amsterdam

The Netherlands

Powers of authority appointing Messrs Eikelboom, Schüller and Sluiter as their representatives are attached **(Annex 1)**

II. State concerned / Articles violated

Name of the State that is a party to the Optional Protocol:

Democratic Republic of the Congo (hereinafter also: "DRC")

Articles of the Covenant alleged to have been violated:

Article 9 ICCPR

III. Exhaustion of domestic remedies

The authors have raised the complaints raised herein on several occasions with the domestic authorities, as will be shown in the body of the complaint. No response whatsoever has been received.

The remedies available to the authors therefore were and still continue to be ineffective[1] Therefore, there was no "reasonable prospect in redress"[2] or prospect of success.[3]

Concluding, due to the fact that the remedies available to the authors were ineffective, the authors were unable to exhaust any domestic remedies that might theoretically have been available.

IV. Application to other international procedures

The authors have not submitted the same matter for examination under another procedure of international investigation or settlement.

V. Conclusion on admissibility

Based on the abovementioned, the authors submit that – in accordance with Articles 1 to 5 of the First Optional Protocol to the ICCPR – the complaint is admissible for consideration by the Human Rights Committee:

- The Democratic Republic of the Congo is a State Party to the First Optional Protocol to the ICCPR (see chapter II 'State concerned / Articles violated' above);
- the authors claim to be victims of violations of the ICCPR (see chapter II 'State concerned / Articles violated' above, and chapter VII 'Violations of the ICCPR as alleged by the authors' below);
- the authors have exhausted all (available, accessible and effective) remedies (see III 'Exhaustion of domestic remedies' above);

[1] Human Rights Committee General Comment No. 20 [44], para. 15.

[2] Communication No. 437/1990, *Benjamin Colamarco Patiño* v. *Panama*, views adopted on 21 October 1994, para. 5.2.

- the complaint is written, not anonymous and not an abuse of the right of submission or incompatible with the provisions of the Covenant;
- the same matter is not being examined under another procedure of international investigation or settlement (see chapter IV 'Application to other international procedures' above).

Concluding, the authors request the Committee to decide that the complaint is admissible under the First Optional Protocol to the ICCPR.

VI. Facts of the complaint

1. [ ]

2. [ ]

3. [ ]

4. [ ]

5. Since then, the authors have been detained in several detention centres in the DRC until 27 March 2011, when they were transferred to The Hague, the Netherlands to testify in proceedings before the International Criminal Court ('ICC'). They are presently detained in The Hague. It is noted that before the ICC, they benefit from witness protection and their identities are accordingly not disclosed.

[3] Communications Nos. 210/1986 and 225/1987, *Earl Pratt and Ivan Morgan* v. *Jamaica*, views adopted on 6 April 1989, para. 12.3; see also M. Nowak, 'U.N. Covenant on Civil and Political Rights: CCPR Commentary' (Second revised edition, N.P. Engel, 2005), p. 887.

6. Upon their arrest, the authors were informed that they were suspected of involvement in the killing of nine Bangladeshi United Nations peacekeeping forces on 25 February 2005 in Ituri. No evidence of this supposed involvement has ever been presented. It is noted that the authors were in Kinshasa at the time of the killings.

7. It was only after the authors had been held without title for more than one year that, on 18 April 2006 the Auditor-General (*Auditeur Général*) of the DRC Armed Forces filed a request before the High Military Court (*Haut Cour Militaire)* for a formalisation of the pre-trial detention (**Annex 2**). According to the request, the authors were now charged with a "crime against humanity", described as follows: "committed in the Ituri District of the Oriental Province in the period between May 2003 and December 2005, by an attack knowingly directed at the civil population, one of the crimes listed in article 169 of the Congolese Military Penal Code, causing death."

8. It is pointed out that the period includes a period of nearly one year during which the authors were incarcerated.

9. On 29 May 2006 author III, sent a letter to the Auditor-General requesting to be liberated. No response was received.

10. By decision of 1 December 2006, nearly eight months later, the High Military Court allowed ordered the continuation of the detention of the authors on the basis of the charge cited above, for a period of sixty (60) days, in order to permit the prosecutor (*Magistrat Instructeur*) to finalise his investigation and send it to the court for adjudication (**Annex 3**).

11. Fifty-five days into this term, the Auditor-General requested, on 2 March 2007, an extension of this term with two months, explaining that he was solely awaiting information from the Prosecutor's Office at the ICC in order to finalise the case against the authors. By decision of 10 April 2007, the extension was granted and the pre-trial detention prolonged with sixty working days. Counted from 10 April 2007, this means that this prolongation expired at the latest on 2 July 2007 (**Annex 4**).

12. No further extension of detention has been authorised. Therefore, the authors have been detained without title since 2 July 2007; i.e. for nearly 4,5 years.

13. On 26 June 2007 author III sent another handwritten letter from jail, this time to the First President of the High Military Court (**Annex 5**). In this communication, he further explained the case and requested release from his illegal detention.

14. On 4 December 2009, [ ], acting as counsel of, among others, the applicants, wrote a letter raising the above in no uncertain terms with the Auditor-General (**Annex 6**). Copies of this letter were sent to (among others) the Congolese Minister of Defence, the Minister of Justice, the Minister of Human Rights, and the First President of the High Military Court.

15. As no response was received the aforementioned letter and the authors remained in detention, new counsel [ ] sent another letter on 18 May 2010, this time an open letter to the particular attention of the President of the Democratic Republic of the Congo (**Annex 7**).

16. In this letter, counsel reminded the President of the fundamental principles of both Congolese and international law which were being violated by the continued detention of the Authors and their co-detainees. Moreover it was pointed out that in its address before the Second Chamber of First Instance of the ICC on 1 June 2009, the responsible delegates of the Congolese Government had confirmed that General Katanga, who is currently on trial before the ICC, had been prosecuted for the death of the MONUC staff, and that this prosecution had meanwhile been terminated. Accordingly, counsel put forward, the prosecution of Katanga's alleged accomplices (including the authors) could not be pursued either. It was even argued that those detained in this respect should be released or, if the suspicion was still actual, transferred to the ICC for trial.

17. Needless to say, neither has happened. Receipt of the letter was confirmed by the President's office on 14 September 2010 (**Annex 8**), yet no steps were taken to release the Authors and their co-detainees. In March 2011 they were transferred to The Hague, the Netherlands at the request of the ICC, where they continue to be so detained. Whereas they are formally within the jurisdiction of the ICC, the ICC Registry has confirmed that they are being held solely at the request of the authorities of the DRC (**Annex 9**: *"On the specific matter of the detained witnesses, the Registrar hereby confirms the position that the four detained witnesses [-] are currently detained under the exclusive authority of the Democratic Republic of the Congo ("DRC") [-]."*). Thus, if the Government so wishes (whether or not upon instigation from the Human Rights

Committee), it can inform the ICC at any time that the continued detention is no longer warranted, and the authors will be released.

VII. Violations of the ICCPR as alleged by the authors

1. The authors complain of violations of Article 9 of the ICCPR, which provides as follows:

> *Article 9*
>
> *1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*
>
> *2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*
>
> *3. Anyone arrested or detained on a criminal charge 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. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.*
>
> *4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*
>
> *5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.*

2. The authors submit that their arrest and continued detention were in violation of each of the five paragraphs of Article 9.

Violation of Article 9 (1)

3. The arrest of the authors was arbitrary. Upon their arrest, they were informed that they were suspected of involvement in the death of nine peacekeepers in February 2005. However, no substantiation has ever been provided for this allegation. Moreover when, more than a year later, the Court was requested to 'formalise' their pre-trial detention, this charge had apparently been dropped as they were now charged with a largely unspecified "crime against humanity" which would allegedly have been committed in the Ituri District of the Oriental Province between May 2003 and December 2005. Despite the fact that the authorities have stated before the Court that information on the authors would be forthcoming from the ICC (presumably implicating them in certain criminal acts), no

such information has, to the knowledge of the applicants, ever been provided by the ICC. Without evidence to the contrary, it must be assumed that no such information exists.

4. Thus, in the absence of any actual proof against the authors at the time of their arrest, this arrest must be considered to have been arbitrary.

5. Moreover, as the Committee has found already in a case which bears great resemblance to the present one (1177/2003, *Willy Wenga Ilombe and Nsii Luanda Shandwe v. Democratic Republic of Congo*), "the detention of civilians by order of a military court for months on end without possibility of challenge must be characterised as arbitrary detention within the meaning of article 9, paragraph 1, of the Convenant".

Violation of Article 9 (2)

6. As explained above, the applicants were not immediately informed of the reasons of their arrest. Moreover, the reason that they have been given later turned out to have been false. This is equally a violation of the second paragraph of Article 9.

Violation of Article 9 (3)

7. Although the pre-trial detention of the authors was approved at two points in time by the Court, it was not until almost eight months that this happened. This is way outside the definition of "prompt" as meant in the third paragraph of Article 9. According to General Comment No. 8, such delays must not exceed a few days.[4] Moreover, according to the same General Comment, "Pre-trial detention should be an exception and as short as possible".

8. Moreover, as set out above, only in the periods between 1 December 2006 and 2 July 2007 was the detention covered by a judicial decision. The period before and after these dates, totalling to more than five years to this date, there has been no title for their detention, rendering this detention unlawful.

Violation of Article 9 (4)

9. As the Committee found in the above-cited case *Willy Wenga Ilombe and Nsii Luanda Shandwe v. Democratic Republic of Congo*, decisions of the Military Court can neither be opposed nor appealed. As in that case, this implies a violation of the fourth paragraph of Article 9.

[4] A/37/40 (1982) Annex V (pp. 95-96) ; CCPR/C/21/Rev.1, (pp. 7-8)

VIII. Conclusion

Admissibility

10. Since the requirements for the submission of an individual complaint pursuant to the First Optional Protocol to the International Covenant on Civil and Political Rights have been met, the present complaint is admissible under the Optional Protocol (see concerning this, chapter V 'Conclusion on Admissibility' above).

Violations of the ICCPR

11. By becoming a party to the Optional Protocol, the DRC has recognized the competence of the Committee to determine whether there has been a violation of the Covenant. As has been set out in chapter VII 'Violations of the ICCPR as alleged by the authors', the authors have been the victims of violations of the ICCPR.

12. The authors submit that there has been a violation of the Article 9 of the Covenant.

13. Concluding, the authors request the Committee to conclude to a violation of Articles 9 of the Covenant by the Democratic Republic of the Congo.

Remedies requested

14. In accordance with Article 2, paragraph 3 (a) ICCPR, DRC is under an obligation to provide the authors with an effective and enforceable remedy in case a violation has been established,[5] which should include adequate reparation both for material and immaterial damage. The authors request the Human Rights Committee to urge DRC to take measures to give effect to its obligations arising out of the Covenant and the First Optional Protocol and to take measures to prevent similar violations in the future:

> the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices[6]

15. Naturally, the authors are to be released from detention immediately.

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[5] Human Rights Committee General Comment No. 31 [80], para. 15.

[6] Human Rights Committee General Comment No. 31 [80], para. 17.

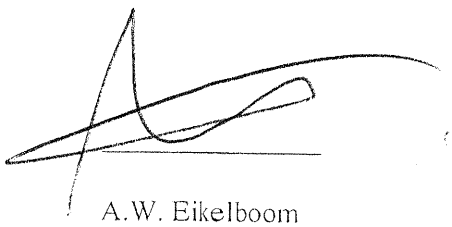
16. Moreover, since Article 9 ICCPR has been violated, the authors have an enforceable right to be compensated according to law (see Article 9 paragraph 5 ICCPR).

17. In addition to the explicit reparation required by Article 9 ICCPR, the Committee considered in its General Comment No. 31 that the Covenant generally entails appropriate compensation. The Committee further noted that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

18. The damage the authors have suffered consists of both material and immaterial damage. The authors therefore request the Human Rights Committee to indicate an appropriate remedy and to urge DRC to pay compensation. The authors reserve the right to complement their request for compensation at a later stage.

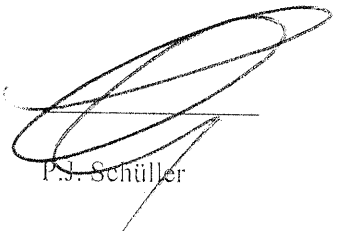
19. Finally, as the authors are, at the moment of filing this complaint, detained in The Hague, they would like to solicit the Committee's views on the responsibility of third parties, including in particular the Kingdom of the Netherlands and the International Criminal Court, for continuing their detention in the light of the circumstances raised above.

Representatives' signatures:



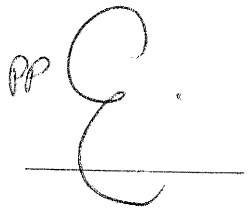
A.W. Eikelboom

Amsterdam, 22/11/2011



P.J. Schüller

Amsterdam, 22/11/2011



Prof. Göran Sluiter

Amsterdam, 22/11/2011