Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/04-01/06**
Date: **23 November 2011**

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.

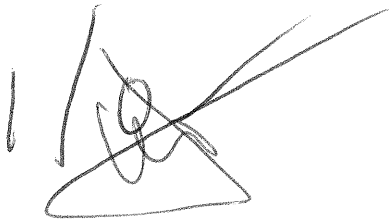
In case Witness 19 remains detained at the ICC Detention Unit

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