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**International
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TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA***

Public Document

**Amicus Curiae Observations by mr. Schüller and mr. Sluiter, Counsel in Dutch
asylum proceedings of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-
D02-P-0350**

Source: Flip 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. On 15 February counsel for witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 ('the witnesses') submitted to the Trial Chamber an application for leave to file amicus curiae observations.¹ By Decision of 7 March the Trial Chamber granted the application.² The Chamber authorized counsel to elaborate on the expected scope and duration of ongoing Dutch asylum proceedings, thereby enabling the Chamber to be more fully informed about these proceedings.³ In addition the Trial Chamber requested counsel to elaborate on the expected duration of national proceedings concerning the detention of the witnesses, which are currently pending before the Dutch Supreme Court.⁴
2. The present observations aim at addressing these issues and thereby hopefully assist the Chamber in its decision-making process. We take the opportunity to also inform the Trial Chamber about recent developments in respect of other Dutch asylum proceedings involving ICC witnesses, which may also be relevant to the position of the three witnesses in the present case. We conclude with some final remarks.

Dutch Asylum Proceedings

3. The observations below are in addition to the estimated timeline provided in our application for leave to file amicus curiae observations, filed on 15 February 2013. The following remarks serve to explain to the Chamber why these particular asylum claims are taking so long and why the delays encountered are in no way attributable to the witnesses.
4. The asylum requests of our clients were filed on 12 May 2011. The initial rejection by the Immigration Service to deal with these requests in accordance with ordinary asylum law was quashed by the District Court on 28 December 2011. Following that decision, the Dutch immigration authorities commenced the procedure on 23 January 2012. By decisions of 31 October 2012, the asylum requests were rejected with

¹ ICC-01/04-01/07-3354.

² ICC-01/04-01/07-3357.

³ Id., para. 13.

⁴ Id., para. 14.

reference to Article 1F of the Refugee Convention. It was moreover decided by the Immigration Service that return of our clients to the DRC would not entail any risk of treatment contrary to Article 3 ECHR. The decisions of 31 October 2012 came more than four months after the statutory maximum period for the State to decide on these requests had ended.

5. Appeals against these decisions have been filed and they are presently pending before the District Court of The Hague, sitting in Amsterdam. A court hearing is set for 11 April 2013. Normally, a judgment is delivered within six weeks of the hearing, but this time limit is regularly exceeded – especially where it concerns complex cases, which are heard by a bench of three judges. This is the case here; furthermore it concerns three cases being treated simultaneously, which is an additional complicating element.
6. The complexity of the cases is indeed self-evident. It is our position that the State has, during the long period it took to assess the asylum requests, failed to properly investigate certain key elements of the asylum claims. In particular, it is submitted in this respect that the State carried out a specific investigation with regard to our clients' alleged involvement in serious crimes, but has committed errors in doing so. The aforementioned investigation has, as stated, resulted in the application of Article 1F Refugee Convention (although the report containing the conclusions of the investigation was finalized only *after* that decision had been taken). Under Dutch asylum law, however, exclusion from refugee status under Article 1F does not exonerate the authorities from assessing whether a return of the individual involved would entail risk of treatment in violation of Article 3 ECHR. Those risks, however, were not investigated *in situ*, or elsewhere, in any way comparable to the investigations which focused on Article 1F.
7. The absence of a thorough and genuine investigation in respect of Article 3 ECHR is one of the key elements of our clients' appeal currently pending before the District Court, and will be pleaded at the hearing of 11 April 2013. Conducting such independent and autonomous investigation by the Dutch authorities is in our view indispensable. It is the gist of the Decisions by both the present Chamber and the *Lubanga* Trial Chamber that the ICC's role is limited to witness protection and that a – broader- asylum claim requires independent and autonomous assessment by the

competent national authorities. Contrary to what seems to be the current approach by the Immigration Service, it is wrong to forego such independent assessment and 'hide' behind the specific mandate the ICC has in respect of witness protection. Below we inform the Trial Chamber of a recent judgement of a District Court concerning other ICC witnesses, which has confirmed this position.

8. We are convinced that our clients have an arguable claim of violation of Article 3, should they be expelled to the DRC. In light of various facts and circumstances - including the current situation in the DRC, various relevant human rights reports related to that country, and the individual situation of each of the witnesses- it is expected that the District Court will share that conviction. The District Court is, however, not in a position to substitute its findings for those of the Immigration Service. In case it would be decided -as we anticipate- that the risks pertaining Article 3 ECHR have not been properly investigated by the State, the Immigration Service will be ordered to re-conduct the investigations. This will cause further delay, but should -of course- be preferred over a decision-making process which would have a flawed basis.
9. In addition to an arguable claim of violation of Article 3, clients also strongly object to the determination by the Immigration Service that they fall within the ambit of Article 1F of the Refugee Conventions. This will also be part of the pleadings at the hearing of 11 April 2013.
10. The present Chamber may be aware that we also represent the interests of Mathieu Ngudjolo in his asylum case. The asylum claim of mr. Ngudjolo was provoked by the fact that he was deprived of his liberty by the State, acting in violation of an Appeals Chamber decision of 20 December 2012 ordering his immediate release, with a view to returning him to the DRC. At present, mr. Ngudjolo is still being detained by the Dutch authorities.
11. There are significant parallels, both in terms of procedure and of substance, between the asylum case of the three witnesses and the asylum case of mr. Ngudjolo. We have requested the District Court in the cases of our clients to await the outcome of the assessment of Ngudjolo's asylum claim, which may call for a re-assessment of certain

facts and circumstances which are vital in respect of the determination of the risk of treatment in violation of Article 3. Such adjournment is possible under Article 8:64 of the Dutch General Code on Administrative Law (*Algemene wet bestuursrecht*) which reads as follows:

1. The administrative judge can adjourn the court hearing. In addition, he can decide that the preparatory investigation (*vooronderzoek*) will be resumed.
2. In case no time and date for further hearing are set by the judge at the moment of adjournment, he will determine these as soon as possible. The court clerk communicates the time and date of further hearing as soon as possible to the involved parties.
3. Where a hearing has been adjourned, the case will be resumed on further hearing in the state in which it was left at the moment of adjournment.
4. The administrative judge can decide that the court hearing will be recommenced.
5. The administrative judge can decide that the further hearing be dispensed with the consent of the involved parties. [-]

12. Under Dutch administrative law, when a court appeal is won, the case is referred back to the administration for a fresh decision unless either or both of the parties appeal the judgment before the Administrative Jurisdiction Division of the Council of State. This would lead to a further delay of up to 26 weeks (in theory), or (in practice) even more.
13. If, either by the District Court or the Council of State, the original decisions rendered by the Immigration Service are eventually quashed, a fresh decision must be taken. Depending on the content of the judgment, this may take up to another six months and will result in a new decision to be taken by the Immigration Service, which is –again– subject to review by the competent District Court. It would thus be possible to have several repetitive cycles of original decision-making and judicial review.
14. Should the arguable claim of witnesses in respect of Article 3 ECHR not be accepted, after having exhausted all available national remedies, our clients will have no choice but to submit their case to the European Court of Human Rights. It is foreseeable that they would need to request an interim measure under Rule 39 of the Rules of Court, preventing their expulsion to the DRC pending the outcome of the procedure. If this were necessary, it can be assumed that a further year, or more, passes before a final judgment on the matter has been issued.

Pending Appeal with the Dutch Supreme Court

15. By Decision of 26 September 2012 the Single Judge of The Hague District Court ordered the State to inform the ICC that it would accept taking over the witnesses. The State appealed this decision. By judgement of 18 December 2012, the Hague Court of Appeal ruled in favour of the State and annulled the Decision of the District Court of 26 September 2012. We appealed the judgement of 18 December 2012 with the Dutch Supreme Court. The various grounds of cassation concentrate on several errors in the legal reasoning of the Court of Appeal and the overall failure of the Court of the Appeal to properly interpret the various decisions of the present Chamber, as well as the failure to properly distinguish between the situation of three witnesses and the witness in the *Lubanga* case. The witnesses are represented in these civil proceedings before the Dutch Supreme Court by mr. Guido Den Dekker, a lawyer from Barents & Krans Law Firm (The Hague), who is specialized in 'cassation practice' and who works in close collaboration with us.

16. The (civil) procedure at the Dutch Supreme Court is even harder to predict in terms of duration than the asylum procedure. Mr. Den Dekker has informed us of different possible scenarios. Until now the State has not responded to our 'complaints' in cassation. There can be several weeks to months for exchange of further arguments between the parties. Upon completion of that phase, the 'Procureur-Generaal' will provide to the Supreme Court with a so-called conclusion, which can be referred to as legal advice as to how to decide the case; there is normally a period of five months to provide this conclusion. Upon receipt thereof, the Supreme Court will generally decide within three months.

17. On the basis of the above, mr. Den Dekker has estimated that a decision by the Dutch Supreme Court will certainly not be delivered before the end of March 2014. That is the most optimistic scenario. However, we have also been informed that delay occurs frequently in these proceedings, for example, because the 'Procureur-Generaal' postpones the submission of the conclusion to the Supreme Court. It is therefore also possible that a decision by the Supreme Court takes a year and a half from today, or even longer.

Recent District Court Decision on other ICC Witnesses Asylum Application

18. Counsel for the witnesses take this opportunity to inform the Trial Chamber of a recent judgement of a Dutch asylum court concerning other ICC witnesses, whom we also represent. Because of confidentiality restrictions we can only refer in general terms to this judgement. It was delivered on 8 March 2013 and is currently being redacted in such a manner that it can be published. We are convinced it will be available shortly to the Trial Chamber.

19. This judgement represents the first substantive judicial review of a decision by the Dutch Immigration Service denying an asylum application submitted by ICC witnesses. The Dutch asylum court annulled the decision of the Immigration Service rejecting the asylum request. This is not to say that these ICC witnesses have now been granted asylum. The procedure is such that the Immigration Service has to take a new decision, of course, taking into account the court's judgement. We are currently awaiting that new decision, unless the State decides to appeal the asylum court's judgement.

20. The judgement of 8 March 2013 is illustrative of both the complexity and possible lengthy duration of asylum proceedings involving ICC witnesses. In this respect it is worth emphasizing that delays in these asylum proceedings involving ICC witnesses are occasioned by the State. Dutch courts have now ruled twice that the State has violated asylum law in respect of ICC witnesses. First, on 28 December 2011 the asylum court ruled that witnesses in the present case have been unlawfully deprived of the regular asylum procedure. Second, on 8 March 2013 the competent asylum court ruled that an asylum request from other ICC witnesses has been rejected in violation of the law. In this light, it would be wrong to attribute the delays in the asylum procedure to the three witnesses. It would also be wrong to let them continue to suffer the consequences of such delay, namely continuing detention at the ICC.

Concluding Remarks

21. On 27 March 2013 the three witnesses will be detained for two years at the ICC Detention Center. Prospects are that without intervention by the present Chamber this

period will at least be extended by another year, possibly even longer. As this Chamber is aware, two of the witnesses have been detained since 2005; one since 2010. To our knowledge, a simple legal document -in the form of a valid Congolese court order, which serves to justify both the detention in the DRC and their extended custody at the ICC Detention Unit- has never been produced to the Court. The witnesses certainly have never seen such a document, since July 2007 (expiration date of the last Congolese court order justifying detention).

22. The Chamber has not had the opportunity to interact directly with our clients for a long time, but we can assure the Chamber that they are at the end of their tether.
23. In this unique situation it is submitted that it is a combination of factors which requires the Chamber at present to end the detention of the witnesses, thereby acting in accordance with the Statutory obligations set out in Article 21 (3). These factors are: a) the duration of detention at the ICC for two years; b) the likelihood, bordering on certainty, that asylum proceedings –or other Dutch court proceedings which could end the detention- will not be finalized within a year from now, and can even take considerably longer; c) the fact that delays in the asylum proceedings are not caused by the witnesses; d) the absence of a valid Congolese court order which would continue to justify the detention in these exceptional circumstances.
24. We are available to the Chamber to elaborate further on any of these issues and to answer any question the Chamber may have, if necessary at a hearing.

Respectfully submitted,




Flip Schüller Göran Sluiter

Dated this 14 March 2013

At Amsterdam, The Netherlands