

ANNEXE 3

Confidentiel



Ministerie van Buitenlandse Zaken

Protocol Department
DKP-2011/777

The Ministry of Foreign Affairs of the Netherlands presents its compliments to the International Criminal Court ("Court") and has the honour to refer to the note verbale of the Registry of the Court dated 26 August 2011 by which it transmitted the "Decision on the Security Situation of witnesses DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350" (ICC-01/04-01/07-3128) ("the decision") of 24 August 2011 of Trial Chamber II.

Further to the proposed consultations between the Registry and the Netherlands "in order to determine whether DRC-D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350 should remain detained pending the final outcome of their request for asylum in The Netherlands and, if so, who should be responsible for their detention", the Netherlands informs the Court as follows.¹

First, the Netherlands would refer to its note verbale in the case *The prosecutor v. Thomas Lubanga Dyilo* of 26 August 2011 concerning the same issue.²

Second, in order for the Dutch authorities to consider the asylum request of the detained witnesses, it would be necessary for them to obtain:

- access to the detained witnesses at the ICC Detention Centre; and
- information, in as much detail as possible, on the protective measures put in place by the Court with respect to the detained witnesses upon their return.

The Netherlands would be grateful for the Court's assistance in this respect.

Third, and lastly, the Netherlands would refer to discussions between the Ministry of Foreign Affairs and Court authorities to explore modalities to address concerns that have arisen in this matter.

The Ministry of Foreign Affairs of the Netherlands takes this opportunity to renew to the International Criminal Court the assurances of its highest consideration.

The Hague, 15 September 2011

To the International Criminal Court
The Hague



¹ ICC-01/04-01/07-3128, p. 11.

² DKP-2011/710, see also ICC-01/04-01/06-2801-Conf-Anx2.



Ministerie van Buitenlandse Zaken

Protocol Department
DKP-2011/710

The Ministry of Foreign Affairs of the Kingdom of the Netherlands presents its compliments to the International Criminal Court ("Court") and has the honour to refer to the Note Verbale of the Registry of the Court dated 16 August 2011 by which it transmitted the "Order on the Report of the Registrar on the execution of decision ICC-01/04-01/06-2766-Conf" (ICC-01/04-01/06-2785-Conf) ("the decision") of 15 August 2011 of Trial Chamber I.

Further to the proposed consultation between the Registry and the Dutch authorities "on the transfer of the witness into the "control" of the Netherlands if the Host State intends to defer his departure pending its decision on the asylum application", the Netherlands informs the Court as follows.¹

The position of the Netherlands has consistently been that the witness is to remain in custody of the Court during the asylum procedure. In this respect the Netherlands draws attention to its Note Verbale of 2 August 2011, in which it set out the procedure to be followed by the Netherlands to be able to discharge its obligation pursuant to the asylum request, including the administrative and judicial proceedings.² Therein the Netherlands stated that it "requires the detained witness to remain at the ICC Detention Centre throughout".³

The witness has been temporarily transferred in custody from the DRC to the Court pursuant to an agreement between them under Article 93(7) of the Statute. Under this agreement the witness shall remain in custody and shall be returned to the DRC when the purposes of the transfer have been fulfilled. This agreement was concluded between the Court and the DRC to facilitate the prosecutions undertaken by the Court. The Netherlands fails to understand how an obligation to accept undocumented or illegal foreigners into its territory would follow from a bilateral agreement to which it is not a party. The Court does not have the authority under the Statute or the Headquarters Agreement to transfer the witness to the Netherlands, nor does it have the authority to impose such a transfer upon the Host State. Neither, as was acknowledged by the Court, is the Netherlands obligated to accept the transfer of the witness into its control.⁴

In this regard the Netherlands would also note that under the current circumstances it lacks jurisdiction to keep the witness in custody throughout the consideration of his asylum application.

Moreover, it is not the Netherlands that intends to defer the departure of the witness. The Netherlands notes that the decision reiterated the responsibility of the Court to ensure that the witness has a real - as opposed to a merely theoretical - opportunity to make his request for asylum to the Dutch authorities

¹ ICC-01/04-01/06-2785-Conf, para. 12.

² DKP/NG-2011/643; see also: ICC-01/04-01/06-2781-Conf-Anx2.

³ *Ibid.*

⁴ ICC-01/04-01/06-2766-Red, para 87 and ICC-01/04-01/06-2785-Conf, para. 10.



before his return to the DRC.⁵ It is the understanding of the Netherlands that this responsibility implies that the Court will not undertake the transfer of the witness to the DRC during the procedure pertaining to the asylum request.

Consequently, the position of the Netherlands remains that the witness is to remain in custody of the Court pending the consideration of the asylum application. Therefore, the Netherlands does not consider that there is a need to consult with the Registry of the Court at this time.

For the sake of good order, the foregoing is without prejudice to the appeal that the Netherlands intends to file against decision ICC-01/04-01/06-2766-Conf.⁶ It is submitted that, apart from the legal considerations mentioned above, cooperating with the Court at this stage would potentially render an appeal by the Netherlands without object, and therefore illusory. The request of the Court may pre-empt the position of the Netherlands in the appeals procedure. The Netherlands reserves its right to request that the appeal have suspensive effect.

The Ministry of Foreign Affairs of the Kingdom of the Netherlands takes this opportunity to renew to the International Criminal Court the assurances of its highest consideration.

The Hague, 26 August, 2011



To the International Criminal Court
The Hague

⁵ ICC-01/04-01/06-2785-Conf, para. 6 and ICC-01/04-01/06-2766-Red, para 86.

⁶ The Netherlands filed its "Urgent Request for Direction" to the Appeals Chamber for the purpose of filing its appeal, ICC-01/04-01/06-2788-Conf.



Ministerie van Buitenlandse Zaken

Protocol Department
DKP/NG-2011/643

The Ministry of Foreign Affairs of the Kingdom of the Netherlands presents its compliments to the Registry of the International Criminal Court ('Court' or 'ICC'). In answer to the Court's request for information regarding the procedure that needs to be followed in order for the Netherlands to be able to discharge its obligation pursuant to the asylum request before witness 19 is returned to the DRC, further to the Decision of the Trial Chamber I in the case of the *Prosecutor v. Thomas Lubanga Dyilo*, Case Nr. ICC-01/04-01/06-2766-Conf, dated 4 July 2011, the Ministry of Foreign Affairs of the Kingdom of the Netherlands has the honour to inform you as follows.

First, the Immigration and Naturalisation Service will need access to the detained witness at the ICC Detention Centre to conduct interviews to obtain information regarding, for example, the detained witness's identity, his background and the risks and treatment the detained witness fears to receive upon return. During these interviews an interpreter interpreting into Dutch would be required. Thereafter, the Immigration authorities will conduct an assessment of the facts and circumstances in connection with the asylum request. Further investigations may, and are likely to, be part of that assessment. Insofar as the Immigration authorities intend not to grant the asylum request, the detained witness will have the opportunity to present his views. Following a formal decision, the detained witness may seek judicial review of this decision, which may be followed by further litigation.

The foregoing administrative and judicial proceedings may take considerable time and the Netherlands requires the detained witness to remain at the ICC Detention Centre throughout. For the sake of good order, the foregoing is without prejudice to the pending request of the Netherlands to the Trial Chamber for leave to appeal the Trial Chamber's said decision.

The Ministry of Foreign Affairs of the Kingdom of the Netherlands avails itself of this opportunity to renew to the Registry the assurances of its highest consideration.

The Hague, 2 August 2011



To the International Criminal Court
The Hague