

ANNEX 5

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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

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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

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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 ineffective¹. 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.

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- 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.

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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.

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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

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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

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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 Covenant”.

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)

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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 practices⁶

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

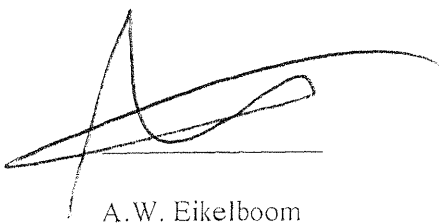
⁵ Human Rights Committee General Comment No. 31 [80], para. 15.

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

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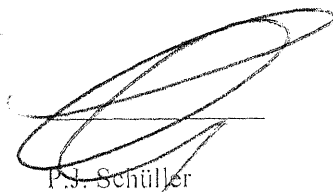
16. Moreover, since Article 9 ICCPR has been violated, the authors have an enforceable right to be compensated according to law (see Article 9 paragraph 5 ICCPR).
17. In addition to the explicit reparation required by Article 9 ICCPR, the Committee considered in its General Comment No. 31 that the Covenant 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:



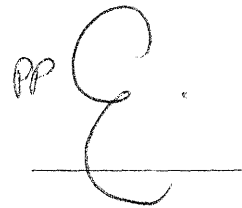
A.W. Eikelboom

Amsterdam, 22/11/2011



P.J. Schüller

Amsterdam, 22/11/2011



Prof. Göran Sluiter

Amsterdam, 22/11/2011