

CASE LAW COVER PAGE TEMPLATE

Name of the court ¹ (English name in brackets if the court's language is not English): Rechtbank 's Gravenhage zittinghoudende te Amsterdam (The Hague District Court)			
Date of the decision:	28 Dec 2011	Case number:²	AWB 11/25891, 11/25904, 11/25907, 11/36660, 11/36662, 11/36664, 11/39010, 11/39011 and 11/39012
Parties to the case: Applicant 1, 2 and 3 v Minister of Immigration and Asylum			
Decision available on the internet? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No			
If yes, please provide the link: http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=kenmerken&vrije_tekst=BU9492 (If no, please attach the decision as a Word or PDF file):			
Language(s) in which the decision is written: Dutch			
Official court translation available in any other languages? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No (If so, which):			
Countr(y)(ies) of origin of the applicant(s): DRC			
Country of asylum (or for cases with statelessness aspects, country of habitual residence) of the applicant(s): Netherlands			
Any third country of relevance to the case:³ N/A			
Is the country of asylum or habitual residence party to:			
The 1951 Convention relating to the Status of Refugees <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Relevant articles of the Convention on which the decision is based: Art. 33		
(Only for cases with statelessness aspects) The 1954 Convention relating to the Status of Stateless Persons <input type="checkbox"/> Yes <input type="checkbox"/> No	Relevant articles of the Convention on which the decision is based:		
(Only for cases with statelessness aspects) The 1961 Convention on the Reduction of Statelessness <input type="checkbox"/> Yes <input type="checkbox"/> No	Relevant articles of the Convention on which the decision is based:		
(For AU member states): The 1969 OAU Convention governing the specific aspects of refugee problems in Africa <input type="checkbox"/> Yes <input type="checkbox"/> No	Relevant articles of the Convention on which the decision is based:		

For EU member states: please indicate which EU instruments are referred to in the decision

Relevant articles of the EU instruments referred to in the decision:

Topics / Key terms: (see attached 'Topics' annex):

Access to procedures

Due process/procedural fairness

Jurisdiction

Witnesses

Right to seek asylum

Criminal courts

International tribunals

(International law) Agreements

Key facts (as reflected in the decision): [No more than 200 words]

Three witnesses from the DRC were brought to the International Criminal Court (ICC) in The Hague to testify in the case against Katanga, a Congolese rebel. In May 2011, these witnesses applied for asylum in the Netherlands. Their claim for asylum is partly based on the fact that they have testified before the ICC on involvement of President Kabila in war crimes and crimes against humanity. The Netherlands Government refused to allow the three witnesses access to the Dutch asylum procedure under its 2000 Aliens Act (*Vreemdelingenwet 2000*). In a letter dated 28 September 2011, the Dutch Immigration and Nationalization Service (IND) stated the following:

- the applicants are not in the jurisdiction of the Netherlands,
- the requests made are not asylum requests but request for protection because the Dutch asylum procedure is not applicable,
- as a result "a non-Dutch asylum procedure" will have to be initiated, and
- the requests for protection shall be assessed by the Netherlands based on the principle of *non-refoulement* as contained in the 1951 Convention and (article 3 of) the ECHR, thereby taking into account that the applicants are not within the jurisdiction of the Netherlands.

On 11 October 2011 the Dutch Labour Party asked a number of questions in Parliament regarding the situation of the three witnesses and their right and ability to apply for asylum in the Netherlands. In response (dated 16 November 2011) the Minister indicated that the Netherlands will take the requests for asylum into consideration and an assessment will be made regarding the principle of non-refoulement. At the same time the affirmed that according to the Dutch Government the Dutch Aliens Act is not applicable.

Key considerations of the court (translate key considerations (containing relevant legal reasoning) of the decision; include numbers of relevant paragraphs; do not summarize key considerations) [max. 1 page]

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(para. 9.4) According to the Court the Headquarters Agreement between the International Criminal Court and the host State (see http://wetten.overheid.nl/BWV0002899/geldigheidsdatum_06-01-2012) cannot serve as a legal basis for declaring the Dutch Aliens Act (*Vreemdelingenwet 2000*) and subsequent regulations and guidelines not applicable on the assessment and determination of the asylum requests of the applicants.

(para. 9.5) Such basis can neither be found in the Dutch Implementation Act of the International Criminal Court (*Uitvoeringswet Internationaal Strafhof*). Dutch laws are only not applicable regarding detention ordered by the ICC.

(para. 9.6) Such basis can also not be found in the Article 93(7) of the ICC Statute (see text below).

Article 93 (7) ICC Statute:

(a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:

(i) The person freely gives his or her informed consent to the transfer; and

(ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.

The Court allows the grounds for appeal and orders the state to decide no later than the applicable legal deadline of 28 June 2012 on the asylum requests, thereby taking into account the Court's judgment.

Other comments or references (for example, links to other cases, does this decision replace a previous decision?)

On 9 June 2011 the ICC's Trial Chamber II delivered a decision on a request made by witnesses' counsel to "present the three detained witnesses to the Dutch authorities" so that the asylum procedure before them may follow its course.

See, *Situation en République Démocratique du Congo : Le Procureur c. Germain Katanga et Mathieu Ngudjolo Chui*, ICC-01/04-01/07, International Criminal Court (ICC), 9 June 2011, available at: <http://www.unhcr.org/refworld/docid/4e1c06452.html>. Also, <http://www.icc-cpi.int/iccdocs/doc/doc1086912.pdf>.

In its decision the Chamber acknowledges the witnesses' right to apply for asylum and sets out clearly the ICC's views on the content of the right to asylum. The Chamber refers to the 1951 Convention, Article 14 UDHR, Article 18 of the EU Charter of Fundamental Rights as well as the principle of *non-refoulement* as entailed in various instruments and customary international law (paras. 68 and 69).

In addition to the right to asylum, the Chamber states that it must pay particular attention to the right to effective remedy, as enshrined in a number of international and regional human rights instruments. The Chamber concludes that it is unable to apply Article 93(7) of the ICC Statute (i.e. the obligation to return the witnesses to their country of origin), as it would then become impossible for them to exercise their right to apply for asylum and they would be deprived of the fundamental right to effective remedy (para. 73).

Moreover, the Chamber emphasises that the Dutch authorities have clearly indicated on several occasions that, in the event that an application for asylum is submitted to them, they would be obliged to consider it (para. 74).

EXPLANATORY NOTE

1. Decisions submitted with this form may be court decisions, or decisions of other judicial, quasi-judicial and administrative bodies.
2. Where applicable, please follow the court's official case reference system.
3. For example in situations where the country of return would be different from the applicant's country of origin.

For any questions relating to this form, please contact the RefWorld team at the address below.

Please submit this form to:

Protection Information Unit
Division of International Protection
UNHCR
Case Postale 2500
1211 Genève 2 Dépôt
Switzerland
Fax: +41-22-739-7396
Email: refworld@unhcr.org