G.P.-S. 3-00032

AANHANGSEL

J 55

DIREKTORAAT VAN VEILIGHEIDSWETGEWING
DIRECTORATE OF SECURITY LEGISLATION

LÊER NR. 2/3/2/7323
FILE NO.

LÊER NR. 2/3/2/7323
FILE NO.

HOOFREEKS Binnelandse Veiligheid
MAIN SERIES

ONDERWERP Kontrolering van Persone
SUBJECT

LÊER Klaas de Jonge
FILE

LÊER GEOPEN OP
FILE OPENED ON

LÊER GESLUIT OP
FILE CLOSED ON

BESKIKKINGSVOORSKRIFTE
DISPOSAL DIRECTIONS

AANHANGSEL

SUBLÊER OF GEVAL
SUBFILE OR CASE

LÊER NR. DEEL

DEPARTEMENT
VAN
BUITELANDSE SAKE

Republiek van Suid-Afrika, Privaatsak X152, Pretoria, 0001

Tel. 28-6912 x 252 J C G Liebenberg

Verw. 400/016/307
85120902u26

09 -12- 1985

GEHEIM / DRINGEND

DIE DIREKTEUR-GENERAAL
JUSTISIE

Vir aandag: Mnr S S van der Merwe

GEVAL KLAAS DE JONGE

Dokumentasie:

A. Teleks no 675 van 7 Desember 1985 vanaf Den Haag.

Met verwysing na vorige korrespondensie in verband met die geval Klaas de Jonge, heg ek hierby aan, vir u aandag, 'n afskrif van bogenoemde teleks.

WAARNEMENDE DIREKTEUR-GENERAAL : BUITELANDSE SAKE

INKOMEND

KOPIENR....VAN....
LEERNR.....

1 PRIORITEIT
2 TELNR675
3 19851207/
4 DEN HAAG
5 PRETORIA
6 ROETE 241

WERKKOPIE

GEHEIM
SECRET

G E H E I M

1. U DIENSBRIEF 400/016/307 VAN 19851127.

2. ONDERSTAANDE IS DIE TEKS VAN 'N BRIEF GEDATEER 5 DESEMBER WAT GISTERMIDDAG DEUR AMBASSADEUR WIJNAENDTS (IN AANWESIGHEID VAN MAAS GEESTERANUS) AAN MY OORHANDIG IS VIR BESORGING AAN MINISTER RF BOTHA:

''ZIJNER EXCELLENTIE
DE HEER RF BOTHA
MINISTER VAN BUITELANDSE ZAKEN TE PRETORIA.

GEACHTE COLLEGA

HET RAPPORT DAT DOOR ONZE JURIDISCHE EXPO RPT EXPERTS IS OPGESTELD NAV HUN RECENTE BESPREKINGEN IN PRETORIA. HEB IK MET BIJZONDERE AANDACHT BESTUDEERD. HUN OVERLEG VOND PLAATS OP BASIS VAN HET PAKKET DAT DOOR U EN UW MEDEWERKERS OP 4 EN 5 OKTOBER JL. BESPROKEN IS MET DE AMBASSADEUR IN ALGEMENE DIENST VAN MIJN DEPARTEMENT.

U EN IK WAREN HET ER REEDS OVER EENS DAT HET PROBLEEM, WAARVOOR WIJ O ONS GESTELD ZIEN, EEN POLITIEKE OPLOSSING VERGT. IK MEEN ER DAN OOK GOED AAN TE DOEN DE NEDERLANDSE UITGANGSPUNTEN VOOR EEN DERGELIJKE OPLOSSING NOG EENS VAST TE LEGGEN.

HET IS NIET ONZE BEDOELING OM DE HEER DE JONGE AAN VERVOLGING EN EVENTUELE BERECHTING TE ONTTREKKEN. DE INTERNAL SECURITY ACT WIJKT ECHTER TE ZEER AF VAN DE NORMEN DIE IN NEDERLAND GANGBAAR ZIJN OM DAARVOOR AANVAARDBAAR TE KUNNEN ZIJN. DE ZAAK TEGEN DE HEER DE JONGE ZAL ZICH DERHALVE, NAAR ONZE OPVATTING, GEHEEL BUITEN HET KADER VAN DE ISA MOETEN VOLTREKKEN,.

HET ZAL U NIET VERRASSEN DAT ALLEEN AL HET DENKBEELD VAN EEN EVENTUELE VEROORDELING TOT DE DOODSTRAF DOOR NEDERLAND MOET WORDEN AFGEWEZEN.

TENSLOTTE ACHT IK, INGEVAL VAN VEROORDELILNG VAN DE HEER DE JONGE IN ZUID-AFRIKA, OVERNAME VAN STRAFEXECUTIE DOOR NEDERLAND ESSENTIEEL.

DAARNAAST BEVAT HET RAPPORT VAN ONZE JURIDISCHE EXPERTS EEN AANTAL ANDERE PUNTEN DIE M.I. NADER BESPROKEN ZOUDEN MOETEN WORDEN, DIT ZOU IN EEN LATERE FASE KUNNEN GEBEUREN.

DE BESPREKINGEN IN PRETORIA VAN OKTOBER EN NOVEMBER ZIJN NUTTIG

GEWEES EN VORMEN M.I. EEN BRUIKBARE BASIS VOOR VERDERE OVERLEG. IK GEEF U GAARNE DIE VERZEKERING DAT OOK VAN MIJN KANT EEN SPOEDIGE AFRONDING WORDT NAGESTREEFD.

UW NADERE BERICHTEN ZIE IK MET BELANGSTELLING TEGEMOET.

MET GEVOELENS VAN DE MEESTE HOOGACHTING.

(GETEKEN) H VAN DEN BROEK''

3. WIJNAENDTS HET DIE PRAATWERK GEDOEN MET ENKELE OPHELDIRINGS DEUR MAAS G OOR DIE INHOUD VAN BOSTAANDE BRIEF.
DIE PUNTE DEUR HULLE GEOPPER WAS DIE VOLGENDE.

4. DIE TWEE REGSGELEERDES HET MET 'N VERSLAG UIT PRETORIA TERUGGEKEE WAT ASPEKTE VAN TELEURSTELLING BY DIE MINISTER EN WIJNAENDTS LAAT ONTSTAAN HET.

WIJNAENDTS HET IN OKTOBER TERUGGEKEER MET 'N OPTIMISTIESE SIENING VAN DIE MOONTLIKHEDE OM DIE DE JONGE PROBLEEM TYDENS 'N OPVOLGENDE VERGADERING DEUR REGSGELEERDES AAN BEIDE KANTE TOT FINALITEIT TE BRING.

5. WIJNAENDTS HET BEKLEMTOON WAT IN PARA 2 VAN BOSTAANDE BRIEF GESTEL WORD DAT DIE TWEE MINISTERS DIT EENS WAS DAT DIE KWESSIE 'N POLITIEKE OPLOSSING VERG.

AAN NEDERLANDSE KANT WORD DIT AS NOODSAAKLIK BESKOU DAT VAN DEN BROEK OOR 'N ''PAKKET'' MOET BESKIK WAARIN ALLE ASPEKTE BETROKKE BY DIE AANGELEENTHEID UITG RPT UITEENGESIT WORD EN WAAROOR ONS TWEE REGERINGS AD IDEM IS. WAT HY DEUR DIE ''PARLEMENT'' GOEDGEKEUR KAN VERKRY. (HOEWEL DIE WOORD ''PARLEMENT'' DEUR WIJNAENDTS GEBRUIK IS, IS DIT NIE DIE BEDOELING DAT DIE MINISTER 'N DEBAT OOR DIE SAAK WIL VOER NIE, MAAR WEER OM AAN SLEUTELFIGURE VAN DIE VERNAAMSTE PARTYE DIE BESLUITE VOOR TE LE EN HULLE BEGINSELGEODKEURING TE VERKRY). DIE REDES HIERVOOR SAL VIR U DUIDELIK WEES.

6. DIT IS VERDER VERDUIDELIK DAT DIE MINISTER DUS NIE GOEDKEURING AFSONDERLIK KAN VERLEEN TOV INDIVIDUELE STAPPE WAT IN DIE AANGELEENTHEID BETROKKE IS NIE EN DAT DAARMEE VOORTGEGAAN KAN WORD NIE : BYVOORBEELD DIE AFHANDELING VAN DIE VERDERE ONDERVRAGING VAN DE JONGE DEUR SAP, DAARNA DIE GOEDKEURING VAN DIE KLAGSTAAN, ENS.

7. WIJNAENDTS HET GEMELD DAT NA HULLE SIENING DAAR 'N ''VERHARDING'' IN ONS OWERHEDE SE BENADERING INGETREE HET, BY VERGELYKING MET DIE VORDERING WAT GEMAAK IS TYDENS SY BESOEK AAN DIE RSA IN OKTOBER.

8. DIE HOOFPUNTE TEN OPSIGTE WAARVAN HULLE ERNSTIGE PROBLEME HET, IS DIE VOLGENDE :

8.1. ENIGE VERMELDING VAN DIE WET OP BINNELANDSE VEILIGHEID IS VIR HULLE ONAANVAARBAAR EN SAL OOK NIE DEUR DIE MINISTER AS DEEL VAN 'N PAKKET DEUR DIE PARLEMENTERE PARTYE GOEDGEKEUR VERKRY KAN WORD NIE.

8.2. INSGELYKS KAN GEEN GOEDKEURING GEHEG WORD AAN DIE MOONT-

LIKHEID DAT DE JONGE DIE DOODSTRAF OPGELE MAG WORD NIE. AFGESIEN VAN DIE MOONTLIKHEID VAN VERSAGTING VAN VONNIS DEUR DIE STAATS-PRESIDENT . HIERDIE PUNT IS IN ELK GEVAL TYDENS DIE BERAAD IN PRETORIA MET MAAS G AANGESPREEK.

8.3. 'N VERDERE ASPEK GEOPPER IS DIE MOONTLIKHEID VAN TRONKSTRAF-OPLEGGING TEN OPSIGTE VAN VERSKILLENDE KLAGTE EN DIE WYSE WAAROP DIT UITGEDIEN MOET WORD. INDIEN DE JONGE BV IN NEDERLAND TEREG SOU STAAN OP DRIE KLAGTE EN VEROORDEEL SOU WORD TOT 5, 10 EN 15 JAAR RESPEKTIEWELIK, SAL HY DIE DRIE OPGELEGDE VONNISSE GESAMENTLIK UITDIEN EN SAL HY 'N MAKSIMUM VAN 15 IN DIE GEVANGENIS KAN VERKEER, MAAR NOOIT 30 JAAR NIE.

8.4. HOEWEL DE RPT DIE MINISTER DIE UITDIENING VAN STRAF DEUR DE JONGE IN NEDERLANS AS ''ESSENSIEEL'' BESKOU, HET WIJNAENDTS EN MAAS GEESTERNAUS SLEGS DAARVAN MELDING GEMAAK DAT HULLE HUL BEREIDHEID AAN ONS OWERHEDE OORGEDRA HET DAT DE JONGE SY STRAF HIER KAN UITDIEN. HULLE HET DIT IN DIE LIG DAARVAN GESTEL DAT DIT BEWYS DAARVAN IS DAT OOK DIE NEDERLANDSE REGERING NIE WIL SIEN DAT HY SKOTVRY GAAN AS HY 'N MISDAAD GEPLEEG HET EN SKULDIG BEVIND WORD NIE.

9. U SAL OPMERK DAT VAN DE N BROEK AANDUI DAT DAAR 'N AANTAL PUNTE IS WAT VERDER BESPREEK SAL MOET WORD. DIT HET WIJNAENDTS GESE IMPLISEER NOG 'N RONDTE SAMESPREKINGS EN HULLE VOORSTEL IS DAT DIT SO GOU MOONTLIK PLAASVIND NA OORWEGING DEUR U VAN DIE MINISTER SE BRIEF EN BOSTAANDE OPMERKINGS. DIE KERNPROBLEME VIR VAN DEN BROEK IS EGTER DIE BOSTAANDE PUNTE.

WIJNAENDTS HET WEER VERWYS NA ASPEKTE SOOS 'N VRYGELEIDE VAN DE JONGE NA HULLE NUWE KANSELARY EN ANDER ASPEKTE REEDS IN U DIENSBRIEF EN BYLAAG ONDER BEANTWOORDING GEMELD.

MY ALGEMENE INDRUK WAS DAT DIE TWEE WAT DIE MINISTER DIE LAASTE KEER NA DIE RSA GESTUUR HET, NIE OPGEWASSE WAS VIR HULLE TAAK NIE. AS ONDERHANDELAARS VAL HULLE NIE IN DIESELFDE KATEGORIE AS WIJNAENDTS NIE.

10. WIJNAENDTS HET TEN SLOTTE GESE DAT HULLE GEEN MEDEDELING AAN DIE PERS SAL MAAK OOR DIE MINISTER SE REAKSIE OP DIE JONGSTE RONDTE NIE.

11. DIE OORSPRONKLIKE VAN VAN DEN BROEK SE BRIEF WORD PER EERSKOMENDE DIPSAL AANGESTUUR

EINDE

INKOMEND AFSKRIFTE:

GEHEIM
SECRET

1. DRINGEND

2. 19851126

3. TELNO 651

4. SALEG DEN HAAG

5. HK PTA ROETE : 241 (LIEBENBERG)

G E H E I M

UIT WERKSGESPREK TUSSEN LANDMAN EN VD GEER (B/SAKE) BLYK DIT DAT DIE MOONTLIKE ROL VAN RSA-VEILIGHEIDSWETGEWING IN KLAGSTAAT TEEN EN IN REGSGEDING I/S DE JONGE VIR NDLSE REGERING HOOFBREKENS GEE OF MAG GEE. EK HET AAN VAN DER GEER GESE DAT, ALHOEWEL EK NIE VOLLEIDG INGELIG IS OOR DIE JONGSTE VERLOOP VAN DIE ONDER-HANDELINGE TOT OP DATUM NIE, MY EIE AANVOELING VIR SAAK SE DAT DIT UITERS RISKANT VIR NDL SAL WEES OM ENIGE IETS TE DOEN OF TE SE WAT MAG LYK NA INMENGING IN DIE INTERNE REGSPROSES VAN RSA OF REGSINHOUD VAN ONS WETTE. MY AANBEVELINGS WAS DAT HY SY INVLOED MOET GEBRUIK OM BLOOT DIE REGSPROSES STRUKTUREEL AAN DIE GANG TE KRY, SONDER OM NOU AL BYVOORBAAT SEKERE EISE TE STEL WAT REMMEND EN STREMMEND OP DIE VERDERE VERLOOP VAN DIE REGSGEDING KAN INWERK. VAN DER GEER HET SAAMGESTEN DAT DIE NDLERS, INDIEN HULLE OOR REGSINHOUD VAN DIE REGSPROSES WIL BEVRAAGTEKEN OF 'N VOORWERP VAN DISKUSSIE MAAK, EERS MOET WAG TOTDAT DIE REGSGEDING VOLLEDIG TOT 'N EINDE GEBRING IS.

VERDER HET VAN DER GEER GESE DAT DIE INDRUK FOUTIEWELIK MAG BE-STAAN DAT NDLSE REGERING SAAK TOT NA VERKIESING IN MEI 1986 WENS UIT TE REK. HY WYS DAAROP DAT AS DIE SOSIALISTIESE FVDA DIE REGERING UITMAAK, WAT NA DIE VERKIESING NIE UITGESLUIT IS NIE, 'N OPLOSSING VAN DIE SAAK VEEL MOEILIKER, INDIEN NIE ONMOONTLIK SAL WEES NIE. DIT IS DUS OOK, ALDUS VAN DER GEER, IN DIE NDLSE BELANG DAT SAAK BESPOEDIG WORD

EINDE

Ontwerp: 20.11.85

SCENARIO IN DE ZAAK K. DE JONGE

naar de stand van het overleg tussen de juridische deskundigen, Pretoria, november 1985, onder voorbehoud van de beslissingen der regeringen.

I. de J. blijft vooralsnog in Nederlandse ambassade.

II. de J. mag zijn eigen juridische bijstand en vertegenwoordiging vrij kiezen. De benodigde financiële middelen kunnen vrij naar Zuidafrika worden overgemaakt.

III. de J. zal in het ambassade-gebouw door Zuidafrikaanse politie kunnen worden ondervraagd. Onder de volgende voorwaarden:

a) telkenmale voorbericht aan de ambassade, alleen tijdens normale kantooruren, en de bezoekers moeten zich legitimeren;

b) in aanwezigheid van de advocaat van de J; een vertegenwoordiger van de Ambassade heeft toegang;

c) voor zoveel de J. zou weigeren verklaringen af te leggen die als getuigenissen in een strafrechtelijk onderzoek tegen derden kunnen worden gebruikt, zal te zijnen aanzien geen gebruik

worden gemaakt van de bevoegdheden onder Seotion 205, Criminal Procedures Act.

IV. Ingeval de politie, in het kader van de in par. III bedoelde ondervraging, de aanwezigheid van de J. nodig heeft op een andere plaats, is de J. vrij daaraan wel of niet mee te werken. Zo ja, dan:

a) zorgt de Zuidafrikaanse overheid voor de J's terugkeer op de Ambassade;

b) gelden mutatis mutandis de voorwaarden (b) en (c) van par. III.

V. Ingeval de politie voor het in par. IV bedoelde bezoek meer tijd nodig heeft dan dat de J. nog dezelfde dag kan worden teruggebracht, is de J. vrij daaraan wel of niet mee te werken, onder dezelfde voorwaarden.

VI. De Zuidafrikaanse regering behoudt zich voor, een poging van de J. om tijdens een exoursie zoals bedoeld in par. IV en V te ontsnappen, aan te merken als het einde van de toepasselijkheid van het onderhavige scenario.

VII. Wordt de strafzaak tegen de J. geseponeerd, dan krijgt hij van de Zuidafrikaanse overheid een vrijgeleide om het land te kunnen verlaten.

VIII. Volgt een formele aanklacht, dan:

a) ~~zal deze alleen zijn gebaseerd op (the Explosives Act) (the Arms and Amunition Act).~~ De Public Prosecutor zal de politieke overtuigingen van de J. (bijvoorbeeld: ANC-sympathisant) niet als strafverzwarende omstandigheden aanvoeren;

b) zal deze, wanneer eenmaal de dag voor de opening van de terechtzitting is bepaald, niet meer worden aangevuld noch zullen nieuwe aanklachten worden uitgebracht tenzij:

~~(i) ingeval van kennelijke verschrijving;~~

~~(ii)~~ ingeval ter zitting blijkt van nieuwe misdrijven.

IX. Verklaringen door de J. afgelegd tijdens zijn detentie onder de Internal Security Act, onderscheidenlijk verklaringen over de J. die door anderen zijn afgelegd tijdens hun detentie onder die Act, zullen door de Public Prosecutor tijdens de J's terechtzitting niet tegen hem worden aangevoerd.

X. ~~de J. zal niet tezamen met anderen terechtstaan.~~

XI. de J. verblijft ook tijdens de terechtzitting in de Nederlandse ambassade doch wordt dagelijks door de Zuidafrikaanse overheid naar het gerechtsgebouw vervoerd en weer teruggebracht.

a) de bestaande arrestatie-bevelen blijven buiten toepassing zolang de J. niet probeert te ontsnappen;

b) de raadsman en een vertegenwoordiger van de ambassade kunnen de J. vergezellen tijdens het vervoer;

c) in het gerechtsgebouw zelf verblijft de J. op de voor bewaring van verdachten gebruikelijke plaatsen;

d) de strafzaak wordt behandeld ter openbare terechtzitting. Mocht de rechtbank menen de deuren te moeten sluiten, dan zal de Public Prosecutor een verzoek van de J.'s raadsman dat de vertegenwoordiger van de ambassade zal mogen blijven, niet aanvechten.

e) eventuele

XII. De gevangenneming van de J. op bevel van de rechtbank wegens contempt of court is niet in strijd met het gestelde in par. XI.

XIII. Ingeval van vrijspraak, c.q. ontslag van rechtsvervolging dan wel op andere wijze buiten vervolging

gesteld, krijgt de J. van de Zuidafrikaanse overheid een vrijgeleide om het land te kunnen verlaten.

XIV. Ingeval de rechtbank de J. schuldig bevindt ("conviction "), is daarmede een einde gekomen aan de J.'s privilege van verblijf in de Nederlandse ambassade.

XV. de J. wordt na het vonnis bedoeld in par. XIV niet meer aan enige ondervraging door de Zuidafrikaanse politie onderworpen, ook niet ingeval de Zuidafrikaanse Staat tegen het vonnis hoger beroep aantekent.

XVI. In de procedure voor de straftoemeting ("sentencing") zal de Public Prosecutor zich niet verzetten tegen een eventueel verzoek van de verdediging aan de rechtbank om bepaalde straffen gelijktijdig ten uitvoer te leggen.

XVII. Een eventuele doodstraf wordt niet ten uitvoer gelegd.

XVIII Op een verzoek van de Nederlandse regering dat de J. naar Nederland wordt overgebracht, zal de Zuidafrikaanse regering daaraan medewerken, indien:
a) de veroordeling van de J. bestaat of mede bestaat in een vrijheidsbeneming;

(A) Footnote: The Netherlands representatives explained that the necessary legislation to enable forcible [illegible]

b) de J. zelf de wens tot overbrenging te kennen heeft gegeven;

c) de J. ten tijde van het verzoek nog tenminste zes maanden van de veroordeling moet ondergaan;

DOCUMENT FOR FURTHER DISCUSSION ON FRIDAY 22 NOVEMBER 1985

Representatives from the Netherlands and South Africa met in the Union Buildings on 20 November 1985 to discuss (ad referendum to their governments) arrangements under which De Jonge can be made available for trial in South Africa.

As a basis for the discussions were used tentative proposals put to Ambassador Wijnaendts in Pretoria. On most aspects overall agreement was reached but on two points opposing positions could not be resolved.

The proposals discussed are as follows:

(i) Members of the South African Police will be allowed to continue with the interrogation of De Jonge in the premises presently occupied by him in the Nedbank building. Members of the Embassy staff and De Jonge's lawyer can be present. Questioning will take place during reasonable hours and after reasonable notice has been given. Should the pointing out of places, articles or persons require that those involved leave the premises, De Jonge can be taken out for that purpose if he agrees to do so, in which case he will be returned to the premises.

(ii) After the completion of the interrogation, the Attorney-General will consider all the evidence available and decide whether to charge De Jonge with a criminal offence

or offences. If he decides not to prosecute him, De Jonge will be allowed to leave the country. Should he decide to prosecute, an indictment will be prepared and served on De Jonge.

(iii) The Attorney-General will undertake not to charge De Jonge with any offence except offences associated with the loading of arms cachés and the use to which these cachés were put. De Jonge will, therefore, not be prosecuted for a contravention of section 13 of the Internal Security Act, 1982. (The Dutch representatives asked for an undertaking that De Jonge will not be charged under the Internal Security Act at all. To this the South African side could not agree and this is one of the two points that could not be resolved.)

(iv) When the indictment is served on De Jonge, he will be notified of the date on which the trial is to commence. On that day, and on every subsequent trial date, he will be handed over to the South African Police at the premises where he now is, to be taken to court to attend his trial. During adjournments during the day he will remain in police custody but after the final adjournment on each day, he will be returned to the Nedbank premises. At all times he can be accompanied by Embassy officials and his lawyer. It was stressed that it was essential that De Jonge's cooperation was obtained in this respect in that any attempted escape would also be construed as an escape from the protection of

the Netherlands Embassy resulting in his further detention in South African custody.

(v) As is normal in the South African criminal justice system, De Jonge will be able to be assisted and represented by legal counsel of his choice and in this respect the Netherlands Government or any other party will be able to provide the necessary funds.

(vi) The Netherlands Government will be able to send observers to attend the trial in full.

(vii) If De Jonge is found not guilty and discharged, or if he is found guilty and sentenced to a fine (which is paid) or given a suspended sentence, he will be free to leave the country.

(viii) If he is convicted and sentenced to a term of imprisonment, he will commence serving the sentence in a South African prison on the day the sentence is pronounced. The fact that he may lodge an appeal will not change this arrangement.

(ix) The second aspect on which agreement could not be reached, concerns the wish on the Netherlands side that an agreement be entered into between the two governments providing for De Jonge to be transferred to the Netherlands to

serve the remaining portion of his sentence there as soon as the necessary legal provision has come into operation there. There is at present a bill being processed there that will hopefully eventually provide for bilateral and multilateral agreements for the transfer of prisoners in such circumstances. This bill is not expected to be passed as law and to come into operation before January 1987. In South Africa the necessary legal provision already exists for the conclusion of arrangements with foreign states for the transfer of sentenced prisoners. The South African side's approach is, that they would not be able or prepared to recommend to their government that an agreement be entered into ad hoc for De Jonge. They suggest the negotiation of a general agreement as provided for in the Prisons Act, 1957. Once such an agreement has been concluded, a request for De Jonge's transfer in terms of that agreement can then be made and considered by the South African government.

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The two delegations met on Wednesday and again today. Our discussions were fruitful. Certain issues were further clarified and we shall now be reporting to our respective governments. ~~(There may be further discussions at a later date)~~.

KANTOOR VAN DIE
HOOFSTAATSREGSADVISEUR [VOLKEREG]
Sewende Vloer
Noordvaalgebou
Roete 700

MNR S S VAN DER MERWE
DIREKTEUR-GENERAAL
DEPARTEMENT VAN JUSTISIE

VERSLAG OOR SAMESPREKINGS TUSSEN AFVAARDIGINGS VAN DIE RSA EN NEDERLAND TEN AANSIEN VAN GEVAL KLAAS DE JONGE

Aangeheg vind u 'n afskrif van 'n verslag oor die samesprekings tussen die twee afvaardigings op Saterdag 6 Oktober 1985 te Pretoria wat deur mnr. A J Hoffmann en myself opgestel is.

PROF M P VORSTER
STAATSREGSADVISEUR (VR)

PRETORIA
18 OKTOBER 1985

SECRET

REPORT ON DISCUSSIONS BETWEEN DELEGATIONS FROM SOUTH AFRICA AND THE NETHERLANDS REGARDING STAY OF MR DE JONGE IN OFFICES USED BY DUTCH AS DIPLOMATIC OFFICES, PRETORIA 5 OCTOBER 1985

PRESENT:

Mr S S van der Merwe	Director General, Justice
Mr C F G von Hirschberg	Deputy Director General, Foreign Affairs
Dr J C Heunis	Chief Law Adviser, Office of the State President
Mr C G Liebenberg	Foreign Affairs
Prof M P Vorster	Law Adviser, Foreign Affairs
Mr A J Hoffmann	Law Adviser, Foreign Affairs

Mr H Wijnaendts	Special Representative of the Netherlands Minister of Foreign Affairs
Mr R van der Geer	Africa Bureau, Ministry of Foreign Affairs, The Hague
Mr H Bentinck	Chargé d'Affaires a i

MR VON HIRSCHBERG began by stating that the three issues raised, viz a trial in the Netherlands, safeconduct to new Embassy and a third party settlement, would not lead to a

successful conclusion of the matter. He indicated that this matter is causing political problems for both Governments and suggested that ways should be found to accomodate these problems.

He referred to a number of proposals Mr Van der Merwe had made ad referendum in Geneva to which the leader of the Netherlands delegation Mr Geesteranus had responded that they were substantial. The Netherlands Special Representative in the current discussions had a mandate to discuss the matter in all its aspects and he, therefore, assumed that the discussions would advance beyond the three matters proposed.

MR WIJNAENDTS reiterated that he had come to discuss the matter in all its aspects. Both Governments were convinced that the law was in their favour. According to him the possibility of a trial for De Jonge in the Netherlands seemed remote, and it appeared to be equally remote to hand him over to the South African authorities. He was fully aware of the political problems which this matter had caused in both countries. He indicated that the three proposals were still on the table but that the Netherlands Government was open to other suggestions. He stressed, however, that when civilized nations could not agree, it was accepted practice to refer the matter to a third party for settlement; not necessarily the I C J, as he appreciated that South Africa had had unpleasant experiences with this institution.

MR VON HIRSCHBERG suggested that the legal problems be set aside and that the political problems involved should be considered.

MR WIJNAENDTS insisted that the offices in the Nedbank Building retained their inviolability. But even if that position were accepted it would not solve the deadlock position.

MR VAN DER MERWE suggested that the issue of inviolability should not be considered. He realised that this matter had caused political difficulties for both Governments but that the two parties should assist each other to overcome these political problems.

MR WIJNAENDTS made it clear that the Netherlands Government respected the SA judiciary but that they did not like the South African laws; they were not up to standard. The Netherlands Government was of the opinion that the proposal regarding a third party settlement was very reasonable and they could not understand the unwillingness of the South African Government to consent to such a procedure.

He added that the guarantees provided by the SA Government were standard procedures in all criminal cases and would not provide his Minister with sufficient political manoeuvrability.

MR VAN DER MERWE referred to the conditions or guarantees which had been mentioned by the Netherlands delegation in

Geneva in the event that De Jonge would be handed over for trial in South Africa:

"- No evidence obtained from De Jonge or anybody else detained in terms of section 29 of the Internal Security Act should be used in the trial.

- If De Jonge is handed back to the South African Authorities he should not be re-detained under section 29.

- He should not be tried in terms of the Internal Security Act (eg section 54).

- Should the death penalty be imposed it would not be executed.

- He should be tried in open court.

- He should be entitled to full legal assistance.

- Should the Netherlands legislation in future make the necessary provision, the possibility of De Jonge serving his sentence in the Netherlands should be considered by the appropriate South African authorities.

- That the nationality of the accused or the nature of the crime should form no impediment to the application of the normal procedures as to pardon and parole."

The South African delegation on its part mentioned certain undertakings which it could recommend to the South African Government should De Jonge be handed back to the South African authorities:

"- we can undertake not to charge De Jonge with any offence except offences associated with the loading of arms cachés and the use to which these cachés were put. De Jonge will, therefore, not be prosecuted for a contravention of section 13 of the Internal Security Act.

- As is normal in our criminal justice system, De Jonge will be able to be assisted and represented by legal counsel of his choice and in this respect the Netherlands Government or any other party will be able to provide the necessary funds.

- The Netherlands Government will be able to send observers to attend the trial in full.

- As far as the imposition of a possible death sentence is concerned, we can make recommendations to the South African Government with an effect similar to those provided for in certain extradition agreements, that is not to execute the death sentence if it were to be imposed."

He stated that the South African Government would only be prepared to undertake that the State President would consider the possibility of a pardon if the death penalty should be imposed.

MR WIJNAENDTS indicated that his mandate was wide enough to include everything except handing De Jonge over to South African authorities. He was, however, interested in investigating further suggestions in this regard and referred to the possibilities of pardon or remission of sentence.

MR VAN DER MERWE indicated that apart from and in addition to the guarantees mentioned above, he was prepared to propose to the Attorney General and the Minister of Justice of South Africa that the following procedure be followed in bringing Mr De Jonge to trial:

- prior to his trial the South African police would question De Jonge in the Nedbank Building offices and in the presence of Netherlands officials;

- on the completion of the police investigation De Jonge would, while still staying in the Nedbank Offices, be served with a summons to appear in court and stand trial;

- during the period of his trial De Jonge would be allowed to stay on in the Nedbank offices but would be escorted by the South African police from these

offices to the court and back each day of his trail (a Netherlands official would be permitted to accompany De Jonge);

- if De Jonge should be found guilty and sentenced to a period of imprisonment, he would serve his sentence in South Africa.

MR WIJNAENDTS remarked that politically these proposals seemed less remote. With regard to the possibility of De Jonge serving his sentence in the Netherlands he mentioned that although it might not be possible at the moment, a law was in the process of being passed by Parliament which would provide for such an eventuality. Such a process would require a treaty between the Governments concerned, which, in its turn would have to go to Parliament. Even an arbitration procedure would require a treaty which would have to be consented to by Parliament in the Netherlands.

MR VAN DER MERWE again referred to a number of possible scenarios and indicated that it was not impossible that De Jonge might decide to become a state witness subsequent to further investigations. If his evidence were satisfactory he would be granted indemnity of prosecution.

MR WIJNAENDTS indicated that he did not consider this proposal a real option but conceded that in the final instance it would be up to De Jonge to decide if he would be prepared to act as a state witness.

MR VAN DER MERWE cautioned that De Jonge should not be denied this opportunity.

MR VON HIRSCHBERG warned that if the Netherlands stated in public that De Jonge would not be returned it would bring the negotiating process to an end.

MR WIJNAENDTS claimed that the Netherlands authorities had taken great care not to make any public statements. He expressed his disappointment that the South African authorities had brought the matter into the open.

MR VON HIRSCHBERG enquired whether the Netherlands delegation had any additional ideas or suggestions which they were prepared to put forward.

MR WIJNAENDTS said that the 8th of October was fortunately off the table. The Netherlands could not conceive that the South African authorities would go ahead and infringe the inviolability of the premises concerned. Mr Van der Merwe's proposal could provide a way out of the political predicament - especially South Africa breaking into the premises. The proposal reminded him of the solution to the Chinese Welders case. He was prepared to defend such a deal but cautioned that the final decision lay with his Minister. He suggested that the two Governments should work in close collaboration to manage the public information with regard to the matter.

MR VON HIRSCHBERG stated that Minister Botha should be informed and that the Netherlands authorities should respond within a week after they had had the opportunity to digest these proposals.

MR VAN DER MERWE, responding to a question from the Netherlands delegation, stated that the proposals entailed that De Jonge would have to return to the offices in the Nedbank building during his trial and not to the new Embassy premises.

At 13h00 the meeting was adjourned and after consultations on the one hand telephonically with Minister Van den Broek in the Netherlands and on the other hand Minister Botha at the Guest House, the agreed press statement below was issued. The details of the proposed solution involving the continuation of the police enquiry at the premises of the old Embassy and the possibility of a court hearing in South Africa were to be submitted formally to the two Governments for approval. After a working lunch during which events in South Africa were discussed informally, the proceedings were adjourned at 16h00.

"Joint Statement by Mr R F Botha, Minister of Foreign Affairs and Minister Van den Broek's Emissary, Ambassador H Wijnaendts.

Pretoria: Saturday: 5 October 1985

The two delegations have had a series of meetings. Various suggestions were exchanged which will now be submitted to the two Governments for consideration. Further talks are envisaged in due course.

While these talks are in progress, nothing will be done or said by either Government which could be considered as detrimental or prejudicial to a resolution of the problem."

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VERTROULIK

DE JONGE : AANTEKENING INSAKE VERHOOR IN SUID-AFRIKA

VERHOOR IN AFWESIGHEID:

Dit sal nie moontlik wees om De Jonge in sy afwesigheid te verhoor nie. 'n Memorandum waarin hierdie stelling toegelig word, is aangeheg.

ONDERNEMINGS WAT NEDERLAND MAG VRA:

Alhoewel die Nederlandse afvaardiging dit in Genève kategories gestel het dat hulle Regering nie te vinde sal wees vir De Jonge se oorhandiging aan Suid-Afrika nie, het hulle tog sekere ondernemings vermeld wat hulle Regering moontlik sou vra indien daardie opsie oorweeg sou word, te wete die volgende (soos vermeld in die SA afvaardiging se verslag):

"(i) No evidence obtained from De Jonge or anybody else detained in terms of section 29 of the Internal Security Act should be used in the trial.

(ii) If De Jonge is handed back to the South African authorities he should not be re-detained under section 29.

(iii) He should not be tried in terms of the Internal Security Act (eg section 54).

(iv) Should the death penalty be imposed it would not be executed.

(v) He should be tried in open court.

(vi) He should be entitled to full legal assistance.

(vii) Should the Netherlands legislation in future make the necessary provision, the possibility of De Jonge serving his sentence in the Netherlands should be considered by the appropriate South African authorities.

(viii) That the nationality of the accused or the nature of the crime should form no impediment to the application of the normal procedures as to pardon and parole."

ONDERNEMINGS WAT SUID-AFRIKA MOONTLIK KAN AANBIED

Voor die SA afvaardiging se vertrek na Genêve, is daar besin oor moontlike ondernemings wat aangebied kan word sou Nederland bereid wees om De Jonge te oorhandig. Tydens die samesprekings aldaar, is daar aan die Nederlandse afvaardiging die volgende ondernemings genoem as ondernemings wat ons gedink het ons aan ons Regering sou kan voorstel (soos vermeld in die SA afvaardiging se verslag):

"(i) We can undertake not to charge De Jonge with any offence except offences associated with the loading of arms

caches and the use to which these caches were put. De Jonge will, therefore, not be prosecuted for a contravention of section 13 of the Internal Security Act.

(ii) As is normal in our criminal justice system, De Jonge will be able to be assisted and represented by legal counsel of his choice and in this respect the Netherlands Government or any other party will be able to provide the necessary funds.

(iii) The Netherlands Government will be able to send observers to attend the trial in full.

(iv) As far as the imposition of a possible death sentence is concerned, we can make recommendations to the South African Government with an effect similar to those provided for in certain extradition agreements, that is not to execute the death sentence if it were to be imposed."

Ministers het vandag op 'n soortgelyke onderneming besluit, behalwe dat (iv) moet lees dat die Staatspresident begenadiging sal oorweeg indien De Jonge ter dood veroordeel word.

VERHOOR OP DAGVAARDING TERWYL DE JONGE IN DIE NEDBANKSE[B]OU-PERSEEL AANBLY:

Hierdie moontlikheid kan met die Prokureur-generaal bespreek word. Dit sou behels die betekening van 'n dagvaarding aan De Jonge en sy bywoning van sy verhoor terwyl hy in die perseel waar hy tans verkeer, aanbly. Dit sal ook behels 'n onderneming van die Nederlandse Regering om De Jonge vir elke verhoordag beskikbaar te stel deur hom op die perseel te oorhandig aan die SAP vir vervoer na die hof, bewaring daar en terugbesorging op die perseel wanneer die hof verdaag (hulle kan iemand saam met polisie stuur) en om in te stem dat indien hy skuldig bevind en gevonnis word, hy in die gevangenis opgeneem word om sy vonnis uit te dien. In so 'n geval sal die ondernemings van SA kant in verband met sy verhoor (hierbo genoem) ook geld.

Die voordeel vir Nederland lê hierin dat sodoende vermy word dat De Jonge vir verdere ondervraging aangehou word en dat hulle slegs iemand wat deur 'n hof skuldig bevind en gevonnis is, sal hoef te oorhandig.

Die voordeel vir Suid-Afrika lê daarin dat De Jonge normaalweg verhoor kan word en sy vonnis kan uitdien as hy skuldig bevind word. Word hy onskuldig bevind sou ons hom buitendien moes laat gaan. Die nadeel vir Suid-Afrika is dat De Jonge nie weer onder artikel 29 aangehou en ondervra kan word nie wat beteken dat 'n hele aantal opgeleide terroriste wat reeds die land binnegekom

het, nie geïdentifiseer sal kan word nie (wat moontlik tog sou gebeur het al het hy nooit uit aanhouding ontsnap nie).

Sou dit nie moontlik wees om met die verhoor te begin alvorens De Jonge verder ondervra is nie, kan hierdie opsie aangevul word met 'n Nederlandse onderneming dat die SAP De Jonge eers op die huidige perseel en in teenwoordigheid van hulle amptenare kan ondervra.

STAATSGETUIE

'n Interessante moontlikheid wat genoem is (en een wat ook met die Prokureur-generaal bespreek kan word) is dat aangebied kan word om De Jonge as staatsgetuie te gebruik. Dit sou behels dat hy ter voltooiing van die polisie-ondersoek 'n volledige verklaring aan die SAP moet maak; dit kan op die huidige perseel en in teenwoordigheid van Nederlandse beamptes geskied. Daar sal verwag word van hom om alle inligting te verstrek wat in verhore van persone wat hulle nou in Suid-Afrika bevind (of besondere persone wat genoem kan word) getuienis kan wees. Hy sal dan ook beskikbaar gestel moet word om by daardie verhore te getuig. Indien hy, nadat hy getuig het, deur die hof vrywaring van vervolging toegestaan word, sal hy dan toegelaat word om uit Suid-Afrika te vertrek.

Hierdie moontlikheid behels 'n onderneming van De Jonge om staatsgetuie te wees en van die Nederlandse Regering om hom beskikbaar te stel om die verklaring te maak en om te getuig waar en wanneer

nodig (hy sal telkens deur die SAP by die perseel afgehaal en daar terugbesorg word). Van Suid-Afrika se kant sal onderneem moet word dat hy vry geleide uit Suid-Afrika sal ontvang nadat die verhoorhof hom vrywaring verleen het omdat hy bevredigend getuig het.

Die voordeel vir die Nederlandse Regering lê daarin dat De Jonge nie oorhandig word vir verhoor nie, en indien hy bevredigend getuig, vertrek hy uit Suid-Afrika en van hulle hande af.

Vir Suid-Afrika lê die voordeel daarin dat 'n saak bewys word teen 'n moontlike belangriker persoon as De Jonge, dat sy bedrywighede tog blootgelê word en dat die impasse afgehandel word deur 'n prosedure wat nie ongewoon is nie.

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CP

DEPARTEMENT VAN JUSTISIE
DEPARTMENT OF JUSTICE

Direkteur-Generaal Director-General • Minister

Lêer/File No. 8/6/Straf/1/5 (SRE)

VERHOOR VAN 'N BESKULDIGDE IN SY AFWESIGHEID

1. Die vraag het ontstaan of 'n persoon in sy afwesigheid in strafregtelike verrigtinge verhoor kan word.

2. Artikel 158 van die Strafproseswet, 1977 (Wet 51 van 1977), bepaal uitdruklik dat alle strafregtelike verrigtinge in 'n hof in die aanwesigheid van die beskuldigde plaasvind. Die Appèlhof het dan ook in die saak van S v Nzuza, 1963(3) SA 631 AD, uitdruklik beslis dat die beskuldigde selfs nie eens kan toestem tot strafregtelike verrigtinge in sy afwesigheid nie. Hierdie beslissing is gegee aan die hand van die bepalings van artikel 156(1) van die Strafproseswet, 1955 (Wet 56 van 1955), wat materieel dieselfde is as die bepalings van artikel 158 van die huidige Strafproseswet, 1977.

(Art 158; Art 156; S v Nzuza)

3. Artikel 159 van die Strafproseswet, 1977 laat egter sekere uitsonderings op hierdie reël toe:

(a) Indien die beskuldigde hom op so 'n wyse gedra dat voortsetting van die verrigtinge in sy aanwesigheid ondoenlik is.

(b) As twee of meer beskuldigdes saam in strafregtelike verrigtinge verskyn en die hof oortuig is dat:

(i) die beskuldigde se liggaamlike toestand sodanig is dat hy nie die verrigtinge kan bywoon nie; of

(ii) siekte of dood van 'n lid van sy familie sy afwesigheid noodsaak,

en die hof verder oortuig is dat 'n getuie, die staat of 'n medebeskuldigde nie onnodig verontrief of benadeel sal word nie, bepaal dat die verrigtinge, onder die voorwaardes deur die hof bepaal, voortgesit kan word. Daar dien egter op gelet te word dat al hierdie uitsonderings veronderstel dat die beskuldigde reeds in die hof verskyn het voordat sy afwesigheid ter sprake gekom het.

4. Onder geen omstandighede kan strafregtelike verrigtinge dus in die afwesigheid van die beskuldigde begin word nie.

5. Voorgelê vir die Minister se inligting.

ADJUNK-DIREKTEUR-GENERAAL : JUSTISIE

DIREKTEUR-GENERAAL : JUSTISIE

Kennis GENEEM/

H J COETSEE, LP
MINISTER VAN JUSTISIE

because there was no evidence that the accused committed the murder charged or any other offence; see sec. 157 (3).

C. H. Bornman, for the State: Die Hof het die inherente bevoegdheid om 'n pleit van onskuldig aan te teken waar die beskuldigde skuldig pleit. Waar 'n pleit van onskuldig aangeteken is, moet die verhoor voortgaan soos in enige ander saak waar 'n pleit van onskuldig aangeteken is; sien *R.* v. *Kumalo and Another*, 1930 A.D. te bl. 201; *R.* v. *Baboolall*, 1952 (4) S.A. 731; *R.* v. *Zonele*, 1959 (3) S.A. te bl. 323. Art. 258 (1) van Wet 56 van 1955 is nie van toepassing in sake waar 'n pleit van onskuldig aangeteken is nie; sien *R.* v. *Mutimba*, 1944 A.D. te bl. 35; *R.* v. *Baboolall*, *supra*. Die erkennings gemaak deur die verdediging val binne die omvang van art. 284 (1). Die erkenning van feite wat ter sake dienend is, is voldoende bewys van daardie feite. Sien *R.* v. *Mazibuko*, 1947 (4) S.A. 821; *R.* v. *Fouche*, 1958 (3) S.A. te bl. 776, 777. Indien die Hof bevind dat die Staat *viva voce* getuienis moes gelei het, word betoog dat die saak ingevolge art. 22 (*a*) van Wet 59 van 1959 na die Hof *a quo* terugverwys behoort te word vir verhoor. Terugverwysing moet slegs beveel word in uitsonderlike omstandighede waar die getuienis sodanig is dat die saak sonder versuim of werklike geskil sal bewys en waar dit nie gelei is weens oorsig of misverstand nie. Sien *R.* v. *Letuli and Another*, 1953 (4) S.A. 241; *R.* v. *Pretoria Timber Co. (Pty.) Ltd. and Another*, 1950 (3) S.A. te bl. 179; *R.* v. *Siwi*, 1951 (3) S.A. te bl. 709. Die getuienis is nie mondelings gelei nie omdat die vervolger *bona fide* onder die indruk was dat art. 284 (1) van toepassing is.

Law, in reply.

Cur. adv. vult.

Postea (May 27).

HOEXTER, A.J.A.: The appellant was arraigned before JAMES, J., and two assessors on an indictment for murder. He pleaded guilty. What occurred after the plea appears from the following extract from the record:

"Mr. *Law*: I appear for the accused M'Lord. The accused is prepared to admit all the facts of the preparatory examination record.

JAMES, J.: In a murder case, when one records the plea, one records what the accused says but one records a plea of not guilty. A plea of not guilty will be entered.

Prosecutor: As the defence is prepared to admit all the facts of the preparatory examination, I intend reading out the preparatory examination record.

JAMES, J.: Mr. *Law*, is the effect of your admission this: that you agree that what the witnesses said at the preparatory examination is correct—that what the witnesses said at the preparatory examination is correctly recorded and that what they said is the truth?

Mr. *Law*: That is correct, M'Lord.

JAMES, J.: On that basis, I am prepared to record that admission in those terms.

Prosecutor: I will now read from the preparatory examination record.

JAMES, J.: I am not convinced that it is necessary to read the preparatory examination record in Court, but it will take no longer for you to read the record than for the assessors to retire and read it in Chambers.

Prosecutor: M'Lord, I will just indicate to the Court that I do not intend reading the whole of the preparatory examination record, but only the evidence of those witnesses I intend calling in the case.

JAMES, J.: Are you going to read the evidence of those witnesses you would normally have led?

Prosecutor: That's correct M'Lord."

When the prosecuting counsel had read the relevant evidence given at the preparatory examination, counsel for the defence—I quote again from the record:

"states that he does not wish to make any submissions as to whether the accused is to be found guilty or not: that he does not wish to call the accused to give evidence; that he does not wish to examine any of the witnesses and that he does not propose to call evidence".

In finding the appellant guilty, the trial Court said the following:

"The evidence recorded at the preparatory examination and relied on by the prosecutor leaves the Court in no doubt that the accused confessed to having committed this murder. The accused, through his advocate, has formally admitted the correctness of the confession and of the other evidence relied on by the prosecutor as recorded at the preparatory examination. This admission has the result in terms of sec. 284 (1) of the Code of making the facts so admitted evidence in the case. The accused offered no evidence and made no statement. He called no witnesses. The State evidence is therefore uncontradicted. The accused admitted the correctness of the confession. In addition there is evidence establishing that the accused gained possession of an axe on the day of the murder and that the axe was found after the murder as a result of information given by the accused with human blood stains upon it. It is clear that the deceased met his death as the result of a blow from an instrument such as this axe. The evidence also established that the accused was seen in the vicinity of the store immediately before the deceased met his death, and that the store was found to have been broken into after the deceased died and that money had been stolen from the store which was found later in the possession of the accused.

The Court is satisfied that the confession is the truth and that the accused murdered the deceased. He is found guilty as charged."

The trial Court found that there were no extenuating circumstances and the appellant was sentenced to death. Subsequently he applied for leave to appeal to this Court. In granting this application the trial Judge, after quoting the terms of the admission made by counsel for the appellant, continued as follows:

"As a result of this very wide admission I formed the view that there was no purpose in the Court hearing the *viva voce* evidence of the witnesses called at the preparatory examination and that the admission entitled the Court to take into account the evidence of the witnesses as recorded at the preparatory examination, and to treat it as though it had been led at the trial and had been found to be truthful. See sec. 284 (1) of the Code."

Sec. 284 (1) of the Code reads as follows:

"The accused or his representative in his presence, may in any criminal proceedings admit any fact relevant to the issue and any such admission shall be sufficient evidence of that fact."

Relying on this sub-section, the trial Judge regarded the admission of certain facts by the appellant as *evidence* of those facts. In the Afrikaans version, however, the relevant words are "en so 'n erkenning is voldoende *bewys* van daardie feit". It is the Afrikaans version which has been signed by the Governor-General, and the word "evidence" in the section must therefore be interpreted to mean "proof". (See *R.* v. *V.*, 1958 (3) S.A. 474 (G.W.), at p. 479).

Counsel for the appellant accordingly argued that there was no evidence before the trial Court on which it could have convicted the appellant. Before dealing with this argument, I must point out that the terms of sec. 258 (1) (*a*) of the Code, which refers to a plea of guilty and on which counsel for the appellant also relied, are irrelevant because the trial Judge entered a plea of not guilty, and the trial accordingly had to proceed as in any other case in which a plea of not

guilty has been entered. (*Rex* v. *Kumalo and Another*, 1930 A.D. 193 at p. 200).

Returning now to the argument that there was no evidence before the trial Court, it becomes necessary to quote the relevant provisions of sec. 156 (1) of the Code: A

". . . every criminal trial shall take place, and the witnesses shall, save as is otherwise expressly provided by this Act or any other law, give their evidence *viva voce*, in open court in the presence of the accused . . ."

It appears from the record that no witnesses were called at the trial; all that the prosecuting counsel did was to read the evidence given at the preparatory examination. *Prima facie* therefore no evidence was B led before the trial Court. But the matter does not end there, because the appellant did more than to make admissions of facts; what he did was to consent to the proposition that the evidence given at the preparatory examination should be regarded as having been given at the trial. In other words, the appellant consented to a form of procedure other C than that specified in sec. 156 (1). The question now arises whether the appellant could validly so consent.

In the case of *Rex* v. *Perkins*, 1920 A.D. 307, INNES, C.J., said the following at pp. 310-311:

"The terms of the statute are peremptory—a confession made to a peace officer, other than a magistrate or justice 'shall not be admissible in evidence D under this section' unless confirmed and reduced to writing as prescribed. Such confession, the Legislature in its wisdom has decreed, shall not be evidence at all, and an accused cannot by his consent remedy the defect. *Rex* v. *Bertrand*, L. R. 1. P.C. Appeal, p. 520, is instructive upon the point. That was a strong case. The accused had been tried for murder and the jury, failing to agree, had been discharged. At the second trial the evidence given by some of the witnesses on the first occasion was read over to them, liberty to examine and cross-examine E being given to the prisoner and the prosecution. No objection was taken by the accused or his counsel to that course: and in effect they assented to it. But the Judicial Committee held that that did not validate the irregularity—or legalise the evidence. It was pointed out that the matter could not be regarded only with reference to the prisoner. 'The object of a trial' so the judgment ran, 'is the administration of justice in a course as free from doubt, or chance of miscarriage, as merely human administration of it can be—not the interests of either party. This remark very much lessens the importance of a prisoner's F consent, even when he is advised by counsel, and substantially, not of course literally, affirms the wisdom of the common understanding in the profession, that a prisoner can consent to nothing'. These remarks were *obiter*: but they are entitled to great weight, and they confirm the view already expressed that the accused in this case could not by waiver or consent render admissible a statement which the Legislature has expressly and unconditionally declared to be inadmissible. Reference was made during the argument to sec. 318 of the G Act; that clause no doubt introduces a procedure novel in criminal cases, but it has no operation upon the matter before us."

Sec. 318 of Act 31 of 1917, to which the learned CHIEF JUSTICE refers, reads as follows:

"The accused may admit on the trial any material fact and such admission is sufficient proof of the fact without other evidence."

In my opinion the words of sec. 156 (1) of the Code are also H peremptory. That section decrees that witnesses shall give their evidence *viva voce*, and the only exceptions made are those expressly allowed by statute. It follows that the appellant could not by his consent validate the invalid procedure adopted by counsel for the prosecution in the present case.

In the result the evidence given at the preparatory examination was not evidence at the trial and the appellant was, in effect, convicted on

no evidence at all. The appeal must accordingly be allowed and the conviction and sentence set aside.

Counsel for the State argued strenuously that the matter should be remitted to the trial Court to be tried afresh. In my opinion the present case is similar to that of *S.* v. *Moodie*, 1961 (4) S.A. 752 (A.D.), in that there has been so gross a departure from established rules of procedure that the appellant has not been properly tried. Indeed, in the present case the appellant was, in effect, never tried at all. This is an irregularity of such a nature that it is *per se* a failure of justice. It follows from the decision in *S.* v. *Moodie*, 1962 (1) S.A. 587 (A.D.), that it is open to the State to re-indict the appellant, and I do not think that in such a case the Court ought, assuming that it could, to remit the matter for trial afresh. It is for the State to decide whether it will re-indict the appellant.

BEYERS, J.A., and OGILVIE THOMPSON, J.A., concurred.

VAN SCHALKWYK v. VAN DER WATH.

(APPÈLAFDELING.)

1963. *Mei* 14, 27. STEYN, H.R., VAN BLERK, A.R., BOTHA, A.R., HOLMES, A.R., en WESSELS, A.R.

**Water.—Oorloop van water uit buurman se plaas doen skade op eiser se plaas.—Bewering dat sodanige die gevolg is van werke wat op buurman se plaas gedoen is.—Wanneer eiser geregtig op 'n interdik en skadevergoeding.*—Actio de aqua pluvia arcenda.—*Wat eiser moet bewys.*

Waar die eienaar van 'n plaas 'n interdik eis wat 'n buurman belet om reënwater wat op sy eiendom val of kom in 'n onnatuurlike konsentrasie, volume, krag en vaart op eiser se eiendom te laat afloop, moes die eiser aan die vereistes van die *actio de aqua pluvia arcenda* voldoen. Hy moet bewys dat die werke, wat op die verweerder se grond gedoen is, die natuurlike waterloop op sy grond verander het op 'n wyse wat daar skade veroorsaak. Die juistheid van sy bewering kan nie bepaal word sonder 'n vergelyking met die water wat natuurlikerwyse op sy grond sou afgeloop het as die werke nie daar was nie. As hy nie daarin slaag om te bewys dat die oorloop van water, as gevolg van die werke op die verweerder se grond, meer gekon-

**Water.—Overflow of water from neighbour's farm causing damage on plaintiff's farm.—Allegation that such the result of works effected on neighbour's farm.—When plaintiff entitled to an interdict and damages.*—Actio de aqua pluvia arcenda.—*What plaintiff must prove.*

Where the owner of a farm claims an interdict restraining a neighbour from allowing water falling or coming onto his property to flow down in an unnatural concentration, volume, force and speed onto plaintiff's property, the plaintiff must comply with the requirements of the *actio de aqua pluvia arcenda*. He must prove that the works effected on the defendant's property have altered the natural flow of water onto his land in a manner which caused damage there. The correctness of his allegation cannot be determined without a comparison with the water which would have run down in the normal course onto his land if the works were not there. If he fails to prove that the overflow of water, as a result of the works on the de-

STRAFPROSESWET, NO. 56 VAN 1955

(Voor dit deur Wet No. 51 van 1977 gewysig is)

Artikel 156

156. Teenwoordigheid van beskuldigde.—(1) Onderhewig aan die bepalings van artikel *honderd ses-en-vyftig ter*, geskied iedere strafverhoor, en lê die getuies behalwe soos deur hierdie Wet of enige ander wetsbepaling uitdruklik anders bepaal word, hul getuienis mondeling af in die ope hof in die teenwoordigheid van die beskuldigde, tensy hy hom op so 'n wyse gedra dat die voortsetting van die verrigtinge in sy teenwoordigheid ondoenlik is, in watter geval die hof kan gelas dat hy verwyder en die verhoor in sy afwesigheid voortgesit word.

(2) Indien die beskuldigde gedurende die verhoor sonder verlof afwesig is, kan die hof gelas dat 'n lasbrief vir sy inhegtenisneming uitgereik word, en indien hy in hegtenis geneem word, moet hy onverwyld voor die hof gebring word.

(3) Die hof kan te eniger tyd gedurende die verhoor gelas dat enige persoon (behalwe die beskuldigde self) wat as 'n getuie opgeroep staan te word, die hof verlaat en afwesig bly totdat hy opgeroep word, en dat hy in die hof bly nadat sy getuienis afgelê is.

(4) 'n Hoërhof kan, wanneer hy dit goedvind, en 'n laerhof kan, indien dit na die mening van daardie hof ter wille van die goeie orde of openbare sedes of die regsbedeling nodig blyk, gelas dat 'n verhoor agter geslote deure plaasvind of dat (met sodanige uitsonderings as wat die hof gelas) vrouspersone of minderjariges of die publiek oor die algemeen of enige klas daaruit nie daarby aanwesig mag wees nie; en indien 'n beskuldigde verhoor staan te word of verhoor word op 'n aanklag in sub-artikel (5) van artikel *vier-en-sestig* bedoel, kan die hof op versoek van die persoon teen of ten opsigte van wie die misdryf wat ten laste gelê word, na bewering gepleeg is (of indien hy minderjarig is, op versoek van daardie persoon of van sy voog), hetsy skriftelik voor die verhoor of mondeling te eniger tyd gedurende die verhoor gedoen, gelas dat iedereen wie se teenwoordigheid nie in verband met die verhoor nodig is nie, of enige persoon of klas persone in die versoek vermeld, nie daarby aanwesig mag wees nie.

(5) Niemand behalwe die persoon wat verhoor word en sy prokureur of advokaat en behalwe 'n ouer of die voog van 'n minderjarige wat verhoor word, of iemand wat teenoor hom in die plek van 'n ouer staan, mag in enige hof by die verhoor van iemand onder die ouderdom van agtien jaar weens enige aanklag teenwoordig wees nie, tensy sy teenwoordigheid in verband met die verhoor nodig is, of tensy die regter of regterlike amptenaar wat by die verhoor voorsit, aan hom toestemming verleen het om daarby teenwoordig te wees.

(6) Niemand onder die ouderdom van agtien jaar, behalwe iemand wat verhoor word, mag by 'n strafregtelike verhoor in enige hof teenwoordig wees nie, behalwe solank hy werklik getuienis daarby aflê of tensy die regter of regterlike amptenaar wat by die verhoor voorsit, aan hom toestemming verleen het om daarby teenwoordig te wees.

(7) Die regter of regterlike amptenaar wat by 'n verhoor voorsit, kan gelas dat solank 'n getuie onder die ouderdom van agtien jaar getuienis by daardie verhoor aflê, niemand, behalwe 'n prokureur of advokaat van 'n persoon wat verhoor word, en behalwe 'n ouer of die voog van die getuie of van 'n minderjarige wat verhoor word, of iemand wat teenoor die getuie of minderjarige in die plek van 'n ouer staan, wie se teenwoordigheid nie in verband met die verhoor nodig is nie, daarby teenwoordig mag wees nie.

(8) 'n Verhoor in 'n laerhof van 'n beskuldigde wat onder die ouderdom van agtien jaar is, of van twee of meer beskuldigdes gesamentlik wat almal onder daardie ouderdom is, geskied in 'n ander gebou of vertrek (indien 'n geskikte beskikbaar is) as dié waarin strafsake teen persone bo daardie ouderdom gewoonlik verhoor word.

Artikel 156bis

156*bis*. Hof kan verlof tot afwesigheid van verhoor toestaan.—As twee of meer beskuldigdes by 'n verhoor voor 'n hof ingestel kragtens artikel 2 van die Wet op Landdroshowe, 1944 (Wet No. 32 van 1944), of by 'n verhoor voor 'n hoërhof, gesamentlik aangekla word weens enige misdryf, hetsy dieselfde of verskillende misdrywe, en die hof te eniger tyd na die aanvang van die verhoor op aansoek persoonlik gerig deur enige van die beskuldigdes of sy verteenwoordiger, oortuig is—

(*a*) dat die fisiese toestand van daardie beskuldigde sodanig is dat hy nie in staat is om die verhoor by te woon nie of dat dit onwenslik is dat hy die verhoor moet bywoon; of

159. Omstandighede waarin strafregtelike verrigtinge in afwesigheid van beskuldigde mag plaasvind.—(1) Indien 'n beskuldigde hom by strafregtelike verrigtinge op 'n wyse gedra wat die voortsetting van die verrigtinge in sy aanwesigheid ondoenlik maak, kan die hof gelas dat hy verwyder word en dat die verrigtinge in sy afwesigheid voortgesit word.

(2) Indien twee of meer beskuldigdes gesamentlik by strafregtelike verrigtinge verskyn en—

(*a*) die hof te eniger tyd na die aanvang van die verrigtinge op aansoek aan die hof deur 'n beskuldigde persoonlik of deur sy verteenwoordiger, oortuig is—

(i) dat die liggaamlike toestand van bedoelde beskuldigde sodanig is dat hy nie in staat is om die verrigtinge by te woon nie of dat dit onwenslik is dat hy die verrigtinge bywoon; of

(ii) dat omstandighede betreffende die siekte of dood van 'n lid van die familie van bedoelde beskuldigde sy afwesigheid van die verrigtinge noodsaak; of

(*b*) enige van die beskuldigdes van die verrigtinge afwesig is, hetsy ingevolge die bepalings van subartikel (1) of sonder verlof van die hof—

kan die hof, indien hy van oordeel is dat die verrigtinge nie verdaag kan word sonder onbehoorlike benadeling, belemmering of ongerief aan die vervolging of 'n mede-beskuldigde of 'n getuie wat aanwesig is of wat gedagvaar is om aanwesig te wees nie—

(*aa*) in die geval van paragraaf (*a*), die afwesigheid van die betrokke beskuldigde van die verrigtinge magtig vir 'n tydperk deur die hof bepaal en op die voorwaardes wat die hof na goeddunke oplê; en

(*bb*) gelas dat die verrigtinge in die afwesigheid van die betrokke beskuldigde voortgesit word.

(3) Waar 'n beskuldigde in die in subartikel (2) bedoelde omstandighede van die verrigtinge afwesig raak, kan die hof, in plaas van om te gelas dat die verrigtinge in die afwesigheid van die betrokke beskuldigde voortgesit word, op aansoek van die vervolging gelas dat die verrigtinge ten opsigte van die afwesige beskuldigde geskei word van die verrigtinge ten opsigte van die beskuldigdes wat aanwesig is, en daarna, wanneer bedoelde beskuldigde weer aanwesig is, gaan die verrigtinge teen hom voort vanaf die stadium waarop hy afwesig geraak het, en dit is nie nodig dat die hof anders saamgestel word slegs vanweë bedoelde skeiding nie.

160. Prosedure by strafregtelike verrigtinge waar beskuldigde afwesig is.—(1) Indien 'n in artikel 159 (1) of (2) bedoelde beskuldigde weer die betrokke verrigtinge bywoon, kan hy, tensy hy regsverteenwoordiging tydens sy afwesigheid gehad het, 'n getuie ondervra wat tydens sy afwesigheid getuig het, en die oorkonde van die verrigtinge insien of van die hof verlang om bedoelde oorkonde aan hom te laat oorlees.

(2) Indien die ondervraging van 'n getuie ingevolge subartikel (1) plaasvind nadat die getuienis ten behoewe van die vervolging of 'n mede-beskuldigde afgesluit is, kan die vervolging of so 'n mede-beskuldigde, ten opsigte van 'n geskilpunt wat uit die ondervraging ontstaan, getuienis lei ter weerlegging van getuienis betreffende die geskilpunt wat aldus ontstaan.

(3) (*a*) Wanneer die getuienis ten behoewe van al die beskuldigdes, behalwe 'n beskuldigde wat van die verrigtinge afwesig is, afgesluit is, moet die hof, behoudens die bepalings van paragraaf (*b*), die verrigtinge verdaag totdat so 'n afwesige beskuldigde aanwesig is en, indien nodig, die verrigtinge verder verdaag totdat die getuienis, as daar is, ten behoewe van daardie beskuldigde gelei is.

(*b*) Indien dit aan die hof blyk dat die aanwesigheid van 'n afwesige beskuldigde nie redelikerwys verkry kan word nie, kan die hof gelas dat die verrigtinge ten opsigte van die beskuldigdes wat aanwesig is, afgesluit word asof sodanige verrigtinge van die verrigtinge geskei is in die stadium waarop die betrokke beskuldigde van die verrigtinge afwesig geraak het, en wanneer so 'n afwesige beskuldigde weer aanwesig is, gaan die verrigtinge teen hom voort vanaf die stadium waarop hy afwesig geraak het, en dit is nie nodig dat die hof anders saamgestel word slegs vanweë bedoelde skeiding nie.

(3) Niemand mag op enige wyse hoegenaamd enige inligting publiseer wat die identiteit openbaar of kan openbaar van 'n beskuldigde onder die ouderdom van agtien jaar of van 'n getuie by strafregtelike verrigtinge wat onder die ouderdom van agtien jaar is nie: Met dien verstande dat die voorsittende regter of regterlike amptenaar die publikasie van soveel van bedoelde inligting kan magtig as wat hy goedvind indien die publikasie daarvan na sy oordeel regverdig en billik en in belang van 'n bepaalde persoon sal wees.

(4) Geen verbod of lasgewing ingevolge hierdie artikel is van toepassing met betrekking tot die publikasie by wyse van 'n *bona fide*-hofverslag van—

(*a*) inligting ten einde verslag te doen oor 'n regsvraag betreffende die betrokke verrigtinge nie; of

(*b*) 'n beslissing of uitspraak wat deur 'n hof op so 'n vraag gegee word nie,

indien bedoelde verslag nie die naam noem van die persoon wat aangekla is of van die persoon teen wie of in verband met wie die betrokke misdryf na bewering gepleeg is of van 'n getuie by bedoelde verrigtinge nie en nie die plek noem waar die betrokke misdryf na bewering gepleeg is nie.

(5) Iemand wat in stryd met hierdie artikel of met 'n lasgewing of magtiging ingevolge hierdie artikel inligting publiseer of wat op enige wyse hoegenaamd die identiteit van 'n getuie in stryd met 'n lasgewing ingevolge artikel 153 (2) openbaar, is aan 'n misdryf skuldig en by skuldigbevinding strafbaar met 'n boete van hoogstens vyfhonderd rand of met gevangenisstraf vir 'n tydperk van hoogstens 'n jaar of met sowel sodanige boete as sodanige gevangenisstraf.

155. Persone betrokke by dieselfde misdryf kan gesamentlik verhoor word.—(1) Enige aantal deelnemers aan dieselfde misdryf kan gesamentlik verhoor word en enige aantal begunstigers by dieselfde misdryf kan gesamentlik verhoor word of enige aantal deelnemers aan dieselfde misdryf en enige aantal begunstigers by daardie misdryf kan gesamentlik verhoor word, en elke sodanige deelnemer en elke sodanige begunstiger kan by bedoelde verhoor aangekla word weens die betrokke selfstandige misdryf wat hom ten laste gelê word.

(2) 'n Ontvanger van goed wat deur middel van 'n misdryf verkry is, word by die toepassing van hierdie artikel geag 'n deelnemer aan die betrokke misdryf te wees.

156. Persone wat afsonderlike misdrywe op dieselfde tyd en plek pleeg, kan gesamentlik verhoor word.—Enige aantal persone wat aangekla word van verskillende misdrywe wat op dieselfde plek en op dieselfde tyd of op ongeveer dieselfde tyd gepleeg is, kan gesamentlik ten opsigte van daardie misdrywe aangekla en verhoor word indien die aanklaer die hof meedeel dat getuienis wat toelaatbaar is by die verhoor van een so 'n persoon na sy oordeel, ook toelaatbaar sal wees as getuienis by die verhoor van 'n ander sodanige persoon of ander sodanige persone.

157. Voeging van beskuldigdes en skeiding van verhore.—(1) 'n Beskuldigde kan by 'n ander beskuldigde in dieselfde strafregtelike verrigtinge gevoeg word te eniger tyd voordat enige getuienis ten opsigte van die betrokke aanklag gelei is.

(2) Waar twee of meer persone gesamentlik aangekla word, hetsy weens dieselfde misdryf of weens verskillende misdrywe, kan die hof te eniger tyd gedurende die verhoor, op aansoek van die aanklaer of van enige van die beskuldigdes, gelas dat die verhoor van een of meer van die beskuldigdes afsonderlik van die verhoor van die ander beskuldigdes moet geskied, en die hof kan sigself van 'n uitspraak ten opsigte van enige van sodanige beskuldigdes weerhou.

158. Strafregtelike verrigtinge moet in aanwesigheid van beskuldigde plaasvind.—Behalwe waar hierdie Wet of 'n ander wet uitdruklik anders bepaal, vind alle strafregtelike verrigtinge in 'n hof in die aanwesigheid van die beskuldigde plaas.

DEPARTEMENT VAN BUITELANDSE SAKE

Republiek van Suid-Afrika, Privaatsak X152, Pretoria, 0001

Tel. 28-6912 x 252 J C G Liebenberg

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1985 -11- 07

VERTROULIK

DIE DIREKTEUR-GENERAAL
JUSTISIE

Vir aandag: Mnr S S van der Merwe

DIE KOMMISSARIS
SUID-AFRIKAANSE POLISIE

Vir aandag: Brig H Stadler

GEVAL KLAAS DE JONGE

Dokumentasie

A. Teleks no 609 van 5 November 1985 vanaf Den Haag.

Met verwysing na my enersgenommerde diensbrief van 1 November 1985, stuur ek u hiermee 'n afskrif van bogenoemde teleks ter inligting.

DIREKTEUR-GENERAAL: BUITELANDSE SAKE

UNP
INKOMEND

AFSKRIF .... VAN ....
LEERNR.....

400/016/30

B

1. ROETINE

WERKSKOPIE

2. 19851105

3. TELNO 609

4. SALEG DEN HAAG

5. HK PTA ROETE : 241

VERTROULIK

KLAAS DE JONGE

WIJNAENDTS HET MY VANDAG TELEFONIES MEEGEDEEL DAT HULLE VERWAG OM TEEN DIE EINDE VAN DIE WEEK 'N DEFINITIEWE ANTWOORD AAN ONS TE VERSTREK. HY HET BEVESTIG DAT HULLE DIE PAKKET VOORSTELLE WAT HY VANAF PRETORIA TERUGGEBRING HET, AS 'N GOEIE BASIS VIR VERDERE BESPREKING (DEUR JURIDICI) BESKOU.

MINISTER VAN DEN BROEK KON NIE SY SAMESPREKINGS MET DEN UYL EN DIE ADVOKAAT VAN DE JONGE VERLEDE WEEK AFHANDEL NIE, A.G.V. DIE DEBATTE OOR KERNMISSIELE IN DIE PARLEMENT.

GISTER EN VANDAG IS VAN DEN BROEK IN BONN, MAAR HY HOOP OM NA SY TERUGKEER DIE SAAK VERDER TE VOER.

WIJNAENDTS HET BYGEVOEG DAT HY DIT DUIDELIK WIL STEL DAT HULLE NIE VIR TYD SPEEL NIE, MAAR OMSTANDIGHEDE HET DIE AFHANDELING VAN HULLE OORWEGING VAN DIE PAKKET VERTRAAG. EK HET GENOEM DAT HY REEDS VIER WEKE GELEDE IN PRETORIA WAS.

HY HET BYGEVOEG DAT HY WEER WIL BEVESTIG DAT DIE NEDERLANDSE REGERING BEREID IS OM DE JONGE HIER TE VERHOOR, M.A.W. HULLE BE-NADERING IS NIE DAT DE JONGE BEREGTING MOET VRYSPRING NIE

EINDE

DEPARTEMENT VAN BUITELANDSE SAKE

Republiek van Suid-Afrika, Privaatsak X152, Pretoria, 0001

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85102506u26

28-10-1985

GEHEIM

DIE DIREKTEUR-GENERAAL
JUSTISIE

Vir aandag : Mnr S S van der Merwe

DIE KOMMISSARIS
SUID-AFRIKAANSE POLISIE

Vir aandag: Brig H Stadler

GEVAL KLAAS DE JONGE

Dokumentasie:

A. Telnr 586 van 22 Oktober 1985 vanaf Den Haag.

Met verwysing na vorige korrespondensie oor die geval Klaas de Jonge, word afskrif van bogenoemde teleks ter inligting aan u gestuur.

DIREKTEUR-GENERAAL : BUITELANDSE SAKE

1. PRIORITEIT
2. 19851022
3. TELNR586
4. SALEG DEN HAAG
5. HK PTA ROETE : 241

G E H E I M

KLAAS DE JONGE

1. GESPREK TUSSEN LIEBENBERG EN LOUW VERWYS.

2. VOLGENS AMBASSADEUR WIJNAENDTS HET MINISTER VAN DEN BROEK DIE VOORSTELLE WAT AAN SA KANT GEMAAK WAS. IN 'N ALGEMENE SIN AS 'N GOEIE BASIS BESKOU EN DAT JURIDICI VAN BEIDE LANDE VERDER DAAROOR OORLEG KON PLEEG.

3. DIE NDL. MINISTERIE VAN JUSTISIE MOET EGTER NOG FORMEEL AKKOORD GAAN MET DIE VOORSTELLE. HOEWEL WIJNAENDTS VAN MENING IS DAT JUSTISIE NIE ENIGE BESWARE SAL HE NIE, KON HY NIE ENIGE KATEGORIESE VERSEKERING GEE DAT DIT DIE GEVAL SAL WEES NIE.

4. INDIEN JUSTISIE AKKOORD GAAN, IS EK VERTROULIK MEEGEDEEL, SAL MINISTER VAN DEN BROEK NOG OP 'N VERTROULIKE BASIS MET ENKELE LEDE VAN DIE TWEEDE KAMER (SOOS EK DESTYDS VERNEEM HET, ONDER ANDERE JACQUES WALLAGE VAN DIE ARBEIDERSPARTY) EN DIE ADVOKAAT VAN DE JONGE IN NEDERLAND, (ADV. BOUCHEZ) DIE SAAK BESPREEK EN DIE SA VOORSTELLE ONDER HULLE AANDAG BRING. HY VOORSIEN NIE PROBLEME NIE MAAR KAN HOMSELF NATUURLIK NIE OOR HULLE REAKSIE KOMPROMITEER NIE. (DIE MINISTER WIL KLAARBLYKLIK OOK VOORKOM DAT DIE OPPOSISIE LASTIGE VRAE IN DIE PARLEMENT STEL) .

5. EEN ASPEK WAT OOK DEUR DIE SA EN NDL. JURIDICI UITGEKLAAR SAL MOET WORD IS DIE KWESSIE VAN ENIGE STRAF WAT DE JONGE OPGE-LE MAG WORD EN TEN OPSIGTE V WAARVAN NEDERLAND VAN PLAN IS OM TE VERSOEK DAT DIT HIER UITGEDIEN MOET WORD. SOOS U BEWUS IS, IS 'N OOREENKOMS TUSSEN NEDERLAND EN 'N ANDER LAND HIERVOOR NODIG, INGEVOLGE NDL. BENADERING. SOIETS BESTAAN NIE TUSSEN DIE RSA EN NEDERLAND NIE, MAAR WIJNAENDTS HET GESE MOONTLIK KAN 'N AD HOC OOREENKOMS VIR DIE DE JONGE GEVAL (MOONTLIK 'N NOTA- WISSELING) AANGEGAAN WORD.

6. EK HET DIE VRAAG GESTEL WANNEER ONS 'N ANTWOORD KAN VERWAG OP DIE SA VOORSTELLE. VOLGENS WIJNAENDTS IS HY VOLGENDE WEEK MUT VERLOF. SOOS U WEET WERK HY PERSOONLIK MET DIE AANGELEENTHEID. VOLGENS HOM HET HY DIE INDRUK IN PRETORIA GEKRY DAT ONS OWER-HEDE NIE 'OORHAASTIG' MET DIE SAAK IS NIE. HY MEEN DAT JUSTISIE MOONTLIK VOGLENDE WEEK 'N FINALE BESLUIT SAL NEEM EN DAT MINISTER VAN DEN BROEK DAN DIE PERSONE IN PARA 4 SAL INLIG. EK LEI AF DAT HY MEEN DAT DIE AANGELEENTHEID IN DIE WEEK VAN 4 NA 8 NOVEMBER HIER TOT 'N BESLUIT GEBRING SAL WORD.

EK HET HOM NIETEMIN MEEGEDEEL DAT ONS OWERHEDE DIE AANGELEENT-HEID MET SPOED WENS AF TE HANDEL
REPEAT FOR 233

DEPARTEMENT VAN BUITELANDSE SAKE

Republiek van Suid-Afrika, Privaatsak X152, Pretoria, 0001

Tel. 28-6912 x 252 J C G Liebenberg

Verw. 400/016/307
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01 -11- 1985

GEHEIM

DIE DIREKTEUR-GENERAAL
JUSTISIE

Vir aandag: Mnr S S van der Merwe

DIE KOMMISSARIS
SUID-AFRIKAANSE POLISIE

Vir aandag: Brig H Stadler

GEVAL KLAAS DE JONGE

Dokumentasie:

A. Teleks nr 602 van 31 Oktober 1985 vanaf Den Haag.

Met verwysing na my enersgenommerde diensbrief van 30 Oktober 1985, stuur ek u hiermee 'n afskrif van bogenoemde teleks ter inligting.

DIREKTEUR-GENERAAL: BUITELANDSE SAKE

INKOMEND

AFSKRIF .... VAN ....
LEERNR.....

GEHEIM
SECRET

1. PRIORITEIT

2. 19851031

3. TELNO 602

4. SALEG DEN HAAG

5. HK PTA ROETE : 241

G E H E I M

KLAAS DE JONGE

1. MY 598 VAN 19851028 VERWYS.

2. DIT BLYK DAT DIE VERSOEK VIR BESPOEDIGING VAN DIE NDLSE BESLUIT VRUGTE AFGEWERP HET.

3. TYDENS 'N BESOEK BY DR HORAK VANDAG OOR 'N ANDER AANGELEENTHEID, HET HY MY MEEGEDEEL DAT DIE MINISTER REEDS :

- MET SY KOLLEGA VAN JUSTISIEG GEPRAAT HET.,
- GESPREKKE GEVOER HET MET CDA EN VVD SLEUTELFIGURE

4. DIE MINISTER HOOP OM VANDAG MET DR JOOP DEN UYL, LEIER VAN DIE ARBEIDERSPARTY, TE PRAAT. OOR DIE MOONTLIKE RESULTAAT VAN DIE GESPREK KAN DAAR KLAARBLYKLIK NIE GESPEKULEER WORD NIE, AANGESIEN ONS TERDEE BEWUS IS VAN DIE NEGATIEWE POSTUUR VAN DIE PVDA TEENOOR S.A.

5. HORAK HET MY EGTER IN VERTROUE MEEGEDEEL DAT DIE TWEE MINISTERS EN ALBEI DIE CDA EN VVD AKKOORD GAAN MET DIE PAKKET WAT WIJNAENDTS UIT PRETORIA TERUGGEBRING HET, D.W.S. DIE VOORSTELLE WAT AAN SUID-AFRIKAANSE KANT GEMAAK IS. DIT BETEKEN DAT AS DAAR NOU PROBLEME KOM, DIT AAN DIE HOUDING VAN DIE PVDA YT TOEGEDIG SAL KAN WORD

END

DEPARTEMENT
VAN
BUITELANDSE SAKE

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Tel. 28-6912 x 252 J C G Liebenberg

Verw. 400/016/307
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30 -10- 1985

VERTROULIK

DIE DIREKTEUR-GENERAAL
JUSTISIE

Vir aandag: Mnr S S van der Merwe

DIE KOMMISSARIS
SUID-AFRIKAANSE POLISIE

Vir aandag: Brig H Stadler

GEVAL KLAAS DE JONGE

Dokumentasie:

A. Telnr 598 van 29 Oktober 1985 vanaf Den Haag.

Met verwysing na vorige korrespondensie oor die geval Klaas de Jonge, word 'n afskrif van bogenoemde teleks ter inligting aan u gestuur.

DIREKTEUR-GENERAAL : BUITELANDSE SAKE

1. PRIORITEIT
2. 19852910
3. TELNO 596
4. SALEG DEN HAAG
5. HK PTA ROETE : 241

VERTROULIK

KLAAS DE JONGE

1. IN AFWESIGHEID VAN WIJNAENDTS HET EK VANDAG (28/10) MET DR JAN HORAK, HOOF VAN AFRIKA-AFDELING OOR DIE STAND VAN AANGELEENTHEID GEPRAAT.

2. VOLGENS HORAK IS DIE OORWEGING VAN SA VOORSTELLE VRYDAG (25 OKTOBER) OP AMPTELIKE VLAK TUSSEN BUITELAND IIQLE EN JUSTISIE AFGEHANDEL.

3. MINISTER VAN DEN BROEK MOET NOU MET SY KOLLEGA VAN JUSITISIE, MINISTER KORTHALS ALTES, SAAK BESPREEK. VAN DEN BROEK WAS EGTER NAWEEK VIR MINISTERIELE SAMESPREKINGS IN BRUSSEL EN HET NOG NIE GELEENTHEID GEHAD OM MET SY KOLLEGA TE PRAAT NIE. GEVOLGLIK KON HORAK NIE SE WAT AARD VAN REAKSIE OP ONS VOORSTELLE SAL WEES NIE.

4. HY HET WEER BYGEVOEG DAT VAN DEN BROEK NA SY GESPREK MET SY JUSTISIE-KOLLEGA INFORMELE SAMESPREKINGS SAL VOER MET SLEUTELFIGURE VAN DIE VERNAAMSTE PARTYE (CDA, VVD EN ARBEIDERS) VAN TWEEDE KAMER, AANGESIEN HY TEN ALLE KOSTE WIL VOORKOM DAT 'N DEBAT AANGEVRA WORD OOR DIE SAAK. DIE MINISTER BESEF DAT DIE SAAK MET SPOED AFGEHANDEL MOET WORD AANGESIEN 'N PAAR WEKE REEDS VERLOOP HET SEDERT PRETORIA-BERAAD.

5. HORAK SAL MET VAN DEN BROEK PRAAT EN SE DAT EK NAVRAAG GEDEN HET OOR WANNEER ONS 'N ANTWOORD KAN VERWAG EN DAT ONS DIT SO SPOEDIG MOONTLIK WIL HE

EINDE

DG1/85

KLAAS DE JONGE

1. Ligdrukke van korrespondensie wat betrekking het op die Klaas de Jonge-geval, word hierby aangeheg.

2. Vir u inligting.

J.C. Esterhuizen
PERSOONLIKE KLERK 1985 -10-21

DIREKTEUR-GENERAAL: JUSTISIE

DG
Stukke op 85/10/21 na Ministerie.
85/10/21

B11

Mnr Heckenberg
Para 3 is belangrik.
Stuur asb aan die D.G.
van Justisie.
Ltt
9/10

2. 19851003

3. TELNO 547

4. SALEG DEN HAAG

5. HK PTA ROETES : 241 EN 243

EN CLAIR

DE JONGE : PERSBERIGGEWING

1. DE VOLKSKRANT (3/10) VERWYS NA KOMMENTAAR VAN PROF. JOHN DUGARD WAT GESE HET DAT AS SA REGERING AANVOER DAT NEDBANK-PERSEEL VAN NDL. AMBASSADE ''NIE AS AMBASSADE FUNKSIONEER NIE MAAR UIT-S'UITEND GEBRUIK WORD OM DE JONGE TE BESKERM, WORD IN FEITE GESE L..T DIE NEDERLANDSE AMBASSADE AS GEHEEL NIE MEER AS 'N DIPLO-MATIEKE MISSIE FUNKSIONEER NIE''. DUGARD SOU VERDER VERKLAAR HET DAT DIE SA REGERING IN FEITE DREIG MET DIE VERBREKING VAN DIPLOMATIEKE BETREKKINGE AS GEVOLG VAN DIE VERKLARING OOR 8 OKTOBER.

2. HET PAROOL (2/10) DOEN VERSLAG OOR MENINGS VAN PROF. P DE WAART, HOOGLERAAR IN VOLKEREG AAN VRYE UNIVERSITEIT, AMSTERDAM. HY VOER AAN DAT ''BEGRIP 'DIPLOMATIEKE ONSKENDBAARHEID' VOLSTREK WAARDELOOS WORD AS SA DIT EENSYDIG OPSE. SA SOU 'N ERNSTIGE FOUT BEGAAN AS DIT DIE PERSEEL GAAN BETREE. HY VERWAG EGTER NIE DAT DIT SAL GEBEUR NIE, MAAR DAT SA ''DRUK OF DIE KETEL HOU''.

VOLGENS DE WAART IS DIT LOGIESER DAT LANDE WAT FATSOENLIKE BETREKKINGE WIL ONDERHOU ARBITRASIE BY DERDE PARTYE SOEK.

3. DIT SAL U INTERESSEER DAT MINISTER VAN JUSTISIE KORTHALS A' ES PAS IN DIE PARLEMENT VOET BY STUY
AL ES IN DIE PARLEMENT VOET BY STUK GEHOU HET DAT NEDERLAND ALLEEN OP BASIS VAN 'N VERDRAG NEDERLANDERS WAT IN DIE BUITE-LAND GEVANGENISSTRAF OPGELE IS, IN 'N PLAASLIKE GEVANGENIS KAN OPNEEM OM HULLE STRAF UIT TE DIEN.

MINISTER VAN DEN BROEK HET HIERMEE AKKOORD GEGAAN EN GESE DIT SOU IMPLISEER DAT NEDERLAND (AS SO 'N PERSOON SY STRAF HIER MOET UITDIEN) DIE REGSPLEGING VAN DIE LAND WAAR DIE PERSOON VEROORDEEL IS, ERKEN. AS BESWAAR HET HY OOK DAAROP GEWYS DAT DAAR LANDE IS WAT 'N REGSTELSEL HET WAT BAIE AFWYK VAN DIE VAN NDL

EINDE

GEHEIM
SECRET

85/10/15(101

DEPARTMENT OF FOREIGN AFFAIRS

Republic of South Africa, Private Bag X152, Pretoria, 0001 Tel. 28-6912 x 252

Ref. 400/016/307
85101113u27

JCG Liebenberg

14-10-1985

GEHEIM

DIE DIREKTEUR-GENERAAL
JUSTISIE

Vir aandag : Mnr S S van der Merwe

DIE KOMMISSARIS
SUID-AFRIKAANSE POLISIE

Vir aandag : Brig H Stadler

GEVAL KLAAS DE JONGE

Dokumentasie:

A. Teleksnr 555 van 10 Oktober 1985 vanaf Den Haag.

B. Teleksnr 559 van 10 Oktober 1985 vanaf Den Haag.

Met verwysing na vorige korrespondensie oor die geval Klaas de Jonge, word afskrifte van bogenoemde telekse ter inligting aan u gestuur.

JCG Liebenberg

~~DIREKTEUR-GENERAAL~~ : BUITELANDSE SAKE

INKOMEND

KOPIENR...VAN....
LEERNR.....

B5-

1. ROETINE

2. 19851010

3. TELNO 555

4. SALEG DEN HAAG

5. HK PTA ROETE : 241

VERTROULIK

KLAAS DE JONGE

ADV. L. VAN HEIJNINGEN, REEDS VIR ETLIKE JARE BEVRIEND MET DIE AMBASSADE, HET ONLANGS 'N KRITIESE BRIEF AAN DIE NCR HANDELS-BLAD GESKRYF OOR DIE WEIERING VAN DIE NEDERLANDSE REGERING OM DIE KANTOORAKKOMMODASIE IN DIE NEDBANK-GEBOU TE ONTRUIM SOLANK DE JONGE DAAR SIT. DIE BRIEF IS NIE GEPUBLISEER NIE. HY HET DIT ONDER ONS AANDAG GEBRING EN DIE VOLGENDE INLIGTING PER-SOONLIK OORGEDRA.

HOEWEL ''DIE REGTER IN DIE GASHEERLAND NIE REGSMAG HET OOR (VREEMDE) DIPLOMATIEKE VERTEENWOORDIGING NIE''. BETEKEN DIT NIE DAT NEDERLAND SY VERPLIGTINGE AS HUURDER NIE MOET NAKOM NIE. DAARBENEWENS BESIT DIE NEDERLANDSE REGERING NIE DAARDIE IMMUNI-TEIT IN NEDERLAND WAT DIE AANSPRAKE VAN DIE NEDBANK BETREF NIE.

ADV. VAN HEIJNINGEN DOEN DERHALWE AAN DIE HAND DAT NEDBANK 'N GEDING IN DIE NEDERLANDSE HOERHOF AANHANGIG MAAK MET BETREKKING TOT DIE WEIERING VAN DIE NEDERLANDSE REGERING OM DIE BETROKKE KANTORE VOLGENS KONTRAK TE ONTRUIM.

VOLGENS ADV. VAN HEIJNINGEN KAN 'N BEDRAG VAN SELFS GULDE 100.000 PER DAG VAN DIE NEDERLANDSE STAAT GEEIS WORD VIR ELKE DAG WAT HULLE LANGER IN DIE GEBOU AANBLY AS WAAROP HULLE GEREGTIG IS.

KORREKSIE IN MY TWEEDE SIN MOET SOOS VOLG LEES

AMBASSADE, HET ONLANGS 'N KRITIESE BRIEF AAN DIE NRC HANDELS.

HY VOER VERDER AAN DAT DIT DIE OPENBARE B MENING OOK SAL BEINVLOED INDIEN DIE HOF SO 'N UITSPRAAK SOU LEWER, WAT HY AS BAIE MOONTLIK BESKOU, AANGESIEN DIT DAN DIE BETALING DEUT DIE BELASTINGBETALERS VAN NEDERLAND VIR HULLE REGERING SE OPTREDE IN DIE KALKLIG SAL BRING.

HY BERAAM DIE HOFKOSTE VIR SO 'N SAAK OP GULDE 10.000 PER DAG

EINDE
ltnp

LEEKNO.....

1. PRIORITEIT
2. TELNO 559
3. 19851010
4. SALEG DEN HAAG
5. HK PTA ROETE : MIN EN 241

GEHEIM
SECRET

G E H E I M

KLAAS DE JONGE

1. AMBASSADEUR WIJNAENDTS HET MY VANDAG GETELEFONEER OOR SY BESOEK AAN PRETORIA. TYDENS DIE GESPREK HET HY DIE VOLGENDE PUNTE GEMAAK.

2. HY HET MET GROOT LOF GEPRAAT VAN AL DIE GESPREKSGENOTE MET WIE HY IN VERBINDING WAS EN DIE UITSTEKENDE ATMOSFEER WAARIN BERAADSLAAG KON WORD.

3. NA SY MENING HET DIE DE JONGE SAAK BUITE ALLE PROPORSIES BEGIN RAAK EN 'N STADIUM IS BEREIK WAAR DIT NIE MEER ''DIE SAAK DE JONGE'' WAS NIE. MAAR ''DIE SAAK NEDERLAND-SUID-AFRIKA''.

4. SY INDRUK WAS DAT NEDERLAND SOWEL AS SUID-AFRIKA WOU WEG-REWEEG VAN ''ONGELUKKIGE UITSPRAKE'' WAT PUBLISITEIT GENIET HET, SOOS DIE ''ULTIMATUM V OOR 8 OKTOBER ''. DAAROM WAS DIT NODIG OM FORMULES TE VIND OM OORLEGPLEGING TUSSEN DIE TWEE REGERINGS MOONTLIK TE MAAK. DAARNA SAL DIE JURISTE WEER BYEEN MOET KOM.

5. HY MEEN DAAR WAS VOLDOENDE AANKNOPINGSPUNTE VIR VERDERE JURIDIESE SAMESPREKINGS OP 'N LATER DATUM.

6. VOLGENS HOM IS GEEN DATUM BEPAAL VIR 'N VOLGENDE RONDTE NIE EN SOU MINISTER R F BOTHA VERWYS HET NA ''IN DUE COURSE''. WIJNAENDTS MEEN DIT SAL TYD GUN VIR 'N AFKOELINGSTYDPERK, WAAR-NA GETRAG KAN WORD OM DIE AANGELEENTHEID OP EEN OF ANDER WYSE OP TE LOS.

7. HY VOEL DAT A.G.V. SAMESPREKINGS 'N ''HELE END GEVORDER IS'' EN DAT SPEELRUIMTE VERSKAF IS.

8. HY HET BEGRIP VIR ONS VERWERPING VAN DERDE PARTY ARBITRASIE AANGESIEN ONS DAARDEUR GEEN ''GENOEGDOENING'' SAL VERKRY NIE.

9. BY NEDERLAND IS DIE SAAK NOU ONTLONT AANGESIEN AFGESIEN IS VAN DIE 8 OKTOBER ULTIMATUM. HY BESEF EGTER DAT DIE SAAK BY ONS GEVOELIGER IS A.G.V. ULTIMATUM EN PERSPUBLISITEIT.

10. SY INDRUK IS DAT ONDANKS ALLE PROBLEME WORD BETREKKINGE TUSSEN TWEE LANDE WEDERSYDS OP PRYS GESTEL. HY BESEF DAT DIE BI-LATERALE VERHOUDINGS NIE GOED IS NIE EN DAT DIT NIE BINNE AFSIEN-BARE TYD SAL VERANDER NIE. MAAR DAAR KAN GESELS WORD OOR WAT GE-DOEN KAN WORD EN WAAROM SEKERE DINGE NIE GEDOEN KAN WORD NIE (KLAAR-BLYKLIK 'N VERWYSING NA ONS INTERNE POLITIEK EN NEDERLAND SE KRITIESE SIENING DAARAANGAANDE).

11. HY HET TEN SLOTTE GEMELD DAT DIE VIND VAN 'N OPLOSSING REDE VIR OPENBARE REAKSIE SAL GEE, MAAR DAT OP VERSTANDIGE WYSE GEMANEUVREER KAN WORD OM DIT AF TE SKAAL.

12. MINISTER VAN DEN BROEK IS TANS IN SPANJE (WAAR DIE KONINGIN 'N STAATSBESOEK BRING) EN SAL VANDAG OF MORE DEUR WIJNAENDTS VOLLEDIGLIK INGELIG WORD, WAARSKYNLIK LANGS BOGENOEMDE LYNE.

13. HOEWEL EK AANVAAR DAT WIJNAENDTS NIE MET ENIGIETS NUUTS IN SUID-AFRIKA AANGEKOM HET NIE, WAS DIT MYNS INSIENS 'N WYSE BESLUIT OM HOM TE ONTVANG. OP DIE WYSE HET ONS BEREIDWILLIGHEID OPENBAAR OM DIE GESKIL LANGS DIE WEG VAN ONDERHANDELING AAN TE PAK EN IS NEDERLAND DIE GELEENTHEID ONTNEEM OM AS DIE VERONTREGTE UIT DIE STRYD TE TREE. DIT IS KLAARBLYKLIK HULLE TAKTIEK INDIEN DIE KWESSIE OP DIE SPITS GEDRYF SOU WORD EN ONS DE JONGE MET GEWELD SOU GAAN UITHAAL

EINDE

CONFIDENTIAL

SUMMARISED MINUTES OF DISCUSSIONS BETWEEN DELEGATIONS FROM SOUTH AFRICA AND THE NETHERLANDS REGARDING THE DE JONGE QUESTION, PRETORIA, 4 / 5 OCTOBER 1985

PRESENT:

Mr R F Botha	Minister of Foreign Affairs
Mr S S van der Merwe	Director General, Justice
Mr C F G von Hirschberg	Deputy Director General, Foreign Affairs
Dr J C Heunis	Chief Law Adviser, Office of the State President
Mr C G Liebenberg	Department of Foreign Affairs
Prof. M P Vorster	Law Adviser, Department of Foreign Affairs
Mr A Hoffman	Law Adviser, Department of Foreign Affairs
Mr P R Dietrichsen	Department of Foreign Affairs

Mr H Wijnaendts	Special Representative of the Netherlands Minister of Foreign Affairs
Mr H Bentinck	Charge d'Affaires a.i., Embassy of the Netherlands
Mr R van der Geer	Africa Bureau, Ministry of Foreign Affairs, The Hague

MINISTER BOTHA welcomed the Dutch Delegation at the Government Guest House and suggested that the discussions should take place on an informal basis followed by a working din-

ner. If necessary the discussions could continue the following morning (Saturday) for as long as necessary including a working lunch. After Mr Wijnaendts had signalled his agreement with the arrangements the Minister explained that South Africa could not be seen not to be prosecuting Mr de Jonge. Black citizens of South Africa were prosecuted for far less serious offences and if Mr de Jonge was not prosecuted for the crimes he had allegedly committed, it would definitely create an impression with racial overtones. His former wife, Mrs Pastoors, who would be prosecuted, would certainly reveal to a large extent what Mr de Jonge had been involved in before his arrest and this evidence could be severely embarrassing for the Dutch Government.

MR WIJNAENDTS replied that the alleged activities were serious in the South African context but were seen in a different light in the Netherlands. There was therefore an impasse. In proposing to try Mr de Jonge in the Netherlands, the Dutch Government was trying to overcome the problem. The Government of the Netherlands was not trying to avoid a court case and this was the reason for the proposal to have him prosecuted in the Netherlands. If South Africa decided to remove Mr de Jonge from the Embassy premises by force, the violation of the inviolability of the Embassy would be worse than the first incident when Mr de Jonge took refuge in the Embassy. It was the view of the Netherlands Government that Mr de Jonge should not be allowed to take such a prominent place in relations. During 1966 a murderer was kept for six months in the Chinese Embassy in The Hague. The Dutch Government did not violate the invoilability of the Chinese Embassy but sought a political solution with success.

MINISTER BOTHA in reply mentioned that the idea was not to "get at the Dutch" but only to satisfy the South African norm of justice. There was in any case a question over the continued presence of some offices of the Embassy of the Netherlands in the Nedbank Building. The owners of the

building had stated categorically that the contract had run out. South Africa could not occupy any building in The Hague and claim diplomatic immunity. MR WIJNAENDTS observed that the termination of the lease was being used as an excuse to get Mr de Jonge. MINISTER BOTHA pointed out that he had acted correctly so far but that the offices were being kept for the sole purpose of housing de Jonge - that was not acting correctly. MR WIJNAENDTS replied that he had expected the Minister to make such an observation. It was a political problem and a solution would have to be found. MINISTER BOTHA expressed the view that it was also a legal problem. The man would be prosecuted in terms of South African criminal legislation. MR WIJNAENDTS asked if South Africa was so sure of the legal basis of its position, why it was unwilling to submit the case to arbitration. MINISTER BOTHA replied that there was no international requirement for the case to be submitted for arbitration. MR WIJNAENDTS continued that it was not reasonable to use the question of offices to get de Jonge. [redacted] MINISTER BOTHA pointed out that Mr de Jonge had been handed over to the Embassy after the initial incident in the belief that he would again be returned to stand trial. He should perhaps not have been handed back.

MR WIJNAENDTS then turned to possible solutions and said that South Africa should still consider allowing Mr de Jonge to be transferred to the Netherlands for a trial or to give him safe custody for a transfer to the new Embassy.

The informal discussions subsequently continued during a working dinner. After briefly discussing the situation in Africa and South Africa's internal political developments, MR WIJNAENDTS made the point that [redacted]. The problem of South Africa was not considered a colonial situation and the principle of universality was always supported. Regarding de Jonge, the fact that the

Netherlands Government was prepared to prosecute him in the Netherlands, should be an indication that on the basis of available facts, he was considered a criminal. The MINISTER took note of this and added that an important difference between the de Jonge and the Durban Consulate Six cases was that the British had stated categorically that the South African citizens in the Consulate would not be forced to leave the premises while the Netherlands Government had never said that Mr de Jonge would not be handed over. MR WIJNAENDTS added that his Government was at pains to negotiate in private and to keep discussions confidential. MINISTER BOTHA agreed that the conversations in progress should also be kept confidential.

MINISTER BOTHA continued to discuss the de Jonge question and pointed out that at a time he had believed that a break in diplomatic relations would be inevitable. This must have been evident to the Netherlands. The message from The Hague proposing talks had therefore come at a good time. The views held by the two sides on the juridical aspects continued to differ but it would not serve any purpose to be inflexible. The Netherlands evidently considered the political aspects to be of overriding importance and the dilemma was understood on the South African side. MR WIJNAENDTS agreed and pointed out that it was important for the South African authorities not to take unilateral action against the Embassy. The question was: Where to go? MINISTER BOTHA commented that the old Embassy offices were now in effect a jail. South Africans had a lot of respect for the law and the continued presence of Mr de Jonge in the old Embassy building was not acceptable to the South African public. MR WIJNAENDTS replied that the rules of international law should not be violated because of this. The South African authorities could in fact assist to obtain a renewal of the contract for the continued presence of the Embassy offices. The Netherlands knew that certain members of the South African Embassy in The Hague were not involved in traditional Embassy activities - they were security

agents - but the Government of the Netherlands did not question the situation. An extension of the Nedbank contract would enable the two sides to reach a solution.

MR VON HIRSCHBERG then asked under what circumstances the Netherlands would be prepared to hand over Mr de Jonge to the South African authorities. MR WIJNAEDNTS replied that this was the only aspect surrounding the de Jonge case which he had not been mandated to discuss. Nevertheless it was important to keep in mind that the Netherlands condemned the activities Mr de Jonge was alleged to have been involved in. MINISTER BOTHA added that he was under the impression that the Netherlands had problems with certain South African legislation. If the South African authorities gave certain assurances, could this ease the political problems for the Netherlands? It also needed to be said that the positive and moderate attitude displayed by Minister van den Broek during the discussions at Groote Schuur and Westbrooke during the visit of the E C Troika, had contributed substantially towards the willingness of the South African authorities to continue working towards a solution including the improving of relations. Minister van den Broek's moderating influence on Minister Poos and his moderate views expressed at his return to Europe had not gone unnoticed in South Africa.

DR HEUNIS expressed the opinion that whether Mr de Jonge had taken refuge in the old or new Embassy, the basic legal position was beyond debate, i.e. his presence in a diplomatic mission was illegal. Since the South African authorities understood the difficulties experienced by the Netherlands, the South African delegation had already, at another occasion, given certain undertakings regarding the charges Mr de Jonge would be prosecuted on. MR WIJNAENDTS replied that the two sides had been given different advice on the international law aspects. Nevertheless even if no private contract on the use of the offices existed, the premises would still be inviolable. The Netherlands accepted that Mr

de Jonge would not be given safe conduct but it was also hoped that the police would not enter the old Embassy offices. An impasse existed. The South African side was trying to impose a solution of the problem by using the lease as an excuse. If the matter was submitted to arbitration and the verdict went against the Netherlands, Mr de Jonge would be handed over to the South African authorities. MINISTER BOTHA replied that he had no faith in such procedures due to the political considerations which would very likely result in a ruling against South Africa. Something similar had happened at the International Court of Justice when Liberia had brought the case against South Africa on the question of South West Africa - the Jugdes were thrown out. MR WIJNAENDTS interjected that South Africa could always block such a decision.

MINISTER BOTHA observed that he was a member of a government. The delegations should discuss the breaking of diplomatic relations, i.e. aspects such as the time needed to close missions. MR WIJNAENDTS replied that it would be a sad outcome of the talks and his delegation would not be happy with such a solution - it was not in fact an easy solution. MINISTER BOTHA added that he could not deny that the South African authorities wanted to get Mr de Jonge. MR WIJNAENDTS replied that his government would behave in a civilised manner but he could not believe that the Minister wanted such a solution. MINISTER BOTHA agreed that he did not want such a solution but since it was a possibility the two sides were obliged to discuss the matter. MR WIJNAENDTS continued that he had the highest regard for the South African Ambassador in The Hague, Mr Dawid Louw. It would be a sad thing if relations had to be severed. Neither did he travel to South Africa to discuss the breaking of relations. MINISTER BOTHA agreed that such a step would have to be taken in a civilised manner. He would regret it if it became unavoidable and would aim for it to take place in such a manner to allow for the restoring of relations at a later stage. MR WIJNAENDTS also added that it was easier to

break relations than to restore them later. DR HEUNIS added that the South African side had tried to accommodate the political problems of the Netherlands. MR WIJNAENDTS replied that he was being forced to say something he was not keen to raise, i.e. that the problem in fact rested with the "apartheid" system. MR VON HIRSCHBERG reacted that Mr de Jonge would not be tried by the so-called "apartheid" system but in an open court. MR WIJNAENDTS replied that there were two different realities - the situation in South Africa and the situation in the Netherlands. MINISTER BOTHA then pointed out that he had reason to believe from a conversation a South African had had with State Secretary van Eekelen in The Hague that the Netherlands was keen to find a solution. Now he wondered. MR WIJNAENDTS enquired whether the Minister was saying that the breaking of relations would end the inviolability of the Embassy. MR VAN DER MERWE pointed out that there was a problem with the factual basis and not the legal basis of the arguments. South Africa was not questioning the inviolability of an Embassy but the question whether the premises in question were Embassy premises or not. This could be the subject of an arbitration. MR WIJNAENDTS replied that the legal experts would have to deal with the details if the case was submitted for arbitration. Both sides would have to nominate an acceptable intermediary. The Netherlands would abide by the outcome of an arbitration.

MINISTER BOTHA then read from a telegram (no. 546, dated 2 October 1985) he had received from the South African Ambassador in The Hague reporting on inter alia a discussion with State Secretary Dr W van Eekelen during which certain tentative proposals for a solution to the de Jonge case had been discussed. The telegram also covered a discussion between the Ambassador and Mr Wijnaendts. MR WIJNAENDTS replied that Dr van Eekelen was not intimately involved in the de Jonge case and may not be aware of all the details and difficulties. Ambassador Louw should be aware of this. The MINISTER then asked Mr Bentinck to translate the telegram

from the Afrikaans. MR WIJNAENDTS reacted that Ambassador Louw had reported remarkably well on their discussion. He had found the discussions very useful and would propose an adjournment until the next morning. MINISTER BOTHA agreed and said that the South African side had been very inconsiderate in continuing the discussions until well after dinner. MR WIJNAENDTS thanked the Minister and indicated that he would not talk to the Press until the next meeting. He considered Mr de Jonge personally of very little interest to the Netherlands authorities - it was more a matter of finding a solution to the problem. MINISTER BOTHA agreed and expressed the view that the two sides had covered a certain amount of common ground.

The meeting was adjourned at 22h00. An informal discussion lasting approximately 40 minutes followed.

The discussions were continued at 11h00 on Saturday, 5 October 1985 under the joint chairmanship of Mr Wijnaendts and Mr van der Merwe. At 13h00 the meeting was adjourned and after consultations on the one hand telephonically with Minister van den Broek in the Netherlands and on the other with Minister Botha at the Guest House, the agreed press statement below was issued. The details of the proposed solution involving the continuation of the police enquiry at the premises of the old Embassy and the possibility of a court hearing in South Africa were to be submitted formally to the two Governments for approval. After a working lunch during which events in South Africa were discussed informally, the proceedings were adjourned at 16h00.

"Joint Statement by Mr R F Botha, Minister of Foreign Affairs and Minister van den Broek's Emissary, Ambassador H Wijnaendts.

Pretoria : Saturday : 5 October 1985

The two delegations have had a series of meetings. Various suggestions were exchanged which will now be submitted to the two Governments for consideration. Further talks are envisaged in due course.

While these talks are in progress, nothing will be done or said by either Government which could be considered as detrimental or prejudicial to a resolution of the problem."

P R Dietrichsen
Pretoria
8/10/85

DEPARTEMENT
VAN
BUITELANDSE SAKE

Republiek van Suid-Afrika, Privaatsak X152, Pretoria, 0001

Tel. 28-6912 x 252 J C G Liebenberg

Verw. 400/016/307
85100305u26

Dringend

GEHEIM

DIE DIREKTEUR-GENERAAL
JUSTISIE

Vir aandag: Mnr S S van der Merwe

DIE KOMMISSARIS
S A POLISIE

Vir aandag: Brig H Stadler

GEVAL KLAAS DE JONGE

Dokumentasie:

Teleks no 546 van 2 Oktober 1985 vanaf Den Haag.

Met verwysing na vorige korrespondensie oor die geval Klaas de Jonge, word 'n afskrif van bogenoemde teleks ter inligting aan u gestuur.

DIREKTEUR-GENERAAL : BUITELANDSE SAKE

1. ONMIDDELLIK

2. 19851002

3. TELNO 546

4. SALEG DEN HAAG

5. HK PTA ROETES : 241 EN 243

G E H E I M

KLAAS DE JONGE

1. AMBASSADEUR WIJNAENDTS HET MY VANDAG OP VERSOEK VAN MINISTER VAN DEN BROEK GETELEFONEER EN DIE VOLGENDE MEEGEDEEL.

2. DIE NEDERLANDSE REGERING BEVIND HULSELF IN 'N MOEILIKE POSISIE AS GEVOLG VAN MINISTER R F BOTHA SE ANTWOORD VAN 1 OKTOBER 1985. VRAAG WAT BY NDL. REGERING ONTSTAAN IS OF DIT OP KONFRONTASIE AFSTUUR.

NEDERLAND WOU 'N AFGESANT IN 'N VERDERE POGING TOT VIND VAN 'N OPLOSSING STUUR EN MET 'N BREE MANDAAT VOORDAT ONHERROEPLIKE SD
STAPPE AAN ALBEI KANTE GENEEM WORD.

3. HY HET WEER STANDPUNT HERHAAL DAT ONSKENDBAARHEID NIE 'N EENSYDIGE SAAK VIR BESLISSING IS AAN DIE KANT VAN DIE ONTVANGENDE STAAT NIE. DIE GEVAL DAT DIE AMBASSADE NA 'N NUWE ADRES JUIS IN HIERDIE TYD MOES VERHUIS WAS BLOOT TOEVALLIG. DIE HELE AMBASSADE-PERSONEEL KON IN DIE OU AKKOMMODASIE AANGEBLY HET.

4. VAN DEN BROEK SOU DAAROP GEWYS HET DAT :

- 'N HERNIEUDE INBREUK OP DIE ONSKENDBAARHEID VAN DIE AMBASSADE ERNSTIGE GEVOLGE SAL HE..
- GEHOOP WORD DAT DIPLOMATIEKE VERKEER TUSSEN SUID-AFRIKA EN NEDERLAND NOG BETEKENIS HET..
- BESEF WORD DAT DIE VERHOUDINGS TUSSEN SA EN NEDERLAND NIE GOED IS NIE. MAAR DAAR IS DIEGENE WAT SO GOED MOONTLIK 'N REDELIKE BELEID WIL HANDHAAF.

5. WIJNAENDTS HET BYGEVOEG :

- DE JONGE IS 'N VERBYGAANDE EPISODE..
- DIE NEDERLANDSE REGERING PRAAT OOK NIE GOED WAT HY GEDOEN HET NIE..
- AS ONS SO STERK VOEL OOR DIE KORREKTHEID VAN ONS SIENINGS WORD GEVOEL DAT ONS JUIS 'N DERDE PARTY BENADERING BEHOORT TE AANVAAR..

6. DIE VOLGENDE HET HY BESKRYF AS GEEN DREIGEMENT NIE, MAAR ASPEKTE WAT HY WEL OOK MOES NOEM:

- DIE VRAAG ONTSTAAN OF ONS 'N PRESEDENT WIL SKEP OOR DIE SKENDING VAN DIE ONSKENDBAARHEID VAN 'N AMBASSADE..
- AS DIE SA REGERING DIE AANGELEENTHEID ''SKERP'' GAAN SPEEL (D.W.S. KLAARBLYKLIK DIE NEDBANK-GEBOU SAL BINNE-DRING OM DE JONGE TE VERWYDER) SAL DIE NEDERLANDSE REGERING VERPLIG WEES OM DIT OOK ''SKERP TE SPEEL'' EN TE RE-TALIEER..
- DIT SAL AANLEIDING GEE TOT NOG MOEILIKER VERHOUDINGS TUSSEN DIE TWEE LANDE.

7. OM DIE VOORGAANDE OORWEGINGS IS DIT DIE NEDERLANDSE SIENING DAT 'N ''AFKOELINGSTYDPERK'' NOODSAAKLIK IS. INTUSSEN SAL DIE BUITELANDSE MINISTERIE IN OPDRAG VAN VAN DEN BROEK ONTWYKEND OP ENIGE PERSNAVRAE REAGEER IN AFWAGTING VAN 'N VERDERE BESLUIT VANAF SUID-AFRIKA.

8. EK HET VANOGGEND BESOEK ONTVANG VAN [redacted], MNRE. [redacted], [redacted] EN [redacted] VAN DIE SA STIGTING. HULLE HET VROEER VANOGGEND BESOEK AFGELE OP DR WIM VAN EEKELEN STAAT-SEKRETARIS VAN B.S. DR VAN EEKELEN HET MET BETREKKING TOT DE JONGE GESE :

- HULLE HET GEEN SIMPATIE MET DE JONGE NIE..
- DE JONGE SKEP VIR DIE NEDERLANDSE REGERING 'N VERLEENTHEID..
- HY IS JAMMER DAT DIE AANGELEENTHEID TOT KONFRONTASIE TUSSEN ONS TWEE LANDE LEI.

HY HET BY HULLE DIE MOONTLIKHEID GEOPPER DAT SUID-AFRIKA DE JONGE ''VOORWAARDELIK'' TERUGVRA VAN DIE NEDERLANDSE REGERING, D.W.S. DAT ONS BEREID MOET WEES OM NADAT DIE VORLOPIGE ONDERSOEK AFGEHANDEL IS, DE JONGE AAN DIE NEDERLANDSE AMBASSADE TERUG TE BE-SORG, VIR VERDERE ONDERHANDELING VAN SY TERUGGAWE VIR VERHOOR OP VASGESTELDE AANKLAGTE. DIE REDENERING VAN NEDERLANDSE KANT IS KLAARBLYKLIK DAT DE JONGE IN DAARDIE GEVAL AAN DIE NUWE ADRES TERUGBESORG SAL WORD. VERDER, DAT DIE KWESSIE VAN SPESIFIEKE AANKLAGTE EN SELFS 'N MOONTLIKE VONNIS WAT HY OPGELE KAN WORD, DAN DUIDELIKER SAL WEES (HIER KOM DIE MOONTLIKHEID VAN AANKLAGTE OP 'N POLITIEKE MISDAAD EN MOONTLIKE DOODSTRAF TER SPRAKE).

[redacted] WOU MET MIISTER R F BOTHA TELEFONIES OOR DIE AANGE-LEENTHEID GESELS, MAAR DIE MINISTER WAS ONGELUKKIG NIE BESKIK-BAAR NIE. EEN ASPEK WAT HY ONDER DIE MINISTER SE AANDAG WOU BRING, OP BASIS VAN WAT DR VAN EEKELEN HULLE MEEGEDEEL HET, WAS DAT VOORTSPRUITENDE UIT DIE BESOEK VAN DIE TROIKA AAN SA DAAR 'N BETER KLIMAAT VIR SA EN BETER BEGRIP VIR ONS PORLBEME ON PROBLEME ONTSTAAN HET IN DIE KRING VAN DIE NEDERLANDSE REGERING. DIE BOODSKAP WAS GEVOLGLIK DAT DIT JAMMER SOU WEES AS DIE MIS-DAAD VAN 'N ENKELING HIERDIE SITUASIE SOU VERTROEBEL EN ERNSTIGE EN MOONTLIK PERMANENTE GEVOLGE VIR ONS BETREKKINGE SOU HE.

9. EK VERNEEM GRAAG U SIENING

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REPORT ON THE DISCUSSIONS BETWEEN THE SOUTH AFRICAN AND NETHERLANDS LEGAL DELEGATIONS

INTRODUCTION

In pursuance of the discussions between the Ministers of Foreign Affairs of the RSA and the Netherlands held on 2 September 1985 at Pretoria, in depth discussions with regard to certain aspects of the legal questions involved in respect of the presence of Klaas de Jonge in the Netherlands Embassy in Pretoria were held in Geneve on 9 and 10 September 1985 at the respective Missions of the two Governments.

The participants were:

South African Delegation

Mr C.F.G. Von Hirschberg	-	Head of Delegation, Department of Foreign Affairs
Mr S.S. Van der Merwe	-	Director-General of Justice
Adv. K.P.C.O. Von Lieres und Wilkau	-	Attorney-General, WLD
Adv. J.D. Viall	-	Department of Foreign Affairs

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Adv. A.J. Hoffmann	-	Department of Foreign Affairs
Prof. M.P. Vorster	-	Department of Foreign Affairs

Netherlands Delegation

G.W. Maas Geesteranus	-	Head of Delegation
J.J.H. Suyver	-	Public Prosecutor
Mrs. M.A.C.L.M. Bonn	-	Ministry of Justice
P.H. Kooijmans	-	Professor in the University of Leyden
A. Bos	-	Ministry of Foreign Affairs
H.H.M. Sondaal	-	Ministry of Foreign Affairs
Ms. M.S. Kappeyne van de Copello	-	Ministry of Foreign Affairs

The following is a very brief summary of the discussions on the different aspects:

1. Whether there exists a right in International Law to grant diplomatic asylum in a case such as that of De Jonge

The arguments advanced by the two sides are dealt with in Annexure A.

Our conclusion is that our approach remains correct and that international law recognises a right to grant diplomatic asylum only in very limited and special circumstances which do not apply in the present instance.

It appears that the Netherlands delegation has some doubts as to the correctness of certain aspects of their argument. Nevertheless they still maintain that their position is correct and we do not think that they will advise their Government that it is obliged in terms of international law to hand over De Jonge.

2. The question of safe passage from the old Embassy to the new Embassy premises

The Netherlands delegation advised us that in the near future their Government intends to repeat their request to provide safe conduct for De Jonge from the old embassy to the new embassy premises. They requested clarification on the legal obligations involved.

They stated their view that we are legally obliged to afford such passage and referred to authority (E Lauterpacht and M Wiechers) for this proposition.

We indicated that we doubt if such a legal obligation exists but that immediately upon our return we would consider the authorities quoted and advise our Government accordingly.

However, even without having studied the authorities quoted, it seems to us that there is no duty upon the South African Government to afford safe passage and that as soon as De Jonge leaves the present premises he can be arrested.

5. Possible Solutions

In view of the fact that the two delegations could not agree on the position at international law we proceeded to discuss other possible solutions.

As a point of departure we tried to summarise the problems that the situation presents to both Governments. Some of these problems are the following:

(a) South Africa

(i) De Jonge, whom we consider to be an international terrorist engaging in terrorist activities inside South Africa, was given

sanctuary in the Netherlands Embassy whilst in the process of being brought to justice in South Africa. This is politically unacceptable to the South African Government and an unwarranted obstruction of the cause of justice and the enforcement of our law.

(ii) Should the position not be resolved this can create a precedent that may influence others with criminal intent to assume, even during the planning of criminal actions, that they will also be granted refuge in foreign embassies on South African territory. This is not only unacceptable to our Government but to any other Government in the world.

(b) Netherlands

(i) With De Jonge in their Embassy there is severe internal political pressure on the Netherlands Government not to hand him over to the South African authorities.

(ii) In the international political arena the Netherlands Government will be loathed to be seen handing over an accused person under these circumstances to the South African authorities given the existing international perception of the government and administration in South Africa.

The meeting then proceeded to discuss two possible solutions advanced by the Netherlands delegation against the background of the problems stated above in an effort to find ways which might assist both Governments in dealing with the problem with the least political embarrassment.

The two possible solutions were the following:

(a) Expulsion of De Jonge by the South African Government with an undertaking by the Netherlands Government that he will be tried in the Netherlands for the crimes committed in South Africa. This undertaking would be accompanied by certain guarantees on the part of the Netherlands Government.

The Netherlands delegation asked that the South African delegation should emphasize to our Government the political advantage they saw in it for South Africa, namely an implied approval of the South African judicial system through a trial in a court in the Netherlands.

Our response was that -

(i) In principle we do not recognize exterritorial jurisdiction in criminal matters and, therefore, to concede the

competence to try De Jonge in the Netherlands would derogate from this principle.

(ii) If the South African Government should agree to this proposal it would amount to the implied acceptance of their allegation that De Jonge would not receive a fair trial in a South African court.

(iii) There are a number of impracticalities involved in this suggestion.

(iv) We have grave doubts about their legal competence to try De Jonge in the Netherlands for an offence under their Fire Arms Act (Vuurwapenwet, 1919) as proposed by them.

(b) <u>The handing over of De Jonge for trial in South Africa</u>

The Netherlands delegation mentioned certain conditions (guarantees) which may be required by their Government in considering this option.

(i) No evidence obtained from De Jonge or anybody else detained in terms of section 29 of the Internal Security Act should be used in the trial.

(ii) If De Jonge is handed back to the South African authorities he should not be re-detained under section 29.

(iii) He should not be tried in terms of the Internal Security Act (eg section 54).

(iv) Should the death penalty be imposed it would not be executed.

(v) He should be tried in open court.

(vi) He should be entitled to full legal assistance.

(vii) Should the Netherlands legislation in future make the necessary provision, the possibility of De Jonge serving his sentence in the Netherlands should be considered by the appropriate South African authorities.

(viii) That the nationality of the accused or the nature of the crime should form no impediment to the application of the normal procedures as to pardon and parole.

On our side we set out what we thought we could propose to our Government as possible undertakings that

could be given should De Jonge be handed back to the South African authorities:

(i) We can undertake not to charge De Jonge with any offence except offences associated with the loading of arms caches and the use to which these caches were put. De Jonge will, therefore, not be prosecuted for a contravention of section 13 of the Internal Security Act.

(ii) As is normal in our criminal justice system, De Jonge will be able to be assisted and represented by legal council of his choice and in this respect the Netherlands Government or any other party will be able to provide the necessary funds.

(iii) The Netherlands Government will be able to send observers to attend the trial in full.

(iv) As far as the imposition of a possible death sentence is concerned, we can make recommendations to the South African Government with an effect similar to those provided for in certain extradition agreements, that is not to execute the death sentence if it were to be imposed.

4. Third Party Settlement (Arbitration; Conciliation)

The Netherlands delegation mentioned the possibility of a third party settlement should a mutually acceptable solution not be realized. We responded by saying that we do not consider it as a viable possibility but would nevertheless convey this suggestion to our Governments.

5. Further Annexures

Annexure B is a document prepared by Mr Van Lieres and deals in greater detail with the three options advanced by the Netherlands delegation and the guarantees required by them as well as the recommendations the South African delegation would be prepared to submit to the South African Government for their consideration. ~~It is attached for information and~~

Annexure C was also prepared by Mr Van Lieres and deals with ~~the~~ discussions ~~Mr Von Lieres~~ had with members representing the Netherlands Justice Department.

These Annexures are attached for information and record purposes.

6. Conclusion

Both delegations agreed to report back to their respective Governments on the discussions.

Our conclusion is set out in our telegram nr 273 dated 10 September 1985 which reads as follows:

"Discussions with delegation which started Monday afternoon, ended inconclusively this afternoon, but we can be reasonably satisfied with outcome. Dutch have much food for thought.

On question of international legal requirements that De Jonge be returned, we came no nearer a consensus. Dutch maintained their argument that political considerations namely detention under section 29 of the internal security act, his own political conviction including affiliation with the ANC and possibility of eventual charges with political connotations, could produce a "discriminatory prosecution" which, they maintain, is internationally accepted as a ground on which a state may legitimately refuse to return a fugitive for prosecution in the receiving state's courts. They categorised Dutch agreement to return him to South Africa as remote. Given this situation and the clear need for him to be tried, they proposed trial in the Netherlands and sought to give us satisfaction in regard to reservations they thought we might have. We said we did not see this possibility as an option and advanced various reasons.

Against this background, the Dutch proposed that we consider arbitration as a method of ending what seemed to be a stalemate. They gave their views on how arbitration might be handled. We said we would report appropriately and the Government will decide.

With regard to their preoccupations concerning the likelihood of an unfair trial because of the intrusion of various political considerations, Mr Van der Merwe outlined possible undertakings which could be given subject to governmental approval which made an impact. We have the distinct impression that the Dutch delegation for its part is reasonably satisfied that a fair trial will result. The leader of their delegation described Mr van der Merwe's proposals in this respect as "substantial."

The final consideration which left the Dutch case much weakened was our contention that they had no authority in law to try De Jonge in the Netherlands in terms of their equivalent of the arms and ammunitions and explosives acts. They themselves after research were forced to admit that there was indeed an element of doubt so far as this was concerned. They will obviously be researching this aspect carefully on their return but if our contention is borne out they will have to review their approach fundamentally. This coupled to the removal of many if not all of their concerns regarding the intrusion of political elements in the trial itself could be decisive so far as their eventual reply to our request for his return is concerned.

In summing up at the end, the leader of the Dutch delegation made a plea for further negotiations in 2 to 3 weeks time. We responded that there was nothing

further on which we could negotiate bearing in mind the stalemate reached with regard to the right or otherwise of diplomatic asylum in the present case and the conflicting views of the two governments on trial in South Africa and the Netherlands except negotiations on an arbitration procedure. So far as this was concerned, we could not anticipate our Government's decision on the Netherland's proposal but that in any event if we were to agree, issues in connection with the arbitration procedure could be resolved via diplomatic channels. We did not therefore foresee the need for further meetings between us.

It should be added that we were given notice that the Netherlands Government would ask for reconsideration of our decision regarding safe conduct from the old to the new premises. This can be expected by the end of this week. The negotiations were conducted initially in a fairly frosty atmosphere but were today much more relaxed, open and constructive. We believe they are at least satisfied that we are as determined to ensure a fair trial as they."

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Annexure A

LEGAL ARGUMENTS ADVANCED WITH REGARD TO THE POSITION OF DIPLOMATIC ASYLUM IN INTERNATIONAL LAW

The South African Position on Diplomatic Asylum in International Law

On the first day of the meeting, 10 September 1985, between the Netherlands and South African legal experts, the South African delegation commenced the discussions with an exposition of its views on diplomatic asylum.

The general position

It is today unquestionably accepted that international law recognizes no general right of asylum in diplomatic premises. In earlier times such a right was recognised and practised in Europe but at present it is no longer admitted or recognized by European states and its existence in international law is denied by most non-Latin American states.

A number of non-Latin American states have recently reiterated their position that no general customary right of diplomatic asylum exists and a survey of the state practice confirms this attitude.

With reference to a number of instances relating to the British practice in this regard Lord McNair, International Law Opinions, 1956, Vol II, 76 concludes:

"The general conclusions to be drawn from the preceding Reports is that the United Kingdom Government recognizes no legal right to grant asylum upon diplomatic or consular premises ... and no legal right to demand it ... ."

The United States has taken the position that they claim no right or privilege of diplomatic asylum especially when it may lead to the obstruction of the direct operation of the law in the receiving state.

In the Asylum case the International Court of Justice was not convinced that a regional custom exists establishing a general right of asylum in diplomatic premises and clearly stated that "a decision to grant diplomatic asylum involves a derogation from the sovereignty of that state. It withdraws the offender from the jurisdiction of the territorial state and constitutes an intervention in matters which are exclusively within the competence of that state" (Asylum case, (Columbia v. Peru), ICJ Reports 1950, 274-275).

Exceptions to the general position

Temporary asylum or refuge is granted by many states purely on humanitarian grounds. This protection is limited to those cases in which the individual is in grave and imminent danger of his life or is otherwise exposed to immediate and grave physical violence.

It also appears from the authorities that temporary safe haven will never be granted to a person attempting to escape from the normal processes of the law.

As regards the time-span for which the refuge may be granted the authorities make it clear that it may last only for as long as any danger for which protection is granted exists.

Section 29 of the Internal Security Act and the international standard of treatment

The Netherlands delegation was particularly concerned about the fact that De Jonge was detained in terms of section 29 of the Internal Security Act prior to his refuge in the Dutch Embassy. The South African delegation averred that De Jonge's detention complied with the standard of treatment required by international law.

Subsequent events have shown that probable cause for De Jonge's arrest existed and that it cannot be averred that there was any failure to conduct prompt and satisfactory investigations for the purpose of determining whether the charges and the suspicions underlying his arrest were justified.

The facts which gave rise to Mr De Jonge's refuge in the Netherlands Embassy confirms that he was detained in order to conduct an investigation of the charges against him. The intricacy of the case gave rise to the fact that at the

time of his flight he has not been brought before a court of law and provided with formal charges. The specific period of time in which a person under arrest can expect to be informed of the charges against him or in which a trial can commence naturally depends upon the circumstances of the particular case.

Sen is of the opinion that "no objection could be taken if the accused is held incommunicado for a reasonable period of time after his arrest and until he has been questioned by the police or other investigating authority" (B Sen, A Diplomat's Handbook of International Law and Practice,1979,324). The American Law Institute holds the same view: "The holding of a prisoner without permitting him to communicate with a representative of his own state or council for a period of preliminary examination does not necessarily violate the international standard of procedural justice" (quoted by MM Whiteman, Digest of International Law, 1967, Vol. 8, 866). Cf too V A Freeman, The International Responsibility of States for Denial of Justice,1938, 206 and 208 and cases mentioned by him.

However, even if the home state should be of the opinion that the required standards have not been complied with, it is quite clear that the granting of asylum does not constitute an appropriate action to remedy the situation and it cannot be regarded as a legitimate reaction towards purported illegal conduct on the part of the receiving state. No authority exist in international law for the proposition that asylum constitutes a legal remedy for derogation of the rules of the international standard.

The Netherlands position with regard to diplomatic asylum in International Law

Subsequently the Netherlands delegation set out its views with regard to diplomatic asylum in international law and provided the following written summary :

"1. In general a sending State, in this case the Netherlands, may not use its embassy to prevent the receiving State, in this case South Africa, from exercising its jurisdiction over persons who are not entitled to immunity by offering them refuge there. However, there are exceptions to this general rule, the relevant exception here being diplomatic asylum.

2. The granting of diplomatic asylum is an institution which has been in existence as long as permanent diplomatic missions themselves. Indeed, there have been many instances of asylum being granted in legations and embassies since the 17th century, initially largely in Europe but more recently in other parts of the world as well.

3. Such asylum is usually granted for humanitarian reasons, one of which may be the assumption that a person seeking asylum will not be prosecuted, or at least not solely prosecuted, and possibly punished for the criminal offence of which he is accused, but that other factors such as his nationality, race or political convictions will play a role.

4. Diplomatic asylum is more than simply a phenomenon with which States are confronted in practice. Over the years, as is known, the possibility of regulating this area of general international law has been discussed many times. It will suffice here to cite the proposals of the Institute of International Law (Hamburg meeting in 1891 and Cambridge meeting in 1895), the discussion in the United Nations International Law Commission (1957, when Sir Gerald Fitzmaurice put forward textual proposals) and the discussions in the Sixth Committee of the United Nations General Assembly following upon an Australian initiative in 1974.

   The fact that outside the Latin American region diplomatic asylum has not yet been regulated does not mean that it is at variance with international law. On the contrary, experience and the relevant literature both indicate that the legitimacy of the institution as such is not disputed. Opinions are, however, divided on the question of its precise meaning.

5. There are numerous treaties which indicate that fear of discriminatory prosecution is internationally accepted as a ground on which, in general, a State can legitimately refuse to extradite or hand over a person to a second State for prosecution. Two references will suffice to illustrate this point:

European Extradition Treaty (1957), article 3.2: "Extradition shall not be granted .... if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons."

Draft Convention on Diplomatic Asylum (ILA, 1972), article 2.a:

"Asylum will be granted to those who ... would be subjected to persecution on political grounds or for reasons of race, religion, nationality or membership of a particular social group, which shall be understood to include any regional or linguistic group, or adherence to a particular political opinion."

Provisions of a similar purport are also to be found in recent bilateral extradition treaties, such as that between South Africa and the United States of America.

6. Experience has shown that, leaving aside the question of the precise meaning of the legal concept "diplomatic asylum", persons who are granted such asylum are not, or not readily, handed over to the local authorities. Indeed, recent developments in the international protection of human rights tend towards an obligation on the part of both the States concerned - inspired by

mutual feelings of toleration and goodwill" (Asylum Case, International Court of Justice, 20 November 1950) - to seek a solution in the situation which has arisen."

Reply of South African Delegation to Arguments Advanced by the Netherlands

On the second day, the South African delegation again started the discussions with a brief summary of its views on the matter and subsequently replied to the main arguments advanced by the Netherlands delegation:

1. The South African delegation has considered the arguments adduced yesterday on the central question of whether there exists any right to accord diplomatic asylum. With great respect we cannot agree with the view of the Netherlands delegation.

2. According to the Netherlands view the grant of diplomatic asylum constitutes one of the exceptions to the general rule that one State (sending State) may not exercise its jurisdiction over a person not entitled to immunity by affording such person refuge on its diplomatic premises in another State (receiving State). That asylum/refuge may be granted for humanitarian reasons - so the argument ensues - and this might include the case of a person in which there is a fear of "discriminatory prosecution" and where factors such as political convictions may play a role.

3. Our position remains that the right to grant asylum on diplomatic or consular premises is not recognized at customary international law, save in the one case of the imminent peril of the person concerned - and that the right to grant diplomatic asylum subsists only for as long as the danger exists.

4. The argument that asylum may be (and usually is) granted for humanitarian reasons, is in our opinion confined to cases of territorial asylum and finds no application in the case of so called diplomatic asylum except in the one case referred to above.

5. We believe however, that the doctrine of humanitarian intervention has never been clearly established in international law. As Brownlie states: "The state practice justifies the conclusion that no genuine case of humanitarian intervention has occurred, with the possible exception of the occupation of Syria in 1860 and 1861. ... The institution did not conspicuously enhance state relations and was applied only against weak states. It belongs to an era of unequal relations" (I Brownlie, International Law and the Use of Force by States, 1968, 340). See too A H Fairley, "State Actors, Humanitarian Intervention and International Law: Reopening Pandora's Box", Georgia Journal of International and Comparative Law, Vol. 10 (1980), 58.

We believe that the true position is reflected in the Lotus case. In that case the Permanent Court of

International Justice neatly summarised the essence of the principle of nonintervention in the following words:

"Now the first and foremost restriction imposed by international law on States is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another state. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from convention" (The SS Lotus (1927) PCIJ ser A No 9 18-19).

6. It also seems to us that the references quoted by the Netherlands (paragraph 5 of their note on diplomatic asylum) do not constitute authority for the proposition that the Netherlands can refuse to hand over De Jonge. The reference to the European extradition treaty of 1957 and other extradition treaties deals of course with extradition: it is our view that the rules governing extradition cannot by way of analogy or otherwise be equated with the rules governing diplomatic asylum since we are dealing here with two entirely different concepts.

7. There is also reference to the Draft Convention on Diplomatic Asylum drawn up by the International Law Association in 1972. That Convention remains a draft Convention and the fact that it has not been possible to conclude any general convention indicates, we believe, the unwillingness of the general body of

States to accept diplomatic asylum as a legal institution. It is of course true that a treaty is often, if not usually, concluded for the very reason that there is no governing rule of customary international law. But it is also true that the conclusion of a number of similar treaties may eventually lead to the establishment of rules of customary international law where none existed before. As you will be aware, attempts to codify the law in this regard were deliberately excluded at the time the Vienna Convention was negotiated. It appears that a concordant practice of states, however constant and uniform, is really of no more than evidential value. It is not in itself sufficient to establish a rule of customary international law. What, then, distinguishes a mere practice or usage from a rule of law? It is the opinio iuris sive necessitatis, the conviction on the part of all or the great majority of states that the practice is one which is legally binding upon them. In the words of the Statute of the International Court, it must be "a general practice accepted as law."

At its Twenty-ninth Session in 1974, the General Assembly resolved to debate diplomatic asylum further at its Thirtieth Session, to decide whether it should be recognised and codified as an institution of international law. Following this debate, however, the matter was shelved indefinitely.

We are therefore thrown back on customary international law which, as I have said, does not recognize the right to grant diplomatic asylum as opposed to territorial asylum.

8. The South African reply also dealt with some of the arguments advanced by a number of Dutch jurists in an article "Asiel in Pretoria" which appeared in the Nederlands Juristenblad, 60(1985), 965-970, of 7 September 1985.

9. The Netherlands delegation was referred to a decision by the Hoge Raad, Nr. 786 of 31 May 1983, to the effect that the Vuurwapenwet of 1919 could only find application to facts or actions which occur on the Netherlands territory. This decision of the Hoge Raad raises grave doubts as to the legal possibility of De Jonge's trial in the Netherlands.

ANNEXURE B

THE THREE OPTIONS CONSIDERED BY THE DELEGATIONS

1. After an impasse was reached relating to the applicability of certain principles of international law to the present case, inter alia on the validity of diplomatic assylum, the RSA delegation suggested that the practical resolution of the problem be looked at. The Netherlands delegation responded with the following three suggestions:

(a) Expulsion of De Jonge coupled with guarantees that he be prosecuted in the Netherlands;

(b) Handing back of De Jonge to South Africa coupled with the necessary guarantees;

(c) Arbitration.

2. AD ARBITRATION

As far as the latter point was concerned the South African delegation indicated that it had no instructions on that question, but would convey this suggestion to the government. The Dutch delegation suggested that the subject of arbitration be the two options (a) and (b) above - viz. the handing back and expulsion. As an alternative to arbitration the Netherlands Delegation suggested that the possibility of conciliation be considered. Both delegations indicated that direct negotiations between the two governments were preferable and that arbitration was but a remote possibility. The RSA delegation indicated that the question of arbitration and safe conduct will be referred to the RSA government for government to government communication.

3. AD THE HANDLING BACK OF DE JONGE

3.1 In relation to (b) above, i.e. the handing back, it was

stated...

stated unequivocally by the head of the Dutch delegation, Mr. Geesteranus that, when he left the Netherlands to to come to Geneva, the Netherlands government was not ready to give De Jonge back to the South African authorities.

3.2 During the meeting on the 10 September Mr. Geesteranus said "in the opinion of my Government the handing back of Mr. De Jonge is very remote." His motivation for this stance was initially reflected in the statement he made that the application of the internal security law is not conducive to a fair trial nor can evidence obtained during detention in terms of the Internal Security Act be conducive to a fair trial.

3.3 It also became clear that a further difficulty the Dutch faced was that De Jonge "has affiliations with an organization that wants to affect change in South Africa and that is the political stance of my (Netherlands) Government that change must be brought about." Mr. Gessteranus raised the question that it could be possible to exclude the Internal Security Act problem by bringing De Jonge before a judge either in the RSA or in the Netherlands. He expressed a further fear that the Internal Security Act and the prosecution in terms of that Act constitutes "the heart of the matter in our fear about the process. If the person is given back charges might be added, including charges in terms of the Internal Security Act."

4. On being asked how the pre-occupation of the Netherlands Government with the Internal Security Act could be satisfied the Netherlands Delegation indicated that they require the following guarantees; viz. that:

(a) No evidence emanating from De Jonge's Section 29 detention may be used against him at his trial.

/(b)

(b) No evidence obtained from anybody else who was detained in terms of Section 29 at the time of the making of his statement may be used against De Jonge.

(c) De Jonge must not be prosecuted for an offence mentioned in the Internal Security Act.

(d) In case the death penalty were to be imposed an undertaking would be required that it will not be executed.

(e) An open court trial be held.

(f) Full legal assistance must be given to De Jonge.

(g) The South African Government should agree that if in future it become legally possible, De Jonge must be transferred to the Netherlands to serve the unexpired portion of his sentence at the time of such transfer in a Netherlands jail.

5. In response to the guarantees sought by the Netherlands delegation and set out above the South African delegation provided the following undertakings it would be prepared to recommend to Government:

(a) Not to charge De Jonge with any offence except offences associated with the loading of the arm caches and the use to which these caches were put,

(b) that De Jonge would not be prosecuted for a contravention of Section 13 of the Internal Security Act,

(c) that as is normal in the South African criminal justice system, he will be able to be assisted and represented by legal counsel of his choice and in this respect the Netherlands Government or anybody else can provide the

/necessary

necessary funds.

(d) the Netherlands Government can send observers to attend the full trial,

(e) that, as far as the imposition of a possible death sentence is concerned, the South African delegation can make recommendations to the South African Government which would be similar to those provided for in extradition agreements; that is, to recommend to the government not to execute the death sentence if it were to be imposed and to provide a guarantee in this respect if so required.

6. In summary we must point out that the Dutch attitude towards Section 29 is that it does not comply with the minimum human rights standard and that were De Jonge to be returned to the authorities in the RSA they would be party to placing him in a state of arrest, which state does not, according to their perceptions, comply with minimum human rights standard. Then, they would be party to denying him human rights and could be severely strictured because of that. It would appear that if these Dutch fears could be allayed by e.g. providing a guarantee that he would not be re-detained in terms of Section 29, the chances that they will hand him back can become a real probability.

7. AD EXPULSION AND A GUARANTEE OF PROSECUTION IN THE NETHERLANDS

According to the Netherlands delegation the suggestion that De Jonge be expelled from the RSA coupled with guarantees that he be prosecuted in the Netherlands would be the most acceptable solution to the Netherlands government. The South African delegation indicated that this option cannot be considered. In support of this contention the following reasons were advanced:

/(a)

(a) De Jonge is perceived to be an international terrorist who has engaged in international terroristic activities and who now enjoys sanctuary in a diplomatic mission in South Africa. The South African criminal law cannot accommodate such a state of affairs.

(b) This case may create a precedent that criminals may believe that they would receive sanctuary in a diplomatic mission and that is totally unacceptable to the South African Government.

(c) Grave doubts exist concerning the legal competence of the Dutch Government to prosecute De Jonge under the Vuurwapenwet, 1919, in the Netherlands for offences committed in South Africa. Although it appears that generally Section 5 of Dutch Penal Code authorizes a prosecution in the Netherlands of Dutch citizens if they committed offences in a foreign country, this rule only applies where such offence is also recognized in the Netherlands. There appear to be exceptions to this rule such as for example Case No. 786 decided by the Hooge Raad on 31 May 1983 (Nederlandse Jurispretentie, 1983, 2490) where it was held that a prosecution in terms of the Vuurwapenwet, 1919, in the Netherlands for an offence committed overseas was not competent. Accordingly we have grave doubts whether the Netherlands Government has any legal competence to proceed against De Jonge for the loading of the arms caches on the lines suggested. Sabotage or terrorism does not appear to have an equivalent in the Dutch criminal law.

(d) that by agreeing to De Jonge's prosecution in the Netherlands the South African Government would be in fact be conceding extradition; a situation which both parties agree does not exist in this case.

/(e)

(e) Such an agreement would by implication be an admission that De Jonge would not receive a fair trial in the RSA and that the Netherlands Goverment's attitude that that is so, would by necessary implication be confirmed.

(f) The Criminal law of the RSA does not accept extra-territorial jurisdiction; the handing over of De Jonge would impinge on this principle and has the potential of negatively affecting relations with other African States.

(g) In such a case there would also be a deviation from fundamental principle of South African Criminal Law that evidence be given viva voce and be tested by cross examination.

(h) Public opinion in the RSA would not allow the handing over of De Jonge to the Netherlands Government.

8. It will be seen from the above that this approach - the fundamental Dutch approach - has a substantial weakness, to wit: the fact that the legal competence of the Netherlands Government to institute a prosecution is suspect. If this legal position can be confirmed then this option proposed by the Netherlands Government must fall away and handing back is the only remaining option.

9. SUMMARY

(a) In summary it appears that the factual basis for the stance adopted by the Netherlands Government can be condensed to this:

> detention in terms of Section 29 does not accord with basic human rights as that Government has been advised it exists and is internationally recognised, and

/because

because a Section 29 detention is tainted, evidence obtained as a result of such detention is also tainted, this being so, it gives rise to a "discriminating prosecution."

(b) In my view, if the expulsion and prosecution option proves ill-founded, the Netherlands Government would be faced with the following possible options:

(i) arbitration

(ii) handing back

(c) Of these they could press for arbitration as the better option for them. However if the expulsion and prosecution option is without substance (I suggest the South African Government obtain decisive legal advice on this on the basis of the known facts) then arbitration as an option is equally without foundation. This would make the handing back the only feasible resolution to the problem.

(d) It can however be expected that because of the view that Government takes of Section 29, it will insist that diplomatic assylum is, on humanitarian grounds, lawfull. In these circumstances it can be expected that they will try and hold De Jonge in order to obtain the most favourable guarantees for his return.

10. Finally it must be pointed out that the briefing of the various other Ambassadors on the De Jonge matter is known to the Netherlands authorities. This conduct in their view is highly abnormal and the delegation claimed it supported their Government in its stance that a prosecution against him will be discriminatory.

/Generally

Generally, in the South African Criminal Law, it is highly undesirable to disclose evidence the prosecution may tender in a prosecution to any outside agency such as a foreign Government, except if such evidence is disclosed as a result of a formal application for extradition. In the instant case, extradition not being the issue, such disclosure has not only alerted De Jonge's attorney to the strengths and weaknesses of the prosecution case, but has apparently also created a perception with the Netherlands Government that there is indeed something abnormal on the go.

It must be firmly recommended that this practice be not followed in future.

ANNEXURE C

CONSULTATIONS BETWEEN RESPECTIVE JUSTICE OFFICIALS

1. A separate consultation was held between the Justice representatives in the Netherland's delegation and the Attorney-General in the South African delegation on September 10th at 09h30.

2. During these discussions previous legal doubts which existed in relation to fair trial procedure and to the effect Section 29 may have on a prosecution were raised and explained.

3. Doubts on their part relating to fair trial procedure were successfully assauged. A possible prosecution in the Netherlands was also discussed. In this connection reference was made to the Vuurwapenwet, 1919 - about its applicability in casu see paragraph above. It also appears that the Dutch does not have an offence similar to Section 54(1) or (2) of the Internal Security Act.

4. It was mentioned that if other persons committed offences with the cached arms, De Jonge could possibly be prosecuted in the Netherlands as an accessory to whatever common law offences were committed, e.g. murder or arson.

5. The Attorney-General was also advised that were he to be surrendered, De Jonge could only be detained for a period of 102 days. A preliminary investigation would have to be instituted in the Netherlands under control of a Rechter-Kommissaris.

6. There was no dispute between the parties about the relevant legal principles. It is clear, however, that the possibilities sketched by the Dutch justice officials in respect of a prosecution of De Jonge in the Netherlands are lightweight and would not do justice to the considerable damage and deliberate course of conduct he had caused/followed, nor would it contribute to justice in respect of his Co-accused, Pastoors.

7. It was indicated to the Attorney-General that the maximum sentence under the Vuurwapenwet, 1919, that could be imposed was 4 years, which period could be increased by one third were he to be convicted of more than one similar offence under that act.

8. It is our considered opinion that it is not the legal position that creates the impasse but it is the political situation. With this attitude Mr. Suyver from the Minister of Justice's Office, agrees.

Dringend 23-9-55

Mnr. SS van der Merwe

Ek stuur u hiervan 'n afskrif van die finale kabinetantwoord ~~aan~~ op Minister Van den Broek se brief wat aan ons Minister voorgelê word. U mag dit ook aan u Minister wil wys.

Gedeelte

NS. U sal sien dat u kommentaar grootliks geïnkorporeer is.

Mr Minister,

I refer to your letter dated 16 September 1985 regarding the case of Mr de Jonge, the text of which the Netherlands Chargé d' Affaires a.i. conveyed to the Department of Foreign Affairs on 17 September.

May I assure you that we too have been earnest in our search for a mutually acceptable solution to this problem. South Africa's participation in the discussions in Geneva demonstrates this attitude. In the course of those discussions the South African delegation sought (it seemed to them with some success), to convince the Netherlands delegation that, whatever Mr de Jonge's political convictions might be, they would not have any adverse effects for him so far as his trial in South Africa is concerned and that he could be assured of a fair trial in an open court, with full legal representation at his disposal and under public and international scrutiny.

The South African delegation gave a number of compelling reasons why, in its view, the South African authorities could not possibly agree to a trial in the Netherlands for the offences Mr de Jonge is alleged to have committed in South Africa. Amongst the reasons, all of which need not be

repeated here, was that to agree to a trial in a foreign court would be a reflection on South Africa's judiciary inasmuch as it would leave the impression that the South African Government itself had doubts as to the impartiality and competence of its courts in respect of criminal offences committed within South Africa.

The delegation also pointed out technical considerations which rendered a trial in the Netherlands impractical. It can also be stated that it is the intention that Mr de Jonge be tried together with Mrs Passtoors since it is alleged that they were accomplices in committing the same criminal offences. Separate trials with one taking place in the Netherlands under a different judicial system would be prejudicial to the case of either the defendants or the prosecution or both.

The South African Government is consequently unable to agree to your request that Mr de Jonge be tried in the Netherlands. This is a procedure which in any event seemed to our own legal experts to be incompatible with Netherlands law applicable in this case. The Netherlands delegation itself conceded that there was an element of uncertainty as to the competence of the Netherlands courts to try Mr de Jonge.

As to your suggestion that a third party settlement be considered, the South African Government has no doubt that the principles of international law applicable in this case require that Mr de Jonge should be returned to South African custody. The acts for which he was arrested and in respect of which he is now a fugitive from justice constitute internationally recognised criminal offences which, as your

suggestion of a trial in the Netherlands itself implies, are also recognised as criminal offences in the Netherlands. These and all the other considerations mentioned during the course of negotiations and further elaborated upon in this letter, have satisfied the South African Government that it would serve no purpose to pursue the suggestion of arbitration or third party settlement.

So far as the request pertaining to Mr de Jonge's transfer to the new Netherlands Embassy is concerned, the South African Government's interpretation of the applicable principles of international law confirms that there is no obligation on South Africa's part to grant him safe conduct from the old to the new Embassy premises. The authorities referred to in this respect by the Netherlands delegation in the course of the discussions in Geneva in support of a contrary view cannot be considered to provide sufficient foundation in international law for such an obligation bearing in mind the circumstances of this particular case. Nor are there practical considerations justifying further delay in returning Mr de Jonge to South African custody given South Africa's inability to accept a third party settlement, a course of action which would have taken time to complete. The need for safe conduct from the old to the new Embassy premises does not therefore arise in the opinion of the South African Government.

The South African Government must accordingly adhere to its earlier request that Mr de Jonge be handed over to the South African authorities without further delay.

Please accept, Mr Minister, the assurance of my highest consideration.

R F BOTHA
MINISTER OF FOREIGN AFFAIRS

His Excellency Mr H van den Broek
Minister of Foreign Affairs
THE HAGUE

DEN HAAG, 16 SEPTEMBER 1985

ONDERWERP : VERBLIJF DE JONGE IN NEDERLANDSE AMBASSADE TE PRETORIA

TEN VERVOLGE OP ONS GESPREK OP 2 SEPTEMBER JONGSTLEDEN IN PRETORIA, EN HET OVERLEG DAT TUSSEN ONZE JURIDISCHE DESKUNDIGEN IN GENEVE PLAATSVOND OP 9 EN 10 SEPTEMBER JONGSTLEDEN, GESPREKKEN DIE IK ALS NUTTIG HEB ERVAREN, ZOU IK TEN AANZIEN VAN HET VERBLIJF VAN DE HEER DE JONGE IN DE NEDERLANDSE AMBASSADE IN PRETORIA NOG HET VOLGENDE ONDER UW AANDACHT WILLEN BRENGEN, MEDE ALS REACTIE OP DE NOTA VAN UW MINISTERIE VAN 19 JULI 1985.

DE NEDERLANDSE REGERING ACHT ZICH, ZOALS OOK TOEGELICHT IN HET OVERLEG TE GENEVE, GEZIEN DE SPECIFIEKE OMSTANDIGHEDEN, NAAR ALGEMEEN VOLKENRECHT, GERECHTIGD AAN DE HEER DE JONGE DIPLOMATIEK ASIEL TE VERLENEN, ZOLANG NIET IN ONDERLINGE OVEREENSTEMMING TUSSEN ONZE BEIDE REGERINGEN EEN OPLOSSING IS BEREIKT.
HET IS DERHALVE AAN BEIDE REGERINGEN OM IN GEZAMENLIJK OVERLEG TOT EEN OPLOSSING TE GERAKEN. IK MOGE DAARTOE HET VOLGENDE VOORSTELLEN. ZODRA IN ZUID-AFRIKA HET STRAFDOSSIER TEGEN DE HEER DE JONGE DEFINITIEF ZAL ZIJN SAMENGESTELD EN EEN AANKLACHT ZAL KUNNEN WORDEN GEFORMULEERD, ZULLEN DE JUSTITIELE AUTORITEITEN IN NEDERLAND DAARVAN OP DE HOOGTE WORDEN GESTELD, TENEINDE TE BEVORDEREN DAT, NADAT HIJ ZAL ZIJN OVERGEBRACHT NAAR NEDERLAND, HIER TE LANDE TOT STRAFVERVOLGING KAN WORDEN OVERGEGAAN.

IN GEVAL HET BEGINSEL VAN BERECHTING IN NEDERLAND VOOR U ONAANVAARDBAAR ZOU BLIJVEN DAN ZIE IK GEEN ANDERE MOGELIJKHEID DAN U VOOR TE STELLEN EEN ''THIRD PARTY-SETTLEMENT'' TE OVERWEGEN, ZOALS DOOR ONZE DESKUNDIGEN TE GENEVE WERD BESPROKEN.

AANGEZIEN HET VOOR HET GOED FUNCTIONEREN VAN DE NEDERLANDSE AMBASSADE IN PRETORIA VAN BELANG MOET WORDEN GEACHT DE HEER DE JONGE IN HET NIEUWE GEBOUW AAN DE ARCADIASTRAAT ONDER TE BRENGEN, MOGE IK U VERZOEKEN DAARVOOR UW MEDEWERKING TE WILLEN VERLENEN. DE GRONDEN VAN DIT VERZOEK ZIJN REEDS VAN NEDERLANDSE KANT UITVOERIG IN GENEVE TOEGELICHT.

MET GEVOELENS VAN DE MEESTE HOOGACHTING,

ZIJNER EXCELLENTIE
DE HEER R.F. BOTHA
MINISTER VAN BUITENLANDSE ZAKEN
TE
PRETORIA

(H. VAN DEN BROEK)

4000/016/309

STATEMENT BY THE MINISTER OF FOREIGN AFFAIRS, PRETORIA, 1 OCTOBER 1985

ANNEXURES:

A **Statement by the Minister of Foreign Affairs dated 11 July 1985.**

B Statement by the Minister of Foreign Affairs dated 18 July 1985

C Letter from Minister R F Botha to Minister H van den Broek dated 25 September 1985

D Note from the Department of Foreign Affairs to the Embassy of the Netherlands dated 1 October 1985

For background information on what happened prior to 19 July 1985, the day on which Mr de Jonge was handed over to the Embassy of the Netherlands, please refer to annexures A and B.

It will be recalled that Mr Klaas de Jonge was handed to the Netherlands Embassy on 19 July 1985 and that the Embassy was requested on the same date to hand Mr de Jonge to the South African authorities in order to allow the due process of law to proceed.

In response to a request by the Netherlands Government that the South African Government should allow Mr de Jonge to be tried in the Netherlands, it was indicated on 8 August 1985 that the two Governments should adhere to the principles of international law governing cases of this nature and that Mr de Jonge should be handed over to the South African authorities.

On 12 August 1985 the Embassy of the Netherlands was advised that the South African Government could not accept the transfer of Mr de Jonge from the existing Embassy to the new Embassy building when the move was to take place and the Embassy was again requested to return Mr de Jonge to the South African authorities. The move to the new premises took place on 23 August 1985 but the Netherlands Embassy indicated that the political and economic sections would remain in the old premises in the Nedbank Building.

At the time of the visit of the Foreign Ministers of Luxemburg, Italy and the Netherlands to South Africa, arrangements were made for discussions between Minister van den Broek of the Netherlands and Minister R F Botha. During the discussions on 2 September 1985 it became evident that the two Governments held different views on the question of the handing over of Mr de Jonge and it was decided to appoint two legal teams to discuss all aspects of the matter in an effort to find a solution. The meeting took place in Geneva on 9 and 10 September 1985. The two sides could not reach an agreement.

On 16 September 1985 Minister van den Broek addressed a letter to the Minister of Foreign Affairs in which he reiterated his Government's earlier proposals, viz, that Mr de Jonge should stand trial in the Netherlands; that arbitration by a third party should be considered as an alternative; and that the South African authorities should cooperate to transfer Mr de Jonge to the new Embassy building. In his reply to the letter, Minister R F Botha on 25 September 1985 gave the reasons why the South African Government could not agree to the proposals and pointed out that the South African Government had gone out of its way to find a solution for the problem. (A copy of the reply is attached - Annexure C) The Minister indicated that the South African Government maintained its point of view that the Netherlands Government should comply with its international obligations in terms of international law by handing over Mr de Jonge to the South African authorities without delay.

On 1 October 1985 the Embassy of the Netherlands was advised that in view of the fact that the Embassy was continuing to use the offices in the Nedbank Building for the sole purpose of giving refuge to Mr de Jonge and in the light of the fact that the extension of the lease had expired on 30 September 1985, the offices could no longer be considered part of the Netherlands Embassy as they were no longer used for the purpose and functions of a diplomatic mission. The South African Government was therefore regrettably left with no alternative but to lift the diplomatic immunity of those offices as from 8 October 1985. (A copy of the note is attached - Annexure D).

STATEMENT BY MINISTER OF FOREIGN AFFAIRS : PRETORIA : 11 JULY 1985

THE NETHERLANDS MINISTER OF FOREIGN AFFAIRS YESTERDAY CALLED IN THE SOUTH AFRICAN AMBASSADOR IN THE HAGUE AND PROTESTED AGAINST WHAT HIS GOVERNMENT TERMED A VIOLATION OF THE INVIOLABILITY OF THE NETHERLANDS EMBASSY IN PRETORIA. HE REQUESTED AN APOLOGY AND CALLED FOR MR DE JONGE'S RETURN TO THE EMBASSY IN ORDER TO RESTORE THE SITUATION AS IT EXISTED BEFORE HIS REMOVAL.

I HAVE THIS MORNING CONVEYED TO THE NETHERLANDS AMBASSADOR, THE SOUTH AFRICAN POLICE ACCOUNT OF THE INCIDENT IN WHICH MR DE JONGE WAS INVOLVED AT THE NETHERLANDS BANK BUILDING. IT AMOUNTS TO THE FOLLOWING:

MR KLAAS DE JONGE IS AT PRESENT BEING DETAINED IN TERMS OF SECTION 29 SUB-SECTION (1) OF THE INTERNAL SECURITY ACT NO. 72 OF 1982 IN CONNECTION WITH SUSPECTED TERRORIST ACTIVITIES. THESE ACTIVITIES INCLUDE INTER ALIA THE ESTABLISHMENT OF CACHES OF ARMS, AMMUNITION, LIMPET MINES AND OTHER EXPLOSIVE DEVICES AT VARIOUS PLACES IN SOUTH AFRICA TO SERVE AS DISTRIBUTION POINTS FOR ANC TERRORISTS.

ON 9 JULY 1985 WHILST IN THE CUSTODY OF TWO MEMBERS OF THE SOUTH AFRICAN POLICE, HE POINTED OUT CERTAIN LOCATIONS TO THE POLICE WHICH WERE RELEVANT TO THEIR INVESTIGATIONS. DURING THIS PROCESS HE UNDERTOOK TO TAKE THE POLICE OFFICERS TO A FURTHER LOCATION OSTENSIBLY SITUATED ON THE FIRST FLOOR OF THE NETHERLANDS BANK BUILDING. THE POLICE OFFICERS WHO ARE STATIONED IN JOHANNESBURG WERE NOT AWARE OF THE FACT THAT THE NETHERLANDS EMBASSY WAS SITUATED ON THIS FLOOR AND THAT THEY WERE IN FACT BEING LED TO THE EMBASSY.

ON ARRIVAL ON THE FIRST FLOOR, MR DE JONGE LED HIS ESCORT TO A DOOR LEADING OFF A PASSAGE. ON REACHING THE DOOR HE BROKE AWAY AND PARTIALLY ENTERED WHAT TURNED OUT TO BE THE ENTRANCE TO THE NETHERLANDS EMBASSY.

AS HE WAS ALL THE TIME LEGALLY IN CUSTODY AND AS HE WAS

OSTENSIBLY IN THE PROCESS OF POINTING OUT ANOTHER LOCATION RELEVANT TO THE POLICE INVESTIGATIONS, HIS POLICE ESCORT PULLED HIM BACK INTO THE PASSAGE. THE COUNSELLOR OF THE EMBASSY THEREUPON APPEARED IN THE PASSAGE AND REQUESTED THE POLICE OFFICERS TO ENTER THE EMBASSY IN ORDER TO DISCUSS THE MATTER. THE POLICE OFFICERS WERE NOT PREPARED TO DO SO.

THERE ARE CONFLICTING ACCOUNTS OF WHAT EXACTLY HAPPENED IN THE BUILDING. NEVERTHELESS I ASSURED THE NETHERLANDS AMBASSADOR THAT THERE CERTAINLY WAS NO INTENTION ON THE PART OF THE SOUTH AFRICAN POLICE OFFICERS TO VIOLATE THE INVIOLABILITY OF THE NETHERLANDS EMBASSY.

I ALSO ASSURED HIM THAT THE SOUTH AFRICAN GOVERNMENT FULLY RESPECTS THE APPLICABLE PRINCIPLES OF INTERNATIONAL LAW GOVERNING THE INVIOLABILITY OF DIPLOMATIC PREMISES.

I ALSO CONVEYED TO THE AMBASSADOR CERTAIN SENSITIVE ASPECTS CONCERNING THIS CASE AND I ASKED HIM TO FORWARD THIS INFORMATION TOGETHER WITH OUR ACCOUNT OF THE FACTS OF WHAT OCCURRED IN THE BUILDING TO HIS GOVERNMENT.

IN THE MEANTIME THE AMBASSADOR'S REQUEST FOR CONSULAR ACCESS TO MR DE JONGE HAS BEEN GRANTED.

ANNEXURE C

25 September 1985

Geagte Minister,

Ek verwys na u brief van 16 September 1985 insake die geval van mnr De Jonge, die inhoud waarvan die Nederlandse Tydelike Saakgelastigde op 17 September aan die Departement van Buitelandse Sake oorgedra het.

Ek kan u verseker dat ons ook ernstig was in ons soeke na 'n onderling aanvaarbare oplossing van hierdie probleem. Suid-Afrika se deelname aan die samesprekings in Genève is bewys van hierdie houding. Gedurende daardie samesprekings het die Suid-Afrikaanse afvaardiging gepoog (en, soos dit vir hulle voorgekom het, met 'n mate van sukses) om die Nederlandse afvaardiging te oortuig dat, wat ookal mnr De Jonge se politieke oortuigings mag wees, dit geen nadelige effek vir hom sou hê so ver dit sy verhoor in Suid-Afrika betref nie en dat hy verseker kon wees van 'n regverdige verhoor in 'n ope hof met volle regsverteenwoordiging tot sy beskikking.

Die Suid-Afrikaanse afvaardiging het 'n aantal dwingende redes aangevoer waarom, volgens hulle mening, die Suid-Afrikaanse owerhede nie kon instem tot 'n verhoor in Nederland vir misdade wat na bewering deur mnr De Jonge in Suid-Afrika gepleeg is nie. Een van die belangrikste redes was dat indien tot 'n verhoor in 'n vreemde hof ingestem sou word, dit 'n refleksie sou wees op die onpartydigheid en integriteit van die Suid-Afrikaanse regbank aangesien dit die indruk sou skep dat die Suid-Afrikaanse Regering self bedenkings het ten opsigte van die onpartydigheid en bevoegdheid van sy howe ten aansien van strafbare oortredings wat in Suid-Afrika gepleeg is.

Nederlandse afvaardiging in die loop van die samesprekings in Genève verwys het ter stawing van 'n teenoorgestelde siening, verskaf nie 'n voldoende volkeregtelike grondslag vir sodanige verpligting nie, gesien die omstandighede van hierdie besondere geval. Daar bestaan ook nie praktiese oorwegings vir verdere uitstel van mnr De Jonge se terugbesorging aan die Suid-Afrikaanse owerhede nie, in die lig van die feit dat Suid-Afrika nie sy weg oopsien om beslegtiging deur 'n derde party te aanvaar nie. Die noodsaaklikheid om vrygeleide vanaf die ou tot die nuwe Ambassade-persele te verleen, is dus volgens die mening van die Suid-Afrikaanse Regering nie ter sake nie.

Die Suid-Afrikaanse Regering doen met eerbied aan die hand dat geen regsreël u belet om mnr De Jonge aan die Suid-Afrikaanse owerhede te oorhandig nie terwyl gesonde regsadministrasie, gevestigde regsbeginsels en internasionale hoflikheid voorskryf dat hy oorhandig moet word.

Die Suid-Afrikaanse Regering volstaan derhalwe by sy vorige standpunt dat mnr De Jonge onverwyld aan die Suid-Afrikaanse owerhede oorhandig word.

Met die meeste hoogagting.

(sgd) R F Botha

R F BOTHA
Minister van Buitelandse Sake

Sy Eksellensie mnr H van den Broek
Minister van Buitelandse Sake
DEN HAAG

ANNEXURE D

Met betuiging van sy besondere hoogagting aan die Ambassade van Nederland, het die Departement van Buitelandse Sake die eer om te verwys na sy Notas nr 400/016/307 van 19 Julie en 12 Augustus 1985 waarin versoek is dat mnr Klaas de Jonge aan die Suid-Afrikaanse owerhede oorhandig word.

In die brief gedateer 25 September 1985 van die Suid-Afrikaanse Minister van Buitelandse Sake aan die Nederlandse Minister van Buitelandse Sake, is daar geantwoord op die drie versoeke wat aan die Suid-Afrikaanse Regering gerig is. Hieruit blyk duidelik dat die Suid-Afrikaanse Regering uit sy pad gegaan het om by wyse van gesprekvoering 'n oplossing vir die probleem wat geskep is deur mnr De Jonge se teenwoordigheid in die betrokke kantore in die Nedbank-gebou te vind.

Die Suid-Afrikaanse Regering herbevestig sy standpunt dat 'n diplomatieke missie nie aangewend mag word nie om toevlug te verleen aan 'n persoon wat 'n voortvlugtige is ten opsigte van misdade wat deur die geregsowerhede van die ontvangende staat ondersoek word. Wat die huidige situasie soveel erger maak, is dat die Nederlandse Ambassade reeds na 'n nuwe

gebou verskuif het. Die enigste rede waarom enkele kantore in die Nedbank-gebou nog nie deur die Ambassade ontruim is nie, is om voortgesette toevlug aan mnr De Jonge te verleen, strydig met die volkereg. Hierdie kantore word dus in ieder geval nie langer aangewend vir die doel en funksies van 'n diplomatieke missie nie.

Die feit dat die huurkontrak ten opsigte van die betrokke kantore op 30 September 1985 verstryk het, bevestig dat dit die voorneme van die Ambassade was om die kantore in die Nedbank-gebou te ontruim en dat dit gevolglik nie die bedoeling was om die kantore langer vir gebruiklike diplomatieke doeleindes aan te wend nie.

In hierdie omstandighede het die Suid-Afrikaanse Regering, tot sy spyt, geen ander keuse nie as om die Ambassade nee te deel dat erkenning van die betrokke kantore as diplomatieke kantore met ingang van 8 Oktober 1985 teruggetrek sal word.

Die Departement van Buitelandse Sake maak graag van hierdie geleentheid gebruik om die Ambassade van Nederland weer eens van sy besondere hoogagting te verseker.

C.F.G. von Hirschberg

PRETORIA
1 Oktober 1985.

Die Ambassade van Nederland
Pretoria

DEPARTEMENT
VAN
BUITELANDSE SAKE

Republiek van Suid-Afrika, Privaatsak X152, Pretoria, 0001

Tel. 28-6912 x 252 J C G Liebenberg

Verw. 400/016/307
85100204u26

03 -10- 1985

VERTROULIK

DIE DIREKTEUR-GENERAAL
JUSTISIE

Vir aandag: Mnr S S van der Merwe

DIE KOMMISSARIS
S A POLISIE

Vir aandag: Brig H Stadler

GEVAL KLAAS DE JONGE

Dokumentasie:

A. Nota nr 6647 van 2 Oktober 1985 van die Nederlandse Ambassade.

Met verwysing na my eendersgenommerde diensbrief van 1 Oktober 1985, word 'n afskrif van bogenoemde Nota ter inligting aan u gestuur. U sal merk dat daarin gereageer word op hiedie Departement se Nota gedateer 1 Oktober waarin die Ambassade meegedeel is dat die erkenning van die betrokke kantore in die Nedbank-gebou met ingang van 8 Oktober 1985 teruggetrek sal word.

DIREKTEUR-GENERAAL : BUITELANDSE SAKE

No. 6647

De Ambassade van het Koninkrijk der Nederlanden heeft de eer het Departement van Buitenlandse Zaken van de Republiek Zuidafrika zijn bijzondere hoogachting te betuigen en aandacht te vragen voor het volgende.

In de Nota Nr. 400/016/307 van 1 oktober 1985 van het Zuidafrikaanse Departement van Buitenlandse Zaken heeft het Ministerie de Ambassade onder meer in kennis gesteld van de opvatting van de Zuidafrikaanse regering, dat zij eenzijdig de erkenning kan beëindigen van een kantoorruimte die bij de Nederlandse Ambassade te Pretoria als Ambassadekantoor in gebruik is.

De Ambassade heeft opdracht gekregen om het Ministerie mede te delen dat de Nederlandse regering deze opvatting volstrekt van de hand wijst. De diplomatieke status van een Ambassadekantoor vloeit geenszins voort uit, en is in genen dele afhankelijk van enigerlei "erkenning" van de zijde van de ontvangende staat, een erkenning die dan zou kunnen worden herroepen wanneer dit een ontvangende staat zint.

Integendeel, die status vloeit zonder meer voort uit regels van volkenrecht in alle gevallen waarin diplomatieke betrekkingen worden onderhouden. En zelfs ingeval diplomatieke betrekkingen worden verbroken, heeft de ontvangende staat, krachtens algemeen volkenrecht, niet de bevoegdheid eenzijdig aan de diplomatieke status van een Ambassadegebouw een einde te maken. Zoveel te meer geldt dit bij voortzetting van diplomatieke betrekkingen.

De regels van volkenrecht waarnaar de Ambassade hier verwijst, beschermen een groot belang, niet alleen voor de Ambassades van het Koninkrijk der Nederlanden en de Republiek Zuidafrika bij elkanders regeringen, maar evenzeer voor de Ambassades die onze regeringen in derde staten onderhouden. Eerbiediging van deze regels, zonder ook maar de minste uitzondering vormt een hoeksteen voor de instandhouding van het netwerk der diplomatieke betrekkingen in de huidige structuur der internationale samenleving. Het eventueel loslaten van de hierbedoelde regels van volkenrecht door de Zuidafrikaanse regering, zou dan ook niet zonder consequenties kunnen blijven.

Wat de overige inhoud van de Zuidafrikaanse Nota onder referte betreft, brengt de Ambassade in herinnering de bereidheid van de Nederlandse regering, een afgezant naar Pretoria te sturen om over de zaak betreffende de heer De Jonge in al zijn aspekten overleg te plegen.

In dit verband herinnert de Ambassade er aan dat tijdens het gesprek tussen Minister Botha en Minister Van den Broek op 2 september j.l. is vastgesteld dat aan deze zaak belangrijke politieke aspecten zijn verbonden, welke onder volledige inachtneming van het volkenrecht, ook als zodanig in de oplossing dienen te worden betrokken.

De Ambassade maakt graag van deze gelegenheid gebruik om het Departement van Buitenlandse Zaken van de Republiek Zuidafrika opnieuw van haar bijzondere hoogachting te verzekeren.

Pretoria, 2 oktober 1985

VERTROULIK

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx DG 2/85

DIE HOOF : MINISTERIËLE DIENSTE

KLAAS DE JONGE

Afskrifte van die volgende stukke gaan hiermee ter aanvulling van u lêer:

(1) Brief gedateer 16 September 1985 van Minister van den Broek aan Minister Botha.

(2) Antwoord van Minister Botha gedateer 25 September 1985.

(3) Antwoord van Minister van den Broek gedateer 30 September 1985.

(4) Antwoord van Minister Botha gedateer 1 Oktober 1985.

(5) Verklaring van Minister Botha gedateer 1 Oktober 1985.

DIREKTEUR-GENERAAL : JUSTISIE 3/10/85

DEPARTEMENT VAN BUITELANDSE SAKE

Republiek van Suid-Afrika, Privaatsak X152, Pretoria, 0001

Tel. 28-6912 x 252 J C G Liebenberg

Verw. 400/016/307
83100101u26

[redacted]

GEHEIM

Die Direkteur-generaal
Justisie

Vir aandag: Mnr S S van der Merwe

Die Kommissaris
S A Polisie

Vir aandag: Brig H Stadler

GEVAL VAN KLAAS DE JONGE

Dokumentasie:

A. Nota nr 400/016/307 van 1 Oktober 1985 aan die Ambassade van Nederland.

Met verwysing na vorige korrespondensie oor die geval Klaas de Jonge, word 'n afskrif van bogenoemde Nota ter inligting aan u gestuur.

DIREKTEUR-GENERAAL

DEPARTEMENT VAN JUSTISIE
1985 -10- 02
SD 563/85
PRETORIA
DEPARTMENT OF JUSTICE

400/016/307
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Met betuiging van sy besondere hoogagting aan die Ambassade van Nederland, het die Departement van Buitelandse Sake die eer om te verwys na sy Notas nr 400/016/307 van 19 Julie en 12 Augustus 1985 waarin versoek is dat mnr Klaas de Jonge aan die Suid-Afrikaanse owerhede oorhandig word.

In die brief gedateer 25 September 1985 van die Suid-Afrikaanse Minister van Buitelandse Sake aan die Nederlandse Minister van Buitelandse Sake, is daar geantwoord op die drie versoeke wat aan die Suid-Afrikaanse Regering gerig is. Hieruit blyk duidelik dat die Suid-Afrikaanse Regering uit sy pad gegaan het om by wyse van gesprekvoering 'n oplossing vir die probleem wat geskep is deur mnr De Jonge se teenwoordigheid in die betrokke kantore in die Nedbank-gebou te vind.

Die Suid-Afrikaanse Regering herbevestig sy standpunt dat 'n diplomatieke missie nie aangewend mag word nie om toevlug te verleen aan 'n persoon wat 'n voortvlugtige is ten opsigte van misdade wat deur die geregsowerhede van die ontvangende staat ondersoek word. Wat die huidige situasie soveel erger maak, is dat die Nederlandse Ambassade reeds na 'n nuwe

gebou verskuif het. Die enigste rede waarom enkele kantore in die Nedbank-gebou nog nie deur die Ambassade ontruim is nie, is om voortgesette toevlug aan mnr De Jonge te verleen, strydig met die volkereg. Hierdie kantore word dus in ieder geval nie langer aangewend vir die doel en funksies van 'n diplomatieke missie nie.

Die feit dat die huurkontrak ten opsigte van die betrokke kantore op 30 September 1985 verstryk het, bevestig dat dit die voorneme van die Ambassade was om die kantore in die Nedbank-gebou te ontruim en dat dit gevolglik nie die bedoeling was om die kantore langer vir gebruiklike diplomatieke doeleindes aan te wend nie.

In hierdie omstandighede het die Suid-Afrikaanse Regering, tot sy spyt, geen ander keuse nie as om die Ambassade mee te deel dat erkenning van die betrokke kantore as diplomatieke kantore met ingang van 8 Oktober 1985 teruggetrek sal word.

Die Departement van Buitelandse Sake maak graag van hierdie geleentheid gebruik om die Ambassade van Nederland weer eens van sy besondere hoogagting te verseker.

C.F.G. von Hirschberg

PRETORIA
1 Oktober 1985.

Die Ambassade van Nederland
Pretoria

DEPARTEMENT
VAN
BUITELANDSE SAKE

Republiek van Suid-Afrika, Privaatsak X152, Pretoria, 0001

Tel. 28-6912 x 252 J C G Liebenberg

Verw. 400/016/307
85092502u26

1985 -09- 25

GEHEIM

DIE DIREKTEUR-GENERAAL
JUSTISIE

Vir aandag: Mnr S S van der Merwe

GEVAL VAN KLAAS DE JONGE

Dokumentasie:

A. Brief gedateer 25 September 1985 van Min R F Botha aan Min H van den Broek.

Met verwysing na vorige korrespondensie oor die geval Klaas de Jonge, word 'n afskrif van bogenoemde brief wat in antwoord op Min van den Broek se skrywe gedateer 16 September 1985 gestuur is, ter inligting hierby aangeheg.

DIREKTEUR-GENERAAL : BUITELANDSE SAKE

25 September 1985

Geagte Minister,

Ek verwys na u brief van 16 September 1985 insake die geval van mnr De Jonge, die inhoud waarvan die Nederlandse Tydelike Saakgelastigde op 17 September aan die Departement van Buitelandse Sake oorgedra het.

Ek kan u verseker dat ons ook ernstig was in ons soeke na 'n onderling aanvaarbare oplossing van hierdie probleem. Suid-Afrika se deelname aan die samesprekings in Genève is bewys van hierdie houding. Gedurende daardie samesprekings het die Suid-Afrikaanse afvaardiging gepoog (en, soos dit vir hulle voorgekom het, met 'n mate van sukses) om die Nederlandse afvaardiging te oortuig dat, wat ookal mnr De Jonge se politieke oortuigings mag wees, dit geen nadelige effek vir hom sou hê so ver dit sy verhoor in Suid-Afrika betref nie en dat hy verseker kon wees van 'n regverdige verhoor in 'n ope hof met volle regsverteenwoordiging tot sy beskikking.

Die Suid-Afrikaanse afvaardiging het 'n aantal dwingende redes aangevoer waarom, volgens hulle mening, die Suid-Afrikaanse owerhede nie kon instem tot 'n verhoor in Nederland vir misdade wat na bewering deur mnr De Jonge in Suid-Afrika gepleeg is nie. Een van die belangrikste redes was dat indien tot 'n verhoor in 'n vreemde hof ingestem sou word, dit 'n refleksie sou wees op die onpartydigheid en integriteit van die Suid-Afrikaanse regbank aangesien dit die indruk sou skep dat die Suid-Afrikaanse Regering self bedenkings het ten opsigte van die onpartydigheid en bevoegdheid van sy howe ten aansien van strafbare oortredings wat in Suid-Afrika gepleeg is.

Die afvaardiging het ook gewys op tegniese oorwegings wat 'n verhoor in Nederland onprakties maak. Dit kan ook gemeld word dat beoog word om mnr De Jonge saam met mev Passtoors te verhoor aangesien dit beweer word dat hulle medepligtiges was in die pleeg van bepaalde strafbare oortredings. Afsonderlike verhore van een aangeklaagde in Nederland en van die ander aangeklaagde in Suid-Afrika sou die saak van die aangeklaagdes en/of die aanklaer kon benadeel.

Dit is derhalwe vir die Suid-Afrikaanse Regering nie moontlik om toe te stem tot u versoek dat mnr De Jonge in Nederland verhoor word nie. In elk geval skyn so 'n prosedure vir ons regsverteenwoordigers strydig te wees met die Nederlandse reg wat op hierdie geval van toepassing is. Die Nederlandse afvaardiging het self toegegee dat daar 'n mate van onsekerheid bestaan aangaande die bevoegdheid van die Nederlandse howe om mnr De Jonge te verhoor.

Wat betref u voorstel dat beslegting deur 'n derde party oorweeg word, het die Suid-Afrikaanse Regering geen twyfel dat die tersaaklike volkeregtelike beginsels vereis dat mnr De Jonge aan die Suid-Afrikaanse owerhede terugbesorg moet word nie. Minstens sekere van die dade waarvan hy verdink word en waarvoor hy aangehou is en ten opsigte waarvan hy nou 'n voortvlugtige is, is strafregtelike oortredings wat ook as sodanig erken word in ander lande insluitende Nederland, soos u voorstel van 'n verhoor aldaar self impliseer. Hierdie en die ander oorwegings wat tydens die samesprekings genoem is en waarop in hierdie brief verder uitgebrei is, het die Suid-Afrikaanse Regering oortuig dat dit ondoenlik sou wees om die voorstel van arbitrasie verder te voer.

Die Suid-Afrikaanse Regering is daarvan oortuig dat die toepaslike beginsels van die volkereg bevestig dat, wat die versoek vir mnr De Jonge se oorplasing na die huidige Nederlandse Ambassade betref, daar geen verpligting op Suid-Afrika rus om aan dusdanige versoek te voldoen nie. Die gesag waarna die

Nederlandse afvaardiging in die loop van die samesprekings in Genève verwys het ter staving van 'n teenoorgestelde siening, verskaf nie 'n voldoende volkeregtelike grondslag vir sodanige verpligting nie, gesien die omstandighede van hierdie besondere geval. Daar bestaan ook nie praktiese oorwegings vir verdere uitstel van mnr De Jonge se terugbesorging aan die Suid-Afrikaanse owerhede nie, in die lig van die feit dat Suid-Afrika nie sy weg oopsien om beslegtiging deur 'n derde party te aanvaar nie. Die noodsaaklikheid om vrygeleide vanaf die ou tot die nuwe Ambassade-persele te verleen, is dus volgens die mening van die Suid-Afrikaanse Regering nie ter sake nie.

Die Suid-Afrikaanse Regering doen met eerbied aan die hand dat geen regsreël u belet om mnr De Jonge aan die Suid-Afrikaanse owerhede te oorhandig nie terwyl gesonde regsadministrasie, gevestigde regsbeginsels en internasionale hoflikheid voorskryf dat hy oorhandig moet word.

Die Suid-Afrikaanse Regering volstaan derhalwe by sy vorige standpunt dat mnr De Jonge onverwyld aan die Suid-Afrikaanse owerhede oorhandig word.

Met die meeste hoogagting.

(get) R E Botha

R F BOTHA
Minister van Buitelandse Sake

Sy Eksellensie mnr H van den Broek
Minister van Buitelandse Sake
DEN HAAG

[illegible]

DEPARTEMENT
VAN
BUITELANDSE SAKE

Republiek van Suid-Afrika, Privaatsak X152, Pretoria, 0001

Tel. 28-6912 x 252 J C G Liebenberg

Verw. 400/016/307
85100201u26

VERTROULIK

DIE DIREKTEUR-GENERAAL
JUSTISIE

Vir aandag: Mnr S S van der Merwe

DIE KOMMISSARIS
S A POLISIE

Vir aandag: Brig H Stadler

GEVAL KLAAS DE JONGE

Dokumentasie:

A. Inhoud van brief van 30 September 1985 van Min H van den Broek aan Min R F Botha.
B. Min Botha se antwoord gedateer 1 Oktober 1985.

Met verwysing na vorige korrespondensie oor die geval Klaas de Jonge, word afskrifte van bogenoemde dokumentasie ter inligting aan u gestuur.

DIREKTEUR-GENERAAL: BUITELANDSE SAKE

[illegible]

Overhandig aan my DP 1 Okt. 85
om 16h25 deur mn. Zazeraj.

Tekst van een brief van Minister H. van den Broek
aan Minister R.F. Botha (datum 30-9-1985)

IK BEVESTIG HIERBIJ DE ONTVANGST VAN UW BRIEF VAN 25 SEPTEMBER JL. EN HEB GOEDE NOTA GENOMEN VAN UW VERZEKERING DAT HET U ERNST IS OM EEN AANVAARDBARE OPLOSSING TE VINDEN.

UIT UW BRIEF MOET IK ECHTER TOT MIJN TELEURSTELLING CONCLUDEREN DAT U DE VOORSTELLEN VERVAT IN MIJN BRIEF VAN 16 SEPTEMBER JL. ALLE VERWERPT.

HET IS DUIDELIJK DAT ER IN DEZE ZAAK FUNDAMENTELE VERSCHILLEN VAN INZICHT BESTAAN TUSSEN UW REGERING EN DE MIJNE. WIJ BEVINDEN ONS DERHALVE OP HET OGENBLIK IN EEN IMPASSE.

U ZULT HET ONGETWIJFELD MET MIJ EENS ZIJN DAT HET IN ZO'N SITUATIE NIET AANGAAT DAT EEN VAN BEIDE PARTIJEN DE ANDER ZIJN INZICHTEN EENZIJDIG ZOU OPLEGGEN.

WANNEER MOET WORDEN VASTGESTELD DAT ONDERHANDELINGEN TUSSEN TWEE REGERINGEN NIET TOT EEN OPLOSSING KUNNEN LEIDEN IS HET DAN OOK IN DE RELATIE TUSSEN STATEN AANGEWEZEN EEN BEROEP TE DOEN OP EEN ''THIRD PARTY''. MOCHTEN ONZE REGERINGEN DAARTOE BESLUITEN, DAN SPREEKT VANZELF DAT DE MODALITEITEN VAN EEN DERGELIJKE BENADERING DOOR ONS IN GEZAMENLIJK OVERLEG WORDEN OVEREENGEKOMEN.

IK BEN BEREID DAARTOE EEN AFGEZANT NAAR PRETORIA TE STUREN OM OVER DE KWESTIE IN AL ZIJN ASPEKTEN OVERLEG TE PLEGEN.
IK BEN N.L. UITDRUKKELIJK VAN MENING DAT HET OVERLEG TUSSEN ONZE BEIDE REGERINGEN HET STADIUM NOG NIET HEEFT BEREIKT DAT HET ALS BEEINDIGD MOET WORDEN BESCHOUWD.

MET GEVOELENS VAN DE MEESTE HOOGACHTING

1 Oktober 1985

Geagte Minister

Die inhoud van u brief gedateer 30 September 1985 oor die geval De Jonge is vanmiddag 1 Oktober aan my oorgedra.

Graag wil ek u die versekering gee dat daar deeglik ingegaan is op die voorstelle bevat in u brief van 16 September 1985 maar, om die redes vermeld in my antwoord gedateer 25 September, was dit nie vir die Suid-Afrikaanse Regering moontlik om u voorstelle te aanvaar nie. Dit is eweneens vir my 'n teleurstelling dat u skynbaar steeds nie u weg oopsien om mnr De Jonge aan die Suid-Afrikaanse geregsowerhede te oorhandig nie.

Ek het waardering vir u aanbod om u afgesant na Pretoria te stuur maar ek durf u nie mislei nie: tensy hy gemagtig is om sake te opper wat ons nog nie aangespreek en afgehandel het nie, sou sy besoek nie produktief wees nie.

Ten spyte van die verskille wat daar tussen ons twee Regerings oor hierdie aangeleentheid bestaan, waardeer ek die openhartige gees waarin u hierdie aangeleentheid benader.

Met die meeste hoogagting

(g.t) R F Botha

R F BOTHA

Sy Eksellensie mnr H van den Broek
Minister van Buitelandse Sake
DEN HAAG

DEPARTEMENT
VAN
BUITELANDSE SAKE

Republiek van Suid-Afrika, Privaatsak X152, Pretoria, 0001

Tel. 28-6912 x 252 J C G Liebenberg

Verw. 400/016/307
85091601u26

16 -09- 1985

VERTROULIK

DIE DIREKTEUR-GENERAAL
JUSTISIE

Vir aandag: Mnr S S van der Merwe

DIE KOMMISSARIS
S A POLISIE

Vir aandag: Brig H Stadler

GEVAL KLAAS DE JONGE

Dokumentasie:

A. Teleks no 511 van 12 September 1985 vanaf Den Haag.

Met verwysing na vorige korrespondensie oor die geval Klaas de Jonge, word 'n afskrif van bogenoemde teleks ter inligting aan u gestuur.

DIREKTEUR-GENERAAL : BUITELANDSE SAKE

2. 19850912

3. TELNO 511

4. SALEG DEN HAAG

5. HK PTA NOETES : 700 EN 243

VERTROULIK

KLAAS DE JONGE

ALGEMEEN DAGBLAD VAN VANDAG (12/9

ALGEMEEN DAGBLAD VAN VANDAG (12/9) BEVAT ARTIKEL DEUR MICHEL THOMASSEN WAT OOR SES KOLOMME STREK. ONDER OPSKRIF ''KLAAS DE JONGE ALS BLIKSEMAFLEIDER : PRETORIA HEEFT HET VOORAL GEMUNT OP PASSTOORS'' (D.W.S. SY IS ONS DOELWIT). STREKKING VAN ARTIKEL IS NEGATIEF. HOEWEL PUNTE GEMAAK OF OP GISSINGS GEBASEER IS OF SLEGS TEN DOEL HET OM KWAAD TE STIG OF SENSASIE AAN DIE PUBLIEK TE VERKOOP. VOLGENDE IS VERNAAMSTE PUNTE :

1. HIERDIE WEEK IS JURIDIESE ASPEKTE TUSSEN DIE TWEE LANDE

BESPREEK EN NOU KAN OORGEGAAN WORD TOT DIE ONDERHANDE-
LING VAN 'N OPLOSSING WAT VIR ALBEI LANDE DIE MINSTE
''GESIGSVERLIES'' INHOU..

2. OM HIERDIE ONDERHANDELINGE NIE IN GEVAAR TE STEL NIE. IS
NA DE JONGE SE TERUGKEER NA DIE NDL. AMBASSDE
NA DE JONGSE

2. OM HIERDIE ONDERHANDELINGE NIE IN GEVAAR TE STEL NIE. IS NA DE JONGE SE TERUGKEER NA DIE NDL. AMBASSADE OORG. OOREENGEKOM DAT NEDERLAND EN SA HULSELF VAN KOMMENTAAR OOR DIE DE JONGE-PASTOORS-SAAK SOU ONTHOU. ''NEDERLAND HET STRENG HIERAAN GEHOU. S.A. HET HAARSELF BEPERK TOT DIE WEIERING VAN AMPTELIKE KOMMENTAAR, MAAR HET HAAR GE-HEIME DIENS VRYHEID VERLEEN IN POGINGS OM DIE OPENBARE NDL. MENING TE BEINVLOED. DIE DIENS HET ''BELANGRIKE INLIGTING'' AAN NDL. JOERNALISTE IN JOHANNESBURG BE-SKIKBAAR GESTEL. DIE MEESTE WAARVAN AS ONJUIS BEWYS KON WORD''. (INTUSSEN IS ONS IN DIE AMBASSADE DAARVAN BEWUS DAT BURLAGE VAN DE TELEGRAAF WAT IN SA WAS. GOEIE KONTAK MET EEN VAN DIE TWEE ''OPPASSERS'' VAN DE JONGE GEHAD HET EN DAAR INLIGTING VERKRY HET WAT HY GEPUBLI-SEER HET).

3. IN DEN HAAG IS 'N ''ANONIEME'' PERSOON BESIG OM POLITICI EN DIE MEDIA TE VOORSIEN VAN SG. BEWYSMATERIAAL TEEN GE-NOEMDES. DE J. EN P. ..

4. 'N ONTLEDING VAN GEGEWENS REGVERDIG OOK 'N VERMOEDE DAT 'N BEAMPTE VAN DIE NDL. MINISTERIE VAN B.S. SAMEWERKING VERLEEN AAN DIE SA GEHEIME DIENS EN DAARMEE DIE VERSIG-TIGE BELEID VAN MINISTER VAN DEN BROEK ONDERMYN..

5. DIE ''GEHEIME DIENS'' VAN SA SKROOM OOK NIE OM AAN LEDE VAN DIE TWEEDE KAMER VIDEOBANDE AAN TE BIED WAAROP ''SKULDBEKENTENISSE'' VAN DE JONGE VASGELE IS NIE..

6. 'N BELEMMERING DAT DE JONGE NA NEDERLAND OORGEBRING WORD OM HIER TEREG TE STAAN. IS DAT DIE RSA DIE TWEE IN GE-VOLGE POLITIEKE WETGEWING WIL VERVOLG EN NEDERLAND '' DIE

TOP SECRET
UITERS GEHEIM

81/172589
Z 14

REPUBLIEK VAN SUID-AFRIKA

REPUBLIC OF SOUTH AFRICA

Verw. Nr./Ref. No. 1/4/3
NAVRAE/ENQUIRIES:
Tel. No.

KANTOOR VAN DIE OFFICE OF THE
ATTORNEY-GENERAL
PRIVATE BAG X8
JOHANNESBURG

DEPARTEMENT VAN JUSTISIE
G915/85
1985 -09- 16
PRETORIA
DEPARTMENT OF JUSTICE

13 September 1985

TOP SECRET

THe Director-General: Justice
Private Bag X81
PRETORIA
0001

THE STATE vs KLAAS DE JONGE

Further to the negotiations conducted in Geneva and the discussion relating to the report to be submitted to the South African Government, I attach hereto two annexures for your consideration.

The one annexure deal with the three options advanced by the Netherlands delegation, their requirements and those recommendations the South African delegation would be prepared to consider placing before the South African Government, the other with the Attorney-General's discussion with the members representing the Netherlands Justice Department.

Kindly consider paragraph 10 of the annexure dealing with the three resolutions.

K.P.C.O. VON LIERES UND WILKAU
ATTORNEY-GENERAL

('n Kopie aan Buitelandse Sake verskaf)

ANNEXURE

THE THREE OPTIONS CONSIDERED BY THE DELEGATIONS

1. After an impasse was reached relating to the applicability of certain principles of international law to the present case, inter alia on the validity of diplomatic assylum, the RSA delegation suggested that the practical resolution of the problem be looked at. The Netherlands delegation responded with the following three suggestions:

   (a) Expulsion of De Jonge coupled with guarantees that he be prosecuted in the Netherlands;

   (b) Handing back of De Jonge to South Africa coupled with the necessary guarantees;

   (c) Arbitration.

2. AD ARBITRATION

As far as the latter point was concerned the South African delegation indicated that it had no instructions on that question, but would convey this suggestion to the government. The Dutch delegation suggested that the subject of arbitration be the two options (a) and (b) above - viz. the handing back and expulsion. As an alternative to arbitration the Netherlands Delegation suggested that the possibility of conciliation be considered. Both delegations indicated that direct negotiations between the two governments were preferable and that arbitration was but a remote possibility. The RSA delegation indicated that the question of arbitration and safe conduct will be referred to the RSA government for government to government communication.

3. AD THE HANDLING BACK OF DE JONGE

3.1 In relation to (b) above, i.e. the handing back, it was

stated...

stated unequivocally by the head of the Dutch delegation, Mr. Geesteranus that, when he left the Netherlands to to come to Geneva, the Netherlands government was not ready to give De Jonge back to the South African authorities.

3.2 During the meeting on the 10 September Mr. Geesteranus said "in the opinion of my Government the handing back of Mr. De Jonge is very remote." His motivation for this stance was initially reflected in the statement he made that the application of the internal security law is not conducive to a fair trial nor can evidence obtained during detention in terms of the Internal Security Act be conducive to a fair trial.

3.3 It also became clear that a further difficulty the Dutch faced was that De Jonge "has affiliations with an organization that wants to affect change in South Africa and that is the political stance of my (Netherlands) Government that change must be brought about." Mr. Gessteranus raised the question that it could be possible to exclude the Internal Security Act problem by bringing De Jonge before a judge either in the RSA or in the Netherlands. He expressed a further fear that the Internal Security Act and the prosecution in terms of that Act constitutes "the heart of the matter in our fear about the process. If the person is given back charges might be added, including charges in terms of the Internal Security Act."

4. On being asked how the pre-occupation of the Netherlands Government with the Internal Security Act could be satisfied the Netherlands Delegation indicated that they require the following guarantees; viz. that:

(a) No evidence emanating from De Jonge's Section 29 detention may be used against him at his trial.

/(b)

(b) No evidence obtained from anybody else who was detained in terms of Section 29 at the time of the making of his statement may be used against De Jonge.

(c) De Jonge must not be prosecuted for an offence mentioned in the Internal Security Act.

(d) In case the death penalty were to be imposed an undertaking would be required that it will not be executed.

(e) An open court trial be held.

(f) Full legal assistance must be given to De Jonge.

(g) The South African Government should agree that if in future it become legally possible, De Jonge must be transferred to the Netherlands to serve the unexpired portion of his sentence at the time of such transfer in a Netherlands jail.

5. In response to the guarantees sought by the Netherlands delegation and set out above the South African delegation provided the following undertakings it would be prepared to recommend to Government:

(a) Not to charge De Jonge with any offence except offences associated with the loading of the arm caches and the use to which these caches were put,

(b) that De Jonge would not be prosecuted for a contravention of Section 13 of the Internal Security Act,

(c) that as is normal in the South African criminal justice system, he will be able to be assisted and represented by legal counsel of his choice and in this respect the Netherlands Government or anybody else can provide the

/necessary

necessary funds.

(d) the Netherlands Government can send observers to attend the full trial,

(e) that, as far as the imposition of a possible death sentence is concerned, the South African delegation can make recommendations to the South African Government which would be similar to those provided for in extradition agreements; that is, to recommend to the government not to execute the death sentence if it were to be imposed and to provide a guarantee in this respect if so required.

6. In summary we must point out that the Dutch attitude towards Section 29 is that it does not comply with the minimum human rights standard and that were De Jonge to be returned to the authorities in the RSA they would be party to placing him in a state of arrest, which state does not, according to their perceptions, comply with minimum human rights standard. Then, they would be party to denying him human rights and could be severely strictured because of that. It would appear that if these Dutch fears could be allayed by e.g. providing a guarantee that he would not be re-detained in terms of Section 29, the chances that they will hand him back can become a real probability.

7. AD EXPULSION AND A GUARANTEE OF PROSECUTION IN THE NETHERLANDS

According to the Netherlands delegation the suggestion that De Jonge be expelled from the RSA coupled with guarantees that he be prosecuted in the Netherlands would be the most acceptable solution to the Netherlands government. The South African delegation indicated that this option cannot be considered. In support of this contention the following reasons were advanced:

/(a)

(a) De Jonge is perceived to be an international terrorist who has engaged in international terroristic activities and who now enjoys sanctuary in a diplomatic mission in South Africa. The South African criminal law cannot accommodate such a state of affairs.

(b) This case may create a precedent that criminals may believe that they would receive sanctuary in a diplomatic mission and that is totally unacceptable to the South African Government.

(c) Grave doubts exist concerning the legal competence of the Dutch Government to prosecute De Jonge under the Vuurwapenwet, 1919, in the Netherlands for offences committed in South Africa. Although it appears that generally Section 5 of Dutch Penal Code authorizes a prosecution in the Netherlands of Dutch citizens if they committed offences in a foreign country, this rule only applies where such offence is also recognized in the Netherlands. There appear to be exceptions to this rule such as for example Case No. 786 decided by the Hooge Raad on 31 May 1983 (Nederlandse Jurispretentie, 1983, 2490) where it was held that a prosecution in terms of the Vuurwapenwet, 1919, in the Netherlands for an offence committed overseas was not competent. Accordingly we have grave doubts whether the Netherlands Government has any legal competence to proceed against De Jonge for the loading of the arms caches on the lines suggested. Sabotage or terrorism does not appear to have an equivalent in the Dutch criminal law.

(d) that by agreeing to De Jonge's prosecution in the Netherlands the South African Government would be in fact be conceding extradition; a situation which both parties agree does not exist in this case.

/(e)

(e) Such an agreement would by implication be an admission that De Jonge would not receive a fair trial in the RSA and that the Netherlands Goverment's attitude that that is so, would by necessary implication be confirmed.

(f) The Criminal Law of the RSA does not accept extra-territorial jurisdiction; the handing over of De Jonge would impinge on this principle and has the potential of negatively affecting relations with other African States.

(g) In such a case there would also be a deviation from fundamental principle of South African Criminal Law that evidence be given viva voce and be tested by cross examination.

(h) Public opinion in the RSA would not allow the handing over of De Jonge to the Netherlands Government.

8. It will be seen from the above that this approach - the fundamental Dutch approach - has a substantial weakness, to wit: the fact that the legal competence of the Netherlands Government to institute a prosecution is suspect. If this legal position can be confirmed then this option proposed by the Netherlands Government must fall away and handing back is the only remaining option.

9. SUMMARY

(a) In summary it appears that the factual basis for the stance adopted by the Netherlands Government can be condensed to this:

> detention in terms of Section 29 does not accord with basic human rights as that Government has been advised it exists and is internationally recognised, and

/because

because a Section 29 detention is tainted, evidence obtained as a result of such detention is also tainted, this being so, it gives rise to a "discriminating prosecution."

(b) In my view, if the expulsion and prosecution option proves ill-founded, the Netherlands Government would be faced with the following possible options:

(i) arbitration

(ii) handing back

(c) Of these they could press for arbitration as the better option for them. However if the expulsion and prosecution option is without substance (I suggest the South African Government obtain decisive legal advice on this on the basis of the known facts) then arbitration as an option is equally without foundation. This would make the handing back the only feasible resolution to the problem.

(d) It can however be expected that because of the view that Government takes of Section 29, it will insist that diplomatic assylum is, on humanitarian grounds, lawfull. In these circumstances it can be expected that they will try and hold De Jonge in order to obtain the most favourable guarantees for his return.

10. Finally it must be pointed out that the briefing of the various other Ambassadors on the De Jonge matter is known to the Netherlands authorities. This conduct in their view is highly abnormal and the delegation claimed it supported their Government in its stance that a prosecution against him will be discriminatory.

/Generally

Generally, in the South African Criminal Law, it is highly undesirable to disclose evidence the prosecution may tender in a prosecution to any outside agency such as a foreign Government, except if such evidence is disclosed as a result of a formal application for extradition. In the instant case, extradition not being the issue, such disclosure has not only alerted De Jonge's attorney to the strengths and weaknesses of the prosecution case, but has apparently also created a perception with the Netherlands Government that there is indeed something abnormal on the go.

It must be firmly recommended that this practice be not followed in future.

ANNEXURE

CONSULTATIONS BETWEEN RESPECTIVE JUSTICE OFFICIALS

1. A separate consultation was held between the Justice representatives in the Netherland's delegation and the Attorney-General in the South African delegation on September 10th at 09h30.

2. During these discussions previous legal doubts which existed in relation to fair trial procedure and to the effect Section 29 may have on a prosecution were raised and explained.

3. Doubts on their part relating to fair trial procedure were successfully assauged. A possible prosecution in the Netherlands was also discussed. In this connection reference was made to the Vuurwapenwet, 1919 - about its applicability in casu see paragraph above. It also appears that the Dutch does not have an offence similar to Section 54(1) or (2) of the Internal Security Act.

4. It was mentioned that if other persons committed offences with the cached arms, De Jonge could possibly be prosecuted in the Netherlands as an accessory to whatever common law offences were committed, e.g. murder or arson.

5. The Attorney-General was also advised that were he to be surrendered, De Jonge could only be detained for a period of 102 days. A preliminary investigation would have to be instituted in the Netherlands under control of a Rechter-Kommissaris.

6. There was no dispute between the parties about the relevant legal principles. It is clear, however, that the possibilities sketched by the Dutch justice officials in respect of a prosecution of De Jonge in the Netherlands are lightweight and would not do justice to the considerable damage and deliberate course of conduct he had caused/followed, nor would it contribute to justice in respect of his Co-accused, Pastoors.

/7..

7. It was indicated to the Attorney-General that the maximum sentence under the Vuurwapenwet, 1919, that could be imposed was 4 years, which period could be increased by one third were he to be convicted of more than one similar offence under that act.

8. It is our considered opinion that it is not the legal position that creates the impasse but it is the political situation. With this attitude Mr. Suyver from the Minister of Justice's Office, agrees.

Geneva ,
9 and 10 September 1985

Netherlands delegation to the Meeting of Legal Experts

H	G.W. Maas Geesteranus	- Head of Delegation
R3	J.J.H. Suyver	- Public Prosecuter
R2	Mrs. M.A.C.L.M. Bonn	- Ministry of Justice
R1	P.H. Kooijmans	- Professor in the University of Leyden
L1	A. Bos	- Ministry of Foreign Affairs
L2	H.H.M. Sondaal	- Ministry of Foreign Affairs
L3	Ms. M.S. Kappeyne van de Copello	- Ministry of Foreign Affairs

Ex of legal questions + possible options, and to examine possible solutions and to report back to Governments

VIR AANDAG: MNR HOFFMANN

AFSKRIF VAN TELEKS ONTVANG VAN MNR BENTINCK VIR
OORHANDIGING AAN MNR VON HIRSCHBERG
6 SEPTEMBER 1985 OM 15h05

Provisional list of subjects

The Netherlands Delegation proposes proposes the following legal questions for joint examination:

1. The legitimacy of diplomatic asylum, under certain conditions.

2. The question whether, in the present case, such conditions are fulfilled.

3. The extent of the legal obligations, on the part of the states concerned, arising from diplomatic asylum.

4. Circumstances which give rise to a right of transit from one Embassy building to another.

5. Examination of possible solutions, in particular of expulsion from South Africa. Conditions that have to be satisfied to make such a solution acceptable to both parties.

6. Possibilities for a third party settlement.

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(1) What law?
(2) Who.
(3) Procedure

SOUTH AFRICAN DELEGATION TO THE MEETING OF LEGAL EXPERTS

Geneva
9 and 10 September 1985

Mr C.F.G. Von Hirschberg	-	Head of Delegation, Department of Foreign Affairs
Mr S.S. Van der Merwe	-	Director-General of Justice
Adv. K. Von Lieres und Wilkau	-	Attorney-General, WLD
Adv. J.D. Viall	-	Department of Foreign Affairs
Adv. A.J. Hoffmann	-	Department of Foreign Affairs
Prof. M.P. Vorster	-	Department of Foreign Affairs

Diplomatic Asylum: a resulting obligation

Experience has shown that, leaving aside the question of the precise meaning of the legal concept "diplomatic asylum", persons who are granted such asylum are not, or not readily, handed over to the local authorities. Indeed, recent developments in the international protection of human rights tend towards an obligation on the part of both the States concerned - inspired by mutual feelings of toleration and goodwill" (Asylum Case, International Court of Justice, 20 November 1950) - to seek a solution in the situation which has arisen.

JJJ

Diplomatic Asylum

1. In general a sending State, in this case the Netherlands, may not use its embassy to prevent the receiving State, in this case South Africa, from exercising its jurisdiction over persons who are not entitled to immunity by offering them refuge there. However, there are exceptions to this general rule, the relevant exception here being diplomatic asylum.

2. The granting of diplomatic asylum is an institution which has been in existence as long as permanent diplomatic missions themselves. Indeed, there have been may instances of asylum being granted in legations and embassies since the 17th century, initially largely in Europe but more recently in other parts of the world as well.

3. Such asylum is usually granted for humanitarian reasons, one of which may be the assumption that a person seeking asylum will not be prosecuted, or at least not solely prosecuted, and possibly punished for the criminal offence of which he is accused, but that other factors such as his nationality, race or political convictions will play a role.

4. Diplomatic asylum is more than simply a phenomenon with which States are confronted in practice. Over the years, as is known, the possibility of regulating this area of general international law has been discussed many times. It will suffice here to cite the proposals of the Institute of International Law (Hamburg meeting in 1891 and Cambridge meeting in 1895), the discussion in the United Nations International Law Commission (1957, when Sir Gerald Fitzmaurice put foreward textual proposals) and the discussions in the Sixth Committee of the United Nations General Assembly following upon an Australian initiative in 1974.

   The fact that outside the Latin American region diplomatic asylum has not yet been regulated does not mean that it is at variance with international law. On the contrary, experience

and the relevant literature both indicate that the legitimacy of the institution as such is not disputed. Opinions are, however, divided on the question of its precise meaning.

5. There are numerous treaties which indicate that fear of discriminatory prosecution is internationally accepted as a ground on which, in general, a State can legitimately refuse to extradite or hand over a person to a second State for prosecution. Two references will suffice to illustrate this point:

European Extradition Treaty (1957), article 3.2:
"Extradition shall not be granted ... if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons."

Draft Convention on Diplomatic Asylum (ILA, 1972), article 2.a:

"Asylum will be granted to those who ... would be subjected to persecution on political grounds or for reasons of race, religion, nationality or membership of a particular social group, which shall be understood to include any regional or linguistic group, or adherence to a particular political opinion."

Provisions of a similar purport are also to be found in recent bilateral extradition treaties, such as that between South Africa and the United States of America.

1 Abhif.

INKOMEND.

AFSKRIF.....VAN.....
LEERNO.....

1B

1. PRIORITEIT

2. 19850829

3. TELNO 479

4. SALEG DEN HAAG

5. HK PTA ROETE 243

G E H E I M

HELENA PASTOORS

MNR J C H LANDMAN VAN DIE MISSIE HET VAN 'N KONTAK VERNEEM DAT BRIGITTE VAN LEYNSEELE, DOGTER VAN HELENA PASTOORS, AANSOEK OM SOSIALE UITKERING GEDOEN HET. SY IS MINDERJARIG EN HET DIE WERKSIDENTITEIT VAN HAAR MOEDER AANGEGEE AS ''MINISTERIE VAN BUITELANDSE SAKE''

END