

AMNESTY INTERNATIONAL PUBLIC STATEMENT

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Netherlands: Do not return ICC witnesses at risk of death penalty, ill-treatment and unfair trials to the Democratic Republic of the Congo

Amnesty International is concerned that the Dutch Council of State (Raad van State)'s [27 June 2014 decision](#) denying claims of asylum by three International Criminal Court (ICC) witnesses, may put these individuals at risk of serious human rights violations if returned to the Democratic Republic of the Congo (DRC). Amnesty International calls on the Netherlands not to return the three witnesses as they have a credible fear that they will face torture or other ill-treatment, flagrant violations of the right to a fair trial, and the imposition of the death penalty.

Floribert Ndjabu Ngabu, Sharif Manda Ndadza Dz'Na, and Pierre-Célestin Mbodina Iribi were detained in the DRC¹ when, in 2011, they were transferred to the Netherlands to testify for the Defence before the International Criminal Court in the [case against Germain Katanga](#), a former Congolese militia leader accused of war crimes and crimes against humanity. Following their testimony at the ICC in The Hague – in which they implicated DRC's current President Joseph Kabila in allegations of crimes under international law in the DRC's turbulent Ituri region – the detained witnesses filed for asylum in the Netherlands.

The three men were detained at the ICC Detention Centre in The Hague for over three years as their asylum claims were considered, until they were [transferred into the custody of the Dutch authorities on 4 June 2014](#). They are reportedly being held in immigration detention at Schiphol Airport outside Amsterdam. One of the men previously went on hunger strike over his situation, but has since ended the protest and is reportedly in good health. Before testifying before the ICC in 2011, two of the three Congolese nationals had been imprisoned in Kinshasa, DRC, for over six years in connection with allegations of crimes under international law.

They claim that they are at risk of persecution and reprisals from the DRC authorities if sent back, having publicly made allegations that the present-day President of the DRC has been involved in serious crimes. In addition, all three individuals previously held high level positions in armed groups responsible for crimes under international law in eastern DRC. Two of them are suspected of being involved in the killing of nine Bangladeshi peace-keepers in the town of Kafe, DRC. While these two were allegedly arrested, together with four others, in relation to these acts in March 2005, there are still no official charges against them at this time.

Amnesty International believes that the detained witnesses have a reasonable fear that they will be subjected to torture or other ill-treatment in DRC prisons; that they will face flagrant violations of the right to a fair trial and that they may face the death penalty. The prohibition of *refoulement* – transferring an individual to a country where they face a risk of serious human rights violations – is one of international law's most firmly established norms. It applies to all states, even those who have not ratified the relevant international conventions, such as the Refugee Convention and the Convention against Torture.

Amnesty International's research indicates that the justice system in the DRC is not sufficiently robust to protect the rights of the three detained witnesses. In 2011, the organization published a report on the justice system in

¹ All three detained witnesses face allegations of committing gross human rights abuses. It is not evident whether the DRC will promptly try them on these allegations or whether instead the men may face continued pre-trial detention without formally being charged with a criminal act.

the DRC, *The time for justice is now: New strategy needed in the Democratic Republic of the Congo*,² raising concerns about the justice system including: the dire conditions in all prisons; the lack of independence of the judiciary; endemic violations of the right to a fair trial; prolonged pre-trial detention; and insecurity in the prisons. These concerns have not abated and the organization does not believe that assurances from the government of the DRC will be sufficient to ensure protection of their rights.

If brought to trial, the three men will be judged by military courts, which are often subjected to political pressure and interference. The individuals' rights to a fair trial are at risk of being violated, including their rights to a trial within a reasonable time and the right to adequate time and resources to prepare a defence; and they are at a high risk of torture or other ill-treatment, which is often committed in detention facilities in the DRC.

While the DRC has not carried out any executions in recent years, it retains the death penalty, including for the type of crimes of which the detained witnesses are suspected. Although no known judicial execution has taken place in the DRC since January 2003, judges continue to impose the death penalty. In 2013, at least 26 new death sentences were reported to have been handed down, mostly by military courts.

In addition, the authorities in the Netherlands appear to have relied on the ICC's *preliminary assessment of the risks*³ as well as diplomatic assurances given by the DRC to the ICC, but not to the government of the Netherlands itself. It therefore appears that the Netherlands has effectively delegated its obligations under international human rights law to examine risks of human rights violations in the receiving country to the ICC. Amnesty International is concerned that this delegation violates the state's international obligations, including under the *European Convention on Human Rights* because the ICC has indicated on a number of occasions that it does not have the mandate of an international human rights court, for example:

1. The ICC's Registry's Victim and Witnesses Unit (ICC VWU) concluded in 2011 that it could not determine that the witnesses faced no risk if returned to the DRC, but assessed them as being at low risk although this could increase. However, the assessment by this unit also notes that neither the Registry nor the ICC have the "competency to exercise its influence on the DRC authorities management of a national detention center".⁴
2. On 9 July 2011, the Trial Chamber of the ICC ruled "Article 21 (3) of the Statute does not place an obligation on the Court to ensure that States parties properly apply internationally recognized human rights in their domestic proceedings."⁵
3. On 23 August 2011, the Trial Chamber concluded that the requirements of Article 68 of the Rome Statute⁶ are limited to risks related to the cooperation of the detained witnesses with the ICC and thus, that the Chamber could take no position on the alleged risk for violations of the human rights of the detained witnesses in the DRC, or indeed on the question of their alleged persecution by the DRC authorities.⁷

In denying the asylum applications of the three detained witnesses, the Dutch court accepted as valid assurances given to the ICC Registrar by DRC authorities that the death penalty will not be administered in the cases and that their domestic trials will move forward. The Dutch court also accepted assurances given to the ICC that special measures would be taken to ensure no violation of Article 3 of the European Convention on Human Rights (which would prohibit the Netherlands from transferring the three to a situation where they face a real risk of torture or other ill treatment). These assurances included detention in a separate part of the prison with secure doors

² AI Index AFR 62/006/2011.

³ See <http://www.icc-cpi.int/iccdocs/doc/doc1071944.pdf>.

⁴ See <http://www.icc-cpi.int/iccdocs/doc/doc1078769.pdf#search=ICC%201%20Fo4%201%20Fo7%20D2952>, para. 12.

⁵ See <http://www.icc-cpi.int/iccdocs/doc/doc1093334.pdf>, para. 62).

⁶ Article 68 of the Rome Statute obligates the ICC to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.

⁷ See <http://www.icc-cpi.int/iccdocs/doc/doc1209549.pdf>, para. 14.

monitored by guards chosen in consultation with the ICC; weekly visits by the ICC VWU; and access for ICC VWU to the hearings.

Amnesty International considers that the Dutch court's decision places an unjustifiable weight on the DRC government's promised protective measures and other assurances to the ICC. Unenforceable, bilateral assurances do not provide a reliable safeguard against serious human rights violations, most notably torture or other ill-treatment. The assurances are even less credible when they are not even given to the state that is transferring the people but to a third party (the ICC).

As Amnesty International's research has confirmed, such unreliable promises undermine the absolute ban on torture and other ill-treatment.⁸ Under international law, the European Convention of Human Rights, and EU and domestic law the government of the Netherlands is also barred from forcibly removing the detained witnesses to the DRC if any risk of the death penalty is not effectively removed.

It is of deep concern therefore that the Netherlands accepted assurances given not to itself but to a third party and without allowing the three detained witnesses to present evidence to challenge these assurances. Since the Netherlands is not a party to the assurances it will have no way to supervise them and to ensure that they are implemented. Amnesty International is also deeply concerned that the ICC Registry accepted such assurances and immediately transferred the witnesses – which it has an obligation to protect – over to the Dutch authorities without any form of judicial consideration of the reliability of the most recent assurances.

In addition to these concerns, Amnesty International believes that the DRC's assurances, which imply that one of the three individuals may benefit from a domestic amnesty from prosecution, violate international law that prohibits amnesties for gross abuses of human rights. If the DRC is incapable of trying these three for their alleged involvement in crimes under international law, the Netherlands should exercise universal jurisdiction to try them in the Netherlands.

Lawyers for the three witnesses filed an application to the European Court of Human Rights on 26 May 2014 seeking interim measures to prevent the immediate transfer of the detained witnesses back to DRC if the Dutch Council of State ultimately rejected the asylum applications. The application for interim measures was rejected on 27 June 2014, the same day the Council of State denied the asylum petition – meaning that the men may be at imminent risk of *refoulement* to the DRC. Although asylum has been denied, Amnesty International calls on the Netherlands to refrain from transferring the three men as the transfer would violate, among other things the European Convention of Human Rights as they could face torture or other ill-treatment, flagrant violations of their right to a fair trial and the imposition of the death penalty.

Fundamental human rights norms, such as fair trial protections and the absolute ban against torture, apply to all individuals, regardless of the crimes of which they are suspected.

⁸See for example, *Dangerous Deals: Europe's Reliance on 'Diplomatic Assurances' against torture* AI Index: EUR 01/012/2010