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To his Excellency Fred Teeven

State Secretary of Security and Justice and Minister for Migration
Ministerie van Veiligheid en Justitie
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HRW.org

July 4, 2014

Your Excellency, State Secretary Teeven,

At the outset, we want to thank you for meeting our colleague Leslie Lefkow on June 20. We are now writing on a separate matter.

In the wake of the recent Dutch State Council's decision on June 27, 2014 to deny asylum and authorise the return to the Democratic Republic of Congo (Congo) of three International Criminal Court (ICC) witnesses, we are writing to urge you to use your prerogative to delay the deportation of the three men, Floribert Njabu, Sharif Manda and Pierre-Célestin Mbodina until such time as you are satisfied that the individuals will be tried in accordance with international fair trial standards if returned to their country.

As you are aware, the decision of the State Council, the highest court in the Netherlands, marked the end of a long and complicated legal battle and asylum application process. The State Council confirmed the decision of a lower court that the three witnesses should not be granted asylum given suspicions of involvement in grave international crimes in Congo, pursuant to article 1F of the Refugee Convention. The State Council however overturned the lower court's decision that they should not be returned to Congo, finding the witnesses' rights are not at risk, in part because of the undertakings given by the Congolese authorities to the ICC.

As a state party to the European Convention on Human Rights (ECHR) and in accordance with the principle of *non-refoulement* under international law, your government has a strict duty to ensure that individuals removed from its territory will not be subject to serious human rights violations, including the death penalty (article 2 of the ECHR), torture and inhumane or degrading treatment (article 3 of the ECHR) and flagrant violations of liberty and security and fair trial (articles 5 and 6 of the ECHR respectively). The assessment of the risks faced by the ICC witnesses if returned to Congo falls strictly under the Dutch authorities' responsibility.

Although the ICC was satisfied by the undertakings given to it by the Congolese authorities, it is important to stress that the ICC's evaluation was narrow in scope and limited solely to the question of whether the men would face repercussions stemming from their testimony in court. By contrast, and as explained above, the Netherlands has broader obligations

under the ECHR to ensure that it is not complicit in a broader set of human rights violations against persons removed from its territory.

It is thus the Dutch government's legal obligation to fully satisfy itself that the three ICC witnesses will not be subject to the death penalty — a cruel and degrading punishment that Human Rights Watch opposes in all circumstances — torture or denied justice through an unfair trial or arbitrary detention. Although the ICC accepted measures proposed by the Congolese authorities regarding the safety of the witnesses in detention (such as appointment of guards to the aisle of the detention centre where they will be held, screening of other inmates and twice weekly private visits by the court's protection officers), it is Human Rights Watch's firm position that guarantees given by a government against torture and prohibited ill-treatment are an inadequate safeguard against such treatment and cannot be used to meet a state's obligations not to send any individual to a place where they face a real risk of torture.

In addition, we share the assessment of the Amsterdam District Court which ruled in October 2013 that if the three witnesses were returned to Congo they would face a risk of an unfair trial and violations of due process rights.

At least two of the three witnesses, Njabu and Mbodina (also known as "Iribi Pitchou") stand accused of grave international crimes, such as war crimes and crimes against humanity, before the military justice system in Congo. Human Rights Watch has documented widespread atrocities committed by the armed group they formerly belonged to and believes that the role of Njabu and Iribi Pitchou in these crimes should be investigated. Real accountability however, demands fair, credible and impartial trials. Unfortunately, to date, the national proceedings against the witnesses have been marred with serious problems. Njabu and Iribi Pitchou were arrested and placed in detention in 2005. Although they were formally charged, their pre-trial detention should have ended given the lack of progress in their cases. They were illegally detained until their transfer to the ICC. In our view, this constitutes a "flagrant denial of justice", the standard used by the ECHR to evaluate the risks of violations of articles 5 and 6 in the context of removals.

The Congolese authorities have indicated that the case of the witnesses has now moved forward before the High Military Court in Kinshasa and have committed to inform the ICC about progress and allow attendance by ICC observers at the proceedings. Given the depth of problems faced by the Congolese justice system — including lack of resources and interference by the executive and the military hierarchy — Human Rights Watch believes that these undertakings are highly insufficient.

We call on you to immediately engage with the Congolese government and satisfy yourself that the right of the witnesses to a fair trial will be protected, prior to any decision to return these individuals to Congo.

Below are a few examples of measures that the Congolese authorities could take, together with the UN peacekeeping mission in Congo (MONUSCO), and other partners, to help ensure that the rights of the ICC witnesses are respected and proceedings against them are fair and credible:

- Ensure that the witnesses have access to the defense lawyers of their choosing with recognised expertise in international crimes, and to legal aid to cover the costs of this representation and any needed investigations if they are indigent;
- Ensure that the witnesses are tried before a jurisdiction that ensures a right to appeal to a higher tribunal, which would not be the case if they are tried before the High Military Court in Kinshasa;¹
- Ensure that the witnesses' case is heard before a panel of professional military magistrates only, selected in a manner that ensures their independence;
- Ensure that the judgment is rendered in writing and includes the judges' legal reasoning in order to allow scrutiny;
- Establish that MONUSCO will provide technical and legal support to the Congolese judicial authorities with regards to additional investigations that may be required and at trial, notably though support from the Prosecution Support Cells, the unit within MONUSCO that provides technical support to Congolese judicial proceedings;
- Clarify that MONUSCO's witness protection unit will provide support to victims and witnesses involved in the trial, including witnesses called by the defendants, in order to protect them from threats or attacks.

If the Congolese government is not willing to implement these or other similar measures, we believe the witnesses could face a flagrant violation of fair trial and should instead be investigated and prosecuted before the Dutch national judicial system, in accordance with universal jurisdiction laws that provide jurisdiction to Dutch courts over war crimes and crimes against humanity committed abroad.

We are aware of the order issued by an appeals chamber of the ICC on January 20, 2014 to the court's registry to immediately return the witnesses to Congo. Should your government consider that delaying the deportation of these three individuals presents a conflict between its obligations to the ICC and its obligations under the European Convention on Human Rights, we believe your government should consider urgent consultations with the court. These consultations are provided for in article 97 of the ICC treaty and article 55 of the Host state Agreement between the ICC and your government.

We recognize that this case is of significance to the handling of witnesses coming to testify before the ICC and has relevance for the court's ability to secure the cooperation of states in facilitating the appearance of witnesses. The ability of witnesses to appear before the ICC is, of course, essential to its mandate to hold to account perpetrators of the most serious crimes under international law and to thus contribute to the protection of human rights. It is

¹ It must be underscored that the High Military Court in Kinshasa is the highest court in the Congolese military justice system. In addition to hearing appeals from lower military courts, it is also competent to hear in first and last instance cases of individuals benefitting from privileges of jurisdiction (article 82 and 120 of the Congolese military justice code), including generals and military justice officials. This privilege of jurisdiction, however, means that no appeal on the merits of the cases heard at the High Military Court is available.

of the highest importance, however, that witnesses who take the courageous step to participate in the justice process before the ICC but who, at the same time, have legitimate concerns with regards to their safety in their country of origin be provided with an effective remedy to ensure their own human rights are not violated.

It is a deep testament to the Netherlands' commitment to international justice that it has taken on the task of being the host country for the ICC, a key international institution for the enforcement of human rights worldwide. We recognise that acting as host state brings additional costs and burdens. But in keeping with your government's strong commitment to both international justice and human rights, we urge you to take all necessary steps to ensure that three witnesses' rights will be fully respected if they are returned to Congo.

This assessment, and the monitoring of its implementation, strictly fall under your responsibility, **Your Excellency, State Secretary Teeven**, and cannot be based on reliance upon undertakings provided to the ICC.

We thank you for your attention on this important matter,

Yours sincerely,



Richard Dicker
Director
International Justice Program

Background on the case:

Floribert Njabu, Sharif Manda and Pierre-Célestin Mbodina are former members of a Congolese rebel group, the *Front Nationaliste et Intégriste*, which was active during the conflict in the district of Ituri, northeastern Congo. The conflict in Ituri started in 1999 and lasted till about 2006, although some fighting still continues in southern Ituri. They were called to give testimony at the ICC as part of the defense of Germain Katanga, the former leader of another rebel group allied to the FNI, the *Front de Résistance Patriotique in Ituri*.

At the time of their transfer to the ICC in March 2011, the three witnesses had been detained for a number of years in a prison in Kinshasa, Congo, on a range of charges including participation in a rebel movement, war crimes and crimes against humanity.

Prior to their transfer and pursuant to article 93 (7) of the ICC treaty, the ICC signed a "Standard Operating Procedure Agreement" with the Congolese authorities regarding the handling of the witnesses. Under the agreement, the court committed to return the three men to Congolese custody as soon as possible after their testimony.

Once they completed their testimony in May 2011, however, the three witnesses expressed fear for their physical safety and respect of their human rights should they be returned to Congo. At least one of the witnesses offered testimony regarding the alleged role of Congolese President Joseph Kabila in backing and directing some of the rebel groups in eastern Congo at the time of the conflict in Ituri. On this basis, the three witnesses applied for asylum in the Netherlands.

A final judicial decision was rendered by the Dutch State Council on June 27 that the witnesses should be denied asylum and returned to Congo. The State Secretary for Security and Justice, however, retains the ultimate authority to decide whether the witnesses will be deported.