

# ICC and The Netherlands: Free the Three Congolese Witnesses NOW!

Posted on [May 13, 2014](#) by [Julien Maton](#)

by [Göran Sluiter](#)



— The ICC detention Centre

This blog is generally the place for academic reflection and analysis, but this posting -I am aware- also may be perceived as having the nature of an (emotional) appeal to both the ICC and the Netherlands.

Representing the three Congolese witnesses in their asylum procedure in the Netherlands -together with colleagues Van Eik and Schüller- I fully and openly declare an interest. That said, it is my conviction that the fate of the three Congolese witnesses in ICC detention has reached the level of absurdity and requires urgent attention.

Those who are not very closely following the ICC express great surprise when I inform them that there are witnesses being detained at the ICC Detention Unit. The starting point and legal basis for the witnesses' detention lies in art. 93 (7) of the [Statute](#). It is indeed a logical and welcome arrangement to facilitate the testimony of witnesses detained in a State party to have their detention temporarily continued at the ICC.

However, in respect of three Congolese defence witnesses an unprecedented situation arose when they applied for asylum in the Netherlands, because, among other things, they fear reprisals by DRC President Kabila in case of return to the DRC. The witnesses had in their testimonies in the Katanga and Ngudjolo trials implicated Kabila in the commission of

international crimes in the DRC.

This all happened in Spring 2011. The witnesses arrived in The Hague on 27 March 2011, finished their testimonies early May 2011, and they applied for asylum on 12 May 2011. The asylum claim spurred fierce and complex litigation, both at the ICC and before Dutch courts (asylum courts and civil courts).

As to the witnesses' detention at the ICC, when I first spoke to clients and at the beginning of this case, I could not imagine that their detention would last very long. I found support in this assumption and trusted the Katanga Trial Chamber, who already ruled in June 2011 that a solution should be found urgently for the witnesses' ongoing detention during their asylum procedure.

However, we passed one year, two years and even three years detention and all witnesses are still detained at the ICC Detention Unit. This is nothing short of shocking, especially if one bears in mind the status of their case in the DRC and the progress of their asylum cases.

In fact, two of the three witnesses have been illegally detained in the DRC since 2005, before they were brought in 2011 to the ICC. They thus suffer almost 10 years of unlawful detention, the ICC being responsible for 3 years. That their detention in the DRC is unlawful -and that the entire criminal procedure against these witnesses in the DRC is as good as non-existent- was confirmed by the Dutch asylum court sitting in Amsterdam. That court ruled, on all available material and after careful analysis, that clients are the victim of flagrant denial of justice in the DRC. This is not only an insurmountable obstacle to the witnesses' return to the DRC, but also fully disqualifies the so-called DRC criminal proceedings against these three men. That there is something wrong with these criminal proceedings should also already have been clear to the ICC. The Katanga Trial Chamber has tried to reach out to the DRC by asking that state party if it could inform the Court about the progress of criminal proceedings against the three witnesses and if the Court could assist in moving forward these proceedings (for example, by organising a video-link). The response from the DRC was evasive, confirming the serious misgivings about the national criminal proceedings.

On 20 January 2014 the ICC Appeals Chamber in the Ngudjolo case [tried to solve the issue](#) of detention of the three witnesses. This intervention came after the Katanga Trial Chamber rejected an application for release by the three witnesses in October 2013 (with Judge Van den Wijngaert strongly dissenting). Basically, the 20 January ruling comes down to the three witnesses having to leave the ICC Detention Unit. It is up to the Netherlands to intervene and to hold the witnesses in the Netherlands as long as is necessary for the asylum procedure.

This is a pretty simple ruling, I would say: open the ICC prison gate and then it is up to the Netherlands to handle the asylum case of the three men. This asylum case is now under appeal with the Council of State, but there is a clear court order in force, saying that the men cannot be returned to the DRC.



And is freedom in light of all the facts and circumstances not fully justified? Almost ten years of unlawful detention does a lot to anybody. The witnesses are at wit's end and one of them has gone into hungerstrike.

This hungerstrike is occasioned by the fact that the Decision of 20 January has still not been executed, after more than four months! What happened is that the Decision of the Appeals Chamber's implementation was delegated to the Registrar. The latter is in regular contact with the Netherlands. I do not know what is going on, but it appears that both the Registrar and the Netherlands are stalling execution of the Appeals Chamber's Decision in an unacceptable manner. This does not only violate the witness' right to liberty, but also undermines the integrity and authority of ICC-Decisions.

The position and strong resistance of the Netherlands against the witnesses leaving the Detention Unit is puzzling. Let it be clear: there cannot be the concern on the part of the Netherlands that these asylum proceedings create an undesirable precedent of ICC witnesses having the right and possibility to obtain asylum in the host-State. We all know that the situation of the detained witnesses is exceptional and the ordinary scenario is one in which witnesses are free. In respect of this large category of witnesses, there has just been a precedent, in another case. Two other ICC witnesses I represent with colleague Schüller have -after having won their cases at the Council of State- received full asylum in the Netherlands. This makes one wonder why both the Registrar and the Netherlands are so strongly opposed against having the three detained Congolese witnesses -after 10 years of unlawful detention- spend some time in freedom. What ulterior motives can there be behind it?

The hungerstrike of one of the detained witnesses is now in an advanced stage, after 18 days. I am deeply concerned about my client's health and well-being. He is at wit's end and has lost -rightly so- confidence in judges and authorities, who have continuously over the last three years been passing the buck. With a few exceptions, no judge, no authority seems to care about what happens with these three men. These witnesses experience desperation and disbelief, like Jozef K. did in Kafka's *Der Prozess*.

Before more harm is done and in the firm belief in human justice, the appeal to all involved is clear and simple: execute the 20 January Decision of the Appeals Chamber, free the three witnesses and do it NOW!