

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 1 May 2014

THE PRESIDENCY

Before: Judge Sang-Hyun Song, President
Judge Sanji Mmasenono Manageng, First Vice-President
Judge Cuno Tarfusser, Second Vice-President

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF THE PROSECUTOR
*v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO MUSAMBA, JEAN-JACQUES
MANGENDA KABONGO, FIDÈLE BABALA WANDU ET NARCISSE ARIDO***

Public Document

Defence Request for the Disqualification of the Single Judge Cuno Tarfusser

Source: Defence for Mr Aimé Kilolo Musamba

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. *Purpose*: This Request (“Request” or “Defence Request”) is submitted by the Defence of Mr Aimé Kilolo Musamba (“Mr Kilolo”) to the Presidency of this Court pursuant to Article 41(2)(b) of the Rome Statute (“Statute”) and respectfully requests that a plenary session be convened as per Article 41(2)(c) of the Statute and Rule 4(2) of the Rules of Procedure and Evidence (“Rules”) in order to review and rule upon the disqualification of Single Judge Cuno Tarfusser from the proceedings in case ICC-01/05-01/13.
2. *Structure*: The following sections discuss the particularity of the disqualification request to the present proceedings only (II), the legal basis for such Request (III), and the substantive legal arguments in support of this Request (IV & V).

II. THE DEFENCE DOES NOT IN ANY WAY CHALLENGE THE INTEGRITY, COMPETENCE OR QUALIFICATIONS OF THE SINGLE JUDGE OR OF ANY JUDGE OF THIS COURT

3. At the outset, the Defence wishes to make clear that the present Request is in no way intended to challenge or undermine the competence, integrity, professionalism or qualifications of Single Judge Cuno Tarfusser. Neither should this Request be construed as an assault on this Court’s esteemed judiciary as a whole. On the contrary, the Defence has the utmost respect for and holds in the highest regard the Single Judge, as it does all the Honourable Judges of this Court. Indeed, this Defence Request is simply a legal exercise of those fundamental rights – such as judicial impartiality¹ and presumption of innocence² – guaranteed to a defendant under the Statute, and is submitted in cognizance of the fact that judges, as human beings, may inadvertently fall prey to the most subconscious of biases. Thus, this Request is without prejudice to the Single Judge, and is not intended to impugn or insult his high moral character in any way; neither should it be so construed. Rather, the issue before the Presidency

¹ Rome Statute, Art. 41(2)(a).

² *Ibid.*, Art. 66.

today is whether a reasonable observer, properly informed, could reasonably doubt the Single Judge's impartiality *on any grounds in this specific case*.³

III. IT IS THE SUSPECTS' RIGHT TO REQUEST THE DISQUALIFICATION OF A JUDGE WHOSE IMPARTIALITY MIGHT REASONABLY BE DOUBTED

4. The Rome Statute stipulates that judges shall be independent in the performance of their functions⁴ and that "a judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground."⁵ Where a judge may be considered less than wholly impartial, then, the "person being investigated or prosecuted may request the [judge's] disqualification".⁶ There exists an *absolute* duty of disqualification upon the showing of such reasonable doubt.⁷ Indeed, even though a presumption of impartiality attaches to judicial office and disqualification is not a step lightly taken, such presumption – intended to safeguard the sound administration of justice⁸ – is in fact *rebuttable* and *must be reviewed* upon the "appearance of bias in the eyes of the reasonable observer".⁹ To fail to depart from the ordinary position that a judge is impartial in the face of reasonable doubt – or worse yet, in the face of *mounting evidence* to the contrary – amounts to turning a blind eye to the sound and fair administration of justice, the purpose of the presumption in the first place.
5. This 'reasonable doubt' standard does not require the Defence to allege any *actual* bias on behalf of the Single Judge; rather, it need only demonstrate the *appearance* of grounds to doubt his impartiality.¹⁰ Indeed, the relevant standard of assessment as formulated by a plenary of this Court's Judges is whether the circumstances are such that a reasonable observer, properly informed, could

³ ICC-02/05-03/09-317, para. 5.

⁴ Rome Statute, Art. 40(1).

⁵ *Ibid.*, Art. 41(2)(a).

⁶ *Ibid.*, Art. 41(2)(b).

⁷ See Art. 41(2)(a) using unequivocal language to indicate a judge *shall not* participate in *any case* in which his or her impartiality *might* reasonably be doubted on *any ground* (emphasis added).

⁸ ICC-02/05-03/09-344, para. 14.

⁹ *Ibid.*

¹⁰ *Ibid.*, para. 11; ICC-02/05-01/09-76-Anx2, p. 6.

apprehend bias and whether such bias is objectively reasonable.¹¹ Thus, judges must necessarily be disqualified from participating in a case where *either* actual bias *or* apprehension of apparent bias is objectively thought to exist.

6. Furthermore, this standard of disqualification extends to *any grounds*, which includes, *inter alia*, prior participation in the case¹² or statements made by the Judge in public forums.¹³ Indeed, the grounds for disqualification in Article 41 and Rule 34 provide *non-exhaustive* examples of situations in which a judge is obliged to request excusal and/or must be disqualified from his position in a case.
7. In the present case, the Defence submits that the grounds for disqualification also extend to the Single Judge's (i) unorthodox and legally unsubstantiated judicial mandates that overwhelmingly favour the Office of the Prosecutor ("Prosecution"), rendering the Single Judge a Second Prosecutor, (ii) injudicious haste in issuing the Arrest Warrant¹⁴, and (iii) actions and language manifestly contravening the presumption of innocence and instead implying guilt.

IV. FROM THE OUTSET, THE SINGLE JUDGE ACTED *ULTRA VIRES*, ACTING AS A SECOND PROSECUTOR AS OPPOSED TO A JUDGE AND GREATLY PREJUDICING THE FUNDAMENTAL RIGHTS OF THE SUSPECTS

8. A Judge must act within his or her capacity as an impartial umpire between two adversarial parties, namely the Prosecution and the Defence. It is inappropriate for a Judge to involve himself in the proceedings to the extent that he becomes an interested and affected party. As such, the Single Judge had an obligation to remain neutral and to refrain or remove himself from *any* active participation in the investigation and prosecution of the Suspects. The Single Judge breached these duties by personally involving himself in the investigation of the Suspects – including the unilateral appointment of Independent Counsel and interfering

¹¹ ICC-02/05-03/09-344, para. 13.

¹² Rome Statute, Art 41(2)(a).

¹³ Rules of Evidence and Procedure ("Rules"), Rule 34(1)(d).

¹⁴ ICC-01/05-01/13-1.

with the scope and methodology of the Prosecution's and Independent Counsel's investigation (A), improvident approval of the arrest warrant (B), and personal application to the Presidency for a waiver of Mr Kilolo's and Mr Mangenda's immunity (C) – to the effect that he can no longer be deemed wholly impartial and must be disqualified from all future proceedings.

A. The Single Judge's Legally Unfounded Appointment of Independent Counsel to Assist the Prosecution's Investigation Demonstrates an Attitude of Partiality towards the Prosecution that Rebuts The Presumption of Judicial Impartiality

9. Neither the Rome Statute nor the other core legal texts guiding this Court envisage the appointment of an external independent counsel ("Independent Counsel"). Indeed, none of the respective Articles enumerating prosecutorial¹⁵ or judicial powers¹⁶ reference or permit in any fashion whatsoever the use of *outside* investigators to facilitate an *internal* Court investigation. As such, the Single Judge's appointment of Independent Counsel in July 2013 to investigate possible Article 70 offenses¹⁷ not only represents a judicial overstep and misstep into the realm of prosecutorial investigation but also transforms the role of the Single Judge from that from impartial Judge to investigator and secondary prosecutor.
10. It should be recalled that the Statute is clear and unequivocal in granting the powers of investigation and prosecution to the *Prosecution*.¹⁸ Indeed, it is for the Prosecution to initiate – or reconsider a decision to initiate¹⁹ – an investigation or prosecution²⁰, with the parallel duties of the Pre-Trial Chamber with regard to investigations limited to that of supervisory functions, i.e., authorization of investigations²¹, review of the Prosecution's decision not to proceed in certain

¹⁵ Rome Statute, Arts. 54 and 55.

¹⁶ *Ibid.*, Arts. 56 and 57.

¹⁷ ICC-01/05-52-Conf-Exp.

¹⁸ Rome Statute, Part V, Arts. 53-55.

¹⁹ *Ibid.*, Art. 53(4).

²⁰ *Ibid.*, Art. 53(1).

²¹ *Ibid.*, Art. 15.

circumstances²², and ability to impose measures to *protect the rights of the defence*.²³

Nowhere do the Statute or Rules envision the ability of *Judges* to initiate, directly involve themselves, or actively engage in prosecutorial investigations.²⁴

11. Even if one were to argue that appointment of Independent Counsel could conceivably fall under the umbrella of Article 56, which details the role of the Pre-Trial Chamber in relation to a unique investigative opportunity, the Pre-Trial Chamber may only act, upon the request of the Prosecutor, to take “*such measures as may be necessary to ensure the efficiency and integrity of the proceedings, and, in particular, to protect the rights of the defence*” (emphasis added). Article 57, further elaborating the Pre-Trial Chamber’s functions and powers, similarly does not countenance appointment of Independent Counsel, thus obviating any argument that there exists unfettered discretion to appoint outside experts to guide and facilitate the Prosecution’s investigation. Indeed, if there does in fact exist any substantive legal ground giving rise to the appointment of Independent Counsel, it would stem from Article 56(2)(c), which enables the Pre-Trial Chamber to appoint an expert, but only in the context of *protecting the rights of the defence, not that of aiding the Prosecution*.
12. In July 2013, the Single Judge appointed Independent Counsel to investigate and substantiate the Prosecution’s allegations.²⁵ In monthly *ex parte* status conferences thereafter, the Single Judge explicitly instructed Independent Counsel on the manner in which the latter should execute his mandate,²⁶ specifically tasking him

²² *Ibid.*, Art. 53(3)(b).

²³ *Ibid.*, Art. 56(1)(b).

²⁴ See Part V of the Rome Statute, detailing the duties and powers incumbent on the Prosecution in investigations, as well as the role of the Pre-Trial Chamber in relation to investigations. Specifically, Article 57 details the functions and powers of the Pre-Trial Chamber.

²⁵ ICC-01/05-52-Conf-Exp.

²⁶ See, for example, ICC-01/05-T-3-CONF-EXP-ENG, p. 7, lines 14-22, authorizing the Independent Counsel to continue listening to the private phone calls of Mr Kilolo and the other Suspects. The status conferences setting out the Independent Counsel’s mandate and *modus operandi* took place on 30 August 2013 (ICC-01/05-T-2-CONF-EXP-ENG), 25 September 2013 (ICC-01/05-T-3-CONF-EXP-ENG), and 10 October 2013 (ICC-01/05-T-4-CONF-EXP-ENG), as well as in the “*Rapport intermédiaire du conseil ad hoc*” dated 1 October 2013 (1 ICC-01/05-59-Conf-Exp, with confidential, *ex parte* Annex A).

with finding *incriminating* evidence only as opposed to both incriminating *and* exculpatory evidence.²⁷ Indeed, the Single Judge specifically ordered “the independent counsel tasked with (i) reviewing the logs of telephone calls either placed or received by Mr Aimé Kilolo and Mr Jean-Jacques Mangenda...[to] transmit[] to the Prosecutor the relevant portions of any and all such calls which might be of relevance for the purposes of the [Prosecution’s] investigation” (emphasis added).²⁸ At the same status conferences, Independent Counsel consistently received further instructions from the Single Judge on the manner in which to execute his mandate of listening in and sifting through Mr Kilolo’s private and privileged phone calls, subsequently providing the Single Judge with the results of his investigation, which also culminated in two reports dated 25 October 2013²⁹ and 14 November 2013³⁰.

13. While unilaterally and unlawfully broadening the Prosecution’s investigative powers envisioned in Article 54, the Single Judge’s appointment of Independent Counsel concomitantly violated respect of the Suspects’ rights as enshrined in Articles 54(1)(c) and 56(1)(b).³¹ In the first place, though the Statute grants powers of investigation to the Prosecution *only*, the Single Judge saw fit to similarly charge Independent Counsel³², inflating the already-considerable resources available to the Prosecution. Worse yet, *the Single Judge did not require Independent Counsel to look for exculpatory evidence, a requirement imposed even on the Prosecution*, which must, in the interests of justice, investigate and disclose potentially exonerating evidence to the defence.³³ Furthermore and most shockingly, the Single Judge – already acting *ultra vires* by designating outside

²⁷ ICC-01/05-52-Red2, p. 7-8.

²⁸ *Ibid.*

²⁹ ICC-01/05-64-Conf-Exp with confidential, *ex parte* Annex.

³⁰ *Ibid.*

³¹ Rome Statute, Art. 54(1)(c) reads in pertinent part: “The Prosecutor shall...[f]ully respect the rights of persons arising under this Statute” while Article 56(1)(b) permits the Pre-Trial Chamber to “take such measures as may be necessary...to protect the rights of the defence”.

³² ICC-01/05-01/13-33-Conf.

³³ Rome Statute, Art. 54(1)(a).

persons to investigate, substantiate and qualify potentially incriminating evidence – ordered Independent Counsel to listen to and utilize the contents of *private and privileged* conversations, in direct violation of the attorney/client confidentiality guaranteed by this Court³⁴ and of the protections afforded under Article 8 of the European Convention on Human Rights (“ECnHR”).

14. Indeed, the investigations undertaken by Independent Counsel included reviewing the logs and recordings of Mr Kilolo’s telephone conversations for a period of at least two months, which, disturbingly, entirely coincided with a time period in which Mr Kilolo was the Lead Counsel in the Main Case and was, or at least *should have been*, protected by the immunity ostensibly guaranteed by this Court.³⁵ Indeed, even the Presidency acknowledged that “in their capacity as counsel and case manager in the case, [Mr Kilolo and Mr Mangenda] enjoy immunities pursuant to, *inter alia*, the Rome Statute, the Headquarters Agreement [] and the Agreement on the Privilege and Immunities of the Court...”³⁶

15. Furthermore, Article 56(1)(b) is explicit in providing that the rights of the defence not be prejudiced or compromised, mandating *particular protection* thereof, while Article 56(2)(c) is unambiguous in that the appointment of an expert may be undertaken *as a measure to protect* – and not to *infringe* – the rights of the defence. The Single Judge, however, violated the express language of these Articles by not only appointing Independent Counsel to *aid* the Prosecution, but

³⁴ Rule 73(1) states that communications made in the context of professional relationships between persons and their legal counsel shall be regarded as privileged, and consequently not subject to disclosure, unless the person consents in writing to the disclosure, and/or voluntarily disclosed the content of the communication to a third party who then gives evidence of that disclosure.

³⁵ Article 48(4) of the Statute affords privileges and immunities to “counsel... shall be afforded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court”; Article 18(1)(b) of the ICC Privileges and Immunities Agreement reads in pertinent part: “Counsel shall enjoy the...privileges, immunities and facilities to the extent necessary for the independent performance of his or her functions...in connection with the performance of his or her functions... [including] immunity from legal process of every kind in respect of words spoken or written and all acts performance by him or her in official capacity, which immunity shall continue to be accorded even after he or she has ceased to exercise his or her functions”.

³⁶ ICC-01/05-68, para. 6.

also in directing Independent Counsel in the manner and scope of his investigation, i.e., limiting his mandate to gathering *incriminating evidence only*.

16. Finally, even if the appointment of Independent Counsel *is* permitted within the practice of this Court – and the Defence vehemently contends that it is not – the Single Judge should have at the very least ensured Independent Counsel stayed true to his title – “Independent” – and instructed the latter to act to protect the rights of *both* the Prosecution and Defence, as opposed to assisting the Prosecution only. Furthermore, the Single Judge was rendered *an interested and affected party* in the investigation by virtue of his involvement with the process and work of the Independent Counsel, such as instructing the latter to report back the contents of Mr Kilolo’s privileged communications, for example. Indeed, the Single Judge’s decision to directly involve himself with the Prosecution’s investigation by way of supervising the Independent Counsel is an illegitimate judicial overstep into the ambit of prosecutorial powers³⁷ and an unwarrantable act of law-making by which the Single Judge has necessarily made himself an interested and affected party, and can no longer be presumed entirely impartial.

B. The Single Judge’s Biased Attitude is Manifested in his Haste to Grant the Prosecution’s Application for an Arrest Warrant and in Personally Applying for a Waiver of Mr Kilolo’s Immunity As Lead Counsel

17. The incredible celerity with which the Single Judge decided on the Prosecution’s Application for Warrant of Arrest (“AWA”)³⁸, and personally applied to the Presidency for a waiver of Mr Kilolo’s immunity (“Waiver Application”) is absolutely astounding and suggests a gross miscarriage of justice.
18. Specifically, the AWA was presented to the Single Judge on 19 November 2013, **numbering 50 pages, and accompanied by a further 55 annexes totalling more than 1,500 pages**. Indeed, just the annexes comprised a **minimum of 30,000**

³⁷ Rome Statute, Art. 54.

³⁸ ICC-01/05-01/13-19-Conf.

pieces of information, with **two (2) of the annexes alone**³⁹ *containing more than 18,000 phone calls and text messages*. Furthermore, in the Arrest Warrant issued *only one day later*, the Single Judge bemoaned the regrettable “lack of concision which mark[ed] the Application...[and] the repetitive and unduly complicated manner in which the facts were set out”.⁴⁰

19. It is a wonder, then, that the Single Judge was able to peruse, reflect, and decide upon the AWA with the ease and rapidity he did. Having received the AWA in all its copiousness on 19 November 2013, the Single Judge decided the issue on the *very same day*. Indeed, within *mere hours* of the AWA’s receipt, the Single Judge urgently applied to the Presidency for a waiver of Mr Kilolo’s immunity,⁴¹ informing the Presidency that he was – *after being in possession of the AWA for no more than a few hours* – “*minded to grant the request of the Prosecutor and issue the warrant of arrest*”.⁴² To that end, the Single Judge annexed a draft Arrest Warrant to his Waiver Application **dated 19 November 2013**.

20. That the Single Judge was able to receive, review, analyse, deliberate, and decide upon the immediate deprivation of the Suspects’ liberty *in a matter of hours* is flabbergasting. The Defence admits to being mystified as to the Single Judge’s ability to fairly and impartially rule upon an AWA totalling over 1,500 pages in less than one day, such that the Single Judge could not only make up his mind, but also draft *both* an Arrest Warrant *and* a Waiver Application on the same day. Indeed, even with the invaluable aid of an extremely efficient and hardworking team, the Defence believes it impossible to review that sheer quantity of material in less than 48 hours *at a very minimum*.

21. The Defence cannot help but wonder if the Suspects were accorded the courtesies of proper judicial review and real deliberation before the Arrest Warrant was

³⁹ ICC-01/05-01/13-19-Conf-AnxH.1 & ICC-01/05-01/13-19-Conf-AnxH.2.

⁴⁰ ICC-01/05-01/13-1-Red2-tENG, para. 11.

⁴¹ ICC-01/05-68, reclassified as Public pursuant to Presidency Order ICC-01/05-01/13-269-Conf (18 March 2014), para. 2.

⁴² *Ibid.*

issued. After all, the staggering speed in which the Single Judge made the Waiver Application and issued the Arrest Warrant suggests the Suspects were not afforded meaningful judicial review of the allegations. Rather, it seems evident that the Single Judge – in assessing the Article 58(1)(a) threshold – simply accepted the Prosecution’s allegations at face value, seeing fit to deprive the Suspects of their liberty with no more than a cursory glance at the AWA.

22. While the standard for an Article 58(1)(a) arrest warrant is that of ‘reasonable grounds’, the accepted practice of this Court is to be guided by the principles of international human rights law in its interpretation. After all, it is axiomatic that, without an efficient guarantee of liberty, the protection of other individual rights becomes increasingly vulnerable and often illusory. Indeed, the Pre-Trial Chamber I has specifically remarked upon the importance of judicial supervision on the deprivation of personal liberty on suspicion of criminal liability.⁴³
23. To that end, “consistent with the fact that...the fundamental right of the relevant person to his liberty is at stake”⁴⁴, the fact-finder must, in applying the ECnHR ‘reasonable suspicion’ standard, be “*intimately convinced*”⁴⁵ of the “existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence”⁴⁶ and this notion of “reasonableness” cannot be stretched to the point where the *essence* of this “reasonable suspicion” safeguard is impaired.⁴⁷ Furthermore, the Human Rights Committee – in explicating the prohibition on arbitrary arrest as enshrined in Article 9(1) of the International Covenant on Civil and Political Rights⁴⁸– has held that “arbitrary arrest” refers not to an “unlawful” arrest or one that is “against

⁴³ ICC-01/04-01/06-8-Corr, para. 12, fn 6, citing Inter-American Court of Human Rights cases, *IACHR, Case of Bamaca Velasquez v. Guatemala*, “Judgment”, 2 November 2000, Series C No. 70, paras. 138-144; *IACHR, Case of Loayza-Tamayo v. Peru*, “Judgment”, 17 September 1997, Series C No. 33, paras. 49-55.

⁴⁴ *Ibid.*, para. 10.

⁴⁵ *Ibid.*, para. 9.

⁴⁶ *Fox, Campbell, and Hartley v. United Kingdom*, Judgment, 13 Eur.H.R.Rep. 157 (30 Aug 1990) para. 32.

⁴⁷ *Ibid.*

⁴⁸ International Covenant on Civil and Political Rights (1966), Art. 9(1): “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention...”

the law”, but rather, “arbitrariness...must be interpreted more broadly to include elements of *inappropriateness, injustice, lack of predictability and due process of law*...”⁴⁹ As such, international human rights standards dictate deprivation of liberty be appropriate, fair, and *the result of due consideration and process of law*.

24. That the Single Judge felt the reasonable grounds threshold satisfied after only a few hours does not pass international human rights muster. After all, to find the information alleged in the AWA demonstrated reasonable grounds for an Arrest Warrant *necessitated due deliberation and analysis of the entire Application and Annexes*, including review of the excess of 18,000 phone calls and text messages and 30,000 pieces of information annexed to the AWA. Anything less is prejudicial to the rights of the defendant. Furthermore, it is notable that the Arrest Warrant totalled 16 pages – surprisingly light reading considering there are *five* (5) Suspects who are *each* alleged to have committed multiple offenses⁵⁰ – and that, in an Arrest Warrant already pockmarked by paucity, the Single Judge devoted only *one* paragraph – comprised of *one singular sentence* – to Mr Kilolo’s role in the alleged commission of the offenses⁵¹. Regrettably, even this paragraph lacks any real reasoning, with the Single Judge simply expressing his satisfaction “that there are reasonable grounds to believe that...[Aimé Kilolo] attempted to tender into the record at least 14 documents which he knew to be false or forged...”⁵² without any explication as to the reasoning of this contention or discussion as to the element of intention, a constitutive part of the offence that is glaringly neglected in the Arrest Warrant.
25. The Defence thus contends that, considering the objective impossibility of having reviewed – much less *fairly* reviewed – the allegations and evidence presented in

⁴⁹ Communication No. 458/1991, *A. W. Mukong v. Cameroon* (Views adopted on 21 July 1994) in UN doc. GAOR, A/49/40 (vol. II), para. 9.8, emphasis added.

⁵⁰ By way of comparison, some decisions on Article 58 applications issued by this Court (and some by the same Pre-Trial Chamber II as in this case), and which usually only involve one suspect, number between 38 to 68 pages. See ICC-01/04-02/06-36-Red and ICC-01/04-02/06-20-Anx2.

⁵¹ ICC-01/05-01/13-1-Red2-tENG, para. 16.

⁵² *Ibid.*

the Prosecution's AWA and the accompanying annexes in less than a single day such that the reasonable grounds standard could be considered to have been properly met, the Single Judge was altogether too hasty in issuing the Arrest Warrant, depriving the Suspects of their liberty without due consideration and unfairly prejudicing them from the outset of these proceedings.

26. Furthermore, and by his own admission, the Single Judge navigated the unnecessary complexity and lack of concision of the Prosecution's AWA by relying upon the reports of Independent Counsel.⁵³ As indicated above, Independent Counsel is not a position, appointment, or mechanism envisaged by the legislator, Statute, or other core legal texts. Similarly, the fruits borne of such unlawful appointment carry no import; the Independent Counsel reports cannot be secondary evidence or even persuasive upon this Court, and certainly cannot become the actual source upon which a Judge of this Court makes an Article 58 assessment and issues an arrest warrant. Rather, an arrest warrant issued by this Court must be predicated on *verifiable and verified* evidence stemming from a *legitimate and properly authorized investigation by the Prosecution* pursuant to its investigative powers, and *not on any outside sources*. Indeed, it is incongruous that an arrest warrant issued pursuant to a Prosecution's Application for a Warrant of Arrest be issued on the basis of evidence *not actually submitted by the Prosecution*.

27. The Defence contends the procedural irregularities arising from the Single Judge's prosecutorial as opposed to judicial actions have greatly prejudiced the Defence from the outset, necessitating a dismissal of the entire case at best, and disqualification of the Single Judge at a minimum. After all, the Single Judge has clearly evidenced a prosecutorial initiative and direction – from authorizing wiretaps on a Counsel protected by immunity to ordering external investigations and unilaterally seeking an immunity waiver – which diametrically violate his

⁵³ *Ibid.*, para. 11.

obligation of impartiality and can be remedied only by his immediate disqualification from the remainder of these proceedings.

C. The Ultra Vires Application by the Single Judge to Waive Mr Kilolo's Immunity as Lead Counsel Evidences the Single Judge's Bias and Renders him a Prosecutor as Opposed to Neutral Judge

28. The Waiver Application by the Single Judge is problematic primarily for two reasons. First, it is for the Prosecution, and not the Single Judge, to make such an application. Second, the Single Judge made the Waiver Application mere hours after receipt of the Prosecution's Application for Warrant of Arrest.
29. In the first place, upon receipt of the Prosecution's AWA, the Single Judge should have considered the propriety of granting such application in light of Mr Kilolo's standing immunity. Indeed, the Single Judge should have reminded the Prosecution of the bar such immunity represented to the granting of an Arrest Warrant and ordered the Prosecution to first apply to the Presidency for an immunity waiver. Rather, the Single Judge *himself*, in lieu of the Prosecution, made the Waiver Application to his colleagues in the Presidency.
30. That the Single Judge himself made the Waiver Application is not simply unorthodox but is legally unfounded. Nowhere in Article 57 or elsewhere in the Statute or Rules is it suggested that a *Judge* may make *any* application to the Presidency – or to any organ – on behalf of an interested party, regardless of membership in such organ. After all, to do so would be to effectively render the Judge an interested party, a clear breach of the obligation of absolute impartiality.
31. Furthermore, the Rome Statute forbids the blurring of such lines, clearly delineating the various independent organs of the Court and divorcing the functions of the Presidency from that of the other organs, including the judicial divisions.⁵⁴ This differentiation is further reinforced in Article 40, providing that the judges of the Court shall not only be independent in the performance of their

⁵⁴ Rome Statute, Art. 34.

functions but also shall not engage in any activity likely to interfere with their judicial functions or *which might affect confidence in their independence*.⁵⁵ Here, by spontaneously applying to the Presidency for the Waiver Application, the Single Judge seemingly muddled the distinction between his role as a Judge in the Article 70 proceedings and his position as the Second Vice-President of the Presidency, an action certainly giving rise to concern as to his judicial independence *in these present proceedings*.

32. Second, and as indicated above, the Single Judge made the Waiver Application *on the very same day* he received the Prosecution's AWA. The Defence continues express its stupefaction as to how the Single Judge could – in a matter of only a few hours – have properly read, reviewed, analysed, and fairly ruled upon a 50-page Application accompanied by over 50 annexes, such that he felt a Waiver Application to the Presidency was appropriate.
33. Ultimately, as with the appointment of the Independent Counsel, the Single Judge's actions in this respect – by taking it upon himself to make an application that should only have been introduced by the Prosecution – have effectively rendered him an *interested and affected* party tantamount to a second Prosecutor, and who can no longer be considered wholly impartial. Accordingly, the Defence – in an effort to mitigate continuing prejudice to the Suspects' rights – is left with no choice but to request his immediate disqualification.

V. THE LANGUAGE USED BY THE SINGLE JUDGE CASTS DOUBT ON HIS IMPARTIALITY

34. The Single Judge's language in the proceedings thus far calls into question his impartiality and suggests the presumption of innocence has been subverted into one of guilt. Indeed, from the opening paragraphs of the "Decision on the 'Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba'"⁵⁶, the Judge is clear: Mr Kilolo has been found guilty in the court of public and judicial opinion.

⁵⁵ *Ibid.*, Art. 40(1) and Art. 40(2).

⁵⁶ ICC-01/05-01/13-259.

35. The Defence recalls here the necessity of preserving the fundamental presumption of innocence, and the dangers inherent in allowing the perversion of such presumption into one of guilt. Indeed, the Prosecution in the Main Case was recently reprimanded by Trial Chamber III for exactly such behaviour, and was warned to refrain from “presuppos[ing] facts that have not been verified or confirmed at this stage”⁵⁷. Such judicial castigation stemmed from a Prosecution Statement that accused Mr Bemba and the “*members of his Defence team [of] consciously and knowingly bas[ing] their case on false evidence*’.⁵⁸ The Trial Chamber reminded the Prosecution to “exercise caution when phrasing its submissions and to refrain from making statements that might be interpreted as undermining the presumption of innocence.”⁵⁹

36. In parallel, the Single Judge has often referenced Mr Kilolo’s actual commission of crimes as opposed to the alleged commission of offences, alluding for example to “*a scheme of witness corruption*” in which Mr Kilolo “*played a determinant role*”⁶⁰ and was “*particularly prominent*”.⁶¹ The Judge also highlights the ‘obvious risks’ posed by Mr Kilolo in obstructing or endangering relevant investigations or proceedings “*in light of the conducts carried out by [Mr Kilolo] prior to his arrest*”⁶² and further chastises him for his serious and significant role in “*disrupt[ing] justice*”.⁶³ The reference to Mr Kilolo’s “*determinant role*” in the “*scheme of witness corruption*” is particularly ironic in light of the fact that the Single Judge devoted only one sentence in the Arrest Warrant to such apparently nefarious conduct.

37. In light of the Trial Chamber’s recent admonishment to the Prosecution for its failure to respect the presumption of innocence through its use of conclusory language, the Defence cannot help but draw the Presidency’s attention to the

⁵⁷ ICC-01/05-01/08-3011, para. 8.

⁵⁸ ICC-01/05-01/08-2940, para. 3.

⁵⁹ ICC-01/05-01/08-3011, para. 8.

⁶⁰ ICC-01/05-01/13-259, para. 13.

⁶¹ *Ibid.*, para. 31.

⁶² *Ibid.*, para. 39.

⁶³ *Ibid.*, para. 23.

similar language utilized by the Single Judge. If references to Mr Kilolo's 'prominent' role in the commission of 'crimes of the utmost gravity' do not manifest a presumption of guilt – particularly when such language was in the context of not-yet-proven Article 70 offenses, and was used to justify Mr Kilolo's continued pre-trial detention and coupled with references to Mr Kilolo as an obvious flight risk – the Defence is flummoxed as to what *would* reach such threshold.

38. Furthermore, in depriving Mr. Kilolo of his liberty, the Single Judge indicates that "*offences against the administration of justice are of the utmost gravity, even more so when proceedings relating to crimes as grave as those within the jurisdiction of the Court are at stake*" (emphasis added).⁶⁴ This amounts to an unprecedented upgrading and equating of offenses (conviction of which is subject to a maximum of five years) to those crimes punishable by life in prison. After all, 'crimes of the utmost gravity' are limited to the "*most serious crimes of concern to the international community as a whole*" – such as genocide, crimes against humanity, war crimes and the crime of aggression⁶⁵ – and *do not* include Article 70 offenses.
39. To now argue that the gravity of Mr Kilolo's alleged offenses are so heinous as to be equated with crimes of international concern and to potentially occasion a punishment of five years *per* offense – nowhere envisaged in the Statute – is a violation of the principles of *nullum crimen sine lege*⁶⁶ and *nulla poena sine lege*⁶⁷, enshrined in the Rome Statute and which ensure not only that the "definition of the crime shall be strictly construed...shall not be extended by analogy [and] shall be interpreted in favour of the person being investigated..."⁶⁸ but also that punishment may only be doled out in accordance with the Statute. By indicating that "it remains yet to be decided how the statutory limit may apply in case

⁶⁴ *Ibid.*, para. 23.

⁶⁵ Rome Statute, Art. 5.

⁶⁶ *Ibid.*, Art. 22.

⁶⁷ *Ibid.*, Art. 23.

⁶⁸ *Ibid.*, Art 22(2).

multiple offences are found to have been committed”⁶⁹ – meaning he may deem it appropriate to sentence the Suspects to five years *per offense* – the Single Judge is effectively creating new terms of punishment not contemplated under the Statute or in the Rules. Indeed, Rule 166(3) – which addresses sanctions under Article 70 – makes clear that where the Rules and Statute wish to address *a singular offence*, the offence is unmistakably referenced in the singular.⁷⁰

40. Overall, the Single Judge does not seem to be adjudicating from a place of strict impartiality; caring not what the law is, the Single Judge is more inclined to rule based on what he wishes the law to be. While admirable, this is not a quality desirable in an arbiter, who, bound by the principles of independence,⁷¹ impartiality⁷² and integrity⁷³, must even-handedly balance the realization of international criminal justice with respect of an accused’s rights.

VI. CONCLUSION

41. The importance of judicial independence and impartiality within the Court’s legal framework⁷⁴ and for the preservation of the Court’s integrity cannot be overstated or underestimated. After all, this is a court of justice, and lapses in due process risk the legitimacy of the entire institution. Indeed, there is no point in asserting a standard of impartiality if it is not availed, as a standard left fallow is little more than empty legal rhetoric absent real value. In the present case, from the viewpoint of the fair-minded and reasonable observer, properly informed, the impartiality of the Single Judge could come into question. The Defence takes this opportunity to recall here that it is not required to show *actual bias* on the part of the Single Judge, but simply demonstrate that a *reasonable observer could*

⁶⁹ ICC-01/05-01/13-259, para. 31.

⁷⁰ Rule 166(3) reads: “*Each offence* may be separately fined and those fines may be cumulative...”

⁷¹ ICC Code of Judicial Ethics, Art. 3.

⁷² *Ibid.*, Art. 4.

⁷³ *Ibid.*, Art. 5.

⁷⁴ Rome Statute, Arts. 36(3)(a), 41, 45, 64(8)(b), 67(1); Rules 5(1)(a), 34, 91.

apprehend apparent bias on any ground in this case, which is all that is needed to warrant the disqualification of the Single Judge.

42. The Single Judge's language, presumption of guilt, and assistance of the Prosecution's investigation – resulting in an effective crippling of the Defence – should not be disregarded, and attention must be paid to how such actions will be viewed by the world, and by the Suspects in particular. After all, the Suspects appear at this Court voluntarily – and some will have been detained for more than half a year before formally charging – with the belief that they await justice from an impartial and independent Court free of prejudice. For this Court to today turn a blind eye to the very real concerns about the Single Judge's potential lack of absolute impartiality and to refuse to act upon the material issues asserted herein is to condone a pattern of judicial relativism that has thus far subverted the rights of defendants, generating a legacy not easily shrugged off and one that will surely plague this Court in the future. As such, the Presidency should guarantee the Suspects' right to an impartial arbiter and fair hearing by ordering the disqualification of the Single Judge from the remainder of these proceedings.

VII. RELIEF REQUESTED

43. The Defence for Mr Kilolo respectfully requests that the Presidency:
- Grant this present Request for the disqualification of the Single Judge from the remainder of the proceedings in case ICC-01/05-01/13 as concerns Mr Kilolo.



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Lead Counsel for Mr Aimé Kilolo Musamba

Dated this 1 May 2014,

At The Hague, The Netherlands