



Original: English

No.: ICC-01/05-01/13

Date: 5 August 2014

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

**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 AND NARCISSE ARIDO***

Public

**Decision on the first review of Aimé Kilolo Musamba's detention pursuant to
article 60(3) of the Statute**

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

The Office of the Prosecutor

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Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Competent authorities of the Kingdom of the Netherlands

Competent authorities of the Kingdom of Belgium

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel, Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

Patrick Craig

I, Judge Cuno Tarfusser, having been designated as Single Judge of Pre-Trial Chamber II of the International Criminal Court;

NOTING the “Warrant of arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido” issued on 20 November 2013;¹

NOTING the “Decision on the ‘Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba’” dated 14 March 2014 (“14 March 2014 Decision”)², rejecting Mr Kilolo’s request for interim release pursuant to article 60(2) of the Statute;

NOTING the “Order requesting observations for the purposes of the periodic review of the state of detention of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo and Fidèle Babala Wandu pursuant to rule 118(2) of the Rules of Procedure and Evidence” dated 13 June 2014³;

NOTING the “Prosecution Observations on the review of the detention of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, and Fidèle Babala Wandu” dated 30 July 2014 (“Prosecutor’s Observations”)⁴, whereby the Prosecutor submits *inter alia* that “there has been no change in circumstances”, “[t]he conditions of article 58(1) of the Statute continue to be met” and that additional evidence collected and made available to the suspects since the 14 March 2014 decision “mitigate in favour of ... continued detention”;

NOTING the “Defence observations on the continued detention of Aimé Kilolo Musamba pursuant to ICC-01/05-01/13-495, *Order requesting observations for the purposes of the periodic review of the state of detention of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo and Fidèle Babala Wandu pursuant to rule 118(2) of the Rules of Procedure and Evidence*” dated 30 June 2014 (“Defence Observations”)⁵;

¹ ICC-01/05-01/13-1-Red2-tENG.

² ICC-01/05-01/13-259.

³ ICC-01/05-01/13-495.

⁴ ICC-01/05-01/13-529.

⁵ ICC-01/05-01/13-528 and Confidential *ex parte* Annexes A-F thereto.

NOTING the “Decision requesting the Kingdom of Belgium to provide its views for the purposes of the review of Aimé Kilolo Musamba’s and Jean-Jacques Mangenda’s detention pursuant to article 60(3) of the Statute” dated 4 July 2014⁶;

NOTING the “Judgment on the appeal of Mr Aime Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled ‘Decision on the “Demande de mise en liberté provisoire de Maître Aime Kilolo Musamba”” dated 11 July 2104⁷;

NOTING the “Registry transmission to the Single Judge of the exchange of letters between the ICC and the Kingdom of Belgium” dated 18 July 2014⁸, whereby the Registrar, pursuant to the Single Judge’s order, noted that the agreement between the Court and the Kingdom of Belgium was concluded by way of exchanges of letters and filed the said exchange of letters in the record of the case on a confidential, *ex parte* basis;

NOTING the “Transmission of the observations submitted by the Belgium authorities on the ‘Decision requesting the Kingdom of Belgium to provide its views for the purposes of the review of Aimé Kilolo Musamba’s and Jean-Jacques Mangenda’s detention pursuant to article 60(3) of the Statute’” dated 1 August 2014⁹ and confidential, *ex parte* Annex III thereto¹⁰;

NOTING articles 21, 58(1), 60(3) and 67(1) of the Statute, rules 118(1), (2) and (3), 119(1) of the Rules of Procedure and Evidence;

HEREBY RENDERS THIS DECISION.

Determinations by the Single Judge

A. General principles

1. The Single Judge will review Mr Kilolo’s detention in light of those principles which are consolidated in the case-law of the Appeals Chamber of the Court, as repeatedly upheld by the Pre-Trial Chambers.

⁶ ICC-01/05-01/13-540.

⁷ ICC-01/05-01/13-558.

⁸ ICC-01/05-01/13-582-Conf-Exp and confidential *ex parte* annexes 1 and 2 thereto.

⁹ ICC-01/05-01/13-605.

¹⁰ ICC-01/05-01/13-605-Conf-Exp-AnxIII.

2. Pursuant to article 60(3) of the Statute, in conjunction with rule 118(2) of the Rules, the Chamber is mandated to review its ruling on the release or detention of the person at least every 120 days. Upon such review, the Chamber “may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require”. As clarified by the Appeals Chamber, the Chamber shall make its determinations by “revert[ing] to the ruling on detention to determine whether there has been a change in the circumstances underpinning the ruling and whether there are any new circumstances that have a bearing on the conditions under article 58 (1) of the Statute”; “should not restrict itself to only considering the arguments raised by the detained person”; “must weigh the Prosecutor’s submissions against the submissions, if any, of the detained person”, as well as “consider any other information which has a bearing on the subject”; a decision on periodic review shall “clearly set out reasons for its findings¹¹.”

3. The notion of “changed circumstances” within the meaning of article 60(3) of the Statutes “imports either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary”¹²; “[i]f there are changed circumstances, the Pre-Trial or Trial Chamber will need to consider their impact on the factors that formed the basis for the decision to keep the person in detention”; otherwise, the “Chamber is not required to further review the ruling on release or detention¹³”; more recently, the Appeals Chamber has further clarified this principle, by stating that “[i]t is first for the Pre-Trial Chamber to determine whether changed circumstances exist to warrant the disturbing of a previous ruling on detention, rather than addressing each factor underpinning detention in a *de novo* manner to determine whether any of these have changed”¹⁴.

4. Because of its specific object, “the scope of the review carried out in reaching a decision under article 60(3) is potentially much more limited than that to be carried

¹¹ ICC-01/05-01/08-1019, para. 52.

¹² ICC-01/05-01/08-631-Red, para. 60.

¹³ ICC-01/05-01/08-2151-Red, paras 1 and 31.

¹⁴ ICC-02/11-01/11-548-Red, para.1.

out in reaching a decision under article 60 (2) of the Statute”¹⁵. Furthermore, “[t]he Chamber does not have to enter findings on the circumstances already decided upon in the ruling on detention” and does not have to “entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions”¹⁶.

B. Whether there are changed circumstances that would require a modification of the previous ruling on detention

B.1 As to the first limb of the assessment

5. In the 14 March 2014 Decision, the Single Judge noted that the Defence for Mr Kilolo had not challenged or otherwise addressed the material and information contained either in the Prosecutor’s application under article 58 of the Statute or in the reports submitted by Independent Counsel prior to the issuance of the warrant of arrest. Accordingly, he was satisfied that such material and information still justified the finding that there were reasonable grounds to believe that Mr Kilolo committed the crimes alleged by the Prosecutor and that, therefore, the requirements of article 58(1)(a) of the Statute continued to be satisfied. In the warrant of arrest, based on the evidence submitted by the Prosecutor, the Single Judge had found that there were reasonable grounds to believe that Mr Kilolo i) made payments to Defence witnesses in the case *The Prosecutor v. Jean-Pierre Bemba Gombo* (“Main Case”) with funds made available by Jean-Pierre Bemba ; ii) attempted to tender into the record of the Main Case at least 14 documents which he knew to be false or forged; iii) contacted several Defence witnesses, immediately before or after their appearance before the Trial Chamber, and, in some instances, during recesses between two phases of their in-court testimony; iv) during such contacts, explained to the witnesses which questions would be put to them and the responses they should give in court.

6. None of the observations submitted by the Defence for Mr Kilolo for the purposes of this review addresses the first limb of the assessment. The Single Judge

¹⁵ ICC-02/11-01/11-278-Red, para. 24.

¹⁶ ICC-01/05-01/08-1019, para. 53.

takes the view that, since the 14 March 2014 Decision, no change in the circumstances underpinning that ruling has occurred and that no new circumstances having a bearing on the conditions under article 58(1)(a) of the Statute have arisen. Rather, as highlighted by the Prosecutor, additional elements pointing to the role played by Aimé Kilolo in the implementation of the alleged scheme aimed at perverting the course of justice, and to initiatives taken by him in that context, have emerged, notably from Independent Counsel's Third Report¹⁷, thereby strengthening the finding contained in the 14 March 2014 Decision as to the persisting existence of reasonable grounds to believe that Aimé Kilolo has committed the offenses charged.

B.2 As to the second limb of the assessment

7. The 14 March 2014 Decision found that Mr Kilolo's detention still appeared necessary for all the reasons listed in article 58(1)(b) of the Statute. As to the risk of flight, it noted *inter alia* that Aimé Kilolo (i) as part of the network revolving around Jean-Pierre Bemba, and in spite of having ceased to be his counsel in the Main Case, could benefit from the substantial means and resources being available to the latter, which resources might well be used with a view to allowing him to evade prosecution; (ii) if released within the Schengen area (as requested by him), would be able to travel freely within such area in spite of no longer being in possession of travelling documents. It also found that the ongoing process of disclosure might also be relevant in assessing the risk of flight. As to the risks that proceedings (whether pertaining to this case or to the Main Case) be obstructed or endangered, it noted that such risk did exist in respect of items of evidence might be still outstanding, in particular in light of the pattern of conducts aimed at the disruption of the course of justice which emerged from the material brought to the attention of the Chamber, and that the detention centre was the only environment allowing the effective management of such risks.

8. The Appeals Chamber did not find these determinations unreasonable, or otherwise flawed.

¹⁷ ICC-01/05-01/13-421-Conf-Anx, *passim*.

9. The Defence for Mr Kilolo submits that “Mr Kilolo’s circumstances have drastically changed since the previous detention decision, thus warranting an entirely new assessment and decision as to his continued detention”. These circumstances are identified in the following: (i) as an entirely “new” circumstance, the entry into force, on 10 April 2014, of a cooperation framework agreement between the Court and the Kingdom of Belgium, governing the procedure for the interim release on the Belgian territory of a person detained by the Court (“Framework Agreement” or “Agreement”), which Agreement, in the view of Mr Kilolo’s Defence, would “demonstrate an accord intended to facilitate the pre-trial release of persons pending trial at the ICC” and “clearly manifest... Belgium’s ability, willingness and capacity to respect all ICC-imposed conditions on release”: (ii) as “old facts that have significantly changed”, (a) the prolonged period of detention; (b) the “non-satisfaction of Article 58(1)(b) conditions”, since Aimé Kilolo would not “pose a flight risk in any way or to any degree”, as allegedly shown *inter alia* by his family situation and his “full cooperation with this Court throughout his detention, manifested through active participation in the judicial process”; (c) the imminent deposit of the document containing the charges and the advanced stage of the Prosecutor’s investigation, as well as the fact that the case *The Prosecutor v. Jean-Pierre Bemba Gombo* (“Main Case”) “is in its final stages of trial”.

10. The Single Judge notes that the observations submitted by the Defence for Mr Kilolo as regards the adverse impact that his current detention has on his professional practice and on the financial situation of his family, as well as the statements made and the documents submitted relating to his being “an exemplary role model” in possession of an “unquestionable moral character”, fail to go beyond repeating arguments and reasoning already brought before the Chamber in the context of Mr Kilolo’s application for interim release. As such, they rely upon elements which had already been addressed by the 14 March 2014 Decision and do not qualify as “changed circumstances” within the meaning of article 60(3) of the Statute. The same can be said as regards the purported “minor” or “lesser” gravity of the violations at stake in these proceedings, as opposed to the other crimes falling

within the jurisdiction of the Court: it was also fully addressed, and found as irrelevant for the purposes of the assessment as to the persisting existence of the risks listed in article 58(1)(b) of the Statute, including in light of the fact that it remains to be decided how the statutory limit may apply in case multiple offences.

11. As regards the observations based on the “prolonged period of detention”, which would be in contrast to the law and practice of other jurisdictions, the Single Judge notes that these differences can hardly qualify as “changed circumstances”, even leaving aside the fact (*per se* decisive) that proceedings before the ICC are governed by the Statute and the Rules. Furthermore, the Defence fails to specify in what way the continuing duration of detention might make the finding(s) of the 14 March 2014 Decision become obsolete. Holding that the mere elapsing of time and the prolongation of detention might qualify as changed circumstances for the purposes of the review pursuant to article 60(3) of the Statute would be tantamount to holding that at least one “changed circumstance” would be present in respect of any and all periodic reviews conducted in compliance with that provision.

12. Conversely, the Single Judge concurs with the Defence for Mr Kilolo in considering the entry into force of the Framework Agreement between the Court and the Kingdom of Belgium as a “changed circumstance”, as such in principle suitable to require the review and possibly the amendment of a previous ruling on detention pursuant to article 60(3) of the Statute.

13. By the same token, it is to be noted that the Agreement, far from witnessing to an unconditional availability and willingness on the part of the Kingdom of Belgium to accept that detainees from the Court be released on its territory or, even less, establishing an obligation on their part to do so, makes such acceptance explicitly conditional upon an assessment to be made “*au cas-par-cas*” on the basis of the specific appreciation that the Belgian authorities may make of a given case. As stated by the Belgian authorities, the Framework Agreement “ne peut toutefois nullement modifier les règles applicables en la matière, soit notamment l’article 60-3 du Statut de Rome” ; furthermore, it cannot by and itself be considered as the source of a

Belgian suspect's "right" to be accepted on that country's territory in the context of interim release.

14. As regards the fact that the Prosecutor's investigation is now completed, the Single Judge notes that this argument was already addressed in the 14 March 2014 Decision (and, as such, is unsuitable to constitute a "changed circumstance" for the purposes of article 60(3)) and reiterates that, whilst many pieces of evidence might by this stage be beyond the suspects' reach, it cannot yet be excluded that action be taken in respect of other evidentiary items which might be still outstanding. The seriousness and concreteness of this risk should also be appreciated in light of article 83(1) and (2) of the Statute, vesting in the Appeals Chamber "all the powers of the Trial Chamber", including, most critically, the power to "call evidence".

15. As regards the fact that the trial in the Main Case has now reached its final stages, the Single Judge notes that, indeed, two decisions in principle suitable to be relevant for the purposes of this review have been adopted by Trial Chamber III in the Main Case since the issuance of the 14 March 2014 Decision: on 2 April 2014 ("Trial Chamber III's 2 April 2014 Decision"¹⁸), Trial Chamber III rejected a Prosecutor's application to submit additional evidence arising from this case; on 7 April 2014 ("Trial Chamber III's 7 April 2014 Decision"¹⁹), it adopted a decision on the closure of evidence in the Main Case.

16. The Single Judge takes the view that neither of these decisions is suitable to amend his assessment as to the persisting existence of the risk that proceedings, whether in the Main Case or in this case, be obstructed or endangered, or that future crimes of the same nature might be committed. Today, as on 14 March 2014, the outcome of the trial of the Main Case is still open and the impact of these proceedings on that trial is yet to be determined. The Main Case might be reopened even following the filing of the parties' final submissions, or the submission of final oral pleadings (as has occurred in the case of *The Prosecutor v. Germain Katanga*).

¹⁸ ICC-01/05-01/08-3029.

¹⁹ ICC-01/05-01/08-3035.

17. This conclusion is strengthened by the statements made by Trial Chamber III in its 2 April 2014 Decision. Trial Chamber III stated that it “retain[ed] its discretion under Article 69(3) of the Statute to, at any stage, request *submission of additional relevant evidence, including that relating to the ongoing proceedings in case ICC-01/05-01/13*, where it considers it appropriate and necessary for the determination of the truth”²⁰ (emphasis added). It appears rather of significance that Trial Chamber III explicitly evoked a scenario whereby the submission of additional evidence, including the one relating to this case, might be required; in so doing, Trial Chamber III’s Decision certainly qualifies as a “changed circumstance” *vis-à-vis* the 14 March 2014 Decision, not only suitable but bound to reinforce the Chamber’s conviction about the persisting existence of a risk that both proceedings in the Main Case and these proceedings might be obstructed or endangered.

18. Based on the above, the Single Judge takes the view that, since the 14 March 2014 Decision, no change in the circumstances underpinning that ruling has occurred and that no new circumstances having a bearing on the conditions under article 58(1) of the Statute have arisen.

C. Conditional release

19. Release with conditions is one of the possible outcomes of a review of a previous ruling on detention, subject to the “Chamber, although satisfied that the conditions under article 58 (1) (b) are not met, nevertheless considers it appropriate to release the person subject to conditions”; or “where risks enumerated in article 58 (1) (b) exist, but the Chamber considers that these can be mitigated by the imposition of certain conditions of release”²¹. The Pre-Trial Chamber enjoys discretion when deciding on conditional release²².

20. The Single Judge recalls his finding that the nature of the crimes alleged in these proceedings and the alleged modalities of their commission (ie, by way of communications with the other suspects, or with third parties connected to them by reason of personal or professional links) are such as to make it difficult to conceive of

²⁰ ICC-01/05-01/08-3029, para 33.

²¹ ICC-01/05-01/08-1626-Red, para. 55.

²² ICC-02/11-01/11-278-Red, para 87.

measures which might effectively counteract the risks associated with the suspect's communications with the external world and that, accordingly, the detention centre is the only environment providing adequate guarantees for the effective management of those risks.

21. The conditions proposed by the Defence for Mr Kilolo as possibly assisting his conditional release are not suitable to effectively neutralise the risks listed in article 58(1)(b) of the Statute. This conclusion is strengthened by the observations submitted by the Kingdom of Belgium : as to the risk of flight, the Belgian authorities reiterated their view to the effect that “si l'intéressé décidait de quitter le pays sans l'accord de la Cour, la configuration du pays lui permettrait de le quitter en très peu de temps, sans compter la présence de l'aéroport national à proximité de la résidence de l'intéressé” ; as to the risks of the commission of future crimes, they noted that, were Aimé Kilolo to be conditionally released on their territory, Belgian law does not allow “de procéder à des écoutes téléphoniques ou au contrôle de la correspondance postale ou électronique des personnes libérées sous condition”; this since “[d]e tels actes de surveillance décidés par l'autorité compétente pour se prononcer sur une demande de libération sous condition démontreraient que cette autorité craindrait la poursuite de la commission des infractions considérées ou constaterait l'existence d'un risque élevé de fuite ou de non comparution”, which risks “justifieraient à eux seuls le maintien en détention”.

22. The Single Judge takes the view that, indeed, the availability of a thorough system of monitoring of all forms of communication available to the suspect is critical so as to make it possible to consider if, in principle and in light of all relevant circumstances, such monitoring would be suitable to counteract the relevant risks, and in particular the risks that proceedings be interfered with or that future crimes be committed. In the complete absence of such system, and in the presence of such risks, conditional release is not only unwarranted, but also practically unfeasible.

D. On the request for a hearing

23. Finally, the Single Judge notes that no need for convening a hearing arises under the present circumstances. The observations submitted by the Kingdom of

Belgium are extensive and detailed enough as to provide all information which is necessary and relevant for the purposes of this review. As to the Kingdom of the Netherlands, they already stated their unavailability to accept Mr Kilolo on their territory for the purposes of his interim release. Since it is the Chamber's determination that there are no changed circumstances requiring an amendment of its previous decision that Aimé Kilolo shall remain in detention, there is no need for discussion as to the making of all relevant arrangements.

FOR THESE REASONS, THE SINGLE JUDGE

REJECTS Aimé Kilolo Musamba's request for a hearing;

DECIDES that Aimé Kilolo Musamba shall remain in detention.

Done in both English and French, the English version being authoritative.



Judge Cuno Tarfusser
Single Judge

Dated this Tuesday 5 August 2014

At The Hague, The Netherlands