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TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

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 redacted version
With
Public annex**

**PUBLIC REDACTED VERSION OF KILOLO DEFENCE'S SENTENCING
SUBMISSIONS (ICC-01/05-01/13-2087-Conf)**

Source: Defence for Aimé Kilolo Musamba

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

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Aimé Kilolo Musamba, through his Counsel (“the Defence”), pursuant to the Trial Chamber’s order of 20 October 2016,¹ hereby files his submissions on sentencing, having been convicted on 19 October 2016 of corruptly influencing fourteen witnesses in *The Prosecutor v. Jean-Pierre Bemba Gombo*,² producing false evidence in relation to these witnesses, and encouraging their false testimony.³ It is respectfully requested that the Trial Chamber (“Chamber”) impose a term of imprisonment that does not exceed the 11 months Mr. Kilolo has already served in detention,⁴ or, in the alternative, that any sentence requiring further imprisonment be suspended. No fine, or only a limited fine, should be imposed. The requested sentence is proportionate to the offences and Mr. Kilolo’s degree of culpability, and meets the sentencing goals of retribution, deterrence, and rehabilitation. These submissions are filed as confidential pursuant to Regulation 23(2) *bis* of the Regulations of the International Criminal Court (“Court” or “ICC”) as they refer to information not accessible to the public. A public redacted version of these submissions will be filed shortly.

I. BACKGROUND

1. Mr. Kilolo is 44 years old. He was born in the Democratic Republic of Congo (“DRC”). He is the eldest son of eight siblings. He spent his formative years in the DRC before emigrating to Belgium at the age of 18 to attend law school. He is now a citizen of Belgium and the DRC. He is an accomplished professional, a socially active member of his community, and a deeply committed family man.
2. Mr. Kilolo was admitted as a member of the Bar in Brussels in January 1998.⁵ During his career, Mr. Kilolo developed a reputation for professionalism and good ethics.⁶ He has not previously been sanctioned for any professional misconduct.⁷ Prior to his arrest in this case, Mr. Kilolo had an impeccable record:

¹ ICC-01/05-01/13-1990.

² ICC-01/05-01/08.

³ ICC-01/05-01/13-1989-Red.

⁴ Mr. Kilolo was detained from 23 November 2013 to 21 October 2014. *See* ICC-01/05-01/13-1-Red-Conf and ICC-01/05-01/13-703.

⁵ CAR-D21-0013-0018.

⁶ CAR-D21-0013-0001; CAR-D21-0016-0001.

⁷ CAR-D21-0013-0018.

no prior criminal convictions,⁸ no disciplinary infractions,⁹ and no abuse of power or authority of any kind.

3. Mr. Kilolo is an active and responsible member of his community. He has been involved in projects aimed at promoting the legal profession, developing infrastructure, and improving health in the DRC. He also has supported his religious community.¹⁰
4. Mr. Kilolo married in 2004 and is the father of [REDACTED] children, aged [REDACTED]. His family resides in [REDACTED], Belgium. Mr. Kilolo is the backbone of his family, and their sole financial provider. He alone assumes responsibility for the payment of his children's food, accommodation, and school fees. The school fees for his three school-aged children are approximately [REDACTED] per year. Mr. Kilolo also provides financial support when necessary for his younger brother and other siblings,¹¹ as well as his parents¹² (approximately [REDACTED] per year, primarily for medical expenses) and one of his cousins¹³ (approximately [REDACTED] per year for university expenses). Mr. Kilolo also supports two aunts who live in the DRC¹⁴ (approximately [REDACTED] each per year). His entire family looks to him for emotional and financial support.¹⁵
6. Mr. Kilolo's sudden arrest in November 2013¹⁶ was a shock to both him and his family members, who suddenly found themselves without a husband, father, son, or brother. His detention and subsequent conviction has harmed his physical and emotional health, damaged his reputation and career, and has put him and his family in a precarious financial situation.

⁸ CAR-D21-0013-0016.

⁹ CAR-D21-0013-0018.

¹⁰ CAR-D21-0018-0004, p. 0007, question 15.

¹¹ *Id.*, p. 0005, questions 10, 11, 12.

¹² *Id.*, questions 9, 13, 19.

¹³ *Id.*, p. 0018-19, question 23.

¹⁴ *Id.*, p. 0007, question 14.

¹⁵ *Id.*, questions 9, 20, 21.

¹⁶ CAR-D21-0018-0065, p. 0070, lines 129-150.

II. SUBMISSIONS ON SENTENCING

7. The Chamber may impose a term of imprisonment not exceeding five years and/or a fine.¹⁷ The Chamber must deduct any time Mr. Kilolo spent in detention.¹⁸
8. The Chamber must consider evidence presented and submissions made during trial that are relevant to the sentence.¹⁹ The Chamber may consider non-evidentiary submissions.²⁰ Statutory schemes at other international tribunals require chambers to consider “‘any relevant information,’ not just evidence, in the determination of a sentence.”²¹
9. The Chamber must consider Article 78 of the Statute and Rule 145 of the Rules of Procedure and Evidence (“RPE”) when determining an appropriate sentence; the Statute and RPE apply *mutatis mutandis* to Article 70 offences.²²
10. The Chamber must consider the gravity of the offences and Mr. Kilolo’s individual circumstances.²³ The Chamber also must consider additional factors, such as the extent of the damage caused (in particular, harm to victims and their families); the nature of the unlawful behavior and the means employed to execute the offence; the degree of Mr. Kilolo’s participation; the degree of intent; the circumstances of manner, time, and location; and Mr. Kilolo’s age, education, and social and economic condition.²⁴

¹⁷ Statute, Art. 70(3).

¹⁸ *Id.*, Art. 78(2); ICC-01/04-01/06-3122, para. 35.

¹⁹ Statute, Art. 76(1).

²⁰ ICC-01/05-01/13-2025, para. 7.

²¹ *Id.*

²² Rules of Procedure and Evidence (“RPE”), Rule 163(2).

²³ Statute, Art. 78(1).

²⁴ RPE, Rule 145(1)(c).

11. The Chamber must consider, as appropriate, any aggravating or mitigating circumstances,²⁵ balancing all the relevant factors and considering the circumstances both of Mr. Kilolo and the offence.²⁶
12. Respectfully, Mr. Kilolo should be sentenced to a term of imprisonment that does not exceed the 11 months he has already served in detention, or, in the alternative, that any sentence requiring further imprisonment be suspended. No fine, or only a limited fine, should be imposed. This sentence is appropriate given the gravity of the offences and Mr. Kilolo's individual circumstances. It is proportionate to Mr. Kilolo's degree of culpability, and it satisfies the sentencing goals of retribution, deterrence, and rehabilitation.

A. Mr. Kilolo's sentence should not exceed the time he has already served, or any additional sentence should be suspended

1. The gravity of the offences warrants a sentence not exceeding time served

13. The Chamber convicted Mr. Kilolo under Article 70(1)(a)-(c), having found that he: a. intended to unlawfully manipulate testimonial evidence²⁷ by illicitly coaching and bribing witnesses;²⁸ b. scripted, corrected, instructed, and dictated testimonies, either in person or over the telephone,²⁹ and gave money, material benefits, and non-monetary promises to witnesses to procure favorable testimony;³⁰ c. agreed with his co-accused, Mr. Bemba and Mr. Mangenda, to conceal the common plan; and d. made essential contributions to the illicit coaching activities.³¹

²⁵ *Id.*, Rule 145(2).

²⁶ *Id.*, Rule 145(1)(b).

²⁷ ICC-01/05-01/13-1989-Red, para. 898.

²⁸ *Id.*, para. 897.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*, para. 898.

14. The Chamber must assess gravity in light of the particular circumstances of the case and the nature and degree of Mr. Kilolo's participation in the offences.³² When assessing the gravity of Article 5 offences (the core offences of genocide, crimes against humanity, war crimes, and the crime of aggression), Trial Chambers have considered several factors, including: the extent of the damage caused; the nature of the unlawful behavior; and the circumstances of the offence.³³ In contrast to aggravating circumstances, the assessment of gravity involves consideration of the elements of the offence itself.³⁴
15. Article 70 offences against the administration of justice are serious. However, they are "by no means considered to be as grave as the core crimes under Article 5 of the Statute."³⁵ Judge Kourala, in a dissenting opinion relating to Mr. Kilolo's appeal of the Trial Chamber's decision on his provisional release, stated that the Article 70 offences for which Mr. Kilolo had been charged "are not at the higher end of the scale of seriousness."³⁶ Judge Ušacka echoed Judge Kourala in her dissenting opinion, stating that, while Article 70 offences "are undoubtedly directed against an important value – the proper and efficacious administration of international criminal justice – their gravity does not even come close to that of the core crimes."³⁷ The views of Judge Kourala and Judge Ušacka warrant due consideration by the Chamber.
16. It merits highlighting that Mr. Kilolo has been convicted cumulatively in relation to several counts. Cumulative convictions should not "unduly inflate" Mr. Kilolo's punishment; rather, the Chamber should "take into account the fact that largely the same conduct underlies multiple convictions when determining an appropriate sentence."³⁸

³² ICC-01/12-01/15-171, para. 71; ICC-01/04-01/07-3484, para. 43.

³³ See ICC-01/12-01/15-171, para. 76; ICC-01/04-01/07-3484, p. 20, 24, 26. These factors are set out in Rule 145(1)(c) of the RPE.

³⁴ ICC-01/05-01/08-3399, para. 15.

³⁵ ICC-01/05-01/13-558, para. 64.

³⁶ ICC-01/05-01/13-558-Anx1, para. 3.

³⁷ ICC-01/05-01/13-558-Anx2, para. 6.

³⁸ ICC-01/05-01/13-1989, para. 956.

2. Mr. Kilolo's individual circumstances warrant a sentence not exceeding time served

17. The Chamber must consider Mr. Kilolo's individual circumstances in determining his sentence.³⁹ These include Mr. Kilolo's age, education, and social and economic condition.⁴⁰ Mr. Kilolo is not someone likely to commit future offences, either before the ICC or elsewhere. Moreover, as set out *supra* in paragraph 4 and *infra* in paragraphs 40 to 41, his social and economic circumstances are such that a further period of detention will present real difficulties be devastating to his dependent family.

3. No aggravating circumstances exist in Mr. Kilolo's case that warrant a sentence exceeding time served

18. The Chamber must be convinced beyond a reasonable doubt of the existence of any aggravating circumstances.⁴¹ Aggravating circumstances must be linked to the offences of which the person has been convicted or to the person himself.⁴² The absence of any mitigating circumstances can never be an aggravating circumstance.⁴³ The Chamber cannot "double-count" factors assessed regarding the gravity of the offence as aggravating circumstances, and vice versa; nor can it consider a legal element of the offence or a mode of liability as an aggravating circumstance.⁴⁴

19. The Chamber must consider, as appropriate, any of the following aggravating circumstances:

(i) Any relevant prior criminal convictions for offences under the jurisdiction of the Court or of a similar nature;

(ii) Abuse of power or official capacity;

³⁹ Statute, Art. 78(1); RPE, Rule 145(1).

⁴⁰ Statute, Art. 145(1)(c).

⁴¹ ICC-01/12-01/15-171, para. 73; ICC-01/04-01/06-2901, paras. 33-34; ICC-01/04-01/07-3484-tENG-Corr, 23 October 2015, para. 34.

⁴² ICC-01/12-01/15-171, para. 73.

⁴³ ICC-01/05-01/08-3399, para. 19.

⁴⁴ *Id.*, para. 14.

- (iii) Commission of the offence where the victim is particularly defenceless;
- (iv) Commission of the offence with particular cruelty or where there were multiple victims;
- (v) Commission of the offence for any motive involving discrimination on any of the grounds referred to in Article 21, paragraph 3, of the Statute;
- (vi) Other circumstances which, although not enumerated above, by their nature are similar to those mentioned.⁴⁵

20. No aggravating circumstances exist in this case that justify further imprisoning Mr. Kilolo or ordering him to pay a fine.

- Mr. Kilolo has no prior criminal convictions.
- There were no identifiable victims in this case; thus, no victim was separately represented during the trial.
- The offences for which Mr. Kilolo has been convicted are not particularly cruel, nor were there multiple victims.
- The offences for which Mr. Kilolo has been convicted were not committed for any discriminatory motive.
- There are no other circumstances that could be considered aggravating.

4. Several mitigating circumstances exist that favor a sentence not exceeding time served

21. In contrast to aggravating circumstances, which must be proved beyond a reasonable doubt, the Chamber need only be satisfied of the existence of any mitigating circumstances on the balance of probabilities.⁴⁶ Mitigating circumstances do not need to be linked directly to the offence nor are they limited

⁴⁵ RPE, Rule 145(2)(b).

⁴⁶ ICC-01/04-01/06-2901, para. 34; ICC-01/04-01/07-3484-tENG-Corr, para. 34; ICC-01/12-01/15-171, para. 74. *See also Prosecutor v. Bralo*, IT-95-17-A, Judgement on Sentencing Appeal, 2 April 2007, para. 53; *Prosecutor v. Babić*, IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005, para. 43; *Prosecutor v. Simba*, ICTR-01-76-A, Judgement, 27 November 2007, para. 328; *Prosecutor v. Fofana & Kondewa*, SCSL-04-14-T, Sentencing Judgment, 9 October 2007, para. 40.

to the framework defined by the charges or the judgment; they need only be linked directly to the person convicted.⁴⁷

22. The Chamber must consider, as appropriate, mitigating circumstances such as:

- (i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress;
- (ii) The convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court.⁴⁸

23. The Chamber has considerable discretion to determine what constitutes a mitigating circumstance and the weight, if any, to give such a circumstance.⁴⁹

a. Mr. Kilolo has no prior history of criminal convictions or disciplinary violations

24. Prior to his arrest, Mr. Kilolo had no disciplinary record with the Brussels Bar,⁵⁰ though he is currently facing a disciplinary procedure in relation to his conduct arising from this case.⁵¹ Nor has he anywhere been the subject of any criminal prosecution.

25. The good character and ethics are conformed in the character statements presented to the Chamber.⁵² Good character before the commission of an offence has been considered as a mitigating circumstance at the International Criminal Tribunal for Rwanda ("ICTR") in the *Niyitegeka*⁵³ and *Ntakirutimana*.⁵⁴ This Chamber should adopt the same approach.

⁴⁷ ICC-01/12-01/15-171, para. 74.

⁴⁸ RPE, Rule 145(2)(a).

⁴⁹ ICC-01/12-01/15-171, para. 74.

⁵⁰ CAR-D21-0013-0018.

⁵¹ Mr. Kilolo provided this information orally to the Defence.

⁵² CAR-D21-0016-0001; CAR-D21-0016-0004; CAR-D21-0016-0005; CAR-D21-0016-0007; CAR-D21-0013-0001.

⁵³ *Prosecutor v. Niyitegeka*, ICTR-96-14-T, Judgment and Sentence, 16 May 2003, para. 496. *See also Prosecutor v. Semanza*, ICTR-97-20-A, Appeals Judgment, 20 May 2005, para. 397.

⁵⁴ *Prosecutor v. Ntakirutimana*, ICTR-96-10 & ICTR-96-17-T, Judgment and Sentence, 21 February 2003, para. 895.

26. Similarly, Mr. Kilolo's good character and good behavior during these proceedings and after his conviction are mitigating circumstances.⁵⁵ Good behaviour during provisional release was considered a mitigating circumstance by the International Criminal Tribunal for the former Yugoslavia ("ICTY") in the *Becaj* case.⁵⁶ This Chamber should adopt the same approach.

b. Mr. Kilolo has cooperated with the Court

27. Mr. Kilolo's cooperation with the Court is a mitigating circumstance.⁵⁷ His cooperation exceeds mere good behavior.⁵⁸ Cooperation with the Court does not have to be substantial to be a mitigating circumstance.⁵⁹ The Chamber should consider Mr. Kilolo's positive attitude as demonstrating cooperation with the Court as was done by the Trial Chamber in *Lubanga*.⁶⁰

28. Mr. Kilolo has cooperated with the Court and shown a positive attitude. Since his release from detention, Mr. Kilolo has informed the Registry of all trips outside Belgium that exceeded 24 hours. He did so even before this Chamber made such notice a condition of his provisional release. Mr. Kilolo has complied with all conditions of his provisional release and with all of the Chamber's orders. In this regard, the Presiding Judge duly noted:

First, Mr Kilolo, Mr Mangenda, Mr Babala and Mr Arido at no point in time have shown any indication that they will not face the trial or attend hearings scheduled by the Chamber. All convicted persons have been cooperating with the Court and complying with the Chamber's orders and its decisions in this respect.⁶¹

⁵⁵ ICC-01/12-01/15-171, para. 97, considering Mr. Al-Mahdi's behavior in detention in the context of considering his individual circumstances and any related aggravating or mitigating circumstances.

⁵⁶ *Prosecutor v. Becaj*, IT-03-66-T-R77, Judgment on Contempt Allegations, 27 May 2005, paras. 63-64.

⁵⁷ ICC-01/04-01/07-3484-tENG, para. 32; RPE, Rule 145(2)(a)(ii).

⁵⁸ ICC-01/04-01/07-3484-tENG-Corr, paras. 126-27.

⁵⁹ *Id.*

⁶⁰ ICC-01/04-01/07-3484-tENG-Corr, para. 128.

⁶¹ ICC-01/05-01/13-T-51-ENG ET WT, p. 33, lines 14-18 (emphasis added).

29. Mr. Kilolo has attended all but two and a half days of the 39 days of court hearings held by this Chamber.⁶² During court sessions, he has always been respectful toward the Judges, Court staff, other parties, and witnesses. He has always maintained his composure and dignity.

c. Mr. Kilolo has worked to promote the legal profession and contribute to his community

30. Mr. Kilolo has worked to promote the legal profession in Belgium and the DRC, with the aim of enhancing the capacity of lawyers of the Lubumbashi Bar. He played a central role in initiatives that brought together the Brussels and the Lubumbashi Bars.⁶³ His efforts led to the signing of a twinning agreement between both Bars, which has strengthened the exchange of knowledge between both institutions.⁶⁴ His work has contributed significantly to the training of lawyers of the Lubumbashi Bar.

31. Recently, Mr. Kilolo has been involved with developing a non-governmental organization that promotes water sanitation and hygiene in the Haut Lomali region of the DRC. The aim of the project is to assist in the fight against cholera and malnutrition by providing access to clean drinking water. Since mid-2016, he has been the project developer, working toward the project's intended launch in April 2017.⁶⁵

5. Other factors relevant to the Chamber's determination of Mr. Kilolo's sentence

32. The Chamber may consider any other factors it deems relevant to the determination of an appropriate, proportionate sentence.⁶⁶ Several factors exist that are relevant to this determination.

⁶² The Trial Chamber excused Mr. Kilolo from attendance at court in the afternoon of 21 October 2015, on 22 October 2015 and 11 March 2016. See ICC-01/05-01/13-1410-Conf and ICC-01/05-01/13-1410-Conf-Exp-Anx; ICC-01/05-01/13-1681. See also, ICC-01/05-01/13-T-44-ENG ET WT, p. 2, lines 5-6.

⁶³ CAR-D21-0016-0004; CAR-D21-0016-0005.

⁶⁴ CAR-D21-0016-0007.

⁶⁵ CAR-D21-0018-0048, p. 0048.

⁶⁶ RPE, Rule 145(1)(b).

a. Mr. Kilolo's physical and mental health have suffered

33. Mr. Kilolo's arrest, transfer to the ICC's Detention Unit in The Hague, and subsequent detention was traumatic for him. His 11-month detention seriously impacted his physical health. Mr. Kilolo suffered from [REDACTED],⁶⁷ which [REDACTED].

34. Kilolo was arrested, detained, strip-searched, confined, and thereby suddenly separated from his wife and children and compelled to sever his social and professional ties. As Mr. Kilolo emphasized in his oral statement,⁶⁸ the suffering he has endured during these proceedings has profoundly impacted his mental health.

b. Mr. Kilolo's personal and professional reputation has suffered

35. The seriousness of the offences for which Mr. Kilolo has been convicted and the widespread publicity surrounding his conviction has significantly impacted his national and international reputation. Moreover, it has further contributed to the punishment and ignominy he has already suffered.

36. Mr. Kilolo's conviction was widely disseminated in the press and media in various countries.⁶⁹ The ICC's press services posted information about his conviction on the ICC's website, through a press release available both in French and English.⁷⁰ The ICC held a press conference regarding the Trial Judgment in

⁶⁷ CAR-D21-0018-0004, p. 0008, question 22.

⁶⁸ ICC-01/05-01/13-T-48-Red-ENG, p. 118, lines 19 to 25, p. 119, lines 1 to 2.

⁶⁹ See, e.g., *La CPI juge Jean-Pierre Bemba Coupable de Subornation de Témoins*, LE MONDE, 20 October 2016, available at http://www.lemonde.fr/afrique/article/2016/10/19/la-cpi-juge-jean-pierre-bemba-coupable-de-subornation-de-temoins_5016626_3212.html. See also Harriet Agerholm, *Congo's Jean-Pierre Bemba Guilty of Bribing Witnesses International Criminal Court Rules*, THE INDEPENDENT, 19 October 2016, available at <http://www.independent.co.uk/news/world/africa/congo-s-jean-pierre-bemba-found-guilty-witness-bribing-international-criminal-court-human-rights-war-a7370731.html>. See also *DRC Congo's Bemba Found Guilty at ICC of Witness Bribing*, BBC, 19 October 2016, available at <http://www.bbc.com/news/world-africa-37706424>.

⁷⁰ See *Affaire Bemba et autres : La Chambre de première instance VII de la CPI déclare cinq accusés coupables d'atteintes à l'administration de la justice*, 19 October 2016, available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1245&ln=fr>. See also *Bemba et al.: ICC Trial Chamber Finds Five Accused Guilty of Offences Against the Administration of Justice*, 19 October 2016, available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1245>.

Kinshasa on 19 October 2016.⁷¹ Several videos of the hearing were made publicly available on YouTube in French and English.⁷² Information about Mr. Kilolo's conviction also was posted on the ICC's Twitter page, which has more than 197,000 subscribers and followers.⁷³ Several posts on the issue were published on 19 October 2016 in French and English.⁷⁴

c. Mr. Kilolo's professional career has suffered

37. Mr. Kilolo's arrest, detention, and trial have significantly impacted his practice, virtually bringing it to a standstill. During his detention, Mr. Kilolo had to stop all activities related to his law firm and his role as lead counsel for Mr. Bemba. The only income he received during this period was arrears of remuneration paid by the Court.⁷⁵

38. Since his provisional release, Mr. Kilolo has tried to resume his activities as a lawyer at the Brussels Bar. However, after 11 months of inactivity Mr. Kilolo has lost a significant portion of his clientele, making resumption of his professional work extremely difficult. Although his clientele had already been reduced because of the relocation of his activities to The Hague, his complete inactivity due to his detention resulted in a significant loss of business.

39. Because of his convictions, Mr. Kilolo assuredly will be struck off the ICC list of counsel. He most likely will be further sanctioned by the Brussels Bar.

d. Mr. Kilolo's family has suffered

40. Mr. Kilolo's detention had a significant emotional and financial impact on Mr. Kilolo's wife, children, parents, and extended family. His wife and children were left without their husband and father, respectively, for almost a year. Mr. Kilolo's

⁷¹ See ICC Twitter posts dated 19 October 2016, *available at* <https://twitter.com/intlcrimcourt?lang=fr>.

⁷² As of 07 December 2016, the English version of the video has been viewed 258 times. *See* <https://www.youtube.com/watch?v=T0uzRhIsheg>. As of 07 December 2016, the French version of the video has been viewed 539 times. *See* <https://www.youtube.com/watch?v=x4cuVgQPue8>.

⁷³ See ICC's Twitter account, *available at* <https://twitter.com/intlcrimcourt?lang=fr>.

⁷⁴ *See* ICC Twitter posts dated 19 October 2016, *available at* <https://twitter.com/intlcrimcourt?lang=fr>.

⁷⁵ ICC-01/05-01/13-1014-Red, paras. 17, 24.

detention was traumatizing for his wife and children.⁷⁶ During his detention his wife and children were sad, defeated, and on the verge of depression.⁷⁷ His wife was forced to stop working to care for their children⁷⁸ and forgo her monthly income of approximately [REDACTED] per month. She had to sell the family vehicles and rent a part of their home to make ends meet.⁷⁹

41. Mr. Kilolo's parents also were deeply affected by his detention.⁸⁰ Not only were members of his family emotionally affected: Mr. Kilolo was not able to cover the medical expenses of his parents.⁸¹ Other members of Mr. Kilolo's extended family who live in precarious conditions in the DRC and rely on his support also suffered because of his detention.⁸²

6. Any additional sentence of imprisonment should be suspended

42. Respectfully, if the Chamber decides to impose a sentence exceeding the 11 months Mr. Kilolo has already served in detention, any additional term of imprisonment should be suspended.

43. Article 70 of the Statute and Rules 145 and 146 of the RPE do not expressly provide that a Chamber may impose a suspended sentence. Nonetheless, the power to suspend a sentence is part of the Chamber's inherent authority.

44. Similar to the Rome Statute, neither the ICTY Statute nor the Special Court for Sierra Leone ("SCSL") Statute provide for suspended sentences. Even so, both the ICTY and the SCSL have imposed such sentences within the context of contempt cases, which parallel Article 70 offences at the ICC.

45. In the *Bulatović* case, the ICTY Trial Chamber sentenced Mr. Kosta Bulatović to a four-month term of imprisonment, but suspended the sentence for two years "so

⁷⁶ See Witness D21-011. CAR-D21-0018-0004, p. 0007, question 18.

⁷⁷ See Witness D21-010. CAR-D21-0018-0065, p. 0069, lines 101-113, p. 0071, lines 154-157. See also CAR-D21-0018-0073, p. 0069, lines 101-113, p. 0071, lines 154-157.

⁷⁸ CAR-D21-0018-0004, p. 0007, question 18.

⁷⁹ *Id.*

⁸⁰ See Witness D21-011. CAR-D21-0018-0004, p. 0007-0008, question 19.

⁸¹ *Id.*

⁸² See Witness D21-011. CAR-D21-0018-0004, p.0008, question 20.

that the sentence shall not take effect unless during that period the Respondent commits another offence anywhere that is punishable with imprisonment, including contempt of court.”⁸³

46. In the *Rašić* case, the ICTY Trial Chamber imposed a 12-month term of imprisonment, but suspended eight months of the sentence. The Trial Chamber considered the particularly difficult circumstances Ms. Jelena Rašić would face as the only female detainee at the United Nations Detention Unit and the quasi-solitary confinement that would follow. The Chamber also considered Ms. Rašić’s comparably young age and the fact that the imprisonment would have been her first.⁸⁴ The Appeals Chamber rejected the Prosecution’s appeal of Ms. Rašić’s sentence, which argued that the Trial Chamber acted *ultra vires* by suspending part of the sentence.⁸⁵ The Appeals Chamber explained that although the ICTY Rules do not expressly refer to the authority of trial chambers to suspend sentences, “the Trial Chamber’s power to suspend a sentence is inherent to its authority to impose one. Such power is operative at the time of sentencing, and not thereafter, and for this reason is entirely distinct from the power to grant pardon or commutation.”⁸⁶ The Appeals Chamber considered that the Trial Chamber’s decision to suspend Ms. Rašić’s sentence was an integral part of the Trial Chamber’s discretion in determining a sentence.⁸⁷

47. In the *Bangura et al.* case, the SCSL Trial Chamber imposed a suspended sentence on the condition that Mr. Samuel Kargbo remained on good behavior for two years.⁸⁸ He had been convicted of knowingly and willfully interfering with the SCSL’s administration of justice by offering a bribe to a witness who testified

⁸³ *Prosecutor v. Milošević*, Contempt Proceedings against Kosta Bulatović, IT-02-54-R77.4, Decision on Contempt of the Tribunal, 13 May 2005, para. 19.

⁸⁴ *Prosecutor v. Rašić*, IT-98-32/1-R77.2, Written Reasons for Oral Sentencing Judgement, 6 March 2012, para. 31.

⁸⁵ *Prosecutor v. Rašić*, IT-98-32/1-R77.2-A, Prosecution Appeal Brief, 16 March 2012, para. 6. *Prosecutor v. Rašić*, IT-98-32/1-R77.2-A, Judgement, 16 November 2012.

⁸⁶ *Prosecutor v. Rašić*, IT-98-32/1-R77.2-A, Judgement, 16 November 2012, para. 17.

⁸⁷ *Id.*, para. 18.

⁸⁸ *Independent Counsel v. Bangura et al.*, SCSL-11-02-T, Sentencing Judgement in Contempt Proceedings, 11 October 2012, paras. 92, 101.

before a Chamber and by disclosing information relating to the proceedings in knowing violation of an order of a Chamber.⁸⁹

48. The power to suspend sentences is expressly provided for in the laws of several domestic jurisdictions, indicating that such power may be considered a general principle of law applicable at the ICC under Article 21(1)(c) of the Statute.⁹⁰ In Belgium, a judge may partially or entirely suspend a sentence if the convicted person has not been previously convicted of a term of imprisonment of three years, or the equivalent sentence recognized pursuant to Article 99 *bis* of the Criminal Code, and if the sentence imposed is not of a term of more than five years of imprisonment.⁹¹ Other states also provide for suspended sentences in certain circumstances. For example, in France, custodial sentences not exceeding five years may be suspended⁹² and in the United States, both federal law⁹³ and state law⁹⁴ provide for the suspension of sentences.

49. Should the Chamber determine that a sentence of time served is not appropriate in this case, a suspended sentence would better achieve the objectives of sentencing than ordering Mr. Kilolo to spend additional time in prison. The time Mr. Kilolo has already served in detention, along with the financial difficulty and

⁸⁹ *Id.*, para. 1.

⁹⁰ Article 21(1)(c) provides that the Court may apply “general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.”

⁹¹ See Article 8 of the 29 June 1964 Belgian law, available at http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1964062930&table_name=loi.

⁹² See Article 132-31 of the French Penal Code, available at <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719&dateTexte=20161201>. An English translation of this code is available at <https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>.

⁹³ 18 U.S.C. §§ 3551(b), 3561 (2012), regarding the imposition of probation in place of a term of imprisonment, available at <https://www.gpo.gov/fdsys/pkg/USCODE-2011-title18/pdf/USCODE-2011-title18.pdf>.

⁹⁴ See, e.g., California, CAL. PENAL CODE § 1170(a)(3) (1976), available at http://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=PEN&division=&title=7.&part=2.&chapter=4.5.&article=1; New York, N.Y. PENAL LAW § 65, available at <http://ypdcrime.com/penal.law/article65.htm#p65.00>; Texas, TEXAS CRIM. PRO. CODE, Art. 42A.053 (2016), available at <http://www.statutes.legis.state.tx.us/Docs/CR/htm/CR.42A.htm>; Illinois, 730 ILCS 5/5-6-1 (2015), available at <http://www.ilga.gov/legislation/ilcs/fulltext.asp?DocName=073000050K5-6-1>.

emotional and mental strain it has caused him, has been sufficient punishment for his offences. Imposing a suspended sentence on the condition of good behavior would deter Mr. Kilolo from engaging in any similar behavior and would ensure that he can begin to re-build his life while providing for his family.

B. No fine, or only a limited fine, should be imposed

50. The Chamber may impose a fine for an offence against the administration of justice.⁹⁵ Respectfully, no fine should be imposed upon Mr. Kilolo. Mr. Kilolo is the sole financial provider for his wife, children, and extended family.⁹⁶ Without his financial support, Mr. Kilolo and his family risk financial hardship. The imposition of any fine, however minimal, will interfere with his ability to continue to provide for himself and his family.⁹⁷

C. The proposed sentence is proportionate to the offences and Mr. Kilolo's degree of culpability and meets the goals of sentencing

51. The Chamber must impose a sentence that, in its totality, reflects Mr. Kilolo's degree of culpability⁹⁸ and is proportionate to the offences and his culpability.⁹⁹

52. A sentence must satisfy three goals: retribution, deterrence, and rehabilitation.¹⁰⁰ Retribution expresses the international community's condemnation of the offence, not its desire for revenge.¹⁰¹ Deterrence implies that an adequate sentence discourages the convicted person from recidivism (specific deterrence) and deters

⁹⁵ Statute, Art. 70(3). *See also* RPE, Rule 166(3): "Each offence may be separately fined and those fines may be cumulative. Under no circumstances may the total amount exceed 50 per cent of the value of the convicted person's identifiable assets, liquid or realizable, and property, after deduction of an appropriate amount that would satisfy the financial needs of the convicted person and his or her dependants."

⁹⁶ *See supra* paras. 4 and 41.

⁹⁷ The Defence will fully address the matters contained in the Registry's Solvency Report in due course. At this stage it is noted [REDACTED].

⁹⁸ RPE, Rule 145(1)(a).

⁹⁹ ICC-01/05-01/08-3399, para. 12; ICC-01/04-01/06-3122, paras. 39-40.

¹⁰⁰ ICC-01/05-01/08-3399, paras. 10-11; ICC-01/04-01/07-3484, paras. 37-38.

¹⁰¹ ICC-01/05-01/08-3399, para. 11.

others from committing similar offences (general deterrence).¹⁰² Rehabilitation addresses the desire to ease the convicted person back into society.¹⁰³

53. The proposed sentence is proportionate to the offences for which Mr. Kilolo was convicted and his culpability.¹⁰⁴ Mr. Kilolo was convicted of Article 70 offences, which are not as grave as Article 5 offences. For these latter offences, which “threaten the peace, security, and well-being of the world,”¹⁰⁵ the primary goals of sentencing are punishment and deterrence.¹⁰⁶ Rehabilitation is given less weight.¹⁰⁷ By contrast, Mr. Kilolo’s convictions involve offences against the administration of justice. These offences, although serious, do not involve any degree of physical or emotional harm or violence to individual victims, nor do they directly threaten the peace, security, and well-being of the world.

54. Rehabilitation should be the central goal of any sentence imposed upon Mr. Kilolo. The goals of sentencing would be met with a sentence of time served with no fine, or in the alternative, a suspended term of imprisonment. The serious and significant suffering endured by Mr. Kilolo and his family during his 11 months of detention are sufficient retribution and deterrence for his offences, as are the long-lasting damage to Mr. Kilolo’s personal and professional reputation and his professional career. Moreover, the example set by the Court in charging, investigating, detaining, and prosecuting Mr. Kilolo for these acts will deter similar acts by other lawyers involved in ICC proceedings.

55. The proposed sentence punishes Mr. Kilolo for his offences and deters him and others from committing these offences in the future. It rehabilitates him by permitting him to reintegrate into society and become a productive member of the community again.

¹⁰² *Id.*, para. 11.

¹⁰³ ICC-01/04-01/07-3484, para. 38.

¹⁰⁴ ICC-01/04-01/06-3122, para. 40.

¹⁰⁵ ICC-01/04-01/07-3484, para. 37.

¹⁰⁶ ICC-01/05-01/08-3399, para. 10.

¹⁰⁷ *Id.*, para. 11.

56. As indicated *supra* in paragraphs 45 to 48 and *infra* in paragraphs 58 to 64, the proposed sentence aligns with sentences imposed in similar cases in other international and national jurisdictions.

1. ICTY sentences in contempt cases

57. At the ICTY, contempt offences are punishable under Rule 77 of the Rules of Procedure and Evidence (“Rule 77”) by a maximum term of imprisonment of seven years and/or a fine. In practice, the chambers have imposed sentences of imprisonment that range from three months to two years, or fines, or both; in some cases, the sentences have been wholly or partially suspended.¹⁰⁸

58. In the *Vujin* case, Mr. Milan Vujin, former lead counsel to Mr. Duško Tadić, was charged under Rule 77 with contempt for instructing witnesses, who were preparing to make statements to his co-counsel, to lie; nodding his head to indicate during witness interviews when the witnesses should say yes or no; intimidating witnesses in a manner that dissuaded them from telling the truth; knowingly instructing a witness to make false statements to the Tribunal; and paying a person who gave a statement when he was pleased with the information provided.¹⁰⁹ He was convicted of contempt for: (i) putting forward a case that he knew to be false in relation to the weight to be given to statements made by other persons, and (ii) manipulating two witnesses by seeking to avoid any identification by them of persons who may have been responsible for the offences for which Mr. Tadić had been convicted.¹¹⁰ He was ordered to pay a fine of 15,000 DFL (approximately 6,800 euros). Although emphasizing the seriousness of Mr. Vujin’s offences, the Appeals Chamber held that imprisonment was not appropriate and that a fine was adequate punishment.¹¹¹

¹⁰⁸ See Annex.

¹⁰⁹ *Prosecutor v. Tadić*, IT-94-1-A-R77, Judgement on Allegations of Contempt against Prior Counsel Milan Vujin, 31 January 2000, para. 2.

¹¹⁰ *Id.*, para. 160.

¹¹¹ *Id.*, paras. 166-73.

59. In the *Rašić* case, discussed *supra* in paragraph 46, Ms. Rašić, a member of the Milan Lukić Defence Team,¹¹² was sentenced to 12 months in prison for knowingly and wilfully interfering with the administration of justice by bribing Mr. Zuhdija Tabaković and two other persons, and by inciting Mr. Tabaković to bribe two other potential witnesses.¹¹³ Ms. Rašić pleaded guilty to the charges. The Trial Chamber gave her credit for the 78 days she spent in detention and suspended the last eight months of her sentence.¹¹⁴ The Appeals Chamber upheld Ms. Rašić's sentence.¹¹⁵

60. In the same matter, Mr. Tabaković was convicted of interfering with the administration of justice for signing a statement that he knew to be false in exchange for a bribe¹¹⁶ and for bribing two persons to sign false statements.¹¹⁷ Mr. Tabaković pleaded guilty to three of the six counts brought against him.¹¹⁸ He was sentenced to a single term of three months of imprisonment, which represented time served and resulted in his immediate release.¹¹⁹

61. In the *Beqaj* case, Mr. Beqa Beqaj was convicted of contempt for interfering with a witness in an attempt to get the witness to withdraw his statement.¹²⁰ In determining an appropriate sentence, the Trial Chamber considered the seriousness of the offence, the aggravating circumstances (Mr. Beqaj knew the witness was particularly vulnerable and in a witness protection program),¹²¹ and the mitigating circumstances (Mr. Beqaj's good character, lack of a criminal record, and conduct while on provisional release).¹²² The Trial Chamber held that

¹¹² *Prosecutor v. Rašić*, IT-98-32/1-R77.2, Written Reasons for Oral Sentencing Judgment, 6 March 2012, para. 19.

¹¹³ *Id.*, paras. 10-13.

¹¹⁴ *Id.*, para. 1.

¹¹⁵ *Prosecutor v. Rašić*, IT-98-32/1-R77.2-A, Judgement, 16 November 2012, p. 26.

¹¹⁶ *Prosecutor v. Tabaković*, IT-98-32/1-R77.1, Sentencing Judgement, 18 March 2010, para. 5.

¹¹⁷ *Id.*, para. 6.

¹¹⁸ *Id.*, para. 3.

¹¹⁹ *Id.*, para. 19.

¹²⁰ *Prosecutor v. Beqaj*, IT-03-66-T-R77, Judgment on Contempt Allegations, 27 May 2005, paras. 40 and 55.

¹²¹ *Id.*, paras. 61-62.

¹²² *Id.*, paras. 63-64.

a four-month term of imprisonment was the most appropriate punishment to achieve the objectives of a sentence.¹²³

2. SCSL sentences in contempt cases

62. In the *Bangura et al.* case, discussed *supra* in paragraph 47, the four accused were convicted of knowingly and willfully interfering with the administration of justice by offering a bribe to a witness who had testified before the Trial Chamber.¹²⁴ After a plea, Mr. Kargbo was sentenced to two concurrent sentences of 18 months' imprisonment, suspended on the condition of good behavior for two years.¹²⁵ The Trial Chamber considered the following as mitigating circumstances: (i) Mr. Kargbo cooperated with the Independent Counsel during the investigation; (ii) Mr. Kargbo was pressured by his friend, Mr. Sesay, and had allowed his friendship to be abused in order to persuade a witness to change his testimony; (iii) Mr. Kargbo was not part of the initial planning of the scheme; and (iv) Mr. Kargbo had complied with his bail conditions.¹²⁶ The other co-accused were sentenced after trial to terms of imprisonment between 18 months and two years. These sentences were less than one-third as long as the seven-year maximum sentence provided under Rule 77 of the SCSL's Rules of Procedure and Evidence.¹²⁷

63. In the *Taylor* case, Mr. Prince Taylor, an investigator for the Charles Taylor Defence, was convicted of knowingly and wilfully interfering with witnesses who had testified before the Trial Chamber by attempting to get them to recant their testimony.¹²⁸ For four of the five counts for which he was convicted, the Trial Chamber imposed a two-year prison sentence. For the fifth count, the Trial Chamber imposed a sentence of two and one-half years. Those sentences were to

¹²³ *Id.*, para. 67 and p. 22

¹²⁴ *Independent Counsel v. Bangura et al.*, SCSL-11-02-T, Sentencing Judgement in Contempt Proceedings, 11 October 2012, para. 1.

¹²⁵ *Id.*, para. 101.

¹²⁶ *Id.*, paras. 77-78.

¹²⁷ *Id.*, para. 61.

¹²⁸ *Independent Counsel v. Taylor*, SCSL-12-02-T, Judgement in Contempt Proceedings, 11 February 2013, paras. 1 and 213.

be served concurrently.¹²⁹ The Trial Chamber considered that the sentence imposed had to fulfill the objectives of deterrence, retribution, and rehabilitation.¹³⁰ The Trial Chamber recognized as mitigating circumstances that Mr. Taylor had had a “fine record of work,” gave “excellent support [to] his family,” and that the loss of that employment had a bad effect on his family.¹³¹ The Trial Chamber also considered Mr. Taylor’s lack of prior criminal convictions, his standing in his community and church community, his family’s loss of status in their community, and his contributions to his community and to the Court’s justice system.¹³² The Trial Chamber considered that a heavier sentence was not warranted.¹³³ The Trial Chamber declined to impose a fine, considering that a fine would not have a deterrent, retributive, or rehabilitative effect on Mr. Taylor as his family likely would have to pay it.¹³⁴ The Appeals Chamber later quashed his conviction on appeal.¹³⁵

3. Early release practices at the ICTY and SCSL

64. The *Rašić*, *Bangura et al.*, and *Taylor* cases indicate that other international tribunals have imposed longer sentences than the 11-month time served sentence proposed in Mr. Kilolo’s case. In relation to those cases, it is important to highlight that the ICTY and SCSL permit early release under certain conditions,¹³⁶ which means that convicted persons do not necessarily serve the full length of their sentences. Typically, persons who have been on good behavior while

¹²⁹ *Independent Counsel v. Taylor*, SCSL-12-02-T, Sentencing Judgement, 14 February 2013, para. 56-57.

¹³⁰ *Id.*, para. 55.

¹³¹ *Id.*, para. 51.

¹³² *Id.*, paras. 51 and 55.

¹³³ *Id.*, para. 55.

¹³⁴ *Id.*

¹³⁵ *Independent Counsel v. Taylor*, SCSL-12-02-A, Judgement in Contempt Proceedings, 30 October 2013, para. 66.

¹³⁶ See ICTY Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the International Tribunal, IT/146/Rev.3, 16 September 2010; SCSL Practice Direction on the Conditional Early Release of Persons Convicted by the Special Court of Sierra Leone, 1 October 2013 (“SCSL Practice Direction on Early Release”).

incarcerated are only required to serve two-thirds of the sentence imposed, provided they have fulfilled other conditions imposed by the court.¹³⁷

III. CONCLUSION AND RELIEF SOUGHT

65. Mr. Kilolo should be sentenced to a term of imprisonment not exceeding time served with no fine imposed, or, in the alternative, a suspended sentence of imprisonment. The gravity of the offences and his individual circumstances warrant such a sentence. His convictions are entirely out of character. They are a stain on his otherwise exemplary record. Mr. Kilolo's arrest, 11-month detention, and his convictions are significant punishment for him, and are a sufficient deterrent to him and others. Any further imprisonment would have devastating consequences for Mr. Kilolo's physical and mental health, and his family's emotional and financial wellbeing. Imposing a sentence of time served with no fine would fulfill the primary goal of rehabilitation: easing Mr. Kilolo back into society. Such a sentence will ensure that he is sanctioned while allowing him to rebuild his life.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Chamber to **IMPOSE** a sentence not exceeding the time Mr. Kilolo has served in detention. In the alternative, should the Trial Chamber wish to impose a greater penalty, it should **SUSPEND** any additional term of imprisonment in excess of the time Mr. Kilolo has served in detention; and/or **IMPOSE** a limited financial penalty.

¹³⁷ SCSL Practice Direction on Early Release, Section 2, permitting conditional early release after two-thirds of a sentence has been served, provided certain conditions have been fulfilled. *See also, e.g., Prosecutor v. Simić*, IT-95-9-ES, Decision of President on Early Release of Blagoje Simić, 15 February 2011, para. 20.



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Respectfully submitted this 15 December 2016.

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