

**Cour  
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**International  
Criminal  
Court**

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### **APPEALS CHAMBER**

**Before:** Judge Sanji Mmasenono Monageng, Presiding Judge  
 Judge Sang-Hyun Song  
 Judge Akua Kuenyehia  
 Judge Erkki Kourula  
 Judge Anita Ušacka

**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**

**Brief in Support of the "*Acte d'appel contre la 'Decision on the 'Demande de mise en  
 liberté provisoire de Maître Aimé Kilolo Musamba' (ICC-01/05-01/13-259)"*  
 (ICC-01/05-01/13-260)**

**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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**Victims Participation and Reparations  
Section**

**Other**

## I. INTRODUCTION

1. *Purpose*: Pursuant to Regulation 64-5 of the Rules of the Court, the present brief in support of the appeal<sup>1</sup> is timely filed to the Appeals Chamber by the Defence for Mr Aimé Kilolo Musamba (hereinafter “the Defence” and “Mr Kilolo” respectively) to the Decision of the Pre-Trial Chamber II on the ‘Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba’ (“the Decision”)<sup>2</sup> by which the Single Judge (“the Judge”) denied Mr Kilolo’s Application for Interim Release.<sup>3</sup>
2. *Structure*: This brief will address the relevant legal and factual arguments in support of its appeal by reference to the particularity of the matter at hand (III).

## II. PROCEDURAL BACKGROUND

3. The procedural history of this case can be found in the “Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba” (“Initial Request”).<sup>4</sup>

## III. PARTICULARITY OF THE MATTER AT HAND

### A. THE CONTINUED DETENTION OF MR KILOLO IS A MANIFEST INJUSTICE AND A BLATANT VIOLATION OF THE PRESUMPTION OF INNOCENCE

4. The Rome Statute<sup>5</sup> – as well as long-established rules of international criminal law and international human rights law<sup>6</sup> – enshrines the principle of presumption of innocence, unequivocally stating that an accused must be

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<sup>1</sup> ICC-01/05-01/13-260.

<sup>2</sup> Decision on the “Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba”, 14 March 2014, ICC-01/05-01/13-259.

<sup>3</sup> ICC-01/05-01/13-42.

<sup>4</sup> Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba, 16 décembre 2013, ICC-01/05-01/13-42.

<sup>5</sup> Rome Statute, Art. 66.

<sup>6</sup> International Covenant on Civil and Political Rights (1966), Art. 14(2); Universal Declaration (1948) Art.11(1); European Convention on Human Rights (1950) Art. 6(2); American Convention on Human Rights (1969) Art. 8(2); African Charter on Human and Peoples’ Rights (1981) Art. 7(1).

presumed innocent until proved guilty before the Court and that the onus to prove the accused's guilt lies with the Prosecutor alone.<sup>7</sup> To countervail this presumption of innocence and assume guilt instead is an error of law amounting to a manifest injustice.

**(a) The Judge's Clear Bias Mutates the Presumption of Innocence into a Presumption of Guilt**

5. From the outset, the Judge evinces a presumption of guilt as opposed to one of innocence, evidenced in the (i) unsubstantiated denial of Mr Kilolo's request for a public hearing; (ii) language used throughout the Decision; (iii) persistent refusal to consider any mitigating factors; (iv) lack of concrete and specific reasoning; and (v) manifest discrimination against Mr Kilolo.

*i. Inexplicable Denial of Mr Kilolo's Request for a Public Hearing*

6. After his first appearance and as was his right, Mr Kilolo requested in accordance with Rule 118(3) of the ICC Rules<sup>8</sup> a public hearing to discuss the possibility of interim release and the plethora of conditions to which he was willing to stipulate.<sup>9</sup> In arbitrarily denying the request, the Judge particularly prejudiced Mr Kilolo to the extent that he and the Belgian authorities – who had expressed a desire to be present at the hearing – could have come to a mutual compromise and understanding as to the conditions of an interim release were Mr Kilolo to be released to Belgium.

*ii. The Language of the Judge Evidences a Bias Against Mr Kilolo*

7. From the opening paragraphs of a Decision littered with language implying guilt, the Judge is clear: Mr Kilolo has been found guilty in the court of public and judicial opinion. Indeed, the Judge often references Mr Kilolo's actual

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<sup>7</sup> Rome Statute Arts. 66(1) and 66(3).

<sup>8</sup>Rule 118,

<sup>9</sup> ICC-01/05-01/13-42 para. 71.

commission of crimes as opposed to the *alleged* commission of offenses, referencing for example “a scheme of witness corruption” in which Mr Kilolo “played a determinant role”<sup>10</sup> and was “particularly prominent”.<sup>11</sup> 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”<sup>12</sup> and further chastises him for his serious and significant role in “disrupt[ing] justice”.<sup>13</sup>

8. Bound by the principles of independence,<sup>14</sup> impartiality<sup>15</sup> and integrity<sup>16</sup>, judges must balance the fair and impartial realization of international criminal justice with the respect of an accused’s rights. In noting that the Judge’s comments are laced with bias and have been issued even before the confirmation of charges, the Defence bemoans the outrageousness of a judge – singularly charged with dispensing judicial protection – utilizing language revealing such patent bias and presumptions of guilt.

*iii. The Refusal to Consider Mitigating Factors Prejudices Mr Kilolo*

9. In assessing the criteria to grant interim release, the Judge refused to take into real consideration any mitigating factors, stating instead that “[p]ersonal circumstances of education, professional or social status are per se neutral and inconclusive in respect of the need to assess the existence of flight risks. Similarly, the fact that an individual has never in the past been charged or found guilty of offences...does not as such impact the evaluation of the risks...”<sup>17</sup>. However, the decision to grant interim release is not made in a legal vacuum and requires a holistic assessment of the accused’s circumstances in its totality. To simply

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<sup>10</sup> Decision, para.. 13.

<sup>11</sup> *Ibid.* para. 31.

<sup>12</sup> *Ibid.* para. 39.

<sup>13</sup> *Ibid.* para. 23

<sup>14</sup> ICC Code of Judicial Ethics, Art. 3.

<sup>15</sup> *Ibid.* Art. 4.

<sup>16</sup> *Ibid.* Art. 5.

<sup>17</sup> *Ibid.* para. 23.

arbitrarily deny the value of the above factor without any real reason is to contravene judicial equity and presuppose guilt.

*iv. The Decision Lacks Concrete and Specific Reasoning Supporting Detention*

10. In addressing the Appeals Chamber's criticism that Article 60(2) decisions on interim release must be accompanied by a full reasoning, the Judge expresses his doubts as to "actual existence of such a need".<sup>18</sup> Noting that the presumption of innocence does not *per se* prevent detention as a necessary *exception*<sup>19</sup>, he did however concede detention must be justified and justifiable.
11. However, to justify Mr Kilolo's detention, the Judge referenced "material attached to the Prosecutor's Application [for an arrest warrant]"<sup>20</sup> which included such 'compelling evidence' as Mr Kilolo's contact with and preparation for deposition of Defence witnesses<sup>21</sup> in his capacity as the Lead Defence Counsel in the Main Case and his "*comparisons between, and complaints about, witnesses' statements.*"<sup>22</sup> Additionally, the Judge thrice refers to Mr Kilolo's receipt from *another* individual of documents whose authenticity is now disputed on the basis of a *singular* witness.<sup>23</sup>
12. That the Judge apparently believes such highly tenuous and unsubstantiated "evidence" sufficient to *indefinitely* detain Mr Kilolo is decidedly prejudicial and amounts to a presumption of guilt, particularly in the absence of any concrete evidence rendering detention suitable in this case. Continued detention *after arrest* is subject to the conditions articulated in Article 58(1)(b) and necessitates an *ex novo* review. Indeed, it cannot be assumed – on the basis of an Article 58(1)(a) arrest warrant issued against Mr Kilolo more than four months ago – that reasonable grounds for detention *continue* to exist and

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<sup>18</sup> *Ibid.* para. 4.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.* paras. 6, 7 and 8.

<sup>21</sup> *Ibid.* para. 11.

<sup>22</sup> *Ibid.* para. 13.

<sup>23</sup> *Ibid.* paras. 6, 7 and 8.

it was erroneous for the judge to simply refer to the materials listed in the arrest warrant as justification for continued detention.

*v. The ICC Cannot Tolerate Racial Discrimination*

13. Mr. Kilolo is a citizen of Belgium and was in possession only of Belgian identity and travel documents, until their surrender to the Registry. In his Decision, the Judge states Mr Kilolo is not a candidate for interim release because of the (unjustified) possibility that he might flee to Cameroon (a non-State party to the Statute) or the Congo (State Party).<sup>24</sup> However, had this been a Caucasian suspect belonging to another Schengen State such as France or Italy, one wonders if such suspect would have similarly have been accused of wanting to flee to Africa. It is clear that the Judge assumed Mr Kilolo would flee to Africa – and abandon his family and professional career – simply on the basis of his skin colour.

(a) Article 70 Offenses are not Crimes of the Utmost Gravity

14. In depriving Mr Kilolo of his liberty, the 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).<sup>25</sup> This amounts to an unprecedented upgrading and equating of offences (conviction of which is subject to a maximum of five years) to those heinous crimes punishable by life in prison.

15. 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 aggression.<sup>26</sup> They *do not* include

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<sup>24</sup> Decision, para. 20.

<sup>25</sup> *Ibid.*, para. 23

<sup>26</sup> Rome Statute, Art. 5.

Article 70 offenses. The Judge cannot argue that the gravity of Mr Kilolo's alleged offenses are so heinous as to justify protracted detention.

(b) Detention is the Exception and Not the Norm

*i. Detention is an Exception To be Utilized as a Last Resort*

16. International law is clear in that detention is the exception and not the rule, a premise affirmed in *Gbagbo*.<sup>27</sup> It is not a precautionary measure to be meted out on unsubstantiated evidence, and must be both justified and justifiable, *and* necessary and proportionate.<sup>28</sup> Deprivation of liberty by way of pre-trial detention is an exception to be used as a means of *last resort*.<sup>29</sup> As a general rule, persons awaiting trial shall not be detained in custody<sup>30</sup> and alternatives shall be employed at as early a stage as possible, lasting *no longer than necessary*.<sup>31</sup> Accordingly, interim release cannot be considered an *entitlement or privilege*; rather, it is the detention that must be justified.

17. Being tasked with interpreting and applying law in accordance with internationally recognized human rights<sup>32</sup>, the Chambers are obliged to judiciously balance the competing interests of an individual's deprivation of liberty and effective administration of justice. This is particularly germane when detention is ordered prior to the confirmation of charges. Though detention may be ordered upon execution of an arrest warrant, it *should only be prolonged upon the Prosecutor's indubitable showing of concrete and specific evidence* that the accused satisfies Article 58(1)(b). Any decision to deny interim release must be accompanied by full reasoning.<sup>33</sup>

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<sup>27</sup> ICC-02/11-01/11-180-Red, para. 42.

<sup>28</sup> Decision, para. 3.

<sup>29</sup> UN Human Rights Committee, *General Comment No. 08: Right to liberty and security of persons (Art. 9) 30/06/1982*, para. 3.

<sup>30</sup> International Covenant on Civil and Political Rights, Art. 9(3)

<sup>31</sup> UNGA Res. 45/110, United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules), (14 December 1990), principles 6.1 & 6.2.

<sup>32</sup> Rome Statute, Art. 21(3).

<sup>33</sup> ICC-02/11-01/11-278-Red, para. 49; ICC-01/04-01/06-824m para. 124.



18. The Appeals Chamber has established that decisions on continued detention *cannot be taken on the basis of one factor in isolation*; instead, all relevant factors must be considered together. For instance, the Court takes into account the *accused's* – and not his co-defendant's – political position, influence and contacts<sup>34</sup>; available financial resources<sup>35</sup>; *assurances of cooperation with the Court*<sup>36</sup>; *good behaviour in detention*<sup>37</sup>; and *family ties*<sup>38</sup>. It is critical to remember that the assessment's purpose is to determine the necessity of detention *to ensure the person's appearance at trial* and not to *pre-emptively and arbitrarily punish* through protracted detention.
19. The Decision has fallen far short of international standards. Mr Kilolo has been detained for four months while the Prosecutor idles in the completion of an investigation for which she has requested an additional four months and which has not resulted in *any concrete or specific evidence of Mr Kilolo's guilt*. To ignore Mr Kilolo's various personal undertakings, professional endorsements, lack of criminal record and willingness to work with the various authorities to negotiate conditions of an interim release is unjustifiable and blatantly disregards his fundamental right to liberty. The Judge's statement that "*the fact that an individual has never in the past been charged or found guilty of offences against the administration of justice, or of any other nature, does not as such impact on the evaluation of the risks associated with the specific conduct which has led to his or her arrest...*"<sup>39</sup> is an egregious presumption of guilt by which a mere accusation absent formal charging is sufficient to justify indefinite internment.

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<sup>34</sup> *Prosecutor v. Lubanga* (Decision) ICC-01/04-01/06-586-tEN, PT Ch I (18 October 2006) para. 6.

<sup>35</sup> *Prosecutor v. Mbarushimana* (Decision) ICC-01/04-01/10-163 PT Ch I (19 May 2011) para. 46.

<sup>36</sup> *Prosecutor v. Bemba* (Decision) ICC-01/05-01/08-321, PT Ch III (16 December 2008) para. 46

<sup>37</sup> *Ibid Bemba*, para. 64.

<sup>38</sup> *Ibid* para. 68.

<sup>39</sup> Decision, para. 23

*ii. The Prosecution Bears the Burden of Proof to Show the Necessity of Detention*

20. Logic, justice and *law* mandate that the Prosecutor bear the burden of proving satisfaction of Article 58(1)(b) conditions. Article 67(1)(i) assures the accused of the *minimum guarantee* “not to have imposed on him or her any reversal of the burden of poof or any onus of rebuttal”.<sup>40</sup> Indeed, the Appeals Chamber has criticized the shifting of the burden of proof onto the accused, holding that the analysis must be predicated on the evidence presented by the Prosecution as to whether the grounds for detention *continue to be met*.<sup>41</sup> The phrasing “*continue to be met*” indicates that an accused’s initial satisfaction of the conditions permitting detention does not necessarily continue in perpetuity.
21. The Judge declares the *Defence’s failure to address the material submitted by the Prosecutor*<sup>42</sup> *fully persuades him as to the convincing nature of the materials*. He also assumes a personal connection between Mr Bemba and Mr Kilolo in the absence of absolute proof by the Defence showing otherwise.<sup>43</sup> Seeing as it is the onus of the Prosecutor to convincingly demonstrate such connection, this shift of the burden onto the Defence is wrongful.

**B. ARTICLES 58(1)(A) AND 58(1)(B) MUST BE READ SEPARATELY**

22. The Defence recalls that decisions on requests for interim release are premised on the existence of those risks posed in Article 58(1)(b).<sup>44</sup> The Decision’s focus on the reiteration of the Prosecutor’s unsubstantiated evidence in her Article 58(1)(a) Application for an arrest warrant is thus perplexing when the Judges himself notes that assessments of interim release *necessitate a determination under Article 58(1)(b)*. In criticizing the Defence

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<sup>40</sup> Rome Statute, Art. 67(1)(i)

<sup>41</sup> *Prosecutor v. Bemba* (Judgment) ICC-01/05-01/08-323, A Ch (16 December 2008) Dissenting Opinion of Judge Pikis para. 24 ; *Prosecutor v. Gbagbo* (Judgment) ICC-02/11-01/11-278-Red, A Ch (26 October 2012) Dissenting Opinion of Judge Usacka para. 22.

<sup>42</sup> Decision, para 15.

<sup>43</sup> *Ibid.* para. 24.

<sup>44</sup> *Ibid.* para. 5.

for failing to address in its Initial Request the Prosecutor's allegations in the warrant of arrest, the Judge noted that "*under these circumstances, he is still fully persuaded that the information and materials made available to the Chamber by the Prosecution at the time of her Application under article 58 of the Statute...still justify the finding that there are reasonable grounds to believe that Mr Aime Kilolo committed the crimes alleged by the Prosecutor and that, therefore, the requirements of article 58(1)(a) of the Statute continue to be satisfied.*"<sup>45</sup>

23. However, since Article 58(1)(b) is the applicable rule, interim release requests are not the appropriate venues at which to contest arrest warrant allegations. For the Defence to now contest the Prosecutor's allegations would be a *clear conflation of two distinct legal rules under Article 58(1) and would amount to a mini-trial*, before any charges have even been confirmed. Such conflation would mean that once the arrest warrant is issued under Article 58(1)(a), the conditions of Article 58(1)(b) would automatically be satisfied, negating the purpose of an *ex novo* review. A decision on interim release is not simply a secondary opportunity to reiterate the reasoning underlying the arrest warrant and by considering the arrest warrant materials in his assessment of interim release, the *Judge effectively precludes Mr Kilolo from successfully arguing for interim release*.

### C. MISAPPLICATION OF THE CONDITIONS OF ARTICLE 58(1)(B)

24. *Simply showing the feasibility, ease or possibility of a detainee's ability to abscond is insufficient; rather, there must be concrete circumstances demonstrating the risk of flight is particularly likely.*<sup>46</sup> In indicating satisfaction of Article 58(1)(b) conditions "revolves around the possibility, not the inevitability, of a

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<sup>45</sup> *Ibid.* para. 16.

<sup>46</sup> *Stogmuller v. Austria*, App. No 1602/61 (ECtHR, 10 November 1969) para 15; *Hill v. Spain* (1997) UN Doc CCPR/C/59/D/526/1993 para. 12.3.

future occurrence”<sup>47</sup>, the Appeals Chambers specifically utilized a “*possibility*” standard, *and not that of ‘hypothetical conjecture’ or the legal equivalent of ‘grabbing at straws’*. It must be assumed that the Chamber intended to use the term “possibility” within its ordinary meaning, i.e., likelihood or the state or fact of being likely, focusing specifically on those factual scenarios likely to come into fruition. Furthermore, satisfying Article 58(1)(b) revolves around the possibility of a future occurrence, “*provided only that such risk is established on the basis of specific and concrete elements*” (emphasis added)<sup>48</sup>, thus establishing a two-prong test whereby the risk must be (i) *concrete* and (ii) *specific*.

(a) Mr Kilolo Does Not Pose Any Risk of Flight

*i. Mr Kilolo does not and will not benefit from the resources at Mr Bemba’s disposal*

25. The Judge’s reasoning simply regurgitates the Prosecutor’s factually and legally questionable positions that Mr Kilolo is “*part of [Mr] Bemba’s network [and] could be made available financial resources allowing him to readily abscond from the jurisdiction of the Court.*”<sup>49</sup> The Defence is curious as to how the Judge arrived at the conclusion that Mr Kilolo is in fact a “part of [Mr] Bemba’s” network in the absence of any concrete or specific ties between Mr Kilolo and Mr Bemba’s network. From the outset, the Judge seems predisposed to the assumption that Mr Kilolo presents a flight risk, stating that “*the political connections which [Mr] Bemba continues to maintain, even at an international level, despite his current detention, and the substantial nature [of the] financial resources directly or indirectly available’ to [Mr] Bemba ‘for the purposes of the conduct under investigation...show that [Mr] Bemba could also mobilise substantial means and*

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<sup>47</sup> *Katanga* Judgement, para. 21.

<sup>48</sup> Decision, para. 19.

<sup>49</sup> *Ibid.*, para. 20.

*resources to evade prosecution for said conduct before the Court or to prevent such prosecution of his associates’*”.<sup>50</sup>

26. Notwithstanding the unsubstantiated allegation that Mr Bemba *could or would* “mobilise substantial means and resources...to prevent [] prosecution of his associates”, there is not a single shred of evidence to demonstrate a relationship between Mr Bemba and Mr Kilolo outside a professional one. The Decision also indicates Mr Kilolo poses a risk of flight “*inherent in the very connection of [Mr] Kilolo to the network of [Mr Bemba] and to the ensuing likelihood that he might be made available resources enabling him to abscond from the jurisdiction of the Court*” and that withdrawal from his role as lead counsel is not persuasive of the “*severance of all of his ties to the latter’s vast network and hence to the concrete risk that resources be made available to him for the purpose of evading justice*” (emphasis added)<sup>51</sup>. The Judge further indicates “*the absence of documents witnessing to the existence of a ‘relation personnelle’ between the two cannot be considered as mitigating or otherwise affecting this conclusion*” (emphasis added).<sup>52</sup>

27. In the absence of proof by the Prosecutor, the assumption by the Judge that Mr Kilolo is “*an associate*” of Mr Bemba is baseless and is explained nowhere in the Decision. That Mr Kilolo’s relationship was long and continuing is not *legal proof* of a personal relationship as most attorney-client relationships in international criminal law span long periods. A two-year professional relationship is not concrete evidence of a personal relationship or involvement in a client’s network. At best, these are abstract, hypothetical conjectures that have no place in a reasoned judgement.

28. Assuming Mr Bemba would assist Mr Kilolo in fleeing from the jurisdiction of this Court is far-fetched as it assumes Mr Bemba’s willingness to expend

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<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*, para. 24.

<sup>52</sup> *Ibid.*

resources on Mr Kilolo and to risk an extended sentence for his participation. Absent a *clear and irrefutable showing* that Mr Bemba would finance the getaway of a *professional acquaintance* and a showing that he would do so for Mr Kilolo *specifically*, such scenario – judicially formulated from thin air – cannot be used as a factual basis on which to satisfy legal criteria. This is simply assumed by the Prosecutor and accepted by the Judge, demonstrating once again the former’s uncanny ability to draw entirely unsubstantiated conclusions on shaky factual and legal grounds.

*ii. Mr Kilolo cannot travel freely either in or outside of the Schengen region*

29. The Prosecution contends “Kilolo can still travel throughout the Schengen region without his passport.”<sup>53</sup> However, even if travel in the Schengen region is permissible without one’s passport, one must still be in possession of valid identity documents. Mr Kilolo is not – nor will he be in – in possession of such documents. Indeed, even if Mr Kilolo were able to travel within the Schengen area, it would be restricted to the Schengen States alone (all of whom would be under an obligation to return him to the Court) and the absence of travel documents would preclude his travel to non-States parties.

30. The Prosecution further indicated that Mr Kilolo is a flight risk because *eight years ago*, he ran for Congolese political office. The Defence fails to see how Mr Kilolo’s participation in Congolese politics eight years ago demonstrates any *concrete* evidence that he is *now* a flight risk. Moreover, Mr Kilolo has never entered the Congo absent express travel authorization and visas, and would still require, both now and in the future, valid travel documents (which he has surrendered to the Registry). Mr Kilolo is not currently in possession of any valid travel visa to the Congo. In the absence of such documents, he does not

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<sup>53</sup> ICC-01/05-01/13-88-Red (“Prosecution Response”), para. 30.

have the ability to travel freely. The Congo is a State Party and as such subject to extradition and cooperation requirements under Article 98.

31. The Judge contends that Mr Kilolo could travel freely “to non-States parties to [the] Statute, such as Cameroon”.<sup>54</sup> The Defence is curious as to how the Judge believes Mr Kilolo could even *get* to Cameroon given his lack of a passport. While travel within the Schengen States does not necessitate a passport, as far as the Defence is aware – and a Google search has indeed confirmed – that Cameroon is in fact *not* within the Schengen region. How the Judge arrive at the conclusion that Mr Kilolo – a citizen of *Belgium* and one without a passport – might arrive in *Africa*. This reasoning – or the lack thereof – is feeble and unconvincing and is simply the rhetoric of a Judge already predisposed to denying Mr Kilolo his liberty.
32. Furthermore, Mr Kilolo is requesting interim release in *Belgium*, his home of more than twenty years, State Party to the Rome Statute, and which notably has not expressed disinclination to Mr Kilolo’s return. Mr Kilolo has also articulated his readiness to meet any conditions set by the Court and Belgian authorities, including daily (or twice-daily) presentation at the local police station and continued surrender of his passport, effectively precluding any real risk of flight. Arguing that he would escape Belgium and flee to live as a fugitive amounts to no more than abstract speculation.
33. The Judge noted the Belgian observations that the structure of Belgium is such as to enable a quick getaway, especially in light of the proximity of a national airport to Mr Kilolo’s residence.<sup>55</sup> In order escape to non-States Parties – as the Judge and Prosecution are clearly wont to believe – Mr Kilolo requires access to an airplane, and in order to get *on* an airplane, he would need a *passport*. The national airport’s proximity to Mr Kilolo’s home is concrete evidence of

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<sup>54</sup> Decision, para 20.

<sup>55</sup> Decision, para. 22.

nothing, save that Belgium possesses a national airport. It does not demonstrate a *concrete* risk of flight, nor is this a risk *specific* to Mr Kilolo.

*iii. Mr Kilolo's entire personal and professional life is in Belgium*

34. The Judge stated that "the prejudices allegedly entailed by the protracted detention to Mr Kilolo's personal and professional life...are [not]...a factor which might *per se* influence the determination under article 60(2) of the Statute."<sup>56</sup> How such prejudices are irrelevant in a determination on interim release is bewildering, especially since Mr Kilolo's family life in Belgium is determinative proof that he will not abscond.
35. Mr Kilolo has a wife and children in Belgium whom he will *absolutely not abandon* and for whom he seeks interim release today. Their family life is grounded in Belgium, the country to which he and his family now belong. His Dutch-speaking children are Belgian; there they were born and raised and are in the midst of their education. Mr Kilolo would never sacrifice his marriage or his children's lives, education and their mental health by uprooting them in an effort to flee this Court's jurisdiction or by otherwise unilaterally absconding and abandoning his family. That the Prosecutor or Judge would insinuate that Mr Kilolo would forsake his family and leave them dependent on social services and welfare is appalling and amiss.
36. Mr Kilolo is also tied to Belgium through his professional activities where he is an accredited member of the Brussels bar. Despite the Belgian authorities' observation that Mr Kilolo's professional activity in Belgium was limited to a very small number of unresolved cases,<sup>57</sup> the Defence wishes to draw the Chamber's attention to the fact that this Court imposes an obligation upon *all lead counsel in Court cases* to maintain a residence and nucleus of professional activity in The Hague in order to better serve on their Court cases. Mr Kilolo

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<sup>56</sup> *Ibid.* para. 32.

<sup>57</sup> *Ibid.*



had done *exactly that* in his capacity as lead counsel in the Main Case. The Judge cannot now reprimand Mr Kilolo for complying with his Court obligations or use this fact to Mr Kilolo's detriment.

37. Additionally, it must be emphasized that Mr Kilolo not only wishes but also *needs* to resume his professional activities, as *he is the sole source of revenue for his family*. As such, he cannot and would not sacrifice his professional career by absconding as the detriment to his family would be incalculable.

(b) Mr Kilolo will not obstruct or endanger Court proceedings

38. Detention may be necessary "*to ensure...the person does not obstruct or endanger the investigation or the court proceedings*", or "[...] *to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances*". Here too, the establishment of such risk requires *elements arising from an evaluation in concreto and of a degree superior to mere hypotheses and speculations*.<sup>58</sup>

39. The Decision is conspicuously absent evidence of and reasoning with regard to the concrete and specific risk presented by Mr Kilolo in obstructing or endangering on-going investigations of Court proceedings and *simply accepts as fact the Prosecutor's arguments, which are no more than mere speculations and suppositions*. In the first place, Mr Kilolo is no longer the lead counsel in the Main Case and is not entitled to any privileged or confidential information relating thereto. Even if he wanted to contact witnesses in the Main Case, Mr Kilolo has no idea who they are, what they have said, or how to contact them. Additionally, any materials on the Main Case are now disclosed to the new lead counsel.

40. Moreover, the Judge had declared that "*most of the conducts related to the alleged crimes have occurred by way of communication with the other suspects, or with third parties connected to them by reason of personal or professional links*".<sup>59</sup> The Defence

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<sup>58</sup> Decision, para. 33.

<sup>59</sup> *Ibid.* para. 43.

wishes to underline that Mr Kilolo is currently not precluded from contact with either the other accused or with third parties. He is given unfettered access to a telephone allowing his unimpeded contact with the external world. Inside the detention center, he is able to communicate with the other suspects. Indeed, *he will be more limited in his contact with Mr Bemba and other persons if released* because he would not be on the list of privileged persons allowed to telephone Mr Bemba from the outside.

(c) There is no risk relating to future crimes

41. In his discussion of the third condition of Article 58(1)(b), the Judge held that *“the risks that the relevant investigation or these proceedings be obstructed or endangered, in light of the conducts carried out by Aimé Kilolo Musamba prior to his arrest, are still outstanding”*.<sup>60</sup> The language is outrageous by referring not to the *alleged* conducts of Mr Kilolo, but rather, to his presumed guilt at a time when charges have not yet even been confirmed.
42. The Judge needs – and has failed – to demonstrate a *“concrete risk”*<sup>61</sup> that Mr Kilolo might commit crimes related to the ones alleged in the arrest warrant, speaking once again in generalities that do not address specifically what risk Mr Kilolo might present regarding the commission of other offenses. The mere statement that Mr Kilolo is guilty – when the Judge is still bound to his duty of impartiality – is not enough to substantiate such risk. Indeed, the sole fact that Mr Kilolo has been arrested cannot be the basis for assuming there is a risk he will commit future, related crimes.
43. A judicial decision is not an exercise in cut and paste but rather a place for the fair balancing of opposing views and evidence. The Judge cannot simply lift what he wishes from the Prosecution’s Response without actually considering the converse side and transparently applying the law. Not once does the

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<sup>60</sup> *Ibid.* para. 39.

<sup>61</sup> *Ibid.* para. 40.

Judge convincingly establish any real likelihood that Mr Kilolo would commit any crimes during his interim release, stating instead that crimes “*might be committed*”.<sup>62</sup> Nor does the Judge specifically apply his reasoning to Mr Kilolo, stating simply that “*it is likely that [Mr Kilolo] might take additional action...in respect of other evidentiary items which might be outstanding*”.<sup>63</sup> “*Might*”, “*likely*”, and “*could*” are far from concrete and the Judge cannot presume to deny a man his liberty on the basis of hypothetical conjecture.

44. Furthermore, the Judge indicates that the risk of future related crimes are, by their very nature, “impossible to specify in detail”.<sup>64</sup> However, this is a blatant contravention of the “concrete and specific” standard. Once more, the Decision fails to pass muster; rather, it is littered with legal lacunae and amorphousness, unacceptable in a Court of this stature.

45. In essence, it seems that nothing short of absolute acquittal would be adequate for the Judge to grant interim release. If personal undertakings, commitments, statements of good moral character, community and professional statements, lack of gravity of the offense and a clear criminal record are insufficient to prompt interim release, it is unclear as to what could. The Defence contends that the Judge is manifesting a clear bias towards Mr Kilolo and should such bias continue to rear its ugly head and the Judge be unable to perform his duties of impartial adjudication, perhaps the Judge should recuse himself from the present case or, alternatively, the Pre-Trial Chamber should be convened in its entirety for the remainder of all proceedings so that Mr Kilolo is not further prejudiced.

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<sup>62</sup> *Ibid.* para. 36.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.* para. 39.

#### IV. Relief Requested

85. The Defence for Mr Kilolo requests that the Appeals Chamber:

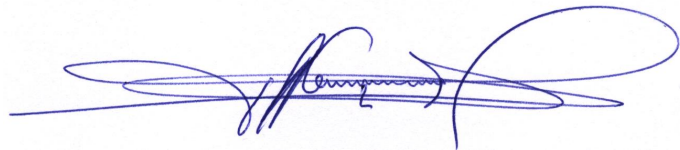
- Dismiss the impugned Decision in its entirety;

*In the first place,*

- To review and do as should have been done by the Single Judge, and grant Mr Kilolo's request for interim release;

*In the alternative,*

- To remand the case to the Pre-Trial Chamber for a ruling upon those points of law as instructed by the Appeals Chamber.



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**Ghislain M. Mabanga**

**Lead Counsel for Mr. Aimé Kilolo Musamba**

Dated this 24 March 2014,

At the Hague, The Netherlands