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No.: **ICC-01/05-01/13**
Date: **3 November 2014**

THE 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 AND NARCISSE ARIDO

Public Document

Kilolo Defence's Response to Prosecution Submission ICC-01/05-01/13-727

Source: Defence for Mr Aimé Kilolo Musamba

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

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I. INTRODUCTION

1. *Purpose*: Pursuant to Article 82-1-b and Regulation 64-5 of the Rules of the Court, the present Response to Prosecution submission ICC-01/05-01/13-727 is timely filed to the Appeals Chamber by the Defence for Mr Aimé Kilolo Musamba ("hereinafter "the Defence" and "Mr Kilolo" respectively) opposing the Prosecution's demand that Mr Kilolo be remanded into custody after his lawful interim release as ordered by the Single Judge in his Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido[1] (the "Decision").

2. *Structure*: This Response will dispense with the procedural history of his case, addressing only the relevant legal and factual issues in support of its arguments by reference to the particularity of the matter at hand *(III)*.

II. APPLICABLE LAW AND STANDARD OF REVIEW

3. The Appeals Chamber has repeatedly stated that *it "will not review the findings of the Pre-Trial Chamber de novo, instead it will intervene in the findings of the Pre-Trial Chamber only where clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision".*[2]
4. The Appeals Chamber *"will intervene in the findings of the Pre-Trial Chamber only where clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision".*[3] In distinguishing between legal and factual errors, Judge Pikis stated that *"[a] correct judgment is one legally and factually well-founded. Consequently, the grounds of appeal must be defined by reference to the legal and factual foundation of the decision under review".*[4] Errors of law are *"[l]egal errors*

[1] ICC-01/05-01/13-703.
[2] ICC-01/05-01/13-559 para. 18.
[3] ICC-01/05-01/08-631-Red, para 62 cited in ICC-01/04-02/05-271-Red, para 29.
[4] ICC-01/04-01/06-568, Dissenting opinion of Judge Pikis, para 14.

[which] may arise from the misapplication of adjectival or substantive law"[5] while errors of fact arise – and the Appeals Chamber may justifiably interfere[6] – when the *"Pre-Trial or Trial Chamber…misappreciates facts, disregards relevant facts or takes into account facts extraneous to the sub judice issues."*[7]

5. In determining whether the Trial Chamber has misappreciated facts in an interim release decision, the Appeals Chamber will "*defer or accord a margin of appreciation both to the inferences [the Trial Chamber] drew from the available evidence and to the weight it accorded to the different factors militating for or against detention*", interfering only where clear errors exist, such as where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it.[8]
6. For any type of error, the appellant must *"not only* [] *set out the alleged error, but also* [] *indicate, with sufficient precision, how this error would have materially affected the impugned decision''*.[9] Such error must be indicated with specificity, as *"an appellant cannot simply claim that an impugned decision violated the overall fairness or led to a violation of his or her human rights without specifying and substantiating such claim"*[10], and cannot amount to *"mere disagreement"*.[11]

III. PARTICULARITY OF THE MATTER AT HAND

A. THE SINGLE JUDGE CORRECTLY BALANCED THE PRESUMPTION OF INNOCENCE AND THE (LACK OF) NECESSITY OF CONTINUED DETENTION

7. The Rome Statute[12] – as well as long-established rules of international criminal law and international human rights law[13] – enshrines the principle of

[5] ICC-01/04-01/06-568, Dissenting opinion of Judge Pikis, para 14.
[6] ICC-01/04-01/07-572, para 25.
[7] ICC-01/05-01/08-2151-Red, para 16; ICC-01/04-02/05-271-Red, para 31; ICC-01/05-01/13-558, para 16.
[8] ICC-01/05-01/08-2151-Red, para 16; ICC-01/04-02/05-271-Red, para 31; ICC-01/04-01/10-283, para 1.
[9] ICC-02/04-01/05-408, para 47; ICC-01/04-02/05-271-Red, para 32.
[10] ICC-01/05-01/08-2151-Red, para 41.
[11] ICC-01/04-02/05-271-Red, para 31; ICC-01/04-01/10-283, para 31.
[12] Rome Statute, Art. 66.

presumption of innocence, unequivocally stating that an accused must be presumed innocent until proved guilty before the Court and that the onus to prove the accused's guilt lies with the Prosecutor alone.[14] As the Prosecution itself has noted, the concept of detention is truly one of "exceptionality"[15]. To countervail this presumption of innocence and assume guilt instead is an error of law amounting to a manifest injustice as detention is *only* warranted under the Rome Statute "when the conditions of Article 58(1)(b) are satisfied."[16]

8. That the Prosecution now alleges that the vociferously debated and carefully-thought out decision to release Mr Kilolo, Mr Mangenda, Mr Babala and Mr Arido (the "Four Suspects") is "vitiated by multiple errors which warrant reversal" including by the *ultra vires* actions of the Single Judge – charged precisely with balancing competing interests and making such decisions – amounts to nothing more than a mere disagreement with the decision.

9. In support of its contention, the Prosecution argues that the Decision to release the Four Suspects "fundamentally incompatible with the Single Judge's eight previous consistent decisions requiring the continued detention of the Four Suspects".[17] Perhaps the Prosecutor has forgotten that law is not static and stationary, but must adapt and be adapted to changing circumstances. Just because the Mr Kilolo may *at one time* have been found to perhaps satisfy the requirements of Article 58(1)(b) does not mean that such situation is set in stone and continues in perpetuity. Indeed, the *Bemba* Appeals Chamber made clear that "the purpose of the periodic review under article 60(3) of the Statute [] ensure[s] that detention that was ordered in

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[13] 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).
[14] Article 66(1) and 66(3).
[15] ICC-01/05-01/13-302, para. 2.
[16] Rome Statute, Art. 58(1)(b); ICC-01/05-01/13-302, para. 2; ICC-01/05-01/13-259, para. 3.
[17] ICC-01/05-01/13-727, para. 1.

accordance with the Statute does not become unwarranted because of a change of circumstances."[18] While such holding was made in the context of Article 60(3) and not Article 60(4), it goes to demonstrate the Court's cognizance of the fluidity and evolving nature of law and of a detainee's circumstances.

10. In fact, as was clearly stated by Judge Ušacka in her dissenting opinion[19], one of the most problematic issues permeating the Article 70 case thus far in the context of interim release is the Pre-Trial Chamber's prior "uncritical reliance on previous judgements of the Court – made in the context of alleged core crimes – when discussing whether the continued detention of Mr Kilolo appeared necessary" and the fact that such reliance and assessments did not consider the "transferability of the holdings of the Appeals Chamber (in relation to core crimes) to the case at hand."[20] Thus, Judge Ušacka makes clear that the law is not static and does not amount to an exercise in cut-and-paste; rather, it requires continuing and unrelenting assessment and, more importantly, ***reassessment***, to ensure that justice is not only done but it seen as being done, for *all* parties.

11. It is in this vein that Article 60(2) and 60(3) provide for the possibility of interim release, necessitating a review not only at the request of the accused, but *also* periodically every four months. Specifically, Rule 118(2) mandates the Pre-Trial Chamber "review its ruling on the release or detention of a person…***at least*** every 120 days".[21] Such review must be conducted in accordance with Article 60(3), which mandates the Chamber's consideration of the existence of changed circumstances, in light of which the Chamber is obliged to revisit its previous rulings on detention. Upon such review, the Pre-Trial Chamber may either reaffirm or modify its prior ruling on detention,

[18] ICC-01/05-01/08-1019, para 49.
[19] ICC-01/05-01/13-558, Anx B, para. 14.
[20] ICC-01/05-01/13-558, Anx B, para. 14.
[21] Rules of Procedure and Evidence, rule 118(2) (emphasis added).

release or conditions of release, if satisfied that changed circumstances so require. As held by the Appeals Chamber, the Pre-Trial Chamber shall "revert to the ruling on detention to determine whether there has been a chance 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."[22]

12. As such, the Prosecution's contention that the Single Judge acted *ultra vires* by reassessing the detention of the Suspects – after almost eleven months in detention – is erroneous. After all, the Statute itself makes clear that it is the prerogative and the duty of the Judge to make such balancing assessments *at least* – if not more often than – every 120 days. Furthermore, it is incumbent upon the Pre-Trial Chamber to *address anew* its prior ruling on the issue of detention or release in light of the requirements under Article 58(1) of the Statute.[23] It is not the duty of the Judge – as the Prosecution seems to think – to simply reaffirm prior existing decisions. After all, the Rome Statute provides "safeguards against the undue prolongation of the period of detention"[24] specifically to ensure ***detention is not extended beyond what is necessary to secure the ends of justice***.[25] It is telling that Article 60(4) casts a duty upon the Pre-Trial Chamber to make certain an accused's detention is not unreasonably prolonged as a result of the Prosecutor's inexcusable delay, such as through a failure to take timely steps to move the judicial process forwards as the ends of justice may demand. If such delay is noticed, the Chamber is empowered to release the person, conditionally or unconditionally. Indeed, it is the purpose of periodic review to ensure a prior detention ruling remains ***necessary***.

13. In view of the present circumstances, the Single Judge adopted the ***only***

[22] ICC-01/05-01/08-1019, para 52.
[23] ICC-01/05-01/08-631-Red, para 58.
[24] ICC-01/04-01/07-572, para 14.
[25] ICC-01/04-01/07-572, para 14.

reasonable and rational decision possible, given the fact that the detention of Mr. Kilolo as of November 2013, almost one year ago. In the Decision, the Single Judge rightly relied on Article 60(4) which reads: "*the Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor*", a provision now challenged by the Prosecutor as inapplicable to the present case.

14. However, it cannot escape the attention of the Appeals Chamber that the Prosecution has twice requested – and been granted – extensions of deadlines in the present proceedings. Indeed, such requests for extensions were sometimes made the *day* before the deadline itself, leading to even more time being spent in detention by Mr Kilolo, who, as indicated above, is little more than a Suspect, and is not even yet an accused. As such, it can hardly be said that the Prosecution is not responsible for inexcusable delays, nor that the Pre-Trial Chamber was erroneous or acting *ultra vires* in holding the length of pre-trial detention to be extraordinary and disproportionate.
15. Even if the Court had not deemed the time in detention – caused by the Prosecution's strategies – excessive, the Pre-Trial Chamber is the primary guardian of the Suspect's human rights, including, *inter alia*, Article 67(1)(c)'s enshrinement of the right of the accused to "*be tried without undue delay*". As a consequence, there is in fact a "*distinct and independent obligation*" as the Prosecution itself concedes[26] for the Trial Chamber to ensure that a person is not detained for an unreasonable period where it deems there is an inexcusable delay by the Prosecutor.
16. Yet more importantly, the Prosecution seems to entirely overlook the critical fact – expounded by the Kilolo Defence since March 2014[27] and accepted by Appeals Chamber Judges Ušacka [28] and Kourula[29], and later by the Single

[26] ICC-01/05-01/13-727.
[27] ICC-01/05-01/13-290.
[28] ICC-01/05-01/13-558, Anx B.

Judge himself – that the Four Suspects are accused of offences against the administration of justice under Article 70(1) of the Statute and not core crimes[30], and that the Pre-Trial Chamber must address a request for interim release in this case distinctly from and unlike "any other request for interim release by a suspect who is alleged to be criminally responsible for core crimes."[31]

17. The Prosecution very adamantly contends that the Four Suspects have not been detained for an unreasonable period.[32] The Kilolo Defence is perturbed by such a cavalier attitude by the Prosecution to liberty and deprivation thereof, particularly when the Suspects have been held – *without charge* – for close to eleven full months *for offences carrying a* ***maximum penalty*** *of five years.* That the Prosecution thinks it appropriate that the Four Suspects serve almost twenty percent of the maximum sentence *before charges even being confirmed* is nothing less than shocking and demonstrates a shocking lack of empathy and respect for human right by the very Court organ charged with upholding such basic and fundamental rights.[33]

18. Indeed, the Prosecution accuses the Single Judge of determining that the Four Suspects have been detained for an unreasonable period prior to trial through an "arbitrary assessment of the proportionality of the period of pre-trial detention relative to a hypothetical future sentence."[34] These are strong words coming from the same party who once lauded the Single Judge for his detailed and reasoned arguments which were "[f]ar from arbitrar[y][35] and made clear that the "Appeals Chamber will accord a margin of appreciation to the Single Judge's analysis and may only intervene 'where it cannot discern

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[29] ICC-01/05-01/13-558, Anx A.
[30] ICC-01/05-01/13-558, Anx B, para. 12.
[31] ICC-01/05-01/13-558, Anx B, para. 12.
[32] ICC-01/05-01/13-727, para. 4.
[33] Rome Statute, Article 54(1)(a).
[34] ICC-01/05-01/13-727, para. 15.
[35] ICC-01/05-01/13-302, para 5.

how the Chamber's conclusion could have reasonably been reached'".[36] The Kilolo Defence urges the Prosecution to take into account its very own words and understand that far from being capricious or arbitrary, the Single Judge is not shackled to his previous decisions, especially where the circumstances have – as here – markedly changed, and that he is entitled to reverse a prior erroneous decision, even to the dismay of the Prosecution, so long as such decision is in the interest of justice.

19. Furthermore, the Prosecution's entire argument – by which it questions the Single Judge's reasoned decision that the Four Suspects have been held for an unreasonable period of time – is predicated on questions of sentencing and the fact that the Prosecutor is still trying to forward the idea of "cumulative sentencing upon the conviction of multiple Article 70 offences".[37] To this, the Kilolo Defence has little more to say than: Enough is enough. It has been made clear by not only the Rome Statute, the *travaux preparatoires,* the working papers and working groups, the Single Judge's decisions, ***and*** the opinions of the Appeals Chamber that Article 70 offences are subject to a *maximum* penalty of five years.[38] Indeed, if one were to accept the Prosecution's ridiculous contention that Article 70 sentences could be cumulative, the Prosecution is theoretically seeking a maximum penalty for Mr Kilolo of two hundred and fifteen (215) years, for the offences of witness corruption. How can this possibly be reconciled with the fact that – as has been clearly articulated in multiple forums and by multiple persons[39] – that the gravity of Article 70 offences which undoubtedly directed against an important value *does not even come close to that of the core crimes?*[40] How can it

[36] ICC-01/05-01/13-302, para 5.
[37] ICC-01/05-01/13-727, para. 16.
[38] Rome Statute, Art. 70.
[39] Judge Ušacka for example specifically stated: "even if Mr Kilolo were found guilty and convicted, the *actual sentence imposed could remain significantly below the* ***maximum*** *penalty of five years*". ICC_01/05-01/13-558-Anx B, para 16.
[40] ICC_01/05-01/13-558-Anx B, para 6.

be argued that any of the Four Suspects should face a lifetime in prison just as those convicted of core crimes perpetrated against the conscience of humanity? The fact is that it cannot be, and that Article 70 offences are subject to a *maximum* penalty of five years, in line with the various national jurisdiction also domesticating and punishing offences under Article 70.[41] As such, the Prosecution's contention that the issue of cumulative sentencing is one for the Trial Chamber to discuss and decide, and which thus renders the Single Judge's decision of disproportionality of detention materially erroneous, is itself erroneous and is nothing more than a prosecutorial attempt at grasping at straws.

20. Finally, the Kilolo Defence draws the Chamber's attention to the fact that the Prosecution itself has conceded that "Article 60(4) requires an assessment of the general circumstances of the case to determine whether the period of pre-trial detention is reasonable".[42] The Kilolo Defence wholly agrees with this statement and contends that – in line with the Prosecution's own arguments – that the Single Judge's decision was properly predicated in law and was a proper exercise of his own judicial authority and discretion.

IV. Relief Requested

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

- Dismiss the Prosecution's Appeal in its entirety; and
- Uphold the "Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido" in its entirety.

[41] See Judge Ušacka's dissenting opinion in which she clearly lays out the offences and parallel punishments of Article 70 in several national jurisdictions. ICC_01/05-01/13-558-Anx B, para 9.
[42] ICC-01/05-01/13-727, para. 20.

Paul Djunga Mudimbi

Lead Counsel for Mr. Aimé Kilolo Musamba

Dated this 3 November 2014,

At the Hague, The Netherlands