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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 of "Defence Observations on the Continued Detention of Aimé Kilolo Musamba Pursuant to ICC-01/05-01/13-495, *Order requesting observations for the purposes of the periodic review of the state of detention of Aimé Kilolo Musamba, Jean Jacques Mangenda Kabongo and Fidèle Babala Wandu pursuant to rule 118 (2) of the Rules of Procedure and Evidence*" (ICC-01/05-01/13-528-Conf-Exp)

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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I. INTRODUCTION

1. *Purpose*: These Observations ("Observations" or "Defence Observations") on Mr Aimé Kilolo Musamba's ("Mr Kilolo") state of continued detention are submitted by the Defence of Mr Kilolo ("Kilolo Defence") to the Single Judge pursuant to Articles 58(1) and 60(3) of the Rome Statute ("Statute"), and Rules 118(2) and 119 of the Rules of Procedure and Evidence.
2. *Confidentiality*: These Observations and the accompanying annexes are classified as "Confidential" and filed *ex parte* as per Regulation 23*bis* of the Regulations of the Court as they reference private information relating to Mr Kilolo's personal and private family life and financial matters.

II. DISCUSSION

3. The present Observations arise out of the Single Judge's order of 13 June 2014 requesting the Kilolo Defence submit observations for the purposes of and in connection with the forthcoming periodic review of Mr Kilolo's continued detention pursuant to Rule 118(2) of the Rules of Procedure and Evidence. Specifically, Rule 118(2) mandates the Pre-Trial Chamber to "review its ruling on the release or detention of a person…at least every 120 days"[1], which 120-day time limit as regards Mr Kilolo is due to expire on 14 July 2014.[2] Rule 118(2) further requires a review of the Pre-Trial Chamber's ruling on detention in accordance with Article 60(3), which mandates the Chamber's consideration, during its review, of the existence of changed circumstances, in light of which the Chamber is obliged to revisit its previous rulings on detention.[3]
4. The concept of changed circumstances "*imports either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary*".[4] Changed circumstances are thus

[1] Rules of Procedure and Evidence, Rule 118(2).
[2] "Decision on the 'Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba'" was rendered on 14 March 2014, with the 120-day time limit expiring on 14 July 2014.
[3] ICC-01/05-01/08-1019, para. 52.
[4] ICC-01/05-01/08-403, para. 60.

comprised of entirely new facts not in existence at the time of the previous ruling on detention, on the one hand, and facts previously existing but that have since changed significantly. The Defence avers that both such factual modalities exist in the present case, such that Mr Kilolo's circumstances have drastically changed since the previous detention decision, thus warranting an entirely new assessment and decision as to his continued detention.

(a) NEW FACTS NOT IN EXISTENCE AT THE TIME OF THE DETENTION DECISION

5. Aside from the legal prong of interim release under Article 58(1)(b), there exists the requirement of State cooperation, which, in the absence of specific Court territory onto which the detainee can be released, necessitates the agreement and cooperation of the State onto whose territory the detainee seeks release. In large part, interim release has proved impracticable due to the unwillingness and/or the inability of states to accept detainees onto their territory and enforce the conditions of release imposed by the Court.

6. It was in large part on this basis that Mr Kilolo's interim release application was denied in March 2014. Specifically, Belgium – his country of citizenship and the country into which he sought release – did not have a cooperation framework agreement with the Court and considered itself unable to provide the requisite level of monitoring to curb any hypothetical risk of flight posed by Mr Kilolo. As detailed by the Single Judge in his Decision, the Belgian authorities noted, "'*si l'intéressé souhaitait quitter le pays sans l'accord de la Cour, la configuration du pays lui permettrait de le quitter en très peu de temps, sans compter la présence de l'aéroport national à proximité de la résidence de l'intéressé', **with the consequence that**…l'interception, à temps, de l'intéressé serait dès lors probablement illusoire*'".[5]

7. On 10 April 2014, almost one month after the denial of Mr Kilolo's interim release application, a cooperation framework agreement between the Registry of the Court and the Kingdom of Belgium entered into force, by which a number of ICC

[5] ICC-01/05-01/13-259, para. 22, citing ICC-01/05-01/13-95-Conf-Anx9.

detainees are to be allowed interim release onto Belgian territory.[6] Specifically, the agreement regulates the procedure for the interim release of an ICC detainee and in particular formalizes the necessary consultations with the Court's Registry with the Belgian authorities, which shall be examined by the latter on a case-by-case basis. Though the specific content of the agreement itself remains confidential, *ex parte* between the Registry and Belgium, what is clear is that Belgium is accepting to provisionally receive Court detainees on its territory on a temporary basis under conditions established by the competent Chamber, thus proving itself willing and able to provide the requisite level of monitoring.

8. The Defence, unable to secure a copy of such agreement despite concerted efforts in that regard, has nonetheless – vis-à-vis various exchanges with the Belgian authorities and the Registry – confirmed the existence and validity of such agreement. These exchanges clearly demonstrate an accord intended to facilitate the pre-trial release of persons pending trial at the ICC. Indeed, though forced to make certain presumptions in the absence of a copy of the agreement, the Defence contends that the agreement clearly manifests Belgium's ability, willingness and capacity to respect all ICC-imposed conditions on release.

9. The existence of an agreement between a State Party and the Court to welcome detainees onto its territory is a significant development necessarily altering the conditions, criteria, and procedure by which interim release should be assessed. Indeed, such agreement negates to a large extent the various factors previously precluding interim release, including the lack of State cooperation and fears of flight risk, which have, to date, featured prominently in this Court's decisions. The Detention Decision is no exception. Indeed, as a result of this agreement, the risk of flight is drastically reduced, particularly as the agreement presumably envisages means and methods by which the Belgian authorities shall monitor the detainee and ostensibly provides for immediate recourse and actions upon flight.

[6] ICC-CPI-20140410-PR993,10 April 2014.

10. As regards Mr Kilolo specifically, this agreement is undoubtedly a new fact concerning his continued detention, not in existence at the time of the Detention Decision, and which constitutes a changed circumstance within the meaning of Article 60(3). As such, it must be considered in the Pre-Trial Chamber's *de novo* assessment on Mr Kilolo's detention and imputed with the relevant legal weight.
11. In the first place, the agreement drastically reduces fears that Mr Kilolo poses a flight risk, as the agreement necessarily provides measures by which Belgium shall respect Court-imposed conditions, including *inter alia* proper and vigilant monitoring. Furthermore, the Agreement presumably provides a method by which to arrest a detainee upon any violation of such Court-imposed conditions, such as an attempt to abscond. In the absence of direct access to the agreement, the Kilolo Defence stipulates that such measures likely include the ability of the Belgian authorities to immediately apprehend the detainee vis-à-vis a domestic arrest warrant rather than seeking an ICC arrest warrant under Article 60(5). In the unlikely event the Defence is mistaken about the ability to issue a domestic arrest warrant, it requests the Court and the State of Belgium consider this one of a plethora of personal guarantees by which Mr Kilolo will abide, in this case meaning he agrees to be immediately subject and will not contest arrest pursuant to a Belgian arrest warrant upon the violation of any condition of his release. This would, in large part, negate the fears of the Belgian government and the Single Judge – as articulated in the Detention Decision – that should Mr Kilolo attempt to abscond, the Belgian authorities would be unable to arrest him as they would have to first request an arrest warrant from the ICC.[7]
12. Furthermore, the relevance of this agreement to Mr Kilolo cannot be overstated in light of the fact that not only is Mr Kilolo a European citizen[8], but he is a *Belgian national*, and Belgium is *the only country* into which he has sought release.

[redacted]

[7] ICC-01/05-01/13-259, para. 22, citing ICC-01/05-01/13-95-Conf-Anx9.
[8] Treaty on the Functioning of the European Union, Art. 20.

[redacted][9] That a State cooperation agreement exists to facilitate interim release is certainly relevant to any detainee, including Mr Kilolo, but that the State in question is Mr Kilolo's own makes it all the more pertinent a consideration.

13. The United Nations Declaration on Human Rights provides in pertinent part that "*[e]veryone has the right to…return to his country.*"[10] This is a right further enshrined in the International Covenant on Civil and Political Rights, according to which "*[n]o one shall be arbitrarily deprived of the right to enter his own country*"[11] and which has been expanded upon by the Human Rights Committee to mean that "***in no case*** *may a person be arbitrarily deprived of the right to enter his or her own country*."[12] This prohibition on arbitrariness extends to and safeguards from judicial intervention as well.[13] As such, even judicial interference with the right to return to one's country – vis-à-vis court proceedings, for example – must necessarily be aligned with the aims and objectives of the ICCPR ***and*** must be reasonable in light of the specific facts of the case at hand. According to the HRC, there are "***few, if any***, circumstances in which deprivation of the right to enter one's own country could be reasonable."[14]

14. This right to return is embedded in the special relationship of the individual with his or her State, which, save for voluntary cases, cannot be severed by any external means, whether legislative, administrative or judicial[15], and rests on the premise that each individual is afforded with an unspoken connection with his or her country of nationality, i.e., the country with whom one shares a "legal bond…[and] genuine connection of existence, interests and sentiments."[16] It extends to both nationals as well as those who demonstrate "genuine and

[9] *See* Annex D.
[10] UNDHR, Art. 13, African Charter on Human and Peoples' Rights, Art. 12.
[11] ICCPR, Art. 12(4).
[12] ICCPR, General Comment No. 27, Art. 12, 02/11/99.CCPR/C/21/Rev.1/Add.9.
[13] *ibid.*, para. 20.
[14] *ibid*.
[15] *ibid*.
[16] International Court of Justice, *Nottebohm*, ICJ Reports, 6 April 1955, p. 23.

effective links…with the State." [17] While lawful detention may, in some circumstances prove to be a valid reason to deprive someone of the right to return and to exercise his nationality, this must still be read in light of and consistent with international human rights law by which liberty is the norm and detention the exception. Thus, one may conceivably be deprived of the right to return to one's country only where the detention is ***appropriate, fair, and the result of due consideration and process of law***.[18]

15. Mr Kilolo is a Belgian citizen manifesting effective and genuine links to Belgium.[19] [redacted], and it is there that his private and professional lives are wholly based. In the first place, his law firm, which he has spent over 15 years building and to which he would like to return, is seated in Belgium. However, it is not simply a *desire* to return to work that serves as the impetus for Mr Kilolo's current request for interim release in Belgium, but also a *need* to resume his practice, for the bifurcated reasons of (i) being useful to society, and (ii) financially protecting his family life.

16. Indeed, Mr Kilolo is currently poised – after his continuous seven-month detention – to lose his clients and practice, a loss devastating not only professionally but to his family life as well. He is the sole breadwinner in a family [redacted]. The loss of his practice will mean the financial ruin of the family, who depend entirely on Mr Kilolo for financial support. In his continued absence, Mr Kilolo is unable to provide for his family, and as it stands, is at great risk of defaulting on [redacted] [20] Needless to say, defaulting on such [redacted] would render the family homeless. In short, Mr Kilolo's family life risks being entirely disintegrated by his current and continued detention.

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[17] European Convention on Nationality [1997] Art.18(2)(a).
[18] Communication No. 458/1991, *A.W. Mukong* v. *Cameroon*, UN doc. GAOR, A/49/40 (vol. II), para. 9.8.
[19] *See* Annex F, attesting to Mr Kilolo's recent voting in the Belgian and European election by procuration.
[20] *See* Annex B.

17. This is made all the more compelling considering Mr Kilolo the only European Union national to ever be detained by the Court, and is seeking interim release to his own country, which is *obliged* – even absent a State cooperation framework agreement – to receive him. In light of the latter, however, his request for interim release is made all the more striking. Indeed, the Defence contends that the interim release of Mr Kilolo to Belgium is necessary not only pursuant to international human rights standards but also to ensure the provisions of the Framework Agreement does not prove illusory and prodigal. As such, the Defence calls upon the Single Judge to consider – with the great import it deserves – the existence of this cooperation framework agreement as a changed circumstance within the meaning of Article 60(3).

(b) OLD FACTS THAT HAVE SIGNIFICANTLY CHANGED

i. Prolonged Period of Detention

18. Pre-trial detention as an exception to the general rule of individual liberty, a premise upheld by this Court[21], is recognized in all legal orders, both domestic and international.[22] Indeed, individual liberty is a fundamental human right intrinsic to the human condition, and to be limited only in very specific circumstances. The exceptional character of such limitation is corollary to the basic human rights principles of the presumption of innocence, right to a fair trial and individual liberty, all of which are encapsulated in the proper administration of justice. The ECtHR has applied the standards of proper administration of justice equally to *all* types of criminal offences[23], whether major crimes or minor infractions. Similarly, this Court has consistently championed international human rights as a pillar upon which the Rome Statute was built, and has held such standards are applicable to judicial procedures as a *whole*.[24]

[21] ICC-01/05-01/08-475, para. 35.
[22] ECtHR, *Ilijkov v. Bulgaria*, para. 85; IACtHR, *Tibi v. Equador*, para. 106.
[23] ECtHR, *Teixeira de Castro v. Portugal*, para. 36.
[24] ICC-01/04-01/06-772, para. 37.

19. The presumption of innocence, as one of the core components of due process, assumes an important role in relation to pre-trial release, with the right to interim release being regarded as both an accoutrement to and manifestation of the presumption of innocence. The ECtHR has repeatedly recognized the relevance of the presumption of innocence in its assessment of pre-trial detention, observing that a determination as to whether the pre-trial detention of an accused person has exceeded a reasonable time requires an examination by the national judicial authorities of "all the circumstances arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the presumption of innocence, a departure from the rule of respect for individual liberty".[25] Indeed, interim release as a way to exhibit the presumption of innocence is very fitting and relevant: if a person is presumed innocent with regard to the charges filed against him, why should he be required to forfeit his liberty interests prior to conviction, and, even more problematically, prior even to the confirmation of charges or, worse yet, the *document containing the charges*?
20. In explicating the standards of pre-trial detention, the ECtHR has made abundantly clear that the deprivation of liberty of a person not yet convicted shall occur ***only when necessary and proportional, and shall not continue beyond the period for which appropriate justification can be provided***.[26] The ICTY has applied this principle in the context of interim release, holding that detention must be suitable, and its degree and scope necessary.[27] Consequently, if measures more lenient than mandatory detention suffice, such measures "*must be applied*".[28]
21. Accordingly, the legal grounds to justify pre-trial detention – even if initially reasonable or sufficient – may shift over time, and a decision on detention must necessarily reflect such changes. Indeed, the ECtHR has expounded on the principle that, after a certain period of time, reasonable suspicion that the person

[25] ECtHR, *Clooth* v *Belgium*, App. no. 12718/87, 12 December 1991, para. 36.
[26] ECtHR, *McKay v. UK*, para. 30, ECtHR; *Assanidze v. Georgia*, para. 170.
[27] *Mrda*, IT-03-69-PT, 15 April 2002, para. 31.
[28] *ibid.*

arrested may have committed a crime ***no longer suffices to deprive him or her of liberty*** and that pre-trial detention must not be an instrument to anticipate a custodial sentence.[29] After all, pre-trial detention and interim release do not have a punitive character[30] and the protracted incarceration of a human being – predicated on no more than reasonable suspicion – is not befitting of a system of justice.

22. A speedy trial is paramount to avoid prolonged and unreasonable lengths of pre-trial detention, especially when dealing with minor offenses, such as interference with the administration of justice. The ICTY's adjudication of the *Beqaj* case is particularly instructive in this regard. The accused, ultimately found guilty of interfering with the administration of justice, was detained for a ***total*** of six months and one day with regard to such offense; indeed, he was surrendered into ICTY custody on 4 November 2004 and the Trial-Chamber Judgement was rendered only six months later, on 5 May 2005.[31]

23. Similarly, limitations have been established in domestic legal systems as to the legal duration of pre-trial detention. In France, for instance, ***pre-trial detention may not exceed four months for lesser criminal offenses***, i.e., when the risk of the accompanying sentence is five years or less.[32] Germany establishes a ***maximum of six months for the duration of pre-trial detention for all crimes***; an equivalent time limit applies in Greece for lesser criminal offenses. In Poland, pre-trial detention cannot exceed three months (unless extension is requested under certain conditions).[33] Indeed, a number of these laws are the consequence of legal

[29] ECtHR, *Vosgien v. France,* App. No. 12430/11; ECtHR, *Letelier v. France*, para. 35; ECtHR, *Tomasi v. France*, para. 84; ECtHR, *Kemmache v. France*, para. 45.
[30] IT-99-36-T, 20 September 2002, para. 28.
[31] *Beqa Beqaj*, IT/03/66/R77.
[32] Article 145-1 French Criminal Procedure Code.
[33] Article 263(1) of the Polish Criminal Procedure Code.

suits filed against the relevant states for violating the standards of necessity and proportionality as regards duration of pre-trial detention.[34]

24. While some may argue that the grave and serious nature of the crimes prosecuted at the international Courts and tribunals remove – or at least limit somewhat – the protections of international human rights as regards the detainee, several Chambers at the ICTY have warned about overreliance on gravity of crimes and lengthy sentences in assessing provisional release indicating because all accused before the Tribunal are likely to face long prison sentences, such argument cannot *in abstracto* be used against the accused.[35] As such, gravity of the crimes alone – or the anticipated length of sentence – cannot be considered in isolation or as the pretext provisional release denial; to do so would effectively result in the blanket and categorical obviation of provisional release.

25. Similarly, Judge Trendafilova found that the gravity of the crimes with which Mr Bemba was charged and an anticipated lengthy sentence could not, in itself, serve to justify long periods of pre-trial detention.[36] Even if, as subsequently found by Appeals Chamber, the gravity of crimes and anticipated length of sentence, coupled with high "political and professional position[s] and [vast] international contacts and ties" favours continued detention[37] – a contention hotly contested by the Defence – this is entirely inapplicable to Mr Kilolo, a man who enjoys none and cannot avail himself of any such benefits.

26. Mr Kilolo is not being charged with *crimes* within the jurisdiction of this Court, which, due to their grave and serious natures, *may* arguably justify longer periods of detention. Rather, he is being charged with *offenses* against the administration of justice. The maximum penalty for such offenses is five years,

[34] ECtHR, *Tomasi v. France*, Series A, No. 241-A, p. 39, 27 August 1992; *Clooth v. Belgium*, Series A, No. 225, 12 December 1991.
[35] *Prlić*, IT-04-74-PT, 30 July 2004, para. 20.
[36] *ibid.*, para. 59.
[37] *ibid.*, paras. 70, 71.

and indeed, may be punishable by *no more than a fine.* Clearly, Article 70 offenses are not serious crimes within the meaning of the Rome Statute or this Court's jurisprudence that would give rise to concerns of flight risk, and by way of consequence, justify continued detention.

27. The Defence contends that Mr Kilolo's circumstances have changed since the previous Detention Decision in that by the time these observations are submitted, Mr Kilolo will have been detained, absent ***any*** formal charges, for ***more than seven months***. This constitutes more than 11.6% of the ***maximum sentence*** of five years that he may serve if ultimately found guilty under Article 70. That Mr Kilolo has already served more than 11% of a maximum sentence *before even being presented with the document containing the charges* cannot be considered reasonable, within the meaning of either international human rights standards or this Court's practice. Rather, it is a manifest obviation of his rights. Indeed, if Mr Kilolo is not released by the time the decision on the confirmation of charges is issued, he will have been deprived of his liberty, *absent any judicial decision on the charges*, for almost an entire year, i.e., he would have already served, prior to the confirmation decision, approximately 18.3% of the *maximum* sentence for Article 70 offenses. To that end, the Defence urges the Single Judge to consider the Mr Kilolo's continued, uninterrupted and protracted detention is a changed circumstances within the meaning of Article 60(3), and must be considered in the Judge's *de novo* assessment.

ii. Non-Satisfaction of Article 58(1)(b) Conditions

28. A periodic review under Article 60(3) requires a review of the previous ruling on detention, in this case the Single Judge's Detention Decision, which was predicated on Articles 60(2) and 58(1)(b) of the Statute. As such, a present periodic review necessitates consideration of both such Articles, which, by consequence, requires an *ex novo* review of those facts giving rise to the arrest warrant under Article 58(1)(a). Indeed, the Appeals Chamber has made absolutely clear that a decision on interim release, though able to consider the

same materials as those looked at for the purposes of the warrant and on the same factors underpinning it[38], nonetheless requires that the Pre-Trial Chamber inquire anew into the existence of the facts justifying detention.[39]

29. The language of Article 60(2) makes clear that detention is possible only upon the satisfaction of certain conditions, in the absence of which detention remains unwarranted, suggesting that the burden is placed on the side *seeking* the detention, i.e., the Prosecution. Furthermore, as articulated by the Appeals Chamber, "*the decision on continued detention or release…is not of a discretionary nature…[d]epending on whether or not the conditions of article 58(1) of the Statute continue to be met, the detained person shall be continued to be detained or shall be released*"[40], with or without conditions.[41] Though detention may be ordered upon execution of an arrest warrant, it should be prolonged only upon the Prosecutor's showing of concrete and specific evidence that the accused continues to satisfy the three conditions encapsulated in Article 58(1)(b). The transposition of Article 58(1) into Article 60(2) as the criterion for the continuation of the detention of the arrestee *in no way correlates or subordinates* the decision to be made – i.e., that on interim release – to that already taken in the arrestee's absence and which sanctioned the deprivation of liberty, i.e., the arrest warrant.

30. Article 58(1)(b) stipulates three conditions by which detention is justified, the first of which is the existence of risk of flight that consequently necessitates arrest to ensure appearance at trial. As this Court's practice has thus far found a risk of flight to exist in every single case presented before it – raising the question as to when a flight risk is *not* present – the Defence contends that ICTY jurisprudence is particularly persuasive in this regard. Indeed, the Tribunal allows for a wide variety of subsidiary and relevant factors to be considered cumulatively[42] in

[38] ICC-02/11-01/11-278-Red, para. 27.
[39] *ibid*., para. 23.
[40] ICC-01/05-01/08-824, para. 134.
[41] Rome Statute, Art. 60(2).
[42] *Stanisić & Zupljanin*, IT-08-91-A, 19 December 2013, para. 18.

assessing provisional release, with the weight accorded to each factor depending upon the particular circumstances of the individual case.[43]

31. For example, the ICTY has found that a cooperative attitude subsequent to surrender to the Tribunal is a strong contra-indicator of flight risk, noting with approval an accused's cooperation during detention,[44] towards the Tribunal[45], and with the Prosecution[46] as circumstances weighing heavily in favour of provisional release. Indeed, where an accused has manifested a "*determination to submit to the course of international justice*", the Chambers have been wont to find a negation of flight risk.[47] Indeed, good behaviour while in detention – manifested by cooperation with the Tribunal and availing oneself of the judicial process – weigh heavily in favour of provisional release, a premise upheld by the Special Court of Sierra Leone, which has held that "*personal circumstances could satisfy the Court that an accused would appear for trial if released.*"[48] Consequently, where a detainee has cooperated with the judicial process, has behaved exemplarily and in good faith, and has already served a large part of his sentence, he or she is unlikely to prove to be a flight risk.[49]
32. This Court has also held that simply showing the feasibility, ease or possibility of a detainee's ability to abscond is insufficient; rather, there must be <u>*concrete*</u> *circumstances demonstrating the risk of flight is particularly likely*.[50] In indicating satisfaction of Article 58(1)(b) conditions "revolves around the possibility, not the inevitability, of a future occurrence", the Appeals Chambers specifically indicated such standard was ***not*** one of 'hypothetical conjecture'.
33. Here, Mr Kilolo does not pose a flight risk in any way or to any degree. In the first place, he is being charged with Article 70 offenses, which are not grave

[43] *Popović,* IT-05-88-A, 11 January 2012, para. 5.
[44] *Kupreskić,* IT-95-16-T, 6 May 1999, p. 2.
[45] *Gotovina*, IT-06-90-T, 18 July 2008, para. 19.
[46] *Stanišić and Simatović*, IT-03-69-T, 31 March 2010, para. 23.
[47] *Haradinaj,* IT-04-84-PT, 6 June 2005, para. 33.
[48] *Karemera,* ICTR-01-69-AR65, 7 April 2009, para. 13.
[49] *Haradinaj*, IT-04-84bis-PT,6 June 2005, para. 23
[50] ECtHR, *Stogmuller v. Austria*, App. No 1602/61 (10 November 1969) para 15.

enough to warrant fears of absconding. Second, he has already served 11.6% of the maximum sentence. To flee now – after serving more than 11% of a sentence for an offense with which he has not yet been charged – would be to spend the rest of his life in hiding, away from his home and family in Belgium. He is a Belgian citizen, whose return is highly anticipated by his wife and children. [redacted], as should Mr Kilolo. The fact that he will have already fulfilled a large part of his maximum sentence in pre-trial detention, in addition to the knowledge that his family, his principal reason for requesting interim release and to whom he has dedicated his life, anxiously await his return absolutely a contra-indicator of flight risk. Indeed, Mr Kilolo's full cooperation with this Court throughout his detention, manifested through active participation in the judicial process should be given great import in the Single Judge's imminent assessment on interim release.

34. The second condition of Article 58(1)(b) enables detention where it appears necessary to "ensure that the person does not obstruct or endanger the investigation or the court proceedings" while the third condition presumes an arrest is necessary where there is a risk of the continued commission of crimes or commission of related crimes. In the Detention Decision, the Single Judge stated *"the nature of the crimes at stake in these proceedings (i.e., offences against the administration of justice) is such as to create a great degree of overlapping between the risk that the investigation be obstructed or endangered and the risk that the commission of the crimes be continued or that related crimes be committed"*. Furthermore, the Chamber held that such risks extended not only to the Article 70 investigation and case, but to the investigation of the Main Case as well.[51]

35. The ECtHR has expressly stated the risk of obstructing or endangering investigations diminishes with the passing of the time as the inquiries are

[51] ICC-01/05-01/13-259, para. 36.

effected, statements taken, and verifications carried out.[52] This has been upheld by the ICTY, which has held that an accused's ability to prejudice a case or investigation is diminished with the progress of the case.[53] Furthermore, this Court has further explicated that such risk must be concrete and specific and cannot be based on hypothetical conjecture or abstract assessment.

36. The Defence notes that the Prosecution will present the document containing the charges at the time these present Observations are submitted. As such, it is evident that the Prosecutor will have concluded her investigation and the findings related thereto. Indeed, pursuant to the ECtHR jurisprudence, the advanced stage of the Article 70 investigation will have negated any risk posed by Mr Kilolo as to obstructing or endangering the Prosecutor's investigation, since the substantial aspects of the investigation will have been completed.

37. Furthermore, the Single Judge previous indicated that the second and third conditions of the Article 58(1)(b) test extended to the Main Case as well, in light of the inextricable connection between the cases. It should be noted that the Main Case is in its final stages of trial. Indeed, all evidence has been submitted, the Prosecution submitted its closing briefs on 2 June 2014 and corrections on 20 June 2014, and the only outstanding submissions – the Defence's closing replies – are to be submitted on 25 August 2014.[54] The Defence cannot conceive in what way Mr Kilolo could have any influence on the Main Case, much less prejudice it in any way, especially where such risk is objectively impossible. As such, there is very little – if any – possibility that Mr Kilolo, even if he wanted to, could prejudice or affect the investigations and court proceedings in any way in *either* the Article 70 or Main Case.

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[52] ECtHR, *Clooth v. Belgium*, App. No. 12718/87, 12 December 1991, para 49.
[53] *Delić*, IT-04-82-T, 5 June 2008, para. 21.
[54] ICC-01/05-01/08-3091, paras. 2, 16 and 17.

38. Indeed, there is no reason whatsoever to believe – and certainly no concrete or specific risk –that Mr Kilolo, if released, *would* endanger or interfere with court proceedings and investigations or otherwise commit new or related crimes. He has always been an exemplary role model, both to his family and to his colleagues, and has spent his life in the service of justice. His unquestionable moral character is attested to by the [redacted][55] and is buttressed by the fact that he has *never* been sancti [redacted] ed.[56] To hold that Mr Kilolo poses a risk to the investigations at hand is inconsistent with both his personal characteristic and the virtual impossibility that the investigations can even be obstructed or endangered in the first place.

III. PERSONAL GUARANTEES

39. As indicated above, personal guarantees carry a lot of weight at the international tribunals and can serve to negate flight risk. Mr Kilolo is willing to stipulate to a number of personal guarantees to ensure his compliance with any Court-imposed conditions upon his release, the violation of which would subject Mr Kilolo to a Belgian arrest warrant and which would provide for his immediate transfer back into the Court's custody.

40. In addition to any other Court-imposed conditions, Mr Kilolo pledges the following:

(a) He consents and commits to residing and remaining for the entire term of his interim release in the territory of Belgium, and shall not leave said territory for any reason whatsoever during such period of release unless otherwise ordered by the Pre-Trial Chamber for purposes connected with the current proceedings;

(b) He commits to residing only at his home address in [redacted], Belgium, which address has been provided to and will be confirmed with the Registry;

(c) He commits to the Registry's continued possession of his passport;

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[55] *See* Annexes A and E.

[56] *See* Annex E.

(d) He commits to presenting himself no less than three times each day to the police station located in his neighbourhood, at 8:00 am, 1:00 pm, and 6:00 pm every day;

(e) Alternatively, he is willing to present himself at the police station at regular intervals determined by the Court between 7:00 am and 10:00 pm each day;

(f) He commits to return home each evening no later than 10:00 pm and shall not leave his residence for any reason between 10:00 pm and 7:00 am each day;

(g) He commits to, upon his release, refraining from any contact with Mr Bemba, the other Suspects, or any persons close or related to the above, and is willing to allow monitoring of his telephone communications in this respect;

(h) He shall not contact any of the witnesses from the Main Case or the Article 70 proceedings, nor anyone close or related to the witnesses, and is willing to allow passive monitoring of his telephone communications to ensure the Court's satisfaction of compliance therewith;

(i) He shall not communicate using any telephone lines other than his fixed home telephone line, to which he agrees to allow passive monitoring, as well as from one singular GSM mobile phone number, which phone number shall be prior provided to the Registry and on which passive monitoring shall be allowed;

(j) He commits to limiting himself to the use of a singular email address, which address is his profession email address registered with the Brussels bar, which shall be prior provided to the Registry, and shall be contactable at all times by the Registry vis-à-vis a mobile telephone number the Registry may call at any time;

(k) He shall not speak to any member of the media whatsoever with regard to the present proceedings or the Main Case or any issues related thereto; and

(l) In light of the fact that Belgium has a very specific structure by which it is divided into individual court districts, each of which has, in addition to a police force, a *Maison du Justice* which is intended to ensure compliance of a released person with reintegration into society, Mr Kilolo consents and commits to the imposition of any conditions to his release relating to presentation in front of such *Maison du Justice* and to agree to a social investigation in that regard, which

shall include phone verifications of Mr Kilolo's compliance with his conditional release, social investigations as to Mr Kilolo's behaviour and monthly reports in this regard, which condition Mr Kilolo would be willing to discuss at the status conference mentioned below;

(m) Though in no way an admission of guilt or culpability, he shall seek preventative guidance regarding the respect of administration of justice, to which end, Mr Kilolo has already sought the expertise of [redacted][7] [redacted]; and

(n) He shall attend ten hours of classes in continuing legal education as provided by the Brussels bar on issues of professional ethics, proof of which shall be provided to the Registry.

IV. RELIEF REQUESTED

The Defence for Mr Kilolo respectfully requests that the Pre-Trial Chamber:

- Request the Registry to give its observations on the concrete possibility of Mr Kilolo's release in light of the cooperation agreement signed between the Court and the Kingdom of Belgium;
- Request a Status Conference with the appropriate authorities of Kingdom of Belgium and the Kingdom of the Netherlands as regards the practical questions and conditions associated with Mr Kilolo's conditional release on Belgian territory and transfer from the territory of the Netherlands to the territory of Belgium; and
- Decide on Mr Kilolo's continued detention and interim release I accordance with Article 60(3) and with the arguments expressed herein, especially in light of the personal guarantees and conditions stipulated in Section IV above.

[57] *See* Annex C.

Maître Paul Djunga Mudimbi

Lead Counsel for Aimé Kilolo Musamba

Dated this 24th June 2016

At Paris, France