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

Date: 14 March 2014

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF *THE PROSECUTOR V. JEAN-PIERRE BEMBA GOMBO,
AIMÉ KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE
BABALA WANDU AND NARCISSE ARIDO***

Public

**Decision on the “ *Demande de mise en liberté provisoire de Maître Aimé Kilolo
Musamba* ”**

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

The Office of the Prosecutor

Fatou Bensouda
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Jean-Pierre Kilenda Kakengi Basila

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Competent authorities of the Kingdom of the Netherlands
Competent authorities of the Kingdom of Belgium

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel, Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

Harry Tjonk

Victims Participation and Reparations Section Other

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

NOTING the “Warrant of arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido” issued on 20 November 2013¹;

NOTING the “Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba” dated 16 December 2013², whereby the Defence for Aimé Kilolo requests the Single Judge to (i) convey a public hearing pursuant to rule 118 (3) of the Rules of Procedure and Evidence, (ii) “accorder la mise en liberté provisoire au requérant” or, “à titre subsidiaire” (iii) “accorder sa mise en liberté sous conditions conformément à la règle 119 du Règlement de Procédure et Preuve”;

NOTING the “Decision requesting observations on the ‘Demande de mise en liberté provisoire de Maître Aimé Kilolo’” dated 17 December 2013³, requesting the Prosecutor, the relevant authorities of the Kingdom of the Netherlands and of the Kingdom of Belgium to submit their views on Mr Kilolo’s Request for Interim Release no later than Friday 3 January 2014;

NOTING the “Request by the Kingdom of Belgium for an extension of the deadline for submitting its observations on the ‘Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba’” dated 20 December 2013⁴;

NOTING the “Decision granting an extension of time limits for submitting observations on the ‘Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba’” dated 20 December 2013⁵, whereby the Single Judge extended the time limit for the submission of observations until Monday 13 January 2014;

NOTING the “Addendum à la demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba introduite le 16 décembre 2013 (ICC-01/05-01/13-42)” dated 7

¹ ICC-01/05-01/13-1-Red2-tENG.

² ICC-01/05-01/13-42 with confidential Annexes 1-18.

³ ICC-01/05-01/13-46.

⁴ ICC-01/05-01/13-59, with confidential Annexes 1 and 2.

⁵ ICC-01/05-01/13-60.

January 2014⁶, whereby the Defence for Mr Kilolo sought to inform the Single Judge on “quelques changements intervenus depuis sa demande”;

NOTING the “Prosecution Response to the ‘Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba’ of 16 December 2013 and its Addendum of 7 January 2014 (ICC-01/05-01/13-42 and ICC-01/05-01/13-69)” dated 13 January 2014⁷, whereby the Prosecutor submits that Mr Kilolo’s Request for Interim Release “advances no cogent reasons why provisional release should be granted”;

NOTING the “Report of the Registry on the ‘Decision requesting observation on the “Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba”” dated 14 January 2014⁸, whereby the Registrar transmitted to the Chamber the observations received by the Kingdom of the Netherlands and the Kingdom of Belgium;

NOTING that the Belgian authorities expressly stated they would not oppose the reclassification of their observations as public⁹;

NOTING articles 21, 58(1), 60(1) and (2) and 67(1) of the Statute, rules 118(1), (2) and (3), 119(1) of the Rules of Procedure and Evidence and regulation 51 of the Regulations of the Court;

HEREBY RENDERS THIS DECISION.

Determinations by the Single Judge

A. General principles

1. The Single Judge will decide Aimé Kilolo Musamba’s request for interim release in light of those principles which are now consolidated in the case-law of the Appeals Chamber of the Court and have constantly been upheld by this Chamber.

2. Pursuant to article 60(2) of the Statute, upon an application for interim release, the Chamber has to determine whether “the conditions set forth in article 58, paragraph 1, are met”. In the affirmative, “the person shall continue to be detained; in the negative, the person shall be released, “with or without conditions”. This assessment requires the Chamber to “inquire anew into the existence of facts

⁶ ICC-01/05-01/13-69, with Confidential Annexes 19-36.

⁷ ICC-01/05-01/13-88-Conf.

⁸ ICC-01/05-01/13-95, with Confidential Annexes 1-9.

⁹ ICC-01/05-01/13-95-Conf-Anx-9, p. 6.

justifying detention”¹⁰, but can be based on the same materials as those looked at for the purposes of the warrant and on the same factors underpinning it¹¹.

3. The Single Judge agrees with the Defence submission to the effect that “la détention est une mesure exceptionnelle” and, as such, must be “nécessaire et proportionnelle”¹². By the same token, he highlights that the presumption of innocence does not *per se* prevent detention, provided it is justifiable and justified. It is an exception which is necessary, and shall therefore unfailingly apply, when the relevant statutory requirements are satisfied. As stated by the Appeals Chamber, “the decision on continued detention or release pursuant to article 60(2) read with article 58(1) of the Statute, is not of a discretionary nature. Depending upon 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”¹³.

4. The Single Judge is mindful of a recent “recommendation” issued by the Appeals Chamber, by way of criticism to a Pre-Trial Chamber’s decision under article 60(2) of the Statute, to the effect that such decisions must contain a “full reasoning”¹⁴. Whilst believing that more than one doubt could be raised as to the actual existence of such a need, he will nevertheless specifically refer to some of the materials relied upon in issuing the warrant (as well as to their contents), all of which have been reconsidered and assessed *ex novo* for the purposes of this decision.

5. By referring to “article 58, paragraph 1”, article 60(2) of the Statute seems to require the Pre-Trial Chamber to proceed anew to an assessment of both the existence of reasonable grounds to believe that the crimes alleged by the Prosecutor have been committed by the arrested person (article 58(1)(a), and of the existence of one or more of the risks listed under article 58(1)(b). It is debatable, however, to what extent a Pre-Trial Chamber (namely, the same Pre-Trial Chamber who has issued the warrant of arrest) can be meaningfully called upon reassessing the existence of reasonable grounds to believe that a crime has been committed in the context of an

¹⁰ ICC-02/11-01/11-278-Red, para. 23.

¹¹ ICC-02/11-01/11-278-Red, para. 27.

¹² ICC-01/05-01/13-42, para. 45.

¹³ ICC-01/04-01/06-824, para. 134.

¹⁴ ICC-02/11-01/11-278-Red, para. 49. See also ICC-01/04-01/06-824, para. 124.

application for interim release. It is also worth noting that the practice developed so far by the Chambers of the Court in their decisions on requests for interim release seems, most appropriately, to have rather focussed on the determination as to whether one or more of the risks listed under letter b of article 58(1) still exist. Be it as it may, the Single Judge will also briefly proceed to assess the persisting existence of reasonable grounds to believe that the crimes alleged by the Prosecutor in the application have been committed.

B. First limb of the assessment: article 58(1)(a) (whether there are reasonable grounds to believe that the person committed the crimes alleged by the Prosecutor)

6. On the basis of material attached to the Prosecutor's Application, the Single Judge found that there were reasonable grounds to believe that Aimé Kilolo Musamba i) "made payments to Defence witnesses with funds made available by the Accused"; ii) attempted to tender into the record of the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* ("Main Case") "at least 14 documents which he knew to be false or forged"; iii) contacted several Defence witnesses in the Main Case, "immediately before or after their appearance before the Trial Chamber, and, in some instances, during recesses between two phases of their in-court testimony"; iv) during such contact, "explained to the witnesses which questions would be put to them and the responses they should give in court"¹⁵.

7. The material on which the Chamber based its findings in relation to Aimé Kilolo – which, together with the Prosecutor's Application, was reclassified as confidential and therefore made available to all the suspects as of 27 November 2013 - included the following: a) translated excerpts of phone calls intercepts between Jean-Pierre Bemba and Fidèle Babala, where Aimé Kilolo is mentioned in connection with money transfers requested by or made to him¹⁶ (and to Jean-Jacques

¹⁵ ICC-01/05-01/13-1-Red2-tENG, para. 16.

¹⁶ ICC-01/05-67-Conf-Anx I.1, page 1, 6 February 2013, 2013/000029875; page 2, 25 May 2012, 2013/000031430; page 3, 7 September 2012, 2013/000034810; page 5, 14 August 2012, 2013/000034780; page 7, 28 September 2012, 2013/000034808; page 8, 16 October 2012, 2013/000034984; page 9, 13 November 2012, 2013/000035203; page 11, 22 November 2012, 2013/000035136.

Mangenda¹⁷); b) tables containing details of amounts of money transferred to and by Aimé Kilolo, including to Defence witnesses in the Main Case¹⁸; c) fourteen documents received by Aimé Kilolo from Narcisse Arido for the purposes of being tendered into evidence in the Main Case¹⁹, the authenticity of which is explicitly disputed by witnesses²⁰.

8. Materials submitted by the Prosecutor in relation to the offence enshrined in article 70(1)(a) of the Statute (presenting forged evidence) included a witness statement in the Main Case challenging the authenticity of a number of documents, on the basis of reasons relating to both their form and their content²¹.

9. As regards the offence enshrined in article 70(1)(c) of the Statute (corruption of witnesses), the materials made available by the Prosecutor showed that Defence witnesses were contacted during adjournments of their testimony, in the absence of an authorisation from the Victims and Witnesses Unit²², and that some of the contacted witnesses actually amended their testimony²³.

10. The Single Judge was also able to rely on two reports submitted by Independent Counsel, respectively on 25 October 2013 (“First Report”)²⁴ and on 14 November 2013 (“Second Report”)²⁵.

11. The First Report stated inter alia that intercepts of phone communications authorised by the Dutch judicial authorities showed “la préparation de témoins, la fabrication de témoignages et/ou la subornation de témoins”²⁶. More specifically, Independent Counsel stated that conversations between Aimé Kilolo and a witness showed that “le Conseil principal” (i.e, Aimé Kilolo, lead counsel for Jean-Pierre Bemba in the Main Case) “fait répéter au témoin ce qu’ils [sic] devra dire lors de sa

¹⁷ ICC-01/05-67-Conf-Anx I.1, page 12, 12 December 2012, 2013/000035648.

¹⁸ ICC-01/05-67-Conf-AnxB.4; ICC-01/05-67-Conf-AnxB.6; ICC-01/05-67-Conf-AnxC.3.

¹⁹ ICC-01/05-67-Conf-AnxD.1-D.14.

²⁰ ICC-01/05-67-Conf-AnxE.1, pages 22 (CAR-OTP-0069-0031) and 29 (CAR-OTP-0069-0038); ICC-01/05-67-Conf-AnxE.4, pages 15-19.

²¹ ICC-01/05-67-Conf-AnxE.1, pages 22, 23, 29.

²² ICC-01/05-67-Conf-AnxK.13.

²³ See ICC-01/05-01/08-T-332-CONF-ENG, page 79, line 7 and ICC-01/05-01/08-T-333-CONF-ENG, page 66, lines 10 to 23.

²⁴ ICC-01/05-64-Conf-Red.

²⁵ ICC-01/05-66-Conf-Red.

²⁶ ICC-01/05-64-Conf-Red, pages 7-8.

déposition” and that other conversations between Mr Kilolo and Mr Mangenda (case manager for Jean-Pierre Bemba in the Main Case) showed that “soit le Conseil principal a intentionnellement donné, ou va donner, des instructions à des témoins quant au contenu de leur déposition”; “soit des instructions ont été intentionnellement données à des témoins quant au contenu de leur déposition, et le Conseil principal et le gestionnaire de dossier en ont, au moins, une parfaite connaissance” and that “le contenu des conversations à ce jour fait également apparaître que le Conseil principal et/ou le gestionnaire de dossier ont vraisemblablement, directement ou indirectement, donné des instructions à des témoins sur les propos qu’ils devraient tenir lors de leur déposition”²⁷.

12. Aimé Kilolo also emerged from the intercepts as being involved in money transfers²⁸, some of which executed through Western Union²⁹.

13. Similar elements emerge from the Second Report, referring to conversations in which, inter alia, Aimé Kilolo refers to instructions to be given to the witnesses³⁰, or makes comparisons between³¹ and complains about³², witnesses’ statements. As a whole, both reports contain several elements suitable to support the finding that there are reasonable grounds to believe that a “scheme” of witness corruption existed and that Aimé Kilolo played a determinant role in its implementation.

14. Confidential redacted versions of both the First and the Second Report (and of their unredacted annexes) were made available to the Defence teams of the suspects on 16 December 2013.³³

15. None of the material contained either in the Prosecutor’s Application or in the Independent Counsel reports is addressed by the Defense for Aimé Kilolo. Counsel

²⁷ ICC-01/05-64-Conf-Red, pages 7-8. See, in support of these statements, inter alia the following: ICC-01/05-64-Conf-Anx, pages 4-5 and ICC-01/05-01/08-T-332-Conf-ENG, pages 65-66; ICC-01/05-64-Conf-Anx, pages 17-20.

²⁸ ICC-01/05-64-Conf-Anx, pages 5-7 ; 14.

²⁹ ICC-01/05-64-Conf-Anx, page 7.

³⁰ ICC-01/05-66-Conf-Anx, page 6.

³¹ ICC-01/05-66-Conf-Anx, pages 7-8.

³² ICC-01/05-66-Conf-Anx, page 9. See also transcripts of phone conversations held on 29 August 2013 (ICC-01/05-66-Conf-Anx, pages 10-11); 1 September 2013 (ICC-01/05-66-Conf-Anx, page 13); 10 September 2013 (ICC-01/05-66-Conf-Anx, page 17); 11 and 12 September 2013 (ICC-01/05-66-Conf-Anx, page 19 and page 25).

³³ ICC-01/05-64-Conf-Red and ICC-01/05-66-Conf-Red, and annexes thereto.

simply stated that he reserved his right, “le moment venu, de prouver le contraire en formulant ses moyens de défense” and to demonstrate “qu’il n’en est rien”³⁴.

16. The Single Judge notes that, under these circumstances, he is still fully persuaded that the information and materials made available to the Chamber by the Prosecutor at the time of her Application under article 58 of the Statute and by Independent Counsel, all of which have been assessed *ex novo* in light of Mr Kilolo’s request for interim release, still justify the finding that there are reasonable grounds to believe that Aimé 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.

C. Second limb of the assessment: article 58(1)(b) (whether the arrest appears necessary for one or more of the reasons listed therein)

17. Mr Kilolo’s Request for Interim Release relies to a great extent on the submission of “changements matériels survenus dans les circonstances qui ont prévalu au moment de l’émission du mandat d’arrêt”, which changes – in his view – would make it necessary that release be granted. He refers to a decision by the Appeals Chamber, stating *inter alia* that the Pre-Trial Chamber “in assessing whether the conditions under article 58 (1) continue to be met may, pursuant to article 60 (3), second sentence, modify its ruling if it is satisfied that changed circumstances so require. The requirement 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”³⁵.

18. At the outset, and for the sake of accuracy, the Single Judge notes that the Appeals Chamber precedent referred to by the Defence for Mr Kilolo was made in relation to a pre-trial chamber’s review of its ruling on the release or detention pursuant to Article 60(3) of the Statute (i.e., periodical review) and not in relation to a request pursuant to article 60(2) of the Statute. It is debatable to what extent “changed circumstances” are or must be the subject matter of a decision under the latter, which rather requires the Chamber to assess whether it continues to be

³⁴ ICC-01/05-01/13, para. 15.

³⁵ ICC-01/05-01/08-631-Red, para. 60.

satisfied that the requirements of article 58(1) are met. Be it as it may, since a decision on a request for interim release is not the appropriate venue to embark upon subtle issues of interpretation of legal texts, the Single Judge will address all the factors mentioned in the Request, all of which pertain to the determination as to whether either of the risks listed in article 58(1)(b) still exist.

19. As regards the requirements set forth under article 58(1)(b), the Single Judge notes that – as clarified by the Appeals Chamber³⁶ and also recently reiterated by this Chamber³⁷ – the three conditions listed in the provision are “in the alternative”, thereby making “the fulfilment of one of them sufficient to negate the need to address the remaining conditions”. Nevertheless, the Single Judge deems it appropriate to consider all of them. By the same token, he will also strictly follow the guidance provided by the Appeals Chamber to the effect that, when it comes to determine the existence of one or more of the risks set forth in article 58(1)(b), the “question revolves around the possibility, not the inevitability, of a future occurrence”³⁸, provided only that such risk is established on the basis of specific and concrete elements.

C.1 *Appearance at trial*

20. At the time of the issuance of the Warrant, the Single Judge had found that “the political connections which Jean-Pierre 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 him “for the purposes of the conduct under investigation ... show that Jean-Pierre Bemba could also mobilise substantial means and resources to evade prosecution for said conduct before the Court or *to prevent such prosecution of his associates* (including the other persons who are the subject of the Application pursuant to article 58)”³⁹ (emphasis added). Furthermore, he had found that Aimé Kilolo possessed identity documents which entitled him to travel freely, not only throughout the Schengen area, but also to non-

³⁶ ICC-01/04-01/06-824, para. 139.

³⁷ ICC-01/04-02/06-147, para. 39.

³⁸ ICC-01/04-01/07-572, para. 21.

³⁹ ICC-01/05-01/13-1-Red2-tENG, para. 22.

States parties to Statute, such as Cameroon, which are under no obligation to cooperate with the Court” and that, as part of Jean-Pierre Bemba’s network, he could be made available financial resources allowing him to readily abscond from the jurisdiction of the Court.⁴⁰ He also found that, since the relevant conducts had continued from at least early 2012, and in all likelihood continued to date, the arrest of Aimé Kilolo and the others persons referred to in the Application was necessary to prevent them from further obstructing or endangering the investigation or the trial, and so that the commission of the crime did not continue⁴¹.

21. The Defence for Mr Kilolo submits that “[c]es motifs ne sont plus d’actualité”⁴². First, the Defence clarifies that Mr Kilolo, as a national of Belgium and not of the Democratic Republic of the Congo, is in possession of no identifying documents which would allow him to move to States not party to the Statute without being granted a visa by the Belgian authorities,⁴³ or even within the Schengen area, in particular in light of the fact that he handed over his Belgian passport to the authorities of the ICC Detention Centre on 27 December 2013⁴⁴. Second, it attaches a letter from the former *Bâtonnier* in Brussels⁴⁵ as well as by a number of colleagues from the bar⁴⁶ and a neighbour⁴⁷, all of whom provided ad hoc statements witnessing to Aimé Kilolo’s morality, good conduct and professionalism. Copies of Mr Kilolo’s *casier judiciaire* in Belgium⁴⁸, of his tenancy agreement for an apartment in The Hague⁴⁹ and a certificate of residence in Belgium⁵⁰ are also attached. Third, it submits that, following his exclusion from the defence team of Mr Bemba’s as a consequence of his arrest, “aucun risqué n’est à redouter quant au financement du requérant par le reseau de [Jean-Pierre Bemba] pour prendre la fuite

⁴⁰ ICC-01/05-01/13-1-Red2-tENG, para. 22.

⁴¹ ICC-01/05-01/13-1-Red2-tENG, para. 23.

⁴² ICC-01/05-01/13-42, para. 18.

⁴³ ICC-01/05-01/13-42, para. 25.

⁴⁴ ICC-01/05-01/13-69, para. 8.

⁴⁵ ICC-01/05-01/13-42-Conf-Anx1.

⁴⁶ ICC-01/05-01/13-42-Conf-Anx2; ICC-01/05-01/13-42-Conf-Anx3; ICC-01/05-01/13-42-Conf-Anx4; ICC-01/05-01/13-69-Conf-Anx19;. ICC-01/05-01/13-69-Conf-Anx20.

⁴⁷ ICC-01/05-01/13-42-Conf-Anx5.

⁴⁸ ICC-01/05-01/13-42, para. 43.

⁴⁹ ICC-01/05-01/13-42, para. 38, Annex 9.

⁵⁰ ICC-01/05-01/13-42, para. 38, Annex 10.

ou pour faire obstruction à l'enquête ou à la procédure"⁵¹. Fourth, he submits that continued detention is causing serious prejudice to his personal and professional life⁵².

22. Whilst acknowledging the handing over of Mr Kilolo's passport to the authorities of the Detention Centre, the Single Judge observes that this does not detract from the risks of flight which are inherent in the very connection of Aimé Kilolo to the network of Jean-Pierre Bemba Gombo and to the ensuing likelihood that he might be made available resources enabling him to abscond from the jurisdiction of the Court. Furthermore, it is to be noted that Mr Kilolo requests to be released in Belgium, i.e. in a country within the Schengen area, where travel is to a great extent possible without the need that identity documents be shown or relied upon. As noted by the Belgian authorities, "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, since his arrest would require the prior issuance of a new warrant of arrest by the Chamber, "l'interception, à temps, de l'intéressé serait dès lors probablement illusoire"⁵³.

23. As regards the statements of individuals variously connected to Aimé Kilolo and his family, witnessing to his personal and professional qualities, the Single Judge notes that the personality of a suspect is not one of the reasons on the basis of which the Chamber can or should determine whether detention is or continues to be necessary. Rather, it has to determine whether detention is necessary "to ensure that the person appears at trial". Personal 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 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, in the presence of other

⁵¹ ICC-01/05-01/13-42, paras 27-33, in particular para. 32.

⁵² ICC-01/05-01/13-42, para. 50.

⁵³ ICC-01/05-01/13-95-Conf-Anx9.

elements suitable to substantiate the existence of those risks. The Single Judge notes 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. They may not only threaten or disrupt the overall fair and efficient functioning of the justice in the specific case to which they refer, but also ultimately undermine the public trust in the administration of justice and the judiciary. Such seriousness is only enhanced by the fact that this effect is bound to be even more significant and strong when committed by highly educated individuals, particularly when – such as in the case of Aimé Kilolo, an admitted lawyer - their professional mission is to serve, rather than disrupt, justice.

24. The Single Judge is likewise not persuaded that Aimé Kilolo's withdrawal from his role as lead counsel for Jean-Pierre Bemba in the Main Case entails *per se* 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. The fact that "depuis le 6 décembre 2013, le requérant n'a plus de contacts *privilégiés* avec M. Bemba"⁵⁴ (emphasis added) does not mean that the long-established relationship between Mr Bemba and Mr Kilolo by virtue of the latter's role as lead counsel in the Main Case has ceased to exist. Contrary to what stated by the Defence⁵⁵, 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. Similarly, if it is true that assets pertaining to Mr Bemba and Mr Babala have been seized by way of implementation of the Chamber's order, such assets obviously form but a small part of the assets which are or might be made available to the network as a whole, which comprises a number of individuals by far exceeding the suspects in this case. The fact that "il n'y a plus de crainte que les avoirs ou les comptes en banque de M Babala puissent alimenter le requérant"⁵⁶ is, accordingly, not decisive or otherwise *per se* significant.

⁵⁴ ICC-01/05-01/13-42, para. 33.

⁵⁵ ICC-01/05-01/13-42, para. 37.

⁵⁶ ICC-01/05-01/13-42, para. 35.

25. Even less decisive, for the purposes of assessing the existence of a flight risk, is the fact that the Single Judge lifted the restrictions to contacts among the suspects in this case and third persons as early as 4 December 2013. Those restrictions had been ordered *in addition* to the measure of detention, which was obviously meant to continue upon their lifting. Accordingly, by no reasonable standard is it possible to read either this lifting, or the fact that the Prosecutor had requested that restrictions be maintained for a period limited to 14 days, as “la prevue que la Chambre n’avait plus rien à redouter dans le chef du requérant”⁵⁷.

26. Both the Appeals Chamber⁵⁸ and Pre-Trial Chambers of the Court have previously found the existence of a network of supporters behind a suspect to be a relevant factor in the determination of the existence of a risk of flight, because it might indeed facilitate absconding; in particular, the availability of financial means, “whether directly or indirectly” through a network, has been likewise recently been found relevant by this Chamber in the case of *The Prosecutor v. Bosco Ntaganda*⁵⁹.

27. An additional factor in this respect has been brought to the attention of the Chamber by the Belgian authorities. Contrary to Mr Kilolo’s statement, that he “ne vit que dans l’univers judiciaire”, they noted that, since he also founded the Parti Réformateur pour le Congo and ran as a candidate of that party for the 2006 presidential elections in the Democratic Republic of the Congo, “il est également lié au milieu politique congolais”⁶⁰.

28. In light of the above, the Single Judge is persuaded that the submissions brought forward by the Defence for Mr Kilolo are not suitable to weaken the persuasiveness of the factors supporting the existence of a flight risk. Rather, it must be noted that the process of disclosure, which had yet to start at the time of the issuance of the warrant, has by now reached an advanced stage, a factor that may also be relevant in weighing the likelihood of the risk of flight, due to its resulting in enhancing the suspect’s knowledge of the Prosecutor’s case.

⁵⁷ ICC-01/05-01/13-42, para.34.

⁵⁸ ICC-02/11-01/11-278-Red, para. 26

⁵⁹ICC-01/04-02/06-147, para. 55 .

⁶⁰ ICC-01/05-01/13-95-Conf-Anx-9, page 4.

29. The Single Judge is not persuaded that these factors can be outweighed either by any of the “changements matériels” identified as relevant by the Applicant, or by his personal commitment not to abscond from the proceedings. As previously found by this Chamber⁶¹, such undertaking, commendable as it might be, and however “confirmed” by other individuals on behalf of the suspects, is not and cannot be *per se* decisive but should rather be assessed and appreciated in light of all other relevant factors. Similarly, Mr Kilolo’s statement to the effect that “une simple citation à comparaître aurait suffi”⁶² amounts to what the Appeals Chamber has considered a “hypothetical statement”, as such “of little weight in the determination of whether the conditions of article 58(1)(b)(i) of the Statute are fulfilled”⁶³.

30. Neither are of relevance the comparisons made by the Defence for Mr Kilolo with cases before the Court where summonses to appear were issued: in particular, the case of *the Prosecutor v. Abu Garda*, *the Prosecutor v. Abdallah Banda* and in the situation in Kenya⁶⁴, where – in the view of Mr Kilolo’s - the gravity of the charges brought against the accused “n’est en rien comparable avec le requérant”⁶⁵.

31. The Single Judge is aware that chambers of this court - including the Appeals Chamber⁶⁶ - have found that the gravity of the crime, and the likely duration of ensuing detention in case of conviction, was a relevant factor in assessing the parameters of article 58(1)(b), in particular the likelihood that the person might appear at trial. The Single Judge is likewise aware of the statutory limitation to five years of detention in case of conviction for offences against the administration of justice. However, he observes that none of these factors are *per se* suitable to diminish the risk of a flight. First, as observed by the Prosecutor⁶⁷, it remains yet to be decided how the statutory limit may apply in case multiple offences are found to have been committed, as it might happen in these proceedings. Furthermore, it is

⁶¹ ICC-01/05-01/08-321, para. 37.

⁶² ICC-01/05-01/13-42, para. 51.

⁶³ ICC-01/05-01/08-323, para. 56; see also ICC-01/04-01/06-824, para. 138.

⁶⁴ ICC-01/05-01/13-42, paras 22-24.

⁶⁵ ICC-01/05-01/13-42, para. 22.

⁶⁶ ICC-01/04-01/07-572, paras. 21, 24. See also ICC-01/04-01/06-824, para. 136.

⁶⁷ ICC-01/05-01/13-88-Conf, pages 8-9.

worth reminding not only that Aimé Kilolo's role in the implementation of the scheme was particularly prominent, but also that – unlike the crimes allegedly committed in the Abu Garda and Banda cases, or in the situation in Kenya, all of which referred to events and scenarios which were concluded - this case is about behaviours allegedly aimed at disrupting the course of justice in respect of a trial the outcome of which is still open; and where the impact of these proceedings on it is yet to be determined and, at this stage, unknown.

32. As to the prejudices allegedly entailed by the protracted detention to Mr Kilolo's personal and professional life, the Single Judge observes that they are neither a factor which may be relevant for a Chamber's decision to issue a summons to appear instead of a warrant of arrest, nor a factor which might *per se* influence the determination under article 60(2) of the Statute. Furthermore, the reliability of some of Mr Kilolo's statements in this context appears significantly weakened by the results of the on-site searches conducted by the Belgian authorities. As to the fact that he would be lodging his aged and ailing parents at his residence, the Belgian authorities noted that "seuls l'intéressé, son épouse et leurs enfants logeaient dans la maison"⁶⁸; as to his statement to the effect that he would have, as a lawyer, "une clientèle qu'il ne peut délaisser", they observed that the addresses indicated as professional offices "ne semblaient correspondre à aucune activité professionnelle concrète menée par l'intéressé" and that Mr Kilolo's professional activity in Belgium "se limite à un nombre extrêmement réduit d'anciens dossiers non encore clôturés"⁶⁹.

C.2 *Obstructing or endangering the investigation of the Court proceedings*

33. The Single Judge subscribes entirely to the submission by Mr Kilolo's Defence, to the effect that "les craintes hypothétiques, les simples conjectures ne peuvent fonder ni la détention preventive, ni le maintien en détention préventive"⁷⁰ and that the determination as to the existence of a risk to the integrity of the

⁶⁸ ICC-01/05-01/13-95-Conf-Anx9, p. 3.

⁶⁹ ICC-01/05-01/13-95-Conf-Anx9, p. 4.

⁷⁰ ICC-01/05-01/13-42, para. 54.

proceedings “ne peut être évaluée in abstracto”⁷¹. In this case, as recalled above, the decision to issue a warrant for arrest is however based on anything but “craintes hypothétiques”, or assessments in the abstract.

34. In particular, the Single Judge recalls that both the material attached to the Prosecutor’s Application and the reports submitted by Independent Counsel reveal several instances of conducts by Aimé Kilolo directly aimed at influencing the content of the testimony to be given by witnesses in the Main Case. In addition, the Second Report contains an element suitable to signal to Mr Kilolo’s readiness to take action in respect of the ongoing investigation and these proceedings. On 16 October 2013, in the context of a conversation with Jean-Jacques Mangenda on the subject of information received by the latter about the existence of an ICC investigation on them both, and of the concerns reportedly expressed by Jean-Jacques Bemba after receiving such information, Aimé Kilolo tells Jean-Jacques Mangenda that he has prayed Jean-Pierre Bemba “d’être calme, moi-même je sais comment je vais arranger les choses”⁷².

35. The Single Judge is satisfied that all these objective elements are serious and univocal enough as to adequately substantiate his assessment of the persisting existence of a risk that obstruction or endangerment of the proceedings does exist, both in respect of this case and of the Main Case, and that none of the arguments submitted by the Defence for Mr Kilolo is suitable to weaken or otherwise affect this conclusion.

36. It is not accurate to say that, since the testimonies of the witnesses in the Main Case were completed on 22 November 2013, “il n’y a plus aucun risqué à redouter de continuer à poursuivre la commission des crimes allégués”⁷³. First, it cannot be excluded that the Main Case is reopened, as has occurred in the case of *The Prosecutor v. Germain Katanga*. Second, future and related crimes, the risk for which the Single Judge is called to assess, might also be committed by the suspect in respect of these proceedings. Similarly, neither the fact that during the status conference

⁷¹ ICC-01/05-01/13-42, para. 55.

⁷² ICC-01/05-66-Conf-Anx, page 46.

⁷³ ICC-01/05-01/13-42, para. 26.

held on 27 November 2013 the Prosecutor “a déclaré que ses enquêtes sont presque terminées”⁷⁴, nor that items of evidence seized by the relevant national authorities upon their arrest are now beyond the suspects’ reach⁷⁵, can be considered as decisive *vis-à-vis* the determination of the persisting existence of a risk that the course of justice be obstructed or interfered with. In the light of the pattern of conduct emerging from the intercepts of Aimé Kilolo’s conversations over the period August-October 2013, it is likely that he might take additional action, similar in nature to that mirrored in Independent Counsel reports, in respect of other evidentiary items which might be outstanding, whether in relation to the Main Case or to these proceedings. As stated by the Prosecutor, “as long as there is a single investigative activity left to conduct, or a single witness left to interview, the risk of corruption and interference with the investigation remains”⁷⁶. Furthermore, article 58(1)(b)(ii) explicitly states that detention might be necessary with a view to ensuring that the person does not obstruct or endanger not only the investigation, but also the “court proceedings”.

37. The Single Judge is persuaded that the very nature of the crimes at stake makes it obvious that the detention is the only context allowing the effective management of these risks. The more so, when one considers that the crimes alleged in the Prosecutor’s Application, which the Chamber found reasonable grounds to believe were indeed committed, appear to have been at least partly committed in spite of the fact that one of the suspects was already in the custody of the detention unit of the Court, and by means of an abuse of the communication system set up within it.

38. Finally, the Single Judge takes the view that Aimé Kilolo’s decision to waive any remedy he might have been entitled to under the Belgian national law, in favour of a swift transfer to the Court following his arrest⁷⁷, is not a factor suitable to affect the Single Judge’s determination as to the need for detention.

⁷⁴ ICC-01/05-01/13-42, para. 44.

⁷⁵ ICC-01/05-01/13-42, para. 36.

⁷⁶ ICC-01/05-01/13-88-Conf, para. 41, page 16.

⁷⁷ ICC-01/05-01/13-42, paras. 57-58.

C.3 *The risk relating to future crimes*

39. Again, the Single Judge will be guided by the Appeals Chamber in making his assessment under this heading. The risk relating to the possible commission of related crimes, by its very nature, is such as to make it impossible to specify in detail what the nature of such crimes might be, or the context in which they might be committed⁷⁸. Furthermore, 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. Accordingly, the observations contained in paragraph C.2 above, to the effect 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, are also of relevance for the purposes of assessing the third element listed under article 58(1)(b) of the Statute.

40. In light of the above, the Single Judge is satisfied that a concrete risk that Aimé Kilolo might commit crimes related to, or of the same nature of, those underlying the Prosecutor's Application and the warrant continues to exist unabated.

D. **As to the issue of conditional release as an alternative to detention**

41. Mr Kilolo submits that, should he be released from custody, he "comparaitra et obtempérera à toutes les convocations de justice". More specifically, he undertakes⁷⁹ to (i) "se présenter au poste de police le plus proche de son domicile familial" ("une petite commune néerlandophone située à une heure trente minutes de La Haye en voiture") une fois par semaine"; (ii) "à ne pas sortir des limites territoriales de la Belgique et des Pays-Bas"; (iii) "à éviter tout contact avec des témoins ayant déposé dans l'affaire principale et dont les noms sont repris par le Procureur comme ayant été corrompus et subornés"; (iv) "à résider à l'adresse

⁷⁸ICC-02/11-01/11-278-Red, para. 70.

⁷⁹ ICC-01/05-01/13-42, paras 64-69.

familiale renseignée dans son certificat de résidence”; (v) “à remettre son passeport au Greffe”.

42. The Single Judge, whilst taking note of these undertakings, observes that none of them is suitable to neutralise the risks detailed above. As said above, the personal undertakings of a suspect cannot be considered as adequate to nullify all the objective elements supporting the assessment of the persisting existence of one or more of the risks listed under article 58(1)(b) of the Statute.

43. The Single Judge notes that most of the conducts related to the alleged crimes have occurred by way of communications with the other suspects, or with third parties connected to them by reason of personal or professional links. Today, as upon the issuance of the warrant, he remains persuaded that it is difficult to conceive of measures which might effectively counteract the risks associated with the suspect’s communications with the external world and that, accordingly, the detention centre is the only environment providing adequate guarantees for the effective management of those risks.

44. Moreover, the Single Judge notes that no availability to accept Mr Kilolo on their territory in the event of his release, with or without conditions, has been shown by the Kingdom of the Netherlands⁸⁰.

45. As regards the Belgian authorities, they took a very cautious approach, noting *inter alia* the following⁸¹:

- a. neither the Statute, nor the Rules provide for “une solution adéquate en cas de nécessité d’une réponse à donner dans l’extrême urgence à une situation de violation flagrante des conditions de la libération provisoire”;
- b. the absence of a framework agreement between the Court and Belgium as to conditional release might make it impossible for the Belgian authorities to implement some of the measures which might be ordered by the Chamber, such as “la mise sous écoute de l’intéressé”.

⁸⁰ ICC-01/05-01/13-95-Conf-Anx8.

⁸¹ ICC-01/05-01/13-95-Conf-Anx9, page 3.

46. In light of these submissions by the relevant State authorities, the Single Judge finds that the interim release, with or without conditions, is not only not justified in light of all relevant factors, but also practically unfeasible.

E. On the request for a hearing under rule 118(3) of the Rules

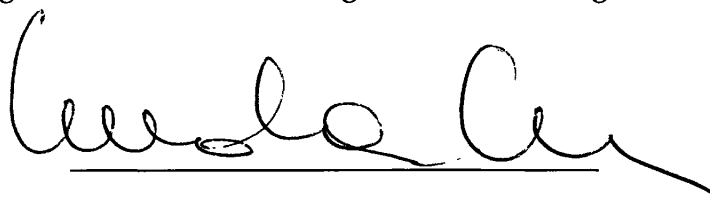
47. The Single Judge takes the view that the abundance of the material available to him, a great amount of which has been referred to in this decision, makes it not necessary or appropriate to hold a hearing at this stage for the purposes of the determination of Aimé Kilolo's request for interim release.

FOR THESE REASONS, THE SINGLE JUDGE

REJECTS Aimé Kilolo Musamba's request for a hearing under rule 118(3) of the Rules;

REJECTS Aimé Kilolo Musamba's request for interim release.

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

A handwritten signature in black ink, appearing to read 'Cuno Tarfusser', written over a horizontal line.

Judge Cuno Tarfusser

Single Judge

Dated this Friday, 14 March 2014

The Hague, The Netherlands