

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13
Date: 16 May 2014

THE PRESIDENCY

Before: Judge Sang-Hyun Song, President
Judge Sanji Mmasenono Monageng, First Vice-President
Judge Akua Kuenyehia, Acting Second Vice-President

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF
THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO MUSAMBA,
JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU AND
NARCISSE ARIDO

Public Redacted document

Public Redacted version of “Prosecution’s Observations on the Kilolo, Mangenda, and Babala Defences’ Requests to Disqualify the Single Judge Cuno Tarfusser and the Kilolo Defence’s Request for the Automatic Temporary Suspension of the Single Judge”, 16 May 2014, ICC-01/05-01/13-404-Conf

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

Fatou Bensouda
 James Stewart
 Kweku Vanderpuye

Counsel for the Defence of Jean-Pierre Bemba

Nicholas Kaufman

Counsel for the Defence of Aimé Kilolo Musamba

Ghislain Mabanga

Counsel for the Defence of Jean –Jacques Mangenda Kabongo

Jean Flamme

Counsel for Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Göran Sluiter

Legal Representatives of Victims

Legal Representatives of Applicants

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section Others

I. Introduction

1. The Office of the Prosecutor (“Prosecution”) hereby submits its Consolidated Observations on the Kilolo, Mangenda and Babala Defences’ respective requests for the disqualification and/or recusal of the Single Judge of Pre-Trial Chamber II (“Request(s)”)¹, and the Kilolo Defence’s separate but related request for an automatic temporary suspension of the Single Judge, pending the disposition of its disqualification Request (“Suspension Request”).

2. As detailed below, the Defence Requests do not raise any cognisable legal or factual issue warranting the Single Judge’s disqualification, pursuant to Article 41 of the Rome Statute (“Statute”). Further, the absence of any substantiated ground for disqualification eviscerates any legal basis for the immediate injunctive relief sought in the Suspension Request. All four Defence Requests should therefore be rejected.

II. Confidentiality

3. This filing is classified as “Confidential” because it contains references to material so designated and otherwise yet unavailable publicly. A “Public” redacted version will be filed promptly.

III. Submissions

4. The Requests fail on both the facts and law, and are a transparent attempt by the Defence to tie-up the pre-trial proceedings in the Article 70 case.²

5. The Kilolo Defence prefaces its submissions by stating that it “has the utmost respect for and holds in the highest regard the Single Judge.”³ This markedly contrasts with its appeal submissions on provisional release, which - without foundation - contended that “[i]t is clear that the [Single] Judge assumed Mr Kilolo would flee to Africa – and abandon his family and

¹ ICC-01/05-01/13-367 (Mangenda Defence Request); ICC-01/05-01/13-372 (Kilolo Defence Request); ICC-01/05-01/13-383 (Babala Defence Request).

² ICC-01/05-01/13.

³ ICC-01/05-01/13-372, para. 3.

professional career – simply on the basis of his skin colour.”⁴ The Kilolo Defence’s apparent abandonment of accusing the Single Judge of racism does not correlatively invest its new strategy with any more substance.

6. The Mangenda Defence’s Request suffers from much of the same flawed reasoning and analysis that characterises the Kilolo Defence’s, by fundamentally advancing mere disagreements with the Single Judge’s decisions as a basis for his recusal. Despite the record of the proceedings, the Mangenda Defence further implausibly claims, *inter alia*, that the Single Judge’s comportment and public criticism of Counsel is insulting and intimidating,⁵ thus comprising grounds for his disqualification.

7. Although the Babala Defence’s Request is less strident, it points to the Single Judge’s denial of Defence requests as demonstrative of his alleged alliance with the Prosecution, as a second prosecutor.⁶ However, this, like the Mangenda and Kilolo Defences’ allegations,⁷ is fanciful and hyperbolic.

8. As shown below, none of the three Defences advances any ground, taken individually or cumulatively, justifying the Single Judge’s disqualification in the Article 70 pre-trial proceedings. Further, as is apparent in the respective Requests, each Defence effectively attempts to circumvent the Court’s procedural framework by rearguing issues before the Presidency properly decided during the course of the proceedings.

A. The Requests do not meet the high evidential threshold for disqualifying a judge

9. Article 41 of the Statute governs the disqualification of judges. Specifically, Article 41(2)(a) of the Statute provides: “[a] judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground . . . [a] judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.” Thus, the article sets forth a non-exhaustive list of grounds requiring disqualification, as does Rule 34 of the Rules of Procedure and Evidence (“Rules”).

⁴ ICC-01/05-01/13-290, para. 13.

⁵ ICC-01/05-01/13-367, paras. 11-12.

⁶ ICC-01/05-01/13-383, paras. 21-22.

⁷ ICC-01/05-01/13-367, para. 16; ICC-01/05-01/13-372, para. 8.

10. Regardless of the particular grounds for disqualification alleged, the Plenary of Judges has recognised that a judge’s disqualification is a very serious matter:

“[disqualification is] not a step to be undertaken lightly, noting that a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office, with such high threshold functioning to safeguard the interests of the sound administration of justice. When assessing the appearance of bias in the eyes of the reasonable observer, unless rebutted, it is presumed that the judges of the Court are professional judges, and thus, by virtue of their experience and training, capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in the particular case.”⁸

11. Sufficient grounds to disqualify a judge exist where: (1) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias;⁹ and (2) such apprehension is objectively reasonable.¹⁰ The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has similarly held that a judge’s disqualification is justified where “the hypothetical fair-minded observer (with sufficient knowledge of the circumstances to make a reasonable judgement)” (i.e., knowledge of the traditions of integrity and impartiality which a judge undertakes to uphold) would reasonably doubt the impartiality of a judge.¹¹

12. The Kilolo Defence’s Request conflates the legal test for disqualification, asserting that the Defence “need only demonstrate the *appearance* of grounds to doubt [the judge’s] impartiality.”¹² To the contrary, the test demands not the establishment of ‘apparent grounds’, but *actual* grounds giving rise to an objectively reasonable apprehension of partiality. That said, each Defence Request fails both legally and factually to meet the test for the Single Judge’s disqualification in this case.

⁸ ICC-02/05-03/09-344-Anx, para.14 and authorities referred to in footnotes 21 and 22 of that same decision.

⁹ ICC-02/05-03/09-344-Anx, para.11.

¹⁰ ICC-02/05-03/09-344-Anx, para.13.

¹¹ *Prosecutor v. Delalic et al.*, IT-96-21-A, Judgement, 20 February 2001, para.683.

¹² ICC-01/05-01/13-372, para.5.

B. The Single Judge's request to the Presidency regarding lifting potential immunities incident to the execution of the arrest warrant was appropriate and justified

13. Both the Kilolo and Mangenda Defences seize on the Single Judge's 19 November 2013 request to the Presidency regarding the lifting of any extant privileges or immunities incident to the execution of the arrest warrant, contending that such conduct demonstrates partiality.¹³ In essence, they argue that the request is not foreseen in the Rules and thus impermissibly interjects the Single Judge into the process, rendering him a party thereto and demonstrating his bias.¹⁴ However, as is apparent in both Requests, this argument is built-up from a series of self-serving assumptions represented as facts.

14. First, the Single Judge's application to the Presidency is entirely consistent with his general mandate to do justice. That the Single Judge has this broad obligation should go without saying. Contrary to the Requests, the Single Judge's application sought the Presidency's guidance concerning the question of immunity rather than advocated any specific result.

15. In its Application for a Warrant of Arrest (AWA), the Prosecution's requested that the Chamber specify in the arrest warrant that Kilolo and Mangenda "are not entitled to invoke such privileges and immunities as a bar to their arrest and surrender to the Court."¹⁵ Consequently, the Single Judge appropriately sought the Presidency's guidance on the matter, stating:

"I consider it is for the Presidency to make a finding on such a delicate issue and therefore I am formally requesting the Presidency, whether to waive the privileges and immunities of Aime Kilolo Musamba and Jean Jaques Magenda Kabongo, or to follow the interpretation given by the Prosecution."¹⁶

16. Second, had the Single Judge exceeded his authority or acted *ultra vires* in respect of this request, the Presidency would have so noted in its decision and acted accordingly. As

¹³ ICC-01/05-01/13-367, paras. 3-5; ICC-01/05-01/13-372, paras. 28-31.

¹⁴ ICC-01/05-01/13-367, paras. 4-5; ICC-01/05-01/13-372, paras. 30-31.

¹⁵ ICC-01/05-68-AnxI, p. 2.

¹⁶ ICC-01/05-68-AnxI, p. 2.

such, the allegations levied by the Defences¹⁷ have no grounding in the record of the proceedings.

17. Third, it is obvious that Kilolo's and Mangenda's Requests side-step salient aspects of the Decision of the Presidency regarding the Single Judge's application.¹⁸ There are two reasons for this: (1) the Presidency's Decision exposes no procedural impropriety or anomaly under the Court's procedural framework; and (2) the Presidency's Decision exposes the fallacious arguments advanced by the Defence concerning the need to waive immunities inuring to the two Suspects. Specifically, the Presidency noted:

“As stipulated in the Headquarters Agreement and the Immunities Agreement, such immunities are granted to counsel and persons assisting counsel only to the extent necessary for the performance of their functions. The legitimate functions to be performed by counsel and persons assisting them do not extend to the types of conduct depicted in Article 70(1)(b) and Article 70(1)(c) of the Statute, which the persons concerned are alleged to have undertaken. Consequently, there is no immunity attaching to the acts allegedly committed by the persons concerned which presents a bar to their arrest and potential detention on remand for alleged Article 70 offences in the instant case and it follows, therefore, that no waiver need be granted.”¹⁹

18. The Presidency's Decision thus exposes the vacuity of the Mangenda Defence's claim that *«Cette immunité absolue ne pourrait bien évidemment être levée en dehors des conditions prévues par l'art. 26 du même accord et certainement pas « automatiquement » en vertu de l'art. 70 du Statut de Rome, tel que le prétendait le Procureur dans sa requête d'arrestation du 19 novembre 2013, eu égard au principe de la présomption d'innocence.»* Moreover, it rejects the Mangenda Defence's contention that *«[l]e Juge unique a de telle sorte voulu remédier aux «oublis» répétitifs du Procureur ainsi qu'à ses propres «oublis», et a voulu s'«assurer» que les conditions essentielles à l'arrestation soient remplies.»*,²⁰ along with its related assertions purportedly demonstrating the Single Judge's partiality.

19. Under the weight of the record, the Kilolo Defence's contentions fare no better. The Defence asserts that the “[t]he Presidency acknowledged that ‘in their capacity of counsel and

¹⁷ ICC-01/05-01/13-367, paras. 3-5; see also ICC-01/05-01/13-372, paras. 28-30.

¹⁸ ICC-01/05-68 (“Presidency's Decision”).

¹⁹ ICC-01/05-68, para. 10.

²⁰ ICC-01/05-01/13-367, para. 5.

case manager in the case, [Mr Kilolo and Mr Mangenda] enjoy immunities.”²¹ However, it omits the key operative condition - that Counsel acted “in connection with the performance of his or her functions.”²² The record of the proceedings before the Single Judge, indeed the very nature of the alleged charges, firmly shows that Kilolo and Mangenda did not.

20. The Mangenda Defences’s further contention that «[t]ant que les délits visés par cet article ne sont pas établis, ils ne pourraient pas servir à la levée de l’immunité de leurs prétendus auteurs.»²³ is circular and untenable. On this logic (echoed by the Babala Defence²⁴), a case involving an attorney’s alleged corrupt influencing of witnesses could not be investigated until it is proven.

21. Furthermore, the position of the Mangenda Defence directly contradicts the Presidency’s Decision. At best, it amounts merely to a difference of opinion from the Single Judge as to the application of the Headquarters and Privileges and Immunities agreements. Such an assertion however, cannot meet the legal threshold of establishing a reasonable apprehension of bias. Similarly, the Kilolo Defence’s claim that the “Single Judge should have reminded the Prosecution of the bar such immunity represented to the granting of an Arrest Warrant”²⁵ holds no water, in view of the Presidency’s Decision. It too, cannot reasonably sustain any allegation that the Single Judge failed to act impartially.

22. For its part, the Babala Defence’s contentions concerning the applicability of immunities inuring to counsel under the Headquarters Agreement²⁶ and Agreement on Privileges and Immunities fundamentally misunderstand their purpose and scope.²⁷ In addition to the Presidency’s Decision, the applicability of the privileges and immunities extended to counsel under these two agreements must be considered in their own terms (i.e.,

²¹ ICC-01/05-01/13-372, para. 14.

²² ICC-ASP/1/3, Agreement on the Privileges and Immunities of the International Criminal Court, 3-10 September 2002, Art. 18 (“Agreement on Privileges and Immunities”); Rule 22 of the Rules (referencing “independent performance of their functions”); Article 25 of the Headquarters Agreement (specifying “acts performed in their official capacity”); see also ICC-01/05-68, paras. 9-10.

²³ ICC-01/05-01/13-367, para. 3.

²⁴ ICC-01/05-01/13-383, para. 52 (arguing that «tous les conseils exerçant leur ministère à la CPI sont continuellement épiés, quitte, le moment venu, pour le Procureur de faire le tri entre ce qui relève de l’article 70 du Statut et qui, à bien l’entendre, ne requiert aucune levée préalable de l’immunité des avocats et ce qui ne l’est pas.»).

²⁵ ICC-01/05-01/13-372, para. 29.

²⁶ ICC-BD/04-01-08, Headquarters Agreement between the International Criminal Court and the Host State, 1 March 2008 (“Headquarters Agreement”).

²⁷ ICC-01/05-01/13-383, paras. 20 and 52.

to protect acts carried out in the “good administration of justice”²⁸, “proper functioning of the Court”²⁹ and as are “necessary for the performance of [counsel’s] functions”³⁰ - not conduct undermining the administration of justice).

23. Thus, the respective Defence Requests’ thinly veiled attempts to parlay the Single Judge’s actions regarding the issue of counsel’s immunity into grounds for disqualification fail because: (1) they concern mere legal disagreements; (2) they are in fact incorrect; and (3) they cannot therefore sustain an objective apprehension of bias in a reasonable and informed observer.

C. The Appointment of an Independent Counsel is within the discretionary authority of the Single Judge

24. Article 57 of the Statute delineates the functions and powers of the Pre-Trial Chamber, inclusive of those of a single judge, who “may exercise the functions provided for in this Statute.”³¹ Even a cursory reading of the article reveals, contrary to the Defence Requests,³² that the Single Judge had the power under the Statute to appoint an independent counsel in the circumstances of the investigation of the alleged Article 70 offences.

25. Article 57(3)(a) of the Statute provides that a Pre-Trial Chamber may “[a]t the request of the Prosecutor, issue such orders . . . as may be required for the purposes of an investigation” - investigations falling under the auspices of Article 54. These provisions establish several important facts contradicting the Defence Requests.

26. First, the Prosecution properly requested the assignment of an outside counsel to evaluate potentially privileged material likely to be encountered during the course of its investigations; second, the Single Judge’s response of appointing an independent counsel was not *ultra vires*,³³ but well within his recognised authority contemplated under the Statute; third, the Single Judge’s appointment of an independent counsel in the circumstances of the Prosecution’s investigation was specifically undertaken to ensure his independence from the

²⁸ ICC-01/05-68, para. 13.

²⁹ ICC-01/05-68, para. 13.

³⁰ ICC-01/05-68, paras. 10 and 13.

³¹ See Article 57(2)(b) of the Statute.

³² ICC-01/05-01/13-372, para. 11; ICC-01/05-01/13-383, para. 20; ICC-01/05-01/13-383, para. 10.

³³ ICC-01/05-01/13-372, para. 13.

Prosecution and to avoid the possibility of a breach of potentially privileged information - i.e., *to protect the Defence's interests*.

27. The Defence Requests omit mention of the Single Judge's motivation for appointing an independent counsel:

“the Single Judge takes the view that such counsel should be a really independent one, as opposed to be appointed by or acting in cooperation with the Prosecutor...appointed counsel would have to review and screen all relevant recordings...privilege would be strictly maintained on all such recordings...”³⁴

28. The Kilolo Defence's contention that the Single Judge “appoint[ed] Independent Counsel to *aid* the Prosecution”³⁵ and that he “limit[ed] [Independent Counsel's] mandate to gathering incriminating evidence only”³⁶ has no basis in fact. So too is the assertion that “the Single Judge should have at the very least ensured Independent Counsel stayed true to his title – “Independent” – and instructed the latter to act to protect the rights of both the Prosecution and Defence, as opposed to assisting the Prosecution only.”³⁷ This is a claim of pure imagination.

29. The Babala Defence's contention that «*Conseil indépendant qui a à la fois fait office d'enquêteur et outrepassé son mandat*»³⁸ similarly has scant contact with reality. Allegations such as these cannot credibly constitute a ground on which a reasonable apprehension of partiality can rest, given the clarity of the Single Judge's reasons for appointing the Independent Counsel in the Article 70 investigation.

D. The circumstances under which the arrest warrant was issued raise no reasonably objective ground for disqualification

- i. The Single Judge is required³⁹ to issue a warrant on satisfaction of the conditions of Article 58(1) of the Statute

³⁴ ICC-01/05-52-Red2, para. 7.

³⁵ ICC-01/05-01/13-372, para. 15.

³⁶ ICC-01/05-01/13-372, para. 15.

³⁷ ICC-01/05-01/13-372, para. 16.

³⁸ ICC-01/05-01/13-383, para. 24.

³⁹ See Article 58 of the Statute (the Pre-Trial Chamber *shall* on the application of the Prosecutor, issue a warrant of arrest” upon reasonable grounds to believe that the person as committed a crime within the Court's jurisdiction) (emphasis added); see also ICC-01/04-169 OA, 13 July 2006, para. 44.

30. The Kilolo Defence does not contest that the evidence and information provided to the Single Judge in relation to the AWA provided sufficient grounds for the warrant's issuance pursuant to Article 58 of the Statute. Instead, it contends that the alleged procedural anomalies, particularly the speed with which the Single Judge issued the warrant following the Prosecution's application, demonstrate that the review and determination of the AWA and its supporting evidence and information were insufficient.⁴⁰

31. The Mangenda Defence argues tangentially and implausibly, that the Single Judge's failure to reject the AWA because the Prosecution had not resolved the immunity issue and his application to the Presidency in his capacity as Vice President of the Court, demonstrate his lack of partiality.⁴¹

32. The Babala Defence instead attacks the substance of the arrest warrant, asserting that «*Le mandat d'arrêt du Juge unique . . . n'est que la copie conforme de la requête du Procureur.*»⁴² It further claims, «*[l]e lecteur n'y décèle aucune distance critique du Juge unique vis-à-vis du raisonnement développé par le Procureur.*»⁴³ However, the record of the proceedings contradicts this. Even if the Babala Defence's claims were accurate - and they are not by any means - this would not undermine the legal authority and propriety of the Single Judge to issue the warrant any manner as he saw fit, provided that doing so was supported by the evidence and information before him. However, a cursory review of the arrest warrant itself (critical of form of the Prosecution's application⁴⁴) readily reveals the Babala Defence's unsubstantiated claims.

33. The Kilolo Defence's further efforts to impute the standards referred to under the European Court of Human Rights and the Inter-American Court of Human Rights to assess "reasonable grounds" under the Statute⁴⁵ derive from the *obiter dicta* of Pre-Trial Chamber I in its Decision on the Prosecutor's Application for a warrant of arrest in the *Lubanga* case.⁴⁶ However, this is neither binding precedent nor factually on-point.

⁴⁰ ICC-01/05-01/13-372, para. 21.

⁴¹ ICC-01/05-01/13-367, para. 5.

⁴² ICC-01/05-01/13-383, para. 24.

⁴³ ICC-01/05-01/13-383, para. 24.

⁴⁴ See ICC-01/05-01/13-1-Red2-tENG, para. 11.

⁴⁵ ICC-01/05-01/13-372, paras. 22-23.

⁴⁶ ICC-01/04-01/06-8-US-Corr, para. 9 at p. 12 ("Lubanga Decision").

34. The circumstances addressed in the *Lubanga* Decision concerned the Prosecution's application for an arrest warrant, accompanied not by substantive evidence, but by summaries thereof. This is not the case here. The Single Judge expressly noted that "[n]umerous, objective, specific and detailed items of evidence were tendered in relation to each category of alleged conduct or each person whose arrest the Prosecutor seeks",⁴⁷ as acknowledged in the Kilolo Defence's Request.⁴⁸

ii. The celerity of the Single Judge's determination of the AWA does not establish any reasonable ground for disqualification

35. Although the Kilolo Defence asserts its "flabbergast[ment]",⁴⁹ "astonish[ment]", "mystify[cation]"⁵⁰ and "stupefaction"⁵¹ regarding the apparent speed with which the Single Judge determined the Prosecution's application for Kilolo's and the other suspects' arrests, the number of adjectives or the "vehemen[ce]"⁵² with which the Defence portrays its reaction to the circumstances are not determinative. The same is true regarding the Babala Defence's unsubstantiated contentions concerning the content of the arrest warrant.⁵³ Instead, disqualification is determined by the capacity of the objective facts to meet the legal threshold, which the Requests fail to demonstrate.

36. The Single Judge's familiarity with the evidence garnered and submitted by the Prosecution in support of the AWA can hardly come as a surprise. It does not suggest his active engagement in the Prosecution's investigations. Contrary to the Kilolo Request,⁵⁴ a pre-trial judge's familiarity with the nature of an investigation is to be expected, particularly here, where the nature of the investigation required the Prosecution to substantiate its request to the Single Judge for authorisation to request the relevant States' to record Mangenda's and Kilolo's telephone conversations, *inter alia*, pursuant to Article 54(1)(b) of the Statute.⁵⁵

37. A single judge's role during an investigation may obviously entail his/her legitimate familiarity with aspects of the Prosecution's activities and with the resultant evidence. Here,

⁴⁷ See ICC-01/05-01/13-1-Red2-tENG, para. 12.

⁴⁸ ICC-01/05-01/13-372, para. 18.

⁴⁹ ICC-01/05-01/13-372, para. 20.

⁵⁰ ICC-01/05-01/13-372, para. 20.

⁵¹ ICC-01/05-01/13-372, para. 32.

⁵² ICC-01/05-01/13-372, para. 16.

⁵³ ICC-01/05-01/13-383, para. 24.

⁵⁴ ICC-01/05-01/13-372, para. 12.

⁵⁵ See e.g., ICC-01/05-44-Red; ICC-01/05-51-Red; and ICC-01/05-60-Red.

as the respective Defences are fully aware, the Single Judge had to be familiar with the content of the recordings of Kilolo's and Mangenda's phone conversations vetted by the Independent Counsel prior to authorising their release to the Prosecution in order to ensure that no privileged material would be inadvertently disseminated.⁵⁶

38. This same material was used in support of the AWA,⁵⁷ and alone amply demonstrates reasonable cause for the issuance of the warrant of arrest against the suspects. This can be gleaned almost immediately from the recordings themselves and the written extracts thereof contained in the Independent Counsel's reports. In issuing the arrest warrant, the Single Judge noted:

“The Single Judge considers that he is able to navigate the body of evidence tendered by the Prosecutor, relying also on Independent Counsel's work.”⁵⁸

39. Thus, contrary to the Kilolo Request, the speed with which the Single Judge determined the AWA does not imply any failure thoroughly to consider the supporting evidence or a determination made in haste. Instead, the Defence simply chooses to ignore the elephant in the room - that the warrant was issued expeditiously because the supporting evidence and information provided to the Single Judge (some of which he was already aware of at the time of the application) overwhelmingly and decisively established “reasonable grounds to believe that [the suspects had] committed a crime within the jurisdiction of the Court.”⁵⁹

40. Nothing about the Single Judge's decision to issue the arrest warrant or the process by which this was undertaken comes close to supporting the contention that his actions were partial or, as averred by the Mangenda Defence, «*il a donc reconnu vouloir ces arrestations et a abandonné sa position de garant des droits des parties.*»⁶⁰

41. The Requests' failure to identify any misapprehension of the information relied on by the Single Judge in issuing the warrant, or identifying any evidence clearly contrary to the

⁵⁶ ICC-01/05-01/13-T-3-red-ENG, p. 14, l. 5-15 (noting, the Chamber's involvement from an early stage, its awareness of the potential of the investigation to encounter privileged materials and that this “was all treated in a proper way, appointing independent counsel in order to separate . . . what is privileged and relevant and therefore not seen by the Prosecutor from that what is relevant to the case in a very conservative matter.”).

⁵⁷ [Redacted].

⁵⁸ ICC-01/05-01/13-1-Red2-tENG, para. 11.

⁵⁹ Article 58(1)(a) of the Statute.

⁶⁰ ICC-01/05-01/13-367, para. 5.

conclusion that the suspects' arrests were supported by reasonable grounds, belies the Defences' claims.

42. The Mangenda Defence's claim - that the Single Judge's partiality is demonstrated by his denial of an application for certain detention records of suspect Bemba that it claims are exculpatory in its provisional release application⁶¹ - misconstrues the decision. Although the Mangenda Request suggests that these detention records were exculpatory, showing that Mangenda provided the money he received *via* commercial money transfer agencies (well over 30,000 USD) to Bemba as opposed to Defence witnesses in *Prosecutor v. Bemba*, this fact was never directly alleged in the AWA or otherwise formed the basis for the arrest warrant. Thus, although the Mangenda Defence's claim that the records demonstrate «*qu'il aurait donc été impossible de suborner des témoins au départ d'un tel compte, pour des raisons évidentes*»,⁶² they do not address any substantive charge against Mangenda.

43. Read in this context, the Single Judge's decision was simply procedural, implicitly directing the Mangenda Defence to submit an application for the records sought separately from its provisional release application. The Mangenda Defence having failed to do so, the Prosecution duly requested - and obtained - the material, which was disclosed to the Defence.

44. While the Mangenda Defence asserts that «*[l]e Juge unique a non seulement violé d'une manière inacceptable le principe de l'égalité des armes, en accordant au Procureur ce qu'il avait auparavant refusé à la Défense*»,⁶³ it cannot shirk responsibility for failing to follow up on the straightforward procedural decision and instead characterise the consequence as an expression of the Single Judge's partiality.

E. A request for disqualification cannot act as a vehicle to attack the prior determinations of a Chamber

45. The Plenary of Judges does not sit as a court of appeal in judgement of the decisions of a single judge of a Pre-Trial Chamber and as such, re-litigating matters already decided is an

⁶¹ ICC-01/05-01/13-367, para. 8.

⁶² ICC-01/05-01/13-367, para. 8.

⁶³ ICC-01/05-01/13-367, para. 9.

inappropriate use of the disqualification process. The Defence Requests nevertheless attempt this, in contravention of the procedural requirements of the Statute and Rules.

46. The Requests thus attack *inter alia* the legality of the judicially authorised investigation and appointment of the Independent Counsel;⁶⁴ the issuance of the arrest warrant; prior requests for reconsideration;⁶⁵ and decisions on provisional release.⁶⁶

47. With respect to the latter, the Kilolo Defence previously telegraphed its intention to file the instant Request following the denial of Kilolo's application for provisional release:

“The Defence contends that the Judge is manifesting a clear bias towards Mr Kilolo and should such bias continue to rear its ugly head and the Judge be unable to perform his duties of impartial adjudication, perhaps the Judge should recuse himself from the present case or, alternatively, the Pre-Trial Chamber should be convened in its entirety for the remainder of all proceedings so that Mr Kilolo is not further prejudiced.”⁶⁷

48. The impetus for the Kilolo Defence's Request is thus abundantly clear. Similarly, there is nothing subtle about the motivations for the Mangenda and Babala Requests.⁶⁸

49. Many of the arguments in the Kilolo Defence's Request not only inappropriately attempt to re-litigate the previous decisions, but even appropriate the same language in doing so. For example, Kilolo Defence's Appeal Brief contends that the Single Judge's observations on the gravity of the Article 70 offences:

“amount[] to an unprecedented upgrading and equating of offenses (conviction of which is subject to a maximum of five years) to those heinous crimes punishable by life in prison.”⁶⁹

⁶⁴ ICC-01/05-01/13-367, para. 13; ICC-01/05-01/13-383, paras. 20, 21 and 57; ICC-01/05-01/13-372, paras. 9 and 31.

⁶⁵ ICC-01/05-01/13-367, para. 10.

⁶⁶ ICC-01/05-01/13-372, paras. 34-38; ICC-01/05-01/13-383, paras. 23 and 31.

⁶⁷ ICC-01/05-01/13-290, para. 45.

⁶⁸ See e.g., ICC-01/05-01/13-367, para. 11 (claiming, *inter alia*, personal attacks on Counsel in a public decision, and unpersuasively alleging Counsel's intimidation and subjection to pressure by the Single Judge).

⁶⁹ ICC-01/05-01/13-290, para. 14.

50. This point also appears in the instant Request as follows:

“This amounts to an unprecedented upgrading and equating of offenses (conviction of which is subject to a maximum of five years) to those heinous crimes punishable by life in prison.”⁷⁰

The same can be said for other arguments advanced in the Mangenda and Babala Defence Requests.

F. Unfavourable decisions do not, on their own, warrant disqualification

51. The Mangenda and Babala Defences allege, *inter alia*, that unfavourable decisions issued by the Single Judge constitute a basis for his disqualification.⁷¹ Notably, the Mangenda Defence asserts that «*[r]ejet de la demande de la défense de Maître Aimé KILOLO MUSAMBA d’audition de témoins*» demonstrates a basis for the Single Judge’s disqualification. The Babala Defence echoes this position, contending that “[l]a preuve la plus tangible de ce refus du Juge unique est le rejet sans autre forme de procès de la «*Requête aux fins d’audition de témoins de la Défense à l’audience de confirmation des charges*». However, both claims are belied by the fact that the Kilolo Defence, which has an obvious interest in raising this point in its own right in the circumstances, did not do so in its Request. This disagreement among the Defences underscores the absence of any objective substantiation of the claims advanced.

52. The Mangenda Defence argues that the Single Judge’s failure to issue decisions favourable to the Defence is a consideration for the purposes of its Request. The Babala Request repeats this sentiment.⁷² However, first, the allegation that «*toutes les demandes fondamentales des cinq défenses...ont été toutes systématiquement rejetées par le Juge unique*»⁷³ is not factually accurate.⁷⁴ Second, even if this were the case, that would not constitute a reasonable basis for the Single Judge’s recusal. This is more so, given the entirely reasonable alternative hypothesis that the adjudicative outcomes are the result of the inadequate legal or factual assertions by the Defence. Put simply, a judge’s tenure in a case

⁷⁰ ICC-01/05-01/13-372, para. 38.

⁷¹ See ICC-01/05-01/13-367, sections 3.3, 3.4, 3.5 and 3.6; ICC-01/05-01/13-383, para. 28.

⁷² ICC-01/05-01/13-383, paras. 8-9, 21, 23.

⁷³ See ICC-01/05-01/13-367, para. 16.

⁷⁴ See e.g., ICC-01/05-01/13-298 (granting Bemba and Babala Defence requests).

cannot be held hostage to the effectiveness or lack thereof of the parties, or to considerations beyond the merits of a given legal position.

53. The Defence's contentions regarding the comportment of the Single Judge generally, and in particular, during the first appearance and in public decisions are similarly unsubstantiated.⁷⁵ During the initial appearance, Counsel for Mr Mangenda remarked, "Mr. President, I would say that there are certain number of things that you don't know yet, I think"⁷⁶, to which the Single Judge responded:

"I think now maybe you are also not aware of a lot of things because you started to say maybe certain thing I don't know, but maybe it's also to you. So I think we should just wait for the proceedings ongoing, and then . . .you can raise all the matters . . . you think you have to raise and they will be decided obviously . . . very much in detail and consciously."⁷⁷

54. Nothing about this exchange, in which the Single Judge addressed Counsel using the same language as that with which he was addressed, suggests reflects partiality or even discourteousness, much less signals that the Single Judge was "*en voulant ainsi intimider la défense*."⁷⁸ Further, that it has taken Counsel the better part of five months to advance this claim should not be overlooked when assessing it. Additionally, the Defence's claims concerning the Single Judge's public admonishments of Counsel have to be considered in context.

55. Given Counsel's previous problematic representations to the Court⁷⁹ for which he was duly called to task, his view of the Single Judge cannot be counted upon as objectively reasonable.

⁷⁵ See ICC-01/05-01/13-367, para.6.

⁷⁶ See ICC-01/05-01/13-T-3-Red-ENG, p. 21, l. 4-5.

⁷⁷ See ICC-01/05-01/13-T-3-Red-ENG, p. 23, l. 3-9.

⁷⁸ ICC-01/05-01/13-367, para. 6.

⁷⁹ ICC-01/05-01/13-109, pp.4-8 (observing in relation to the reasons proffered for the late filing of the Mangenda Defence's application for leave to appeal "[Counsel's] statement to the effect that the 17 December 2013 Decision was "not notified to him" is untrue" and reminding "Counsel for Mr Mangenda of his duty not to "deceive or knowingly mislead the Court", pursuant to article 24(3) of the Code [of Professional Conduct for Counsel]).

56. Although the Prosecution has not submitted observations on every allegation raised in the Requests, it considers that their merits on the whole are seriously called into question in view of the contentions and allegations addressed above.

57. Ultimately, a fair and objective assessment of the Requests demonstrates that no single factual or legal element advanced therein, considered individually or cumulatively, meets the high threshold of proof required to disqualify a judge of this Court, pursuant to Article 41.

G. The requested suspension of the Single Judge lacks any legal basis

58. First, the Prosecution observes that in its Suspension Request that the Kilolo Defence takes a position diametrically opposite to that which it advanced before the Pre-Trial Chamber.⁸⁰

59. On 7 May 2014, the Kilolo Defence requested before the Pre-Trial Chamber, that “the Pre-Trial Chamber convene in full immediately and for the remainder of the proceedings. Indeed, it is only upon such rectification of the fair trial deficiencies already suffered that the Defence’s and the public’s confidence in the present proceedings can be restored.”⁸¹

60. The requested remedy does not exclude the Single Judge’s continued participation in the case in an adjudicative capacity. Two days later, on 9 May, the Kilolo Defence contended: “the Single Judge should be precluded from exercising judicial functions in his capacity as a member of such Pre-Trial Chamber”⁸², and that “the Single Judge should be excused from his judicial functions in these proceedings in his capacities as either the Single Judge or a member of the Pre-Trial Chamber II.”⁸³ The Kilolo Defence cannot have it both ways. These contradictory positions belie the basis of the Suspension Request, namely that it is “wholly problematic that the Single Judge would, in light of the current contentions as to his impartiality, be allowed to continue to adjudicate.”⁸⁴

⁸⁰ ICC-01/05-01/13-381.

⁸¹ ICC-01/05-01/13-381, para. 17.

⁸² ICC-01/05-01/13-388, para. 11.

⁸³ ICC-01/05-01/13-388, para. 12.

⁸⁴ ICC-01/05-01/13-388, para. 12.

61. Second, the decisional authority identified by the Kilolo Defence in support of its request for the Single Judge's automatic and immediate suspension in the circumstances - that the Defence cites as "practice and jurisprudence of this Court"⁸⁵ - amounts to a single instance in a single case - *Lubanga* - which did not involve a sitting judge, but rather a former OTP member serving as a Legal Advisor to the Pre-Trial Division.⁸⁶

62. The Defence's suggestion that the *Lubanga* Pre-Trial Chamber's consideration of the situation as "tantamount to a request for disqualification of judges" is linked to the temporary separation of the Legal Advisor from rendering advice in the *Lubanga* case is misleading. Rather, the Chamber likened the situation to that which might concern a judge for the purposes of convening the special plenary of judges in order to resolve the complaint,⁸⁷ quite apart from the question of necessity of the Legal Officer's temporary suspension from his activities in the case.

63. Further, the separation of the Legal Adviser was done in the President of the Pre-Trial Division's exercise of discretion, particularly informed by the agreement in this position advanced by both the Prosecution and the Defence.⁸⁸ This is not the case here: (1) there is no such agreement among the parties - even the respective Defences in the Article 70 case are not in unison concerning the Single Judge's disqualification; (2) the conflict issue in *Lubanga* was clear as it concerned a former OTP staff member acting as a Legal Adviser to the Pre-Trial Division in a case in which he had been previously involved; and (3) the Kilolo, Mangenda and Babala Requests respectively fail to advance any genuine 'question' as to his impartiality.⁸⁹

64. The Kilolo Defence thus fails to establish any plausible legal or factual basis for the Suspension Request.

⁸⁵ ICC-01/05-01/13-388, para. 4.

⁸⁶ ICC-01/05-01/13-388, para. 6; ICC-01/04-01/06-623, AnxI, para. 13.

⁸⁷ ICC-01/04-01/06-623, p. 2.

⁸⁸ ICC-01/04-01/06-623, AnxI, paras. 14 and 20 (emphasis added) (noting that the Defence counsel joined the Prosecution application to separate the Senior Legal Advisor to the Pre-Trial Division, and that the Prosecution's allegations of the appearance of bias was "supported by Defence Counsel").

⁸⁹ Cf. ICC-01/04-01/06-623, AnxI, para. 20 (noting the "various references in the documents of the Prosecutor to the Presidency and President of the Pre-Trial Division call[ing] into question the appearance of impartiality of the judges concerned.).

IV. Requested Relief

65. For the foregoing reasons, the Defence Requests and the Suspension Request should be rejected.



Fatou Bensouda, Prosecutor

Dated this 16th Day of May 2014

At The Hague, The Netherlands