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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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

**Confidential
URGENT**

**Prosecution Observations on the Review of the Detention of Aimé Kilolo
Musamba, Jean-Jacques Mangenda Kabongo, and Fidèle Babala Wandu**

Source: Office of the Prosecutor

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

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I. Introduction

1. The Office of the Prosecutor ("Prosecution" or "OTP") hereby provides its observations concerning the pre-trial detention of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo and Fidèle Babala Wandu (together "Suspects"). The Suspects' detention should be maintained pursuant to Article 60(3) of the Rome Statute ("Statute") and Rule 118(2) of the Rules of Procedure and Evidence ("Rules"), as there has been no change in circumstances.¹ The conditions of Article 58(1) of the Statute continue to be met.

2. Moreover, additional evidence collected and made available to each of the Defence teams since the Suspects' respective Detention Decisions militate in favor of their continued detention.²

II. Procedural history

3. On 19 November 2013, the Prosecution applied for a warrant of arrest ("Application") against Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido for alleged offences against the administration of justice pursuant to Article 70 of the Statute.³

4. The Single Judge granted the Prosecution's Application and issued a warrant of arrest on 20 November ("Warrant of Arrest") against all five suspects.⁴ On 27

¹ See ICC-01/05-01/13-495.

² See ICC-01/05-01/08-1019, para. 51.

³ Prosecution's Application for Warrant of Arrest ("AWA") filed under seal, ICC-01/05-67-US-Exp. The AWA and its supporting materials were reclassified as confidential on 27 November 2013, ICC-01/05-67-Conf, Prosecution's Application for Warrant of Arrest, 19 November 2013.

⁴ ICC-01/05-01/13-1-US-Exp-tENG. The warrant of arrest was unsealed on 28 November 2013, ICC-01/05-01/13-1-Red2-tENG, 5 December 2013.

November 2013, the Court held the Initial Appearance of Kilolo and Babala.⁵ Mangenda's Initial Appearance took place on 5 December 2013.⁶

5. On 14 March 2014, the Single Judge rejected applications for interim release from Kilolo and Babala in the ""Decision on the '*Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba*'""⁷ and "Decision on the '*Requête urgente de la Défense sollicitant la mise en liberté provisoire de monsieur Fidèle Babala Wandu*'",⁸ respectively. Likewise, on 17 March 2014, the Single Judge rejected Mangenda's application for interim release in the "Decision on the '*Requête de mise en liberté*' submitted by the Defense for Jean-Jacques Mangenda Kabongo"⁹ (together "Detention Decisions").

6. On 13 June 2014, the Single Judge issued an "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" inviting the concerned parties to submit their observations on 30 June 2014, at the latest.¹⁰

III. Confidentiality

7. This filing is classified as "Confidential" as it refers to evidence classified as such. The Prosecution will file a public redacted version as soon as practicable.

IV. Standard of Review pursuant to Article 60(3) of the Statute

8. These Observations are provided for the purpose of the first review under

⁵ ICC-01/05-01/13-T-1-ENG, 27 November 2013.

⁶ ICC-01/05-01/13-T-3-CONF-ENG, 5 December 2013.

⁷ ICC-01/05-01/13-259.

⁸ ICC-01/05-01/13-258.

⁹ ICC-01/05-01/13-261.

¹⁰ ICC-01/05-01/13-495, p.3.

Article 60(3) of the continued detention of the Suspects. As stipulated by the Appeals Chamber, “[w]hile a review of detention pursuant to article 60(2) entails a decision *de novo* in which the Pre-Trial Chamber must decide whether the conditions of article 58(1) are met, the Pre-Trial Chamber may modify its ruling on release or detention under article 60(3) if ‘it is satisfied that changed circumstances so require’”.¹¹ The Appeals Chamber clarified further that “[i]f there are changed circumstances, the Pre-Trial or Trial Chamber will need to consider their impact on the factors that formed the basis for the decision to keep the person in detention. If, however, the Pre-Trial or Trial Chamber finds that there are no changed circumstances, that Chamber is not required to further review the ruling on release or detention.”¹²

V. Observations

9. For the purpose of his rulings under Article 60(2), the Single Judge made an *ex novo* assessment of each limb of Article 58(1) in light of the circumstances for each of the Suspects taking into account the submissions made by the parties, the observations made by the Kingdom of the Netherlands,¹³ the United Kingdom,¹⁴ the authorities of Belgium¹⁵ and the Democratic Republic of the Congo,¹⁶ and determined that the conditions set by Article 58(1) as a whole continue to be satisfied.¹⁷

10. The object of a periodic review of a suspect's detention pursuant to Article 60(3)

¹¹ ICC-02/11-01/11-548-Red, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Pre-Trial Chamber I of 11 July 2013 entitled “Third decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute”, 29 October 2013, para. 51.

¹² *Ibid.*

¹³ See ICC-01/05-01/13-261, at para. 42 and ICC-01/05-01/13-258, at paras. 37 and 38.

¹⁴ See ICC-01/05-01/13-261, at para. 42 and ICC-01/05-01/13-259, at paras. 44-46.

¹⁵ See ICC-01/05-01/13-259, at paras. 44-46.

¹⁶ See ICC-01/05-01/13-258, at paras. 37 and 38.

¹⁷ ICC-01/05-01/13-259, paras 6-16; ICC-01/05-01/13-258, paras 6-13 and ICC-01/05-01/13-261, paras 11-22.

of the Statute and Rule 118(2) of the Rules is the initial ruling on detention based on Article 60(2);¹⁸ namely the initial Detention Decisions issued on 14 and 17 March 2014 in the case at hand.

11. The reasons underpinning the Detention Decisions still stand and are bolstered by the collection and disclosure of additional evidence, the more advanced stage of the proceedings, and the Suspects' knowledge of the of the Prosecution's case and underlying evidence¹⁹.

12. The continued detention of Kilolo, Babala and Mangenda must be maintained since (i) reasonable grounds to believe that the Suspects have committed the crimes within the jurisdiction of the Court — namely Article 70 offences — continue to exist; and (ii) the continued detention of the Suspects is necessary for all the grounds laid down by Article 58(1)(b).

I. Article 58(1)(a)

13. As detailed in the Warrant of Arrest,²⁰ the Single Judge found reasonable grounds to believe that the Suspects are criminally responsible for offences against the administration of justice as set out in the counts and described in greater detail in the Prosecution Application for Warrant of Arrest.²¹ Based on an *ex novo*

¹⁸ See ICC-01/05-01/08-1019, para. 45

¹⁹ See ICC-02/11-01/11-278-Red, para. 65:

The Appeals Chamber in the Gbagbo case confirmed that the disclosure of evidence to a suspect "amplified" the risk to the investigation and the proceedings in case of release, noting that "[d]isclosure enhances the detainee's knowledge of the Prosecutor's investigation".

²⁰ ICC-01/05-01/13-1-Red2-tENG.

²¹ Prosecution's Application for Warrant of Arrest ("AWA") filed under seal, ICC-01/05-67-US-Exp. The AWA and its supporting materials were reclassified as confidential on 27 November 2013, ICC-01/05-67-Conf, Prosecution's Application for Warrant of Arrest, 19 November 2013.

assessment, the Single Judge confirmed these findings in his Detention Decisions.²²

14. Since the Detention Decisions, no evidence or information has been submitted by the Defence teams, other participants and/or a third party to undermine these findings. Therefore, the Single Judge's findings with respect to article 58(1)(a) of the Statute continue to be satisfied. Moreover, the evidence collected and disclosed to the Suspects' Defence teams since the Detention Decisions corroborates and bolsters the Single Judge's factual findings, as set out below.

(i) Kilolo

15. The strength of the evidence against Kilolo is now even greater than prior to the 14 March Detention Decision. The newly collected statements from D-2 and D-3 disclosed to the Kilolo Defence on 20 June 2014, as well as the communication of the Independent Counsel's Third Report on 26 May 2014 ("Third Report") provide further evidence on Kilolo's role in the implementation of the common plan.²³ This newly disclosed material reveals, among other things, additional elements on the instances of Kilolo's illicit coaching of witnesses; payments or promises he made to witnesses in exchange for their testimony,²⁴ as well as Kilolo's knowledge that the 14 documents he presented as evidence in Court were false or forged.²⁵ It further reveals his intention to present additional false evidence to rehabilitate their impugned authenticity and to avoid possible prosecution.²⁶

(ii) Babala

²² ICC-01/05-01/13-259, paras 6-16; ICC-01/05-01/13-258, paras 6-13 and ICC-01/05-01/13-261, paras 11-22.

²³ See CAR-OTP-0080-1138, in its entirety.

²⁴ See CAR-OTP-0078-0198 at 0200-0202; CAR-OTP-0078-0248 at 0254-0255, at 0256-0257 and 0257-0258; CAR-OTP-0078-0264 at 0274; CAR-OTP-0080-0494 at 0517-0518; CAR-OTP-0078-0198 at 0202; CAR-OTP-0078-0248 at 0255-0257; CAR-OTP-0080-0021 at 0037; CAR-OTP-0080-0069 at 0072-0073, 0075 and 0080; CAR-OTP-0080-0135 at 0142-0144.

²⁵ CAR-OTP-0080-1138, at 1253-1256.

²⁶ CAR-OTP-0082-1252, at 1254

16. The Independent Counsel's Third Report provides additional incriminating evidence against Babala, as the financial cog in the bribery scheme,²⁷ but also on his role in managing certain aspects of the bribing of witnesses.²⁸ The report mentions exchanges between Kilolo and Babala, and conversations that Babala had with Bemba regarding transfers of money to ensure '*le service après-vente*';²⁹ a coded expression meaning money spent to have witnesses confirm their in-court statement and prevent them from speaking to the OTP. Babala - in contact with Kilolo and Bemba at all times - makes urgent transfers to Kilolo to pay witnesses since Kilolo purports that the contact with these has been neglected, which explains the reason that one or more of them would have *leaked* information.³⁰ Babala even uses his own personal account in Paris to send money to Kilolo and contacts the bank's representative to have Kilolo pick up money there for that purpose.³¹ Furthermore, Babala acts on his own initiative to ensure that the *service après-vente* is effective.³²

(iii) Mangenda

17. Similarly, the highly incriminating evidence disclosed since 17 March 2014, supports the charges against Mangenda and strongly militates for his detention.

18. The newly disclosed material reveals, *inter alia*, additional elements on Mangenda's significant role in the implementation of the common plan;³³ his involvement at meetings where witnesses are coached and paid and when payments or promises are made to witnesses in exchange for their testimony³⁴ as well as on his

²⁷ CAR-OTP-0080-1138, at 1159-1160, 1168, 1170, 1175, 1191-1193, 1194, 1197-1202, 1204-1212, 1215-1216.

²⁸ See CAR-OTP-0080-1138, at 1215-1216.

²⁹ CAR-OTP-0080-1138, at 1159-1160, 1168, 1170, 1175, 1191-1193, 1194, 1197-1202, 1204-1212, 1215-1216.

³⁰ CAR-OTP-0080-1138, 1159-1161, 1168, 1170.

³¹ CAR-OTP-0080-1138, at 1191-1192, 1206-1213.

³² CAR-OTP-0080-1138, at 1215-1216.

³³ See CAR-OTP-0080-1138, in its entirety.

³⁴ See CAR-OTP-0078-0198 at 0200-0202; CAR-OTP-0078-0248 at 0254-0255, at 0256-0257 and 0257-0258; CAR-OTP-0078-0264 at 0274; CAR-OTP-0080-0494 at 0517-0518; CAR-OTP-0078-0198 at 0202; CAR-OTP-

knowledge that the 14 documents presented as evidence in Court were false or forged.³⁵ The material reveals, as in Kilolo's case, Mangenda's intention to present false testimonial evidence in an attempt to rehabilitate their impugned authenticity and avoid possible prosecution.³⁶

II. Continued detention is necessary for all the grounds laid down by article 58(1)(b) of the Statute

19. In determining the need for continued detention pursuant to Article 58(1)(b), the Single Judge considered the means available to the Suspects, including political connections, substantial financial resources, and their ability to travel freely not only throughout the Schengen area but also to non-States parties to the Statute. The Single Judge found that the Suspects' arrest and detention was necessary (i) to ensure their appearance at trial, (i) to prevent them from obstructing or endangering the proceedings, and (iii) to prevent further commission of crimes.³⁷ The same findings apply today and are reinforced by the recently disclosed evidence.

i. Article 58(1)(b)(i) - Continued detention is necessary to ensure the Suspects' appearance at trial

(i) Kilolo

20. In his Detention Decision of 14 March 2014, the Single Judge determined that Kilolo's detention was necessary to ensure his appearance at trial based on a number of elements which remain verified to date, such as: (a) the availability of substantial resources of Bemba's network allowing him to readily abscond the jurisdiction of the

0078-0248 at 0255-0257; CAR-OTP-0080-0021 at 0037; CAR-OTP-0080-0069 at 0072-0073, 0075 and 0080; CAR-OTP-0080-0135 at 0142-0144.

³⁵ CAR-OTP-0080-1138, at 1253-1256.

³⁶ CAR-OTP-0080-1138, at 1253-1256.

³⁷ ICC-01/05-01/13-1-Red2-tENG, paras. 21-23; ICC-01/05-01/13-259, paras 17-40; ICC-01/05-01/13-258, paras 14-33 and ICC-01/05-01/13-261, paras 23-38.

Court; (b) his ability to travel freely, if released, within the Schengen area; (c) the nature and gravity of the offences alleged against him; (d) the political connections available to Kilolo as part of Jean-Pierre Bemba's network, in addition to his own, as the founder of the "Parti Réformateur pour le Congo"; (e) the advanced stage of the disclosure process, which enhances his knowledge of the Prosecution's case; and (f) Kilolo's prominent role in the alleged offences against the administration of justice.³⁸

21. These grounds are unchanged and are, in fact, compounded by the disclosure of the Third Report and recent witness statements containing further incriminating evidence, unavailable to Kilolo when the Detention Decision was issued. D-3's statement makes reference to email exchanges he had with Kilolo.³⁹ Kilolo's emails, once communicated to the OTP, are likely to further confirm this and other evidence provided by these witnesses and others. Therefore, Kilolo's knowledge of the material already in the Prosecution's possession and that more evidence is yet to come further increase the risk of his flight.

(ii) Babala

22. In his 14 March 2014 Detention Decision, the Single Judge determined that Babala's detention was necessary to ensure his appearance at trial based on a number of elements which remain verified to date, such as: (a) the nature and gravity of the offences alleged against him; (b) his contacts, including at an international level and the existence of a network of supporters; (c) his ability to travel freely to a non-State Party; (d) the advanced stage of the disclosure process which enhances his knowledge of the Prosecution's case; (e) Babala's instrumental role in the execution of money transfers as part of the criminal scheme.⁴⁰

³⁸ ICC-01/05-01/13-259, paras 17-32

³⁹ CAR-OTP-0078-0184, at 0193.

⁴⁰ ICC-01/05-01/13-258, paras 14-23

23. These grounds remain unchanged and are further enhanced by the new evidence. The Third Report, for instance, provides additional insight into Babala's direct and immediate access to significant financial resources placed in various accounts including foreign accounts and his role as the financial pillar of the scheme.⁴¹ This incriminating evidence disclosed recently to Babala aggravates his risk of flight. These elements undoubtedly provide him with the incentive and further reveal his ability, if released, to abscond the jurisdiction of the Court.

(iii) Mangenda

24. In his 17 March 2014 Detention Decision, the Single Judge determined that Mangenda's detention was necessary to ensure his appearance at trial based on a number of elements which remain verified to date, such as: (a) the nature and gravity of the offences alleged against him; (b) Mangenda's ability to travel freely, if released, within the Schengen area; (c) as part of Jean-Pierre Bemba's network, financial resources would be made available to him allowing him to readily abscond the jurisdiction of the Court; (d) the advanced stage of the disclosure process which enhances his knowledge of the Prosecution's case; (e) his role in the execution of money transfers as part of the criminal scheme which enabled him to connect with other members of the Bemba network.⁴²

25. These grounds remain unchanged to warrant any modification to 17 March Detention Decision. Furthermore, as demonstrated above, the new highly incriminating evidence communicated to his Defence team on 20 June 2014, can only but increase Mangenda's incentive, if released, to abscond the jurisdiction of the Court. Similarly to Kilolo, Mangenda's emails are yet to be communicated to the parties and are likely to yield further elements shedding light on his role in the implementation of the common plan.

⁴¹ CAR-OTP-0080-1138, at 1160; 1191-1192; 1200-1201 and 1206-1210.

⁴² ICC-01/05-01/13-261, paras 23-32

- ii. Article 58(1)(b)(ii) and (iii) - Continued detention is necessary to ensure that the Suspects do not obstruct or endanger the investigation or the Court proceedings and that they do not continue with the commission of crimes*

(i) Kilolo

26. In his Detention Decision of 14 March 2014, the Single Judge found that Kilolo's detention was necessary to ensure that he does not obstruct or endanger the investigation or the court proceedings or continue with the commission of crimes. The grounds underpinning this ruling were, *inter alia*: (a) evidence revealing several instances of conducts by Kilolo directly aimed at influencing the content of the testimony to be given by witnesses in the Main Case, and Kilolo's demonstrated readiness to take action in respect of the ongoing investigation and the current proceedings; (b) the potential interference in both cases; (c) the very nature of the crimes at stake, and the way in which they are alleged to have been committed, make it obvious that detention is the only context allowing the effective management of these risks.⁴³

27. The new evidence reveals additional instances of Kilolo's illicit interference with witnesses and his intent and readiness to fabricate evidence including bringing witnesses to testify falsely in an attempt "*de nous couvrir pour ses documents*"⁴⁴ with respect to the false or forged documents produced in Court. Now with his reputation, career and liberty at stake his incentive, if released, to obstruct or endanger the ongoing investigation or the court proceedings and to continue with the commission of the crimes is undoubtedly much greater since the Detention Decision.

⁴³ ICC-01/05-01/13-259, paras 33-40

⁴⁴ CAR-OTP-0080-1138 at 1255

(ii) Babala

28. In his Detention Decision of 14 March 2014, the Single Judge found that Babala's detention was necessary to ensure that he does not obstruct or endanger the investigation or the court proceedings or continue with the commission of crimes. The grounds underpinning this ruling were, *inter alia*: (a) Babala's role in the execution of money transfers as part of the criminal scheme; (b) the potential interference not only in the instant proceedings but also in the Main case; (c) the very nature of the crimes at stake, and the way in which they are alleged to have been committed, make it obvious that detention is the only context allowing the effective management of these risks.⁴⁵

29. The impact of the new disclosed material, which further incriminates Babala, provides him with an even greater incentive, if released, to obstruct or endanger the ongoing investigation or the court proceedings and to continue with the commission of the crimes.

(iii) Mangenda

30. In his Detention Decision of 17 March 2014, the Single Judge found that Mangenda's detention was necessary to ensure that he does not obstruct or endanger the investigation or the court proceedings or continue with the commission of crimes. The grounds underpinning this ruling were, *inter alia*: (a) Mangenda's role in the scheme of witness corruption and his demonstrated readiness to take action in respect of the ongoing investigation and the instant proceedings; (b) due to his former position as case manager, he possesses knowledge of the identity of most of the potential witnesses, which together with the precise information disclosed to him, put him in a better position to obstruct or endanger the investigation; (c) the

⁴⁵ ICC-01/05-01/13-258, paras 24-33

potential interference not only in the instant proceedings but also in the Main case; (d) the very nature of the crimes at stake, and the way in which they are alleged to be committed, make it obvious that the detention is the only context allowing the effective management of these risks.⁴⁶

31. The same submission made for Kilolo with respect to the effect that the disclosure of the new evidence may have regarding his incentive, if released, to obstruct or endanger the ongoing investigation or the court proceedings and to continue with the commission of the crimes can be made for Mangenda.

32. In light of the above, the grounds underpinning the Detention Decisions remain unaltered making the continued detention of the Suspects necessary. Additionally, the increased wealth of evidence incriminating the Suspects, their knowledge of the evidence relied on by the Prosecution to establish their criminal responsibility, and the advancement of the proceedings to the confirmation of charges stage, all are additional factors that increase the flight risk of the Suspects and the possibility that if released they would further interfere with the investigation and/or the Court proceedings and continue to commit crimes. This is further demonstrated by the fact that when they learned of the launching of the Article 70 investigation against them, the Suspects demonstrated readiness to take further actions to interfere with witnesses.⁴⁷

⁴⁶ ICC-01/05-01/13-261, paras 33-38.

⁴⁷ CAR-OTP-0080-1138, at 1215-1217, 1224 -1233, 1257-1258.

VI. Relief Requested

33. For the foregoing reasons, the Prosecution respectfully requests that the Single Judge order the continued detention of the Suspects.



Fatou Bensouda, Prosecutor

Dated this 30th day of June 2014
At The Hague, The Netherlands