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THE APPEALS CHAMBER

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Anita Ušacka
Judge Akua Kuenyehia

**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***

**Confidential *Ex parte* Registry, Prosecution and Kilolo Defence only
With Confidential Annex I, *Ex parte* Registry, Prosecution and Kilolo Defence
only**

**Document in Support of Appeal against the decision of the Single Judge ICC-
01/05-01/13-611 entitled “Decision on the first review of Aimé Kilolo Musamba’s
detention pursuant to article 60(3) of the Statute”**

Source: Defence for Mr Aimé Kilolo Musamba

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Kweku Vanderpuye

Counsel for Aimé Kilolo Musamba

Mr Ghislain Mabanga

**Counsel for Jean-Pierre Bemba
Gombo**

**Counsel for Jean-Jacques Mangenda
Kabongo**

Counsel for Fidèle Babala Wandu

Counsel for Narcisse Arido

Legal Representatives of the Victims

**Legal Representatives of the
Applicants**

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. *Purpose*: This Document in Support of Appeal ("Document") is hereby submitted by the Defence of Mr Aimé Kilolo Musamba ("Kilolo Defence" and "Mr Kilolo" respectively) to the Appeals Chamber of this Court pursuant to Article 82(1)(b) of the Rome Statute ("Statute"), Rule 154 of the Rules of Procedure and Evidence ("RPE") and Regulation 33(1) of the Regulations of the Court ("RoC"), in support of its appeal against the "Decision on the first review of Aimé Kilolo Musamba's detention pursuant to article 60(3) of the Statute", rendered by the Single Judge on 5 August 2014¹ ("Impugned Decision").
2. *Confidentiality*: This Document is classified as "Confidential" and filed *ex parte* as per Regulation 23bis of the Regulations of the Court as it references information relating to the *ex parte* Framework Agreement between the Registry and the Kingdom of Belgium as well as Observations submitted to the Single Judge from the Kingdom of Belgium which were filed confidentially *ex parte*.

II. RIGHT OF APPEAL

3. The present Document arises out of the Impugned Decision, denying Mr Kilolo's interim release after the first review of Mr Kilolo's detention pursuant to Article 60(3) of the Statute. The Impugned Decision was rendered subsequent to the Single Judge's order of 13 June 2014 requesting the Kilolo Defence submit observations for the purposes of and in connection with the periodic review of Mr Kilolo's continued detention pursuant to Rule 118(2) of the Rules of Procedure and Evidence.
4. Article 82(1)(b) of the Statute provides for the right of appeal against such decision. Specifically, the Article stipulates that either party may, in accordance with the RPE, appeal a decision granting or denying the release of the person being investigated or prosecuted.

¹ ICC-01/05-01/13-611.

III. APPLICABLE LAW

A. GENERAL PRINCIPLES OF LAW

5. Because detention is an exceptional restriction of the fundamental right to liberty – a rule reaffirmed at this Court²– the general rule is that an accused not yet charged or convicted should not be deprived of his freedom, unless such detention is proved necessary and proportional, and should not continue beyond the period for which appropriate justification can be provided.³ In other words, detention must be justified and justifiable.⁴ Indeed, the Rome Statute, already clear in its respect of human rights⁵, also enshrines within its text the right to interim release, as a natural extension and manifestation of several basic human rights, including the rights to a fair trial and presumption of innocence.
6. The presumption of innocence, as one of the core components of due process, assumes an important role in pre-trial release. Indeed, the right to interim release has been regarded as both an accoutrement and manifestation of the presumption of innocence. The European Court of Human Rights has repeatedly recognised the relevance of the presumption of innocence in its assessment of pre-trial detention, observing that in determining whether the pre-trial detention of an accused person has exceeded a reasonable time, judicial authorities “must examine all the circumstances arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the presumption of innocence, a departure from the rule of respect for individual liberty”.⁶
7. Specifically, the language of the Rome Statute makes clear that the right to interim release is always applicable, and that an accused shall only be detained insofar as the conditions encapsulated in Article 58(1)(b) are met. If the Pre-Trial Chamber is not convinced of satisfaction thereof, it shall release the person, with

² ICC-01/05-01/08-475, para 35; ICC-02/11-01/11-454, para 55.

³ ECtHR, *McKay v UK*, App no 543/03, 3 October 2006, para 30; ECtHR, *Assanidze v Georgia*, App no 71503/01, 8 April 2004, para 170.

⁴ ICC-01/05-01/13-259.

⁵ Rome Statute, art 21(3).

⁶ ECtHR, *Clooth v Belgium*, App no 12718/87, 12 December 1991, para 36.

or without conditions.⁷ This suggests that it is the need for *detention* that must be proved, and not the need for *release*, a rule reaffirmed in various cases before this Court.⁸ Indeed, the *Bemba* Appeals Chamber made clear that “the purpose of the periodic review under article 60(3) of the Statute [] ensure[s] that detention that was ordered in accordance with the Statute does not become unwarranted because of a change of circumstances.”⁹ Such procedural safeguard must also be seen in the context of the detained person’s right to be presumed innocent.¹⁰ Indeed, the statutory provisions relevant to detention, like every other provision of the Statute, must be interpreted and applied in accordance with “internationally recognised human rights”¹¹, as underlined by the *Lubanga* Chamber, which has clearly indicated that “[h]uman rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court.”¹²

8. In parallel, various Chambers at the international *ad hoc* tribunals have made also clear the Tribunals are required to respect defendants’ fundamental human rights in their interpretations of Rule 65, which governs provisional release.¹³ This includes the presumption of innocence – which operates in favour of provisional release unless convincing reasons exist to deny liberty – as well as the principle of proportionality, by which detention must be suitable and necessary, and its degree and scope reasonable. Accordingly, where measures more lenient than mandatory detention suffice, such measures “must be applied”.¹⁴
9. It is in that vein that Article 60(2) and 60(3) provide for the possibility of interim release, necessitating a review not only at the request of the accused, but also periodically every four months. Specifically, Rule 118(2) mandates the Pre-Trial Chamber “review its ruling on the release or detention of a person...at least every

⁷ Rome Statute, art 60(2).

⁸ ICC-01/05-01/08-403, para 36; ICC-01/05-01/08-475, para 36.

⁹ ICC-01/05-01/08-1019, para 49.

¹⁰ ICC-01/05-01/08-1019, para 49; Rome Statute, art 66.

¹¹ ICC-01/04-01/07-572, para 15; Rome Statute, art 21(3).

¹² ICC-01/04-01/06-772, para 37.

¹³ *Prosecutor v Milutinović et al*, Decision on Provisional Release, IT-99-37-PT, 14 April 2005, para 30.

¹⁴ *Prosecutor v Darko Mrda*, Decision on Provisional Release, IT-03-69-PT, 15 April 2002, para 31.

120 days”.¹⁵ Such review must be conducted in accordance with Article 60(3), which mandates the Chamber’s consideration of the existence of changed circumstances, in light of which the Chamber is obliged to revisit its previous rulings on detention. Upon such review, the Pre-Trial Chamber may either reaffirm or modify its prior ruling on detention, release or conditions of release, if satisfied that changed circumstances so require. As held by the Appeals Chamber, the Pre-Trial Chamber shall “revert to the ruling on detention to determine whether there has been a change in the circumstances underpinning the ruling and whether there are any new circumstances that have a bearing on the conditions under article 58(1) of the Statute.”¹⁶

B. ARTICLE 60(3) AND CHANGED CIRCUMSTANCES

10. The concept of changed circumstances “*imports either a change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary*”.¹⁷ Thus, changed circumstances include entirely new facts not in existence at the time of the previous ruling on detention, and facts previously existing but that have since changed significantly, which thus materially change the prior circumstances and warrant a revision of the prior decision. During such review, the Court must necessarily consider all arguments raised by the accused and the Prosecutor, as well as “any other information which has a bearing on the subject”.¹⁸ The decision on periodic review must be fully reasoned and shall clearly set out the reasons underpinning the decision.¹⁹
11. The Appeals Chamber has found an Article 60(3) review makes it incumbent upon the Pre-Trial Chamber to *address anew* its prior ruling on the issue of detention or release in light of the requirements under Article 58(1) of the

¹⁵ Rules of Procedure and Evidence, rule 118(2).

¹⁶ ICC-01/05-01/08-1019, para 52.

¹⁷ ICC-01/05-01/08-403, para 60.

¹⁸ ICC-01/05-01/08-1019, para 52.

¹⁹ ICC-01/05-01/08-1019, para 52.

Statute.²⁰ In clarifying what is required in a periodic review, “the object and purpose of article 60(3) must be considered”²¹, i.e., import must be given to Article 60(3)’s existence as one of the “safeguards against the undue prolongation of the period of detention”.²² The object of the law is to ensure *detention is not extended beyond what is necessary to secure the ends of justice*.²³ It is telling that Article 60(4) casts a duty upon the Pre-Trial Chamber to make certain an accused’s detention is not unreasonably prolonged as a result of the Prosecutor’s inexcusable delay, such as through a failure to take timely steps to move the judicial process forwards as the ends of justice may demand. If such delay is noticed, the Chamber is empowered to release the person, conditionally or unconditionally. Indeed, it is the purpose of periodic review to ensure a prior detention ruling remains *necessary*.

12. In *Bemba*, the Appeals Chamber laid out the following procedure for reviewing detention decisions under Article 60(3). First, the Pre-Trial or Trial Chamber must “identify the ruling on release or detention” requiring review, i.e., the initial decision made under Article 60(2). Second, the relevant Chamber must consider where there are ‘changed circumstances’. If changed circumstances exist, the Chamber will need to consider their impact on the factors that form the basis for the decision to keep the person in detention. If, however, the Chamber finds that there are no changed circumstances, it is not required to – but, importantly, is *not precluded from* – further review [of] the ruling on release or detention.²⁴ Indeed, it has been made clear that though an Article 60(3) review does not require the Chamber to make a decision on detention *ab initio*, it *is still obliged to look at those circumstances already decided upon to determine whether they still exist*.²⁵

²⁰ ICC-01/05-01/08-631-Red, para 58.

²¹ ICC-01/05-01/08-1019, paras 49 (footnote omitted).

²² ICC-01/04-01/07-572, para 14.

²³ ICC-01/04-01/07-572, para 14.

²⁴ ICC-01/05-01/08-1019, paras 46-53.

²⁵ ICC-01/05-01/08-1019, para 53.

13. Importantly, the Appeals Chamber has taken pains to clarify that “while it is correct that the Prosecutor does not have to re-establish circumstances that have already been established, he must show that there has been no change in those circumstances.”²⁶ Indeed, the Prosecutor must, “for each periodic review of detention, make submissions as to whether there has been any change in the circumstances that previously justified detention and [s]he must bring to the attention of the Chamber any other relevant information of which [s]he is aware that relates to the question of detention or release.”²⁷ Thus, the onus necessarily remains on the Prosecutor.
14. Trial Chamber III has identified certain developments that – if reaching the necessary threshold – are capable of constituting a material change in circumstances.²⁸ Such developments include *inter alia* the (i) completion of disclosure obligations by a party; (ii) the “passage of time”; (iii) the possibility of obtaining the cooperation of a host State; (iv) diminished political status; (v) shrinking finances; and (vi) the established lack of international contacts.²⁹
15. The *Gbagbo* Chamber further clarified the concept of changed circumstances. In indicating that the “existence of new or additional *evidence* for the same facts does not, as such, constitute a changed circumstance, insofar as it does not establish previously unknown facts that could amount to changed circumstances”³⁰, the Chamber implicitly recognises that *previously unknown facts would* indeed amount to changed circumstances within the meaning of Article 60(3). This means that where the Defence is able to demonstrate that a fact unknown at the time of the prior detention decision has since come to light, this would constitute a changed circumstance warranting a *de novo* assessment on interim release.

²⁶ ICC-01/05-01/08-1019, para 51.

²⁷ ICC-01/05-01/08-1019, para 51.

²⁸ ICC-01/05-01/08-743, para 29.

²⁹ ICC-01/05-01/08-743, para 28.

³⁰ ICC-02/11-01/11-454, para 40.

IV. APPEALS MAY BE BROUGHT ON ISSUES OF FACT, LAW OR PROCEDURE

16. Appellate jurisdiction derives from the power conferred upon the Appeals Chamber to review the correctness of a decision. The Appeals Chamber “*will intervene in the findings of the Pre-Trial Chamber only where clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision*”.³¹ In distinguishing between legal and factual errors, Judge Pikis stated that “[a] correct judgment is one legally and factually well-founded. Consequently, the grounds of appeal must be defined by reference to the legal and factual foundation of the decision under review”.³² Errors of law are “[l]egal errors [which] may arise from the misapplication of adjectival or substantive law”³³ while errors of fact arise – and the Appeals Chamber may justifiably interfere³⁴ – when the “*Pre-Trial or Trial Chamber...misappreciates facts, disregards relevant facts or takes into account facts extraneous to the sub judice issues.*”³⁵
17. In determining whether the Trial Chamber has misappreciated facts in an interim release decision, the Appeals Chamber will “*defer or accord a margin of appreciation both to the inferences [the Trial Chamber] drew from the available evidence and to the weight it accorded to the different factors militating for or against detention*”, interfering only where clear errors exist, such as where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it.³⁶
18. For any type of error, the appellant must “*not only [] set out the alleged error, but also [] indicate, with sufficient precision, how this error would have materially affected the impugned decision*”.³⁷ Such error must be indicated with specificity, as “*an appellant cannot simply claim that an impugned decision violated the overall fairness or*

³¹ ICC-01/05-01/08-631-Red, para 62 cited in ICC-01/04-02/05-271-Red, para 29.

³² ICC-01/04-01/06-568, Dissenting opinion of Judge Pikis, para 14.

³³ ICC-01/04-01/06-568, Dissenting opinion of Judge Pikis, para 14.

³⁴ ICC-01/04-01/07-572, para 25.

³⁵ ICC-01/05-01/08-2151-Red, para 16; ICC-01/04-02/05-271-Red, para 31; ICC-01/05-01/13-558, para 16.

³⁶ ICC-01/05-01/08-2151-Red, para 16; ICC-01/04-02/05-271-Red, para 31; ICC-01/04-01/10-283, para 1.

³⁷ ICC-02/04-01/05-408, para 47; ICC-01/04-02/05-271-Red, para 32.

led to a violation of his or her human rights without specifying and substantiating such claim”³⁸, and cannot amount to “mere disagreement”.³⁹

A. THE PRE-TRIAL CHAMBER FAILED TO PROVIDE A FULL REASONING OF ITS DECISION

19. A detention decision must be supported by a full reasoning.⁴⁰ The Appeals Chamber has held that insufficient reasoning may amount to an error of law.⁴¹ Though the extent of the reasoning depends on the circumstances of the case, it is essential the Chamber indicate, with sufficient clarity, the basis of its decision and the facts it found relevant in coming to its conclusion.⁴² Similarly, the ICTY Appeals Chamber has indicated that though a Trial Chamber is not obliged to deal with all possible factors when deciding whether it is satisfied under Rule 65(B), the Chamber must, at a minimum, provide reasoning to support its finding regarding the substantive considerations relevant to its decision.⁴³ In fact, appeals have been accepted where the impugned decisions have been considered to be vague, unreasoned or insufficiently reasoned.

a. Misappreciation of the Framework Agreement concluded between the Court and the Kingdom of Belgium in April 2014

20. The Kilolo Defence contends the Impugned Decision is insufficiently reasoned. In the first place, the Defence argued in its 30 June Observations that a cooperation framework agreement concluded between the Registry of the Court and the Kingdom of Belgium – Mr Kilolo’s country of citizenship – in which Belgium agrees to accept on a case by case basis Court detainees on its territory⁴⁴, and which entered into force in April 2014, was a changed circumstance warranting a review of the prior detention ruling of 14 March (“14 March Decision”).⁴⁵

³⁸ ICC-01/05-01/08-2151-Red, para 41.

³⁹ ICC-01/04-02/05-271-Red, para 31; ICC-01/04-01/10-283, para 31.

⁴⁰ ICC-01/04-01/06-824, para 124; ICC-02/11-01/11-278-Red, para 49.

⁴¹ ICC-01/04-01/06-773; ICC-01/04-01/06-774.

⁴² ICC-01/04-01/06-773, para 20.

⁴³ *Prosecutor v Ramush Haradinaj et al.*, Decision, 9 March 2006, IT-04-84-AR65.2, para 10.

⁴⁴ ICC-CPI-20140410-PR993, 10 April 2014.

⁴⁵ ICC-01/05-01/13-528-Conf-Exp, paras 6-11.

21. In the Impugned Decision, the Single Judge indicates his concurrence “*with the Defence for Mr Kilolo in considering the entry into force of the Framework Agreement...[is] a ‘changed circumstance’...suitable to require the review and possibly the amendment of a previous ruling on detention*”.⁴⁶ However, after such statement, the Single Judge significantly and disturbingly *fails to analyse to any degree whatsoever* such Agreement. Other than generically stating the Agreement does not constitute “*an unconditional availability and willingness on the part of the Kingdom of Belgium to accept that detainees from the Court be released on its territory*”⁴⁷ – which was never argued by the Kilolo Defence – and reiterating the case-by-case analysis that must take place – which the Defence itself recognised in its 30 June Observations⁴⁸ – the Single Judge *does not address, analyse, reason or dissect in any manner the Framework Agreement and its impact on Mr Kilolo’s present detention*. Indeed, after such generic statements, the Framework Agreement *is never again mentioned in the Impugned Decision*.
22. The conspicuous absence of *any* assessment of the Framework Agreement at all, and its complete lack of application to Mr Kilolo is surprising in light of the fact that the Agreement came into existence almost one month *after* the 14 March Decision and represents the Belgium’s willingness and capacity to respect all ICC-imposed conditions on release as well as its ability to provide the requisite level of monitoring. More shockingly, the Single Judge finds, *not four paragraphs later and absent any reasoning at all*, that “since the 14 March 2014 Decision, no change in the circumstances underpinning that ruling has occurred and that no new circumstances having a bearing on the conditions under article 58(1) of the Statute have arisen.”⁴⁹ This conclusion is rendered even more problematic when one considers the 14 March Decision was partially predicated on the concerns of the Belgian authorities that “*the absence of a framework agreement between the Court*

⁴⁶ ICC-01/05-01/13-611, para 12.

⁴⁷ ICC-01/05-01/13-611, para 13.

⁴⁸ ICC-01/05-01/13-528-Conf-Exp, para 7.

⁴⁹ ICC-01/05-01/13-611, para 18.

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”⁵⁰, a consideration leading the Single Judge to hold that interim release was “not only not justified...but also practically unfeasible”⁵¹. How, then, was the Single Judge able to hold, in the Impugned Decision, that no changed circumstances exist to warrant change in ruling when (i) he himself admitted to the existence of a changed circumstance, (ii) he failed to analyse and apply the Framework Agreement, and (iii) where the Framework Agreement *directly* negates one of the factors on which the previous detention ruling of 14 March was made?

23. The Defence is confounded as to how the Single Judge can concur the existence of the Framework Agreement constitutes a changed circumstance, on the one hand, and almost immediately thereafter *absent any reasoning whatsoever*, hold that no changed circumstances exist to warrant a modification of the prior detention ruling. Rather, the Defence stipulates the Framework Agreement is a *critical* factor that *significantly* changes the circumstances of Mr Kilolo’s detention in that it necessarily alters the conditions, criteria, and procedure by which interim release should be assessed and which negates to a large extent various factors previously precluding interim release, such as lack of State cooperation and fears of flight risk. Indeed, the risk of flight is drastically reduced, particularly as the Agreement provides for immediate recourse and actions upon flight, such as the ability to issue a domestic arrest warrant.⁵² Indeed, the Belgian authorities have specifically *modified* the domestic criminal law in order to better accommodate conditional release on its territory.⁵³

⁵⁰ ICC-01/05-01/13-259, para 45.

⁵¹ ICC-01/05-01/13-259, para 46.

⁵² ICC-01/05-01/13-605-Conf-Exp-AnxIII, p. 4/9.

⁵³ See page 3 of Annex I, stating: “[t]outefois, l’article 20bis, §2 de la loi du 29 mars 2004 concernant la coopération avec la Cour pénale internationale et les tribunaux pénaux internationaux, introduit par une loi modificative du 26 mars 2014, permet au juge d’instruction belge, sur réquisition du ministère public, agissant d’office ou à la demande de l’Autorité centrale, de décerner un mandat d’arrêt belge à l’encontre de la personne libérée sous condition si celle-ci ne respecte pas lesdites conditions.”

24. Indeed, the Defence stipulates the Impugned Decision is not simply insufficiently reasoned, but is in actuality *entirely* unreasoned, as it effectively disregards the Framework Agreement and the impact it could have on Mr Kilolo's release.

b. Failure to assess the conditions proposed by Mr Kilolo for interim release

25. In its 30 June observations, the Defence for Mr Kilolo unilaterally proposed 14 personal guarantees to serve as assurances of his compliance with any Court-imposed conditions upon his release, the violation of which would subject Mr Kilolo to a Belgian arrest warrant and which would provide for his immediate transfer back into the Court's custody.⁵⁴ The Belgian authorities reviewed in detail, analysed and mostly accepted Mr Kilolo's guarantees in its 1 August Observations,⁵⁵ an exercise conducted at the behest of the Single Judge.⁵⁶

26. It is somewhat surprising, then, that the Single Judge conducted no similar analysis or even cursory discussion in the Impugned Decision. In fact, the Single Judge *does not discuss such proposed guarantees at all, even in the section entitled 'Conditional Release', which was ostensibly intended to include precisely such discussion.*⁵⁷ Rather, the Single Judge, from the *outset* of his reasoning, makes a conclusory statement to the effect that the conditions proposed by Mr Kilolo are unsuitable to effectively neutralise the Article 58(1)(b) risks. This is problematic as (i) it makes clear the Single Judge has reached his conclusion before even engaging in any reasoning, and (ii) no evidence is later given to support his conclusion. Indeed, the guarantees become conspicuous only by their absence.

27. The Kilolo Defence thus contends the Single Judge's determination that the proposed guarantees are insufficient to effectively neutralise the Article 58(1)(b) risks is entirely unreasoned. The term reasoning denotes a *process* of thinking about something in a logical way in order to form a conclusion or judgment. That

⁵⁴ ICC-01/05-01/13-528-Conf-Exp, paras 39 and 40.

⁵⁵ ICC-01/05-01/13-605-Conf-Exp-AnxIII, included as Annex I to the present Document.

⁵⁶ ICC-01/05-01/13-540.

⁵⁷ ICC-0105-01/13-611, paras 21, 22.

the Single Judge expended *absolutely no time* whatsoever discussing Mr Kilolo's conditions before coming to his conclusion is a leap of logic evidencing a lack of reasoning that has no place in a sound legal decision.

28. Finally, the Single Judge states "*the complete absence*" of a system of monitoring upon conditional release coupled with the presence of Article 58(1)(b) risks renders conditional release "*unwarranted [and] also practically unfeasible*".⁵⁸ Unfortunately, the Single Judge fails to elaborate as to how he arrived at this somewhat surprising conclusion. After all, not only has Mr Kilolo offered 14 personal guarantees in addition to all those imposed by the Court, *but the Belgian authorities have accepted* most of these conditions (and even agreed to a closed hearing to discuss procedural matters related to release)⁵⁹. It is incomprehensible, then, as to how the Single Judge could have found that there exists a complete absence of monitoring system (which is rather strong language) when there now exists not only a Framework Agreement governing release but also explicit Belgian acceptance of Mr Kilolo's personal guarantees, thus implying a willingness to welcome him on its territory. Such willingness necessarily implies the Belgian authorities have a surveillance system sufficient to comply with Court conditions; how, then, did the Single Judge conclude otherwise?

c. Misappreciation of the Factual Significance of the Belgian Observations

29. The Single Judge indicates the "*conditions proposed by the Defence for Mr Kilolo...are not suitable to effectively neutralise the risks listed in article 58(1)(b) of the Statute*".⁶⁰ In support of this claim, the Single Judge invokes what he seemingly suggests are the current Belgian observations on the matter, restating the Belgian authorities' fear that the Belgium's geographical configuration and the proximity of Mr Kilolo's home to an airport could increase the likelihood of absconding. However, the Single Judge fails to consider that these concerns were voiced by

⁵⁸ ICC-01/05-01/13-611, para 22.

⁵⁹ ICC-01/05-01/13-605-Conf-Exp-AnxIII, pp. 8/9.

⁶⁰ ICC-01/05-01/13-611, para 21.

the Belgian authorities on **14 January 2014**⁶¹ for the purposes of Mr Kilolo's *first* request for interim release.⁶² They are observations that have since become obsolete, in light of both the recent Framework Agreement *and* the *new* Observations recently rendered by the Belgian authorities ("Second Belgian Observations")⁶³, of which the Single Judge was aware since (i) he had requested such observations on 4 July 2014 for the purposes of the Article 60(3) review⁶⁴, and (ii) the Second Belgian Observations were rendered on 1 August 2014.

30. Indeed, though the concerns quoted by the Single Judge in support of his conclusion *does* appear in the Second Belgian Observations, they *are not*, as the Single Judge avers, *current concerns of flight risk*; rather, they are no more than a restatement of *prior* concerns. It is critical to note that *immediately* after the section relied upon by the Single Judge, the Belgian authorities clearly indicate the previous fears of flight risk is *greatly reduced* in light of recent modifications to domestic criminal law, which confers the ability to issue a domestic arrest warrant in case of breach of the Court's conditions for release (a recourse not afforded prior to April 2014). As such, what the Single Judge claimed in support for his conclusion that the conditions proposed by the Kilolo Defence were insufficient to neutralise Article 50(1)(b) risks was actually miscontextualised.

31. Moreover, in further attempting to support his conclusion as to the insufficiency of the proposed conditions, the Single Judge yet again misinterpreted the Second Belgian Observations. Specifically, he interpreted a statement that wiretaps "*décidés par l'autorité compétence [...] démontreraient que cette autorité craindrait la poursuite de la commission des infractions considérées ou constaterait l'exigence d'un risqué élevé de fuite ou de non comparution*"⁶⁵ as indicating that a person who must be wiretapped is one undeserving of interim release.

⁶¹ ICC-01/05-01/13-95-Conf-Anx9; ICC-01/05-01/13-259, para 22.

⁶² ICC-01/05-01/13-42.

⁶³ ICC-01/05-01/13-605-Conf-Exp-AnxIII, included as Annex I to the present Document.

⁶⁴ ICC-01/05-01/13-540.

⁶⁵ ICC-01/05-01/13-611, para 21.

32. However, what the Single Judge mistakenly interpreted as an authoritative Belgian position against Mr Kilolo's interim release was nothing more than a general explanation of *why* wiretapping is illegal under domestic law. In fact, the Belgian authorities were commenting on a guarantee unilaterally offered by Mr Kilolo in which he agreed to be subject to wiretaps if the Court deemed it appropriate. In responding to such proposal, the authorities were merely voicing the inappropriateness and unlawfulness of such measure under domestic law, a general explanatory statement the Single Judge mistakenly interpreted as an indication the authorities feared Mr Kilolo posed a flight risk, and accordingly used to deny Mr Kilolo's personal guarantees and conditional release.⁶⁶
33. The Single Judge also failed to appreciate the very nature, content and *significance* of the Second Belgian Observations, which make clear **the Kingdom of Belgium is not opposed to receiving Mr Kilolo on its territory**; on the contrary, the Belgian authorities note that "*[l]'Autorité centrale souhaite préciser que si elle reconnaît qu'au regard du droit international elle ne peut refuser l'entrée sur son territoire d'un de ses ressortissants, libéré sous condition par la Cour.*"⁶⁷ Furthermore, throughout the Observations, the authorities make abundantly clear they accept most – if not all – of the conditions for interim release proposed by Mr Kilolo⁶⁸, indicating throughout no less than four pages⁶⁹ their acceptance of such conditions, and where appropriate, their comments as to the legality of such proposed conditions under Belgian law.
34. Taken as a whole, the Second Belgian Observations are critical to Mr Kilolo's interim release, in that they introduce a new element that eliminates the risk of flight foreseen under Article 58 of the Statute, and which risk was found to exist in the 14 March Decision. It is incongruent that the Judge was able to come to the conclusion that interim release in the present case is "not only unwarranted, but

⁶⁶ ICC-01/05-01/13-611, paras 21, 22.

⁶⁷ Annex I, p. 5/9.

⁶⁸ ICC-01/05-01/13-528-Conf-Exp.

⁶⁹ Annex I, pp. 5-8.

also practically unfeasible”⁷⁰ – terminology that interestingly mirrors the exact language of the 14 March Decision⁷¹ – when he entirely failed to consider the added factual element of the Belgian authorities’ perspective as memorialised in the Observations. After all, the Observations – accepting to welcome Mr Kilolo on Belgian territory should the Court grant interim release – is indubitably a significant changed circumstance, which logically should have played a relatively major role in the Article 60(3) periodic review (for which the Observations were especially rendered) and whose absence from the Impugned Decision materially changed the outcome of the Article 60(3) review.

35. Ultimately, the Single Judge’s misappreciation of the facts in the present case – namely, the existence of a Framework Agreement negating to a large extent the fears that permeated the 14 March Decision, and the lack of consideration of the Second Belgian Observations – are factual errors. Simultaneously, the complete lack of legal reasoning permeating the Impugned Decision gives rise to an error of law the Kilolo Defence contends has greatly prejudiced Mr Kilolo. After all, the facts, as the Single Judge sees them, is not at all explained or reasoned. This is, in the language of Judge Pikis, *impermissible*, as “[w]hat is missing is the evaluation of the relevant facts by the Single Judge in the present proceedings. A judge, the Single Judge in this case, is duty-bound to appraise facts bearing on sub judice matters, determine their cogency and weight and come to his/her findings, as the Single Judge was bound to do in this case but failed to do.”⁷²

B. FAILURE TO APPRECIATE THE LESSER GRAVITY OF OFFENCES

36. In assessing the circumstances warranting detention or release, the consistent practice of this Court has been to consider the “gravity of the crimes and the

⁷⁰ ICC-01/05-01/13-611, para 22.

⁷¹ ICC-01/05-01/13-259, para 46.

⁷² ICC-01/04-01/07-572, para 26.

likelihood of a lengthy prison sentence”.⁷³ Indeed, the Court has recognised that the gravity of the offences is a distinct consideration bearing on detention.⁷⁴

37. In July 2014, the Appeals Chamber rendered three decisions⁷⁵ that made very clear the inherent distinction between core crimes and Article 70 offences. Indeed, it underlined the fact that *“offences under article 70 of the Statute, while certainly serious in nature, are by no means considered to be as grave as the core crimes under article 5 of the Statute”*, and reproached the Pre-Trial Chamber’s equating of offences with core crimes, indicating the *“description of offenses against the administration of justice as those ‘of the utmost gravity’ is concerning”*.⁷⁶

38. Two strong dissenting opinions by Judges Ušacka and Kourula stemmed from these decisions. Notably, Judge Ušacka questioned the Pre-Trial Chamber’s overall approach, indicating the Chamber had failed to properly appreciate the relevant applicable law, and had thus *“failed to properly interpret the [appropriate] legal framework”*. More specifically, Judge Ušacka underscored the fact that *“offences against the administration of justice are not comparable to core crimes”* as the *“the gravity...is in no way equivalent”*.⁷⁷ Indeed, she firmly distinguished core crimes as those *“most serious crimes of concern to the international community as a whole”* from Article 70 offences, which, though targeting an important value, *“does not even come close to that of the core crimes”*.⁷⁸ Ultimately, in Judge Ušacka’s view, the erroneous equation of offences with core crimes was an error of misinterpretation of the relevant legal framework that wholly tainted the 14 March Decision denying Mr Kilolo interim release.⁷⁹

39. Similarly, Judge Kourula considered the Pre-Trial Chamber’s treatment of the gravity of Article 70 offences *“critically impacted upon the Pre-Trial Chamber’s*

⁷³ ICC-01/04-01/10-283, para 21; ICC-01/05-01/08-631-Red, para 70; ICC-01/05-01/08-323, para 55.

⁷⁴ ICC-01/04-01/07-572, para 24.

⁷⁵ ICC-01/05-01/13-558; ICC-01/05-01/13-559; ICC-01/05-01/13-560.

⁷⁶ ICC-01/05-01/13-558, paras 1, 64.

⁷⁷ ICC-01/05-01/13-558-Anx2, Dissenting opinion of Judge Ušacka, para 6.

⁷⁸ ICC-01/05-01/13-558-Anx2, Dissenting opinion of Judge Ušacka, para 6.

⁷⁹ ICC-01/05-01/13-558-Anx2, Dissenting opinion of Judge Ušacka, para 1.

determination of whether the conditions under article 58(1)(b)(i),(ii) and (iii) of the Statute continue to be met”.⁸⁰ Indeed, Judge Kourula felt the language utilised by the Pre-Trial Chamber in order to describe the offenses alleged against Mr Kilolo – as being of the “utmost gravity” – was “an indication that it gave too much weight to the seriousness of the alleged offen[ces] in finding that the conditions under article 58(1)(b) [...] continue to be met”.⁸¹

40. In light of the fact that the three appellate decisions and six collective dissenting opinions by Judges Ušacka and Kourula – *all similarly finding that a clear disparity exists between the gravity of core crimes and offences* – one might consider that the Single Judge would have revisited his prior approach in the 14 March Decision, which too heavily focused on the “very grave” nature of Article 70 offences. Once again and somewhat surprisingly, the Single Judge did not address such distinction, **simply recalling and endorsing his previous “finding [as to] the nature of the crimes alleged”**.⁸² The failure of the Single Judge to revisit his prior detention ruling in light of this new and very clear jurisprudence is, for the Kilolo Defence, an error of law, as the Single Judge makes very clear in the Impugned Decision that the prior 14 March Decision – including the findings as to the gravity of offences – continues to stand.

41. Indeed, the Kilolo Defence contends that the clear distinction between offences and crimes as envisaged by the Appeals Chamber in its three opinions of 11 July 2014 is material to the assessment of Article 58(1)(b) conditions, and arguably results in a ‘changed circumstance’ material to the interim release assessment and which should have been *at the very least considered* in the Impugned Decision.

V. CONCLUSION

42. The practice of finding, in almost every circumstance, that a Suspect before this Court poses an Article 58(1)(b) risk as a justification for the categorical denial of

⁸⁰ ICC-01/05-01/13-558-Anx1, Dissenting opinion of Judge Kourula, para 3.

⁸¹ ICC-01/05-01/13-558-Anx1, Dissenting opinion of Judge Kourula, para 3.

⁸² ICC-01/05-01/13-611, para 20.

interim release has, as its effect, *the obviation of the right in its entirety*. Indeed, if interim release is supposed to be predicated on a careful decision weighing the need for detention against the right to release, and which should take into account “the specific circumstances of the case, as relevant to an assessment of whether or not a suspect is likely to appear before the Court”⁸³, it should conceivably require a case-by-case analysis that considers *inter alia* the *nature* of the offences or crimes for which the suspect is incarcerated, and is supported by a full reasoning that properly explicates the reasoning as to why the fundamental right to liberty has been curtailed. Anything less is a violation of international human rights norms, and thus, a violation of the Rome Statute and of the fair trial process guaranteed by this Court.

43. Indeed, respect of human rights – including the presumption of innocence and the right to liberty – requires not only the obligation of means, but also the obligation of *result*, the culmination of which is the *actual* enjoyment of *each* individual right by *every* human being. Where a single individual, whether victim or accused, is robbed of such right, the right and the right-holder have been violated. Thus, this Court must today set an example by respecting the rights of its accused by not only doing justice, but by being *seen* as doing justice.

VI. RELIEF REQUESTED

The Defence for Mr Kilolo respectfully requests the Appeals Chamber:

- *In the first place*: To review and do as should have been done by the Single Judge, and grant Mr Kilolo’s request for interim release as requested in ICC-01/05-01/13-528-Conf-Exp.
- *In the alternative*: To remand the case to the Pre-Trial Chamber for a ruling upon those points of law as instructed by the Appeals Chamber.

⁸³ ICC-01/05-01/13-558.



Ghislain M. Mabanga

Lead Counsel for Mr. Aimé Kilolo Musamba

Dated this 12 August 2014,

At The Hague, The Netherlands