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THE APPEALS CHAMBER

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

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, EX PARTE, only available to the Prosecution, the Registry and the
Kilolo Defence**
**Prosecution's Response to the Kilolo Defence's Appeal against the Single Judge's
"Decision on the first review of Aimé Kilolo Musamba's detention pursuant to
article 60(3) of the Statute"**

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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Introduction

1. The Kilolo Defence's appeal¹ against the Single Judge's "Decision on the first review of Aimé Kilolo Musamba's detention pursuant to article 60(3) of the Statute"² should be dismissed. Kilolo fails to show that the Single Judge of Pre-Trial Chamber II ("Single Judge") erred in fact, in law or procedurally in his periodic review of Kilolo's detention pursuant to Article 60(3) of the Statute. For his appeal against the Article 60(3) decision to succeed, Kilolo must establish that the Single Judge erred in finding that no "changed circumstances" exist to justify modifying the original 14 March 2014 decision on detention. However, he fails to demonstrate any such error: for the most part, his appeal merely disagrees with the Single Judge's assessment, at times even misreading and misstating the Decision. To the contrary, in a reasoned decision the Single Judge correctly and reasonably determined that there were no changed circumstances and that Kilolo's detention pending trial should continue.

Level of Confidentiality

2. The Prosecution files this response as "Confidential, *EX PARTE*, only available to the Prosecution, the Registry and the Kilolo Defence", pursuant to Regulation 23bis(2) of the Regulations of the Court ("RoC"), because it responds to a Defence filing of the same classification. It will file a public redacted version of its response.

Procedural Background

3. Kilolo was transferred to the Court's Detention Centre on 25 November 2013. He initially appeared before the Court on 27 November 2013. His request for interim release pending trial, under Article 60(2) of the Statute, was denied on 14 March 2014.³ As the Single Judge determined, there were "reasonable grounds to believe that Aimé Kilolo committed the crimes alleged by the Prosecutor" satisfying

¹ ICC-01/05-01/13-629-Conf-Exp ("Appeal"). See also ICC-01/05-01/13-629-Conf-Exp-AnxI ("Annex"), ICC-01/05-01/13-623 ("Notice of Appeal").

² ICC-01/05-01/13-611 ("Decision").

³ ICC-01/05-01/13-259 ("Article 60(2) Decision").

the requirements of Article 58(1)(a).⁴ The Single Judge also found, pursuant to Article 58(1)(b), that his detention was necessary to ensure his appearance at trial,⁵ to ensure that he did not obstruct or endanger the Court's proceedings,⁶ and to prevent him from continuing to commit the crimes alleged or related crimes.⁷ The Appeals Chamber confirmed the Article 60(2) Decision on 11 July 2014.⁸

4. On 5 August 2014, the Single Judge completed his first periodic review under Article 60(3) of the Statute, and decided that Kilolo should remain detained.⁹ The Single Judge found "the persisting existence of reasonable grounds to believe that Aimé Kilolo has committed the offences charged."¹⁰ The Single Judge held that there were no changed circumstances to justify modifying the detention,¹¹ and that conditional release was "not only unwarranted, but also practically unfeasible."¹² The Single Judge also denied the request for a hearing.¹³ Kilolo now challenges this decision in certain respects.

Submissions

I. The Single Judge correctly applied the law as to "changed circumstances" when deciding not to modify Kilolo's detention

5. A Pre-Trial Chamber conducting its periodic review under Article 60(3) may modify its ruling as to detention, release or conditions of release "if it is satisfied that changed circumstances so require".¹⁴ The existence of "changed circumstances" is therefore a prerequisite for any modification of a detention order. As emphasised by the Appeals Chamber,

⁴ Article 60(2) Decision, para.16.

⁵ Article 60(2) Decision, paras.20-32.

⁶ Article 60(2) Decision, paras.33-38.

⁷ Article 60(2) Decision, paras.39-40.

⁸ ICC-01/05-01/13-558.

⁹ Decision, para.18.

¹⁰ Decision, para.6.

¹¹ Decision, para.18.

¹² Decision, para.22.

¹³ Decision, para.23.

¹⁴ Article 60(3), Statute (emphasis added).

[A] Chamber carrying out a periodic review of a ruling on detention under article 60 (3) of the Statute must satisfy itself that the conditions under article 58 (1) of the Statute [...] continue to be met. In doing so, the Chamber must 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. [...] It should, however, be underlined that the periodic review of a ruling on detention under article 60 (3) of the Statute does *not* require the Chamber to make a decision on detention *ab initio*. The Chamber does not have to enter findings on the circumstances already decided upon in the ruling on detention. Nor does the Chamber have to entertain submissions by the detained person that merely repeat arguments that the Chamber has already addressed in previous decisions. [...] [T]he emphasis of the review is whether there has been a change in any of the circumstances.¹⁵

6. For an Article 60(3) assessment, the notion 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.”¹⁶ Moreover, the Pre-Trial Chamber must first determine whether changed circumstances exist to warrant disturbing a previous detention ruling, rather than addressing each factor underpinning detention *de novo* to determine whether any have changed.¹⁷

7. The Single Judge correctly articulated and applied this law.¹⁸ Kilolo’s general discourse on the applicable law¹⁹ raises no valid challenge to the correctness of the legal principles set out in the Decision. In any event, notwithstanding Kilolo’s submissions, the Appeals Chamber has recently found in this very case that pre-trial detention, while it is to be ordered exceptionally, does not breach internationally recognised human rights or criminal law principles including the

¹⁵ ICC-01/05-01/08-1019 OA4, paras.52-53. See also ICC-02/11-01/11-548-Red OA4, paras.51-53.

¹⁶ ICC-01/05-01/08-631-Red OA2, para.60.

¹⁷ ICC-02/11-01/11-548-Red OA4, para.1.

¹⁸ See Decision, paras.1-4 (citing ICC-01/05-01/08-631-Red OA2; ICC-01/05-01/08-1019 OA4; ICC-01/05-01/08-2151-Red OA10; ICC-02/11-01/11-278-Red OA1; ICC-02/11-01/11-548-Red OA4). See also para.18 (“[s]ince the 14 March 2014 Decision, no change in the circumstances underpinning the ruling has occurred, and [...] no new circumstances having a bearing on the conditions under article 58 (1) of the Statute have arisen”).

¹⁹ Appeal, paras.5-15.

presumption of innocence where it is justified under Articles 58(1) and 60(2) of the Statute.²⁰

II. Grounds A and B of Kilolo's Appeal show no error and should be dismissed

8. Kilolo raises two grounds of appeal. In his first ground of appeal (A), raising three sub-grounds, he argues that the Pre-Trial Chamber failed to provide a fully reasoned decision.²¹ First, he claims that the Single Judge misappreciated the April 2014 Framework Agreement concluded between the Court and the Kingdom of Belgium ("Framework Agreement").²² Second, he argues that the Single Judge failed to assess the conditions proposed by Kilolo for interim release.²³ Third, he argues that the Single Judge misappreciated "the factual significance of the Belgian Observations ["Observations", "Belgian Observations" or "Second Belgian Observations"]".²⁴ In his second ground of appeal (B), Kilolo claims that the Single Judge failed to appreciate the lesser gravity of the Article 70 offences in his case.²⁵

9. None of Kilolo's arguments show that the Single Judge erred in law, fact or procedurally. As the Appeals Chamber has noted, for appeals against decisions granting or denying interim release, "it 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."²⁶ Moreover, when factual errors are alleged, the Appeals Chamber will give a margin of appreciation to the Pre-Trial Chamber's inferences and interfere only in the case of a clear error when it cannot discern how the Chamber's conclusion could have been reasonably reached from the evidence.²⁷ While Kilolo must identify an alleged error and indicate, with sufficient precision, how this error would have materially affected the Decision,²⁸ several of his

²⁰ ICC-01/05-01/13-558 OA2, para.68. *Contra* Appeal, paras.5-9, 42-43.

²¹ Appeal, para.19.

²² Appeal, paras.20-24.

²³ Appeal, paras.25-28.

²⁴ Appeal, paras.29-35.

²⁵ Appeal, paras.36-41.

²⁶ ICC-01/05-01/13-558 OA2, para.15.

²⁷ ICC-01/05-01/13-558 OA2, para.16.

²⁸ ICC-01/05-01/13-558 OA2, para.19.

arguments under both grounds of appeal are based on a misreading of the Decision and/or amount to a mere disagreement with the Single Judge's conclusions. This is insufficient to establish error.²⁹ He also attempts to re-litigate issues determined in the Article 60(2) review, outside of the scope of the limited nature of the Article 60(3) review. Finally, for his first ground of appeal, he fails to acknowledge and apply the Appeals Chamber's settled law. For all these reasons, both grounds of appeal should be dismissed.

A. Response to Ground A: The Single Judge provided a reasoned opinion and Kilolo shows no error

10. Kilolo's arguments on this ground of appeal are based on a flawed understanding of the settled law on reasoned opinion. The Appeals Chamber has held that a Chamber must indicate the basis of its decisions with sufficient clarity. The extent of the reasoning will depend on the circumstances of each case. Such reasoning will not necessarily require reciting each and every factor; rather a Chamber must identify the facts relevant to its conclusion.³⁰ The Single Judge was cognisant of this law, noting that "a decision on periodic review shall clearly set out reasons for its findings,"³¹ and noting the recent Appeals decision in Kilolo's case articulating this standard.³² Moreover, in recent decisions in this case, the Single Judge has been "mindful" of the Appeals Chamber's recommendation that decisions on interim release must contain a "full reasoning".³³ The Decision does not depart from this standard.

11. To the contrary, the Single Judge scrupulously applied the legal standard on reasoned opinion, clearly identifying the facts relevant to his conclusion and

²⁹ ICC-01/05-01/13-558 OA2, para.18.

³⁰ ICC-01/04-01/06-773 OA5, para.20; ICC-01/04-01/06-774 OA6, para.30.

³¹ Decision, para.2.

³² See Decision, p.4, 'noting the "Judgement on the appeal of Mr. Aimé Kilolo Musamba against the Pre-Trial Chamber II of 14 March 2014 entitled 'Decision on the "Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba"' dated 11 July 2104 (sic)'. See also ICC-01/05-01/13-558 OA2, para.51.

³³ Article 60(2) Decision, para.4; ICC-01/05-01/13-588, para.4.

articulating reasons underpinning his findings. In reviewing the Article 58(1)(b) conditions, the Single Judge identified and exhaustively considered several factors, including the adverse impact of Kilolo's current detention on his professional practice and financial situation, statements and documents on "being an exemplary role model," "the purported minor or lesser gravity of the violations," "the prolonged period of detention," the Framework Agreement between the Court and the Kingdom of Belgium, the completion of the Prosecution's investigation, and two new decisions (2 April 2014 and 7 April 2014) from the *Bemba* main case.³⁴

12. Likewise, when considering conditional release, the Single Judge recalled his earlier finding on "the nature of the crimes" and the "alleged modalities of their commission (i.e., by way of communications with the other suspects, or with third parties connected to them by reason of their personal or professional links)".³⁵ He also considered the conditions proposed by Kilolo, and the Kingdom of Belgium's Observations on the risks of flight and the commission of future crimes.³⁶ Kilolo shows no error in the Single Judge's application of the law on reasoned opinion. Indeed, as the Appeals Chamber found in relation to his submissions when appealing the Article 60(2) Decision,³⁷ in many instances, Kilolo merely argues against the strength of the case, rather than against the reasoning in the Decision. Again, Kilolo's interpretation of the Decision is selective, and he fails to substantiate his claim. Therefore, to the extent that Kilolo incorrectly alleges that "the complete lack of legal reasoning permeating the Impugned Decision gives rise to an error of law,"³⁸ his arguments under the first,³⁹ second⁴⁰ and third⁴¹ sub-grounds of Ground A lack merit and should be dismissed.

³⁴ Decision, paras.9-18.

³⁵ Decision, para.20.

³⁶ Decision, paras.20-21. *Contra* Appeal, para.26 stating "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."

³⁷ ICC-01/05-01/13-558 OA2, para.53.

³⁸ Appeal, para.35. Mr. Kilolo makes several sweeping statements here: "fails to analyse to any degree whatsoever", "does not address, analyse, reason or dissect in any manner the Framework Agreement and its

- i. *Response to first sub-ground (Ground A): The Single Judge properly assessed the Framework Agreement concluded between the Court and the Kingdom of Belgium in April 2014*

13. Kilolo erroneously argues that the Decision is insufficiently reasoned because of “the conspicuous absence of *any* assessment of the Framework Agreement at all and its complete lack of application.”⁴² To the contrary, the Single Judge considered whether the entry into force of the Framework Agreement between the Court and Kingdom of Belgium constituted a changed circumstance for the purposes of the Article 60(3) review.⁴³

14. The Single Judge first considered that the Framework Agreement was a “changed circumstance” as such, *in principle*, suitable to require the review and *possibly* the amendment of a previous detention ruling. In principle, the Single Judge concurred with Kilolo that the Framework Agreement could *potentially* be a “changed circumstance”.⁴⁴ However, on a closer analysis of the specific provisions of the Framework Agreement, the Single Judge found that it did not amount to a changed circumstance *in this case* for two reasons.⁴⁵ Firstly, the Framework Agreement did not demonstrate that the Kingdom of Belgium was unconditionally available and willing to accept the Court’s detainees on its territory. The Framework Agreement imposes no such obligation, and the acceptance of detainees is based on the Belgian authorities’ subjective assessment of a given suspect’s situation on a case-by-case basis. Secondly, the Framework Agreement is not a source of a Belgian suspect’s “right” to be accepted on that country’s territory for

impact on Mr. Kilolo’s present detention”, “absent any reasoning at all”, “absent any reasoning whatsoever”, “entirely unreasoned”. (Appeal, paras.21-24). All these claims do not accurately reflect the Decision.

³⁹ Appeal, paras.20-14.

⁴⁰ Appeal, paras.26-28.

⁴¹ Appeal, para.35.

⁴² Appeal, paras.20, 22.

⁴³ Decision, paras.9, 12-13.

⁴⁴ Decision, para.12 (emphasis added).

⁴⁵ Decision, paras.13, 18 (emphasis added).

interim release. Indeed, it states expressly that it does not modify the applicable rules, especially Article 60(3) of the Rome Statute.⁴⁶ Considering the equivocal nature of the Framework Agreement, it was within the scope of the Single Judge's discretion to determine whether this qualified as a material "changed circumstance," and to decide that it did not. As Kilolo fails to show the Single Judge's finding was unreasonable or that he erred in the exercise of his discretion, his decision should remain undisturbed.

15. Kilolo acknowledges the conditional nature of the Framework Agreement, by reiterating the "case by case analysis that must take place."⁴⁷ However, he incorrectly suggests that the Single Judge should confine his assessment to the Defence arguments,⁴⁸ when the Single Judge was entitled to consider all submissions and any other information which had a bearing on the subject.⁴⁹

16. Kilolo argues that the existence of the Framework Agreement *per se* is a material change of circumstances for the purposes of the Article 60(3) review. He contends that its coming into existence only after the Article 60(2) Decision is a "critical factor" significantly changing the circumstances of his detention.⁵⁰ These submissions lack merit. First, the mere existence of the Framework Agreement is not a material change of circumstance. Not every change will be relevant,⁵¹ only those materially bearing on the detention decision. Merely raising new arguments, without more, does not amount to "changed circumstances."⁵² Kilolo was obliged to show that the Framework Agreement amounted to a material change of circumstances relevant to the Decision, but did not do so. Further, if, as Kilolo

⁴⁶ Decision, para.13.

⁴⁷ Appeal, para.21.

⁴⁸ See Appeal, para.21, stating that the Kilolo Defence had not argued the unconditional availability and willingness on the part of the Kingdom of Belgium to accept detainees on its territory.

⁴⁹ ICC-01/05-01/08-1019 OA4, para.52.

⁵⁰ Appeal, paras.22, 23.

⁵¹ ICC-02/11-01/11-548-Red OA4, para.51.

⁵² ICC-02/11-01/11-548-Red OA4, para.68.

argues, the mere existence of a new Framework Agreement was always sufficient to modify a detention ruling, a Chamber would be prevented from conducting its own assessment to “determine” and “satisfy” itself that changed circumstances exist. This would defeat the purpose of the periodic review and improperly limit a Chamber’s role in determining this issue. As the Appeals Chamber has found, even if there is a change, the Chamber must consider its impact on the factors forming the basis of the detention ruling.⁵³

17. Second, Kilolo’s claim that his risk of flight is drastically reduced does not accurately reflect the Belgian Observations. Indeed, while the Belgian authorities could issue an arrest warrant if the person concerned were to violate the conditions of release,⁵⁴ such a non-renewable warrant is only valid for 15 days. If no further action were to be taken by the Court at that stage, the person would be released under the same conditions as before.⁵⁵ Notwithstanding Kilolo’s repetitive submissions already advanced in his appeal against the Article 60(2) Decision,⁵⁶ both the Belgian authorities,⁵⁷ as well as the Appeals Chamber,⁵⁸ have acknowledged that the country’s configuration, as well as the fact that Kilolo’s residence is close to a national airport, could allow him to leave the country quickly. The Framework Agreement, therefore, does not mitigate Kilolo’s risk of flight.

18. Third, Kilolo merely disagrees with the Single Judge’s conclusions and the weight he accorded the Framework Agreement.⁵⁹ As the Appeals Chamber has recognised,⁶⁰ this does not establish a clear error.

⁵³ ICC-02/11-01/11-548-Red OA4, para.51.

⁵⁴ Appeal, para.23.

⁵⁵ Annex, p.3.

⁵⁶ ICC-01/05-01/13-558 OA2, para.92.

⁵⁷ Annex, p.3.

⁵⁸ ICC-01/05-01/13-558 OA2, para.107.

⁵⁹ See e.g., Appeal, para.22 stating “where the Framework Agreement *directly* negates one of the factors on which the previous detention ruling of 14 March was made.”

⁶⁰ ICC-01/05-01/13-558 OA2, para.18.

- ii. *Response to second sub-ground (Ground A): the Single Judge properly assessed the conditions proposed by Kilolo for interim release*

19. Kilolo's claim that the Single Judge failed to properly assess the conditions for interim release are without merit. First, as noted above,⁶¹ the Single Judge properly reasoned his decision on conditional release. Kilolo's exaggerated allegations that "the Single Judge does not discuss such proposed guarantees at all"⁶² and that his determination lacks reasoning, misstate the Decision. Conversely, the Single Judge specifically considered "the conditions proposed by the Defence for Kilolo" along with other factors, but found "they were not suitable to effectively neutralise the risks listed in article 58(1)(b) of the Statute."⁶³ The Single Judge was not required to engage in a lengthy discussion of each of the 14 proposed conditions, contrary to Kilolo's suggestion.⁶⁴

20. Moreover, Kilolo incorrectly argues that the Single Judge failed to elaborate the basis for his conclusion.⁶⁵ To the contrary, based on several clearly articulated factors, the Single Judge found that conditional release was "not only unwarranted, but also practically unfeasible."⁶⁶ The Single Judge found that any conditional release measures would not effectively counteract the risks of the suspect's communications with the external world, given the nature of the alleged crimes and the alleged modalities of their commission, including communicating with other suspects and third parties. In his view, the detention centre was therefore the only environment which could provide adequate guarantees to effectively manage those risks.⁶⁷ In any event, the Single Judge considered and found Kilolo's proposed

⁶¹ See above para.12.

⁶² Appeal, para.26.

⁶³ Appeal, para.21.

⁶⁴ ICC-01/04-01/06-773 OA5, para.20; ICC-01/04-01/06-774 OA6, para.30. *Contra* Appeal, para.27, stating, "the Single Judge expended *absolutely no time* whatsoever discussing Mr. Kilolo's conditions before coming to his conclusion" and para.26 stating "[i]ndeed, the guarantees become conspicuous only by their absence."

⁶⁵ Appeal, para.28.

⁶⁶ Appeal, paras.20-22.

⁶⁷ Decision, para.20.

conditions unsuitable to mitigate the risks. The Single Judge's conclusion was only strengthened by the Kingdom of Belgium's Observations.⁶⁸ The Single Judge was entitled to a "margin of appreciation" in determining if the conditions amounted to changed circumstances, and Kilolo fails to show that his assessment was unreasonable or amounted to an abuse of discretion.

21. Notwithstanding Kilolo's claim that the Belgian authorities "mostly accepted Kilolo's guarantees,"⁶⁹ they did not do so. The Belgian authorities raised issues on at least five of the proposed conditions.⁷⁰ Significantly, the Belgian authorities identified several serious concerns relating to the Single Judge's assessment of "risk of flight" and "the risks of the commission of future crimes." The Single Judge correctly found, based on the Belgian Observations, that Kilolo could still leave the country without the Court's permission because of its configuration and the proximity of his residence to a national airport.⁷¹

22. Additionally, once again based on the Belgian Observations, the Single Judge properly found that the prohibition in Belgian law against particular types of monitoring and surveillance of persons on conditional release would limit the potential monitoring of the suspect.⁷² He therefore, correctly found that the "availability of a thorough system of monitoring of all forms of communication available to the suspect" was critical to even consider the suitability of such monitoring to counteract the relevant risks.⁷³ In the absence of a thorough monitoring system of all forms of communication, and given the risks in this case, the Single Judge correctly found that conditional release was both unwarranted and practically unfeasible.⁷⁴ Kilolo shows no error. Instead, disregarding the express

⁶⁸ Decision, para.21.

⁶⁹ Appeal, para.25.

⁷⁰ See Annex, pp.5-6, Observations on proposed conditions 6, 7, 8, 9 and 10.

⁷¹ Decision, para.21; Annex, p.3.

⁷² Decision, paras.21, 22; Annex, pp.5-6 (Observations on proposed conditions 6, 7, 8 and 9).

⁷³ Decision, para.22.

⁷⁴ Decision, para.22.

Observations of the Belgian authorities and the Single Judge's findings, he speculates that "[a] willingness to welcome him on its territory" implies that "the Belgian authorities have a surveillance system sufficient to comply with the conditions."⁷⁵ Such unsubstantiated arguments lack merit and should be dismissed.

iii. Response to third sub-ground (Ground A): The Single Judge correctly assessed the Belgian Observations

23. Kilolo's claim that the Single Judge did not consider the Belgian Observations⁷⁶ is without any merit. Once again, as noted above, the Single Judge expressly considered the Belgian Observations.⁷⁷ In any event, the Single Judge was not required to exhaustively list the entire set of Observations.⁷⁸ That Kilolo now disagrees with the Single Judge's assessment of those Observations⁷⁹ does not show error.⁸⁰

24. Further, Kilolo's claim that the Single Judge misappreciated the Belgian Observations is incorrect. Firstly, Kilolo relies on a selective reading of the Belgian Observations to argue a greatly reduced flight risk.⁸¹ Conversely, however, the Belgian Observations did not lessen the flight risk in any manner. Indeed, as Kilolo concedes,⁸² the Second Belgian Observations only restated prior concerns of flight risk compounded by the country's configuration and the proximity of his residence to a national airport. In addition, although inaccurately reported by Kilolo, an arrest warrant for a breach of release conditions would only be valid for 15 days and would be non-renewable. Therefore, the mere fact that a domestic arrest warrant could be issued would not mitigate the existing risks in any way.⁸³

⁷⁵ Appeal, para.28.

⁷⁶ Appeal, para.35.

⁷⁷ Decision, paras.12,13,21.

⁷⁸ ICC-01/04-01/06-773 OA5, para.20; ICC-01/04-01/06-774 OA6, para.30.

⁷⁹ Appeal, paras.33-35.

⁸⁰ ICC-01/05-01/13-558 OA2, para.18.

⁸¹ Appeal, paras.29-30.

⁸² Appeal, para.30.

⁸³ Annex, p.3.

25. Secondly, Kilolo is wrong to claim that the Single Judge misinterpreted the Belgian Observations on “wiretaps” to find that “a person who must be wiretapped is one undeserving of interim release.”⁸⁴ Kilolo merely conjectures—there is nothing in the Decision to indicate that the Single Judge interpreted the Observations in this manner. To the contrary, the Single Judge considered the totality of the Belgian Observations including those on the unavailability of a thorough system of monitoring of all forms of communication available to a suspect, and concluded that the risks of flight and commission of future crimes would not be mitigated. In any event, the Single Judge enjoys discretion when deciding on conditional release.⁸⁵ He was therefore entitled to conclude that conditional release was unwarranted, absent a showing by Kilolo that his decision was unreasonable or amounted to an abuse of his discretion. He has not done so.

26. Thirdly, Kilolo is wrong to suggest that the fact that “the Kingdom of Belgium is not opposed to receiving Mr. Kilolo on its territory” should be decisive in any conditional release decision.⁸⁶ It is the Single Judge’s exercise of discretion in conditional release matters that is decisive, not a State’s observations. The Appeals Chamber has recently affirmed that, where “[n]o State had *expressly* offered to accept [a detained person] and to enforce conditions”, the Pre-Trial Chamber “was not duty-bound to consider conditional release.”⁸⁷ It likewise follows that, even where a State has offered to accept a detained person, the Pre-Trial Chamber is “duty-bound” only “to *consider*” interim release with conditions, and is not obliged simply to order such release.⁸⁸ Any other interpretation would render the Single Judge’s critical function of periodically reviewing detention obsolete.

⁸⁴ Appeal, para.31.

⁸⁵ ICC-02/11-01/11-278-Red OA1, para.87.

⁸⁶ Appeal, paras.33-34.

⁸⁷ ICC-01/05-01/13-559 OA3, para.117 (emphasis added).

⁸⁸ ICC-01/05-01/13-559 OA3, para.117 (emphasis added).

27. Because Kilolo's arguments fail to show that the Single Judge erred in finding that no changed circumstances exist, this ground of appeal (and its three sub-grounds) should be dismissed.

B. Response to Ground B: The Single Judge correctly assessed the gravity of the offences and Kilolo shows no error

28. The Single Judge properly considered the gravity of Kilolo's alleged Article 70 offences. Kilolo fails to show any error in this regard.

29. Contrary to Kilolo's argument that the Single Judge failed to consider the latest Appeals Chamber jurisprudence distinguishing between the gravity of core crimes and Article 70 offences,⁸⁹ the Single Judge expressly took note of the relevant Appeals decision.⁹⁰ Moreover, in his Decision, the Single Judge considered the Defence's observations on the "purported minor or lesser gravity of the violations at stake in the proceedings"⁹¹ and recalled his finding on "the nature of the crimes alleged."⁹² The Single Judge was cognisant of the Appeals Chamber's distinction between the gravity of core crimes and Article 70 offences, which is reflected in the Decision. Kilolo's speculation and disagreement with the Single Judge's Decision fails to establish error.

30. In any event, notwithstanding Kilolo's claim,⁹³ the Single Judge was not required, at this stage, to revisit his earlier finding in the Article 60(2) Decision since the Appeals Chamber found no error with his finding on gravity. The Appeals Chamber's decision therefore did not amount to a material change to the circumstances of the original interim release assessment. Indeed, although the

⁸⁹ Appeal, paras.40-41.

⁹⁰ See Decision, p.4, noting the Appeals Judgement of 11 July 2014 (ICC-01/05-01/13-558 OA2). See also ICC-01/05-01/13-558 OA2, paras.62-65 for a discussion on the gravity of the crimes.

⁹¹ Decision, para.10.

⁹² Decision, para.20.

⁹³ Appeal, paras.40-41.

Appeals Chamber was concerned by the Pre-Trial Chamber's description of Article 70 offences as those "of the utmost gravity",⁹⁴ it did not find that the Chamber had erred. The Appeals Chamber was convinced that the Pre-Trial Chamber did not equate Article 70 offences with those under Article 5 of the Statute because of its exhaustive reasoning. It found that the finding of the gravity of Kilolo's alleged offences was justified because:

- the offences "threaten or disrupt the overall fair and efficient functioning of the justice in the specific case to which they refer";
- the offences "ultimately undermine the public trust in the administration of justice and judiciary";
- "such seriousness is only enhanced" when committed by those whose "professional mission is to serve, rather than disrupt, justice."⁹⁵

Indeed, the Appeals Chamber recognised that Article 70 offences are serious in nature, and had specific and serious ramifications on the case at hand and the administration of justice more generally.⁹⁶ Kilolo's attempt to minimise the seriousness of these offences is to no avail, and fails to establish error in the Decision.

31. Because Kilolo shows no error in the Single Judge's assessment of gravity of the offences, this ground of appeal should be dismissed.

Relief sought

32. For these reasons, the Appeal should be dismissed. Kilolo should continue to be detained pending trial.

⁹⁴ ICC-01/05-01/13-558 OA2, para.64.

⁹⁵ ICC-01/05-01/13-558 OA2, para.65.

⁹⁶ ICC-01/05-01/13-558 OA2, paras.64,65. As the Appeals Chamber has held, the gravity of the crimes and the concomitant sentence are relevant considerations in assessing the risk that a person may not appear at trial. (ICC-01/05-01/13-558 OA2, para.63).



Fatou Bensouda, Prosecutor

Dated this 18th day of August 2014

At The Hague, The Netherlands

Word Count: 4832⁹⁷

⁹⁷ It is hereby certified that this document contains the number of words specified and complies in all respects with the requirements of Regulation 36 of the RoC. This statement (53 words), not itself included in the word count, follows the Appeals Chamber's recent direction to "all parties" appearing before it: ICC-01/11-01/11-565 OA6, para.32.