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Court

Original: **English**

No.: **ICC-01/05-01/13**
Date: **10 November 2014**

PRE-TRIAL CHAMBER II

Before: **Judge Ekaterina Trendafilova, Presiding Judge**
Judge Cuno Tarfusser
Judge Christine Van den Wyngaert

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 only

Aimé Kilolo Musamba's Notice of Appeal against the decision of the Single Judge ICC-01/05-01/13-743-Conf-Exp entitled "Decision on the 'Requête de la Défense de M. Aimé Kilolo Musamba visant une décision urgente relative à la mainlevée sur le gel de ses avoirs' "

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

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Mr Paul Djunga Mudimbi

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

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REGISTRY

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Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. INTRODUCTION

1. *Purpose*: The Defence of Mr Aimé Kilolo Musamba ("Kilolo Defence" and "Mr Kilolo" respectively) hereby seeks leave to appeal the "Decision on the 'Requête de la Défense de M. Aimé Kilolo Musamba visant une décision urgente relative à la mainlevée sur le gel de ses avoirs'" ("Impugned Decision")[1], rendered by the Single Judge on 4 November 2014. This present leave to appeal is submitted pursuant to Article 82(1)(d) of the Rome Statute ("Statute"), Rule 155 of the Rules of Procedure and Evidence ("RPE") and Regulation 65 of the Regulations of the Court ("RoC").

II. APPLICABLE LAW

1. Article 82(1)(d) of the Statute provides for the right of either party to appeal against a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. In determining whether leave to appeal should be granted, the Pre-Trial Chamber must not justify or defend the correctness of its decision; rather, it must determine whether the issues presented significantly affect the fairness of the proceedings.[2] The purpose of such appeal procedure is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial.[3]

[1] ICC-01/05-01/13-743-Conf-Exp.
[2] ICC-01/09-02/11-253, para. 28.
[3] ICC-01/04-168, para. 19.

2. Rule 155(1) of the RPE requires that a leave to appeal under Article 82(1)(d) be filed with the Chamber that rendered the decision within five days of the date upon which the party filing the appeal is notified of the decision. Such written application must set out the reasons for the request for leave to appeal, and shall furthermore state the name and number of the case or situation, and shall specify the legal and/or factual reasons in support thereof, in accordance with Regulation 65(1) RoC. Finally, the leave to appeal shall specify the reasons warranting immediate resolution by the Appeals Chamber of the matter at issue.

3. The Appeals Chamber has held that the criterion of "immediate resolution" will be deemed to have been met if the relevant Chamber rules that an authoritative determination on the appeal would "move forward" the proceedings and "remove doubts about the correctness of the decision or map a course of action along the right lines".[4] Indeed, immediate resolution by the Appeals Chamber would be seen as settling the matter through authoritative determination, and thus ridding the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.[5] Fairness of the proceedings has been discussed by the Appeals Chamber as being associated with the norms of a fair trial and corresponding human rights, in light with Articles 64(2) and 67(1) of the Rome Statute.[6]

III. SUBMISSIONS

A. Request that the Present Leave to Appeal be Ruled Upon by the Full Pre-Trial Chamber

[4] ICC-01/04-168, paras. 14-15.
[5] ICC-01/04-168, para. 14.
[6] ICC-01/04-168, para. 11.

4. The present leave to appeal is lodged in case ICC-01/05-01/13, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, presently before Pre-Trial Chamber II, and is filed subsequent to the Single Judge's "Decision on the 'Requête de la Défense de M. Aimé Kilolo Musamba visant une décision urgente relative à la mainlevée sur le gel de ses avoirs' " (ICC-01/05-01/13-743-Conf-Exp), rendered on 4 November 2013, which denied Mr Kilolo's third request for the lifting of the freeze on his assets[7].
5. Rule 7(3) of the Rules, relating to the functions of the Single Judge under Article 39(2)(b)(iii) of the Statute, allows for a party to request that a Pre-Trial Chamber convene in its entirety to jointly exercise the judicial functions otherwise entrusted to the Single Judge alone. The language of the Rule is clear and does not envisage any limitations to this ability, nor does it stipulate that such requests be made only in specific circumstances.
6. This Rule should also be read in conjunction with the rights guaranteed under the Statute and the other texts of the Official Journal, including *inter alia* those minimum protections afforded to the accused as per the proper administration of justice, such as the right to a fair and public hearing conducted impartially[8], judicial impartiality[9], and presumption of innocence[10]. Such minimum guarantees are to be assured and ensured throughout the entire judicial process, and cannot be forsaken at any point in the proceedings. To that end, the Kilolo Defence respectfully requests that – in light of the importance of the issue at stake, which is *literally* related to the survival or Mr Kilolo and his family – the full Pre-Trial Chamber decide upon the present request.

[7] ICC-01/05-01/13-653-Conf-Exp and Annex A thereto.
[8] Rome Statute, Art. 67(1).
[9] Rome Statute, Art. 41(2)(a).
[10] Rome Statute, Art. 66.

B. No Reason Exists to Justify the Continued Asset Freeze on Mr Kilolo's Bank Accounts

7. The assets of Mr Kilolo were first frozen pursuant to the Prosecutor's request – and the Single Judge's decision – in the 20 November 2013 Warrant of Arrest.[11] Neither the legal nor the factual basis for this decision by the Single Judge was elaborated upon in the Warrant of Arrest. Subsequently, Mr Kilolo made a request for the unfreezing of his assets – including three bank accounts – on 24 April 2014 ("First Request")[12], on the basis that his family was suffering severe financial distress.

8. Interestingly, the Single Judge's 20 May 2014 decision on the First Request[13] did not *oppose* Mr Kilolo's First Request, but rather, held that it was moot[14], because, as the Single Judge had been informed, "the [*sic*] bank accounts…of Mr Kilolo have already been released from seizure".[15] Problematically, however, and as was later clarified by the "Transmision of the observations submitted by the Belgium authorities on the 'Rêquete en vue de notifier à l'Etat Belge la mainlevée du gel sur les avoirs de M. Aimé Kilolo Musamba'" dated 7 July 2014 ("Observations of the Belgian Authorities")[16], Mr Kilolo's bank account at Belgian bank ING were in actuality *still* under seizure, and had *not* been released, as the Single Judge had previously thought.

9. To this day, Mr Kilolo's assets remain frozen, and both he and his family are unable to gain access to the funds contained within.

10. The Single Judge's factual error in his 20 May 2014 decision – wherein he believed Mr Kilolo's assets had already been unfrozen and thus did not order the unfreezing thereof – has resulted in a continuing seizure of Mr Kilolo's assets, which seizure has caused grave financial distress to his family, who has been

[11] ICC-01/05-01/13-1-Red2-tENG, para. 25(c).
[12] ICC-01/05-01/13-359-Conf-Exp.
[13] ICC-01/05-01/13-411-Conf-Exp.
[14] ICC-01/05-01/13-411-Conf-Exp, p. 4.
[15] ICC-01/05-01/13-411-Conf-Exp, p. 3.
[16] ICC-01/05-01/13-544-Conf-Exp.

unable to pay critical fees and bills as a result of this restricted – or rather non-existent – financial access. This fact has been repeatedly made clear in Mr Kilolo's various requests to this Court.[17]

11. The original asset freeze as ordered in the Warrant of Arrest was not supported by any legal or factual claims or basis. Subsequently, the Single Judge has not opposed the unfreezing of Mr Kilolo's assets, and indeed, has not provided any reasoning for the continuing thereof. In the recent Impugned Decision, however, the Single Judge indicates that "pursuant to article 70 of the Statute, the statutory penalties provided for offences against the administration of justice are imprisonment *and/or* a fine" and that "Mr Kilolo has been granted legal assistance".[18] To that end, the Single Judge considers that the "seizure of Mr Kilolo's assets might also prove instrumental to enabling the Court to recover the costs of his legal assistance" and that it is accordingly "necessary that Mr Kilolo's assets remain seized, with a view not to making it unfeasible for the Court to recover any amount which might be due by Mr Kilolo."[19]

12. However, such reasoning by the Single Judge seems somewhat arbitrary and capricious, especially considering the asset freeze was unjustified in the first place. Indeed, the Impugned Decision does not seem to lay out a legal basis for the continued freeze on Mr Kilolo's assets, but rather, seems to be grasping at available straws. After all, that Article 70 is punishable by imprisonment and/or a fine is not questioned; what is problematic, however, is the fact that Mr Kilolo is once again being punished before there is a conviction (or even a trial). In much the same manner as Mr Kilolo was imprisoned for almost eleven months prior to his interim release – essentially being punished and serving a sentence prior even to conviction – in the *off-chance* that he might be later proven guilty, Mr Kilolo's assets are being similarly imprisoned in the interim, and are being held by the

[17] ICC-01/05-01/13-359-Conf-Exp; ICC-01/05-01/13-476-Conf-Exp; ICC-01/05-01/13-653-Conf-Exp.
[18] ICC-01/05-01/13-743-Conf-Exp, p. 4.
[19] ICC-01/05-01/13-743-Conf-Exp, p. 4-5.

Court in the *off-chance* Mr Kilolo is convicted or is no longer provided legal assistance. This is simply a new manifestation of the presumption of guilt, especially as there is no reason – much less a convincing one – to justify the continued freezing of Mr Kilolo's assets while his family quite literally continues to struggle to put food on the table.

13. Furthermore, the Single Judge's reasoning that Article 70 is punishable by imprisonment *and/or* a fine is significant; after all, there is no guarantee that Mr Kilolo will be convicted, and even if he is, there is no telling whether he will be punished by a fine at all. Indeed, Rule 146(1) RPE specifically indicates that "the Court shall determine whether imprisonment is a sufficient penalty". To thus keep Mr Kilolo's money for potential Court purposes is to essentially have already convicted Mr Kilolo, *and* to punish him vis-a-vis a fine that may not even be imposed upon actual conviction.

14. Furthermore, there is no international precedent or rule by which one can justify such premature sanctions. Indeed, the fact that a potential fine may be imposed in a legal case does not amount to a freestanding license to freeze assets; that would be a violation of rights that would not be tolerated, and which similarly, cannot be tolerated here.

15. Lastly, Rule 146(3) RPE states the Court must allow the convicted person a reasonable amount of time to pay a fine resulting from a decision. This implies, then, that payment of the fine is to be made *after* the decision, i.e., *after* the conviction. In fact, the Rules themselves state that where a person is incapable of paying a fine imposed upon conviction, he would simply face an extension of the period of imprisonment under Article 146(7). Nowhere in the Rules is a *preemptive* fine vis-à-vis an unjustified freezing of assets contemplated or allowed.

16. Finally, the Defence contends that the Single Judge's justification of the asset freeze should Mr Kilolo later be found ineligible for legal assistance pursuant to Article 21(5) is misplaced. Article 21(5) only applies to people found to have abusively requested legal assistance. Nothing indicates Mr. Kilolo has done so,

would do so, or that Article 21(5) would ever apply. That argue that it might is mere conjecture and hypothesis. Furthermore, nowhere in the Official Journal and legal texts of this Court is it stated that potential abuse of the legal assistance scheme is punishable by the preemptive freezing of a Suspect's assets. To do so would be fundamentally unfair and would contravene the very notion of justice with which this Court is entrusted with furthering.

IV. RELIEF REQUESTED

17. The Defence for Mr Kilolo respectfully requests the Pre-Trial Chamber II to:

- Grant it leave to appeal the Single Judge's "Decision on the 'Requête de la Défense de M. Aimé Kilolo Musamba visant une décision urgente relative à la mainlevée sur le gel de ses avoirs' " of 4 November 2014.

Paul Djunga Mudimbi

Lead Counsel for Mr. Aimé Kilolo Musamba

Dated this 10 November 2014,

At The Hague, The Netherlands