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No.: ICC-01/05-01/13
Date: 10 May 2017

THE APPEALS CHAMBER

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Howard Morrison
Judge Piotr Hofmański
Judge Geoffrey A. Henderson

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* (Kilolo Defence only)

Response to the "Prosecution's request in relation to 'Registry Transmission of a document received from Mr. Aimé Kilolo Musamba' (ICC-01/05-01/13-2151)"

Source: Counsel for Aimé Kilolo Musamba

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

The Office of the Prosecutor	**Counsel for Jean-Pierre Bemba Gombo**
	Counsel for Aimé Kilolo Musamba Mr Michael G. Karnavas Mr Steven Powles
	Counsel for Jean-Jacques Kabongo Mangenda
	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**

Mr. Aimé Kilolo Musamba, through his Counsel ("the Kilolo Defence"), hereby responds to the Prosecution's request in relation to "Registry Transmission of a document received from Mr. Aimé Kilolo Musamba."[1] Though the Prosecution publicly filed its request in violation of Regulation 23(2) *bis* of the Regulations of the Court ("Regulations"),[2] this response is filed confidential *ex parte* (Kilolo Defence only) pursuant to Regulation 23(2) *bis* because it refers to a confidential *ex parte* document.[3] The essence of the Prosecution's request concerns Mr. Kilolo's confidential *ex parte* letter rather than the Registry's public transmission and the Prosecution is not entitled to obtain insight into the letter simply by virtue of having sought its disclosure. The Prosecution's request should be denied: (a) the request is not relevant to the Prosecution's appeal of Mr. Kilolo's sentence; (b) no part of Mr. Kilolo's letter concerns his ability to pay the fine imposed on him by the Trial Chamber; and (c) the Prosecution should have filed its request to the Presidency.

I. BACKGROUND

1. Mr. Kilolo received a sentence of two years and six months of imprisonment and a fine of 30,000 Euros[4] and is entitled to a deduction of the 333 days he served in detention during the proceedings.[5] Mindful of Mr. Kilolo's family situation, his good behavior throughout the Article 70 proceedings, and the damage to his professional life due to incarceration, the Trial Chamber suspended the remaining term of Mr.

[1] ICC-01/05-01/13-2151.
[2] The Prosecution cites to Mr. Kilolo's confidential *ex parte* letter in its request. *See id.*, fn. 1. Regulation 23(2) *bis* states: "Unless otherwise ordered by a Chamber, any response, reply or other document referring to a document, decision or order marked '*ex parte*', 'under seal' or 'confidential' shall be filed with the same classification."
[3] ICC-01/05-01/13-2135-Conf-Exp-AnxI.
[4] ICC-01/05-01/13-2123-Corr, paras. 195, 198.
[5] *Id.*, para. 196: "Mr Kilolo is entitled to have deducted from his sentence the time previously spent in detention in accordance with an order of the Court, namely since his arrest on 23 November 2013, pursuant to the warrant of arrest issued by Pre-Trial Chamber II on 20 November 2013, until his release on 22 October 2014."

Kilolo's imprisonment for a period of three years so long as he pays his fine within three months of the Sentencing Decision and does not commit any offense punishable by a term of imprisonment.[6] The deadline to pay the fine has not lapsed[7] and Mr. Kilolo has not committed any offenses.

2. Following the Sentencing Decision, Mr. Kilolo sent a letter to the Registrar.[8] The Prosecution now seeks access to Mr. Kilolo's letter "insofar as it contains information relevant to the Prosecution's sentencing appeal in this case," so that it can "present a full and informed appeal."[9] The Prosecution argues that "[t]o the extent the 'personal financial information' in Kilolo's letter concerns his ability to pay the fine imposed on him, such information will be relevant to the Prosecution's sentencing appeal concerning Kilolo's adequate sentence."[10]

3. Mr. Kilolo is not appealing the Sentencing Decision.

II. LAW AND ARGUMENT

4. Rule 166(5) of the Rules of Procedure and Evidence ("Rules") provides that the Court may take appropriate measures pursuant to Rules 217 to 222 if the convicted person does not pay the fine imposed according to the conditions set by the Trial Chamber.[11] Rule 166(5) is not triggered until there has been a failure to pay. Rule 217 and

[6] *Id*., paras. 197, 199.
[7] The Trial Chamber rendered the Sentencing Decision on 22 March 2017, making the due date 22 June 2017.
[8] ICC-01/05-01/13-2135-Conf-Exp-AnxI.
[9] ICC-01/05-01/13-2151, paras. 1, 3.
[10] *Id*., para. 3.
[11] Rule 166(5): "If the convicted person does not pay a fine imposed in accordance with the conditions set forth in sub-rule 4, appropriate measures may be taken by the Court pursuant to rules 217 to 222 and in accordance with article 109."

Regulation 113(1) give the Presidency jurisdiction over the enforcement of fines imposed by the Trial Chamber.[12]

5. Mr. Kilolo has not failed to pay his fine within the Trial Chamber's deadline. There is no issue concerning the payment of the fine imposed.

6. The Prosecution baldly asserts that Mr. Kilolo's ability to pay his fine is relevant to its sentencing appeal.[13] Poppycock. The Prosecution provided no authority for this proposition or explanation as to how Mr. Kilolo's ability to pay is relevant.

7. Even if the Prosecution had made any effort to carry its burden to demonstrate that ability to pay is somehow relevant to its appeal of Mr. Kilolo's sentence, the claim for disclosure still fails because it is based upon the erroneous assumption that Mr. Kilolo's letter relates to his ability to pay his fine.[14] It does not.

8. The Prosecution cites the *Gbagbo* Appeal Judgment for the proposition that it is entitled to confidential information to make an informed sentencing appeal.[15] Its citation is inapposite. The cited portion of the *Gbagbo* Appeal Judgment concerns Gbagbo's failure to comply with the Appeals Chamber's order to file a lesser redacted version of the Document in Support of Appeal so that the Prosecution and Victims

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[12] *See* Rule 217: "For the enforcement of fines, forfeiture or reparation orders, the Presidency shall, as appropriate, seek cooperation and measures for enforcement in accordance with Part 9, as well as transmit copies of relevant orders to any State with which the sentenced person appears to have direct connection by reason of either nationality, domicile or habitual residence or by virtue of the location of the sentenced person's assets and property or with which the victim has such connection." *See also* Regulation 113(1): "The Presidency shall establish an enforcement unit within the Presidency to assist it in the exercise of its functions under Part 10 of the Statute, in particular: (a) The supervision of enforcement of sentences and conditions of imprisonment; and (b) The enforcement of fines, forfeiture orders and reparation orders."
[13] ICC-01/05-01/13-2151, para. 3.
[14] *See id*.
[15] *Id*., fn. 8.

Representatives could adequately respond to his arguments.[16] It does not stand for the proposition that the Prosecution should have access to a confidential *ex parte* letter filed with the Registrar that has no relevance to the Prosecution's appeal and does not contain the information for which it is purportedly sought.

9. The Prosecution assumes that the Appeals Chamber has jurisdiction over the enforcement of fines.[17] It does not. The Presidency has jurisdiction over the enforcement of fines imposed by the Trial Chamber as provided by Rule 217 and Regulation 113(1).

10. Without any basis in law or fact, the Prosecutor has gone on a fishing expedition to obtain a document that is appropriately confidential and *ex parte*. Because the Prosecution has failed to demonstrate relevance, because the document does not contain any of the information the Prosecution claims to seek, and because the Prosecution request should have been filed with Presidency, the request must be denied.

WHEREFORE, for the reasons set forth in this response the Appeals Chamber should **DENY** the Prosecution's request.

Respectfully submitted, 10 May 2017,
In The Hague, the Netherlands.

Mr. Michael G. Karnavas
Counsel for Mr. Aimé Kilolo Musamba

[16] ICC-02/11-01/15-208, paras. 84-88. *See also* ICC-02/11-01/15-159-Red, para. 8.
[17] ICC-01/05-01/13-2151, para. 3. "Considering that the Prosecution's appeal brief is due on June 21st, the Prosecution respectfully requests the Appeals Chamber to rule on this request in an expedited fashion."