

ANNEX III
Confidential, ex parte
Only available to the Defence of Mr Kilolo

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***

**DECISION REQUESTING THE KINGDOM OF BELGIUM TO PROVIDE ITS VIEWS FOR THE
PURPOSES OF THE REVIEW OF Aimé KILOLO MUSAMBA'S AND Jean-Jacques MANGENDA'S
DETENTION PURSUANT TO ARTICLE 60(3) OF THE STATUTE
of 4 July 2014**

***OBSERVATIONS OF THE KINGDOM OF BELGIUM ON THE PERIODIC REVIEW OF THE
DETENTION of Aimé KILOLO MUSAMBA
23 July 2014***

Noting articles 21, 58(1), 60(3) and 67(1) of the Rome Statute, rules 118, 119 and 185 of the Rules of Procedure and Evidence, and regulation 51 of the Regulations of the Court;

Noting the declaration made by the Kingdom of Belgium pursuant to article 87(1) of the Rome Statute (hereinafter referred to as "the Statute"), stipulating that "the Kingdom of Belgium declares that the Ministry of Justice is the authority competent to receive requests for cooperation";

Noting the declaration made by the Kingdom of Belgium pursuant to article 87(2) of the Statute stipulating that "the Kingdom of Belgium declares that requests by the Court for cooperation and any documents supporting the request shall be in an official language of the Kingdom";

Noting Article 2, indent 4, and Article 5 of the Belgian Law on Cooperation with the International Criminal Court and International Criminal Tribunals of 29 March 2004, designating the International Humanitarian Law Section (Ministry of Justice) as the Belgian Central Authority for Judicial Cooperation with the International Criminal Court;

Noting the decision of the Presidency of the International Criminal Court, dated 19 March 2009, assigning the situation in the Central African Republic to Pre-Trial Chamber II of the International Criminal Court;

Noting the arrest warrant issued under seal on 20 November 2013 by the Single Judge designated by Pre-Trial Chamber II of the International Criminal Court in the case against Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido;

Noting the charges in that decision against Aimé Kilolo Musamba, namely:

- i. Presenting evidence that the party knows is false or forged (Charge 1), within the meaning of article 70(1)(b) of the Statute, read with article 25(3)(a), by presenting false or forged documents to the Court in the Case; and
- ii. Corruptly influencing witnesses, within the meaning of article 70(1)(c) of the Statute, read with article 25(3)(a), by bribing witnesses and coaching them to provide false testimony in the Case;

Noting that on 23 November 2013 the Belgian authorities executed the said arrest warrant for Aimé Kilolo Musamba;

Noting that on 25 November 2013 Aimé Kilolo Musamba was surrendered to the International Criminal Court, at the seat of the Court;

Noting that on 27 November 2013 Aimé Kilolo Musamba made his first appearance before the Single Judge of Pre-Trial Chamber II;

Noting the application for interim release filed by the Defence for Aimé Kilolo Musamba on 16 December 2013, pursuant to article 60 of the Statute; the Single Judge's decision of 17 December 2013 requesting Belgium to file its observations; Belgium's observations dated 10 January 2014; and the Single Judge's decision rejecting the Defence's application, rendered on 14 March 2014 and confirmed on appeal on 11 July 2014;

Noting the "Order requesting observations for the purposes of the periodic review of the state of detention of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo and Fidèle Babala Wandu pursuant to rule 118(2) of the Rules of Procedure and Evidence" rendered by the Single Judge on 13 June 2014;

Noting the "Defence Observations on the Continued Detention of Aimé Kilolo Musamba" dated 30 June 2014 and communicated to the Central Authority in French in a *note verbale* by the Registry on 11 July 2014, in which the Defence requests the organisation of a "status conference" [sic] with, in particular, the Belgian authorities "as regards the practical questions and conditions associated with ... conditional release".

Noting the Single Judge's Decision of 4 July 2014 requesting the Kingdom of Belgium to provide its views no later than Friday 25 July for the purposes of the review of Aimé Kilolo Musamba's and Jean-Jacques Mangenda's detention pursuant to article 60(3) of the Statute of 11 July 2014, communicated to the Central Authority in French in a *note verbale* from the Registry on 11 July 2014;

On behalf of the Kingdom of Belgium, the Belgian Central Authority for Judicial Cooperation with the International Criminal Court hereby makes the following observations, bearing in mind the arguments set out by the Defence of Aimé Kilolo Musamba in its application for interim release.

These observations are to be reviewed solely in relation to the issue of the Court's potential choice of the Kingdom of Belgium as the location for interim release and not in relation to the issue of the appropriateness of granting the application for interim release itself, an issue which comes under the sovereign jurisdiction of the Court.

A. General observations by the Belgian authorities on a hypothetical interim release in the Kingdom of Belgium

Considering that Aimé Kilolo Musamba may find himself on Belgian soil if a decision by the International Criminal Court to grant interim release were to be implemented, it is incumbent upon the Belgian authorities to make the following general observations:

- 1) *Concerns whether the Statute and the Rules of Procedure and Evidence relating to interim release are adequate in the event it becomes necessary to respond quickly if the conditions of release are flagrantly violated*

Neither the Rome Statute nor the Rules of Procedure and Evidence provide an appropriate solution in the event that it is necessary to respond on an emergency basis to a flagrant violation of the conditions for interim release.

For example, if Mr Kilolo decided to leave the country without the Court's permission, the country's geography would allow him to do so very quickly. Furthermore, the national airport is close to his residence.

However, Article 20*bis*(2) of the Law on Cooperation with the International Criminal Court and International Criminal Tribunals of 29 March 2004, inserted through an amendment law of 26 March 2014, allows a Belgian investigating judge, on the instructions of the Public Prosecutor's Office, acting *proprio motu* or at the request of the Central Authority, to issue a Belgian arrest warrant for a person who has been conditionally released if the latter does not respect the conditions in question. This arrest warrant is valid for a non-renewable period of 15 days. If within that period the Central Authority does not receive a request from the Court for the person's interim arrest or a request for the person to be arrested and transferred, the latter is to be released on the same conditions as previously decided.

- 2) *Framework agreement between the International Criminal Court and the Kingdom of Belgium relating to interim release on Belgian territory*

A framework agreement containing the provisions agreed by the Court and Belgium on detainees' interim release on Belgian territory, in implementation of decisions by the competent chambers, was concluded by exchange of letters dated 2 and 8 April 2014 issued by the Kingdom of Belgium and the Court respectively. Although the existence of this agreement has been made public, its content is confidential.

This framework agreement on interim release regulates the procedure for the interim release of an ICC detainee on Belgian territory and, in particular, formalises the Court Registrar's necessary consultations with the Belgian authorities, who will examine the Court's requests on a case-by-case basis. However, this agreement in no way alters the rules applicable in this matter, in particular article 60(3) of the Rome Statute and rules 118, 119 and 185 of the Rules of Procedure and Evidence.

Hence, the agreement does not in itself have a specific impact on a decision granting interim release in Belgium which may be rendered on a given application for conditional release. It simplifies the procedure for implementing the applicable provisions, without prejudging the case-by-case decision taken by Belgium on a specific request for observations issued in the context of a specific application for conditional interim release.

- 3) *Observations on the Defence argument that the Kingdom of Belgium is duty-bound to receive Mr Kilolo in the event of interim release*

At paragraph 17 of the Defence observations, the latter states that Aimé Kilolo Musamba "is seeking interim release to his own country, which is obliged – even absent a State cooperation framework agreement – to receive him." It goes on to say that "the interim release of Mr Kilolo to Belgium is necessary not only pursuant to international human rights standards but also to ensure the provisions of the Framework Agreement does not prove illusory and prodigal".

While acknowledging that it cannot, under international law, refuse entry to a national who is conditionally released by the Court and authorised by the latter to return to Belgium, a circumstance which is, in particular, covered by rule 185 of the Rules of Procedure and Evidence, the Central Authority wishes to clarify that such a right does not arise from the framework agreement.

4) *Observations on Jean-Jacques Mangenda Kabongo's concomitant application for conditional release*

The Central Authority respectfully directs the Court's attention to Jean-Jacques Mangenda Kabongo's concomitant application for interim release, "[TRANSLATION] in the alternative"¹, on Belgian territory.

Simultaneous enforcement in Belgium of a decision to conditionally release the two co-accused persons would mean that they would be living within a few dozen kilometres of each other.

B. Observations of the Belgian authorities on the guarantees offered by the Defence in its application for interim release

1. First proposed guarantee: Mr Kilolo's undertaking to remain in the territory of Belgium (paragraph 40(a) of the Observations)

We make no specific observations on this point, save that the Central Authority notes that Mr Kilolo would not leave Belgian territory unless ordered by the competent chamber for purposes connected with the proceedings.

2. Second proposed guarantee: Mr Kilolo's undertaking to reside at his home address (paragraph 40(b) of the Observations)

We make no specific observations on this point.

3. Third proposed guarantee: Mr Kilolo's undertaking to hand over his passport to the Registry (paragraph 40(c) of the Observations)

The Central Authority wishes to respectfully draw the Court's attention to the difficulties that may arise if Mr Kilolo is left without any identification papers, should he be granted interim release on Belgian territory, particularly given the possibility that he may be stopped for identification on the street.

Consequently, the Central Authority suggests that Mr Kilolo's national identity card be returned to him, if this has not already been done, in order to avoid any such inconveniences. Indeed, the Central Authority learned in the context of the previous request for observations that Mr Kilolo's identity card had been handed over to the Registry.

Furthermore, except the Court's decision for interim release includes a condition barring Mr Kilolo from driving a vehicle, it may also be proper to return Mr Kilolo's national driving licence to him.

Finally, confirmation should be sought that Mr Kilolo does not possess and is not entitled to possess a Congolese passport or other identity document.

4. Fourth proposed guarantee: Mr Kilolo's undertaking to present himself at regular intervals to the police station located in his neighbourhood to confirm his presence (paragraphs 40 (d) and (e) of the Observations)

We make no specific observations on this point, except to indicate that the Central Authority defers to the wisdom of the Court in determining the frequency of proposed controls should the Court make interim release conditional on such controls and were the Defence application to prosper.

5. Fifth proposed guarantee: Mr Kilolo's undertaking not to leave his residence between 10:00 pm and 7:00 am each day (paragraph 40(f) of the Observations)

¹ICC-01/05-01/13-523-Conf, page 10, para. 15.

We make no specific observations on this point, except that the Central Authority defers to the wisdom of the Court in deciding whether to grant Mr Kilolo the right to leave his home between these times in the event of *force majeure* and in that case, to stipulate that he is obliged to immediately telephone a contact person designated by the Belgian authorities.

6. Sixth proposed guarantee: Mr Kilolo's undertaking to refrain from any contact with Jean-Pierre Bemba Gombo, the other suspects, or any persons close or related to the above, and willingness to allow monitoring of his telephone conversations (paragraph 40(g) of the Observations)

We make no specific observations on this point, except as regards the monitoring of telephone conversations.

Belgian law does not allow monitoring of the telephone calls, postal mail or e-mails of persons released conditionally. Were such surveillance to be ordered by the competent authority when ruling on an application for interim release, it would mean that the authority feared the continued commission of the offences in question or believed there was an elevated risk of flight or non-appearance. Indeed, under Belgian law and the Rome Statute (articles 58(1) and 60(2) read jointly), such grounds would by themselves justify a decision to continue detention.

In contrast, if during the interim release, the Office of the Prosecutor, as part of its investigations, wished the Belgian authorities to carry out such telephone monitoring and other types of surveillance for the purposes of mounting a prosecution, it would simply have to send a request for cooperation to this effect to the Central Authority, pursuant to articles 86, 87 and 93 (read jointly) of the Rome Statute.

7. Seventh proposed guarantee: Mr Kilolo's undertaking not to contact any of the witnesses from the main case or the Article 70 proceedings, nor anyone close or related to the witnesses, and willingness to allow monitoring of his telephone conversations (paragraph 40(h) of the Observations)

Apart from the comments made at point 6 on the monitoring of telephone conversations, the Central Authority observes that the guarantee covers contact initiated by Mr Kilolo ("shall not contact") and not contact initiated by witnesses, their friends or families. The Court could also make a determination on the latter.

8. Eighth proposed guarantee: Mr Kilolo's undertaking to use no other telephones except his landline home telephone, or one specific cell phone number, to be monitored (paragraph 40(i) of the Observations).

We make no specific observations on this point other than those already expressed at point 6 on monitoring of telephone conversations.

9. Ninth proposed guarantee: Mr Kilolo's undertaking to limit himself to the use of one e-mail address (his professional e-mail address) and to remain contactable at all times by mobile phone (paragraph 40(j) of the Observations)

We make no specific observations on this point, other than the comment already made at point 6 regarding surveillance.

10. Tenth proposed guarantee: undertaking to have no contact with the press in relation to the present proceedings, the main case, or any related issues (paragraph 40(k) of the Observations)

The Central Authority believes that contact with the press and any public or publicised pronouncements or announcements should be treated on an equal footing.

[Similarly, it could be useful for the Court to examine, in the context of any conditions included in a decision granting interim release, whether restrictions should be placed on any political activities

which Mr Kilolo could undertake during his conditional release.

In this respect, the Central Authority takes the liberty of respectfully reminding the Court that, in his previous application for interim release, Mr Kilolo claimed that he “operate[d] strictly within legal circles”, “[was] not a politician”, “[was] only involved in law [...] [and] practise[d] only law” and “only operate[d] in legal circles where, for the past 15 years, he has moved amongst lawyers and judges”² whereas he stood as a candidate in the 2006 Congolese presidential elections.]

11. Eleventh guarantee proposed: acceptance of investigations by *Maisons de Justice* (paragraph 40(l) of the Observations)

The Central Authority respectfully informs the Court that the powers and activities of the *Maisons de Justice* are not dictated by Mr Kilolo’s good will. Mr Kilolo’s contact with the competent *Maison de Justice*, should he be conditionally released on Belgian territory, will be determined strictly by the regulations in force.

12. Twelfth guarantee proposed: acceptance of preventative psychological monitoring (paragraph 40(m) of the Observations)

We make no specific observations on this point.

13. Thirteenth guarantee proposed: enrolment in a 10-hour course on professional ethics organised by the Brussels Bar (paragraph 40 (n) of the Observations)

We make no specific observations on this point.

C. Observations of the Belgian authorities on the Defence request for a hearing to examine the practical questions and conditions associated with the interim release

At point IV of its submissions, entitled “Relief Requested”, the Defence “respectfully requests that the Pre-Trial Chamber [...] [r]equest a Status Conference with the appropriate authorities of [the] Kingdom of Belgium and the Kingdom of the Netherlands as regards the practical questions and conditions associated with Mr Kilolo’s conditional release on Belgian territory and transfer from the territory of the Netherlands to the territory of Belgium”.

The Central Authority notes that Rule 118(3) provides that the decision to hold a hearing in this case lies entirely with the Court.

The Central Authority would not object to such a hearing, provided it is held in closed session.

During such a hearing, it would seem appropriate to discuss the conditions of the Accused’s release in his presence. However, the practical manner in which Belgium would implement a decision granting release and its attendant conditions, such as practical issues relating to Mr Kilolo’s transfer from the Netherlands to Belgium or the technical and human resources to be employed to enforce the conditions for interim release, would appear to be a matter for discussion between the Court and the Kingdom of Belgium alone.

D. Observations of the Belgian authorities on the potential financial impact of a possible interim release on Belgian soil

The Central Authority respectfully draws the Court’s attention to the relevant provisions of the framework agreement mentioned above and emphasises that it would be necessary to make advance arrangements to cover the expenses generated by a decision to allow interim release on Belgian soil, should such release be granted.

² ICC-01/05-01/13-42-tENG, para. 59.

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E. Observations of the Belgian authorities on the confidentiality or non-confidentiality of these observations

The Kingdom of Belgium raises no objection to these observations being made public, should the Court so wish.

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CONCLUSION

In conclusion, mindful of the observations made at A, B, C, D and E above, the Belgian Central Authority for Judicial Cooperation, on behalf of the Belgian Government, respectfully informs the Court that:

- it has no objection in principle to the Court's selection of the Kingdom of Belgium as the location for interim release, should the Court grant the Defence application;
- it is willing to attend a closed session hearing on this matter;
- the financial implications of interim release should be addressed prior to implementation, should the Court allow such release;
- it agrees to these observations being made public, should the Court so wish.

Done at Brussels, 23 July 2014

FOR THE KINGDOM OF BELGIUM

On behalf of the Central Authority for Judicial Cooperation
with the International Criminal Court,

[signature]

Gérard DIVE,
Head of the Central Authority