

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13

Date: 7 May 2014

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilanova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

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***

Public Document

**With Confidential Annexes 1 and 2 *ex parte* Registry and Kilolo Defence only, and
Confidential Annex 3**

**Defence Request for the Exercise of Judicial Functions by the full Pre-Trial
Chamber II**

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

Mr Nicholas Kaufman

Counsel for Jean-Jacques Mangenda

Kabongo

Mr Jean Flamme

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Göran Sluiter

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 Request (“Request” or “Defence Request”) is submitted by the Defence of Mr Aimé Kilolo Musamba (“Mr Kilolo”) to the Pre-Trial Chamber II of this Court pursuant to Articles 39(2)(b)(iii) and 57 of the Rome Statute (“Statute”) and Rule 7(3) of the Rules of Procedure and Evidence (“Rules”), respectfully requesting that the full Pre-Trial Chamber II be convened for the remainder of all proceedings in case ICC-01/05-01/13.
2. *Structure:* This Request will dispense with the procedural posture of this case, except to such extent as is necessary for a proper analysis of the substantive factual and legal issues forming the subject of the present Request. The following sections discuss the legal basis for and law applicable to such Request (**II**), and the supporting substantive legal arguments (**III**). Hereinafter, all references to ‘Articles’ shall be assumed to refer to Articles of the Statute, all references to ‘Rules’ shall be to the ICC Rules of Procedure and Evidence, and all references to ‘the Suspects’ shall refer collectively to Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido.

II. THE DEFENCE IS PERMITTED TO REQUEST THE PRE-TRIAL CHAMBER TO CONVENE IN ITS ENTIRETY AND TO EXERCISE THE JUDICIAL FUNCTIONS CURRENTLY EXERCISED SOLELY BY THE SINGLE JUDGE

3. 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. This unequivocal language – coupled

with the absence of any limitations – means that Rule 7(3) requests need not meet a specific standard or pass a certain threshold; rather, they are *ipso facto* valid. As such, Rule 7(3) is a right afforded to *any* party, in *any* circumstances, and exercisable at *any* point in the proceedings.

4. 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 impartially¹, judicial impartiality², and presumption of innocence³. Such minimum guarantees are to be assured and ensured throughout the entire judicial process, and cannot be forsaken at any point in the proceedings. Read together, Rule 7(3) and the relevant Articles make abundantly clear that a suspect may request the full Pre-Trial Chamber to exercise its judicial functions at any time during the term of a Single Judge's mandate, a right made all the more salient and relevant upon the existence of any risk of impairment of or prejudice to a suspect's right to enjoy a fair trial. It is under this auspice – of assuring the Suspects' rights are no longer infringed – that the Kilolo Defence makes this present Request for the Pre-Trial Chamber to exercise – immediately and for the remainder of these proceedings – the judicial functions until now vested solely in the Single Judge.

III. THE EXERCISE OF JUDICIAL FUNCTIONS BY THE FULL PRE-TRIAL CHAMBER IS THE ONLY WAY TO ASSURE A FAIR TRIAL IN THE PRESENT PROCEEDINGS

5. The right to a fair trial is fundamental, unquestionable and inviolable, and is vital to the protection of basic constitutional and human rights. It is a right guaranteed under international criminal law both explicitly and through reference to

¹ Rome Statute, Art. 67(1).

² *Ibid.*, Art. 41(2)(a).

³ *Ibid.*, Art. 66.

international human rights law. Indeed, this principle – embedded in all legal systems – is memorialized in every major international and regional human rights instrument⁴, including the International Covenant on Civil and Political Rights⁵, the European Convention on Human Rights⁶ and the American Convention of Human Rights⁷. That the right to a fair trial is a cornerstone of international human rights instruments is particularly instructive in the context of the Rome Statute, which requires the application of the law under the Statute be subject to and interpreted in line with internationally recognised human rights,⁸ a practice respected and perpetuated by this Court. Indeed, this Court's Appeals Chamber has indicated that:

*Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of this Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety...A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.*⁹

6. As further explicated by the European Court of Human Rights ("ECtHR"), this concept of fairness and the general requirements thereof applies to proceedings concerning *all types* of criminal offences, from the most straightforward to the most complex.¹⁰ This is further buttressed by the Rome Statute and by this Court's jurisprudence, which makes clear that the right to a fair hearing applies at all stages of the proceedings, even in the investigative stages during which no

⁴ Universal Declaration of Human Rights, GA Res. 217A(III), UN Doc. A/810 (1948), Art. 10; African Charter of Human and Peoples' Rights, (1986) 1520 UNTS 217, Art. 7.

⁵ International Covenant on Civil and Political Rights (1966), Art. 14(1).

⁶ European Convention on Human Rights, Art. 6(1).

⁷ American Convention of Human Rights, Art. 8(1).

⁸ ICC-01/04-01/06-772, para. 36.

⁹ ICC-01/04-01/06-772, para. 37 (emphasis added).

¹⁰ *Teixeira de Castro v. Portugal*, Judgment, 9 June 1998, Application no. 44/1997/828/1034, para. 36.

defendant has yet been identified.¹¹ Therefore, the right to a fair trial – and all that comes with it – is always applicable, always relevant, and from which derogation is never permitted, in any form or to any degree.

A. Impartiality Is A Critical Part of a Fair Hearing and Can Only Be Assured Through the Exercise of Judicial Functions by the Full Pre-Trial Chamber

7. The right to a fair trial does not focus on a single issue, but rather, consists of a complex and intertwined set of rules and practices. A fundamental aspect of this right is that of impartiality throughout the proceedings and the right to present one's case before an impartial arbiter.¹² Indeed, the independence and impartiality of the judiciary is described as a fundamental pillar of democratic society respectful of the rule of law and the effective protection of human rights,¹³ and is considered to be non-derogable since it provides the “minimum [levels of] protection to citizens”.¹⁴ Indeed, as unambiguously held by the United Nations Human Rights Committee, “the right to be tried by an independent and impartial tribunal is an *absolute right that may suffer no exception*”.¹⁵ Similarly, the *Tadić* Appeals Chamber stated that an international tribunal established in accordance to the rule of law “*must provide all the guarantees of fairness, justice and even-*

¹¹ ICC-01/04-135-tEN, para. 35; Rome Statute, Art. 67, the *chapeau* of which requires that the Court respect for the rights of the accused “keep pace with the progressive development of human rights law”, W. Schabas, *An Introduction to the International Criminal Court* (2011) 220.

¹² ICCPR, Art. 14(1), reading: “all persons shall be equal before the courts and tribunals” and that “in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”. This language is mirrored in Articles 40 and 41 of the Rome Statute.

¹³ United Nations Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (2003) 115.

¹⁴ African Charter on Human and Peoples' Rights, Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria, Communication No. 218/98, decision adopted during the 29th Ordinary session, 23 April – 7 May 2001.

¹⁵ Communication No. 263/1987, *M. Gonzalez del Río v. Peru* (Views adopted on 28 October 1992), UN doc. GAOR, A/48/40 (vol. II), p. 20, para. 5.2 (emphasis added).

handedness, in full conformity with the internationally recognized human right instruments.”¹⁶

8. These guarantees are mirrored in the language of the Statute, which stipulates that judges shall be independent in the performance of their functions¹⁷ and that “a judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground.”¹⁸ Where a judge may be considered less than wholly impartial, then, the “person being investigated or prosecuted may request the [judge’s] disqualification”.¹⁹ As such, the Statute envisages an absolute duty of disqualification upon the showing of reasonable doubt²⁰ in order to guarantee judicial impartiality and assure respect of the right to a fair trial. After all, without impartiality, the right to a fair trial is indubitably impaired and the judicial process – as held by this Court – must be immediately stopped.
9. The Defence contends that the rule of judicial disqualification under the Statute can be read in parallel to Rule 7(3) in the present matter. The Single Judge, through designation by the Pre-Trial Chamber²¹ and as per Article 39 of the Statute, has been vested with singular power to adjudicate in the present proceedings. However, where the impartiality of the Single Judge is in question, as it is now²², it is critical that the Court not only do justice, but be *seen as doing justice*, and convene the Pre-Trial Chamber II in full (i) not only for the remainder of the proceedings, but also (ii) *especially now*, while the disqualification of the Single Judge is pending decision.
10. Indeed, herein lies the gravamen of the problem and the impetus for the present Request. To allow a Judge whose impartiality is under challenge and whose

¹⁶ *Tadić* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 45.

¹⁷ Rome Statute, Art. 40(1).

¹⁸ *Ibid.*, Art. 41(2)(a).

¹⁹ *Ibid.*, Art. 41(2)(b).

²⁰ See Art. 41(2)(a) using unequivocal language to indicate a judge *shall not* participate in *any case* in which his or her impartiality *might* reasonably be doubted on *any ground* (emphasis added).

²¹ ICC-01/05-01/13-45-Conf-Exp.

²² ICC-01/05-01/13-367; ICC-01/05-01/13-372.

disqualification the Defence has sought to continue to singularly and uniquely exercise his judicial functions – when this is under vigorous protest – would be tantamount to disrespecting the object and purpose of the Statute and the language of the Rules, and to turning a blind eye to the sound and fair administration of justice. In fact, the continuation of proceedings in front of the Single Judge in any form – whether alone or collectively as part of the Pre-Trial Chamber II, and *especially during* the consideration of the Defence’s disqualification request – represents a continuing violation of the guarantees of impartiality and fair trial rights, particularly in light of ECtHR jurisprudence which has indicated that “doubts as to impartiality [are] objectively justified where there is some confusion between the functions of a prosecutor and judge”²³, the precise grounds on which the Single Judge’s impartiality is currently being questioned.

11. Where, as in this case, the Single Judge has consistently acted as both prosecutor and judge – for instance, in appointing an Independent Counsel who reported back to him only²⁴ and in **rejecting 100% of Defence requests** in relation to said Independent Counsel²⁵ - it becomes abundantly clear that the Single Judge cannot be deemed *absolutely* impartial to the effect that a fair trial is ***guaranteed***, as necessitated by international human rights law and by this Court itself. This perceived impartiality is particularly problematic in light of the Single Judge having been vested with the sole adjudicatory powers in the case thus far. As such, the exercise of judicial functions by the Pre-Trial Chamber in full – diluting, if not entirely removing, the reasonably perceived lack of impartiality – is a method by which fair trial rights may be restored in the present proceedings.

²³ European Court of Human Rights, *Kyprianou v. Cyprus*, App. no. 73797/01 [2005] para. 126.

²⁴ See, for example, ICC-01/05-T-3-CONF-EXP-ENG, p. 7, lines 14-22, authorizing the Independent Counsel to continue listening to the private phone calls of Mr Kilolo and the other Suspects. The status conferences setting out the Independent Counsel’s mandate and *modus operandi* took place on 30 August 2013 (ICC-01/05-T-2-CONF-EXP-ENG), 25 September 2013 (ICC-01/05-T-3-CONF-EXP-ENG), and 10 October 2013 (ICC-01/05-T-4-CONF-EXP-ENG), as well as in the “*Rapport intermédiaire du conseil ad hoc*” dated 1 October 2013 (1 ICC-01/05-59-Conf-Exp, with confidential, *ex parte* Annex A).

²⁵ Annex 2.

B. Other Aspects of Fair Trial Guarantees Have Been Violated and Can Only Be Mitigated Through the Exercise of Judicial Functions by the Full Pre-Trial Chamber

12. Furthermore, this Court's Pre-Trial Chamber II has closely linked fairness "to the concept of 'equality of arms', or of balance, between the parties during the proceedings, [which a]s commonly understood, [sic] concerns the ability of a party to a proceeding to *adequately make its case, with a view to influencing the outcome of the proceedings in its favour*".²⁶ The ICTY has further expounded on this principle, noting that the scope given to the defence under such principle deserves a more liberal interpretation, considering it "important and inherent...that each party be afforded a reasonable opportunity to present his or her case under condition that do not place him at an appreciable disadvantage *vis-à-vis* his opponent".²⁷
13. The Defence notes the connection with this concept to that of impartiality. After all, the fulfilment of a judge's role as independent and impartial is essential to the principle of equality of arms, which is violated upon the demonstration of an apparent unwillingness to deviate from past positions, decisions already rendered, or through predisposition towards one of the two adversarial parties.²⁸ Indeed, as articulated by an esteemed jurist, impartiality – and relatedly, equality of arms – plays a vital role in the protection of individual rights, meaning that "a judge must be free to float hither and thither between the positions of the parties

²⁶ ICC-02/04-01/05-20-US-Exp, unsealed pursuant to ICC-02/04-01/05-52, para. 30 (footnotes omitted).

²⁷ *Brdjanin and Talic* (IT-99-36-PT), Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002, 23 May 2002; European Court of Human Rights, *Nideröst-Huber v. Switzerland*, App. No. 12794/87 [1990] para. 23.

²⁸ Annexes 1 and 2 to this filing demonstrate the partiality of the Single Judge towards to Prosecution from the outset of these proceedings. Annex 2 illustrates the fact that the Single Judge has ruled in favour of the Prosecution in *all* matters concerning the Suspects' right to interim release – repeatedly denying Suspects this right – as well as in relation to the Independent Counsel. Concerning the latter, the Single Judge has ruled in favour of the Prosecution 100% of the time, rendering eight decisions that each effectively rule against the various Defence teams when concerning Independent Counsel.

and finally reach a decision at the place which, in correct application of the law and rules of jurisprudence, marks the just solution”.²⁹ This necessarily entails, then, the ability of each party to sway, or at least attempt to sway, a judge through the proper presentation of its case.

14. The Defence contends that this is impossible in the present case, where, as indicated above and in its prior request for disqualification³⁰, the Single Judge has already manifested his investigatory and prosecutorial initiative and seemingly made clear his partiality towards the Prosecution. This is all the more significant when the Single Judge has *himself made clear* that it is inappropriate to ask the same judge who issued an arrest warrant to re-evaluate his own decisions on the matter.³¹ Indeed, the Single Judge stated that “*[i]t is debatable [sic] to what extent a Pre-Trial Chamber* (namely, the same Pre-trial Chamber who has issued the warrant of arrest) *can be meaningfully called upon [to] reassess[] the existence of reasonable grounds to believe that a crime has been committed in the context of an application for interim release.*”³² As such, the Single Judge made clear that, *even in his own learned opinion*, it is inappropriate to ask the same arbiter who has already made certain decisions to revisit and reassess his findings. In light of the above, then, it is impossible to expect a truly and absolutely impartial continuation of proceedings, and to satisfy fair trial guarantees, especially where there is only one adjudicating judge who has thus far unilaterally and singularly taken all the decisions in these proceedings. Indeed, to allow the Single Judge to continue to participate and exercise his judicial functions in these proceedings, whether singly or collectively with the full Chamber, is to compound the gravity of the existing violations already suffered by Mr Kilolo and the Suspects.

15. Finally, the concept of fair trial implies in principle the right for the parties to a trial to have knowledge of and comment on all evidence adduced or observations

²⁹ S. Trechsel, *Human Rights in Criminal Proceedings* (Vol. XII/3, OUP, 2005) 50.

³⁰ ICC-01/05-01/13-372.

³¹ ICC-01/05-01/13-259, para. 5.

³² *Ibid.*

filed.³³ This is true *even where the observations come from an independent tribunal, and do not express any new facts or arguments detrimental to the party concerned*.³⁴ Indeed, the ECtHR has made clear that it is for the parties to a dispute to decide on the importance or relevance of such evidence or observations and to make the minimum determination as to whether the document even calls for their comments. These holdings arose out of a case in which a cantonal court, in referring an already-adjudicated case to the appeals court, made certain observations to the latter that reiterated the findings of the cantonal court and detailed the reasoning as to why the lower court had ruled as it did, and why the applicant's appeal was legally unfounded. The ECtHR held that, despite the fact that the observations filed by the cantonal court were simply restatements of its decision and did not seek to introduce any new facts or information, the applicant's right to a fair trial had been violated when the cantonal court failed to provide the applicant with the same observations it provided to the appeals court. Specifically, the ECtHR reasoned that "[w]hat is particularly at stake here is litigants' confidence in the workings of justice, which is based on, inter alia, the knowledge that they have had the opportunity to express their views on every document in the file."³⁵ Indeed, the Court made clear that even where other considerations are at play, the blatant disregard of a principle as fundamental as the right to adversarial proceedings is not justifiable;³⁶ after all, more than anything, the right to a fair trial is intended "to secure the interests of the parties and those of the proper administration of justice".³⁷

16. In much the same manner, the Defence has, until now, not been afforded the right to express its views in full in the on-going proceedings. Rather, the Defence

³³ *Huber v. Switzerland*, para. 24 (citing *Lobo Machado v. Portugal*; *Vermeulen v. Belgium* judgments of 20 February 1996, Reports 1996-I, p. 206, para. 31, and p. 234, para. 33, respectively).

³⁴ *Ibid.*, paras 24-27, 29.

³⁵ *Ibid.*, para. 29.

³⁶ *Ibid.*, para. 30.

³⁷ *Ibid.*, (citing mutatis mutandis, *Acquaviva v. France*, 21 November 1995, Series A no. 333-A, p. 17, para. 66).

has been denied a full picture of the relationship between Independent Counsel and the Single Judge, is not privy to the communications that have taken place between said parties in the Single Judge's chambers, and remains unaware as to the content of the observations made to the Single Judge. No official record or transcript having ever been released to document or disclose such communications, the Defence cannot speak to, comment on, or even defend itself on the observations made by Independent Counsel. As already expounded by the Bemba Defence³⁸ and supported by human rights jurisprudence, the "relevance of whatever transpired in the Single Judge's chamber *is for the parties to decide* and not the Single Judge."³⁹ That the Single Judge has not disclosed such communications in the case or situation record remains, to this day, a fatal flaw in the judicial proceedings thus far, and one that negates the fair trial guarantees assured by the Statute. This is made ever more problematic in light of the fact that the judges of this Court are the guardians of the Statute and of the rights of all interested parties, including the Suspects. If the Suspects' fair trial rights are being violated by the very entity entrusted with their protection, the Suspects have in essence already lost their case, without ever having been afforded a real opportunity to defend themselves.

17. This Court's jurisprudence allows for an immediate cessation of all judicial proceedings when it is clear that no fair trial can be held⁴⁰. Indeed, the continued prosecution of suspects before a tribunal that is not both independent *and* impartial infringes the right to a fair trial, *even lacking a showing by the criminal defendants that they have suffered substantial injustice*.⁴¹ The Defence, without prejudice to and reserving its rights under any other judicial remedies, through this present Request asks instead that, in an effort to mitigate any injustice already suffered, the Pre-Trial Chamber convene in full immediately and for the

³⁸ ICC-01/05-74-Conf-Anx1.

³⁹ *Ibid.*

⁴⁰ ICC-01/04-01/06-772, para. 37.

⁴¹ *Millar v. Dickson* [2002] 1 WLR 1615 (PC).

remainder of the proceedings. Indeed, it is only upon such rectification of the fair trial deficiencies already suffered that the Defence's and the public's confidence in the present proceedings can be restored.

C. The Presumption of Innocence Requires that the Full Pre-Trial Chamber Convene for the Remainder of these Judicial Proceedings

18. The Statute⁴² – as well as long-established rules of international criminal law and international human rights law⁴³ – enshrines the principle of presumption of innocence, unequivocally stating that an accused must be presumed innocent until proved guilty before the Court and that the onus to prove the accused's guilt lies with the Prosecutor alone.⁴⁴ It is important to note that the presumption is a procedural rather than a substantive principle; that is to say, the presumption pertains to the *process* by which justice is achieved, rather than to the *nature* of the justice itself, the latter of which is proven and rendered through the equitable presentation of the case to the adjudicating body. Indeed, the presumption of innocence may often be breached without a person being prosecuted or convicted, as it represents an obligation of means and not one of result.
19. The Defence contends that the presumption of innocence is particularly friable and increasingly at risk in the on-going proceedings. Specifically, the present case represents the first time in the history of this Court that a Single Judge has, from the outset, singularly, unilaterally, and as the majority, ruled upon *every matter* in the proceedings thus far *as well as* in the investigation beforehand. This includes decisions with regard to the pre-arrest investigation, appointment of

⁴² Rome Statute, Art. 66.

⁴³ International Covenant on Civil and Political Rights (1966), Art. 14(2); Universal Declaration of Human Rights (1948) Art.11(1); European Convention on Human Rights (1950) Art. 6(2); American Convention on Human Rights (1969) Art. 8(2); African Charter on Human and Peoples' Rights (1981) Art. 7(1).

⁴⁴ Rome Statute, Arts. 66(1) and 66(3).

Independent Counsel, issuance of the arrest warrant⁴⁵, unilateral application by the Single Judge of the waiver of Mr Kilolo's and Mr Mangenda's immunity⁴⁶, and decisions taken with respect to Mr Kilolo and the other Suspects' substantive rights, such as requests for interim release.⁴⁷

20. This is significant because the Single Judge was appointed in the present case under specific conditions and subject to a somewhat limited mandate⁴⁸, namely that of addressing and determining issues arising in connection with the Prosecutor's 'Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70'⁴⁹, submitted to the Pre-Trial Chamber on 3 May 2013. Despite the limitation of his mandate to the above, however, the Single Judge has continued decide upon *all issues* arising in this case, including those *entirely divorced* from the matter of judicial assistance for the Article 70 investigation, such as on Mr Babala's⁵⁰, Mr Mangenda's⁵¹, and Mr Kilolo's⁵² various separate requests for interim release.

21. Failing the existence of a second designation extending the Single Judge's mandate and of which the Defence is unaware, it is problematic that the Single Judge is able to continue to adjudicate on *all* matters in these present proceedings, particularly when his impartiality is currently being contested. Indeed, the Defence contends and continues to believe – as has been addressed above – that the Single Judge is unlikely to deviate from the judicial stances already taken. This represents a violation of the presumption of innocence in that the *procedure and manner* in which justice is currently being undertaken – already

⁴⁵ ICC-01/05-01/13-1-Red2.

⁴⁶ 2013/PRES/412.

⁴⁷ It should be noted that, as highlighted in Annex 2, the Single Judge has denied all Defence requests and leaves to reply on this subject, as per decisions ICC-01/05-01/13-92, ICC-01/05-01/13-112, ICC-01/05-01/13-146, ICC-01/05-01/13-258, ICC-01/05-01/13-259, and ICC-01/05-01/13-261.

⁴⁸ ICC-01/05-45-Conf-Exp, reclassified as Public pursuant to decision ICC-01/05-01/13-147 of 3 February 2014.

⁴⁹ ICC-01/05-44-Conf-Exp.

⁵⁰ ICC-01/05-01/13-258.

⁵¹ ICC-01/05-01/13-261.

⁵² ICC-01/05-01/13-259.

fraught with uncertainty – remains unchanged and fraught with lacunae. In fact, since the Single Judge is and remains the singular judicial authority in these proceedings, *he continues to be both the voice of majority and unanimity*. If, as the Defence avers, there is even a *degree* of impartiality or the appearance thereof, the entire judicial proceedings are and continue to be, by way of the enduring judicial architecture, unjust. After all, the presumption of innocence is premised on procedural justice; if this is in question, the presumption is violated.

22. As such, the presumption of innocence requires that the remainder of the proceedings – and any decisions resulting therefrom – be unanimous, or, at the very least, *be issued by a majority of a three-judge Chamber*. Considering the seriousness of the charges and the available sentences under the Statute, the Suspects deserve the consideration of the full Chamber. It is only through such means that one can be assured of the procedural fairness of the case, and for due respect for the presumption of innocence. After all, to allow the continuation of proceedings before a singular judicial authority whose impartiality is being questioned and whose disqualification is being requested gives rise to concerns about procedural fairness, thus violating the fundamental guarantee of the presumption of innocence, and contravening international human rights law, international criminal law, and this Statute itself.

IV. CONCLUSION

23. To borrow from a great and esteemed jurist, history will assess the present proceedings in light of the fairness with which the Suspects are today treated.⁵³ Once more, the Defence draws attention to the fact that justice must not only be done, but also it must be seen as *being* done.⁵⁴ The Rome Statute enjoins this

⁵³ R. Jackson, *Summation for the Prosecution*, July 26, 1946, stating in pertinent part: “*The future will never have to ask, with misgiving, what could the Nazis have said in their favor. History will know that whatever could be said, they were allowed to say.*”


⁵⁴ European Court of Human Rights, *Delcourt v. Belgium*, App. No. 2689/65 [1970] para. 31.

Court's judiciary to act as impartial and independent arbiters charged with even-handedly dispensing justice; the Defence contends that this is achievable only through the exercise of judicial functions by the full Pre-Trial Chamber II. Indeed, any alternative would risk the misperception that this Chamber did not take that action which is necessary to import real meaning and legal value to rights guaranteed in the Statute. After all, the Statute is given life and legitimacy only through the actions and the decisions taken by this Court's honourable judges, without which the Statute is no more than pen to paper. Taken together, the guarantees of impartiality and of a fair trial, as well as the ability of a party to request the Pre-Trial Chamber convene in full, must be read in light of human rights law and jurisprudence, giving rise to the logical conclusion that the very judge whose disqualification is under consideration cannot be permitted to continue to exercise his judicial functions, either now or in the future, and certainly not singly and unilaterally, *in the present proceedings*. To that end, the Defence urges the Pre-Trial Chamber to consider and grant this Request for the Pre-Trial Chamber to exercise, collectively and in full, the judicial functions currently exercised by the Single Judge alone.

V. RELIEF REQUESTED

24. The Defence for Mr Kilolo respectfully requests that the Pre-Trial Chamber II:

- Grant this present Request for exercise of judicial functions by the full Pre-Trial Chamber II in case ICC-01/05-01/13 as concerns Mr Kilolo.



Ghislain M. Mabanga

Lead Counsel for Mr Aimé Kilolo Musamba

Dated this 7 May 2014,

At The Hague, The Netherlands