

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

N° ICC-01/05-01/13
Date: **16 December 2013**

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

**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 AND URGENT WITH 18 CONFIDENTIAL ANNEXES

**APPLICATION FOR INTERIM RELEASE
OF MR AIMÉ KILOLO MUSAMBA**

Source: Defence team for Mr Aimé Kilolo Musamba

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

Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Kweku Vanderpuye
Ms Florence Darques Lane

Defence Counsel for Mr Kilolo

Mr Jean Pierre Kilenda Kakengi Basila

Defence Counsel for Mr Babala

Mr Jean-Pierre Fofé Djofia Malewa

Defence Counsel for Mr Mangenda

Mr Jean Flamme

Defence Counsel for Mr Jean-Pierre Bemba Gombo

Mr Nicholas Kaufman

Defence Counsel for Mr Narcisse Arido

Legal Representatives of Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparations

Office of Public Counsel for Victims

Office of Public Counsel for the Defence

Mr Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. INTRODUCTION

1. The purpose of this application filed by Mr Aimé Kilolo Musamba (hereinafter "the Applicant"), is to request Pre-Trial Chamber II (hereinafter "the Chamber") to grant his interim release in accordance with the provisions of article 60(2) and 60(3) of the Statute. The Applicant also requests for the application of rule 118(1) and (3) of the Rules of Procedure and Evidence.
2. To enable the Chamber to make a fair determination on the merits of this application it is appropriate to present its factual (B) and legal (C) grounds as well as the procedural background (A).

II. ARGUMENTS

3. The procedural background (A), the facts (B), and a legal analysis of the facts (C) will be presented in that order.

A. PROCEDURE BACKGROUND

4. On 20 November 2013, Pre-Trial Chamber II issued an arrest warrant under seal for the Applicant. The arrest warrant also targeted Messrs Jean-Pierre Bemba Gombo, Jean-Jacques Mangenda, Fidèle Babala Wandu and Narcisse Arido.¹
5. Mr Jean-Pierre Bemba Gombo was already in detention when this arrest warrant was issued.
6. Mr Fidèle Babala and the Applicant were arrested on 23 November 2013 in Kinshasa and Brussels respectively.
7. On the same day, 23 November 2013, Mr Jean-Jacques Mangenda Kabongo was arrested in the Netherlands while Mr Narcisse Arido was arrested in France.
8. Mr Fidèle Babala and the Applicant were transferred to the seat of the International Criminal Court at The Hague (hereinafter "the Court") on Monday 25 November 2013.
9. On the same Monday, 25 November 2013, the Pre-Trial Chamber II rendered its decision setting the date of the first appearance hearing as 27 November 2013 at 3 p.m.²

¹ ICC-01/05-01/13-1-US-Exp-tENG, *Warrant of arrest for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, 20 November 2013.

10. During said first appearance hearing of 27 November 2013, Mr Jean-Pierre Kilenda Kakengi Basila, in his capacity as duty counsel for the Applicant (hereinafter "Duty Counsel"), publicly announced to the Chamber that he intended to file an application for interim release of the applicant.³
11. In keeping with that public announcement, Counsel for the Applicant hereby files the application, setting out both the factual and legal grounds therefor.
12. Pursuant to regulation 23bis (1) of the Regulations of the Court, the annexes to this application for interim release filed by the Applicant must remain confidential as they intimately relate to his private life.

B. THE FACTS

13. The aforementioned arrest warrant charges the Applicant with producing evidence that he knows is false or forged, 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 of *The Prosecutor v. Jean-Pierre Bemba Gombo* (hereinafter "the main case").⁴
14. It also charges the Applicant with corruptly influencing witnesses by bribing them in exchange for false testimony in the main case, within the meaning of article 70 (1)(b) of the Statute, read with article 25 (3)(a).⁵
15. With no intent of presenting all its arguments on the merits, here and now, the Defence hereby formally challenges the facts ascribed to the applicant by way of a unilateral application from the Prosecutor. It reserves the right, in due course, to prove the contrary through presentation of Defence arguments. The same applies to the allegations of witness corruption and bribery made by the Office of the Prosecutor. The Defence will demonstrate that such allegations are unfounded.

C. LEGAL AND FACTUAL GROUNDS

² ICC-01/05-01/13-11, *Decision setting the date for the first appearance of Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba et Fidèle Babala, and on issues relating to the publicity of the proceedings.*

³ ICC-01/05-01/13-T-1-ENG p.19, lines 8 to 11: "It is amongst these concerns, Mr President, that I would like to notify you that in the coming hours or days under Article 60 (1) of the Statute, I would like to file a formal and sufficiently justified application for the provisional release of Mr Kilolo."

⁴ ICC-01/05-01/13-1-Red, p. 4.

⁵ *Idem*, p. 4.

16. After a brief overview of the grounds for the arrest warrant (1), the Defence will present the material changes in the circumstances which prevailed at the time the arrest warrant was issued for the applicant (2).

1 Legal and factual grounds for the arrest warrant

17. The Chamber deemed the Applicant's arrest necessary for all of the reasons set out in article 58(1)(b) of the Statute, namely: (i) to ensure the person's appearance at trial; or (ii) to ensure that the person does not obstruct or endanger the investigation or the proceedings; or (iii) to prevent the person from continuing with the commission of that crime.⁶ In support of point (i) the Chamber states that the Applicant possesses an identity document which entitles him to travel freely, not only throughout the Schengen Area, but also to non-States parties to the Statute, such as Cameroon, which are under no obligation to cooperate with the Court. It also maintains that the Applicant belongs to a network which could provide him with the financial resources to abscond from the jurisdiction of the Court.⁷ In support of point (ii) the Chamber states that Jean-Pierre Bemba could mobilise the resources needed to evade the prosecution of his associates, including the Applicant.⁸ Finally, in order to justify the arrest, the Chamber emphasises under point (iii) that:

conduct which may constitute an offence against the administration of justice, as summarised in the present warrant, has continued from at least early 2012, and in all likelihood continues to date. Accordingly, the arrest of all of the persons who are the subject of the Application is necessary to prevent them from further obstructing or endangering the investigation or the trial, and so that the commission of the crime does not continue.⁹

18. These grounds are no longer relevant, due to radically and significantly changed circumstances, within the meaning of article 60(3) of the Statute, since the arrest warrant was issued on 20 November 2013. The Appeals Chamber has already ruled that:

The Pre-Trial Chamber in assessing whether the conditions under article 58 (1) continue to be met may, pursuant to article 60 (3), second sentence, modify its

⁶ ICC-01/05-01/13-1-Red, *Warrant of arrest for Jean-Pierre BEMBA GOMBO, Aimé KILOLO MUSAMBA, Jean-Jacques MANGENDA KABONGO, Fidèle BABALA WANDU and Narcisse ARIDO*, p. 13, para. 21.

⁷ *Idem*, p.13, para. 22.

⁸ *Idem*, p.13, para. 22.

⁹ *Idem*, p.13, para. 23.

ruling if it is satisfied that changed circumstances so require. The requirement 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."¹⁰

2 Material changes in the circumstances which prevailed at the time the arrest warrant was issued for the Applicant

2.1. Significant change: Letter from Mr Pascal Vanderveeren (President of the Bar) dated 26 November 2013

19. Mr Pascal Vanderveeren, whose moral qualities and expertise in disciplinary matters and rules of conduct are authoritative at bar associations and at the International Criminal Court, has vouched for the Applicant, in good faith, that said Applicant will comply with the obligations prescribed within the scope of this case.¹¹ Mr Pascal Vanderveeren, Member of the Brussels Bar, former President of the Brussels Bar, Honorary President of the International Criminal Bar Association (The Hague), featured on the List of Counsel at the International Criminal Court, former member of the Disciplinary Appeals Board provided for by the International Criminal Court's Code of Professional Conduct for Counsel, after having attached his full CV, certified in good faith and to the best of his knowledge on Tuesday 26 November 2013 that:

"[TRANSLATION]

- Mr Kilolo fulfilled his pupillage obligations between 1998 and 2001;
- As President of the Bar during his pupillage, I had the opportunity to meet Mr Kilolo on numerous occasions;
- I was able to assess his professional, ethical and moral qualities, which are all essential to the practice of our profession;
- Mr Kilolo rapidly became interested in international criminal justice;
- He attended the training events where I met him, either as member on the List of Counsel or chairman of these training events;
- At various times during the course of our meetings, he has referred to his mandate to defend Mr Bemba;
- It was evident from our conversations that he was a prudent, scrupulous lawyer who was cognizant of the requirements of his job."¹²

¹⁰ ICC-01/05-01/08-631-Red, 02-10-2012, *Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa"*, 20, para. 60.

¹¹ This is the Defence's interpretation of his attestation.

¹² Annex 1, Attestation of Mr Pascal Vanderveeren, Done at Brussels on Tuesday 26 November 2013.

20. Similarly, many of his colleagues in the French Order of the Brussels Bar certified that the Applicant's conduct is exemplary.¹³ His neighbour, Paul Delnoy, continuously attests to his good character.¹⁴
21. According to article 54(3)(b) of the Statute, the Prosecutor may "request the presence of and question persons being investigated, victims and witnesses." The Applicant could, in response to a simple notice or summons, have provided numerous answers to the various questions raised by the Prosecutor in her application for an arrest warrant.
22. It is, without doubt, public knowledge that the preliminary hearing of suspects prior to the issuance of an arrest warrant is a practice employed by the Prosecutor. This was the case in the Kenya situation where six summonses to appear were issued to suspects being prosecuted for war crimes and crimes against humanity after Pre-Trial Chamber II authorised the Prosecutor, on 31 March 2010, to open a *proprio motu* investigation into the post-election violence which occurred between 2007-2008.¹⁵ Currently, in the same Kenya situation,¹⁶ the President and Vice-President of Kenya have been authorised to appear before the Court as non-detained suspects even though their profile, in terms of financial resources, their network of international contacts, and the gravity of the charges brought against them is in no way comparable to that of the Applicant who, if the facts were to be proven, would incur a fine or a prison term of no more than five years. This should be compared with the term of thirty years or life imprisonment for the offences with which the President and Vice-President have been charged!
23. In the situation in Darfur, Sudan, Bahar Idriss Abu Garda¹⁷ and Abdallah Banda Abaker Nourain,¹⁸ accused of various war crimes and crimes against humanity, are appearing as non-detained suspects.

¹³ Annexes 2, 3 and 4.

¹⁴ Annex 5.

¹⁵ See ICC website: www.icc-cpi.int.

¹⁶ For the situation in Kenya, see. ICC-01/09-01/11, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*; ICC-01/09-02/11 *The Prosecutor v. Uhuru Muigai Kenyatta*.

¹⁷ ICC-02/05-02/09 *The Prosecutor v. Bahar Idriss Abu Garda*.

¹⁸ ICC-02/05-03/09 *The Prosecutor v. Abdallah Banda Abakaer Nourain*.

24. The Defence finds it hard to understand this double standard adopted by the Prosecutor. Apart from being party to proceedings pending before the Chamber, the Prosecution is, above all, an Organ of the Court which should be independent and impartial within the meaning of article 42(1) of the Statute.

2.2. Significant change: the Applicant's identity card situation regarding travel opportunities was clarified after his arrest

25. The Applicant does not hold any identity document issued from the Democratic Republic of the Congo or from anywhere else which would enable him to move freely within non-States Parties to the Rome Treaty such as Cameroon. On the contrary, he holds a Belgian passport.¹⁹ The Applicant does not hold a DRC identity document. The Prosecution has not filed any such document in the case record, or included it among the documents filed in support of its application for an arrest warrant, or among the documents currently being disclosed. The Applicant's Belgian passport attached to this application for interim release, a copy of which is filed at the Registry of the Court, shows that the Applicant is, rather, a European citizen. Consequently, he cannot travel freely since he must, first of all, obtain a visa. Regarding the Applicant's Belgian nationality, the Chamber made that correction during the first appearance hearing.²⁰ The annexes also contain an attestation from the Belgian authorities which, being dated 25 November 2013, was issued after the arrest warrant of 20 November 2013, certifying that the Applicant is a Belgian national.²¹ Also attached is his visa for Cameroon, valid 45 days for a maximum stay of 30 days, which, subsequent to the arrest warrant of 20 November 2013, has now expired.²² A copy of his passport was submitted to the Office of the Prosecutor on the morning of Monday 25 November at the Office of the Belgian investigating magistrate.

¹⁹ Annex 6

²⁰ ICC-01/05-01/13-T-1-ENG p. 4, line 25 – p. 5, line 5, P. 5, lines 4 and 5: "SINGLE JUDGE TARFUSSER: We will take care of this mistake we made in the warrant of arrest."

²¹ Annex 7 Certificate of nationality.

²² Annex 8.

2.3. Significant change: the witness testimony phase in the main case was closed after the arrest warrant was issued.

26. After the arrest warrant of 20 November 2013 was issued, the very last witness in the main case concluded his testimony on 22 November 2013 at 6 p.m. Consequently, there is no longer any risk of continued commission of the alleged crimes as the parties and the participants are no longer authorised to call new witnesses or tender new evidence.

2.4. Highly significant change: Until otherwise decided, Mr Aimé Kilolo Musamba has ceased to serve as Lead Counsel for Mr Jean-Pierre Bemba Gombo in the main case, since 6 December 2013.

27. This is, a new fact within the meaning of the aforementioned judgment of the Appeals Chamber, denoting a significant change in the circumstances such as to justify release.²³

28. Indeed, since the status conference of 28 November 2013 convened by the Chamber hearing the main case, the other members of Mr Bemba's team have, initiated a process to reorganise the team without the Applicant's knowledge. Informed of this development, the applicant in turn, filed two applications to the said Chamber through his counsel Mr Jean-Pierre Kilenda Kakengi Basila. The first, dated 2 December 2013, sought to stay the review of any issues relating to the reorganisation of the team in the absence of the applicant.²⁴ The second, dated 6 December 2013, related to his complaints.²⁵ In that second application, the Applicant requested, *inter alia*, that a Status Conference be convened to discuss the conduct of the proceedings in the main case.

²³ ICC-01/05-01/08-631-Red, 02-10-2012, *Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa"*, para. 60.

²⁴ "Requête de Maître Aimé KILOLO MUSAMBA tendant à obtenir l'autorisation d'accéder à tous les transcripts de la Conférence de Mise en Etat du 28 Novembre 2013, de tous les documents y afférents et de solliciter la surséance de toute question liée à la réorganisation de l'équipe de défense de Monsieur Jean-Pierre BEMBA GOMBO en l'absence de son Conseil principal", 2 December 2013, ICC-01/05-01/08-2913.

²⁵ ICC-01/05-01/08-2914, "Doléances de Maître Aime Kilolo Musamba Conseil principal dans l'Equipe de Mr Jean-Pierre Bemba Gombo".

29. On the same 6 December 2013, the Chamber hearing the main case ruled,²⁶ following a letter dated 5 December 2013 from Mr Jean-Pierre Bemba Gombo confirming Mr Haynes as Counsel responsible for continuing the defence of his interests²⁷, that "[t]he current Co-Counsel, Mr Peter Haynes, will continue²⁸ acting as Counsel for Mr Bemba until otherwise decided."
30. On 13 December 2013, the Chamber hearing the main case rejected the two aforementioned applications filed by Mr Kilenda on behalf of the Applicant and ruled that neither Mr Kilenda nor the Applicant, who are neither parties to nor participants in the main case, had standing to file applications to the Chamber.²⁹
31. The replacement "[TRANSLATION] until otherwise decided", of Mr Kilolo by Mr P. Haynes to defend the interests of Mr Bemba in the main case, constitutes "a **new fact**" which justifies the immediate release of the Applicant, who is henceforth completely excluded from the defence of Mr Bemba's interests in the main case. Such withdrawal of the representation mandate, even temporarily, deprives him, henceforth, of the possibility of exercising any duties in the main case.
32. Hence, there is no further risk that the Applicant will continue to commit the alleged crimes. Furthermore, and given the severance of the collaborative relationship with Mr Bemba, there is no risk that the Applicant will receive financing from Mr Bemba's network in order to abscond or to obstruct the investigation or the proceedings.
33. To substantiate the claim that the applicant may benefit from a network of Mr Bemba's contacts, either to abscond or to obstruct the investigation, the Prosecutor essentially stated that Mr Kilolo is Mr Bemba's lead counsel in the

²⁶ ICC-01/05-01/08-2918, p. 5.

²⁷ ICC-01/05-01/08-2915, "Enregistrement d'une lettre de M. Jean-Pierre Bemba Gombo datée du 5 décembre 2013", 6 December 2013.

²⁸ ICC-01/05-01/08-2922, 13-12-2013, *Decision on the requests made by Mr Kilenda on behalf of Mr Kilolo*, p. 5, para. 7. The full text of this decision, comprising 7 pages, provides references to all written documents referred to in this application for release of Mr Aimé Kilolo Musamba.

²⁹ ICC-01/05-01/08-2922, 13-12-2013, *Decision on the requests made by Mr Kilenda on behalf of Mr Kilolo*, see paras 1 to 12.

main case. This is clearly evident from the arrest warrant.³⁰ Yet, the Applicant has ceased all privileged contacts with Mr Bemba since 6 December 2013.

2.5. The Chamber itself has lifted all restrictions on contact between the Applicant and third parties after issuing the arrest warrant

34. After the Status Conference of 4 December 2013, the Chamber decided to lift all restrictions on contact between third parties and the Applicant. This proves that the Chamber no longer had any fears about the Applicant after the issuance and, above all, execution of the arrest warrant. Such lifting of restrictions constitutes the Chamber's token of confidence in the Applicant. Yet, these restrictions were intended to facilitate the proper conduct of investigations. Furthermore the Prosecution itself requested that contacts be prohibited only for a period of 14 days.³¹ This proves that, beyond the period of 14 days, the Prosecutor had no further fears about the Applicant.

2.6. Significant change: freezing of the assets of Messrs Jean-Pierre Bemba Gombo and Fidèle Babala Wandu

35. The Chamber will recall that the assets of Messrs Jean-Pierre Bemba Gombo and Fidèle Babala Wandu were frozen after issuance of the arrest warrant of 20 November 2013 which was executed from Saturday, 23 November 2013. Hence, there is no further concern that the assets or the bank accounts of Mr Babala could assist **the Applicant who is no longer responsible for the defence of Mr Bemba's interests in the main case.**³²

2.7. Significant change: seizure of all the Applicant's documents, computers, telephones, personal notes and freezing of his personal assets, after issuance of the arrest warrant

36. The Applicant states that on 23 November 2013, the date of his arrest, a search was conducted in his law offices in Brussels, his private residence, his offices at the seat of the Court and his vehicle. On that occasion, all of his telephones

³⁰ ICC-01/05-01/13-1-Red, p. 4.

³¹ ICC-01/05-01/13-18-Conf, *Urgent Request to Extend the Prohibition of Contacts between the Suspects and with Third Parties*, p. 8, para. 19.

³² ICC-01/05-01/08-2918, para. 5.

(Belgian and Dutch), work computers and paper documents relating to the main case were seized. His bank assets were effectively frozen as evidenced by the letter from ING referenced 310/PARQ.13188 and dated 25 November 2013.³³ Consequently, it is impossible **for the Applicant, who is currently excluded from the main case,**³⁴ to obstruct the investigations since his documents have already been impounded by the court.

2.8. Significant change: there is nothing in the documents disclosed by the Prosecutor, after issuance of the arrest warrant, to establish the existence of a personal relationship between Mr Jean-Pierre Bemba Gombo and the Applicant

37. The arrest warrant labels the Applicant as an associate of Mr Jean-Pierre Bemba. The Applicant stresses that he is not an associate of Mr Bemba as he is not a member of his political party. The Applicant has no personal relationship with Mr Bemba. His relations with Mr Bemba are those of a client and his lawyer. No evidence has been attached to the Prosecutor's Application to prove the contrary. This is especially true, considering that the Applicant's fees are advanced by the Court, pending reimbursement by Mr Bemba at a later date, while the sums of money sent by Western Union were remitted solely to cover Defence needs.

2.9. Significant change: the Applicant's lease agreement produced after his arrest shows that he has had a second residence in The Hague since 2010 for the purposes of practising as a lawyer

38. As evident from his lease agreement, the applicant is based in The Hague to ensure the efficient handling of the main case. The Applicant has deposited a copy of his lease agreement at the Counsel Support Services. This document is adequate proof that he resides in The Hague at 41 C, Geversdeynotweg in Scheveningen³⁵ close to the seat of the Court. If the Applicant had been given a

³³ Annex 17.

³⁴ ICC-01/05-01/08-2918, para. 5.

³⁵ Annex 9.

prior hearing, he would have produced his lease agreement for The Hague³⁶ and his certificate of residence in Belgium.³⁷

39. In her Application for an arrest warrant, the Prosecutor also stated that the Applicant would never appear at trial, unless he is arrested. This Prosecution argument is wholly unfounded. It is purely and utterly speculative, since the Prosecution fails to provide any precise facts, precedent to or concomitant with its Application, to justify its claim that the Applicant will not appear.

2.10. Significant change: the identity document enabling free travel within Schengen States is in the custody of the Registry, submitted via the detention centre since 25 November 2013

40. The Prosecutor also argues, in support of her arrest warrant application, that the Applicant can go unnoticed in the Schengen Area within which he is able to travel. The Prosecution loses sight of the fact that the States bound by the Schengen Agreement are full-fledged members of the Assembly of States Parties to the International Criminal Court. These are reliable States which have pledged to cooperate with the International Criminal Court in the enforcement of its decisions. Neither the Prosecutor nor the Chamber should nurture any fears that the Applicant would abscond by travelling to any of these countries. The readiness with which Belgium, France and Holland executed the aforementioned arrest warrant clearly demonstrates that the Applicant, were he to flee, would not feel at ease in any of these countries. Moreover, the Applicant notes that article 112 of the Rome Statute requires that each State Party shall have one representative in the Assembly of States Parties. The role of that representative is to provide the Presidency, the Prosecutor and the Registry with general guidelines regarding the administration of the Court. The Applicant lives permanently between Belgium and Holland which are full-fledged members of the Assembly of States Parties and whose cooperation with the court is exemplary. The Prosecutor herself highlights this fact in her Application for an arrest warrant.³⁸ Above all, it must be noted that the Applicant's identity document has been in the possession of the Registry since his admission to the

³⁶ Annex 9.

³⁷ Annex 10.

³⁸ ICC-01/05-01/13-19-Conf-Exp-Annexe L, para. 23.

detention centre on 25 November 2013 and that, consequently, it is impossible for him to travel freely, even within the Schengen States.

2.11. Significant change: information actually available but not supplied to the Chamber when the arrest warrant was issued relating to Cameroon's cooperation with the Court despite the fact that Cameroon is not a State-party to the Rome Treaty establishing the International Criminal Court

41. Furthermore, it should also be emphasised that Cameroon, without being a party to the Rome Statute, has already cooperated with the Court in the main case by facilitating the hearing of witness testimony by video link from UN mission offices located on its territory. A focal point was appointed within Cameroon's Ministry of Justice as evidenced by the email of 24 May 2013 at 11.26 a.m., sent by the Victims and Witnesses Unit to the Defence within the framework of the main case.³⁹

2.12. Significant change: the criminal record produced on 2 December 2013 states that the Applicant has never been convicted of bribing witnesses, or of any crime, major offence, or minor offence, and it has never been established that he is prone to bribing witnesses

42. According to the Prosecution, the Applicant has demonstrated that he is capable of bribing witnesses; this assertion is contradicted by the Applicant's criminal record and the principle of presumption of innocence.⁴⁰

43. This Prosecution argument has no legal or factual basis. Firstly, it is not supported by any criminal record. The Applicant is presumed innocent under article 66(1) of the Statute. Furthermore, after issuance of the arrest warrant on 20 November 2013, the Belgian Ministry of Justice declared on 2 December 2013 that the Applicant's criminal record was clean.⁴¹ Moreover, there is no risk that the Applicant would obstruct the ongoing investigation or the proceedings as **he no longer represents Mr Bemba the main case.**⁴²

³⁹ Annex 18.

⁴⁰ Annex 11.

⁴¹ Annex 11.

⁴² ICC-01/05-01/08-2918, para.5.

2.13. Significant change: after issuance of the arrest warrant, the Prosecutor declared that her investigations were almost completed

44. The Prosecutor made this statement at the status conference of 27 November 2013 before Trial Chamber III. Consequently, there is no longer any risk of obstruction of the investigation in the present case relating to the offences against the administration of justice, **especially given the decision of 6 December 2013 taken by the Chamber hearing the main case to withdraw the Applicant's representation mandate as Lead Counsel for Mr Bemba in the main case.**⁴³

3 Currently, the conditions of the Applicant's arrest and continued detention are no longer met

45. The Defence submits that detention is an exceptional measure. It must be necessary and proportional.
46. The Defence relies on articles 55(1)(d), 58, 59 and 60 of the Rome Statute which clearly demonstrate the Court's wish to retain the principle of liberty and to do so in compliance with the principle of presumption of innocence.⁴⁴
47. The Defence submits that this is consistent with the law applicable before the Court, pursuant to article 21(3) of the Statute. Indeed, the Court's application and interpretation of the law must be consistent with internationally recognised human rights.
48. The above principle is founded on many international legal instruments including: article 9(3) of the International Covenant on Civil and Political Rights which provides that "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody", as well as paragraph 6(1) of the United Nations Standard Minimum Rules for Non-custodial Measures and paragraph 39 of the Body of Principles for the Protection of all Persons under any Form of Detention

⁴³ ICC-01/05-01/08-2918, para.5.

⁴⁴ See the Draft Statute for an International Criminal Court, International Law Commission 1996, article 11.

or Imprisonment which state that provisional detention is a measure of last resort.⁴⁵

49. Furthermore, detention must be based on the principles of necessity and proportionality. A custodial measure is proportional only if it is appropriate, necessary, and remains reasonable in degree and scope relative to its set objective. Procedural measures should never be capricious or excessive. Where a more flexible measure other than detention would suffice, such a measure must be adopted.⁴⁶

3.1. Significant change: the Applicant's family ties (spouse and children) in Belgium evidenced by a certificate from the Belgian authorities dated 25 November 2013

50. In the present case, the Applicant, who was never given a hearing by the Prosecutor, was nevertheless available to comply with any court summons. He has a well-established law firm in Brussels. He has a clientele which he cannot neglect. The centre of all his social, emotional and economic interests is in Belgium where he has his nuclear family (his dear wife and his three beloved minor children)⁴⁷ as well as his two parents living with him (elderly sick father and elderly mother). His friends and property are all in Brussels. The Defence submits to the Chamber that the applicant has a young family with minor children who are still at a tender age. The Applicant's arrest and detention has profoundly unsettled his wife and children. Removal of the Applicant from his family home will likely lead to the long-term disruption of family life for his children to whom he is much attached through the extra-curricular activities he

⁴⁵ United Nations Standard Minimum Rules for Non-custodial Measures. Off. doc. UN GA A/RES/45/110 (14 December 1990) (The Tokyo Rules) Annex, para. 6(1). Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment, Off. doc. UN GA A/RES/43/173 (9 Dec. 1988) ("Principles Relating to Detention"), Annex, Principle 39.

⁴⁶ Prosecutor v. Prlic et al., *Order on Provisional Release of Berislav v Pusic*, Case N° IT-04-74-PT, T. Ch. I, 30 July 2004, para 15.; Prosecutor v. Limaj et al., *Decision on Fatmir Limaj's Request for Provisional Release*, CASE N° IT-03-66-AR65, Bench of the Appeals Chamber, 31 October 2003, para. 13; Prosecutor v. Brdjanin and Talic, *Decision on the Motion for Provisional Release of the Accused Momir Talic*, Case N° IT-99-36-T, T. Ch. II, 20 September 2002, para. 23 Prosecutor v. Mrdja, *Decision on Darko Mrdja's Request for Provisional Release*, Case N° IT-02-59-PT, T. Ch. II, 15 April 2002, para. 31; Prosecutor v. Blagojevic et al., *Decision on Request for Provisional Release of Accused Jokic*, Case N° IT-02-60-PT, T. Ch. II 28 March 2002, para 18; Prosecutor v. Hadzihasanovic et al., *Decision Granting Provisional Release to Enver Hadzihasanovic*, Case N° IT-01-47-PT, T. Ch. II, 19 December 2001, para. 8.

⁴⁷ Annex 12 Household composition.

carries out with them. The 2013 end-of-year festivities are imminent and it is customary for the Applicant to get together with his minor children. He closely monitors the sporting activities of his son who plays football. He helps his eldest daughter, aged 13 years, who has just begun her first year at secondary school, to revise her Latin course. Lastly, he dotes on his younger daughter. The Applicant's presence among his children is crucial to their multidimensional development. The Applicant's family life in Belgium and the education of his children, who are all of Belgian nationality, demonstrate the impossibility of him absconding.⁴⁸ The Applicant cannot abandon his wife, his dear children and his professional life and reputation which he has gradually and patiently established in Belgium at great sacrifice.

51. Under these circumstances, a simple summons to appear would have sufficed. The necessity of detention must be demonstrated. The case law of the European Court of Human Rights is clearly settled on this point.⁴⁹
52. In light of the foregoing, the Applicant's arrest is unjustified. The same applies to his continued detention. Considering that the Applicant is well known by all Court authorities, the Chamber could have issued him with a summons to appear in accordance with article 60(5) of the Statute.
53. Furthermore, the Applicant is totally willing to cooperate with the Chamber and the Office of the Prosecutor and does not intend to obstruct the ongoing proceedings.
54. The Chamber will not find a shred of evidence in Prosecution filings to justify the Applicant's continued detention or to prove that, were he to be granted interim release, he would obstruct or endanger the proceedings. Hypothetical fears and mere conjecture cannot constitute grounds for pre-trial or continued pre-trial detention. Detention must be founded on exhaustive grounds which are subject to strict interpretation.⁵⁰

⁴⁸ Annex 12.

⁴⁹ See in particular, *Hutchinson Reid v UK*, CEDH, 20 February 2003.

⁵⁰ European Court of Human Rights, *Smirnova v. Russia*, Judgement of 24 July 2003, paras 58 and 59; European Court of Human Rights, *McKay v. the United Kingdom*, Judgement of 3 October 2006, paras. 30 and 41.

55. The question as to whether a person seeking interim release presents a danger to the proceedings cannot be assessed *in abstracto*; a specific danger must be clearly identified.⁵¹
56. Consequently, general considerations such as the overall security situation, the gravity of the alleged crimes, the existence of national or international contacts, or disclosure of confidential information to the accused person cannot, on their own, justify detention.⁵² In the Bemba case, the main case, general concerns were dismissed by the judge when assessing conditions for interim release.⁵³ **Moreover, it must be further emphasised that the Applicant's mandate to represent Mr Bemba in the main case was withdrawn, as of 6 December 2013.**⁵⁴

3.2. Significant change: the specific actions of the Applicant, in terms of cooperating in the investigation and proceedings after issuance of the arrest warrant.

57. The Applicant cannot evade justice or endanger the proceedings. When he appeared before the Belgian investigating magistrate, Judge Anciaux, he immediately requested to be surrendered to the Court for the purposes of cooperating in any investigation. This is evidenced by his statement before the aforementioned investigating magistrate on 25 November 2013, the date of his transfer, at his request, to The Hague.⁵⁵ He refrained from seeking any remedies before the Belgian judicial authorities to delay his transfer to the International Criminal Court.⁵⁶
58. Similarly, during his first appearance hearing on 27 November 2013, the Applicant clearly manifested his willingness to cooperate with justice and not to obstruct the proceedings.⁵⁷

⁵¹ *Prosecutor v. Talic, Decision on the motion for provisional release*, 20 September 2002, available at: <http://www.un.org/icty/brdjanin/trial/decision-e/20155759.htm>.

⁵² See in particular the Appeal Court Judgment in *Prosecutor v. Mico Stanisic* of 17 October 2005, para. 28, http://www.un.org/icty/satnistic/appeal/decision_E :051017.htm

⁵³ ICC-01/05-01/08-475, 14 August 2009, p. 27, para. 72.

⁵⁴ ICC-01/05-01/08-2918, p. 5.

⁵⁵ Annex 13, pp. 5, 6 and 7.

⁵⁶ Annex 13, pp. 5, 6 and 7.

⁵⁷ ICC-01/05-01/13-T-1-FRA, p.9, lines 5-28 and p.10, lines 1-18.

3.3. Significant change: Mr Kilolo has always operated strictly within legal circles and consequently has no network of contacts who could aid him to abscond from justice

59. The Defence also submits that the Applicant is not a politician. He has no political supporters. Since his arrest and detention in The Hague, no popular demonstrations have been organised in his support. The Applicant is only involved in law. He only practices law. He has no international network of contacts who might plan his escape and, consequently, his evasion of justice if he were released. The Applicant only operates in legal circles where, for the past 15 years, he has moved amongst lawyers and judges. Being a lawyer, the Applicant knows and appreciates the importance of appearance in court. He would never sacrifice his profession by fleeing from justice to evade a suit brought against him. All of the Applicant's contacts are recommendable people⁵⁸, mostly lawyers and judges, who would not help him to obstruct the course of justice.
60. The Applicant's wife, as the Chamber must now know, earns no income from a profession. She does not work. The Applicant is the sole breadwinner in his household. The Applicant would not be able to flee from justice under these circumstances. Quite on the contrary, the Applicant has an interest in continuing his work as a lawyer in order to be useful to both his family and to society.
61. The Defence further emphasises the fact that the Brussels Bar certified, on 25 November 2013, after issuance of the arrest warrant of 20 November 2013, that the Applicant has been a lawyer at the Brussels Bar since 1 January 1998 and a registered member of the Order since 26 June 2001.⁵⁹ On 2 December 2013, the Belgian Ministry of Justice certified that the Applicant has no prior criminal record.⁶⁰ The schools attended by the Applicant's minor children all certified on 25 November 2013 that his children are indeed studying in Belgium.⁶¹ The

⁵⁸ Annexes 1, 2, 3, 4, 5 and 14.

⁵⁹ Annex 14, Certificate from the French Order of the Bar, signed at Brussels on 25 November 2013 by the Administrative Director, Christine Weirauch.

⁶⁰ Annex 11, Copy of the criminal record of Aimé Kilolo-Musamba.

⁶¹ Annexes 15, 16 and 17, School attendance certificates for the children of Mr Aimé Kilolo-Musamba.

Belgian authorities certify that the Applicant is legally married and lives with all of his family in Belgium.⁶²

62. The Defence most respectfully requests that the Applicant be released to Belgium, a country of which he is a national, as evidenced by his passport.⁶³ In that case, the Registry would not have to undertake any negotiations with Belgium, a Schengen State which is bound to receive the Applicant who is one of its nationals and is willing to cooperate with the Court at any time.
63. Of course, it is for the Chamber to determine whether it should grant unconditional release to the Applicant or predicate his release on the conditions set out in rule 119 of the Rules of Procedure and Evidence. In the latter case, the Applicant would like to suggest a few proposals.

4. Guarantees offered by the Applicant in support of his request for interim release

64. The Chamber can rest assured that, once released, the Applicant will appear before the court and will comply with all court summonses.
65. Being domiciled near the Dutch border, in a small Dutch-speaking community located one hour and thirty minutes away from The Hague by car, the Applicant undertakes to report, once a week, to the police station closest to his family home in order to confirm his effective presence.
66. The Applicant undertakes to not step out of the territorial boundaries of Belgium and Holland since all his professional and family activities are strictly contained in these two countries.
67. The Applicant undertakes to avoid all contact with the witnesses who testified in the main case and who were cited by the Prosecutor as witnesses who have been corrupted and bribed.
68. The Applicant undertakes to reside at the family address indicated on his residence certificate.
69. The Applicant undertakes to hand over his passport to the Registry; his national identity document is already in the possession of the Registry, submitted through the detention centre management.

⁶² Annex 12, Household composition, drawn up on 25 November 2013.

⁶³ Annex 6, Belgian passport of Mr Aimé Kilolo Musamba.

70. The Applicant prays the Chamber to rule on this application without delay, pursuant to the provisions of rule 118(1) of the Rules of Procedure and Evidence.
71. Lastly, the Applicant requests for a public hearing in accordance with the provisions of the same rule 118(3) of the Rules of Procedure and Evidence.

FOR THESE REASONS

MAY IT PLEASE THE CHAMBER TO

In the main

ORDER a public hearing in accordance with the provisions of rule 118(3) of the Rules of Procedure and Evidence.

REDUCE the time limit prescribed in regulation 34(1) of the Regulations of the Court within which the Prosecutor and the other parties must submit, to the Chamber and to the Defence, their observations on the Applicant's application for interim release, in accordance with the provisions of rule 118(1) of the Rules of Procedure and Evidence which requires the Chamber to issue a decision without delay if the Applicant requests for release.

GRANT the interim release of the Applicant.

In the alternative

GRANT the Applicant's conditional release pursuant to rule 119 of the Rules of Procedure and Evidence.

AND JUSTICE SHALL BE DONE.

RESPECTFULLY SUBMITTED

[Signature]

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Mr Aimé Kilolo Musamba

Done at Denderleeuw in East Flanders (Belgium), 16 December 2013