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No.: ICC-01/05-01/13
Date: 16 September 2015

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

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

Decision on Kilolo Defence Motion for Inadmissibility of Material

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

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Amicus Curiae

REGISTRY

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Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber VII ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Articles 67(1)(b) and 69(5) and (7) of the Rome Statute ('Statute') and Rules 73, 81(1) and 103(1) of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Kilolo Defence Motion for Inadmissibility of Material'.

I. Procedural history and relief sought

1. On 10 August 2015, the defence team for Mr Kilolo ('Kilolo Defence') filed a submission ('Request') requesting that the Chamber exclude the following categories of evidence at trial (collectively, 'Challenged Materials'):
 - (i) The contents of all recorded communications relied upon by the Office of the Prosecutor ('Prosecution'), whether oral or in writing, between Mr Kilolo and his former client Mr Bemba, subject to any waiver by Mr Bemba;
 - (ii) The contents of all recorded communications relied upon by the Prosecution, whether oral or in writing, made by Mr Kilolo in his capacity as the legal representative of Mr Bemba, subject to any waiver by Mr Bemba or where a recipient third party of the communication voluntarily gives evidence of it; and
 - (iii) All materials obtained by the Prosecution related to the investigation or preparation of Mr Bemba's case.¹
2. The Kilolo Defence also requests that the Chamber confirm that Mr Kilolo is 'prohibited from disclosing the detail of any communication between him and Mr

¹ Motion on the inadmissibility of material obtained in violation of the statutory guarantee that accused and counsel be able to communicate freely and in confidence, ICC-01/05-01/13-1140, para. 62.

Bemba or matters related to the investigation or preparation of Mr Bemba's defence'.²

3. On 17 August 2015, the Prosecution responded to the Request ('Response'), submitting that it should be rejected in full.³
4. On 26 August 2015, the Kilolo Defence requested leave to reply to the Response.⁴
5. On 16 September 2015, the ADC-ICTY sought leave to submit observations as *amicus curiae* on issues it submits are related to the Request.⁵

II. Analysis

6. As preliminary matters, the Chamber does not consider it necessary to receive the additional submissions proposed in the Kilolo Defence request for leave to reply. The Chamber also does not consider that it is 'desirable for the proper determination of the case' at this stage to receive the proposed *amicus curiae* submission.⁶ The Chamber is in a position to answer the questions raised by the Request without such assistance. The Chamber therefore rejects these requests.
7. Article 69(7) of the Statute provides that:

Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

- (a) The violation casts substantial doubt on the reliability of the evidence; or
- (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

² Request, ICC-01/05-01/13-1140, para. 63.

³ Prosecution's response to the Kilolo Defence request for evidence to be excluded under article 69(7), ICC-01/05-01/13-1152.

⁴ Urgent Application for Leave to Reply to 'Prosecution's response to the "Kilolo Defence request for evidence to be excluded under article 69(7)" (ICC-01/05-01/13-1152)', ICC-01/05-01/13-1185.

⁵ Application of The Association of Defence Counsel Practicing Before the International Criminal Tribunal for the Former Yugoslavia To File an Amicus Curiae Brief on The Motion on the inadmissibility of material obtained in violation of the statutory guarantee that accused and counsel be able to communicate freely and in confidence, ICC-01/05-01/13-1256.

⁶ Rule 103(1) of the Rules.

8. Contrary to what is suggested by the Kilolo Defence,⁷ the fact that this case only concerns offences under Article 70 of the Statute has no bearing on an Article 69(7) assessment. This provision applies in Article 70 proceedings⁸ and, as held by Trial Chamber I, the ‘seriousness of the alleged crimes committed by the accused is not a factor relevant to the admissibility of evidence under Article 69(7)’.⁹
9. In accordance with Article 69(7) of the Statute, the Chamber will first consider whether the Prosecution obtained the Challenged Materials in violation of the Court’s statutory scheme or internationally recognised human rights. If such a violation is determined, the Chamber will then consider whether this violation ‘casts substantial doubt on the reliability of the evidence’ or whether the admission of the evidence ‘would be antithetical to and would seriously damage the integrity of the proceedings’.

A. Any violation of the Court’s statutory scheme

10. The Kilolo Defence argues that the Challenged Materials are privileged communications not subject to any exception in the statutory framework. As such, the Kilolo Defence submits that the Prosecution’s acquisition of these communications amounts to violations of Articles 67(1)(b) and 69(5) of the Statute and Rules 73(1) and 81(1) of the Rules.¹⁰
11. The Prosecution responds that decisions of the Single Judge,¹¹ the Presidency,¹² the Pre-Trial Chamber¹³ and a Dutch Court¹⁴ all concluded, directly or indirectly, that the Challenged Materials were obtained lawfully.¹⁵

⁷ See Request, ICC-01/05-01/13-1140, paras 40, 58-59.

⁸ See Rule 163 of the Rules.

⁹ Trial Chamber I, *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the admission of material from the “bar table”, 24 June 2009, ICC-01/04-01/06-1981, para. 44.

¹⁰ Request, ICC-01/05-01/13-1140, paras 4-13, 47-49, 60.

¹¹ *Situation in the Central African Republic*, Decision on the Prosecutor’s “Request for judicial order to obtain evidence for investigation under Article 70”, 3 February 2014, ICC-01/05-52-Red2, para. 5 (originally filed 29 July 2013).

12. Although the full scope of the Challenged Materials is not entirely clear, the Chamber understands the Kilolo Defence's argument – from the statutory violations alleged - to be that the Challenged Materials are all privileged communications. The Chamber recalls that when the Single Judge first authorised the collection of these materials, he determined that communications effected in furtherance of crime or fraud are exempted from the principle of professional privilege.¹⁶
13. The Chamber agrees with this interpretation of the law. It is recalled that this Chamber also determined that there is a crime/fraud exception to legal professional privilege.¹⁷ Moreover, the Chamber also adopted the same safeguards developed by the Single Judge to make sure no otherwise privileged communications are provided to the Prosecution. These safeguards include: (i) maintaining appointment of an independent counsel to separate privileged from non-privileged materials and (ii) having the Chamber authorise the transfer of any materials selected by this independent counsel to the parties.¹⁸
14. There is no indication in the Request that the specific safeguards adopted by the Chamber have been inadequate in isolating privileged materials which are not affected by the crime/fraud exception. As the Kilolo Defence has failed to establish that any of the Challenged Materials are privileged, the Chamber finds that no

¹² *Situation in the Central African Republic*, Decision on the urgent application of the Single Judge of Pre-Trial Chamber II of 19 November 2013 for the waiver of the immunity of lead defence counsel and the case manager for the defence in the case of The Prosecutor v Jean-Pierre Bemba Gombo, 20 November 2013, ICC-01/05-68, para.10 (reclassified on 19 March 2014).

¹³ ICC-01/05-01/13-749, para. 14.

¹⁴ See Annex 1 to Second Registry submissions related to the implementation of Decision ICC-01/05-01/13-403, 23 May 2014, ICC-01/05-01/13-424-Anx1 (decision dated 28 April 2014).

¹⁵ Response, ICC-01/05-01/13-1152, paras 4-12.

¹⁶ ICC-01/05-52-Red2, paras 3-5. See also Decision on the filing in the record of the items seized upon the searches of the person and cell of Jean-Pierre Bemba Gombo, 19 May 2014, ICC-01/05-01/13-408, page 5.

¹⁷ Decision Providing Materials in Two Independent Counsel Reports and Related Matters, 15 May 2015, ICC-01/05-01/13-947, paras 14-15.

¹⁸ Decision on 'Request concerning the review of seized material' and related matters, 9 April 2015, ICC-01/05-01/13-893-Red, paras 22-24 and page 13 (confidential version notified same day).

violation of the Statute has occurred within the meaning of Article 69(7) of the Statute.

B. Any violation of internationally recognised human rights

15. The Kilolo Defence argues that the Prosecution's acquisition of the Challenged Materials constitutes an interference with the right to privacy under international human rights law.¹⁹ In particular, the Kilolo Defence submits that, by not acting pursuant to a pre-existing regime as to how and when lawyer-client communications may be monitored, the Challenged Materials were not obtained 'in accordance with the law' as is required for interfering with the right to privacy under international human rights law.²⁰
16. The fact that international human rights law affords a right to privacy is beyond question and the Chamber is duty-bound to respect this right pursuant to Article 21(3) of the Statute.²¹ The exercise of this right may not be interfered with except 'in accordance with the law'.²² Being 'in accordance with the law' for reviewing interference with the right to privacy requires, among other things, that: (i) the measure or measures in question should have some basis in law; (ii) the law in question should be accessible to the person concerned and foreseeable as to its effects; and (iii) as regards foreseeability, the law must set forth with sufficient precision the conditions in which a measure may be applied, to enable the persons concerned – if need be, with appropriate advice – to regulate their conduct.²³

¹⁹ Request, ICC-01/05-01/13-1140, paras 24-36, 41-45, 50-51.

²⁰ Request, ICC-01/05-01/13-1140, paras 24-31, 54-56.

²¹ Art. 17 of the International Convention of Civil and Political Rights; art. 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; art. 11 of the Inter-American Convention on Human Rights; art. 21(1) of the Arab Charter on Human Rights.

²² Art. 8(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Interference with this right is subject to other requirements, such as the interference being 'necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country', but there is no argument in the Request that Mr Kilolo's rights have been violated in these respects.

²³ See European Court of Human Rights (Grand Chamber), *Khoroshenko v. Russia*, 30 June 2015, 41418/04, para. 110 (further citations therein). See also Human Rights Committee, General Comment 16, 28 September 1988, paras 3, 8 and 10; Inter-American Court of Human Rights, *Case of Tristán Donoso v. Panamá*, Judgment, 27 January 2009, paras 55-57.

17. Contrary to the arguments of the Kilolo Defence, the Chamber holds that acquisition of the Challenged Materials remains 'in accordance with the law'.
18. First, the measures taken had a basis in law. Article 70 of the Statute and Rule 165(1) of the Rules allow the Prosecution to conduct investigations with respect to offences against the administration of justice. Article 54 of the Statute authorises the Prosecution to 'collect and examine evidence' and 'take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court'.²⁴ These provisions give the Prosecution a wide mandate to collect evidence relevant to its investigations. It is also to be emphasised that the Prosecution did not exercise this mandate in the absence of judicial authority, but duly applied to the Single Judge for authorisation to obtain the Challenged Materials under Article 57(3)(a) of the Statute. Judicial authorisation of this kind is a main safeguard when considering infringement of the rights of the accused.
19. Second, the Chamber fails to see why these powers of the Prosecution and Pre-Trial Chamber, contained in publicly available statutory provisions, did not provide a sufficiently accessible and foreseeable legal basis for obtaining the Challenged Materials.²⁵
20. Third, the Chamber considers that the legal provisions utilised in obtaining the Challenged Materials, though broad, were sufficiently precise that Mr Kilolo was able to regulate his conduct. It would be patently unreasonable for someone to conclude that judges of this Court could never authorise the monitoring of lawyer-client communications falling under the crime/fraud privilege exception. Indeed, as the Kilolo Defence itself notes, there can be 'no principled objection to an

²⁴ Article 54(1)(b) and (3)(a) of the Statute.

²⁵ See also ICC-01/05-52-Red2, para. 4 (identifying other international jurisdictions which have applied the crime/fraud privilege exception).

interference with lawyer-client privilege in circumstances where the client and/or lawyer are using such communications to perpetrate crime'.²⁶

21. As any interference with Mr Kilolo's right to privacy was 'in accordance with the law', the Chamber finds that the Challenged Materials were not obtained in violation of internationally recognised human rights.

III. Conclusion

22. As set out above, the Kilolo Defence fails to establish any violation of the Statute or internationally recognised human rights. As such, the categories of evidence identified in the Request will not be declared inadmissible at trial.
23. The Chamber also notes the Kilolo Defence request for the Chamber to confirm that Mr Kilolo is 'prohibited from disclosing the detail of any communication between him and Mr Bemba or matters related to the investigation or preparation of Mr Bemba's defence'.²⁷ The scope of the requested confirmation is not clear, and the alleged prohibition is misstated to the extent that the Kilolo Defence has misapprehended which communications qualify as privileged.²⁸ Should the Kilolo Defence seek to use any communications in its defence which fall under Rule 73(1) of the Rules and are not covered by any exception, it may seize the Chamber with a request for specific relief.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Kilolo Defence request for leave to reply;

REJECTS the relief sought in the *amicus curiae* request brought by the ADC-ICTY; and

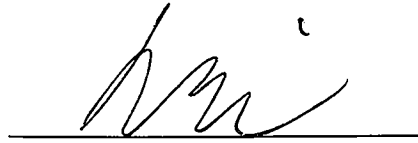
REJECTS the relief sought in the Request.

²⁶ Request, ICC-01/05-01/13-1140, para. 18.

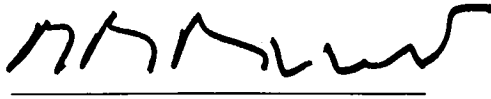
²⁷ Request, ICC-01/05-01/13-1140, para. 63.

²⁸ See Section II.A above.

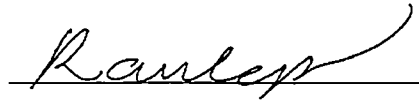
Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Raul Pangalangan

Dated 16 September 2015

At The Hague, The Netherlands