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No. ICC-01/05-01/13 OA 12

Date: 23 December 2015

THE APPEALS CHAMBER

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Silvia Fernández de Gurmendi
Judge Howard Morrison
Judge Piotr Hofmański
Judge Péter Kovács

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

**Decision on the “Requête en appel de la défense de monsieur Aimé Kilolo
Musamba contre la décision de la Chambre de première instance VII du
17 novembre 2015.”**

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

The Office of the Prosecutor

Ms Fatou Bensouda
Ms Helen Brady

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi
Mr Steven Sacha Powles

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Gosnell
Mr Arthur Vercken De Vreuschmen

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Roland Azama Shalie Rodoma

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

REGISTRY

Registrar

Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the matter of the “Requête en appel de la défense de monsieur Aimé Kilolo Musamba contre la décision de la Chambre de première instance VII du 17 novembre 2015.” dated 23 November 2015 and registered on 24 November 2015 (ICC-01/05-01/13-1491-Conf-Exp),

Renders the following

DECISION

1. The Registrar is directed to reclassify as public the document ICC-01/05-01/13-1495-Conf-Exp.
2. Mr Aimé Kilolo Musamba shall file a public redacted version of the document ICC-01/05-01/13-1491-Conf-Exp by 16.00 on Monday, 4 January 2016.
3. The “Requête en appel de la défense de monsieur Aimé Kilolo Musamba contre la décision de la Chambre de première instance VII du 17 novembre 2015.” is dismissed *in limine*.

REASONS

I. PROCEDURAL HISTORY

1. On 20 November 2013, Judge Cuno Tarfusser, acting as the single judge of Pre-Trial Chamber II (hereinafter: “Pre-Trial Chamber”), issued a warrant of arrest against, *inter alia*, Aimé Kilolo Musamba (hereinafter: “Mr Kilolo”).¹ The Pre-Trial Chamber also ordered the Registrar to request that any relevant States “locate and freeze [Mr Kilolo’s] assets”.²

¹ “Warrant of arrest for Jean-Pierre BEMBA GOMBO, Aimé KILOLO MUSAMBA, Jean-Jacques MANGENDA KABONGO, Fidèle BABALA WANDU, and Narcisse ARIDO”, ICC-01/05-01/13-1-US-Exp (hereinafter: “Warrant of Arrest”); a confidential redacted version was registered on 27 November 2013 (ICC-01/05-01/13-1-Red-Conf); a public redacted version was registered on 5 December 2013 ([ICC-01/05-01/13-1-Red2-tENG](#)); original French version registered on 28 November 2013 ([ICC-01/05-01/13-1-Red2](#)).

² [Warrant of Arrest](#), p. 16.

2. Following receipt of this request for cooperation, the authorities of the Kingdom of Belgium seized a bank account that was in Mr Kilolo's name.³
3. On 4 November 2014, the Pre-Trial Chamber issued a decision⁴ (hereinafter: "Decision of 4 November 2014") in which it rejected Mr Kilolo's request⁵ to lift the seizure of the bank account and to allow Mr Kilolo to withdraw funds therefrom.⁶
4. On 1 December 2014, the Pre-Trial Chamber rejected Mr Kilolo's request⁷ for leave to appeal the Decision of 4 November 2014, as well as a further request for a partial lifting of the bank account seizure⁸ (hereinafter: "Decision Denying Leave to Appeal").
5. On 11 November 2014, the Pre-Trial Chamber, *inter alia*, confirmed certain charges for offenses against the administration of justice against Mr Kilolo.⁹
6. On 30 January 2015, the Presidency constituted Trial Chamber VII (hereinafter: "Trial Chamber") and referred the present case to it.¹⁰ Judge Bertram

³ See Annex 3 to "Registry's transmission of a report from the Kingdom of Belgium concerning the freezing of assets belonging to Mr. Aimé Kilolo Musamba", 4 February 2014, ICC-01/05-01/13-152-Conf-Exp-Anx3.

⁴ "Decision on the 'Requête de la Défense de M. Aimé Kilolo Musamba visant une décision urgente relative à la mainlevée sur le gel de ses avoirs'", 4 November 2014, ICC-01/05-01/13-743-Conf-Exp; a public redacted version was registered on 1 December 2014 ([ICC-01/05-01/13-743-Red](#)).

⁵ "Requête de la Défense de M. Aimé Kilolo Musamba visant une décision urgente relative à la mainlevée sur le gel de ses avoirs", 28 August 2014, ICC-01/05-01/13-653-Conf-Exp.

⁶ [Decision of 4 November 2014](#), p. 7.

⁷ "Aimé Kilolo Musamba's Notice of Appeal against the decision of the Single Judge ICC-01/05-01/13-743-Conf-Exp entitled 'Decision on the 'Requête de la Défense de M. Aimé Kilolo Musamba visant une décision urgente relative à la mainlevée sur le gel de ses avoirs''", 10 November 2014, [ICC-01/05-01/13-747](#) (hereinafter: "Mr Kilolo's Application to appeal before the Pre-Trial Chamber").

⁸ "Decision on Mr Kilolo's 'Notice of appeal against the decision of the Single Judge ICC-01/05-01/13-743-Conf-Exp' dated 10 November 2014 and on the urgent request for partial lifting of the seizure on Mr Kilolo's assets dated 24 November 2014", 1 December 2014, [ICC-01/05-01/13-773](#).

⁹ "Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute", [ICC-01/05-01/13-749](#), pp. 47-55.

¹⁰ Presidency, "Decision constituting Trial Chamber VII and referring to it the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*", [ICC-01/05-01/13-805](#). Judge Bertram Schmitt replaced Judge Robert Fremr. See Presidency, Corrigendum to the "Decision replacing a judge in Trial Chamber VII", 18 March 2015, [ICC-01/05-01/13-854-Corr](#). On 24 August 2015, the Presidency assigned Judge Marc Perrin de Brichambaut and Judge Raul Pangalangan to Trial Chamber VII. See "Urgent Decision replacing two judges in Trial Chamber VII", [ICC-01/05-01/13-1173](#).

Schmitt was subsequently elected to act as single judge on behalf of the Trial Chamber.¹¹

7. On 16 June 2015, Mr Kilolo requested that the Trial Chamber, *inter alia*, partially or fully lift the bank account seizure or alternatively authorize the regular withdrawal of certain funds from the account in order to support his family¹² (hereinafter: “Request”).

8. On 28 July 2015, Mr Kilolo filed an addendum to the Request¹³ and, on 2 October 2015, Mr Kilolo filed a further motion, requesting that the Trial Chamber decide as a matter of urgency on the Request and the addendum thereto.¹⁴

9. On 17 November 2015, the Trial Chamber rendered a decision¹⁵ (hereinafter: “Impugned Decision”), in which it rejected the Request in its entirety and ordered Mr Kilolo to file public redacted versions of the Request, the addendum thereto and the further motion of 2 October 2015.¹⁶

10. On 23 November 2015, Mr Kilolo filed a notice of appeal against the Impugned Decision¹⁷ (hereinafter: “Notice of Appeal”). Mr Kilolo did not request leave to appeal the Impugned Decision from the Trial Chamber.

¹¹ “Decision Notifying the Election of a Presiding Judge and Single Judge”, 25 August 2015, [ICC-01/05-01/13-1181-Corr](#).

¹² “Requête de la défense aux fins de levée du gel des avoirs de Monsieur Aimé Kilolo Musamba”, registered on 17 June 2015, ICC-01/05-01/13-1014-Conf-Exp, p. 14; a public redacted version was registered on 1 December 2015 ([ICC-01/05-01/13-1014-Red](#)).

¹³ “Addendum à la ‘Requête de la défense aux fins de levée du gel des avoirs de Monsieur Aimé Kilolo Musamba’ (ICC-01/05-01/13-1014-Conf-Exp)”, ICC-01/05-01/13-1108-Conf-Exp; a public redacted version was registered on 1 December 2015 ([ICC-01/05-01/13-1108-Red](#)).

¹⁴ “Requête urgente de la Défense relative à la demande en mainlevée sur le gel des avoirs de monsieur Aimé Kilolo Musamba”, ICC-01/05-01/13-1334-Conf-Exp; a public redacted version was registered on 1 December 2015 ([ICC-01/05-01/13-1334-Red](#)).

¹⁵ “Decision on the ‘Requête de la défense aux fins de levée du gel des avoirs de Monsieur Aimé Kilolo Musamba’”, ICC-01/05-01/13-1485-Conf-Exp; a public redacted version was registered 17 November 2015 ([ICC-01/05-01/13-1485-Red](#)).

¹⁶ [Impugned Decision](#), p. 11.

¹⁷ “Requête en appel de la défense de monsieur Aimé Kilolo Musamba contre la décision de la Chambre de première instance VII du 17 novembre 2015.”, registered on 24 November 2015, ICC-01/05-01/13-1491-Conf-Exp.

II. PRELIMINARY ISSUE: CLASSIFICATION OF THE NOTICE OF APPEAL AND THE DECISION ON THE PRESIDING JUDGE

11. The Appeals Chamber notes that Mr Kilolo classified the Notice of Appeal as confidential *ex parte* available only to Mr Kilolo and the Registrar on the basis that it refers to Mr Kilolo's private and family life as well as to documents that have received the same classification.¹⁸

12. In this respect, the Appeals Chamber notes that public redacted versions of the Decision Denying Leave to Appeal and the Impugned Decision were issued and that both the Pre-Trial and Trial Chambers ordered Mr Kilolo to file public versions of his underlying submissions, with any information of a personal and confidential nature redacted.¹⁹ Given that the information relevant to the present matter is already publicly available, the Appeals Chamber finds that there is no reason to maintain the confidential, *ex parte* classification of the Notice of Appeal. Under these circumstances and pursuant to regulation 23 *bis* (3) of the Regulations of the Court, Mr Kilolo is ordered to file a public redacted version of the Notice of Appeal by 16.00 on Monday, 4 January 2016. For these same reasons, the Registrar is ordered to reclassify as public the "Decision on the Presiding Judge of the Appeals Chamber in relation to the 'Requête en appel de la défense de monsieur Aimé Kilolo Musamba contre la décision de la Chambre de première instance VII du 17 novembre 2015.'"²⁰

III. MERITS

13. The Appeals Chamber notes that Mr Kilolo does not identify the legal basis for his Notice of Appeal. Instead, he refers to the following statement made by the Pre-Trial Chamber in the Decision Denying Leave to Appeal and appears to argue that article 21 (3) of the Statute requires that there be a right to directly appeal decisions relating to the seizure of a person's assets, despite the absence of such a provision in the Statute.²¹

CONSIDERING that the absence of a specific provision vesting an accused with the right to appeal a Pre-trial Chamber decision relating to the seizure of assets, coupled with the interpretive obstacles to the inclusion of such a decision

¹⁸ Notice of Appeal, para. 17.

¹⁹ See [Decision Denying Leave to Appeal](#), pp. 4, 7; [Impugned Decision](#), p. 11.

²⁰ ICC-01/05-01/13-1495-Conf-Exp.

²¹ Notice of Appeal, para. 19.

among those suitable to meet the requirements for leave to appeal, results in *de facto* depriving an accused of any remedy against this type of decisions;

CONSIDERING that this result might be hard to reconcile with the need that the Statute be construed consistently with internationally recognized human rights pursuant to article 21(3) of the Statute;

CONSIDERING accordingly that, whilst rejecting Mr Kilolo's Application, the Chamber takes the view that it is desirable that the issue be brought before the Appeals Chamber and, accordingly, sees no obstacle for Mr Kilolo to directly submit his "Notice of Appeal" to the Appeals Chamber, thereby prompting its determination of the matter[.]²²

14. The Appeals Chamber recalls its jurisprudence relevant to the scope of the internationally recognised human right to appeal a first-instance decision, which it has summarized as follows:

[I]n the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" [...], [the Appeals Chamber] held that the "decisions that are subject to appeal are enumerated in articles 81 and 82 of the Statute. There is nothing in Part 8 [of the Statute] to suggest that a right to appeal arises except as provided thereunder". On that basis, the Appeals Chamber found that "the Statute defines exhaustively the right to appeal" and further held that the limitation of the right to bring interlocutory appeals to those subjects listed in article 82 of the Statute was fully consistent with internationally recognised human rights, which require that only the convicted person has a right to appeal final decisions on conviction or sentence.²³

²² [Decision Denying Leave to Appeal](#), pp. 5- 6.

²³ *The Prosecutor v. Germain Katanga*, "Decision on the admissibility of the appeal against the 'Decision on the application for the interim release of detained Witnesses DRC-D02-P0236, DRC-D02-P0228 and DRC-D02-P0350'", 20 January 2014, [ICC-01/04-01/07-3424](#) (OA 14), para. 28, referring to the *Situation in the Democratic Republic of the Congo*, "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, [ICC-01/04-168](#) (OA 3), paras 35, 38-39. *See also ibid.*, footnote 43, citing article 14 (5) of the [International Covenant on Civil and Political Rights](#), General Assembly Resolution 2200A (XXI), U.N. Document A/6316 (1966) entered into force 23 March 1976, 999 United Nations Treaty Series 171, which reads: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law"; article 8 (2) (h) of the [American Convention on Human Rights](#), "Pact of San José, Costa Rica", signed on 22 November 1969, entered into force on 18 July 1978, 1144 United Nations Treaty Series 17955, which reads: "2. Every person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: [...] h. the right to appeal the judgment to a higher court"; article 2 (1) of [Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms](#) (22 November 1984), European Treaty Series No. 5, reads: "1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised shall be governed by law".

15. The Appeals Chamber considers that Mr Kilolo does not identify, nor does the Appeals Chamber find, an internationally recognised human right to appeal decisions related to the seizure of an accused's assets that requires the Appeals Chamber to expand its appellate jurisdiction beyond that stipulated in the Statute. The Appeals Chamber observes that the Pre-Trial Chamber informed Mr Kilolo that decisions related to the seizure of an accused's assets "*per se* fall outside the scope of article 82(1)(d) of the Statute",²⁴ which was apparently misleading in its broad terms for Mr Kilolo. However, the Appeals Chamber observes that this was said in the context of wholly different issues²⁵ than those presently raised in Mr Kilolo's Notice of Appeal.²⁶ In this regard, the Appeals Chamber considers that Mr Kilolo has not adequately substantiated his argument that the issues he now seeks to directly appeal to the Appeals Chamber do not fall within the scope of article 82 (1) (d) of the Statute. In the view of the Appeals Chamber, the proper avenue to bring the issues raised in Mr Kilolo's Notice of Appeal to the Appeals Chamber is by requesting leave to appeal from the relevant first-instance Chamber pursuant to article 82 (1) (d) of the Statute.

16. Finally, the Appeals Chamber notes that the Pre-Trial Chamber expressed that its above finding on the scope of article 82 (1) (d) of the Statute "might be hard to reconcile with the need that the Statute be construed consistently with internationally recognized human rights pursuant to article 21(3) of the Statute"²⁷ and that it therefore "[saw] no obstacle for Mr Kilolo to directly submit his 'Notice of Appeal' to the Appeals Chamber".²⁸ The Appeals Chamber recalls that that article 82 (1) (d) of the Statute vests power in the Pre-Trial and Trial Chambers to certify appealable issues

²⁴ [Decision Denying Leave to Appeal](#), p. 5.

²⁵ [Mr Kilolo's Application to appeal before the Pre-Trial Chamber](#), paras 12-16, wherein Mr Kilolo sought leave to appeal the issues of whether an accused's assets may be frozen for the purposes of securing those assets: (1) in case the accused were subsequently convicted under article 70 of the Statute and punished by a fine; (2) in case the accused were subsequently found to be ineligible for legal assistance; and (3) whether a seizure of assets violates an accused's right to be presumed innocent prior to conviction.

²⁶ Notice of Appeal, paras 20-22, wherein Mr Kilolo raises the following two grounds of appeal: (1) whether the Single Judge erred in his interpretation of article 93 (1) (k) of the Statute by holding that this provision does not require a link between the assets seized and the crimes or offenses alleged against the accused under the Statute; and (2) whether the Single Judge erred by considering that the freezing of Mr Kilolo's assets did not constitute an interference with his human right to a normal family life, including his responsibilities to provide financially for his family as head of household.

²⁷ [Decision Denying Leave to Appeal](#), p. 6.

²⁸ [Decision Denying Leave to Appeal](#), p. 6.

and to determine whether appellate resolution will materially advance the proceedings.²⁹ In addition, article 21 (3) of the Statute is applicable to all Chambers, not only the Appeals Chamber. Accordingly, should a first-instance Chamber find itself in a situation similar to that encountered by the Pre-Trial Chamber, the Appeals Chamber considers that the matter falls within the ambit of article 82 (1) (d) of the Statute. Therefore, it is for that Chamber to exercise its discretion to broadly interpret the two prongs of article 82 (1) (d) of the Statute if it considers it necessary due to human rights considerations under to article 21 (3) of the Statute.

17. In light of the above, the Appeals Chamber considers that the present matter is not properly before it and dismisses Mr Kilolo's Notice of Appeal *in limine*.

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



Judge Sanji Mmasenono Monageng
Presiding Judge

Dated this 23rd day of December 2015

At The Hague, The Netherlands

²⁹ See *Situation in the Democratic Republic of the Congo*, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, 13 July 2006, [ICC-01/04-168](#) (OA 3), para. 20, wherein the Appeals Chamber stated that “the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue. By the plain terms of article 82 (1) (d) of the Statute, a Pre-Trial or Trial Chamber may certify such a decision on its own accord”; *The Prosecutor v. Laurent Gbagbo*, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled ‘Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute’”, 16 December 2013, [ICC-02/11-01/11-572](#) (OA 5), para. 63, wherein the Appeals Chamber held that “it is for the Pre-Trial or Trial Chamber to determine not only whether a decision may be appealed, but also to what extent”.