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Pénale
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**International
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Court**

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TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

***THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

Public Document

**Prosecution's response to the Kilolo Defence request for evidence to be excluded
under article 69(7)**

Source: The Office of the Prosecutor

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

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I. Introduction

1. Kilolo's request to exclude material and communications related to his defence of the Accused Bemba in the Main Case ("Request")¹ fails to meet the requirements of article 69(7). It should be dismissed.

II. Submissions

2. Article 69(7) 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.

3. The Request fails to meet the requirements of the above provision, which forms the sole legal basis for the filing.²

A. The Request fails to satisfy the first limb of article 69(7)

4. To exclude evidence under article 69(7), the Defence must first establish that material and communications related to Kilolo's defence of the Accused Bemba in the Main Case were obtained in violation of the Statute or of international human rights standards. Although the overwhelming majority of the Request focuses on this limb,³ the submissions are unpersuasive, as they have been on each previous occasion.⁴

¹ ICC-01/05-01/13-1140.

² See, Request, paras.3(v), 22-23, 46.

³ See, Request, paras.3-36, 46-56, 60-61.

⁴ See, e.g., ICC-01/05-01/13-600-Conf-Corr2, paras.22-40.

5. The Prosecution has already outlined its opposition to these arguments. It refers the Chamber to paragraphs 11 to 18 of its response to Defence submissions made during the 2014 confirmation of charges.⁵

6. Moreover, different Chambers have considered and rejected Kilolo's arguments. During the confirmation of charges, the respective Defences for the Accused Bemba, Kilolo, Mangenda and Arido argued that intercepted phone communications involving either Kilolo or Mangenda, or both, collected prior to the lifting of their immunities by the Presidency of the Court were illegal and, thus, inadmissible.⁶

7. In the 11 November 2014 confirmation decision, the Pre-Trial Chamber denied the requests:

Recalling the relevant previous decisions of the Single Judge and the Presidency, the Chamber finds that the interception of the telephone communications and the appointment of Independent Counsel were not unlawful. Consequently, it does not consider that the evidence obtained as a result of the interception has been "obtained by means of a violation of [the] Statute or internationally recognized human rights" within the meaning of article 69(7) of the Statute. Therefore, the Chamber will take this evidence into account if it considers it to be relevant and of sufficient probative value.⁷

8. On 29 July 2013, the Single Judge granted the Prosecution's initial request to collect logs and recordings of telephone calls placed or received by Kilolo in the following terms:

Although not explicitly stated in the Statute or the Rules, the fact that communications effected in furtherance of crime or fraud provide an

⁵ ICC-01/05-01/13-646-Conf.

⁶ ICC-01/05-01/13-749, para.13.

⁷ ICC-01/05-01/13-749, para.14.

exception to the principle of professional privilege is broadly accepted both at the national and the international level.

[...]

Based on the evidence submitted by the Prosecutor in support of her First and Second Requests, the Single Judge is satisfied that there are sufficient elements warranting access by the Prosecutor to those recordings which might have been instrumental to the furthering of the scheme under investigation, in spite of the fact that such recordings involve conversations to counsel for the Accused.⁸

9. Thus, communications related to Kilolo's defence of Bemba in the Main Case were intercepted at the behest of a judicial order, after the consideration of evidence that *prima facie* suggested Kilolo's unlawful conduct. The Single Judge's decision was implemented in accordance with Dutch law.⁹ And the Independent Counsel assigned to review the communications for privileged material performed his mandate under the supervision of a Dutch investigating judge and within the premises of Dutch courts.¹⁰

10. The Presidency also ruled implicitly on the propriety of obtaining communications related to Kilolo's defence of Bemba in the Main Case when it approved the waiver of counsel immunity necessary for the issuance and execution of the arrest warrant against them.¹¹ It held that "[t]he legitimate functions to be performed by counsel and persons assisting them do not extend to the types of conduct depicted in articles 70(l)(b) and article 70(l)(c) of the Rome Statute, which the persons concerned are alleged to have undertaken".¹²

⁸ ICC-01/05-52-Red2, para.5.

⁹ ICC-01/05-T-2-CONF-ENG ET, 30 August 2013, p.12, lns.20-23.

¹⁰ ICC-01/05-64-Conf-Red, para.4; ICC-01/05-T-2-CONF-ENG-ET, 30 August 2013, p.9, ln.20-p.11, ln.25; ICC-01/05-T-3-CONF-ENG ET, 25 September 2013, p.2, ln.7-p.5, ln.15.

¹¹ ICC-01/05-68.

¹² ICC-01/05-68, para.10.

11. Finally, The Hague District Court ruled, on 28 April 2014, that communications related to Kilolo's defence of Bemba in the Main Case were obtained lawfully:

[T]he attorney-client privilege of counsel may be breached in the exceptional circumstance that a counsel is himself suspected of a serious criminal offence, such as witness tampering. The court agrees with the public prosecutor's view that the authorizations for phone taps were granted lawfully and that the searches and seizures were carried out lawfully. In view of the importance of counsels' attorney-client privilege, in that context the court attaches importance to the method adopted by the examining magistrate, who always carefully weighed the attorney-client privilege and the importance of finding the truth in the selection of tapped calls and seized documents. The examining magistrate sought the advice of the Dean, consulted an independent expert on confidentiality to listen to and select – incriminating and exculpatory – tapped calls and even allowed the complainants to comment on the documents that were seized.¹³

12. In sum, in addition to the Prosecution's objection, chambers of four different constitutions have concluded directly or indirectly that material, particularly communications, related to Kilolo's defence of Bemba in the Main Case were obtained lawfully.

B. The Request fails to satisfy the second alternative limb of article 69(7)

13. Even if, *arguendo*, material and communications related to Kilolo's defence of Bemba in the Main Case were obtained by means of a violation of the Statute or international human rights standards – which the facts do not bear out – the Kilolo Defence must further establish that: (i) the violation casts substantial doubt on the

¹³ ICC-01/05-01/13-424-Anx1, p.9.

reliability of the evidence; or (ii) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

14. The Request establishes neither. It makes no submissions on the first alternative: how the alleged violation of Kilolo's rights casts substantial doubt on the reliability of the evidence.

15. Nor does the Request explain in any detail how the admission of the evidence would be "antithetical to and would seriously damage the integrity of the proceedings". Instead, the Request implicitly acknowledges that it does not meet that bar, by arguing that article 69(7) should be interpreted differently in article 70 cases. Thus, the Request accepts that "within the context of a trial for very serious international crimes, the corresponding human rights violation must be serious before evidence is excluded",¹⁴ but that "the balancing exercise may be differently calibrated within the context of a trial under Article 70 of the Statute".¹⁵

16. This submission should not be entertained. There is no support in the Court's statutory framework or its jurisprudence that article 69(7) should be applied differently in different types of cases. In fact, the opposite is true: the Trial Chamber in the *Lubanga* case held, in the context of admitting evidence from the bar table, that "the seriousness of the alleged crimes committed by the accused is not a factor relevant to the admissibility of evidence under Article 69(7)".¹⁶

17. Further, the rationale for the high threshold for the inadmissibility of evidence under article 69(7) outlined in the same¹⁷ and other¹⁸ decisions applies equally in this case. There is no indication that, in the balancing exercise, "the need to respond to

¹⁴ Request, para.39.

¹⁵ Request, para.40.

¹⁶ ICC-01/04-01/06-1981, para.44.

¹⁷ ICC-01/04-01/06-1981, paras.35-48.

¹⁸ ICC-01/04-01/06-803-tEN, paras.83-89; ICC-01/04-01/10-465-Red, para.61.

victims' and the international community's expectations"¹⁹ should be given less weight because this is an article 70 case. On the contrary, admitting this lawfully obtained evidence in a trial against persons who allegedly attempted to deny justice to the hundreds, potentially thousands, of victims of the crimes charged in the Main Case is consistent with both the Statute and with the fundamental purpose of this Court.²⁰

18. The Request fails to make any credible submission why the second alternative limb is satisfied, and there is no coherent legal or principled justification offered for modifying the test for inadmissibility under article 69(7) in this case.

III. Relief Requested

19. For the reasons above, the Prosecution requests the Chamber to reject the Request.



Fatou Bensouda, Prosecutor

Dated this 17th Day of August 2015
At The Hague, The Netherlands

¹⁹ ICC-01/04-01/06-803-tEN, para.86.

²⁰ See, Preamble of the Statute.