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No: **ICC-01/05-01/13**
Date: **21 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

**Application for Leave to Appeal “Decision on Kilolo Defence Motion for
Inadmissibility of Material”.**

Source: Defence for Mr. Aimé Kilolo Musamba

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

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**Unrepresented Applicants
(Participation/Reparation)**

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I. INTRODUCTION

1. On 16 September 2015, the Trial Chamber issued 'Decision on Kilolo Defence Motion for Inadmissibility of Material' (the 'Decision').¹
2. This is an application for leave to appeal the Decision pursuant to Article 82(1)(d) of the Statute and Rule 155 of the Rules of Procedure and Evidence.
3. This application is made on the basis that:
 - (i) The Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings and/or the outcome of the trial; and
 - (ii) Immediate resolution by the Appeals Chamber may materially advance the proceedings.
4. The reasons for this request are set out below.

II. PROCEDURAL HISTORY

5. The procedural history is set out in full in the Trial Chamber's Decision² and, accordingly, not here repeated.

¹ ICC-01/05-01/13-1257, 16 September 2015.

² ICC-01/05-01/13-1257, paras. 1 to 5. The only additional issue being the 'Request for Leave to Submit Amicus Curiae Observations pursuant to Rule 103 of the Rules of Procedure and Evidence' submitted by Michael Karnavas on 31 August 2015 (ICC-01/05-01/13-1205).

III. SUBMISSIONS

6. The importance of the issues arising in this application for leave to appeal are clear:

- (i) Every advanced legal system throughout the world recognises the essential importance of safeguarding lawyer/client privilege in ensuring fair and proper proceedings.
- (ii) Derogation from this important principle is permitted in only certain, very limited, circumstances.
- (iii) All involved in litigation, but especially lawyers, must have forewarning as to when and how authorities will derogate for this important and fundamental principle.
- (iv) There can and should be no post-hoc ratification of procedures to regulate interference with the privilege.
- (v) Failure to have in place a pre-existing ICC framework of when and how legal privilege may be interfered with renders ICC practice short of acceptable international standards.
- (vi) This failure has direct impact on the conduct of litigation and the fairness of proceedings. It renders a fair trial difficult, if not impossible.
- (vii) Any evidence obtained outside a pre-existing framework should be excluded.

7. It is respectfully submitted that the Decision does not sufficiently uphold these important principles and the protection enshrined in Article 67(1)(b) of the Statute.
8. Consideration of the issues raised on this appeal are of importance, not just to the participants of this case, but, as demonstrated by the applications to intervene as *Amicus Curiae*, to all lawyers and accused appearing before the ICC.
9. Determination of the issues by the highest judicial body of the Court is therefore apposite.

The Decision significantly affects the fair and expeditious conduct of proceedings

10. The Defence complained:

- (i) That the ICC regime, unlike those at some other international tribunals, contains no explicit crime/fraud exception; and
- (ii) That the absence of any pre-existing framework means the interference with lawyer/client communications is not 'in accordance with the law'.

11. The two issues are clearly intertwined.

12. In finding that Article 67(1)(b) of the Statute contains an inherent crime/fraud exception the Trial Chamber cited and agreed with the determination of the Single Judge.³

13. The Trial Chamber also referred to the Prosecution's reliance upon the decisions of the Single Judge, the Presidency, the Pre-Trial Chamber and a Dutch Court in concluding that the challenged materials were obtained lawfully.⁴

14. Two points arise from this:

First: it is plain that consideration of the proper scope of legal professional privilege has vexed every stage of these proceedings. It is an issue at the very core of this case.

Second: while there have been a plethora of decisions on the issue, there has been no authoritative decision from the Appeals Chamber.

15. It is apparent from the drafting history of Rule 73 of the Rules of Procedure and Evidence that some States expressed concern as to whether the crime/fraud exception was compatible with Article 67(1)(b) of the Statute.⁵ Other States felt it should be open to the Court not to recognise any privilege outside the bounds of a professional relationship.⁶

³ ICC-01/05-01/13-1257, paras. 12 and 13.

⁴ ICC-01/05-01/13-1257, para. 11.

⁵ *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* edited by Roy Lee, pp. 359-360.

⁶ *Ibid.*

16. As a compromise to both views sub-paragraph 1 of Rule 73 refers to both the protection enshrined in Article 67(1)(b) and communications made in the ‘context of a professional relationship’. In so doing, the drafters left it to the ICC to develop the scope and extent of the privilege through its practice.
17. If a crime/fraud exception is to be read into both the Statute and Rules, apparently against the views of at least some States participating in the drafting process, it is submitted that this should happen at the highest level: either by all judges participating in the formulation a Code of Practice or by the Appeals Chamber.
18. In finding that the ICC regime is sufficiently foreseeable, and that it sets forth with sufficient precision the conditions in which a measure may be applied, the Trial Chamber stated: “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 exception”.⁷ The Defence respectfully agrees, and as set out and cited by the Trial Chamber in the Decision, ‘there can be no principled objection’ to an interference with lawyer/client privilege when used to perpetrate crime.⁸
19. However, that an interference with privilege *might* be allowed does not answer the important questions of: when, how, in what circumstances and with what protections the interference may be exercised. It is respectfully submitted that these are all essential components in rendering an

⁷ ICC-01/05-01/13-1257, para. 20.

⁸ Ibid.

interference ‘accessible and foreseeable’ and which are all absent from the ICC regime.

20. Of most concern is that there is no clear articulation of the requisite threshold of suspicion of criminal conduct that must be reached, presented and endorsed, before an interference with the privilege can take place.

21. It is accepted that Article 54 authorises the Prosecution to conduct investigations with respect to the administration of justice and ‘take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court’.⁹ But Article 54 does not articulate the modalities and protections that must be in place before there can be an interference with a privilege as sacrosanct as that of lawyer/client privilege.

22. Conclusive resolution of these important issues before trial will plainly affect both the fair and expeditious conduct of proceedings. Evidence that the Prosecution seeks to rely upon could be excluded and the issues for trial narrowed considerably.

The Decision could affect the outcome of the trial

23. If leave is granted and the appeal ultimately successful, reversal of the Decision may lead to the exclusion of evidence found to have been obtained in violation of both the Statute and international human rights standards. This could, self-evidently, have an impact on the outcome of the trial.

⁹ ICC-01/05-01/13-1257, para. 18.

Immediate resolution by the Appeals Chamber will materially advance the proceedings

24. For the reasons set out above, if the Decision is reversed and evidence excluded, the proceedings will be materially advanced.

25. Moreover, the circumstances of this case are particularly unusual – namely - the prosecution of a lawyer and his former client for conduct alleged to have taken place during the course of proceedings that have not yet been concluded or determined. This presents all parties with unique and complex challenges.

26. Some of these challenges arise as result of the complex interplay between continuing professional obligations upon one accused and the legal protection of the privilege vesting in another.

27. The Defence for Mr Kilolo does not underestimate and is grateful to the Trial Chamber for its indication that the Defence may seize the Chamber with a request for specific relief regarding reliance on material falling under Rule 73(1) protection.¹⁰

28. Authoritative guidance from the Appeals Chamber on the scope and operation of lawyer client privilege before the ICC will have a material impact on how such principles may be applied in relation to any request for specific relief raised in these trial proceedings.

¹⁰ ICC-01/05-01/13-1257, para. 23.

IV. RELIEF REQUESTED

29. The Defence for Mr Kilolo respectfully requests leave to appeal Trial Chamber's "Decision on [its] Motion for Inadmissibility of Material".



Maître Paul Djunga Mudimbi
Lead Counsel for Mr. Aimé Kilolo Musamba



Mr. Steven Powles
Associate Counsel for Mr. Aimé Kilolo Musamba

Dated this 21 September 2015,
At The Hague, The Netherlands.