

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13

Date: 31/08/2015

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

**Request for Leave to Submit Amicus Curiae Observations pursuant to Rule 103
of the Rules of Procedure and Evidence**

Source: Michael G. Karnavas

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

The Office of the Prosecutor

Counsel for the Defence of Mr Jean-Pierre Bemba Gombo

Melinda Taylor

Counsel for the Defence of Mr Aimé Kilolo Musamba

Paul Djunga

Steven Powles

Counsel for the Defence of Jean-Jacques Mangenda Kabongo

Christopher Gosnell

Arthur Vercken De Vreuschmen

Counsel for the Defence of Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Azama Shalie Rodoma

Counsel for the Defence of Mr Narcisse Arido

Charles Achaleke Taku

Philippe Larochelle

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section Other

I. Introduction

1. Michael G. Karnavas, List Counsel, pursuant to Rule 103 of the Rules of Procedure and Evidence (“Rules”) hereby seeks leave to submit observations as *amicus curiae* on questions of attorney-client privilege raised in “Decision on Defence Request for Leave to Appeal the ‘Decision Providing Materials in Two Independent Counsel Reports and Related Matters.’”¹ Observations will aid the Trial Chamber on the issues of when the attorney-client privilege can be lifted and the use of communications between an attorney and a client. In particular, it is important that the crime-fraud exception, which is not explicitly provided for in the Rules, be properly defined. Attorney-client communications disclosed pursuant to the Trial Chamber’s decision will likely be the subject of a bar table motion either before or during trial. Accordingly, a decision by the Trial Chamber on these issues will have important implications for those who represent clients before the ICC, and will contribute to the development of international criminal law.

II. Procedural background

2. The ICC Office of the Prosecutor (“OTP”) received an anonymous tip concerning potential defence misconduct in the *Bemba* case, and sought access to phone call logs from the detention center.² The Single Judge then ordered the Registry to provide the OTP with a complete log of telephone calls and non-privileged communications.³
3. Based on the information provided by the Registry, the OTP submitted that the logs and recordings strongly supported evidence of a scheme to bribe

¹ *Prosecutor v. Bemba Gombo et al.*, ICC-01/05-01/13, Decision on Defence Request for Leave to Appeal the “Decision Providing Materials in Two Independent Counsel Reports and Related Matters,” 12 July 2015.

² *Situation in the Central African Republic*, ICC-01/05-44-Red, Prosecution Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70, 12 February 2014.

³ *Situation in the Central African Republic*, ICC-01-05-46-Conf-Exp, Decision on the “Prosecutor’s request for judicial assistance to obtain evidence for investigation under Article 70,” 8 May 2013.

witnesses.⁴ Accordingly, the OTP sought judicial authorization to collect intercepts from the Belgian and Dutch authorities.⁵

4. On 29 July 2013, the Single Judge found that the OTP had sufficient evidence showing that the communications may have been instrumental in the alleged scheme, and thus fell under a crime-fraud exception to the attorney-client privilege.⁶ The Single Judge applied the crime-fraud exception set out by the Special Tribunal for Lebanon (“STL”) Rule 163(iii): “the client intended to perpetrate a crime and the communications were in furtherance of that crime.”⁷ The Single Judge then appointed an Independent Counsel to identify portions that might be relevant for the limited purpose of the OTP’s investigation and to deliver them to the OTP.⁸
5. On 15 May 2015, Trial Chamber VII assessed two reports by the Independent Counsel filed in September 2014 and March 2015,⁹ and analyzed the relevance and potentially privileged character of the documents addressed by the Independent Counsel’s reports. Trial Chamber VII found that “communications effected in furtherance of a crime or fraud are exempted from the principle of professional privilege,” and considered that it had the discretion to define the scope of materials covered by the crime-fraud exception.¹⁰ When assessing the relevance of the materials selected by the Independent Counsel, the Chamber considered “relevance to the case generally.”¹¹ The Chamber found several communications identified by the

⁴ *Situation in the Central African Republic*, ICC-01-05-51-Conf-Exp, Request for judicial order to obtain evidence for investigation under Article 70, 19 July 2013.

⁵ *Id.*

⁶ *Situation in the Central African Republic*, ICC-01/05-52-Red2, Decision on the Prosecutor's "Request for judicial order to obtain evidence for investigation under Article 70", 29 July 2013, paras. 3-5.

⁷ *Id.*, para. 4.

⁸ *Id.*, pp. 6-7.

⁹ *Prosecutor v. Bemba Gombo et al.*, IT-01/05-01/13-947, Decision Providing Materials in Two Independent Counsel Reports and Related matters, 15 May 2015, para. 3.

¹⁰ *Id.*, paras. 14-15.

¹¹ *Id.*, para. 17.

Independent Counsel to be relevant and non-privileged and ordered these communications to be provided to the other parties.¹²

6. The Bemba Defence requested leave to appeal Trial Chamber VII's decision confirming the existence of a crime-fraud exception to the attorney-client privilege on two grounds:
 - a. Whether the "communications effected in furtherance of crime or fraud are exempted from the principle of professional privilege," as set out in Rule 73(1) of the Rules; and
 - b. Whether the principle of open justice requires that the Independent Counsel's analysis concerning certain relevant and non-privileged documents should be transmitted to the parties.¹³
7. On 21 July 2015, Trial Chamber VII denied the Bemba Defence's request for leave to appeal the decision.¹⁴ The Chamber stated that even if it erred in defining the crime-fraud exception, this would not necessarily and automatically mean that material erroneously provided to the OTP would be inadmissible.¹⁵ In a footnote,¹⁶ Trial Chamber VII referred to Article 69(7) of the Statute, stating that "the Chamber is required to declare evidence obtained in violation of the statute inadmissible only if the further criteria under sub-rules (a) and (b) are met."¹⁷

¹² *Id.*, paras. 22, 23, 32, 33, 35, 36, 37.

¹³ *Prosecutor v. Bemba Gombo et al.*, ICC-01/05-01/13, Defence Leave to Appeal Decision Providing Materials in Two Independent Counsel Reports and Related Matters, ICC-01/05-01/13-947, 25 May 2015, para. 1.

¹⁴ *Prosecutor v. Bemba Gombo et al.*, ICC-01/05-01/13-1096, Decision on Defence Request for Leave to Appeal the Decision Providing Materials in Two Independent Counsel Reports and Related Matters, 21 July 2015.

¹⁵ *Id.*, para. 9.

¹⁶ *Id.*, fn. 13.

¹⁷ The sub-rules (a) and (b) read: (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.

III. Specific issues to be addressed

8. Mr. Karnavas respectfully requests to submit observations on the following issue:

When can the attorney-client privilege be lifted and what use can be made of communications between an attorney and a client?

In addressing this issue, the following sub-issues and sub-points will be considered:

- a. *What is the attorney-client privilege?*
 - i. What is the definition of attorney-client privilege?
 - ii. Why is the attorney-client privilege important?
 - iii. How does the attorney-client privilege fit into the hierarchy of privileges at the ICC and other tribunals?
 - iv. What communications are covered by the attorney-client privilege (only those between a client and his lawyers, or also those between a client and all members of his defence team)?
- b. *What exceptions, if any, apply to the attorney-client privilege?*
- c. *When does the crime-fraud exception apply to attorney-client privilege?*
 - i. When is a communication “in furtherance of” a crime or fraud?
 - ii. To what types of communications does the crime-fraud exception apply?
- d. *Can privileged communications (i.e. attorney-client communications to which the crime-fraud exception does not apply) be used as evidence at trial or in other proceedings?*

- i. If so, how should the use of these materials be restricted to best protect their confidentiality?
- ii. What measures should be taken when attorney-client communications are transmitted to the Prosecution or other parties but subsequently are determined to be privileged?

IV. The Applicant

9. As ICC List Counsel, and a lawyer who regularly represents clients before international criminal tribunals, Mr. Karnavas has a legitimate legal interest¹⁸ in the determination of these issues and is well placed to offer observations that would be of assistance to the Chamber.
10. Rule 103 permits the Trial Chamber to grant leave to individuals to file *amicus curiae* observations. In *Katanga*, Trial Chamber II permitted Göran Sluiter and Flip Schüller, who were representing detained witnesses in asylum proceedings before the Dutch authorities, to file *amicus curiae* observations on the possible duration of the Dutch asylum proceedings to the Chamber.¹⁹ Trial Chamber II found it was appropriate for counsel to submit the proposed observations, which would “enable the Chamber to be more fully informed about the nature and especially duration of the Dutch asylum proceedings.”²⁰
11. Mr. Karnavas’s expertise in international criminal law and experience representing clients will assist the Chamber in becoming more fully informed of the nature and application of the attorney-client privilege. Practicing law for over 32 years, Mr. Karnavas has appeared before State and Federal courts

¹⁸ *Prosecutor v. Bagosora*, ICTR-96-7-T, Decision on the Amicus Curiae Application by the Government of the Kingdom of Belgium, 6 June 1998, p. 3. Trial Chamber II noted: “[T]he general definition of amicus curiae does not call for impartiality on the part of the filing party. Rather it takes into consideration that such briefs are filed by a party, not part of the action, but one with strong interests in or views on the subject matter before the court.”

¹⁹ *Prosecutor v. Katanga*, ICC-01/04-01/07, Order authorizing the submission of observations, 7 March 2013.

²⁰ *Id.*, para. 12.

in the United States of America, the International Criminal Tribunal for the former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”), the Extraordinary Chambers in the Courts of Cambodia (“ECCC”), and the ICC. Currently, Mr. Karnavas is Lead Counsel at the ICTY for Dr. Jadranko Prlić and International Co-Counsel at the ECCC for Mr. Meas Muth in Case 003. Previously, he represented Colonel Vidoje Blagojević at the ICTY as Lead Counsel during the pre-trial and trial phases, and was International Co-Counsel at the ECCC for Mr. Ieng Sary in Case 002. He also has represented Mr. Shefqet Kabashi before the ICTY, and a protected witness testifying in *Prosecutor v. Ruto and Sang* before the ICC.

12. Mr. Karnavas serves as one of the two permanent members of the ICC Disciplinary Appeals Board. He also is the Chairman of the Committee tasked with drafting a constitution establishing a bar association for all ICC List Counsel.²¹

13. Mr. Karnavas also has served as President and Vice President of the Association of Defence Counsel Practising before the ICTY (“ADC-ICTY”), the independent professional association for ICTY defence counsel recognized by the Registrar pursuant to Rule 44 of the ICTY Rules of Procedure and Evidence.²² The ADC-ICTY supports the function, efficiency, and independence of defence counsel practicing before the ICTY; has the authority to offer advice to the President, Judges, and the Registrar in relation to the ICTY Rules of Procedure and Evidence; and oversees the performance and

²¹ At the close of the ICC Registrar’s conference of experts held on 23 and 24 March 2015, List Counsel agreed to form a Drafting Committee to draft a constitution for a bar for all counsel before the ICC. See Michael G. Karnavas, *Establishment of a Victims and Defence Office at the ICC*, 31 March 2015, <http://michaelgkarnavas.net/blog/2015/03/31/icc-victims-and-defence-office/>; Michael G. Karnavas, *Musing on the ICCBA Draft Constitution*, 6 May 2015, <http://michaelgkarnavas.net/blog/2015/05/06/musing-iccba-draft-constitution/>.

²² Under Rule 44(A) of the ICTY Rules of Procedure and Evidence, “counsel shall be considered qualified to represent a suspect or accused if the counsel satisfies the Registrar that he or she is...(iii) a member in good standing of an association of counsel practicing at the Tribunal recognised by the Registrar.”

professional conduct of defence counsel.²³ Mr. Karnavas also has served on the ADC-ICTY Rules, Training, and Amicus Committees. He has previously filed *amicus curiae* briefs before the ECCC and has appeared as *amicus curiae* on behalf of the ADC-ICTY.²⁴

14. For the past 22 years, Mr. Karnavas has taught trial advocacy skills to lawyers and law students; has lectured extensively on international criminal law and procedure; has authored trial advocacy practice manuals, articles, and book chapters on international criminal law and procedure; and has been engaged in a variety of development projects in Europe and Asia dealing with issues related to the Rule of Law.

V. Admissibility of the request

15. Rule 103(1) provides that a Chamber may grant leave to a person to submit observations on any issue the Chamber deems appropriate if the Chamber “considers it desirable for the proper determination of the case.” The ICC Appeals Chamber has held that it is in the Chamber’s discretion to grant leave

²³ Association of Defence Counsel Practising before the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Constitution, 23 October 2004, Art. 2.

²⁴ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Meas Muth’s Request to Intervene in Case 002/02 to Address the Use of Torture-Tainted Evidence at the ECCC or, in the alternative, Request or Leave to Submit *Amicus Curiae* Brief on the Use of Torture Tainted Evidence at the ECCC & Submission in Intervention or *Amicus Curiae* Brief on the Use of Torture Tainted Evidence at the ECCC, 26 May 2015; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/SC, Case 003 Defence Request to Intervene in the Appeal Proceedings in Case 002/01 for the Purpose of Addressing the Applicability of JCE III at the ECCC or, in the alternative, Request for Leave to Submit *Amicus Curiae* Brief on JCE III Applicability, 12 January 2015; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Defence Request for Leave to File Amicus Curiae Brief & Amicus Curiae Brief Concerning the Statute of Limitations for Grave Breaches of the Geneva Conventions, 14 May 2014; *Prosecutor v. Brđanin*, IT-99-36-A, Decision on Motion to Dismiss Ground 1 of the Prosecutor’s Appeal, 5 May 2005, p. 5; *Prosecutor v. Brđanin*, IT-99-36-A, Amicus Brief of Association of Defence Counsel – ICTY, 5 July 2005 (The ADC-ICTY was also invited to participate during the appeal oral arguments, with Mr. Karnavas, as President of the ADC-ICTY, appearing to argue the *amicus curiae* brief on 8 December 2006); *Prosecutor v. Brđanin*, IT-99-36-A, Decision on Association of Defence Counsel Request to Participate in Oral Argument, 7 November 2005; *Prosecutor v. Brđanin*, IT-99-36-A, Appeal Judgement, 3 April 2007, paras. 24-27.

to any state, organization or person to submit observations.²⁵ Determination of the admissibility of an application depends on whether the Chamber will be assisted in its “proper determination” of the issues in the case.²⁶

16. Rule 103 mirrors the corresponding provisions from other international criminal tribunals.²⁷ The ICTY, ICTR, and Special Court for Sierra Leone (“SCSL”) have permitted third party interventions where these Tribunals considered that there was reason to believe that submissions would assist the court to reach the right decision.²⁸ The SCSL has found that whether it is desirable to receive such assistance does not mean that the assistance must be “essential,” and that discretion will be exercised in favor of an applicant where there is real reason to believe that written submissions will help the Chamber reach the right decision on the issue before it.

VI. Arguments in support of the request

17. *Amicus curiae* observations by Mr. Karnavas concern a present issue in the *Bemba Gombo et al.* case and would not delay the proceedings. Although the Trial Chamber has denied the Bemba Defence’s request to appeal its decision,²⁹ the Bemba Defence has indicated that the materials analyzed by the Independent Counsel are likely to be the subject of a bar table motion either

²⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06 (OA11), Decision on “Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence,” 22 April 2008, para. 8.

²⁶ *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on Inviting Observations from the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict, 18 February 2008, para. 7.

²⁷ ICTY Rules of Procedure and Evidence, Rule 74; ICTR Rules of Procedure and Evidence, Rule 74; SCSL Rules of Procedure and Evidence, Rule 74; ECCC Internal Rules, Rule 33.

²⁸ See e.g., *Prosecutor v. Prlić et al.*, IT-04-74-T, Order Appointing an Amicus Curiae, 3 July 2009; *Prosecutor v. Akayesu*, ICTR-96-4-T, Order Granting Leave for Amicus Curiae to Appear, 12 February 1998; *Prosecutor v. Kallon*, SCSL-2003-07, Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File Amicus Curiae brief and to Present Oral Arguments, 1 November 2003.

²⁹ *Prosecutor v. Bemba Gombo et al.*, ICC-01/05-01/13-1096, Decision on Defence Request for Leave to Appeal the Decision Providing Materials in Two Independent Counsel Reports and Related Matters, 21 July 2015.

before or during trial.³⁰ Receiving Mr. Karnavas's observations now would not require any additional time before the Trial Chamber deliberates on the issue.

18. Trial Chamber VII's decision³¹ raises novel legal issues of evidence and professional responsibility, having a wide-reaching effect on the legal profession. Although the SCSL Trial Chamber found the existence of a crime-fraud exception to attorney-client privilege in *Bangura et al.*, it did not apply that exception because it found that the counsel in question did not have an existing attorney-client relationship with the accused.³² It appears that no international tribunal has concretely addressed the scope and effect of the crime-fraud exception, or the use of attorney-client communications as admissible evidence. Additionally, the parties have not fully addressed the issues proposed to be addressed. Not having been provided with all information gathered, the Defence teams have only been able to speculate as to what use the Chamber may make of any privileged materials.

19. A future decision by the Trial Chamber will create precedent by providing guidance on the use of such material, affecting many current and potential attorney-client relationships at the ICC and beyond. Though judicial decisions are operative only between parties to a case and only regarding that particular case, in reality, judicial decisions resound beyond particular cases and can,

³⁰ *Prosecutor v. Bemba Gombo et al.*, ICC-01/05-01/13, Defence Leave to Appeal Decision Providing Materials in Two Independent Counsel Reports and Related Matters, ICC-01/05-01/13-947, 25 May 2015, para. 45.

³¹ *Prosecutor v. Bemba Gombo et al.*, ICC-01/05-01/13-1096, Decision on Defence Request for Leave to Appeal the Decision Providing Materials in Two Independent Counsel Reports and Related Matters, 21 July 2015.

³² See *Prosecutor v. Bangura et al.*, SCSL-2011-02-T, Decision on Prosecutor's Request for Subpoena, 28 July 2012, paras. 18-19. *Prosecutor v. Bangura et al.*, SCSL-2011-02-T, Decision on Prosecutor's Additional Statement of Anticipated Trial Issues and Request for Subpoena in Relation to the Principle Defender, 3 September 2012. The Trial Chamber found the accused's preliminary inquiry with Counsel did not establish an attorney-client relationship. However, it found that Article 17(c)(ii) of the Code of Conduct permitted Counsel to reveal confidential information when necessary to prevent a criminal offence.

and regularly do, impact other cases. For example, it is clear that the Single Judge and Trial Chamber in the present case found the SCSL Trial Chamber decision in *Bangura et al.* persuasive, considering the novelty of the issues presented.³³

20. There is no ulterior motive³⁴ underlying this request for leave to file *amicus curiae* observations. Mr. Karnavas has no standing in the proceedings and no interest in assisting any party in this particular case.³⁵ This request is solely concerned with addressing legal issues that have far-reaching implications for all List Counsel.

21. At the SCSL, the Appeals Chamber observed that an intervening party may have a direct interest in the issue, “insofar as this decision will be likely to create a precedent affecting [it] in the future[,]”³⁶ or an indirect interest, “in the sense that a State or NGO or campaigning group may wish to have the law clarified or declared or developed in a particular way.”³⁷ In permitting three international legal organizations to act as *amici curiae* regarding the validity of an amnesty, the SCSL Appeals Chamber observed: “the proper determination of the case refers, quite simply, to the Court reaching the

³³ *Situation in the Central African Republic*, ICC-01/05-52-Red2, Decision on the Prosecutor's “Request for judicial order to obtain evidence for investigation under Article 70”, 29 July 2013, para. 5.

³⁴ See *Prosecutor v. Kallon*, SCSL-2003-07-PT, Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File Amicus Curiae Brief and to Present Oral Submissions, 1 November 2003 (“SCSL *Kallon* Decision on Application by Legal Organizations”), para. 7, in which the Appeals Chamber granted the applicants leave to intervene in the case orally and in writing, stating: “We do not consider that [the applicants] seek leave to intervene for any ulterior motive, for example to provide a publicity platform for themselves, or to use the Court’s privileges and immunities to put declarations on the record or to promote some hidden agenda.”

³⁵ See *Situation in the Republic of Kenya*, ICC-01/09, Decision on Application for Leave to Submit Amicus Curiae Observations, 18 January 2011, para. 6.

³⁶ SCSL *Kallon* Decision on Application by Legal Organizations, para. 4.

³⁷ *Id.*

decision which most accords with the end of justice – i.e. that gets the law right.”³⁸

22. The issues presented in this request go to the heart of the attorney-client relationship and Counsel’s ethical duties toward his or her client. As List Counsel and a member of the ICC Disciplinary Appeals Board, Mr. Karnavas has a legitimate interest in the Trial Chamber’s consideration of the issues presented. These issues affect all List Counsel, not just those representing the Defence. Given the centrality of the attorney-client privilege to a List Counsel’s representation of his or her client, the disclosure of privileged or formerly privileged communications at trial will have a profound impact on how List Counsel diligently, robustly, and ethically represent their clients.
23. This is an issue that may likely come before the ICC Disciplinary Board and Disciplinary Appeals Board when ruling on potential lawyer misconduct. For example, a Chamber may order a lawyer to turn over particular communications that it has deemed not to be privileged because a crime-fraud exception to attorney-client privilege applies. If the lawyer disobeys the Chamber’s order, citing the attorney-client privilege, the ICC disciplinary bodies must know the parameters of the attorney-client privilege and the crime-fraud exception, and concretely what evidence it may rely on when making a ruling.
24. No party will be prejudiced by the filing of an *amicus* brief on these issues, as Rule 103(2) provides that the parties have the right to respond to any *amicus* brief submitted should this request be granted. An *amicus curiae* brief will assist the Trial Chamber in defining the contours of the attorney-client privilege, exceptions to that privilege, application of the crime-fraud

³⁸ *Id.*, paras. 5, 12.


exception, and the admissibility and use during proceedings of communications between an attorney and client.

VII. Conclusion and Relief

25. For the forgoing reasons, the Applicant requests that Trial Chamber VII grant him leave to submit *amicus curiae* observations on these issues pursuant to Rule 103.

Dated: 31 August 2015
The Hague, The Netherlands

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'M. G. Karnavas', is written over a horizontal line.

Michael G. Karnavas