

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No: ICC-01/05-01/13

Date: 26 August 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***

CONFIDENTIAL

Urgent Application for Leave to Reply to 'Prosecution's response to "Kilolo Defence Motion on Scope of Evidence and Allegations" (ICC-01/05-01/13-1157-Conf)'

Source: Defence for Aimé Kilolo Musamba

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

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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Defence**

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**Victims Participation and Reparations
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I. INTRODUCTION

1. This is an application for leave to reply pursuant to Regulation 24(5) of the Regulations of Court.
2. It has been held that a Chamber may grant leave to reply when the moving party has shown "good cause".¹ This has been said to exist when new and distinct issues of law and/or fact are raised in the response and where the importance and potential effect of the issues necessitate additional submissions being made.²

II. SUBMISSIONS

3. On 17 August 2015 the Prosecution filed 'Prosecution's response to "Kilolo Defence Motion on Scope of Evidence and Allegations"'.³
4. It is respectfully submitted that the problems raised in the original Defence Motion are less than straightforward and all parties will benefit from measured reflection on the permitted scope of the allegations arising from the Pre-Trial Chamber's Decision on the Confirmation of Charges. It is therefore unhelpful for the Prosecution to say that the Defence Motion 'defies logic',³ makes 'erroneous assumptions',⁴ and 'misunderstands the meaning of "false testimony"'.⁵

¹ See e.g. *Prosecutor v. Bemba*, Decision on the Defence's Request for Leave to Reply on the Motion for Provisional Release dated 24 November 2008, 27 November 2008, ICC-01/05-01/08-294, para.3: "Having considered the Application, the Single Judge is of the opinion that the Defence has shown good cause to grant leave to reply to the Prosecutor's Response".

² See e.g. *Prosecutor v. Mbarushimana*, Decision on the Prosecution's request for leave to reply to the "Defence Response to Prosecution's Request for the Review of Potentially Privileged Material", ICC-01/04-01/10-61, 24 February 2011; *Prosecutor v. Katanga & Ngudjolo*, Decision on the Application of the Defence for Germain Katanga to file a reply (regulation 24 of the Regulations of the Court), 27 March 2009, ICC-01/04-01/07-1004- tENG.

³ Prosecution's response to "Kilolo Defence Motion on Scope of Evidence and Allegations", 17 August 2015, ICC-01/05-01/13-1157-Conf, para. 3.

⁴ Para. 3 of Prosecution's Response.

⁵ Para. 6 of Prosecution's Response

5. Clarification of the issues raised in the Defence Motion before trial will be of immense help to all parties, including the Prosecution, in establishing the case that must be made/responded to and the concomitant permitted scope of evidence that can be presented at trial.
6. The Prosecution response *is* helpful in that it expands upon and clarifies their view of the rationale behind the Pre-Trial Chamber's Decision on the Confirmation of Charges. While grateful to the Prosecution for this clarification, we accept that it is ultimately for the Trial Chamber to determine whether the Prosecution's interpretation is correct.
7. The point that the Prosecution make in their Response that was not expressly set out or contained in the Pre-Trial Chamber's Decision on the Confirmation of Charges is that the determination of whether an offence of 'false testimony' has been committed depends on the *subjective*, rather than the *objective*, accuracy of the testimony and facts.⁶
8. Thus, it appears that, in the Prosecution's view, the offence of presenting false witnesses pursuant to Article 70(1) will be made out in this case if, *inter alia*:

Requirement 1: The witness concerned *subjectively* believes that they lied on oath and deliberately attempted to deceive the Trial Chamber by giving evidence they *subjectively* knew to be false; and

Requirement 2: That the accused had a *subjective* belief that the evidence of the witness was actually false.

⁶ Paras. 4 and 6 of Prosecution's Response.

9. If that interpretation is correct, it may well be possible for the Trial Chamber in this case to determine the issues arising under Article 70 without forming any view as to the underlying accuracy or otherwise of the evidence given by the witness on issues pertaining to the Main Case.
10. It is noted, however, that the Pre-Trial Chamber, certainly stated that, for the purposes of article 70(1)(a), that a third person may only be prosecuted as an accessory under article 25(3)(b)-(d), with the additional third requirement of it being shown “that the witness’s testimony was objectively false”.⁷
11. It is respectfully submitted that the Prosecution’s articulation of their understanding of the Pre-Trial Chamber’s Decision on the Confirmation of Charges is a new and distinct issue of fact/law in that it expands upon what the Pre-Trial Chamber actually said in the Decision. Moreover, it is an issue at the core of this case in that it establishes the permissible scope of allegations and evidence that may be relied upon in support.
12. If the Trial Chamber is of the view that further Defence submissions in reply on this important issue will be of assistance we are of course ready to expand upon the points made in our original Motion.

III. RELIEF SOUGHT

1. We respectfully ask that the Trial Chamber grant leave to reply pursuant to Regulation 24(5) of the Regulations of Court.

⁷ See Pre-Trial Chamber, Decision on Confirmation of Charges, 11 November 2014, ICC-01/05-01/13-749 para. 28.



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Co-counsel for Mr. Aimé Kilolo Musamba

Dated this 26 August 2015,
At The Hague, The Netherlands