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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

**Urgent Application for Leave to Reply to 'Prosecution's response to the "Kilolo
Defence request for evidence to be excluded under article 69(7)" (ICC-01/05-01/13-
1152)'**

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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(Participation/Reparation)**

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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 Moreover, good cause may be shown where facts have been misrepresented.³

II. SUBMISSIONS

3. On 17 August 2015 the Prosecution filed ‘Prosecution’s response to the Kilolo Defence request for evidence to be excluded under article 69(7)’.
4. The thrust of the Prosecution response is that similar such applications have previously been dismissed by the Single Judge, Dutch Court, the Presidency, and the Pre-Trial Chamber.
5. Leave is requested to respond to this assertion as it is incorrect in two material respects:

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 Redacted Order on the defence Application for Leave to Reply to the “Prosecution's Response to the 'Defence Request for a Temporary Stay of Proceedings' and to the 'Defence Request for an Oral Hearing'”, 16 February 2012, ICC-02/05-03/09-294-Red, para. 6(iv).

First: The argument made in the Defence Motion is that the interference with lawyer/client privilege is unlawful/in breach of rights in this case because (i) it is not provided for in the Statute; and (ii) in the absence of any pre-existing clear and readily accessible framework, steps taken by the Prosecutor were not 'in accordance with the law' for the purposes of Article 8(2) of the ECHR. This latter point has certainly not been fully considered by any of the Single Judge, Dutch Court, Presidency or Pre-Trial Chamber.

Second: While there have been previous decisions on the issue, it has never been determined on an *inter-partes* basis. The Single Judge determined the issue initially on an *ex parte* basis, only receiving submissions from the Prosecution. In dismissing the issue, the Pre-Trial Chamber relied on the decision of the Single Judge (which, again, had been determined on an *ex parte* basis). The Dutch Court did not, and nor could it, determine the legality of the ICC's request in terms of compliance with ICC procedure. Finally, the determination of the Presidency was only in relation to the lifting of immunity. Thus, the specific points raised in the Defence Motion were not in issue and therefore not considered.

6. The issues raised in the Defence Motion are of the utmost importance to the admissibility of some of the core evidence in this case. They are also of immense importance to the question of interference with privileged communications at the ICC more generally.
7. Given the paucity of contested, *inter-partes*, argument on this important issue, the Trial Chamber is respectfully asked to grant the Defence an opportunity to respond to the points raised in the Prosecution's Response.
8. Finally, the Prosecution state that the Trial Chamber 'should not entertain' the Defence submission that the seriousness of the offence is a relevant factor in considering breach of rights and remedies.⁴

⁴ Prosecution Response paras. 15 and 16.

9. It is of note that jurisprudence of both the European Court of Human Rights⁵ and the Appeals Chamber of the ICTR⁶ indicates, however, that the relative seriousness of an offence (or otherwise) is a relevant factor when considering the appropriate remedy for a breach of rights.
10. If granted leave to reply the Defence can expand upon this potentially important issue.

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.



Paul Djunga Mudimbi
Counsel for Mr. Aimé Kilolo Musamba



Steven Powles
Co-counsel for Mr. Aimé Kilolo Musamba

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

⁵ *Jalloh v Germany* (2007) 44 EHRR 32 at [71] – the Grand Chamber intimated that the ‘due regard must be had to the seriousness of the offence in issue’ when considering what official misconduct constituted inhuman and degrading treatment under art. 3.

⁶ *Barayagwiza v The Prosecutor* ‘Decision’, 3 November 1999 – The Appeals Chamber noted the seriousness of charges (at para. 106). And further in Decision (Prosecutor’s Request for Review or Reconsideration) 31 March 2000. The Prosecution highlighted the need for ‘proportionality’ of violation vis a vis prosecuting serious crime (at para. 22)