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No: **ICC-01/05-01/13**
Date: **10 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

**Kilolo Defence Response to “Prosecution’s Urgent Motion for Clarification
of Paragraph 23 of the “Directions on the Conduct of the Proceedings””.**

Source: Defence of Mr. 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)**

The Office of Public Counsel for Victims

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**Victims Participation and Reparations
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I. Introduction

1. The Single Judge issued “Directions on the conduct of the proceedings” on 2 September 2015.¹
2. The Directions stipulated, *inter alia*, that “[i]f the witness who gave the prior recorded testimony is expected to testify before the Chamber, any Rule 68(3) application shall be filed within 21 days of the date the witness is scheduled to appear, with any objections thereto filed no later than 10 days after notification. Such application(s) shall be filed together with copies of the prior recorded testimony.”²
3. On 7 September 2015, the Prosecution filed a request for clarification of the meaning of the above-mentioned paragraph. It requests the Trial Chamber to clarify the applicability of Rule 68 (3) or to provide guidance.³
4. On the same day, pursuant to Regulation 34 of the Regulations of the Courts (“RoC”), the Trial Chamber shortened the deadline for the filing of responses to the Prosecution’s Request to Thursday 10 September 2015.
5. The Kilolo Defence hereby submits its response.

¹ ICC-01/05-01/13-1209, 2 September 2015.

² ICC-01/05-01/13-1209, para. 23.

³ ICC-01/05-01/13-1217, 7 September 2015.

II. Request for Clarification

6. The Defence for Mr. Kilolo respectfully seeks clarification of the Prosecution's Urgent Motion for Clarification: what is the Prosecution's ultimate objective?
7. It is difficult to respond to an application in abstract. If the Prosecution wishes to admit material pursuant to Article 69(3) then that is the application that should be made, specifying the exact material that the Prosecution seeks to adduce and any justification in support.
8. Thereafter the Defence will be in a position to properly and fully respond with concrete submissions.

III. Preliminary Response

9. If and when the Prosecution makes any specific application, the Defence will respond accordingly. This response is therefore on a preliminary basis.
10. The Prosecution's Urgent Motion for Clarification expresses an understanding that paragraph 23 of the Directions, and by extension Rule 68(3), "does not apply to the alleged false testimony of the former Main Case defence witnesses called to testify in this case".⁴
11. The rationale for this, say the Prosecution, is because a 'witness complicit in a crime involving giving of false testimony cannot reasonably have the power to veto the proof of such a crime'.⁵

⁴ ICC-01/05-01/13-1217, para. 2.

⁵ Ibidem.

12. There is no proper basis for this understanding or interpretation.
13. It is worth recalling that Rule 68(3) provides that a Trial Chamber may allow the introduction of previously recorded testimony if:
- (i) The witness does not object; and
 - (ii) The Prosecutor, Defence, and Chamber have an opportunity to examine the witness during the proceedings.
14. As the Prosecution's Urgent Motion applies only to 'witnesses called to testify' in the case, the second limb of Rule 68(3) will plainly be satisfied. The witness will be available to all to examine during the proceedings. This is of special importance to the Defence so as to protect the rights of the accused as set out in Article 67(1) (e).
15. It follows that, if the witness concerned does not object, the Prosecution will most likely be able to utilise Rule 68(3) to introduce their prior recorded testimony.
16. There is only any real issue therefore if there is an objection. What the Prosecution is effectively asking in its 'Urgent Motion for Clarification' is for those objections to be dismissed in advance of considering them. That would be inappropriate.
17. It is submitted that the correct course is for the procedure as provided by Rule 68(3) and paragraph 23 of the 'Directions on the Conduct of Proceedings' be implemented. This will allow for full and proper consideration of any objections that may be raised.

IV. Relief Sought

18. The Defence respectfully requests the Trial Chamber to dismiss the Prosecution's Urgent Motion for Clarification and to direct the Prosecution to abide by the procedures set out by the Single Judge in the pre-existing 'Directions on the Conduct of Proceedings'.

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



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



Dated this 10 September 2015,
At The Hague, The Netherlands.