

**Cour
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**International
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Court**

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TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

***THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

**Confidential Document
with
Confidential Annex A**

**Prosecution's Response to the Kilolo Defence's Request for Reconsideration
of the Decision on the «*Requête aux fins d'obtenir la communication des
coordonnées des témoins D-2 et D-3* » ICC-01/05-01/13-1045-Conf**

Source: The Office of the Prosecutor

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

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I. Introduction

1. The Office of the Prosecutor ("Prosecution") opposes reconsideration of Trial Chamber VII ("Chamber")'s Decision denying the Kilolo Defence's request to obtain contact information for witnesses D-2 and D-3, Prosecution Witnesses P-0260 and P-0245, respectively, in this case¹ ("Reconsideration Request").² The Reconsideration Request fails on the law and the facts, and should be dismissed.

II. Confidentiality

2. This filing and its Annex are classified as "Confidential", as they respond to a filing of the same designation. The Prosecution does not object to the reclassification as "Public" of this filing and not the Annex.

III. Submissions

A. Reconsideration is neither required nor justified in the circumstances

3. The Reconsideration Request fails to satisfy the requisite legal threshold. Although the Court's Chambers have discretion to reconsider their own decisions on the application of a party, or *proprio motu*,³ such discretion is limited. A Chamber should only exercise its discretion to reconsider a decision where there is a clear error of reasoning, reconsideration is necessary to prevent an injustice, or the decision results in manifestly unsound consequences.⁴ Nothing raised in the Reconsideration Request establishes any of these criteria.

¹ ICC-01/05-01/13-1045-Conf ("Impugned Decision").

² ICC-01/05-01/13-1053-Conf.

³ See ICC-01/04-02/06-519, para.12 *citing* article 64(2) and (3) of the Rome Statute; ICC-01/04-01/06-2705; ICC-01/09-01/11-511, para.6; and ICC-01/09-02/11-863.

⁴ ICC-01/04-02/06-519, para.12; *see particularly*, ICC-01/04-01/06-2705, para.18.

4. Kilolo's assertions are either unsubstantiated altogether, or do not justify reconsideration, whether cumulatively or separately.⁵

5. Contrary to Kilolo's contentions, the Chamber did not err in considering P-0260's (D-2) and P-0245's (D-3) prior refusal to be contacted by the Kilolo Defence.⁶ Indeed, there could hardly be a factor more probative of the issue. Further, the Impugned Decision does not conflate the witnesses' prior refusal of the Babala Defence's request for contact and that of the Kilolo Defence.⁷ Rather, the Chamber reasonably concluded that, as the witnesses had not consented to be contacted by Kilolo previously, and recently refused contact with the Babala Defence, further inquiry by the Victims and Witnesses Unit ("VWU") as to their disposition toward the Kilolo Defence was not necessary and unlikely to produce a different result.⁸

6. Kilolo's speculation that the witnesses may have changed their minds since expressing their refusal to be contacted by the Kilolo Defence to the Prosecution,⁹ cannot reasonably support his claim that the Impugned Decision "*est donc manifestement erronée et mal fondée.*"¹⁰

⁵ See ICC-01/05-01/13-1053-Conf, para.11 (the Prosecution is a party), para.12 (the Chamber should have obtained assurances that the refusals were obtained in proper circumstances), para.13 (the Chamber should have assured that the refusals were obtained in a transparent manner, given allegations that the Prosecution has intimidated and threatened witnesses), para.14 (the Chamber should have ensured that the refusals were still valid after seven months), and para.16 (further requests by the VWU's might produce a different result).

⁶ Cf. ICC-01/05-01/13-1053-Conf, p.5.

⁷ Cf. ICC-01/05-01/13-1053-Conf, paras.17, 18.

⁸ ICC-01/05-01/13-1045-Conf, para.5.

⁹ ICC-01/05-01/13-1053-Conf, para.15.

¹⁰ ICC-01/05-01/13-1053-Conf, para.16.

B. The Impugned Decision does not result in injustice or manifestly unsound consequences

7. The circumstances in which the witnesses expressed to the Prosecution their refusal to be contacted by the Kilolo Defence, not only contradict the Reconsideration Request, but underscore the correctness of the Impugned Decision.

8. On 6 November 2014, the Prosecution advised the Kilolo Defence of P-0260's (D-2) and P-0245's (D-3) respective decisions to decline contact with the Defence.¹¹ Notwithstanding the Defence's ostensible suspicions about the refusals and unfounded allegations of prosecutorial misconduct,¹² their disclosed 5 November 2014 interview transcripts below make clear the circumstances under which they were queried and their responses. The arguments Kilolo advances in his Reconsideration Request are thus misleading, at best.¹³

9. P-0260 (D-2) was asked about the prospect of contact with the Kilolo Defence, and stated as follows in the presence of his assigned counsel:

« Intervieweur 1 : Question? OK. On va passer à une autre phase de votre interrogatoire. C'est juste concernant une question logistique. Bon, il y a la Défense qui souhaiterait vous rencontrer, donc la Défense dans le cas ... la Défense de Me KILOLO qui a émis le vœu de vous rencontrer et, en principe, nous, on doit vous demander parce que c'est votre choix, c'est à vous de décider si oui ou non vous voulez les rencontrer. Donc, c'est pour ça que nous sommes aussi là aujourd'hui pour vous demander si vous acceptez l'idée de rencontrer les avocats de la Défense de Me KILOLO.

¹¹ See email from Prosecution to the Kilolo Defence, dated 6 November 2014 at 11:50, attached at Annex A.

¹² ICC-01/05-01/13-1053-Conf, paras.13,14.

¹³ ICC-01/05-01/13-1053-Conf, paras.11-16 (contesting the circumstances of the witnesses' refusing contact with the Kilolo Defence).

Personne entendue : Monsieur le Procureur, je suis désolé, ça ne va pas être possible. Je vais vous dire pourquoi ce n'est pas possible. J'avais d'abord témoigné en tant que faux témoin lorsque Me KILOLO était l'avocat de Jean-Pierre BEMBA GOMBO. J'avais dit des choses, et le Procureur me donne une seconde chance de ne pas être impliqué dans du n'importe quoi. J'ai accepté de venir devant votre Cour pour dire la vérité et me libérer de cette situation. Je n'entends pas le rencontrer parce que si je le rencontre c'est pour dire quoi avec eux, c'est pour discuter quoi avec eux? »¹⁴

10. Similarly, P-0245 (D-3) was asked about the prospect of contact with the Kilolo Defence, and stated as follows in the presence of his assigned counsel:

« *Intervieweur 1* : ... le Bureau du Procureur peut vous rencontrer ? C'est pareil ici. Bon, dans ce cas-ci, dans le cas échéant, en fait, on parle du ... des représentants de la Défense de Me KILOLO, qui aimeraient vous rencontrer et qui nous ont donc demandé de vous demander si c'est possible. Bien sûr, c'est à vous de décider. C'est vous qui décidez, c'est vous qui avez la décision. C'est si vous voulez les rencontrer, vous le faites ; si vous ne voulez pas, vous nous dites tout simplement « Je ne souhaiterais pas les rencontrer », et... ça s'arrête là. Je vous parle en présence de votre conseil. Si vous voulez aussi vous entretenir avec votre conseil par rapport à la question, c'est votre choix, mais en l'état actuel, nous aimerions savoir si vous êtes prêt à rencontrer les représentants de la Défense de Me KILOLO.

Personne entendue : Bon, je voudrais vous dire une chose, hein.

Intervieweur 1 : Mm-mm.

Personne entendue : Je crois que ça sera impossible pour ma sécurité. Je ... je ne peux pas.

Intervieweur 1 : Mm-mm.

Personne entendue : Mm-mm.

¹⁴ CAR-OTP-0084-0472, at 0484, lns.424-437.

Intervieweur 1 : D'accord. Je comprends. Vous avez ... vous ... pour des raisons sécuritaires, vous ne souhaitez pas les rencontrer.

Personne entendue : Oui, oui, oui. Je ne peux pas.»¹⁵

11. The above transcript excerpts expose the fiction advanced in the Reconsideration Request, in suggesting *«qu'il semblerait que certains témoins aient fait l'objet d'intimidation et de menaces par le Bureau du Procureur. Dans ces circonstances, il n'était pas certain que la décision des témoins D-2 et D-3 de ne pas être contactés par la Défense de M. KILOLO avait été prise de façon éclairée»*. Moreover, the transcripts readily show that the Chamber's consideration of the futility of further VWU efforts to ascertain whether the witnesses would reverse their prior decisions was entirely reasonable.

12. Based on the above, the Reconsideration Request clearly does not establish that either the nature or effect of the Impugned Decision, or the attendant facts and circumstances justify reconsideration.

IV. Requested Relief

13. For the foregoing reasons, the Prosecution requests that the Chamber dismiss the Reconsideration Request.



Fatou Bensouda, Prosecutor

Dated this 13th Day of July 2015
At The Hague, The Netherlands

¹⁵ CAR-OTP-0085-0857, at 877, ln.707 – at 0878, ln.734.