

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 10 June 2014

PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

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

**Prosecution's Observations on the Babala Defence's Request for Access to All
Phone Conversations Involving Babala Reviewed by the Independent Counsel and
the Bemba Defence's Response to the Babala Request**

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

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I. Introduction

1. The Office of the Prosecutor ("Prosecution") hereby responds to the Babala Defence request for the Single Judge to provide all recordings and transcripts of conversations involving Babala accessed by the Independent Counsel for the purposes of this case ("Babala Request"),¹ and the Bemba Defence's response to the Babala Request ("Bemba Response").²

2. The Babala Request is not before the correct forum. The requested material is not within the custody and control of the Independent Counsel or the Court and therefore the Single Judge cannot order its release to the Babala Defence. The Babala Request should therefore be dismissed.

3. The Bemba Response does not address the procedure by which the Babala Request is made. It is therefore immaterial to the question of access to the material requested by the Babala Defence.

II. Confidentiality

4. This filing is classified as "Confidential" as it refers to confidential filings.

III. Submissions

A. The Babala Request is procedurally flawed

5. The Independent Counsel was appointed in this case to review recordings of phone conversations relative to the telephones of suspects Kilolo and Mangenda,³ which include the material referred to in the Babala Request.

6. These recordings were obtained by the Dutch authorities and provided to the

¹ ICC-01/05-01/13-459.

² ICC-01/05-01/13-469.

³ ICC-01/05-52-Red2, p. 7.

Independent Counsel to assess, both in terms of carrying out his mandate to review them for relevance to these proceedings, and to assist the Dutch authorities pursuant to Dutch law, whether they could be disclosed to the Court, given their potentially privileged content.⁴

7. Having reviewed the material in this context, phone recordings deemed relevant to the Article 70 investigation by the Independent Counsel were included in his three reports. All such records, including complete audio recordings and SMSs have been fully disclosed. To the Prosecution's knowledge, all records within the control of the Independent Counsel have thus been made available to all parties to these proceedings, including the Babala Defence.

8. To the extent the Babala Request seeks material beyond the contents of the Independent Counsel's reports,⁵ there is no reason to believe that this material is in the custody of the Independent Counsel or the Registry.

9. The Prosecution believes that the material sought beyond the contents of the Independent Counsel's reports remains under the exclusive control of the Dutch authorities, as a matter of Dutch law. The further disposition of the material sought (i.e. material not in the Court's possession) is squarely a matter for the Dutch authorities to determine at the national level. As such, the Single Judge has no authority to order the transmission of this material as requested by the Babala Defence.

10. The selection process of intercepted calls was overseen by a Dutch Investigating Judge.⁶ Consequently, any reconsideration of access to material of the nature sought in the Babala Request would have to be brought before the Dutch courts and is therefore inappropriately before the Court.

⁴ ICC-01/05-T-3-Conf-Eng, p.8.

⁵ Babala Request, para. 10.

⁶ ICC-01/05-T-3-Conf-Eng, p.2.

11. Further, the Babala Request presupposes his entitlement to access privileged information within the requested material.⁷ However, this is not the case, as Babala is not considered to be a privilege holder: (1) his communications are not considered privileged under Article 67(1)(b) of the Rome Statute ("Statute") or Rule 73 of the Rules of Procedure and Evidence ("Rules"), nor apparently, under the national laws as only Kilolo and Mangenda were deemed capable of invoking privilege with respect to the intercepted information;⁸ and (2) access to this information would require a judicial determination by the Dutch courts, which have concluded proceedings determining which phone records may be released by national authorities to the Court.

B. The Bemba Response is immaterial

12. The Bemba Response contains no submissions on the procedure for accessing the material requested by the Babala Defence, focusing only on alleged unfairness of the Independent Counsel's review process.⁹ Contrary to the Bemba Response, the method by which the Independent Counsel conducted the review has not reversed the burden of proof.¹⁰

13. As made clear by the Single Judge, the mandate given to the Independent Counsel was to "review and screen all relevant recordings, with a view to identifying those providing elements which might be relevant for the limited purposes of the Prosecutor's investigation".¹¹ This is to be read in light of Article 54(1)(a) of the Statute which states that investigations conducted by the Prosecution are to include both "incriminating and exonerating circumstances equally".

⁷ Babala Request, paras. 8, 11.

⁸ ICC-01/05-01/13-424, Annex 1, p. 10.

⁹ Bemba Response, paras. 2-4.

¹⁰ Bemba Response, para. 3.

¹¹ ICC-01/05-52-Conf, para. 7.

14. Moreover, the Independent Counsel expressly noted in his reports to the Single Judge when reviewing the recordings provided by the Dutch authorities, that attention was focused on anything “*pertinent pour la détermination de l’existence ou non des infractions concernées*”,¹² as well as “*pour autant et dans la mesure où ces échanges ne relèveraient pas de la commission d’une infraction*.”¹³

15. Indeed, the process of reviewing the intercepted phone recordings conducted under Dutch law was referred to by The Hague District Court, which noted that the “independent expert [...] select[ed] – incriminating and exculpatory – tapped calls”.¹⁴

16. The Bemba Response does not address the core issue of the proper procedure for access to the requested material and therefore fails to advance the submissions in the Babala Request.

IV. Requested Relief

17. The Prosecution requests the Single Judge to dismiss the Babala Request.



Fatou Bensouda, Prosecutor

Dated this 10th Day of June 2014
At The Hague, The Netherlands

¹² ICC-01/05-01/13-6-Conf-Exp-AnxA, p. 4 (emphasis added).

¹³ ICC-01/05-01/13-6-Conf-Exp-AnxB, p. 4.

¹⁴ ICC-01/05-01/13-424, Annex 1, p. 9.