

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 31 March 2015

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

Public Document

Prosecution's Response to « *Requête de la Défense de M. Fidèle Babala Wandu aux fins d'obtenir injonction au Bureau du Procureur en vue de confirmer ou d'infirmier la mise sous surveillance des écoutes téléphoniques de M. Babala et, le cas échéant, d'ordonner l'arrêt de cette mesure illégale* » [ICC-01/05-01/13-846] and its Addendum [ICC-01/05-01/13-848]

Source: Office of the Prosecutor

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

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I. Introduction

1. The Accused Fidèle Babala Wandu ("Babala") Defence's « *Requête de la Défense de M. Fidèle Babala Wandu aux fins d'obtenir injonction au Bureau du Procureur en vue de confirmer ou d'infirmer la mise sous surveillance des écoutes téléphoniques de M. Babala et, le cas échéant, d'ordonner l'arrêt de cette mesure illégale* »¹ ("Request") and its Addendum² should be denied. Both filings rely on the erroneous premise that Babala's communications are being monitored by the Office of the Prosecutor ("Prosecution"), are speculative, and fail in law.

2. The Defence articulates no proper legal basis to support the contention that it should be informed if, and under what conditions, Babala's communications are being monitored. On the contrary, the Prosecution has the right to conduct investigative activities confidentially under the Rome Statute ("Statute"), particularly when necessary to the success of an investigation. Revealing to the subject of an investigation the existence of any monitoring, or reclassifying any related decisions during its course, would undermine the purpose of a Chamber issuing such an order.

3. The Request's analogy to the Court's detention regime also does not help Babala. The regulations governing the Registry's administration of the Detention Centre and the rights of detainees are irrelevant to assessing the rights of non-detained accused, or rights and duties of the Prosecution with respect to the conduct of investigations concerning persons outside the Court's detention system.

¹ ICC-01/05-01/13-846.

² ICC-01/05-01/13-848.

4. The Request and the Addendum advance spurious claims, not only with respect to the alleged monitoring of Babala's communications, but its illegal implementation by the Prosecution. Any interception of communications that has occurred in this case, has been carried out in full compliance with the relevant law and pursuant to the order of a Chamber of this Court. There is no reason or precedent in this case which would suggest to the Defence that, had the Prosecution sought to monitor Babala's communications in the course of its investigations, it would pursue a lesser course. Thus, other than pure speculation founded on anonymous sources and nebulous information, the Request lacks any evidence to support the allegation that the Prosecution has in any way acted in violation of the Statute or the Rules of Procedure and Evidence ("Rules").

II. Submissions

A. The relief sought is moot

5. The Prosecution is not at this time monitoring the communications of the Accused Babala. Thus, the relief sought in the Request and the Addendum is moot. However, should the Chamber decide to entertain the Request and Addendum further, they should nevertheless be dismissed for the reasons articulated below.

B. The Request and the Addendum lack a proper legal basis

6. The Request and the Addendum advance no sound legal basis to support Babala's contention that he is entitled to know whether his communications are being monitored, concurrently with the purported conduct of that activity.

7. *First*, Babala's reliance on article 54(1)(c) is inapposite.³ Nothing in the Statute or the Rules provides for an accused's right to know of the content and extent of the Prosecution's *ongoing investigative activities*. On the contrary, rule 81(2) explicitly allows the Prosecution to withhold material or information if its disclosure might prejudice further or ongoing investigations, under the supervision of the Chamber. If the Prosecution intended to monitor Babala's communications, it would not be required to inform him of that nor would it want to, for obvious reasons: revealing such monitoring was taking place, irrespective of requirements, if any, for judicial supervision, would defeat the very purpose of the measure.

8. *Second*, the Defence's reliance on article 69(7) is similarly inapposite, as well as premature.⁴ That provision is only triggered in determining the admissibility of evidence at the time it is presented before a Chamber. Furthermore, even if evidence is found to have been collected in violation of the Statute or internationally recognised human rights norms, it is only inadmissible if a Trial Chamber finds that such a violation either casts substantial doubt on the reliability of the evidence, or that its admission would be antithetical to and would seriously damage the integrity of the proceedings.

C. The detention regime is irrelevant to assessing the rights of non-detained accused and the obligations of the Prosecution

9. The fact that persons in the Court's Detention Centre are informed that their conversations are being monitored pursuant to the Regulations of the Registry⁵ is irrelevant to whether accused, not in detention, have an analogous

³ The Request, para.5; the Addendum, para.6.

⁴ The Request, para.5; the Addendum, para.6.

⁵ The Addendum, paras.16-19.

right to know if and when their conversations are monitored. Detention is administered by the Registry, a separate organ of the Court. The protections afforded under these Regulations do not extend to non-detainees, nor do they impart any obligations on the Prosecution analogous to those of the Registry.

D. The Request and the Addendum are speculative

10. As the Defence is well-aware, prior to the confirmation of the charges in this case, the Prosecution sought and obtained judicial authorisation to seize national authorities with a request to intercept communications of Accused Kilolo and Mangenda for which it considered legal privilege could apply.⁶ It also sought and applied safeguards for the review of such intercepted communications in consultation with the Single Judge of the Pre-Trial Chamber, and received only those communications that are relevant to the commission of article 70 offences, and not those that could legitimately be considered privileged.⁷ The Babala Defence provides no justification for its suggestion that the Prosecution would circumvent the applicable legal framework if a similar situation arose. Indeed, it would not be in the Prosecution's interest to do so.

11. Babala also seems to imply that all of his communications – not just those between him and his Counsel – should be subject to the Chamber's oversight in order to protect his right to privacy. But, as article 67(1)(b) and rule 73 make clear, communications not falling within the scope of protection offered by these provisions do not require the protection of a Chamber of this Court. National laws regulate instances in which judicial oversight is necessary in order to monitor private communications, including pursuant to any requests

⁶ ICC-01/05-52-Red2.

⁷ *Ibid.*, paras.6-7.

made directly by the Prosecution. The right of the accused to privacy is not a bar to legitimate investigations conducted in accordance with the legal framework of the Court. Where the Statute and the Rules are – as they are here – clear and unambiguous, there is no further need to resort to the jurisprudence of other courts pursuant to article 21.

12. Moreover, at the heart of the Defence's submissions is the contention, based on nothing more than "*plusieurs sources concordantes*"⁸, that the Prosecution is acting illegally and possibly with the endorsement of the Chamber. First, this claim is factually untrue. Second, it is inexcusably reckless, given the clear absence of any credible source identified in the Request or Addendum. The Defence cannot be permitted to insinuate prosecutorial and indeed judicial misconduct wholly unchecked.

III. Relief Requested

13. The Prosecution requests that the Chamber summarily dismiss the Request and the Addendum.



Fatou Bensouda, Prosecutor

Dated this 31st day of March 2015
At The Hague, The Netherlands

⁸ The Request, para.3; the Addendum, para.3.