



Original: English

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

Date: 22/04/2016

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***

Urgent and Public

Joint Defence Request for addition of one item onto the list of evidence

**Source: Counsel for Jean-Pierre Bemba Gombo
Counsel for Jean-Jacques Mangenda Kabongo**

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

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Victims Participation and Reparations Section Other

Introduction

1. The Defence for Mssrs. Bemba and Mangenda respectfully request the leave of the Trial Chamber to:

- a. Add a discrete recording to their respective lists of evidence;¹ and
- b. Admit this recording into evidence.

2. This recording concerns one of the few conversations to have been recorded by both the ICC Detention Unit, and the Dutch authorities.

3. By comparing the Detention Unit recording with the equivalent Dutch recording, it is possible to verify, in an objective manner, the existence of synchronisation and alignment problems in the Detention Unit recording.

4. The recording is therefore highly probative to the issue of the reliability of the Detention Unit recordings.

5. Since the Dutch version of the recording has already been admitted into evidence, the admission of this version will not occasion any prejudice at this juncture.

6. It would therefore be in the interests of justice to allow the Defence to include it on their lists of evidence, and to admit it into evidence.

¹ The recording is CAR-D20-0006-5010.

Submissions

7. As a Minister of Justice, the Prosecution has a positive duty to identify any evidence, which is relevant to Chamber's assessment of the truth. This includes not only incriminating evidence, but also information which could be relevant to the reliability of incriminating evidence.

8. The latter category of information falls squarely within the Prosecution's Article 67(2) obligations.

9. In May 2013, the Prosecution was authorised by the Single Judge to access the detention unit recordings of Mr. Bemba.

10. It would appear from the Detention Unit correspondence that the fact that there were synchronisation issues with these recordings was identified on or before 21 June 2013.²

11. Notwithstanding its duty to investigate and disclose any matters which might be relevant to the reliability of the Detention Unit recordings, the Prosecution chose to tender the Detention Unit intercepts from the bar, and did not call a witness to testify in relation to the recording process. Moreover, although it was aware of the synchronisation issue, the Prosecution did not present any testimony on this issue.

12. In contrast, although the Defence for Mr. Bemba called an expert witness on this matter, as pointed out by the Prosecution, the Defence had limited time and funds to do so, and as a result, it was not possible to request Dr. Harrison to assess all Detention Unit recordings tendered in this case.

² CAR-D20-0006-1221 at 1227. The same document is also stamped CAR-OTP-0079-0205.

13. During the course of preparing its Final Trial Brief, the Defence identified synchronisation issues in the Detention Unit recordings between Mr. Mangenda and Mr. Bemba. Indicia in the transcripts were confirmed by comparing wave forms on the VLC player, and identifying unnatural silences, and missing speech.

14. The existence of such synchronisation issues is consistent with Dr. Harrison's testimony that due to the cause of synchronisation, all recordings created with the same system would be likely to be affected.³

15. The Defence then attempted to corroborate its findings that Mr. Mangenda's calls were similarly afflicted by comparing a conversation that was recorded by both the Dutch authorities and the Detention Unit.

16. However, when it reviewed the trim link provided by the Registry, it was unable to find any recordings for Mr. Mangenda that overlapped with the time period for the interception process in The Netherlands.

17. The Registry also confirmed that the link only contained the recordings, which the Prosecution had requested the Registry to provide to it.⁴

18. It would therefore appear that although the Prosecution was entitled to access the Detention Unit equivalents of the Dutch intercepts in order to compare and contrast the quality, it elected not to do so. Rather, from mid-July 2013 onwards, the Prosecution only relied on recordings between Mr. Bemba and Mr. Mangenda created by the Dutch authorities, which appears to suggest that the Prosecution was aware that the Detention Unit quality was less reliable than the Dutch.

³ CAR-D20-0006-1244 at 1260; ICC-01/05-01/13-T-43-CONF-ENG, p. 44, lines 14-21.

⁴ Email from the Registry to Trial Chamber VII, dated 21 April 2016. This email exchange was forwarded from Trial Chamber VII communications to the parties on 21 April 2016.

19. The Defence contacted the Registry in order to obtain access to the missing recordings on 15 April 2016, and was granted access to a specific recording on 22 April 2016.⁵ The Defence disclosed the recording to the parties on 22 April 2016.

20. Whilst taking into consideration the fact that the Dutch recording and the Detention Unit recording commence at different points,⁶ it is possible to identify clear discrepancies in alignment between the different versions. For example, lines 161 to 169 of the transcript of the Dutch intercept are heard in the following order in the Detention Unit version: 162, 161, 164, 163, 165, 166, 165, 168, 170, 167, 169.

21. Although the recording is being tendered after the formal close of evidence, the Defence teams for Mssrs Bemba and Mangenda foreshadowed their intention to seize the Chamber with this request in their respective notices.

22. The purpose for which the recording is being tendered is also very limited: essentially, the recording constitutes a unique and powerful means for identifying the manner in which synchronisation issues can be manifested throughout a recording, and the impact that this can have on the reliability of the content.

23. The Prosecution also cannot claimed to be prejudiced by the admission of this recording, given that:

- i. the Prosecution had the right to access this particular Detention Unit recording, but elected not to do so;
- ii. by choosing not to do so when it was aware of the synchronisation issue, the Prosecution failed to comply with its positive duty to collect and disclose any information that might be relevant to the reliability of the Detention Unit recordings; and

⁵ The Defence repeatedly underscored the urgency of the matters in its communications with the Registry.

⁶ The Dutch authorities recorded the call from the point at which Mr. Mangenda was contacted by the Detention Unit guard, whereas the Detention Unit records from the point at which the call is transferred to Mr. Bemba.

- iii. conversely, by relying on the Dutch version and not collecting and disclosing the Detention Unit version of the same recording, the Prosecution failed to comply with its duty to collect and disclose information that was clearly relevant to the reliability of the Dutch version.

Relief Sought

24. For the reasons set out above, the Defence teams for Mssrs. Bemba and Mangenda respectfully request the Honourable Trial Chamber to authorise the Defence to rely on the Detention Unit recording dated 2 October 2013 (CAR-D20-0006-5010), and to admit the recording into evidence for the limited purpose identified above.



Melinda Taylor
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Christopher Gosnell
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Dated this 22nd day of April, 2016

The Hague, The Netherlands