

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13
Date: 25 September 2015

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, 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***

Public Document

**Prosecution Response to the Mangenda Defence Objection to the Use of Certain
Materials During the Prosecution's Opening Statements**

Source: The Office of the Prosecutor

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

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1. Mangenda's 24 September 2015 objections to the Prosecution's use of excerpts of intercepted telecommunications ("Intercepts") during its opening statement ("Request")¹ should be rejected as moot.

2. *First*, Trial Chamber VII ("Chamber") has ruled on the general approach it will take to assessing the relevance, probative value and potential prejudice of evidence presented at trial.² The Chamber decided that, as a general rule "these proceedings will be conducted more efficiently if the Chamber defers its assessment of the admissibility of evidence until deliberating its judgment pursuant to Article 74(2)."³ Nevertheless, the Chamber ruled that the materials tendered by the Prosecution from the bar table are deemed "submitted and discussed within the meaning of article 74(2)".⁴ They can therefore, presently be relied on in a final judgment.⁵ Thus, the use of these materials during the opening statement causes no unfair prejudice to the Defence⁶ — they are already before the Chamber.

3. *Second*, the Chamber has already considered and rejected the argument that judges' impressions may be "coloured" by material thus presented.⁷ The Chamber found that the notion of fair trial does not require it to make admissibility assessments when evidence is submitted, "in order to screen itself from considering materials inappropriately".⁸ Whereas these considerations may apply to a jury, "these issues do not apply when professional judges are evaluating evidence presented."⁹ Making such assessments — irrespective of their timing — necessarily

¹ ICC-01/05-01/13-1292.

² See Request, paras. 3-4, 8-9.

³ ICC-01/05-01/13-1285, para. 9.

⁴ ICC-01/05-01/13-1285, para. 16.

⁵ See article 74(2) of the Statute (noting in relevant part, "[t]he Court may *base its decision* only on evidence 'submitted and discussed' before it at the trial") (emphasis added).

⁶ See Request, paras. 3-4.

⁷ See Request, para. 6.

⁸ ICC-01/05-01/13-1285, para. 12.

⁹ ICC-01/05-01/13-1285, para. 12.

entails exposure to potentially inadmissible material, and is a function in which professional judges engage routinely without affecting their judgement.

4. *Third*, the Chamber has rejected the Defence arguments relating to the contention that the intercepted telecommunications were obtained in violation of the Statute and Mangenda's right to privacy and refused to exclude the materials pursuant to article 69(7).¹⁰

5. *Fourth*, Counsel for Mangenda is well-acquainted with the practice before the *ad hoc* tribunals permitting the playing of video-clips during opening statements, and his experience in those cases contradicts Mangenda's submissions.¹¹ That same practice has also been adopted before this Court.¹²

6. In sum, there are no impediments for the Prosecution to use the excerpts of Intercepts during its opening statement. The Request should be rejected.



Fatou Bensouda, Prosecutor

Dated this 25th Day of September 2015
At The Hague, The Netherlands

¹⁰ ICC-01/05-01/13-1284, para. 32.

¹¹ In the *Hadžić* case, Mr Gosnell's co-counsel Zoran Živanović played a video-clip during the Defence's opening statement in that case. See *Prosecutor v. Hadžić*, IT-04-75, T.9280, 3 July 2014. Mr Živanović also played a video-clip during his Defence opening statements in the *Popović* case – a case which Mr Gosnell also participated in as Defence counsel. See *Prosecutor v. Popović et al.*, IT-05-88, T.21561-21562, 2 June 2008.

¹² See, for example, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-T-23-ENG ET, 2 September 2015, pp. 10, 37, 53; *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-T-27-ENG ET, 10 September 2013, p. 23.