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**International
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Court**

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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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

Public Document

**Prosecution's Response to the Joint Defence Request for addition of one item onto
the list of evidence (ICC-01/05-01/13-1831)**

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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I. Introduction

1. The Prosecution opposes Mangenda's and Bemba's "Joint Defence Request for addition of one item onto the list of evidence" ("Joint Request").¹ The Joint Request fails to demonstrate good cause for the relief sought. As regulation 35(2) of the Regulations of the Court qualifies a Chamber's authority to grant an extension of time limits, Trial Chamber VII ("Chamber") is constrained to dismiss the Joint Request.

II. Submissions

A. The Joint Request does not Demonstrate Good Cause

2. Nothing advanced in the Joint Request demonstrates good cause for the delayed collection and submission of the item sought to be added. The Chamber recently and appropriately rejected a Defence request for an extension of time, finding in the pertinent part that the Defence's delay in collecting similar items was "unexplained" and "entirely unjustified" despite its ostensibly material nature:

[...] the Single Judges[sic] notes that the Mangenda Defence did not undertake any steps in acquiring the Requested Material for a period of approximately four months after having received confirmation that the Prosecution was not in its possession.

This unexplained delay appears entirely unjustified and, despite the fact that the Requested Material may be material to defence preparation, the lapse of time in filing this Request casts doubt on the expected importance of these documents to the Mangenda Defence. The Single Judge therefore, despite granting the Request, emphasises that any extension of the 8 April Deadline is not justified at this point in time.²

¹ ICC-01/05-01/13-1831.

² See ICC-01/05-01/13-1768, paras. 13, 14.

3. The Joint Request similarly underscores the Defence's unexplained failure to review and act on certain evidence at their disposal for the better part of two years.

4. It appears from the Joint Request that the earliest the Defence undertook steps to identify and collect the item was "[d]uring the course of preparing its Final Trial Brief".³ The Joint Request predicates their lack of diligence by attempting to blame the Prosecution for "not call[ing] a witness to testify in relation to the recording process" or "present any testimony on [the synchronisation issue]".⁴ Their arguments are neither appropriate, nor accurate.

5. *First*, the argument attempts to shift the Defence's own responsibility to collect material information. As early as February 2014, the Single Judge of Pre-Trial Chamber II forewarned:

the Defence cannot abdicate its duty and responsibility to examine [disclosed material], which examination is necessary for it to be in a position to decide whether to challenge the evidence or its reading by the Prosecutor, as well as to identify portions which it deems relevant for the purposes of the Chamber's determinations.⁵

Although this admonition arose in the context of the pre-confirmation proceedings, it was prescient — notwithstanding the Defence's evident repudiation.⁶

³ Joint Request, para. 13.

⁴ Joint Request, para. 11.

⁵ ICC-01/05-01/13-177, para. 10.

⁶ See *e.g.* ICC-01/05-01/13-T-37-CONF-ENG ET, p. 2, ln. 22 – p. 7, ln.22 (concerning the Defence's apparently similar failure to review a witness statement was disclosed in February 2014 until November 2015 in claiming a Prosecution disclosure violation, at which time the Prosecution noted of Bemba's Counsel "if she's telling this Chamber she hasn't looked at that statement until a year and a half after it's been disclosed, then there's a problem here, but the problem isn't one of disclosure, it's a problem of the preparedness of the Defence and abdication of Defence's responsibility to review the material that is disclosed to them, particularly incriminating material . . .") p. 7, ln.4-11.

6. *Second*, details concerning problems affecting the Detention Unit recordings were disclosed to the Defence as early as the Prosecution's 17 April 2014 disclosure of a technical report provided by the Registry detailing those issues.⁷ There is no question of the Defence's full awareness of the report, since it featured among the documents provided to Dr Harrison for his expert opinion.⁸ The Joint Request provides no plausible explanation for the Defence's failure to take any action for some 20 months concerning the Detention Centre recordings following the 17 April 2014 disclosure.

7. The Defence assertion that "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" is also puzzling.⁹ The matter is hardly ambiguous as, *inter alia*, a 20 November 2014 Registry filing sets out the background concerning the issue.¹⁰

8. *Third*, many of the Defence's arguments omit important albeit inconvenient contextual facts. For instance, while the Joint Request contends that "it was not possible to request Dr Harrison to assess all Detention Unit recordings in this case", it omits that the Bemba Defence did not seek Dr Harrison's engagement before December 2015, even though it was well aware of the synchronisation issues concerning the Detention Unit recordings¹¹ and, in fact, declined to instruct any experts in this case jointly with the Prosecution, at the Chamber's invitation.¹²

⁷ See CAR-OTP-0079-0205, at 0208 (entitled, "Report Ticket 104664: Problems recorded telephone-conversations, International Criminal Court"); see accompanying memo from the Registry entitled, "Report on technical issues that have affected the recordings of non-privileged telephone communications at the Detention Centre".

⁸ CAR-D20-0006-1244, at 1246.

⁹ Joint Request, para. 10 (emphasis added).

¹⁰ ICC-01/05-01/13-243-Conf-Corr, para. 16.

¹¹ See ICC-01/05-01/13-1359-Conf, para. 27 (filed, 9 October 2015); ICC-01/05-01/13-1113-Conf, paras. 23, 24 (filed, 31 July 2015); ICC-01/05-01/13-234-Conf, para. 60 (noting "complex technical challenges relating to material provided by the Registry, such as the Detention Centre recordings" filed, 3 March 2014).

¹² ICC-01/05-01/13-T-8-CONF-ENG ET, pp.49-50.

9. In addition to the above, the Joint Request makes clear that since being given access to Bemba's Detention Centre recordings and logs, the Defence have apparently not reviewed those relating to Mangenda's conversations with Bemba¹³ ("Mangenda Calls") diligently.

10. The Joint Request references an email to the Registry dated 21 April 2016, in which the Bemba Defence inquires as to the content of the TRIM link containing the electronic files comprising the Mangenda Calls.¹⁴ Yet, in a 31 August 2015 filing, the Bemba Defence expressed its clear awareness of the circumstances concerning the Mangenda Calls. Referencing the Mangenda Calls in that filing, the Bemba Defence stated, "[t]he communications were uploaded onto a trim link on 3 June 2013 (that is, whilst the Defence case was ongoing), without any prior vetting as whether they included information concerning Defence *ex parte* matters, or internal Defence strategy."¹⁵ The filing also references a 25 November 2014 filing in the Main Case — one of which Bemba's current Counsel in this case was notified — in which the same awareness is reflected.¹⁶

11. In this respect, the Joint Request misleadingly contends "[i]t would [...] appear that although the Prosecution was entitled to access to the Detention Unit equivalents of the Dutch intercepts in order to compare and contrast the quality, it elected not to do so."¹⁷ The Defence omits three central facts. *First*, the Prosecution's review of the Mangenda Calls was expressly opposed by both the Mangenda Defence¹⁸ and the Bemba Defence.¹⁹ In a complete about face the Defence now contend that "the Prosecution failed to comply with its positive duty to collect and disclose any

¹³ Joint Request, para. 16.

¹⁴ Joint Request, para. 17, fn. 4.

¹⁵ ICC-01/05-01/13-1199-Conf, para. 86.

¹⁶ ICC-01/05-01/08-3203-Conf-Red, paras. 159-166 (clearly demonstrating Counsel's facility with the issues concerning the Mangenda – Bemba recordings over a year and a half before the filing of the Joint Request).

¹⁷ Joint Request, para. 18.

¹⁸ ICC-01/05-01/13-48, p. 4; *see also* ICC-01/05-01/13-242-Conf, paras. 8, 9 (referencing the "Mangenda Calls").

¹⁹ ICC-01/05-01/13-1199-Conf, paras. 80-91 (under the rubric "Specific issues of prejudice arising from the transmission of the call data logs and the communications with Mr. Mangenda").

information that might be relevant to the reliability of the Detention Unit recordings".²⁰

12. *Second*, the Defence has long been aware of the Prosecution's position concerning access to, and the review of, the Mangenda Calls. For instance, on 5 December 2013, the Prosecution noted that despite having access to the TRIM folder "containing certain audio files of Mr. Bemba's conversations on the non-privileged line. [...] To date, as noted, Prosecution staff have not reviewed the Mangenda Calls."²¹ Indeed, in the ensuing decision the Single Judge was "mindful that the Prosecutor's belief that the Mangenda Calls might be of a privileged nature led her to commendably refrain from analysing, or even accessing, those calls until the present day."²²

13. *Third*, although apprised that the Prosecution only ever requested access to some of the Mangenda Calls, the Bemba Defence apparently never requested access to anything other than the recordings which the Prosecution obtained.²³ In its 9 May 2014 Request, filed publicly, Bemba's Main Case Defence team (his present Counsel in this case included) sought, "all non-privileged recordings between Mr. Bemba and others, which the [*sic*] transmitted to the Prosecution in accordance with the Decision of 8 May 2013."²⁴ Thus, although the scope of the Mangenda Calls was placed at issue by the Main Case Defence as early as May 2014,²⁵ the Joint Request provides no explanation for the Defence's subsequent delay — until now — in trying in seeking

²⁰ Joint Request, para. 23.

²¹ ICC-01/05-01/13-33-Conf, para. 4

²² ICC-01/05-01/13-48, para. 8.

²³ ICC-01/05-01/13-391-Anx, para. 18 ("9 May 2014 Request"); ICC-01/05-01/13-440, p. 3 (noting the requested relief to "issue an urgent order to the Registrar to provide the Defence with all non-privileged recordings between Mr Bemba and others, which the [Registrar] transmitted to the Prosecution in accordance with the Decision of 8 May 2013").

²⁴ 9 May 2014 Request, para. 27.

²⁵ See 9 May 2014 Request, para. 21 (contending that "the Prosecution has disclosed some recordings between Mr. Bemba and Mr. Mangenda to the Defence in the Article 70 case").

Bemba's non-privileged recorded conversations from the Registry beyond those provided to the Prosecution.²⁶

14. Notably, in a 16 April 2014 letter to the Main Case Defence declining a request for access to audio recordings in the Registry's possession, the Registry's Director of Court Services noted:

Registry is not in a position to provide you with the specific information requested in your letter of 8 April since the Registry cannot act upon the Defence request to provide it with information which was sought by the Office of the Prosecutor upon the order of the Single Judge. *Nevertheless, the Registry would be able to provide you with information from the detention record of Mr. Bemba Gombo insofar as it relates to the provision of the telephone calls log or list of telephone contacts.*²⁷

15. The Joint Request does not explain why the Defence apparently never compared the telephone call logs against the contents of the TRIM folder which it apparently only recently realised does not contain all of Bemba's non-privileged calls. Moreover, the Joint Request does not aver – because it cannot – that the log information which would have revealed this fact years ago, was not present in the TRIM folder itself.

16. Whether a party has exercised reasonable diligence is always a consideration in determining good cause. The Joint Request is devoid of any such showing. Indeed, nothing contained in it meets the required showing of good cause to add the recording to the respective Defence lists of evidence or for its admission into evidence out of time.

²⁶ See 9 May 2014 Request, para. 25.

²⁷ ICC-01/05-01/13-391-AnxC, p. 2 (emphasis added).

B. The Chamber Should not Admit the Proffered Recording

17. The Defence's tender of the recording is not in the interests of justice, and amounts to a needless presentation of cumulative evidence in this case.²⁸ The recording is of marginal probative value at best, given that the synchronisation issues affecting the Detention Centre recordings have never been contested. To the contrary, the fact is amply demonstrated by the pertinent transcripts of the recordings proffered by the Prosecution, and noted in its Second Bar Table Motion.²⁹

18. Further, as the Defence expert Dr Harrison conceded, the synchronisation problems which appear in the Detention Centre recordings are variable and unpredictable.³⁰ The additional recording would only have bearing on the specific conversation. And, contrary to the Defence contentions,³¹ the degree of problems that it may demonstrate cannot logically be imputed to any other recording. Its admission would therefore be of little value, if any, to the Chamber's analysis and assessment of the reliability of the Detention Centre recordings as a whole.

III. Requested Relief

19. For the foregoing reasons, the Joint Request should be rejected.



Fatou Bensouda, Prosecutor

Dated this 26th Day of April 2016
At The Hague, The Netherlands

²⁸ ICC-01/09-01/11-1938-Anx-Red, para. 9 (Separate, Partly Concurring Opinion of Judge Eboe-Osuji) (noting, that against the background of evidence already admitted on a given issue, "it is correct to reject the additional material as impermissibly cumulative evidence tending show [the same issue]").

²⁹ ICC-01/05-01/13-1113-Conf, paras. 23-24.

³⁰ ICC-01/05-01/13-T-43-CONF-ENG ET, p. 65, lns. 19-24.

³¹ Joint Request, para. 22.