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Pénale
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**International
Criminal
Court**

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No.: ICC-01/05-01/13
Date: 10 February 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***

Public

**Prosecution's Response to the Defence of Mr Mangenda's request for leave to
appeal decision ICC-01/05-52-Red2 (ICC-01/05-01/13-149)**

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

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Detention Section

Victims Participation and Reparations Section Others

I. Introduction

1. The Prosecution opposes Mr Mangenda Defence's application for leave to appeal the 29 July 2013 "Decision on the Prosecutor's 'Request for judicial order to obtain evidence for investigation under Article 70'" of the Single Judge of Pre-Trial Chamber II ("Impugned Decision" ¹).²

2. The Defence lacks standing to seek leave to appeal the Impugned Decision, which was issued in the context of *ex parte* proceedings. On this ground alone, the Application should be rejected. However, should the Pre-Trial Chamber entertain the Defence request on its merits, it should still be rejected because it fails to meet the requirements set forth in Article 82(1)(d).

II. Procedural Background

3. On 8 May 2013, the Single Judge ordered, *inter alia*, that the complete log of telephone calls placed or received by Mr Bemba at the detention centre, and any available recording of non-privileged calls either placed or received by him, be made available to the Prosecution.³ This decision was reclassified as public on 3 February 2014.⁴

4. On 29 July 2013, the Single Judge issued the Impugned Decision, authorising the Prosecution to seize the relevant Belgian and Dutch authorities with collecting logs and recordings of telephone calls placed or received by Mr Kilolo and Mr Mangenda. The Single Judge appointed an independent counsel to review the logs

¹ ICC-01/05-52-Conf-Exp. A public redacted version of the Decision was notified on 3 February 2014: ICC-01/05-52-Red2.

² ICC-01/05-01/13-149, *Requête d'autorisation d'appel de la décision publique ICC-01/05-52-Red2 03-02-2014 du 3 février 2014 sur la requête du Procureur d'obtenir des éléments de preuve sous le régime de l'art. 70*, 4 February 2014 ("Application").

³ ICC-01/05-46.

⁴ Pursuant to ICC-01/05-01/13-147.

and listen to the recordings with a view to singling out calls connected with the instant case from those related to *The Prosecutor v. Jean-Pierre Bemba Gombo* (“Main Case”). A public redacted version of this decision was released on 3 February 2014.⁵

5. On 4 February 2014, the Defence sought leave to appeal the Impugned Decision (“Application”).⁶

III. Submissions

6. The Defence advances two issues in support of the Application:

- (i) The legality of the appointment of independent counsel,⁷ and the modalities of investigation which are limited under Article 53 *et seq* of the Rome Statute (“First Issue”);⁸ and
- (ii) The recording of confidential phone conversations between lawyers, in particular, those between Mr Mangenda and Mr Bemba at the detention center (“Second Issue”).⁹

7. As it is developed below, neither satisfies the requisite conditions for leave to appeal. Furthermore, as a threshold matter, the Defence has no standing to make such a request.

A. The Defence has no standing

8. The Application fails because the Defence has no standing to seek leave to appeal the Impugned Decision. The Impugned Decision was issued *ex parte* in

⁵ ICC-01/05-52-Red2.

⁶ ICC-01/05-01/13-149.

⁷ Application, para.3 in page 4.

⁸ Application, para.6 in page 6.

⁹ Application, para.8.

proceedings to which the Defence was not a party.¹⁰ The fact that the Defence became a party to those proceedings at a later stage, and was given access to prior decisions when the grounds for the original classification as *ex parte* no longer existed, does not retroactively confer the right to challenge them. A distinction must be drawn between notification, within the terms of Regulation 31, and access to the record and to *ex parte* filings by counsel, once the reasons underpinning that initial classification no longer exist.¹¹ The former denotes the operation of transmission of judicial decisions or filings to all those who are participating in the relevant situation or case at the time of the filing of the document or of the issuance of the decision; the latter refers to a different operation, namely access by someone who has just become party or participant, within the meaning of the Regulations of the Court, to the record of the proceedings conducted prior to him or her becoming one.

9. Only the process of notification, as described above, triggers the relevant time-limits prescribed by the Rules of Procedure and Evidence and the Regulations of the Court to file responses, appeals, replies or applications. This is apparent, since only those who are participating in the situation or case at the time of the relevant filing or decision enjoy procedural rights before the Court and are therefore entitled to react to such filing or decision by filing their own document, as defined by Regulation 22. Conversely, a person that becomes a party or participant at a later stage does not acquire, by virtue of his or her subsequent access to the record, a right to retroactively participate in procedures that are already closed. To conclude otherwise would turn the Court's criminal process into a highly unstable set of procedural steps

¹⁰ In the *Kenya* situation, Pre-Trial Chamber II stated that the proceedings triggered by the Prosecution's application for a warrant of arrest or summons to appear are conducted on an *ex parte* basis. The only communication envisaged at the Article 58 stage is conducted between the Pre-Trial Chamber and the Prosecution and until the Chamber has ruled on the Prosecution's application, none of the persons under the Court's investigation is allowed to participate. See ICC-01/09-35, para.10 and ICC-01/09-43, para.9. The same reasoning applies to the instant case, and proceedings were conducted *ex parte* until the arrest warrant was executed.

¹¹ ICC-01/05-01/13-147, para.2.

which, instead of moving forward in a sequential manner, may be revisited or “turned back” at any point in time by the simple inclusion of a new participant.

10. On this ground alone, the Application should be rejected.

B. The Application fails to meet the requirements of Article 82(1)(d)

(i) There is no appealable issue

11. If the Defence is found to have standing, the Chamber should nevertheless reject the Application because it does not identify any appealable issue under Article 82(1)(d).

12. The First Issue comprises a mere disagreement with the Single Judge’s 29 July 2013 appointment of an independent counsel, which is not appealable as such.¹² In fact, the Defence simply rehashes a prior Defence application for leave to appeal the 13 December 2013 decision of the Single Judge appointing an independent counsel to review material seized from the suspects in this case.¹³ In dismissing that application, the Single Judge noted that it merely demonstrated the Defence’s disagreement with the decision. Thus, it failed to identify an issue within the meaning of Article 82(1)(d).¹⁴ The same reasoning applies here, and the Defence has similarly failed to identify an appealable issue. Further, with the Application, the Defence is improperly seeking reconsideration of the Single Judge’s decision rejecting the Defence’s prior application, in which the Single Judge stated that statutory provisions provide

¹² ICC-02/11-01/11-307, para.76. See also ICC-01/04-168 OA3, para. 9; ICC-01/05-01/08-532, para.17; ICC-02/05-02/09-267, para.22; ICC-01/04-01/06-1557, para.30; ICC-01/04-01/07-2035, para.25; ICC-02/05-03/09-179, para.27.

¹³ Compare Application, paras.3-6 and ICC-01/05-01/13-53-Conf, paras.2-5.

¹⁴ ICC-01/05-01/13-56-Conf, p.4.

enough flexibility to permit judicial appointment of independent counsel, although not expressly provided for.¹⁵

13. The Second Issue challenges the detention center recording of Mr Mangenda's conversations with Mr Bemba. However, this matter does not arise from the Impugned Decision. Instead, it concerns the 8 May 2013 decision of the Single Judge granting the Prosecution access to non-privileged detention center recordings.¹⁶ This issue thus falls outside the scope of the Impugned Decision.

(ii) The cumulative requirements are not met

14. Finally, if the Chamber finds that the Defence has identified an appealable issue, the Application still fails, as it does not demonstrate how these issues meet the cumulative requirements of Article 82(1)(d); namely (1), that the issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial; and (2) an immediate resolution by the Appeals Chamber may materially advance the proceedings. In this respect, the Defence simply repeats *verbatim* arguments that were rejected in its application seeking leave to appeal the 13 December decision.¹⁷

15. In rejecting the prior application, the Single Judge observed that the series of cursory and declamatory assertions as to the purported impact of the 13 December decision on the fairness and expeditiousness of the proceedings, failed to meet the cumulative requirements of Article 82(1)(d).¹⁸ Again, the same reasoning requires the dismissal of this Application.

¹⁵ ICC-01/05-01/13-56-Conf, p.4 referring to ICC-01/05-01/13-50 (see p.4) and ICC-01/05-01/13-51 (see p.5) where the Single Judge rejected the applications for leave to appeal ICC-01/05-01/13-45-Conf and ICC-01/05-01/13-47-Conf, respectively.

¹⁶ ICC-01/05-46, p.8.

¹⁷ Compare Application, paras.9-12 and ICC-01/05-01/13-53-Conf, paras.6-9.

¹⁸ ICC-01/05-01/13-56-Conf, p.4.

IV. Requested Relief

16. For the foregoing reasons, the Prosecution requests that the Chamber reject the Defence Application.



Fatou Bensouda, Prosecutor

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