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**International
Criminal
Court**

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No.: ICC-01/05-01/13
Date: 24 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-01/05-01/13-187 (ICC-01/05-01/13-203)**

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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Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section Others

I. Introduction

1. The Prosecution opposes Mr Mangenda's application for leave to appeal decision ICC-01/05-01/13-187 of the Single Judge of Pre-Trial Chamber II, rejecting, *inter alia*, the Defence's application for leave to appeal a previous decision issued in *ex parte* proceedings ("Impugned Decision").¹

2. Although the Defence has labelled its Request an application for leave to appeal pursuant to Article 82(1)(d), it is effectively a motion for reconsideration of the Single Judge's prior decision. The Request should be rejected because the Defence fails to show that reconsideration is merited. 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 29 July 2013, the Single Judge authorised 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 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* ("Decision of 29 July 2013"). A public redacted version of this decision was released on 3 February 2014.²

4. On 4 February 2014, the Defence sought leave to appeal the Decision of 29 July 2013 ("Application").³

5. On 10 February 2014, the Defence filed its "*Réponse de la Défense de Monsieur Jean-Jacques KABONGO MANGENDA à la requête d'autorisation d'appel du 10 février 2014 de Monsieur Jean-Pierre BEMBA GOMBO, à la requête d'autorisation d'appel de*

¹ ICC-01/05-01/13-203 ("Application") and ICC-01/05-01/13-187, ("Impugned Decision").

² ICC-01/05-52-Red2.

³ ICC-01/05-01/13-149.

Maître Aimé KILOLO MUSAMBA du 10 février 2014 et à la requête d'autorisation d'appel de Monsieur Fidèle BABALA WANDU de la même date." In the filing the Defence requested the Single Judge to (a) authorise the above-cited three applications for leave to appeal; and (b) order the Prosecution to communicate to the Defence the reasons rejecting the intercept of phone conversations by the Belgium authorities ("Defence's Reply").⁴

6. On 14 February 2014, the Single Judge issued the Impugned Decision rejecting the Application on the basis that the Defence lacked *locus standi*.⁵ The Single Judge found that the Defence was not a party to the 29 July 2013 Decision, or to the proceedings leading to its issuance, and cannot become a party on an *ex post* basis by virtue of the subsequent filing of a public redacted version.⁶ The Single Judge also noted, *inter alia*, that the Defence's Reply had been filed without leave.⁷

7. On 19 February 2014, the Defence filed its application for leave to appeal the Impugned Decision ("Request").⁸

III. Submissions

8. The Defence advances three issues in support of its Request:

- (i) Whether the Single Judge erred when he thinks that he can rule that a defendant, once arrested and notified of an '*ex parte*' decision, does not have the right to request an appeal against that decision ("First Issue");⁹
- (ii) whether the Single Judge erred when he refused a right of appeal to the person who has not been heard on recordings of his private phone

⁴ ICC-01/05-01/13-184.

⁵ Impugned Decision, p.8. The Single Judge simultaneously rejected two other applications for leave to appeal filed by other suspects who similarly lacked *locus standi*.

⁶ Impugned Decision, p.7.

⁷ Impugned Decision, pp.8-9.

⁸ ICC-01/05-01/13-203.

⁹ Request, p.5.

conversations and the disclosure of such recordings without judicial authorization to the Prosecutor (“Second Issue”);¹⁰

- (iii) whether the Single Judge erred when he publicly criticized the defense counsel, questioning his professional capacity, while implying that his intervention would be unnecessary and / or inappropriate (“Third Issue”).¹¹

9. The Request should be rejected. Although labelled an Article 82(1)(d) application, the Request is transparently a motion for reconsideration of the Impugned Decision, which improperly seeks leave to appeal the Decision of 29 July 2013 for a second time. Either way, the Defence fails to demonstrate that reconsideration is merited or that the Request otherwise satisfies the requisite conditions for leave to appeal, pursuant to Article 82(1)(d).

A. Reconsideration is not merited

10. The Defence fails to advance any argument demonstrating that the Impugned Decision is manifestly unsound and their consequences are manifestly unsatisfactory.¹² The Defence merely disagrees with the Single Judge’s reasoning to dismiss its Application and Reply, and inappropriately puts forward arguments in support of its *locus standi* that should have been included in its original Application.¹³ A request for reconsideration is not the correct avenue to amend past omissions. Moreover, entertaining the Request would be tantamount to permitting the Defence

¹⁰ Request, p.6.

¹¹ Request, p.8.

¹² Notwithstanding the different positions among the Chambers of this Court with respect to a Chamber’s authority to reconsider previous decisions, Trial Chamber I, relying on the practice of the ad hoc tribunals and many common law systems, found that Article 64(2) affords the Chambers such authority within certain parameters. See ICC-01/04-01/06-2705, paras.13, 18. Trial Chamber V endorsed this position: ICC-01/09-02/11-863, para.11. The ad hoc tribunals have held that reconsideration is merited when the Chamber incurred in “a clear error of reasoning” or there are “particular circumstances, which may be new facts or new arguments, justifying its reconsideration in order to avoid an injustice”. See *Prosecutor v. Prlić et. al.*, Case No.IT-04-74-T, Decision on the Stojić Defence Request for Reconsideration, 4 November 2008, p.2 citing *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Defence’s Request for Reconsideration, 16 July 2004, pp. 3 and 4.

¹³ Request, paras.3-5.

to challenge for a second time the Decision of 29 July 2013, despite the fact that it has no standing. As the Appeals Chamber has stated: “the Statute defines exhaustively the right to appeal against decisions of first instance courts”.¹⁴ There is no provision that permits a non-party to file an application pursuant to Article 82(1)(d), much less to file it twice. On these grounds, the Request should be rejected.

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

11. Even if the Single Judge were to treat the Request as an application pursuant to Article 82(1)(d) against the Impugned Decision, the Request fails. None of the issues arise from the Impugned Decision.

12. The First Issue constitutes a mere disagreement with the Single Judge’s reliance on the decisions issued in the *Kenya* situation.¹⁵ As recognised in previous decisions, disagreements or conflicting opinions do not constitute appealable issues.¹⁶ In any event, the Single Judge also relied on other arguments to support the Impugned Decision.¹⁷

13. Nor does the Second Issue arise from the Impugned Decision; the Single Judge did not rule that a person whose conversations have been recorded and disclosed has no right to appeal. Rather, the Single Judge stated that the Defence was not a “party” to the proceedings at the time the Decision of 29 July 2013 was issued.¹⁸

14. Finally, similar to the First Issue, the Third Issue also constitutes a mere disagreement with the Single Judge’s determination that the Reply lacked legal support, that there was no reason justifying the “confidential” character of the filing

¹⁴ ICC-01/04-168 OA3, para.39.

¹⁵ ICC-01/09-35, para.10 and ICC-01/09-43, para.9, quoted in ICC-01/05-01/13-187, pp.6-7.

¹⁶ 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.

¹⁷ See ICC-01/05-01/13-187, pp.7-8.

¹⁸ Impugned Decision, pp.7-8.

and that the Defence had erroneously referred to a defence team.¹⁹ As such, it does not comprise an appealable issue.²⁰

15. Even if the Single Judge were to find that any of the Issues arise from the Decision, none of them satisfies the requirements of Article 82(1)(d). The Defence's general submissions are insufficient to meet these requirements.²¹

IV. Requested Relief

16. For the foregoing reasons, the Prosecution requests that the Chamber reject the Defence's Request.



Fatou Bensouda, Prosecutor

Dated this 24th Day of February 2014
At The Hague, The Netherlands

¹⁹ Impugned Decision, p.9.

²⁰ 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.

²¹ ICC-01/04-168 OA3, para.10; (on abstract arguments that a decision has an impact on fairness); ICC-01/04-01/07-1958, para.20; ICC-01/09-02/11-406, paras.42-43 (on arguments with only a hypothetical impact on the outcome of the trial); and ICC-01/04-01/06-2109, para.22 (on speculative arguments that resolution of an issue by the Appeals Chamber would materially advance the proceedings).