

**Cour
Pénale
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**International
Criminal
Court**

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

Date: 16 December 2013

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,
AIMÉ KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE
BABALA WANDU and NARCISSE ARIDO***

Public

**Prosecution's Response to the Defence of Mr. Jean-Jacques Mangenda Kabongo's
"Requête en autorisation d'appel (art 82.1.d)"**

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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Introduction

1. The Prosecution hereby responds to Mr. Mangenda Defence's application¹ for leave to appeal the 5 December 2013 decision of Pre-Trial Chamber II to conduct proceedings related to the confirmation of charges on the basis of written submissions, pursuant to Rule 165(3).²
2. As more fully set out below, the Defence application fails to identify any issue meeting the requirements for granting leave to appeal pursuant to Article 82(1)(d). As such, the application should be rejected in its entirety.

Procedural History

3. On 20 November 2013, the Single Judge of Pre-Trial Chamber II issued arrest warrants against Mr. Mangenda and four other suspects for offences against the administration of justice pursuant to Article 70.³ The arrest warrants were unsealed on 28 November 2013.
4. On 23 November 2013, Mr. Mangenda was arrested in The Netherlands. He was surrendered to the Court on 4 December 2013.
5. On 5 December 2013, Mr. Mangenda made his Initial Appearance before the Court.⁴ Noting that Rule 165(3) allows for the confirmation of charges relating to Article 70 offences to take place on the basis of written submissions,⁵ the Single Judge announced the Chamber's decision that "written confirmation - is in this case the most appropriate course of action" ("Decision").⁶

¹ ICC-01/05-01/13-37 (« Application »).

² ICC-01/05-01/13-T-3-Red-ENG WT, page 6, lines 10-11.

³ ICC-01/05-01/13-1-Red2.

⁴ ICC-01/05-01/13-T-3-Red-ENG WT.

⁵ ICC-01/05-01/13-T-3-Red-ENG WT, page 6, lines 5-8.

⁶ ICC-01/05-01/13-T-3-Red-ENG WT, page 6, lines 9-11.

6. The Defence opposed written proceedings,⁷ asserting that the crimes charged are “very serious [...] within the framework of a major trial”,⁸ and that the suspects “are entitled to public hearings”,⁹ as a general principle.¹⁰
7. The Single Judge took note “of the fact that [the Defence was] opposed to a written confirmation [...]” and permitted the Prosecution to respond.¹¹
8. In its reply, the Defence referred to Rule 165(3), arguing that the interests of justice required public hearings, and this was necessary to the Defence’s right to call witnesses.¹²
9. The Single Judge stated that “[t]he Chamber will deal with this matter in writing in due course.”¹³
10. On 10 December 2013, the Defence sought leave to appeal the Decision.¹⁴

Submissions

The Issues

11. Firstly, the Defence contends that the Chamber erred in its interpretation of Rule 165(3) because, in its view, this provision does not refer to the hearing envisaged in Article 61(1) but to questions of fact and law that arise during the pre-trial proceedings.¹⁵
12. Secondly, and alternatively, the Defence argues that Article 67(1) entitles an accused to a public hearing and that as a result, the Statute has foreseen as a minimum guarantee not only the publicity but also the oral nature of the

⁷ ICC-01/05-01/13-T-3-Red-ENG WT, page 7, line 7.

⁸ ICC-01/05-01/13-T-3-Red-ENG WT, page 7, lines 7-9.

⁹ ICC-01/05-01/13-T-3-Red-ENG WT, page 8, lines 12-13.

¹⁰ ICC-01/05-01/13-T-3-Red-ENG WT, page 7, lines 15-16.

¹¹ ICC-01/05-01/13-T-3-Red-ENG WT, page 8, line 18 to page 10, line 7.

¹² ICC-01/05-01/13-T-3-Red-ENG WT, page 10, lines 10-19.

¹³ ICC-01/05-01/13-T-3-Red-ENG WT, page 10, lines 20-21.

¹⁴ ICC-01/05-01/13-37.

¹⁵ Application, para.3.

proceedings.¹⁶ The Defence further submits that oral hearings better ensure the fundamental right to public proceedings.¹⁷

13. The Defence then refers to the circumstances of this case, in particular, that the Prosecution seeks to charge counsel of an opposing party with Article 70 offences, and indicates that similar charges against the Prosecution will be requested.¹⁸ It also puts into question the Prosecution's effective discharge of its obligation to investigate exonerating evidence. In light of these facts, the Defence argues that the interests of justice require a public hearing rather than a written proceeding.¹⁹
14. It is unclear which issue or issues the Defence seeks leave to appeal. Further, rather than identifying appealable issues, the Defence provides arguments on the merits and seeks to re-litigate the Chamber's Decision. Chambers of this Court have refused leave to appeal in cases where the parties failed to clearly articulate the issue at stake.²⁰ Moreover, leave to appeal cannot be granted where the party seeking to appeal, "instead of identifying appealable issues, seeks leave to litigate *ex novo* before the Appeals Chamber the entire decision."²¹ The Defence Application should thus be rejected.
15. If the Chamber nevertheless decides to entertain the Defence Application, the Prosecution understands that the Defence is seeking leave to appeal the Chamber's interpretation of Rule 165(3) ("First Issue"),²² and the appropriateness of conducting the pre-trial proceedings on the basis of written submissions in this case ("Second Issue").²³

¹⁶ Application, para.4.

¹⁷ Application, para.5.

¹⁸ Application, para.6.

¹⁹ Application, para.6.

²⁰ ICC-01/05-01/08-2800, paras.15,17. See further ICC-02/11-01/11-568, paras.21-22.²¹ ICC-02/11-01/11-307, para.70.

²¹ ICC-02/11-01/11-307, para.70.

²² Application, para.3.

²³ Application, para.6.

16. According to the jurisprudence of the Appeals Chamber, an issue is constituted by a subject, the resolution of which is “essential for the determination of matters arising in the judicial cause under examination” and furthermore a “conflict of opinion does not define an appealable subject.”²⁴ The First Issue arises from the Decision as, according to the Chamber, Rule 165(3) allows for the confirmation of charges relating to offences against the administration of justice to take place on the basis of written submissions.²⁵ However, and for the reasons developed below, the First Issue does not meet the requirements for granting leave to appeal.
17. The Second Issue amounts to a mere disagreement with the Chamber’s view.²⁶ In deciding to conduct the pre-trial proceedings in writing, the Single Judge considered the circumstances of this case, namely, that Mr. Mangenda was being charged with offences against the administration of justice.²⁷ The Defence Application, merely contests the Chamber’s conclusion.

The issues do not meet the criteria for leave to appeal under Article 82(1)(d)

18. Even if the Chamber considers that the Defence has identified two issues arising from the Decision, they do not meet the requirements for leave to appeal.
19. As the Court’s jurisprudence makes clear, the correctness of a decision is irrelevant to an application for leave to appeal under Article 82(1)(d); the sole question is whether the issue meets the criteria set out in the provision.²⁸ Although the Defence provides submissions on the merits of its position,²⁹

²⁴ ICC-01/04-168, para.9.

²⁵ ICC-01/05-01/13-T-3-Red-ENG ET, page 6, lines 5-8.

²⁶ ICC-01/11-01/11-490, para.31.

²⁷ ICC-01/05-01/13-T-3-Red-ENG WT, page 6, lines 5-8.

²⁸ ICC-02/04-01/05-20-US-Exp, para.22.

²⁹ Application, paras.3-5.

other than a general reference to the fundamental rights of the accused,³⁰ it fails to provide any argument on how the issues raised satisfy the criteria for leave to appeal under Article 82(1)(d). On these grounds, the Application should also be rejected.

20. Even if the Chamber considers that the Defence has provided sufficient arguments, the Application still fails to show that the requirements for leave to appeal are met, as developed below.

The issues do not affect the fairness and expeditiousness of the proceedings

21. The Defence cannot speculate in the abstract that the Decision causes prejudice to the rights of the accused to establish that the fairness of the proceedings is affected.³¹ A purely general complaint is not sufficient.³²
22. Further, the Defence's suggestion that written proceedings are less public than oral proceedings – and therefore unfair - is unsupported.³³ The Single Judge did not make any finding precluding the public nature of the forthcoming pre-trial proceedings.
23. Moreover, if the Pre-Trial Chamber confirms the charges against Mr. Mangenda, there will be public hearings during which the Defence will be entitled to present evidence to rebut the charges brought by the Prosecution. The Decision has no bearing on those subsequent proceedings.
24. The Defence similarly makes no submissions as to how the expeditious conduct of the proceedings is affected. To the contrary, the Defence conceded

³⁰ Application, para.7.

³¹ See ICC-01/04-168 OA3, para.10; ICC-02/04-01/05-316, p.6; ICC-01/09-02/11-211 paras.33, 39; ICC-01/09-02/11-88, para.25, see also paras.23-27; ICC-01/04-01/06-2109, para.22; ICC-01/05-01/08-680, para.36; ICC-01/09-02/11-275, paras.28-29; ICC-01/09-01/11-301, para.30.

³² ICC-01/04-01/06-2463, para.31.

³³ Application, paras.4-5.

at the Initial Appearance that written proceedings will permit “the matter being dealt with on a speedy basis”.³⁴

The issues do not significantly affect the outcome of the trial and an immediate resolution by the Appeals Chamber will not materially advance the proceedings

25. The Defence has also failed to explain why and how pre-trial proceedings conducted on the basis of written submissions will detrimentally impact the outcome of these proceedings. The Defence submissions are grounded on the speculative and unsupported premise that written pre-trial proceedings are prejudicial to the Defence. However, as the Defence does not articulate the concrete prejudice, it is difficult to foresee any impact in the outcome of these proceedings. Moreover, the Defence can still raise any purported prejudice as part of its final submissions, and can also seek leave to appeal the confirmation decision.
26. Finally, at the Initial Appearance and after the Defence indicated that it wished to call witnesses,³⁵ the Single Judge stated that the Chamber would decide on this request in writing.³⁶ Hence, the Defence may still avail itself of this avenue and the Chamber will rule in due course. Thus, any purported impact is premature and resolution by the Appeals Chamber will not materially advance the proceedings.

³⁴ ICC-01/05-01/13-T-3-Red-ENG WT, page 7, lines 22-24.

³⁵ ICC-01/05-01/13-T-3-Red-ENG WT, page 10, lines 10-19.

³⁶ ICC-01/05-01/13-T-3- Red-ENG WT, page 10, lines 20-21.

Conclusion

27. For the above reasons, the Prosecution requests that the Chamber reject the Defence Application.



Fatou Bensouda, Prosecutor

Dated this 16th Day of December 2013

At The Hague, The Netherlands