

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 14 January 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, AIMÉ KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU and NARCISSE ARIDO***

**Public**

**Decision on the “Requête en autorisation d’appel (art. 82.1.d)” submitted by the Defence for Mr Mangenda**

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

**The Office of the Prosecutor**

Fatou Bensouda

James Stewart

Kweku Vanderpuye

Florence Darques Lane

**Counsel for Jean-Pierre Bemba Gombo**

Nicholas Kaufman

**Counsel for Aimé Kilolo Musamba**

Jean-Pierre Kilenda Kakengi Basila

**Counsel for Jean-Jacques Mangenda Kabongo**

Jean Flamme

**Counsel for Fidèle Babala Wandu**

Prof Jean-Pierre Fofé Djofia Malewa

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the Defence**

**States Representatives**

**Others**

**REGISTRY**

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**Registrar**

Herman von Hebel

**Detention Section**

**Victims and Witnesses Unit**

**Others**

**Victims Participation and  
Reparations Section**

**I, Judge Cuno Tarfusser**, having been designated as Single Judge of Pre-Trial Chamber II of the International Criminal Court;

**NOTING** the hearing held in this case on 27 November 2013, during which the Single Judge noted that the Chamber had decided that the confirmation hearing in this case would take place without a hearing and on the basis of written submissions, pursuant to rule 165(3) of the Rules of Procedure and Evidence (“Oral Decision”);<sup>1</sup>

**NOTING** the hearing for the first appearance of Mr Mangenda held on 5 December 2013, during which the Single Judge reiterated the Oral Decision;<sup>2</sup>

**NOTING** the “Requête en autorisation d’appel (art.82.1.d)” dated 10 December 2013 (“Defence Application for Leave to Appeal”),<sup>3</sup> whereby the Defence for Mr Mangenda (I) submits (i) that rule 165(3), while allowing the Pre-Trial Chamber to “make any determinations” under article 61 of the Statute, “ne concerne pas ‘l’audience’ visée à l’article 61.1, mais concerne exclusivement les questions de fait et de droit soulevées en cours de procédure de phase préliminaire”; (ii) that article 67(1) of the Statute, in establishing the principle of the publicity of the proceedings, “precise que l’accusé a le droit que sa cause soit ‘entendue’ publiquement” and, in so doing, “il a prévu comme garantie minimale non seulement la ‘publicité’ des débats, mais aussi ‘l’oralité’ des débats”; (iii) that “une règle de procédure ne peut en aucun cas avoir comme effet de réduire les garanties minimales prévues par le Statut et doit donc s’interpréter restrictivement” and, (II) accordingly, requests leave to appeal the Oral Decision;

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<sup>1</sup> ICC-01/05-01/13-T-1-ENG, pages 14-15.

<sup>2</sup> ICC-01/05-01/13-T-3-Red-ENG, page 6.

<sup>3</sup> ICC-01/05-01/13-37.

**NOTING** the “Prosecution’s response to the Defence of Mr. Jean-Jacques Mangenda Kabongo’s ‘Requête en autorisation d’appel (art. 82.1.d)’”;<sup>4</sup>

**NOTING** articles 61, 67, 82(1)(d) of the Statute and rule 165(3) of the Rules;

**CONSIDERING** that, although the Defence for Mr Mangenda fails to precisely identify the specific issue(s) on which leave to appeal the Oral Decision is sought, the Single Judge deems that two issues can be inferred from the Defence Application, as follows: (i) whether rule 165 provides an exception to the principle set forth in article 67(1) of the Statute as regards the holding of a hearing for the purposes of the Chamber’s determination on the confirmation of the charges when offences under article 70 of the Statute are at stake (“First Issue”); (ii) whether it is possible that Rule 165(3) set forth an exception to article 61 of the Statute (“Second Issue”);

**CONSIDERING** that, once identified the issues raised in the Defence Application, it is necessary for the Single Judge to proceed to determine whether the cumulative requirements of article 82(1)(d) are met in respect of them;

**CONSIDERING**, as regards the First Issue, that the wording of rule 165(2) of the Rules could not be more straightforward in providing that, in proceedings for offences provided under article 70 of the Statute, “any of the determinations” set forth in article 67 can be made by the Pre-Trial Chamber “without a hearing” (emphasis added);

**CONSIDERING** that, accordingly, the Single Judge fails to see how Counsel for Mr Mangenda can purport that rule 165(2) “ne concerne pas ‘l’audience’ visée à l’article 61.1”;

**CONSIDERING**, in light of this, that the fact that in article 70 proceedings all the determinations provided under article 61 can be taken without a hearing arises

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<sup>4</sup> ICC-01/05-01/13-43.

from the plain wording of Rule 165(3), rather than from the Oral Decision, which only made application of that rule;

**CONSIDERING** that, accordingly, the First Issue does not qualify as an “appealable issue” for the purposes and within the meaning of article 82(1)(d), as defined by the Appeals Chamber;

**CONSIDERING** that, also pursuant to the established case-law of the Appeals Chamber, the requirements under article 82(1)(d) are cumulative and that therefore the Single Judge does not need to proceed further and determine if any or all of the other requirements set forth in that provision, as construed by the Appeals Chamber, are met in respect of the First Issue;

**CONSIDERING**, as regards the Second Issue, that the Defence for Mr Mangenda seems not at ease with the fact that rule 165(2) sets forth a clear, explicit exception to the procedure set forth under article 61 of the Statute, pursuant to which the Pre-Trial Chamber shall take its decision as to whether the charges are to be confirmed, amended or not confirmed following a hearing;

**CONSIDERING** that the power of the Rules to set forth “the principles and procedures” governing the exercise of the Court’s jurisdiction over offences against the administration of justice is expressly provided by the Statute itself, under its article 70(2) (emphasis added);

**CONSIDERING** that, accordingly, similarly to what noted above in respect of the First Issue, the Second Issue does not arise from the Oral Decision and is therefore not “an appealable issue”, this making it unnecessary for the Single Judge to proceed with the determination of whether any or all of the other requirements of article 82(1)(d), as construed by the Appeals Chamber, are met in respect of the Second Issue;

**CONSIDERING** that, whilst unnecessary for the Single Judge to address in depth Mr Mangenda’s Defence argument to the effect that oral proceedings

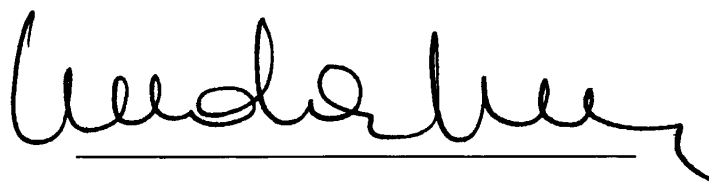
would be “fairer” than written proceedings, it is worthwhile noting that a written procedure cannot be held *per se* as “unfair”, or “less fair” than the oral proceedings, in particular when all requirements of publicity and equality of arms are duly respected;

**CONSIDERING** that the Defence Application seems to raise a broad issue of principle, more appropriately addressed in a prospective of legislative reform of the relevant legal texts rather than in the context of the conduct of pending proceedings;

**CONSIDERING** further that expeditiousness is particularly critical to these proceedings, especially in light of their link to the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* and that the average time required by the Appeals Chamber to determine interlocutory appeals would make it very unlikely that these proceedings could be “materially advanced” by submitting to the Appeals Chamber the resolution of either the First or the Second Issue;

**FOR THESE REASONS, THE SINGLE JUDGE HEREBY  
REJECTS** the Defence Application.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to read 'Cuno Tarfusser', written over a horizontal line.

**Judge Cuno Tarfusser**  
Single Judge

Dated this Tuesday, 14 January 2014

The Hague, The Netherlands