

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 11 August 2014

## **PRE-TRIAL CHAMBER II**

**Before:** Judge Ekaterina Trendafilova, Presiding Judge  
Judge Cuno Tarfusser  
Judge Christine Van den Wyngaert

### **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 Narcisse Arido's Application for Leave to Appeal the  
Single Judge's "Decision on Prosecution request for variation of time limit for  
confirmation response"**

**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. Narcisse Arido's application for leave to appeal<sup>1</sup> the Single Judge's "Decision on the Prosecution request for variation of time limit for confirmation response"<sup>2</sup> should be rejected. None of the three issues ("Issues") are appealable. The First Issue does not arise from the Decision, and the Second and Third Issues do not arise from the Decision and in addition, amount to mere disagreements over a routine case management matter falling squarely within the Single Judge's discretion.
2. In any event, none of the Issues meet the criteria for granting leave to appeal under Article 82(1)(d) of the Statute. The Issues cannot significantly affect the fair and expeditious conduct of the proceedings. Neither would the Appeals Chamber's immediate resolution of these Issues expedite or materially advance the proceedings at this stage.

## Submissions

### *i. The First Issue does not arise from the Decision*

3. The First Issue, on whether the Single Judge erred in law by deciding on the Prosecution's Regulation 35(2) request without obtaining the views of the Defence teams,<sup>3</sup> does not arise from the Decision. The Defence incorrectly reads Regulation 35(2) as providing a "fundamental right to respond" to the Prosecution's request for variation of the time limit.<sup>4</sup> However, Regulation 35(2) provides that a chamber may give the participants an opportunity to be heard on applications to vary time limits "where appropriate." Accordingly, it is within a chamber's discretion to decide, on a case-by-case basis, whether it is appropriate to hear the views of other parties and

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<sup>1</sup> ICC-01/05-01/13-619 ("Application").

<sup>2</sup> ICC-01/05-01/13-610 ("Decision").

<sup>3</sup> Application, para.17(i).

<sup>4</sup> Application, paras.24, 29.

participants. This provision is *lex specialis* to the general rule under Regulation 24(1), also incorrectly relied on by the Defence in its Application.<sup>5</sup>

4. Because the First Issue is based on an incorrect reading of the Regulations and does not arise from the Decision, it should be dismissed on that basis alone.

*ii. The Second Issue is not an appealable issue and does not arise from the Decision*

5. The Second Issue, on whether the Single Judge erred in law by failing to analyse whether the Prosecution demonstrated good cause for the extension of time and whether he violated his duty to provide a reasoned opinion,<sup>6</sup> is not an appealable issue. The Defence simply disagrees with the Single Judge's assessment of the Prosecution's submissions and the exercise of his discretionary trial management powers<sup>7</sup> in relation to the routine functioning of the Court.<sup>8</sup>

6. The Second Issue also does not arise from the Decision. This routine trial management matter, even if had been incorrectly decided, cannot qualify as an error of law. As a result, the Second Issue, as framed by the Defence, does not arise from the Decision.

7. In addition, the Second Issue does not arise from the Decision because the Defence arguments do not accurately reflect the Decision and the Prosecution's request to vary the time limits. Rather, they are based on a selective interpretation of the Decision and request. Contrary to the Defence's claim,<sup>9</sup> the Prosecution's submissions clearly and cogently established good cause for the extension of time. The request relied on "conditions unprecedented at this Court," due to a number of

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<sup>5</sup> Application, para.29, footnote 48.

<sup>6</sup> Application, para.17(ii).

<sup>7</sup> ICC-02/05-03/09-295 OA2, para.29.

<sup>8</sup> ICC-01/04-01/06-2205 OA15 OA16, para.69; ICC-01/04-01/07-675 OA7, para. 7. Diss. Op (Judge Pikis). According to the consistent jurisprudence of this Court, mere disagreements fall short of constituting appealable issues: see ICC-01/04-168 OA3, para.9; ICC-01/05-01/08-532, para.17; ICC-02/05-02/09-267, para.225; ICC-01/04-01/06-1557, para.30; ICC-01/04-01/07-2035, para.25; ICC-02/05-03/09-179, para.27.

<sup>8</sup> Application, para.22.

<sup>9</sup> Application, para.22.

factors, including: five simultaneous filings totalling 848 pages; a response period of only seven days; and the particular issues raised by each of the five Defence teams.<sup>10</sup> Therefore, the Defence wrongly compares the Prosecution's amply reasoned request with Mr. Mangenda's earlier submission which was found to lack "any reasons in support of his request."<sup>11</sup> Further, contrary to the Defence claim,<sup>12</sup> the Single Judge's assessment of "good cause" was not confined to one statement, but fully considered the Prosecution's detailed submissions.<sup>13</sup>

8. Finally, the Defence's claim that the Single Judge assessed "good cause" in a "mere statement"<sup>14</sup> is based on a flawed understanding of the law on reasoned opinion. As the Appeals Chamber has emphasised, the extent of the reasoning will depend on the circumstances of each case and will not necessarily require reciting and summarising each and every factor.<sup>15</sup> The Single Judge followed this standard and no error arises in his reasoning.

*iii. The Third Issue does not arise from the Decision and is not an appealable issue*

9. The Third Issue, whether the Single Judge erred in law by failing to consider the impact of the extension of time on the proceedings as a whole, and on the Suspects' rights to a fair trial,<sup>16</sup> does not arise from the Decision. The Defence's arguments do not accurately reflect the Decision. The Defence wrongly claims that the Single Judge did not consider the rights of the accused.<sup>17</sup> However, the Single Judge made particular reference to Article 67 of the Statute governing the accused's rights.<sup>18</sup>

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<sup>10</sup> ICC-01/05-01/13-608, paras.3-6.

<sup>11</sup> Application, para.22; ICC-01/05-01/13-560 OA4, para.18.

<sup>12</sup> Application, para.30.

<sup>13</sup> See Decision, p.3, 'noting the "Prosecution request for variation of time limit for confirmation response"' and "considering that the length and complexity of the submissions filed by each of the Defence teams is such as to make it indeed difficult for the Prosecutor to adequately respond to them within the time limit originally set".

<sup>14</sup> Application, para.30.

<sup>15</sup> ICC-01/04-01/06-773 OA5, para.20; ICC-01/04-01/06-774 OA6, para.30.

<sup>16</sup> Application, para.17(iii).

<sup>17</sup> Application, paras.21, 25, 27, 28.

<sup>18</sup> Decision, p.3. The Single Judge also considered Article 61 and Rule 121.

Further, the interests of all the Defence teams were appropriately safeguarded when they were granted the same extension of time to submit their replies.<sup>19</sup>

10. Equally, the Defence's argument claiming "significant delay"<sup>20</sup> lacks merit. Firstly, the Defence's arguments alleging delay "during which the Suspects are being held in pre-trial detention"<sup>21</sup> relate to the separate reviews of their pre-trial detention under Article 60 of the Statute, and are extraneous to this Decision. Secondly, the Defence should be estopped from claiming prejudice resulting from any delay from the amendment to the calendar set for the confirmation of charges.<sup>22</sup> The postponement was due to "the persisting unavailability of the final report of the Independent Counsel" and was "strictly and precisely correlated with the need to ensure its availability to the Court and the parties, in particular with a view to allowing the latter to peruse and include it" in their submissions.<sup>23</sup> The Kilolo and Mangenda Defences challenged before the national authorities the propriety of the intercepted communications forming the basis of the Independent Counsel's Third Report. While they had a right to do so, the Arido Defence cannot now claim that it suffered unfair prejudice due to the delay caused by the national authorities taking time to decide on Kilolo and Mangenda Defence's claims. This is so especially since Arido would have benefitted if the national authorities had ruled in favour of Kilolo and Mangenda, and Arido never distanced himself from their claims before the national authorities.

11. Finally, as with the Second Issue, the Defence's arguments under the Third Issue amount to mere disagreements with the Single Judge's exercise of his discretionary trial management powers<sup>24</sup> in relation to the routine functioning of the Court.<sup>25</sup> Such a discretionary decision, even if incorrect, cannot qualify as an error of law. As a

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<sup>19</sup> Decision, p.4.

<sup>20</sup> Application, paras.25-28, 34.

<sup>21</sup> Application, paras.18, 25, 27, 28, 34.

<sup>22</sup> Application, para.26.

<sup>23</sup> ICC-01/05-01/13-255, p.7; ICC-01/05-01/13-443, p.4.

<sup>24</sup> ICC-02/05-03/09-295 OA2, para.29.

<sup>25</sup> ICC-01/04-01/06-2205 OA15 OA16, para.69; ICC-01/04-01/07-675 OA7, para. 7. Diss. Op (Judge Pikis).

result, the Third Issue is not an appealable issue and, as framed by the Defence, does not arise from the Decision.

*iv. The Issues do not meet the criteria for leave to appeal under Article 82(1)(d)*

12. In addition, the Issues do not affect the fair and expeditious conduct of the proceedings.<sup>26</sup> As stated above, the Single Judge in his Decision considered the rights of the accused by making particular reference to Article 67<sup>27</sup> and granted the Defence the same extension of time as given to the Prosecution to submit their replies. In addition, the Defence's argument that the Decision "may have been different" with its submissions<sup>28</sup> is speculative and hypothetical. It is firmly established by the case law of the Court that an issue cannot merely have a hypothetical impact on the fairness or expeditiousness of the proceedings.<sup>29</sup> Even if, *arguendo*, the Decision had some impact on the fair and expeditious conduct of the proceedings, such impact would not be significant, as required under Article 82(1)(d). The Decision only grants a limited extension of two weeks to the Prosecution, while granting a similar time period to each of the Defence teams for their Replies.<sup>30</sup> In this context, the Prosecution also recalls that the Defence had previously asked for an additional time of three weeks to reply to the Prosecution's submissions.<sup>31</sup>

13. In addition, the immediate resolution of the Issues by the Appeals Chamber would not materially advance the proceedings at this stage. In fact, appellate intervention would not remedy any hypothetical violation of the rights of the Defence. Realistically, by the time the parties would file their submissions in any

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<sup>26</sup> Application, paras.24-32.

<sup>27</sup> Decision, p.3. *Contra*, Application, paras.24-28.

<sup>28</sup> Application, para.29; see also paras.30-31.

<sup>29</sup> ICC-01/04-01/07-1958, para. 20. See also ICC-02/04-01/05-367, paras. 21-22.

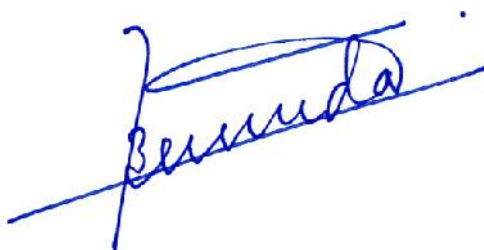
<sup>30</sup> Decision, p.4.

<sup>31</sup> ICC-01/05-01/13-351, para.23.

potential appeal,<sup>32</sup> and the Appeals Chamber were to rule on the merits of an appeal, both parties will have long filed their submissions on the confirmation of charges.<sup>33</sup>

### Conclusion

14. The Defence has not met the criteria for leave to appeal under Article 82(1)(d). Accordingly, the Prosecution requests the Chamber to dismiss the Application.




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**Fatou Bensouda, Prosecutor**

Dated this 11<sup>th</sup> Day of August 2014  
At The Hague, The Netherlands

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<sup>32</sup> Regulation 65(4) and (5) of the Regulations of the Court.

<sup>33</sup> The Prosecution recalls that an appeal does not have automatic suspensive effect of the appealed decision: see ICC-01/04-02/12-12 OA, para. 20; ICC-01/04-01/07-3344 OA13, para.7; ICC-01/11-01/11-480 OA6, para.14. *Contra* Application, para.35, where the Defence assumes suspensive effect of the appeal (if any), but appears to concede that a decision from the Appeals Chamber may not be rendered before the expiry of the Prosecution's deadline.