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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 Response to Jean-Jacques Mangenda Kabongo's Application for Leave
to Appeal the Confirmation Decision**

Source: Office of the Prosecutor

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Introduction

1. The Mangenda Defence application for leave to appeal¹ the Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute (“Statute”)² should be dismissed. None of the six alleged issues (“Issues”)³ raised in the Application arise from the Confirmation Decision. In addition, several of the Issues are mere disagreements, and do not constitute appealable “issues” within the terms of Article 82(1)(d) of the Statute. The Mangenda Defence impermissibly relitigates previously settled subjects extraneous to the Confirmation Decision. In large part, the Mangenda Defence rehearses its unsuccessful confirmation submissions without elaborating or adapting them to the specific context of an application for leave to appeal.⁴

2. In addition, none of the Issues meet the criteria for leave to appeal under Article 82(1)(d), which the Mangenda Defence only cursorily addresses. Even where it does, the Application fails to show that the Issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, *and* that the Appeals Chamber’s immediate resolution may materially advance the proceedings.

Submissions

3. While the Mangenda Defence generally alleges the lack of reasoning in the Confirmation Decision, these claims are cursory and based on a misreading of the Decision.⁵ To the contrary, the Decision is scrupulously reasoned. The Appeals Chamber has held that a Chamber must indicate with sufficient clarity the basis of its decisions. The extent of the reasoning will depend on the circumstances of each case. Such reasoning will not necessarily require reciting and summarising each and every factor; rather a Chamber must identify the facts relevant to its

¹ ICC-01/05-01/13-755 (Application).

² ICC-01/05-01/13-749 (Confirmation Decision or Decision).

³ The Application advances six issues: five issues with two sub-issues within the second issue.

⁴ See for example, Application, footnotes 3,5, paras.5-8.

⁵ See Application, pp.3,5-6. See para.9.

conclusion.⁶ The Pre-Trial Chamber did just that, providing sufficient clarity to ground its Decision.⁷ Without cogent arguments demonstrating how, if at all, this robustly reasoned Decision is insufficient, the Mangenda Defence claim must fail.

4. The Appeals Chamber has ruled that “only an issue may form the subject-matter of an appealable decision. [...] 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.”⁸ None of the Issues identified by the Mangenda Defence meet this test.

(a) The First Issue does not arise from the Confirmation Decision, and does not meet the criteria for leave to appeal

5. The First Issue, alleging the Single Judge’s lack of impartiality,⁹ does not arise from the Confirmation Decision and should be dismissed on that basis alone. As even the Mangenda Defence acknowledges,¹⁰ the Plenary of Judges unanimously dismissed the allegations of bias against the Single Judge.¹¹ The Defence had full opportunity to canvass its allegations of bias at that stage—these allegations were not only dismissed, but the Defence was cautioned against making such frivolous applications.¹² Five months later, an application for leave to appeal the Confirmation Decision is not the appropriate vehicle to raise this settled issue of alleged bias.

⁶ ICC-01/04-01/06-773 OA5, para.20; ICC-01/04-01/06-774 OA6, para.30.

⁷ Confirmation Decision, paras.8-106.

⁸ ICC-01/04-168 OA3, para.9; ICC-02/04-01/05-367, para.22; ICC-02/05-02/09-267, p.6; ICC-01/04-01/06-2463, para. 8; ICC-01/09-02/11-27, para.7. See also, ICC-01/04-01/06-1433 OA11, (Partly Dissenting Opinion of Judge Song), para. 4, specifying that “[a] decision “involves” an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

⁹ Application, para.4 (p.4).

¹⁰ Application, para.4 (p.4).

¹¹ ICC-01/05-01/13-511-Anx (Plenary Decision), paras.35-44.

¹² Plenary Decision, para.41.

6. Further, in a feeble attempt to sidestep the Plenary Decision and impermissibly relitigate the issue of bias, the Mangenda Defence identifies a solitary decision in support.¹³ However, the Decision of 24 July 2014 relates to a different accused—Narcisse Arido—and his request for interim release.¹⁴ While the Mangenda Defence relies on paragraph 23 of the *Arido* Decision, that paragraph pertains exclusively to the Single Judge’s statutorily required findings under Article 58(1)(b) of the Statute on “the risk relating to future crimes” by Narcisse Arido. This matter, as with the other bias allegations, does not arise from the Confirmation Decision. In addition, the finding demonstrates neither bias on the part of the Single Judge nor any unfairness to the proceedings, and further, has no bearing on the Mangenda Defence. No causal link exists between the *Arido* Decision and the rights of the Mangenda Defence—more so, when Narcisse Arido is represented by his own counsel.¹⁵

7. Since the Plenary of Judges has exhaustively considered the allegations of bias raised against the Single Judge and dismissed them, the Mangenda Defence cannot show that the fairness of the proceedings is impacted in any way. Further, an Appeals Chamber’s decision on the same issue is not required at this stage. For all these reasons, the First Issue should be dismissed.

(b) The Second and Third Issues¹⁶ do not arise from the Confirmation Decision, and do not meet the criteria for leave to appeal

8. The Second (appointment of Independent Counsel) and Third (interception of telephone communications) Issues advanced by the Mangenda Defence wrongly

¹³ Application, para.4 (p.4).

¹⁴ ICC-01/05-01/13-588 (*Arido* Decision).

¹⁵ *The Prosecutor v. Ayyash*, STL-11-01/T/TC/F1472, Decision on Certification of ‘Decision on Trial Management and Reasons for Decision on Joinder’, 31 March 2014, para.22.

<http://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/trial-chamber/f1472>

¹⁶ See Application, *Deuxième question (Première sous-question (Second Issue) and Deuxième sous-question (Third Issue))*, paras.4-6 (pp.5-9).

claim that there is no prior decision on these matters.¹⁷ To the contrary, as the Pre-Trial Chamber correctly found,¹⁸ these issues have already been adjudicated by the Single Judge,¹⁹ the Presidency and the Appeals Chamber²⁰ in a swathe of decisions. The Mangenda Defence, along with the other Defence teams, has even unsuccessfully challenged the appointment of the Independent Counsel and the interception of telephone communications on previous occasions.²¹ Raising them yet again at this stage is a thinly veiled and inappropriate attempt to relitigate these issues *via* the Confirmation Decision.

9. Significantly, because the Issues have been previously argued and decided, they do not arise from the Confirmation Decision, neither does the Mangenda Defence demonstrate how they constitute appealable issues. The Mangenda Defence misreads the Decision to claim that paragraphs 11 and 14 are contradictory.²² However, there is no such contradiction. The Chamber, in paragraph 10 (supported by paragraph 11), clearly and correctly found that it could not review previous decisions by the Single Judge or by other organs of the Court.²³ In paragraph 14, the Chamber only recalled and restated these earlier findings that “they were not unlawful”.²⁴ The Chamber did not re-open the earlier findings, but applied them to find that it could consider the evidence obtained by interception, if

¹⁷ Application, para.4 (pp.5-6).

¹⁸ Confirmation Decision, para.14.

¹⁹ For example, ICC-01/05-01/13-41-Red, pp.3-7; ICC-01/05-52-Red2, paras.3-8.

²⁰ For example, ICC-01/05-68, paras.11-13; ICC-01/05-01/13-511 and ICC-01/05-01/13-511-Anx (Plenary Decision), paras.36-41, where the Plenary of Judges dismissed, among others, the Defence allegations contesting the Single Judge’s decisions on the appointment of Independent Counsel and the waiver of immunity of lead counsel and the case manager. See also ICC-01/05-01/13-648-Red3, paras.57-62, where the Appeals Chamber dismissed the Defence arguments to disqualify the Prosecutor on similar grounds.

²¹ For example, ICC-01/05-01/13-50, pp.3-6, rejecting Kilolo’s application for leave to appeal the decision appointing Independent Counsel; ICC-01/05-01/13-51, pp.3-6, rejecting Bemba’s application for leave to appeal the decision appointing Independent Counsel; ICC-01/05-01/13-295, paras.14-22, rejecting *inter alia* Mangenda’s challenge to the telephone intercepts; ICC-01/05-01/13-362-Red, pp.3-7, dismissing Bemba’s request to disqualify the Independent Counsel.

²² Application, para.4 (pp.5-6).

²³ Confirmation Decision, paras.10-11.

²⁴ Confirmation Decision, para.14.

it was relevant and of sufficient probative value.²⁵ The Mangenda Defence fails to show any error with this approach.

10. Further, the Mangenda Defence's reliance on the 17 March 2014 Decision fails to advance its case.²⁶ That Decision merely states that the Defence arguments will be addressed in the confirmation phase²⁷—the Pre-Trial Chamber has already done so by making its findings after having received extensive confirmation submissions from the Defence.²⁸ That same Decision also states that the parties would have the opportunity for an eventual review by the Appeals Chamber.²⁹ These final appeals can only take place once the trial is completed. They are not matters arising out of the Confirmation Decision, and the Mangenda Defence fails to show otherwise.

11. Because the Mangenda Defence impermissibly revisits the Second and Third Issues, they should be rejected on that basis alone. Moreover, while the Mangenda Defence cursorily claims so,³⁰ neither Issue affects the fairness of the proceedings. Nor would an Appeals Chamber's decision materially advance the proceedings at this stage. As the Plenary of Judges found, these issues are appropriately addressed through the Court's appellate process.³¹ Because the Defence has already exhausted the interlocutory appeal process,³² final appeals are the only remaining avenues. The Second and Third Issues should therefore be dismissed.

²⁵ Confirmation Decision, para.14.

²⁶ Application, para.4 (pp.5-6).

²⁷ ICC-01/05-01/13-261 (17 March 2014 Decision), para.5.

²⁸ See also Confirmation Decision, paras.6-14.

²⁹ 17 March 2014 Decision, para.5.

³⁰ Application, paras.5-6 (pp.7-9).

³¹ Plenary Decision, para.40.

³² See for example, footnotes 20-21.

(c) The Fourth Issue does not arise from the Confirmation Decision, and does not meet the criteria for leave to appeal

12. As its Fourth Issue, the Mangenda Defence appears to contest Mangenda's criminal responsibility by arguing—on the basis of Articles 28(b), 33(1) and 30 of the Statute—the defence of superior orders.³³ While these arguments are sparse and fail to address the interlocutory appeal criteria in any substantive way, it suffices to say that this proposition is manifestly wrong in law and fact. As a matter of law, the defence of superior orders can only apply to war crimes;³⁴ it does not apply to Article 70 offences.

13. As a matter of fact, Mangenda cannot possibly invoke such a defence in the face of express findings that he “pursued his role in the overall strategy to defend Mr. Bemba in the Main Case together with Mr. Kilolo and Mr. Bemba, including through the commission of offences against the administration of justice.” The Chamber further found that Mangenda “was fully aware of the conduct of Mr. Bemba and Mr. Kilolo towards the commission of the charged offences, the professional risks they were taking and the possible legal consequences which might arise in the event that an investigation pursuant to article 70 of the Statute were to be launched by the Prosecutor.”³⁵ That the purported orders involved the commission of crimes and hence were manifestly unlawful (Article 33(1)(c)), and that Mangenda knew that the “orders” and conduct, including his own, were manifestly unlawful (Article 33(1)(b)) cannot now be disputed on the basis of the Confirmation Decision. If anything, Mangenda's raising of such a defence supports the Confirmation Decision findings on the sufficiency of the evidence demonstrating his own criminal conduct, and that of his co-accused. Further, Mangenda was under no legal obligation to follow these alleged orders (Article

³³ Application, para.7 (p.10).

³⁴ Article 33 of the Statute.

³⁵ Confirmation Decision, para.75.

33(1)(a)). Therefore, without meeting the three criteria under Article 33, the defence of superior orders is entirely unavailable to Mangenda.

14. In addition, contrary to the Mangenda Defence claim,³⁶ the Pre-Trial Chamber appropriately considered its submissions and provided a reasoned opinion. It was not obliged to address or detail every Defence submission however inapplicable or unfeasible in the circumstances, including such defences. In any event, the fairness of the proceedings is not imperiled since the Decision does not preclude Mangenda from raising the issue or purported defences at trial. The Mangenda Defence's contentions to the contrary misapprehend the purpose of the confirmation procedure before the Pre-Trial Chamber, which is confined to a determination of the sufficiency of the evidence to establish substantial grounds to believe the suspect committed the charged crimes.³⁷ By contrast, a determination of criminal responsibility is a matter for the Trial Chamber at the conclusion of the trial. As Mangenda's criminal responsibility has not yet been adjudicated, it cannot affect the fairness of the proceedings at this stage. An appellate determination at this stage would also be premature.³⁸ Because the Fourth Issue does not arise from the Confirmation Decision, it should be dismissed.

(d) The Fifth Issue does not arise from the Decision, is not appealable and does not meet the criteria for leave to appeal

15. The Fifth Issue is extraneous to the Confirmation Decision. Here, the Mangenda Defence inappropriately claims insufficient means and non-payment of legal fees.³⁹ Such administrative claims have no bearing on the confirmation process or Decision determining the sufficiency of the evidence for trial, but instead

³⁶ Application, para.7 (p.10).

³⁷ Article 61(7) of the Statute.

³⁸ *Contra* Application, para.7 (p.10).

³⁹ Application, para.8 (pp.10-11).

fall within the Registry's remit and are regulated by a distinct procedure.⁴⁰ As the Confirmation Decision correctly stated,⁴¹ the matter of means available to the Defence, including legal aid was already decided in the course of the proceedings.⁴² The Pre-Trial Chamber cannot review these decisions through the confirmation process.⁴³ The Issue therefore does not arise from the Decision.

16. Moreover, this Issue constitutes a mere disagreement and conflicting opinion on the financial means provided.⁴⁴ It is not an identifiable subject or topic requiring a decision for its resolution.⁴⁵ Nor is it essential to the disposition of the Confirmation Decision. For these reasons, it is not an appealable issue.

17. Further, when the Defence is equipped with a distinct procedure to challenge the alleged unfairness of the decision on legal aid, the unrelated Confirmation Decision cannot raise any issues of fairness to the proceedings or the outcome of the trial. Further, an appellate decision on the alleged dispute over the payment of legal aid will not advance the proceedings. The vague and repetitive submissions of the Mangenda Defence⁴⁶ do not show otherwise. The Fifth Issue should be dismissed.

(e) The Sixth Issue does not arise from the Decision, is not appealable and does not meet the criteria for leave to appeal

18. The Sixth Issue⁴⁷ likewise does not arise from the Confirmation Decision. Here, the Mangenda Defence relies on a solitary decision relating to another co-accused—Kilolo, denying his calling of live witnesses, as opposed to written

⁴⁰ See Regulations 83-85 of the Regulations of the Court; Chapter 4, Section 3 of the Regulations of the Registry.

⁴¹ Confirmation Decision, paras.9-10.

⁴² See for example, ICC-01/05-01/13-228-Conf, paras.1-26; ICC-01/05-01/13-365-Conf, pp.3-6.

⁴³ Confirmation Decision, paras.9-10.

⁴⁴ See for example, ICC-01/05-01/13-365-Conf, pp.3-6.

⁴⁵ 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.25; ICC-01/04-01/06-1557, para.30; ICC-01/04-01/07-2035, para.25; ICC-02/05-03/09-179, para.27.

⁴⁶ Application, para.8 (pp.10-11).

⁴⁷ Application, para.9 (p.12).

statements.⁴⁸ This has no merit. First, as with its earlier reliance on the *Arido* Decision, the Mangenda Defence fails to show how disallowing witnesses that Kilolo had previously intended to call impacted the confirmation process against him. The Issue does not arise from the Confirmation Decision. The Mangenda Defence has already unsuccessfully challenged the conduct of the confirmation process through written submissions including the rejection of *viva voce* witnesses *via* the *Kilolo* Decision.⁴⁹ Indeed, as the Pre-Trial Chamber correctly noted, the rejection of *viva voce* witnesses was already decided during the proceedings, and cannot be reviewed at this stage.⁵⁰

19. Second, as the *Kilolo* Decision amply demonstrates, the Single Judge determined that the presentation of evidence in documentary form is the preferred modality for confirmation of charges proceedings.⁵¹ This is particularly so for Article 70 proceedings, where the Rules of Procedure and Evidence specifically allow the confirmation process to be conducted on the basis of written submissions alone.⁵² In addition, Article 61(5) shows that documentary or summary evidence suffices for this process, and that oral testimony is unnecessary.⁵³ The Mangenda Defence submissions merely disagree with the statutory text, and cannot therefore be an appealable issue. When the governing legal documents expressly allow for written evidence, there cannot be an issue of fairness to the proceedings. Neither is an appellate decision required at this stage to revisit express statutory provisions.⁵⁴ For these reasons, the Sixth Issue should be dismissed.

⁴⁸ ICC-01/05-01/13-363 (*Kilolo* Decision).

⁴⁹ See for example, ICC-01/05-01/13-367, paras.13-15. See also ICC-01/05-01/13-37, paras.1-7; ICC-01/05-01/13-93, pp.3-6.

⁵⁰ Confirmation Decision, paras.9-10.

⁵¹ See also ICC-01/09-02/11-226, para. 18; ICC-01/09-01/11-221, para. 14.

⁵² Rule 165(3).

⁵³ Article 61(5) of the Statute. The same principle should apply to the Defence.

⁵⁴ *Contra* Application, para.9 (p.12).

Relief Sought

20. None of the six Issues arise from the Confirmation Decision. Several of them do not constitute issues within the terms of Article 82(1)(d). In addition, the Application fails to substantiate and meet the criteria under Article 82(1)(d). As a result, the Application should be rejected.



Fatou Bensouda, Prosecutor

Dated this 20th day of November 2014

At The Hague, The Netherlands