

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 26 March 2014

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

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 d’autorisation d’appel de la décision publique ICC-
01/05-01/13-187 14-02-2014 ‘joint decision’”
submitted by the Defence for Jean-Jacques Mangenda on 19 February 2014**

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

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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
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Others

REGISTRY

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Victims and Witnesses Unit

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**Victims Participation and
Reparations Section**

PRE-TRIAL CHAMBER II (the “Chamber”) of the International Criminal Court (the “Court”), having been assigned the situation in the Central African Republic, renders this decision on the “Requête d’autorisation d’appel de la décision publique ICC-01/05-01/13-187 14-02-2014 ‘joint decision’” submitted by the Defence for Jean-Jacques Mangenda (“Mr Mangenda”) on 19 February 2014 (“Mr Mangenda’s Second Application” or the “Second Application”))¹, seeking leave to appeal the “Joint decision on applications for leave to appeal decisions issued in the situation following their reclassification, submitted by the Defence for Mr Mangenda, the Defence for Mr Kilolo and the Defence for Mr Bemba” dated 14 February 2014² (the “Joint Decision”).

I. Relevant background and submissions of the parties

1. On 3 February 2014, Single Judge Cuno Tarfusser, acting on behalf of the Chamber, issued the “Decision on the reclassification of documents in the record of the situation and of the case” (the “Reclassification Decision”)³, whereby he proceeded to reclassify a number of filings both in the record of the case and in the relevant section of the record of the situation. More specifically, he reclassified *inter alia* as public redacted⁴ the “Decision on the ‘Prosecutor’s ‘Request for judicial order to obtain evidence for investigation under Article 70’” (the “29 July 2013 Decision”), originally issued on 29 July 2013 as confidential, *ex parte* Prosecutor and Registrar⁵, which had already been reclassified as “confidential redacted” on 13 December 2013⁶.

2. The 29 July 2013 Decision had *inter alia* (i) authorised the Prosecutor to seize the relevant authorities of Belgium and the Netherlands with a view to

¹ ICC-01-05-01/13-203.

² Pre-Trial Chamber II, ICC-01/05-01/13-187.

³ Pre-Trial Chamber II, ICC-01/05-01/13-147.

⁴ Pre-Trial Chamber II, ICC-01/05-52-Red2.

⁵ Pre-Trial Chamber II, ICC-01/05-52-Conf-Exp.

⁶ Pre-Trial Chamber II, ICC-01/05-01/13-39-Conf, confidential Annex A.

collecting logs and recordings of telephone calls placed or received by Aimé Kilolo Musamba (“Mr Kilolo”) and Mr Mangenda and (ii) appointed Independent Counsel tasked with 1. reviewing the logs of telephone calls either placed or received by Mr Kilolo and Mr Mangenda made available by the relevant Belgian and Dutch authorities, with a view to identifying any calls received from or placed to parties connected with the investigation; 2. listening to the recordings of any and all such calls; and 3. transmitting to the Prosecutor the relevant portions of any and all such calls which might be of relevance for the purposes of the investigation.

3. On 4 February 2014, the Defence for Mr Mangenda submitted its “Requête en autorisation d’appel de la décision publique ICC-01/05-52-Red2 03-02-2014 du 3 février 2014 sur la requête du Procureur d’obtenir des éléments de preuve sous le régime de l’article 70” (“Mr Mangenda’s First Application” or the “First Application”))⁷, requesting leave to appeal the 29 July 2013 Decision on the following issues: (i) “la légalité de cette décision, dont l’objet n’est prévu par aucun texte”; and (ii) “la légalité des écoutes autorisées par le Juge unique”.

4. Similar applications, seeking leave to appeal decisions issued on a confidential *ex parte* basis in the context of the situation and reclassified pursuant to the Reclassification Decision, were also submitted, in respect of similar issues, by the Defence for Mr Kilolo and the Defence for Jean-Pierre Bemba Gombo (“Mr Bemba”), respectively on 10 February 2014 and on 11 February 2014.

5. In the “Requête aux fins d’autorisation d’appel de la ‘Decision on the Prosecutor’s request for judicial order to obtain evidence for investigation under Article 70’ (ICC-01/05-52-Red2)” (“Mr Kilolo’s Application”)⁸, the Defence for Mr Kilolo requested leave to appeal the 29 July 2013 Decision on the following issues:

⁷ ICC-01/05-01/13-149.

⁸ ICC-01/05-01/13-169.

(i) whether the Pre-Trial Chamber has “compétence pour: autoriser l'interception des communications téléphoniques d'un Conseil à la Cour au motif d'atteintes présumées à l'administration de la justice” and (ii) whether the Pre-trial Chamber has “compétence pour ... nommer un Conseil indépendant avec mission d'exercer un pouvoir d'enquête sur lesdites communications”.

6. In the “Defence request for leave to appeal decisions ICC-01/05-46 and ICC-01/05-50” (“Mr Bemba’s Application”)⁹, the Defence for Mr Bemba sought leave to appeal two other decisions (namely, the “Decision on the Prosecutor's ‘Request for judicial assistance to obtain evidence for investigation under Article 70’” dated 8 May 2013 - ICC-01/05-46 (the “8 May 2013 Decision”) - and the “Decision on the ‘Registry's Observations pursuant to regulation 24 *bis* of the Regulations of the Court on the implementation of the ‘Decision on the Prosecutor's ‘Request for judicial assistance to obtain evidence for investigation under Article 70’” dated 27 May 2013 - ICC-01/05-50, (the “27 May 2013 Decision”)), both also issued in the context of the situation on a confidential *ex parte* basis and also reclassified as public on 3 February 2014 pursuant to the Reclassification Decision, on three issues variously relating to access by the Prosecutor to logs and recordings of non-privileged telephone conversations entertained by Mr Bemba from the Court’s detention centre.

7. On 12 February 2014, the Defence for Mr Mangenda submitted 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 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 ” (“Mr Mangenda’s Defence

⁹ ICC-01/05-01/13-170-Corr.

Response”)¹⁰, requesting the Single Judge (i) to “accorder l’autorisation d’appel des décisions attaquées” and (ii) to “ordonner au Procureur de communiquer à la Défense les motifs du refus d’écoutes téléphoniques par les autorités belges”.

8. On 14 February 2014, the Single Judge, always acting on behalf of the Chamber and considering that the issues raised by Mr Mangenda’s First Application and by Mr Kilolo’s and Mr Bemba’s Applications were similar in nature, decided that it was appropriate to address and determinate them jointly and issued the Joint Decision.

9. The Joint Decision rejected Mr Mangenda’s First Application, as well as Mr Kilolo’s and Mr Bemba’s Applications, for leave to appeal, based *inter alia* on the following considerations:

- i. the 8 May 2013 Decision, the 27 May 2013 Decision and the 29 July 2013 Decision were all issued in the situation of the Central African Republic, at a time when the identification of possible suspects and the opening of the present case were yet to come;
- ii. the right to request leave to appeal a decision pursuant to article 82(1)(d) of the Rome Statute (the “Statute”) is restricted to “either party” to that decision;
- iii. previous findings of this Chamber, determining the *ex parte* nature of article 58 proceedings¹¹ and the ensuing fact that a person targeted by those proceedings cannot be considered as a ‘party’ to the proceedings within the meaning and for the purposes of

¹⁰ ICC-01/05-01/13-184-Conf.

¹¹ Pre-Trial Chamber II, Decision on Application for Leave to Submit *Amicus Curiae* Observations, 18 January 2011, ICC-01/09-35, para. 10; Pre-Trial Chamber II, Decision on the “Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor’s Application under Article 58(7)”, 11 February 2011, ICC-01/09-42, paras 13, 18 and 23.

article 82(1)(d) of the Statute¹², had to be regarded as even more compelling in respect of proceedings *preceding* the submission of an application under article 58 of the Statute (such as those leading to the issuance of the 8 May 2013, 27 May 2013 and 29 July 2013 Decisions), strictly pertaining to the phase of the investigation;

- iv. since neither Mr Mangenda, nor Mr Kilolo or Mr Bemba, were a party either to the 8 May 2013, 27 May 2013 and 29 July 2013 Decisions, or to the proceedings leading to their issuance, none of them could become a “party” thereto on an *ex post* basis, by mere virtue of the subsequent filing of a “public redacted” version thereof;
- v. neither the reclassification of a decision by the creation of a public redacted version thereof, nor the fact that regulation 25(4) of the Regulations of the Registry requires that the redacted version of a document “shall reflect the date of filing” or the “notification(s)” entailed by such reclassification, can result in creating “new”, autonomous decisions for the purposes of their appeal under article 82(1)(d) of the Statute, with a view not to undermining the necessary certainty in determining the time limits set forth by the statutory texts;
- vi. conferring the right to challenge a decision on a retroactive basis following its reclassification would be tantamount to turning the Court’s criminal process into “a highly unstable set of procedural steps”, as noted by the Prosecutor;

¹² Pre-Trial Chamber II, Decision on a Request for Leave to Appeal, 11 February 2011, ICC-01/09-43, para. 9.

- vii. since being or not being party of given proceedings is a matter of substance rather than of formal labelling, it would not be possible to contradict or otherwise overturn the fact that Mr Mangenda, Mr Kilolo and Mr Bemba were not parties to the 8 May 2013, 27 May 2013 and 29 July 2013 Decisions, or to the proceedings leading to their issuance, by simply “considering” those decisions as “part of the record of the case ICC-01/05-01/13”, as requested by the Defence for Mr Bemba;
- viii. in light of this, it was unnecessary to determine whether one or more of the issues raised by Mr Mangenda’s First Application, Mr Kilolo’s and Mr Bemba’s Defence Applications would qualify as “appealable issues” within the meaning and for the purposes of article 82(1)(d) of the Statute.

10. In the same Joint Decision, the Single Judge noted that (i) Mr Mangenda’s Defence Response, whilst labelled as “response”, was actually a reply to the Prosecutor’s Response to Mr Mangenda’s First Application, which would have required prior authorisation by the Chamber; (ii) failed to indicate any reason in support of its classification as “confidential”; (iii) contained a new, autonomous request that the Single Judge order the Prosecutor to indicate the reasons why the Belgian authorities would have rejected her request for intercept of telephone calls, thereby exceeding the boundaries of a reply to a response; (iv) referred in its title and text generically to filings and requests made by the Defence of Mr Bemba, Mr Kilolo and Fidèle Babala Wandu, without making specific reference to their number of registration in the record. He underscored his serious concern at the procedural, substantial and formal irregularities affecting Mr Mangenda’s Defence Response, highlighted their significantly adverse impact on the efficiency and expeditiousness of the proceedings, to the

detriment of all defence teams and considered that they fell gravely short of the professional standards required from Counsel before the Court, and in particular of Counsel's duties to "take all necessary steps to ensure that his or her actions ... are not prejudicial to the ongoing proceedings" and to "represent the client expeditiously with the purpose of avoiding unnecessary expense or delay in the conduct of the proceedings".

11. On 19 February 2014, the Defence for Mr Mangenda submitted its Second Application, applying for leave to appeal the Joint Decision on the following issues, each of which, in its view, satisfies the requirements set forth under article 82(1)(d) of the Statute:

- a. *"savoir si le Juge unique est dans l'erreur quand il pense pouvoir dire pour droit que le droit de demande d'appel d'une décision « ex parte », prise au stade de l'instruction, n'existerait pas dans le chef d'un prévenu, une fois arrêté et une fois cette décision lui ayant été notifiée"* ("First Issue");
- b. *"savoir si le Juge unique est dans l'erreur quand il refuse un droit d'appel à la personne concernée, qui n'a pas été entendue concernant des enregistrements de ses conversations téléphoniques privées et, de plus, confidentielles et concernant la communication de ces enregistrements sans autorisation judiciaire au Procureur" and "[é]galement de savoir si le refus de droit d'appel comporte une confirmation de la violation antérieure des droits fondamentaux de la personne concernée, c'est-à-dire celui à la vie privée "* ("Second Issue"); and
- c. *savoir si le Juge unique est dans l'erreur quand il critique publiquement le conseil de la défense, mettant en doute ses capacités professionnelles, tout en sous-entendant que son intervention serait inutile et/ou inappropriée"* ("Third Issue").

12. On 24 February 2014, the “Prosecution’s Response to the Defence for Mr Mangenda’ request for leave to appeal decision ICC-01/05-01/13-187 (ICC-01/05-01/13-203)”¹³ was filed. The Prosecutor argues that Mr Mangenda’s Second Application should be rejected, on the basis of two sets of grounds: first, it “is effectively a motion for reconsideration of the Single Judge’s prior decision”; second, “it fails to meet the requirements set forth in Article 82(1)(d)”.

II. Applicable law

13. The Chamber notes articles 82(1)(d) of the Statute, rule 155(1) of the Rules of Procedure and Evidence (the “Rules”), and regulation 24(5) of the Regulations of the Court (the “Regulations”).

III. Determinations by the Chamber

A. The First Issue

14. The First Issue is premised on the Defence’s submission and belief that, contrary to what was held in the Joint Decision, one may become “a party” to a decision on an *ex post* basis, by virtue of being notified of that decision subsequently to its issuance, for the sole purposes of requesting leave to appeal it under article 82(1)(d) of the Statute. The fact that the Joint Decision explicitly rejected this line of arguing is clad by the Defence for Mr Mangenda as a possible “issue” suitable to lead to grant leave to appeal it.

15. The Chamber disagrees with the Defence for Mr Mangenda. In its First Application, the Defence for Mr Mangenda explicitly acknowledged that the 29 July 2013 Decision (erroneously referred to by Counsel as dated 3 February 2014, which date only referred to its public redacted version) had been issued “à l’origine ‘ex parte’”¹⁴. The Defence for Mr Mangenda chose not to consider this aspect (i.e., the fact that it was requesting leave to appeal in respect of a decision

¹³ ICC-01/05-01/13-220.

¹⁴ ICC-01/05-01/13-149, para. 2, page 3.

to which it had not been a party) as problematic and not to develop it further in its First Application. Whilst this was an option legitimately available to it, as expression of its discretion and responsibility to determine and select the lines of arguing to be pursued, the Chamber considers that the Defence for Mr Mangenda is not entitled to reopen today this particular argument (relating to the interpretation of the notion of “party” within the meaning and for the purposes of article 82(1)(d) of the Statute) by trying to turn it into the core of a purportedly “new” issue, for the sole purposes of requesting leave to appeal the decision which first rejected it. In so doing, the Defence makes it clear that it is actually seeking reconsideration by the Chamber of the same issue as the one on which it has already ruled, a remedy which is not provided under the Statute.¹⁵

16. The Defence is certainly entitled to disagree with the view taken by the Chamber and may wish to use the opportunity to challenge this view, at the appropriate time, before the Appeals Chamber. Finally, it has to be recalled that the mere disagreement between a party and a Chamber as regards the Joint Decision does not constitute an appealable issue for the purposes of article 82(1)(d) of the Statute.¹⁶

¹⁵ Pre-Trial Chamber II, Decision on the Prosecutor’s Position on the Decision of Pre-Trial Chamber II to redact factual descriptions of crimes from the warrants of arrest, motion for reconsideration, and motion for clarification, 28 October 2005, ICC-02/04-01/05-60, para. 18. See also, for example, Pre-Trial Chamber I, Decision on the Prosecution motion for Reconsideration, 23 May 2006, ICC-01/04-01/06-123, p. 3; Pre-Trial Chamber I, Decision on the Prosecution motion for Reconsideration and, in the alternative, leave to appeal, 23 June 2006, ICC-01/04-01/06-166, para. 10; Pre-Trial Chamber II, Decision on the “Defence Request for Leave to Appeal the ‘Urgent Decision on the ‘Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence’ (ICC-01/09-01/11-260)’”, 29 August 2011, ICC-01/09-01/11-301, para. 18.

¹⁶ Appeals Chamber, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168 OA3, para. 9.

B. The Second Issue

17. The Chamber notes that the very formulation of the Second Issue suggests that the Defence in the Second Application seeks to obtain leave to appeal in respect of an issue which has already been raised in the context of Mr Mangenda's First Application. Considering that the Single Judge rejected that article 82(1)(d) request, the Second Application is in fact seeking leave to appeal the Joint Decision itself rejecting leave to appeal the 29 July 2013 Decision. Since all decisions rejecting applications for leave to appeal consist of, or result in, "denying" a party the right to appeal a decision on an interlocutory basis, considering that this "denial", albeit temporary in nature, might amount to an appealable issue for the purposes of article 82(1)(d) of the Statute would be tantamount to considering that leave to appeal should be granted for any and all decisions denying leave to appeal. This result would obviously be incompatible with the mechanism of article 82(1)(d) of the Statute, the clearly *exceptional* nature of the remedy enshrined in article 82(1)(d) of the Statute¹⁷ and defeat the very purpose of advancing the efficiency and expeditiousness of the proceedings

¹⁷ See, for example, Pre-Trial Chamber II, Decision on Prosecutor's Application for Leave to Appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, 19 August 2005, ICC-02/04-01/05-20, paras 15-19; Pre-Trial Chamber II, Decision on Prosecutor's Application for Leave to Appeal Dated the 15th Day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal Dated the 11th Day of May 2006, 10 July 2006, ICC-02/04-01/05-90, paras 19-21; Pre-Trial Chamber III, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, 25 August 2008, ICC-01/05-01/08-75, para. 6; Pre-Trial Chamber II, Decision on the Prosecutor's Application for Leave to Appeal the 'Decision Pursuant to Articles 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo', 18 September 2009, ICC-01/05-01/08-532, para. 12; Pre-Trial Chamber II, Decision on the 'Prosecution's Application for Leave to Appeal the *Decision Setting the Regime for Evidence Disclosure and Other Related Matters* (ICC-01/09-01/11-44)', 2 May 2011, ICC-01/09-01/11-74, para. 7; Pre-Trial Chamber II, Decision on the 'Prosecution's Application for Leave to Appeal the *Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali*', 1 April 2011, ICC-01/09-02/11-27, para. 6; see also, Trial Chamber II, Decision on the Prosecutor's Application for Leave to Appeal the Decision on Redactions Rendered on 10 February 2009, 6 March 2009, ICC-01/04-01/07-946-tENG, para. 11.

which the provision is meant to serve. In light of the above, the Chamber finds that the Second Issue cannot be considered under article 82(1)(d) of the Statute.

C. The Third Issue

18. The Third Issue consists essentially of a challenge to the power of the Chamber to point out what, in its view, are shortcomings of a given submission, whether in law or in fact, to remind the parties of their obligations *vis-à-vis* the Court and, if need be, to highlight the possible adverse impact that those shortcomings might have on the overall development of the proceedings, including their efficiency and expeditiousness.

19. The statutory instruments of the Court vest the Chamber (and hence the Single Judge acting on its behalf) with the critical duty and responsibility of ensuring that proceedings are conducted in a way which is fair and expeditious, with full respect for the rights of the suspects. For the purposes of pre-trial proceedings, this principle is enshrined in article 67 in conjunction with rule 121(1), second sentence, of the Rules.

20. The Chamber notes that it is only able to properly discharge its critical duty and responsibility in respect of the orderly conduct of the proceedings if it is in a position to take all measures it deems appropriate to alert the parties to, or to remind them of, the need that they strictly comply with the procedural and substantial requirements of the relevant statutory framework, as well as with their professional duties as set forth by the Code of Professional Conduct for counsel. Alleging that the pointing out of shortcomings in a given submission, or reminding a party of the relevant duties and obligations *vis-à-vis* the Court, most of which are obviously instrumental to the orderly and effective conduct of the proceedings, would amount to undue “criticism” of that party, and therefore to an “issue” for the purposes of an interlocutory appeal, is tantamount to arguing

that the Chamber has to abdicate to that responsibility and let the proceedings have any course the parties may decide to give them.

21. The sections of the Joint Decision affected by the Third Issue are to be regarded as a concrete example of the exercise of this judicial duty and responsibility. They pointed out, by way of specific and objective references to the relevant submissions and to the applicable legal framework, that the “reply” filed by the Defence for Mr Mangenda not only had been filed without prior authorisation and hence in violation of regulation 24(5) of the Regulations, but also contained a number of inaccuracies which could - and should - have been avoided. They also warned that a counsel’s failure to exercise the due diligence in respect of each filing was bound to have a negative impact on the overall expeditiousness of the proceedings and hence to the suspects’ right to a fair trial. The Chamber also wishes to note that similar reminders and warnings, in the same spirit and in pursuance of the same objective of preventing undue delay, have been repeatedly issued by the Single Judge on behalf of the Chamber in respect of both other defence teams¹⁸ and the Prosecutor¹⁹ in these proceedings, the pace of which has been - and will likely continue to be - particularly intense, in the interest of the expeditious and fair prosecution of the suspects and of an expedited completion of the pre-trial phase. As much as Counsel for the Defence for Mr Mangenda is entitled to disagree with the view taken by the Single Judge,

¹⁸ See, for example, Pre-Trial Chamber II, Decision on the “Defence request for assistance pursuant to Regulation 77(4)(b) of the Regulations of the Court”, 19 December 2013, ICC-01/05-01/13-57 (Defence for Mr Bemba); Pre-Trial Chamber II, Decision on the “Requête en communication de la version originale des enregistrements sonores et des entretiens téléphoniques visés par le Procureur dans la pièce ICC-01/05-01/13-19-Conf-AnxI.1” submitted by the Defence for Mr Babala, 15 January 2014, ICC-01/05-01/13-99 (Defence for Mr Babala); and Pre-Trial Chamber II, Decision on Mr Bemba’s request for disclosure dated 2 February 2014, 7 February 2014, ICC-01/05-01/13-158-Conf (Defence for Mr Bemba).

¹⁹ Pre-Trial Chamber II, Decision on the on the “Prosecution’s Application for extension of time for the disclosure of the recordings of telephone calls between Messrs Bemba and Mangenda”, 10 January 2014, ICC-01/05-01/13-80-Conf.

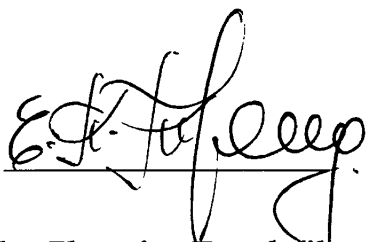
it is inconceivable that the existence of this power be turned into “an issue” warranting a request for leave to appeal under article 82(1)(d) of the Statute.

22. In light of this, the Chamber takes the view that the Third Issue represents a disagreement with the ruling of the Single Judge and is not an “issue” within the meaning and for the purposes of article 82(1)(d) of the Statute.

FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS Mr Mangenda’s Second Application.

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



Judge Ekaterina Trendafilova
Presiding Judge



Judge Hans-Peter Kaul



Judge Cuno Tarfusser

Dated this Wednesday, 26 March 2014
The Hague, The Netherlands