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TRIAL CHAMBER VII

**Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan**

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 Redacted Version
With Confidential Annexes A and B**

**Motion for Reconsideration or, In the Alternative, for Leave to Appeal the Decision on
Request to Declare Telephone Intercepts Inadmissible (ICC-01/05-01/13-1284)**

Source: Defence for Jean-Jacques Kabongo Mangenda

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. The Defence of Jean-Jacques Mangenda is mindful of, and respects, the Trial Chamber's instruction that the parties should resort to a request for reconsideration, or a request for leave to appeal, with care and circumspection.¹ Some decisions, however, concern matters of such vital importance as to justify ensuring that the basis on which they are decided is unequivocal, and that immediate appellate scrutiny confirms that there is no reversible error that might otherwise affect proceedings. The Trial Chamber's *Decision on Request to declare telephone intercepts inadmissible*² ("Decision") is one such vitally important decision for which the following requests for reconsideration or, in the alternative, leave to appeal, are respectfully submitted.
2. The Decision determined that the Prosecution's 19 July 2013 "Request for a Judicial Order to Obtain Evidence for Investigation under Article 70" contained no misrepresentations and that, accordingly, that "the Chamber cannot conclude that the Prosecution obtained the Telephone Intercepts in a manner amounting to a violation of the Statute or an infringement of Mr Mangenda's right to privacy."³ Accordingly, the Trial Chamber considered it unnecessary to further assess whether the grounds for inadmissibility in Article 69(7) were met.
3. Reconsideration is sought based on one specific issue in the Decision that, in the Defence's respectful view, constitutes a clear error of reasoning that may have arisen from a confusion as to the meaning of certain submissions. The issue concerns the Prosecution's possession of Mr. Mangenda's incoming and outgoing Western Union payment records as of 19 July 2013. The outgoing records show that Mr. Mangenda: (i) had not made any Western Union payments to any Defence witnesses; and (ii) that sixteen of the nineteen payments from [REDACTED] did not fit the alleged "pattern" of such payments coinciding with the appearance of witnesses in The Hague. Neither of these facts was disclosed to the Single Judge at the time of the request for judicial authorisation of 19 July 2013 to listen to Mr. Mangenda's telephone.⁴ This non-disclosure left an impression that constituted, in the context of an *ex parte* application requesting such a far-reaching invasion of privacy, a misrepresentation.

¹ This is a public redacted version of a previous filing by the Defence for Mr. Mangenda. Though some reference is made to confidential submissions, no sensitive or confidential information is disclosed.

² ICC-01/05-01/13-1284, 24 September 2015.

³ Decision, para. 32.

⁴ *Situation in the Central African Republic*, Request for Judicial Order to Obtain Evidence for Investigation under Article 70, ICC-01/05-51-Red, 12 February 2014 ("Authorisation Request"), para. 14.

4. In the alternative, the three requirements for granting interlocutory appeal pursuant to Article 82(1)(d) are satisfied in respect of the specific issues hereinafter identified. First, each of the issues for which appellate resolution is sought arises out of the Decision, and each is “essential for the determination of the Decision’s correctness.”⁵ Second, the Decision directly concerns Mr. Mangenda’s right to a fair trial, as well as the outcome of proceedings. Third, immediate appellate resolution will materially advance the proceedings by ensuring that the trial does not proceed on the basis of a substantial volume of inadmissible material.

II. THE TWO ISSUES OF PRIMARY IMPORTANCE TO THE REQUEST FOR RECONSIDERATION AND LEAVE TO APPEAL

(i) *The Allegation that Mr. Mangenda Made Payments to Witnesses By Western Union*

5. On 19 July 2013, the Prosecution requested from a Single Judge “authorization for the Prosecution to collect recordings of telephone intercepts from the Dutch and Belgian governments.”⁶ This request included two distinct statements about the manner in which Mr. Mangenda was purported to have paid witnesses. The first allegation, in paragraph 14 of the Authorisation Request, asserted that Mr. Mangenda “had sent Western Union payments to Defence witnesses”; a second allegation, set out at paragraph 21 of the Authorisation Request, alleged that Mr. Mangenda “may be paying witnesses while they are at the seat of the Court.” Nowhere are these two allegations cross-referenced so as to suggest that the latter was meant as a qualification of the former. Accordingly, the Prosecution made two distinct allegations before the Single Judge: (i) that Mr. Mangenda had “sent Western Union payments” to witnesses;⁷ and (ii) that “Mangenda may be paying witnesses while they are at the seat of the court”⁸ – which implied paying them in person.
6. In the Defence’s Motion to Declare Inadmissible Telephone Intercepts of Mr. Mangenda Obtained Pursuant to a Judicial Order Based on Material Misstatements By

⁵ *Bemba et al.*, Prosecution’s application for leave to appeal the “Decision on Witness Preparation and Familiarisation”, ICC-01/05-01/13-1276, 21 September 2015, para. 22.

⁶ Authorisation Request, para. 23.

⁷ *Id.* para.14.

⁸ *Id.* para. 21.

the Prosecution,⁹ the Defence asserted that the Prosecution, as of the date of the Authorisation Request, already possessed Mr. Mangenda's Western Union payment records and that those payments showed no payments by Mr. Mangenda to any witness.¹⁰ The Prosecution did not contest this fact; indeed, the Prosecution has tendered those records before the Trial Chamber.¹¹

7. However, the Prosecution argued that it possessed a reasonable suspicion about payments in person. According to the Prosecution:

[REDACTED].¹²

8. The reference at the end of the above paragraph to "these suspicions" is ambiguous as to whether it concerns only the allegation about in-person payments, or whether it is meant to encompass the allegation about Western Union payments. This ambiguity is increased by the use of the plural rather than the singular, which might be understood as implying *both* methods of payment. The statement in respect of the former allegation, however, is flatly incorrect: the Prosecution did have evidence refuting those suspicions – i.e., the Western Union records tendered by the Prosecution in this case, which were in its possession as of 19 July 2013,¹³ and which show no payments by Mr. Mangenda to any Defence witness.

(ii) *The Allegation That Mr. Mangenda Made Payments to Witnesses In Person*

9. The Prosecution Response argues that its suspicion that Mr. Mangenda was paying witnesses in person was reasonable because of an alleged "pattern of large Western Union payments received by Mangenda on dates coinciding with the testimony of several witnesses."¹⁴ In particular, the Authorisation Request relied on three such

⁹ *Bemba et al.*, Corrigendum to Motion to Declare Inadmissible Telephone Intercepts of Mr. Mangenda Pursuant to a Judicial Order Based on Material Misstatements By the Prosecution, ICC-01/05-01/13-1136-Conf-Corr, 13 August 2015 ("Inadmissibility Motion"), para. 11.

¹⁰ *Id.* para. 11 ("the Prosecution must have known it to be false, since it already possessed the Western Union records upon which it made this claim").

¹¹ Indeed, the records in question were selectively relied on in paragraph 21 of the Authorisation Request, but were not annexed to the Authorisation Request itself. The records are [REDACTED], and were tendered by the Prosecution in its First Request for the Admission of Evidence from the Bar Table, ICC-01/05-01/13-1013-Conf, 17 June 2015.

¹² *Bemba et al.*, Prosecution's Response to the Mangenda Defence Motion to Declare Inadmissible Telephone Intercepts of Mr Mangenda, ICC-01/05-01/13-1180-Conf, 24 August 2015, para. 9.

¹³ [REDACTED]. All these documents were in the Prosecution's possession as of June 2013 and were tendered by the Prosecution on 17 June 2015 in ICC-01/05-01/13-1013-Conf-AnxA.

¹⁴ Prosecution's Response, para. 9.

payments: of 17 September, 20 October and 22 November 2012, which were said to coincide with the conclusion of witness testimonies on 18 September, 19 October 2012 and 23 November 2012.¹⁵

10. The Trial Chamber held that it was “of the view that the information at the disposition of the Prosecution at that moment in time was supported by sufficient circumstantial evidence to have been reasonably brought forward.”¹⁶

III. RECONSIDERATION OF THESE TWO FINDINGS IS WARRANTED IN THE EXCEPTIONAL CIRCUMSTANCES PRESENTED

(i) *Applicable Standard*

11. The exceptional remedy of reconsideration is appropriate where a “clear error of reasoning has been demonstrated or if it is necessary [...] to prevent an injustice.”¹⁷ This Trial Chamber has affirmed that “[n]ew facts and arguments arising since the decision was rendered may be relevant to this assessment.”¹⁸ Conversely, reconsideration may be denied if the new argument was “within the Chamber’s contemplation at the time of issuing the Decision.”¹⁹

¹⁵ Authorisation Request, para. 21. Incidentally, one of these three witnesses left The Hague on 19 October 2012 after his testimony before Mr. Mangenda picked up the Western Union payment of 20 October 2012. See *Bemba et al.*, Annex to Victims and Witnesses Unit’s Provision of Information Pursuant to Decision ICC-01/05-01/13-182, ICC-01/05-01/13-207-Conf-Anx, 19 February 2014, p. 3.

¹⁶ Decision, para. 23.

¹⁷ *Ntaganda*, Decision on the Defence request for reconsideration, ICC-01/04-02/06-611, 27 May 2015, para. 12; *Ntaganda*, Decision on Defence request seeking reconsideration of the ‘Decision on the Prosecution request for redactions’, ICC-01/04-02/06-605, 21 May 2015, para. 7 (“Reconsideration is exceptional, and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.”)

¹⁸ *Bemba et al.*, Decision on Defence Request for Reconsideration of or Leave to Appeal ‘Decision on “Defence Request for Disclosure and Judicial Assistance”’, ICC-01/05-01/13-1282, 22 September 2015, para. 8; *Ruto et al.*, Decision on the Sang Defence’s Request for Reconsideration of Page and Time Limits, ICC-01/09-01/11-1813, 10 February 2015, para.19 (“[n]ew facts and arguments arising since the decision was rendered may be relevant to this assessment”); *Kenyatta*, Decision on the Prosecution’s motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, ICC-01/09-02/11-863, 26 November 2013, para.11 (“[t]he Chamber finds support, as was also done by Trial Chamber I, in the relevant jurisprudence of the International Criminal Tribunals for the former Yugoslavia (‘ICTY’) and Rwanda (‘ICTR’) whose statutory provisions are equally silent as to the power of reconsideration, that those circumstances can include ‘new facts or new arguments’”); ICC-01/04-02/06-483, para. 13 (“[n]ew facts and arguments arising since the decision was rendered may be relevant to this assessment”); *Prlić et al.*, Case No. IT-04-74-A, Decision on Motions for Reconsideration, 5 September 2014, p. 4; *Stanišić & Župljanin*, Case No. IT-08-91-T, Decision Denying Joint Defence Motion for Reconsideration or Certification of the Decision of 18 April 2012 and Allowing the Defence to Reply to the Prosecution Response to the Joint Defence Final Submissions on the CHS, 10 May 2012.

¹⁹ *Ruto et al.*, ICC-01/09-01/11-1813, para.21. See *Bemba et al.*, ICC-01/05-01/13-1282, 24 September 2015, para. 9 (“[t]he Request is based on arguments made by the Bemba Defence in support of the relief addressed in the Impugned Decision. In the Impugned Decision, the Chamber found that (i) the Bemba Defence’s submissions were speculative and ‘unsupported on any concrete basis’, and (ii) it was ‘not apparent that any undue prejudice is caused by maintaining [the] redactions’. The Bemba Defence advances no new facts or arguments arising since the Impugned Decision. Therefore, the Single Judge does not consider that reconsideration is justified.”)

12. The present request is supported by new arguments that do not appear to have been “within the Chamber’s contemplation” in rendering the Decision. The Prosecution has itself sought consideration in the past on the basis that a Trial Chamber “wrongly construed”²⁰ or “misunderstood”²¹ a submission which led to “manifestly unsound and unsatisfactory consequences.”²² Indeed, the very first ICC decision recognising the possibility of reconsideration arose in a situation where the defence had “made a straightforward mistake about something that at the relevant time was ‘known’ by everyone concerned.”²³ Reconsideration is, accordingly, a recognised remedial mechanism to avert an injustice, whether arising from the fault of a party for having failed to present an argument or fact; from an issue that only becomes apparent after a decision is rendered; or from confusion or ambiguity that may have arisen from the submissions by the parties. All three factors may – and often do – conspire together.

13. Any fault that may be imputed to the Defence in not having previously presented the information discussed below in respect of the Western Union payments with greater clarity is accepted. Any such fault, however, does not impede reconsideration. On the contrary, the purpose of reconsideration is precisely to ensure that an accused is not irremediably prejudiced by such fault when an error arising therefrom becomes evident and will seriously affect the course of proceedings.

²⁰ *Ntaganda*, Prosecution’s motion for reconsideration of a discrete portion of the Decision on the updated documents containing the charges or in the alternative, application for leave to appeal, ICC-01/04-02/06-460, 16 February 2015, para. 2.

²¹ *Ntaganda*, Decision on the Prosecution’s request for reconsideration or, in the alternative, leave to appeal, ICC-01/04-02/06-519, 18 March 2015, paras. 8- 9.

²² *Ntaganda*, Prosecution’s motion for reconsideration of a discrete portion of the Decision on the updated documents containing the charges or in the alternative, application for leave to appeal, ICC-01/04-02/06-460, 16 February 2015, para. 2.

²³ *Lubanga*, Decision on the defence request to reconsider the “Order on numbering of evidence” of 12 May 2010, ICC- 01/04-01/06-2705, 30 March 2011, para. 10.

(ii) *Reconsideration of the Finding In Respect of the Allegation that Mr. Mangenda Paid Witnesses Through Western Union*

14. The Defence respectfully submits that a clear error of reasoning has arisen as a result of the ambiguous statement by the Prosecution that “[n]one of the evidence possessed by the Prosecution at that time refuted these suspicions.”²⁴ The Trial Chamber appears to have understood this statement as pertaining to the allegation about payments through Western Union, as opposed to the allegation about in-person payments at the seat of the court in The Hague:

The Chamber is of the view that the reading of this sentence alone could create the impression that the Prosecution is representing a connection of Mr Mangenda and Western Union payments as a fact. However, considering the Request to Obtain Evidence as a whole, it becomes apparent that the Prosecution did not present the situation as an established fact but as an intermediate result of an on-going investigation. The Prosecution submits that “[t]he times and dates of the transfers of exact sums of money suggest that [...] Mangenda may be paying witnesses.” In summarising the results of its investigation the Prosecution submits that the evidence “strongly indicates” a number of people (among them Mr. Mangenda) are involved in a witness interference scheme, but admits that “the evidence is largely circumstantial and the Prosecution has a fair but incomplete understanding of the scheme.”²⁵

15. The Trial Chamber, accordingly, appears to have understood the Prosecution’s statement that “[n]one of the evidence possessed by the Prosecution at that time refuted these suspicions”²⁶ as referring to the allegation that Mr. Mangenda “ha[s] sent Western Union payments to Defence witnesses.”²⁷ However, as of 19 July 2013, the Prosecution possessed Mr. Mangenda’s outgoing Western Union records.²⁸ Those outgoing payment records, as summarised in Annex A, showed no payments by Mr. Mangenda to any Defence witness. The Prosecution nevertheless asserted in the Authorisation Request that Mangenda “ha[s] sent Western Union payments to Defence witnesses.”²⁹ Not only was this not “a fact”; there was no basis for making this claim as an “intermediate result”³⁰ because that allegation was expressly contradicted by the information already in the Prosecution’s possession.

²⁴ Prosecution Response, para. 9.

²⁵ Decision, para. 22.

²⁶ Prosecution Response, para. 9.

²⁷ Authorisation Request, para. 14.

²⁸ [REDACTED], as relevantly excerpted and consolidated in Annex A.

²⁹ Authorisation Request, para. 14.

³⁰ Decision, para. 22.

16. The Defence sought leave to reply to address the ambiguity in the Prosecution's submissions.³¹ Leave was denied.³²
17. This finding has a substantial and direct impact on the conduct of proceedings, and on the protection of Mr. Mangenda's privacy rights. The situation is one of those exceptional situations where an error of reasoning justifies reconsideration.
- (iii) *Reconsideration of the Finding That There Was "Sufficient Circumstantial Evidence" to Support the Allegation That Mangenda "May Be Paying Witnesses While They Are At the Seat of the Court"*
18. The Trial Chamber found that the allegation that Mr. Mangenda "may be paying witnesses while they are at the seat of the Court"³³ was "supported by sufficient circumstantial evidence to have been reasonably brought forward."³⁴ The Trial Chamber does not elaborate on the reasons for this conclusion, but may be understood to have been persuaded by the Prosecution's submission that this suspicion was supported by the fact that: (i) Mangenda was receiving payments from the same individuals who were paying other Defence witnesses; and (ii) the "pattern of large Western Union payments received by Mangenda on dates coinciding with the testimony of several witnesses in The Hague."³⁵
19. While the Prosecution in the Authorisation Request emphasised the three payments that, in its view, constituted a pattern, the Prosecution did not disclose the existence of payments to Mr. Mangenda that did not coincide with the appearance of any witness. In fact, the Western Union payment records in the Prosecution's possession on 19 July 2013 showed that Mr. Mangenda received sixteen other large Western Union payments from Messrs. Babala and [REDACTED] in 2012 and 2013 that did not coincide with the appearance of witnesses in The Hague.³⁶ Indeed, many of those payments were made long before the start of the Defence case. This would and should

³¹ *Bemba et al.*, Request for Leave to Reply to Prosecution Response to Motion to Declare Inadmissible Telephone Intercepts of Mr. Mangenda, ICC-01/05-01/13-1194-Conf, 28 August 2015, para. 8 ("[t]he claim that the Prosecution had no evidence to refute its submission to the Pre-Trial Judge that Mr. Mangenda was paying witnesses through Western Union is blatantly incorrect. On the contrary, the Prosecution had ample evidence that there were no such payments. The Defence should have the opportunity to place those submissions in their proper context – which convey a meaning contrary to that now forwarded by the Prosecution.")

³² Decision, para. 16 ("In light of the information available to the Chamber, it does not find it necessary to receive further submissions in order to adjudicate the Request and, accordingly, rejects both requests.")

³³ Authorisation Request, para. 21.

³⁴ Decision, para. 23.

³⁵ Prosecution's Response, para. 9.

³⁶ See Annex B.

have put the Prosecution on notice that the payments were for a purpose other than paying witnesses.

20. These other payments, which demonstrate that the alleged “pattern” was even weaker than suggested by the Prosecution, were not disclosed to the Single Judge in the Authorisation Request. It does not take a statistical analysis to recognise that three payments out of nineteen coinciding with the appearance of witnesses in The Hague, as opposed to sixteen not coinciding, would not have constituted reasonable grounds to suspect that the money was being sent to Mr. Mangenda for onward payment to witnesses in-person.
21. Highlighting the three coincident payments without disclosure of the other payments could not but have left an unjustified impression as to the strength and reasonable suspicion that could be entertained as to whether, as the Prosecution alleged in its Authorisation Request, “Mangenda may be paying witnesses while they are at the seat of the Court.”³⁷
22. Given the special context of an *ex parte* submission seeking judicial authorisation to invade Mr. Mangenda’s privacy in the most fundamental way, the statement in question constituted a misrepresentation. A misrepresentation can arise not only from a directly incorrect statement, but also from the failure to disclose all information relevant to an alleged suspicion. The facts should also have inspired further investigations, including as to whether onward payments were being made into the UNDU account for Mr. Bemba and whether any of the witnesses constituting part of the alleged “pattern” had actually left The Hague before Mr. Mangenda received the allegedly coincident Western Union payment.³⁸
23. The Defence submits that these are new facts or arguments that justify reconsideration of the Trial Chamber’s finding that the alleged “pattern” provided sufficient “circumstantial evidence” to permit the allegation of payments to witnesses in The Hague “to have been reasonably brought forward.”³⁹

³⁷ Authorisation Request, para. 21.

³⁸ *Bemba et al.*, Annex to Victims and Witnesses Unit’s Provision of Information Pursuant to Decision ICC-01/05-01/13-182, ICC-01/05-01/13-207-Conf-Anx, 19 February 2014, p. 3 (showing that Witness D-57 left The Hague before Mr. Mangenda received the Western Union payment that the Prosecution alleged at paragraph 21 of the Authorisation Request could have been given to him).

³⁹ Decision, para. 23.

(iv) *Conclusion As to Reconsideration*

24. These two errors, taken together, justify reconsideration of the Decision as a whole. The Prosecution possessed information as of 19 July 2013 that Mr. Mangenda had *not* paid witnesses through Western Union, and had information showing that the alleged “pattern” was, in fact, statistically inconsequential. This information was not shared with the Single Judge. Reconsideration is warranted given the exceptional significance of these findings to Mr. Mangenda’s privacy rights and the potential impact on trial proceedings.

IV. IN THE ALTERNATIVE, LEAVE TO APPEAL IS REQUESTED IN RESPECT OF THE FOLLOWING ISSUES

(i) *Applicable Standard*

25. A decision is subject to appeal, pursuant to Article 82(1)(d), where it:

involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and for which, in the opinion of the [...] Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

26. The Appeals Chamber has defined an “issue” as “a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination” and as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.”⁴⁰ “Essential” in this context is understood as meaning essential to some judicial disposition, and “not merely a question over which there is disagreement or conflicting opinion.”⁴¹ Issues that have previously been recognised as appealable range from the correctness of a particular determination to the standard that has been applied as part of a determination. An appealable issue may be “legal or factual or mixed.”⁴²

⁴⁰ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para.9. See *Ntaganda*, Decision on Defence request for leave to appeal the Chamber’s decision on postponement of the trial commencement date, ICC-01/04-02/06-604, 21 May 2015, para. 15.

⁴¹ *Lubanga*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victim’s Participation of 18 January 2008, ICC-01/04-01/06-1191, 26 February 2008, para. 8.

⁴² *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 9.

An example of the former includes the following broadly formulated issue that was recently approved for interlocutory appeal:

Whether the Chamber had already made the requisite findings under Article 87(7) of the Statute that the Kenyan Government failed to comply with the Prosecution's cooperation request, such that it ought to have referred the matter to the Assembly of States Parties ('ASP'); or in the alternative, if the Chamber's findings are not considered 'formal' or 'judicial' findings under Article 87(7) of the Statute, whether it had any discretion not to enter the required finding under that provision and thus refer the matter to the ASP.⁴³

27. An example of issues that are more legal in nature include:

Whether the Impugned Decision applied the appropriate standard of proof when evaluating whether the conditions under Rule 68(2)(c) and (d) of the Rules were met, including, in particular, in its assessment of the existence of "interference."⁴⁴

...

"Whether the test for an excusal of the accused developed by the Majority is supported by the applicable law."⁴⁵

...

The correctness of the standard and procedure established and applied by the Trial Chamber to determine whether the identity of an intermediary must be disclosed under Rule 77.⁴⁶

28. A Trial Chamber has the discretion to re-formulate issues posited for appeal as it deems necessary and fit⁴⁷ and, as illustrated above, such issues may be formulated in the alternative.⁴⁸ Multiple issues may, and often are, permitted in respect of the same decision.⁴⁹

⁴³ *Kenyatta*, Decision on the Prosecution's request for leave to appeal, ICC-01/09-02/11-1004, 9 March 2015, para. 9(i), 25.

⁴⁴ *Ruto et al.*, Decision on the Defence's Applications for Leave to Appeal the "Decision on Prosecution Request for Admission of Prior Recorded Testimony", ICC-01/09-01/11-1953-Red-Corr, 10 September 2015, paras. 20(v), 21.

⁴⁵ *Ruto et al.*, Decision on Prosecution's Application for Leave to Appeal the 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', ICC-01/09-01/11-817, 18 July 2013, para. 2(ii), 18-19.

⁴⁶ *Lubanga*, Decision on the prosecution request for leave to appeal the "Decision on Intermediaries", ICC-01/04-01/06-2463-Conf, 2 June 2010, paras. 2, 8.

⁴⁷ *Ruto et al.*, Decision on the Defence's Applications for Leave to Appeal the "Decision on Prosecution Request for Admission of Prior Recorded Testimony", ICC-01/09-01/11-1953-Red-Corr, 10 September 2015, para. 20.

⁴⁸ *Kenyatta*, Decision on the Prosecution's request for leave to appeal, ICC-01/09-02/11-1004, 9 March 2015, para. 9(i), 25.

⁴⁹ *Ruto et al.*, Decision on the Defence's Applications for Leave to Appeal the "Decision on Prosecution Request for Admission of Prior Recorded Testimony", ICC-01/09-01/11-1953-Red-Corr, 10 September 2015, paras. 20-21.

29. The second requirement under Article 82(1)(d) is that the issue involve an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial.
30. The third requirement is that the Trial Chamber be of the opinion that immediate appellate intervention would “materially advance the proceedings.” This involves examination of the degree to which an “authoritative determination” of the “matter posing for decision” will “rid [...] the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.”⁵⁰ The Appeals Chamber has also held that the criterion is met if immediate determination would “move forward” the proceedings, by “ensuring that the proceedings follow the right course”⁵¹ and “remove[] doubts about the correctness of the decision or map[] a course of action along the right lines.”⁵² The purpose of such appeal is to avoid the consequences that would otherwise be embedded in the proceedings and which could “cloud or unravel the judicial process.”⁵³ The applicable threshold is “*may* materially advance” not “*will* materially advance”.
31. The Prosecution has previously submitted, with which the Defence agrees, that a request for leave to appeal “must not engage on the merits or correctness of a Decision.”⁵⁴ The sole issue of concern, unlike in a request for reconsideration, is the ramification of the decision on the conduct of proceedings, and the potential benefits that would accordingly arise from immediate appellate intervention.
32. Leave to appeal is mandatory if the conditions set out in Article 82(1)(d) are satisfied. No residual discretion is granted to deny leave once those conditions are satisfied.

⁵⁰ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 14.

⁵¹ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 15.

⁵² *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, paras. 14-15.

⁵³ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 16.

⁵⁴ *Bemba et al.*, Corrected version of “Prosecution’s application for leave to appeal the “Decision on Witness Preparation and Familiarisation”, 21 September 2015, ICC-01/05-01/13-1276, ICC-01/05-01/13-1276-Corr, 21 September 2015, para. 24.

(ii) *The Issues are “Appealable Issues”*

33. Leave is requested to appeal the following issues:

- i. Whether the Trial Chamber erred in failing to provide a reasoned opinion;
- ii. Whether the Trial Chamber erred in (a) the minimum threshold of suspicion to be met in the *ex parte* application seeking judicial authorisation to conduct highly intrusive surveillance; (b) failing to define any positive duty of disclosure of all relevant facts, and to diligently inquire into exculpatory information;
- iii. Whether the Trial Chamber erred in fact in failing to find that the Prosecution had made a misrepresentation in the Authorisation Request in asserting that Mr. Mangenda “ha[d] sent Western Union payments to Defence witnesses”;⁵⁵
- iv. Whether the Trial Chamber erred in law or fact in finding that the allegation that Mr. Mangenda may have been paying witnesses in The Hague “was supported by sufficient circumstantial evidence”;⁵⁶ and
- v. Whether the Trial Chamber erred in fact or law in failing to find that the possible interpretations set out in paragraph 20 of the Decision constituted a misrepresentation, given the proper meaning of that term in the context of an *ex parte* application for judicial authorisation to intercept a person’s telephone communications.

34. The first issue affects several aspects of the Decision. The conclusion that the Prosecution’s allegation about in-person payments “was supported by sufficient circumstantial evidence” is not substantiated by a reasoned opinion.⁵⁷ The Decision

⁵⁵ Decision, para. 22.

⁵⁶ Decision, paras. 23-24.

⁵⁷ *Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, ICC-01/04-01/06-773 (OA5), 14 December 2006, para. 20 (“[t]he extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the Pre-Trial Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion”); *Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial

also does not explain the standards of reasonableness of suspicion, candour and diligence expected of the Prosecution in making the Authorisation Request. These issues are, in turn, inextricably connected to the Trial Chamber's ultimate determination of the motion, and each of the grounds on which it was brought. The absence of reasons is an "issue" that arises from the Decision and that is inextricably connected with findings set out in paragraphs 22 through 24 that were essential to the ultimate disposition.

35. The second issue concerns the legal standards to be met in assessing (a) the minimum threshold of suspicion required for the allegations in the Authorisation Request; and (b) the standard of disclosure and diligence to be met in the Authorisation Request. The Trial Chamber found that the allegations about in-person payments were "reasonably brought forward," but does not further articulate the requisite standard. This legal standard and the factual conclusion in relation thereto are inextricably connected with findings that are essential to paragraph 23 of the Decision and to the ultimate disposition. The standard of diligence was implicitly addressed in paragraphs 21, 23 and 24 of the Decision, which, in turn, are directly relevant to the ultimate disposition in paragraph 32 of the Decision.
36. The third issue concerns the correctness of the factual finding at paragraph 22 of the Decision that no misrepresentation was made in asserting that Mr. Mangenda had "sent Western Union payments to Defence witnesses."⁵⁸ The basis for the incorrectness of that finding is not germane to granting an appeal, but has been set out above in the context of the request for reconsideration. This factual finding arises out of the Decision, and is essential to the finding in paragraph 22 and the ultimate disposition in paragraph 32 that no misrepresentations had been made in the Authorisation Request.
37. The fourth issue concerns the correctness, in law or in fact, of the finding in paragraph 23 of the Decision that the claim that Mr. Mangenda was paying witnesses in The Hague "was supported by sufficient circumstantial evidence." This is a finding of fact made in relation to a standard of proof as to what is "sufficient" in the context of an *ex parte* hearing to order telephone surveillance. This issue is essential to the

Chamber I entitled "Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", ICC-01/04-01/06-774 (OA6), 14 December 2006, para. 30.

⁵⁸ Authorisation Request, para.14.

determination that the allegations against Mr. Mangenda concerning in-person payments in The Hague was not a misrepresentation which, in turn, is indispensable to the Trial Chamber's ultimate conclusion as set out in paragraph 32 of the Decision.

38. The fifth issue concerns the correctness, in fact or in law, of having found that the propensity for misunderstanding described in paragraph 20 of the Decision does not constitute a misrepresentation in the context of an *ex parte* application seeking intrusive surveillance measures. This determination is essential to the disposition set out at paragraph 32.

(iii) *Each of the Appealable Issues Affects the Fair and Expeditious Conduct of Proceedings or the Outcome of the Trial*

39. The Prosecution has asserted that the intercepts whose admissibility are at stake “[REDACTED].”⁵⁹ The admission or otherwise of the intercepts are, accordingly, susceptible to affect the outcome of the trial.
40. The “fair conduct of proceedings” encompasses the assurance that proceedings are conducted in accordance with international human rights and the rights guaranteed in the Statute. The Trial Chamber acknowledged that the right to privacy is an “internationally recognised human right” and that this right is to be interpreted “in accordance with the highest international standards.”⁶⁰ Admission of the evidence obtained in violation of such rights necessarily “affects” those rights, as well as the fairness of the proceedings in which the information is admitted.

(iv) *Immediate Resolution May Materially Advance the Proceedings*

41. The alternative to immediate resolution of these issues is to defer their resolution until a final appeal. This would place the Trial Chamber in the position of making numerous factual findings based on elements that may later turn out to be inadmissible. Proceeding in this manner, assuming that the Decision reflects reversible error, could not be remedied on a final appeal because it would be impossible to disentangle findings of fact based on admissible from inadmissible evidence. In these

⁵⁹ Prosecution's Response, para. 1.

⁶⁰ Decision, para. 18.

circumstances, immediate resolution will ensure that no error has been committed that would “cloud or unravel the judicial process.”⁶¹

42. Conversely, the correctness of the Decision can be adjudicated on an interlocutory basis without causing any interruption to trial proceedings whatsoever, especially in light of the Trial Chamber’s determination that admissibility issues will be determined at the end of trial.⁶² Under these circumstances, granting an interlocutory appeal will cause no interruption to trial proceedings, and will ensure that the case proceedings on proper foundations.

V. CONCLUSION AND RELIEF REQUESTED

43. The issues arising from the Decision justify reconsideration or, in the alternative, leave to appeal. The factual issues are somewhat complex for a matter that must be addressed on an interlocutory basis, and are of extraordinary importance. The two specific errors for which reconsideration is requested on the basis of the new arguments and new facts presented are significant enough to compel a different final determination.
44. In the alternative, the five appealable issues previously identified, individually or cumulatively, are indispensable to the ultimate determination in the Decision. This Decision, in turn, directly affects the fairness of these proceedings and their potential outcome. Immediate resolution thereof will materially advance the proceedings and, accordingly, leave to appeal is justified.

⁶¹ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 16.

⁶² *Bemba et al.*, Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf), ICC-01/05-01/13-1285, 24 September 2015, para. 16.



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