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**International
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Date: **8 February 2016**

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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO

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Public Annex A

Prosecution's Motion to Exclude the Testimony of Witness D23-P-0001
and the Submission of his Report

Source: The Office of the Prosecutor

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I. Introduction

1. Mangenda Defence Witness D23-P-0001's testimony and report should be excluded. Through the Witness, a purported expert on Austrian law, Mangenda seeks to elicit evidence that is *prima facie* inadmissible because it: (1) is irrelevant to the issues in this case; (2) contravenes article 69(8) of the Rome Statute ("Statute") and rule 63(5) of the Rules of Evidence and Procedure ("Rules"); and (3) is not warranted under any other provision of the Statute or Rules.

2. Given the *prima facie* inadmissibility and irrelevance of the Witness' evidence, Trial Chamber VII ("Chamber") should exercise its gatekeeping functions at this stage by excluding the Witness' testimony and rejecting the formal submission of his report, pursuant to articles 64(6)(f), 64(9)(a), 69(3), 69(4) of the Statute, rules 63(2) and 64 of the Rules, and regulation 44(5) of the Regulations of the Court.¹

II. Submissions

A. Witness D23-P-0001's Proposed Testimony and Report are *Prima Facie* Irrelevant

3. Witness D23-P-0001's evidence is *prima facie* irrelevant. To the extent Mangenda seeks to assert a violation of article 69(7), the relevant question is whether the conduct of the Prosecution, Western Union, or Austrian officials in relation to the transfer of Western Union records to the OTP violated international human rights law. Whether Austrian law may have been violated is not at all probative of the issue, and thus obviates any need for an expert on its application.²

¹ To the extent the Chamber permits the witness's testimony and in accordance with Decision 1209, the Prosecution also reserves the right to orally challenge Witness D23-P-0001's qualifications or the overall relevance of his anticipated testimony prior to any ruling on whether the witness may testify as an expert in this case. *See also* ICC-01/05-01/13-T-13-Red-ENG, pp. 5-6, lns. 22-17 (the Chamber's oral ruling on the conduct of proceedings with respect to expert witness P-0361).

² *See e.g.* H. Behrens, "The Trial Proceedings", in R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results* (Kluwer Law, 1999), p. 246 ("Whereas a violation of internationally recognized human rights in principle qualifies as a ground for exclusion of evidence, a violation

4. This Court has repeatedly noted that it is not bound by the decisions of national courts or national laws on evidentiary matters when determining claims under article 69(7). For example, in *Lubanga*, the defence similarly argued that a search and seizure conducted by national authorities violated the accused's international human right to privacy because the search had been conducted in breach of national law – in that case the Congolese Code of Procedure.³ The defence even presented a decision by a Congolese court ruling that the search and seizure was unlawful.⁴ However, the *Lubanga* Chamber rejected that argument, noting that it was “not bound by the decisions of national courts on evidentiary matters” and “the mere fact that a Congolese court has ruled on the unlawfulness of the search and seizure conducted by the national authorities cannot be considered binding on the Court.”⁵ The *Lubanga* Chamber also noted that the determination by the Congolese court was based on a breach of Congolese criminal procedure, not on international human rights law.⁶ Thus, the *Lubanga* Chamber analysed the conduct of national authorities in light of international human rights law, *sensu stricto*, irrespective of what Congolese law prescribed, finding that the conduct of the relevant authorities complied with human rights norms.⁷

5. Citing the same principles as above, the *Katanga and Chui* Chamber equally omitted any analysis of national law in determining whether a *procès-verbal d'audition* of a hearing held in Kinshasa was permissible under international human rights law.⁸ Like in *Lubanga*, the *Katanga and Chui* Chamber strictly focused on whether the

of national laws on evidence does not. The reason for this is that the Court should not be burdened with decisions of purely national law. The Working Group decided at the December 1997 session that all the fundamental rights of an accused and all the basic principles of a fair trial were in fact part of the internationally recognized human rights. Therefore, violations of specific national rules on the conduct of an interrogation or the like were not matters upon which the Court should base a decision on exclusion. The formula, as it was included in the ILC Draft Statute, was accepted in Rome.”).

³ ICC-01/04-01/06-803-tEN, para. 63.

⁴ ICC-01/04-01/06-803-tEN, para. 63.

⁵ ICC-01/04-01/06-803-tEN, para. 69.

⁶ ICC-01/04-01/06-803-tEN, paras. 72, 78.

⁷ ICC-01/04-01/06-803-tEN, paras. 73-90.

⁸ ICC-01/04-01/07-717, paras. 79-99.

conduct of national authorities complied with international human rights law, finding that it did.⁹

6. In this case, a determination of Austrian law is entirely unnecessary in determining whether Western Union's voluntary provision of records complied with international human rights law. This Chamber is readily able to make that determination without resort to Austrian law, or the assistance of an Austrian law expert.

B. Witness D23-P-0001's Proposed Testimony and Report is *Prima Facie* Inadmissible under Article 69(8)

7. Witness D23-P-0001's evidence is *prima facie* inadmissible. Through Witness D23-P-0001, Mangenda asks the Chamber to do what article 69(8) expressly prohibits: to rule on the application of Austrian law in deciding the relevance or admissibility of the Western Union records collected by Austrian authorities. Those records were collected by the Austrian state¹⁰ through a request for information by the Prosecution.¹¹ In processing that request, the Vienna Prosecutor's office (*Staatsanwaltschaft*) obtained a court order from the Vienna Regional Court for Criminal Matters (*Landesgericht für Strafsachen Wien*) authorising collection of those records from Western Union.¹² This fact was also confirmed by Witness P-0267 during his testimony in this case.¹³

⁹ ICC-01/04-01/07-717, paras. 93-99.

¹⁰ *Contra* ICC-01/05-01/13-1545, para. 2 ("The Prosecution's reference to Article 69(8) is misplaced, as it concerns only evidence 'collected by a State'").

¹¹ See ICC-01/05-01/13-T-11-Red-ENG, p. 50, lns. 12-15 (testimony of Witness P-0433 confirming that the Western Union records were obtained "through a request for information process through the Austrian state authorities to the Western Union Company."). For the Prosecution's requests to the Austrian authorities, see CAR-OTP-0091-0351; CAR-OTP-0091-0360; CAR-OTP-0091-0371. Article 69(8) applies irrespective of whether the evidence was collected by the State at its own initiative or at the request of the Prosecution. See D. Piragoff and P. Clarke, "Article 69: Evidence", in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Beck *et al.*, 3rd ed., 2016) ("Triffterer and Ambos Commentary"), p. 1749 (noting with respect to the phrase "collected by a State" that "[g]iven the historical background to paragraph 8, it is likely that no distinction exists dependant on whether the evidence was collected by a State on its own initiative or at the request of the Prosecutor under Part 9 of the Statute.").

¹² See generally CAR-OTP-0085-0845.

¹³ See ICC-01/05-01/13-T-33-ENG, p. 22, lns. 10-20.

8. Article 69(8) prohibits the Chamber from ruling on the application of a State's national law "[w]hen deciding on the relevance or admissibility of evidence collected by a State". Rule 63(5) reiterates this prohibition, stating that "[t]he Chambers shall not apply national laws governing evidence, other than in accordance with article 21."¹⁴ While some domestic jurisdictions permit testimony from experts in foreign laws,¹⁵ the plain terms of this Court's rules explicitly prevents this Chamber from ruling on the validity of a decision of a national court – such as the decision issued by the Vienna Regional Court for Criminal Matters – or to make a decision as to whether or how Austrian law might apply.¹⁶

9. The policy underlying these rules – and precluding any adjudication on what Austrian law permits – is self-evident. This is not an Austrian court. It is not specialised in Austrian law. It has no expertise in Austrian jurisprudence. It is not familiar with the intricacies of Austrian criminal procedure. It cannot assess the proceedings before the Vienna Regional Court for Criminal Matters. Further, questions of Austrian law are expressly those of Austria's sovereign jurisdiction. Indeed, it would be untenable for this Chamber to rule that Austrian law was violated when an Austrian court duly authorised the provision of Western Union records. Yet this is precisely what Mangenda intends.

10. Despite the expression prohibition in article 69(8) and rule 63(5), Mangenda seeks to challenge the admissibility of the Western Union records by alleging that

¹⁴ There is no indication, and the Defence points to none, that the testimony of the witness is being advanced to support that there exists a general principle of international law, in accordance with article 21. Indeed, the Defence has previously conceded that "[t]he expert is not being called to offer opinions on international criminal law". ICC-01/05-01/13-1545, para. 2.

¹⁵ ICC-01/05-01/13-1545, para. 7. The inclusion of article 69(8) and rule 63(5) also differentiates this Court from the *ad hoc* Tribunals, which have occasionally evaluated foreign law in making admissibility determinations in the absence of any similar prohibition to article 68(8) and rule 63(5). *See e.g. Prosecutor v. Delalić et al.*, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, Case No. IT-96-21, 2 September 1997, paras. 49-70.

¹⁶ *See* Triffterer and Ambos *Commentary*, pp. 1749-1750 ("The Court is not to rule on the validity of a decision of a national court, nor to make a decision as to whether or how a national law might apply. These are matters of domestic jurisdiction within the sovereignty of the particular State.").

they were collected in contravention of Austrian law. However, instead of challenging the validity of Western Union's provision of records before the Austrian authorities, Mangenda inappropriately seeks to substitute a determination by an Austrian court with the Chamber's determination of Austrian law by calling Witness D23-P-0001. As Mangenda explicitly notes, "[t]he expert is not being called to offer opinions on international criminal law, but rather on *national law*".¹⁷ The summary of the witness' anticipated testimony states that the witness intends to exclusively testify about what is permissible under Austrian law.¹⁸ The witness' report further confirms that he was only asked to evaluate the applicability and legality of certain matters under Austrian (or applicable EU) laws.¹⁹

11. The witness' evidence squarely falls within what is prohibited under article 69(8) and rule 63(5). It is *prima facie* inadmissible and its submission should be denied.

C. Neither Article 69(7) nor Article 93 Permit a Decision on National Law

12. Neither article 69(7) nor article 93 permit the Chamber to rule on national law.²⁰ Article 93 simply indicates that in complying with requests for cooperation by the Court, State parties to the Statute need not circumvent their own national laws. Article 93 does not permit the Chamber to rule on whether national law has been complied with, nor is a determination under article 93 enumerated as an exception to article 69(8) and rule 63(5).

13. While article 69(7) may require a determination on national law such as where, as presumably suggested here, Mangenda asserts a violation to the right to privacy, it does not *ipso facto* permit the Chamber to make determinations on national law.

¹⁷ ICC-01/05-01/13-1545, para. 2 (emphasis added).

¹⁸ ICC-01/05-01/13-1592-Conf-AnxA.

¹⁹ See CAR-D23-0006-0001, at 0001.

²⁰ *Contra* ICC-01/05-01/13-1545, para. 2

This Chamber was fully cognizant of this principle when it earlier denied the Arido's application under article 69(7).²¹ In that decision, this Chamber refused to rule on whether French law permitted the unrecorded taking of Arido's statements. Citing article 69(8), the Chamber concluded that it was "precluded from ruling on whether French law was correctly applied".²² The issue here is no different.

14. Excluding the proffered expert evidence does not, however, leave Mangenda without recourse. To the extent Mangenda may wish to advance the violation of national laws toward establishing a violation of article 69(7), it is free to pursue such a determination before the relevant national authorities. For instance, in circumstances, like here, where a claim under article 69(7) may be dependent on a determination of national law, the burden is on Mangenda to obtain that determination from the relevant national authorities. In this case the Austrian courts.

15. Requiring Mangenda to go to the Austrian courts for any determination of Austrian law is also consonant with the aims of article 69(8) and rule 63(5) and the jurisprudence of this Court. For instance, in the *Lubanga* case, the defence requested that the prosecution evidence be declared inadmissible on the ground that it had been seized in violation of Congolese rules of procedure and internationally recognised human rights.²³ Prior to advancing a claim under article 69(7), the defence obtained a decision by a Congolese Appeal Court that Congolese law had been violated. Indeed, in this case Mangenda and Kilolo took similar steps to challenge the legality of telephone intercepts by Dutch authorities by challenging the authorisation granted by Dutch courts before a Dutch district court. As noted by this Chamber, that challenge was denied when a Dutch district court specifically verified that the intercepts were obtained in conformity with Dutch law.²⁴ Nothing has precluded Mangenda from taking similar steps here in relation to the Western Union

²¹ ICC-01/05-01/13-1432.

²² ICC-01/05-01/13-1432, para. 24.

²³ ICC-01/04-01/06-803-tEN.

²⁴ ICC-01/05-01/13-1284, para. 25 (*referencing* ICC-01/05-01/13-424-Anx1).

records. Mangenda may not now circumvent the national process by seeking decisions on national law from this Chamber which the Statute and Rules expressly preclude it from providing.

D. The Witness' Testimony and his Report Should be Excluded

16. The exclusion of Witness D23-P-0001's testimony and report is warranted. The Prosecution incorporates by reference the reasons outlined in its recent filing seeking the exclusion of Witness D22-0004's evidence for why the Chamber should exercise its gatekeeping functions and exclude Witness D23-P-0001's evidence *in limine*.²⁵

III. Relief Requested

17. For the foregoing reasons, the Motion should be granted. Witness D23-P-0001's report and proposed expert testimony should be excluded.



Fatou Bensouda, Prosecutor

Dated this 8th Day of February 2016
At The Hague, The Netherlands

²⁵ ICC-01/05-01/13-1594, paras. 13-14.