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No: **ICC-01/05-01/13**
Date: **10 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, AIMÉ KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU AND NARCISSE ARIDO

Public with Public Annexes A-E

Response to Prosecution Motion to Exclude the Testimony of Witness D23-P-0001 and the Submission of his Report (ICC-01/05-01/13-1605)

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. Jean-Jacques Mangenda opposes the Prosecution's motion to exclude the expert report of Mangenda Defence Witness D23-P-0001 ("P-1").[1] The Motion is devoid of merit; contradicts the Prosecution's own often-invoked purported compliance with national procedures in support of admissibility; is contrary to the Trial Chamber's previous rulings concerning admissibility and disclosure; and is, in any event, premature.

2. Article 69(7) of the Rome Statute[2] declares that evidence "shall not be admissible" on the basis of two types of illegality: (i) a violation of the Statute; or (ii) a violation of internationally recognized human rights. National law can, and often will, be relevant to both of these forms of illegality. First, national law is relevant to the content of internationally recognized human rights. Article 17 of the International Covenant on Civil and Political Rights ("ICCPR") declares that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence." The Human Rights Committee has recognized that this right is effected primarily through domestic legislation.[3] Whether an interference with privacy is "arbitrary and unlawful" cannot but consider the content of the applicable national law, even when the actor violating that law is a supra-national institution. The Prosecution is therefore incorrect to assert that national law is irrelevant to consideration of whether information was collected in violation of internationally recognized human rights.

3. Second, national law is, in the circumstances of the present case, directly relevant to whether the Prosecution has violated the Statute. Article 99(1) provides that "[r]equests for assistance shall be executed in accordance with the relevant procedure under national law." Article 99(4) permits the Prosecutor to "execute such request directly on the territory of a State" under three conditions: (i) it must be "necessary for the successful execution of a request"; (ii) where it "can be executed without any compulsory measures"; and, in the case of a State which was not the *locus* of the crime, (iii) only after "consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party." Whether "compulsory

[1] *Bemba et al.*, Prosecution's Motion to Exclude the Testimony of Witness D23-P-0001 and the Submission of his Report, ICC-01/05-01/13-1605, 8 February 2016 ("Motion").
[2] All future references to "Article" refer to Articles of the Rome Statute unless otherwise indicated.
[3] UN Human Rights Committee, CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988, available at: http://www.refworld.org/docid/453883f922.html ("CCPR General Comment No. 16"), para. 3.

measures" are, or are not, required is a determination that can be made only in relation to national law. Austrian law does not permit collection of banking information without the compulsory measure of a court order. The Prosecution also failed to comply with the consultation requirement set out in Article 99(4) which, as prescribed by Austria's law on cooperation with the ICC, requires the Prosecution to: (i) give "prior notice" to the Federal Minister of Foreign Affairs" of the "time and purpose of the investigations"; and (ii) make an affirmation that "they do not involve recourse to or the threat of recourse to coercive measures."[4] National law is therefore directly relevant to whether, under Article 69(7), there has been a violation of the Statute.

4. Article 69(8) applies only to "evidence collected by a State", whereas the evidence in question here was obtained by ICC investigators. Rule 63(5) is entirely irrelevant since P-1's report does not address "national laws governing evidence." The Prosecution's position in this Motion is also contradicted by its own repeated invocation of national laws in this very case to justify its conduct. The Trial Chamber has also provisionally indicated under Rule 77 of the Rules of Procedure and Evidence that compliance with national law is "material" to admissibility. P-1's report is more than sufficiently relevant to pass the threshold for "submission" to the Trial Chamber, pending a fuller evaluation of admissibility in relation to all the relevant facts. The Prosecution Motion, aside from being unfounded, is therefore also premature.

II. PROCEDURAL HISTORY

5. In October and November 2012, Prosecution investigators made contact with Herbert Smetana, an official of Western Union in Austria, and requested the disclosure of financial information in respect of at least sixty-seven individuals. Mr. Smetana disclosed this information directly to those investigators, often by email, without having been authorized or required to do so by any Austrian judicial decision. The first Austrian judicial decision authorizing and requiring such disclosure was issued on 8 November 2012,[5] whereas most or all financial information in respect of the sixty-seven individuals had already been disclosed prior to that date.[6]

[4] Austrian Law on Cooperation With the International Criminal Court (Bundesgesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof, ZISG), § 13(1). *See* Annexes B and C.
[5] CAR-OTP-0092-0834 and CAR-OTP-0092-0867, Anordnung Der Auskunftserteilung, Bankkonten Und Bankgeschäfte, 8 November 2012.
[6] *Bemba et al.*, Transcript, ICC-01/05-01/13-T-34-CONF-ENG, 3 November 2015, p. 28, ll. 14 – 25 – p. 29, ll. 1-12.

6. On 20 January 2016, the Single Judge authorized an extension of time for the disclosure of P-1's expert report to 3 February 2016.[7] The Single Judge rejected as premature the Prosecution's attempt to have the extension denied on the basis that the report would inevitably be inadmissible as it would address matters of Austrian law.[8] The Single Judge noted, however, that this extension was "irrespective of any subsequent decision on the admissibility of the anticipated report or the decision to hear the proposed witness as an expert."[9]

7. The Defence, in accordance with the Trial Chamber's decision, identified P-1 on 21 January 2016, and effected disclosure of his expert report on 3 February 2016.

8. On 8 February 2016, the Prosecution filed its Motion to Exclude the Testimony of Witness P-1 and the Submission of his Report.[10] The Chamber, by an email of the same date, varied the time period of twenty-one days set out for responses prescribed by Regulation 34(b) to a deadline of 10 February 2016 at 4 p.m.[11]

III. SUBMISSIONS

(i) National Law Is Relevant to Whether the Prosecution Has Violated Internationally Recognized Human Rights Under Article 69(7)

9. Article 69(7) of the Rome Statute provides that:

> Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:
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> (a) The violation casts substantial doubt on the reliability of the evidence; or
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> (b) The admission of the evidence would be antithetical to and would

[7] *Bemba et al.*, Decision on the Mangenda Defence Request for Extension of Time Limit for Disclosure of Potential Expert Report, ICC-01/05-01/13-1555, 20 January 2016, paras. 11, 13.
[8] *Bemba et al.*, Prosecution's Response to the Mangenda Defence's Request for Variation of Time Limit for Disclosure of Potential Expert Report, ICC-01/05-01/13-1544, 13 January 2016, para. 4 ("*prima facie* inadmissible").
[9] *Bemba et al.*, Decision on the Mangenda Defence Request for Extension of Time Limit for Disclosure of Potential Expert Report, ICC-01/05-01/13-1555, 20 January 2016, para. 14.
[10] Motion, para. 2.
[11] Email from Trial Chamber VII Communications to all Parties, "Responses to ICC-01/05-01/13-1605", 8 February 2016, 4:44 pm ("[a]ny responses to ICC-01/05-01/13-1605 ('Prosecution's Motion to Exclude the Testimony of Witness D23-P-0001 and the Submission of his Report') are to be filed by 16:00 on Wednesday, 10 February 2016.")

seriously damage the integrity of the proceedings.

10. Article 69(7), accordingly, only encompasses violations of (i) the Statute; or (ii) internationally recognized human rights.

11. Privacy is an internationally recognized human right.[12] Article 17 of the ICCPR declares that:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.

12. The scope of privacy is not necessarily identical in all States, nor is there a single contour of privacy reflected in uniform State practice and *opinio juris* in customary international law. This does not mean, however, that privacy is not an internationally recognized human right, let alone that national law is irrelevant to the scope of this international right. On the contrary, the Human Rights Committee has explained that "it is precisely in State legislation above all that provision must be made for the protection of the right set forth in that article."[13] The expression "arbitrary" sets a baseline minimum of privacy arising from international sources that may not be invaded at all, whereas the word "unlawful" means "that no interference can take place except in cases envisaged by the law" – i.e., the law of the State. Violations of protections afforded under national law can therefore constitute an "unlawful interference" with privacy under Article 17 of the ICCPR even if those same protections are not afforded by law elsewhere. Thus, the Human Rights Committee has insisted that States provide reports showing not only that privacy is given its minimum necessary scope, but also that any scope that is afforded under national law is protected consistently and in accordance with the minimum requirements of the rule of law.[14]

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[12] *Lubanga*, Decision on the confirmation of charges, ICC-01/04-01/06-803, 29 January 2007 ("*Lubanga* Confirmation Decision"), para. 74 (recognizing that privacy is an internationally recognized human right).

[13] CCPR General Comment No. 16, para. 3.

[14] *Id*. paras. 6, 8 ("[t]he Committee considers that the reports should include information on the authorities and organs set up within the legal system of the State which are competent to authorize interference allowed by the law. It is also indispensable to have information on the authorities which are entitled to exercise control over such interference with strict regard for the law, and to know in what manner and through which organs persons concerned may complain of a violation of the right provided for in article 17 of the Covenant […] Even with regard to interferences that conform to the Covenant, relevant legislation must specify in detail the precise

13. Personal information is encompassed by the internationally recognized right to privacy.[15] Indeed, protection of personal data has increasingly come to be internationally recognized as an autonomous right.[16] Such personal data[17] can include banking information, as was recognized by the ECtHR in *G.S.B. v. Switzerland*:

> 50. [i]l convient d'admettre que le requérant a été victime d'une ingérence dans son droit au respect de sa vie privée au plus tard le 14 décembre 2012, lorsque ses données bancaires ont effectivement été transmises aux autorités fiscales américaines (paragraphe 26 ci-dessus).
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> 51. Il n'est pas douteux non plus que des informations relevant des comptes bancaires sont à considérer des données personnelles protégées par l'article 8 de la Convention […][18]

14. The ECtHR more fully explained the basis of this approach in *M.N. and Others v. San Marino*:

> 51. The Court considers that information retrieved from banking documents undoubtedly amounts to personal data concerning an individual, irrespective of it being sensitive information or not. Moreover, such information may also concern professional dealings and there is no reason of principle to justify excluding activities of a professional or business nature from the notion of "private life" (see *Amann v. Switzerland* [GC], no. 27798/95, § 65, ECHR 2000-II). It follows that the notion of "private life" applies in the present case.
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> […]
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> 53. The Court notes that the applicability of Article 8, under the notion of "private life", to seizures of professional documents and personal data continues to be reaffirmed (see *Niemietz v. Germany*, 16 December 1992, Series A no. 251-B; *Crémieux v. France*, no. 11471/85, 25 February 1993; *Greuter v. the Netherlands*, (dec.), no. 40045/98, 19 March 2002 and the more recent *Bernh Larsen Holding AS and Others v. Norway*, no. 24117/08, 14 March 2013). It further notes that the storing of data relating to the "private life" of an individual constitutes interference for the purposes of Article 8 (see *Amann*, cited above) irrespective of who is the owner of the medium on which the information is held (see, *mutatis*

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circumstances in which such interferences may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis.")

[15] *See* ECtHR, *Rotaru v Romania*, No. 28341/95, Judgment of 4 May 2000; CCPR General Comment No. 16, para. 10.

[16] European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, Article 8; Economic Community of West African States (ECOWAS), Supplementary Act A/SA.1/01/10 on Personal Data Protection within ECOWAS, 16 February 2010.

[17] For the definitions of personal data, see European Union, Directive 95/46/EC of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 24 October 1995, Article 2(a). *See also* Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108), 28 January 1981, Article 2(a).

[18] CEDH, *G.S.B. c. Suisse*, No. 28601/11, Arrêt du 22 décembre 2015 (internal citations omitted).

> *mutandis*, *Lambert v. France*, 24 August 1998, § 21, Reports of Judgments and Decisions 1998-V, and *Valentino Acatrinei v. Romania*, no. 18540/04, § 53, 25 June 2013). In particular, both the storing and the release of information related to private life, coupled with a refusal to allow an opportunity to refute it, amounts to an interference under Article 8 (see *Leander v. Sweden*, 26 March 1987, § 48, Series A no. 116; see also *I. v. Finland*, cited above, concerning the disclosure and processing of information relating to "private life", examined under positive obligations).
>
> […]
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> 55. In conclusion, in the present case, the seizure in the sense of copying of banking data (retrieved from bank statements, cheques, fiduciary dispositions and emails), which the Court considers as falling under the notion of both "private life" and "correspondence", and the subsequent storage by the authorities of such data, amounts to interference for the purposes of Article 8. The provision is therefore applicable to the instant case.[19]

15. Technical, minor or equivocal violations of national procedure may not always amount to a violation of the internationally recognized right. Hence, in *Lubanga*, the Pre-Trial Chamber determined that a violation of a Congolese procedural rule requiring the presence of the suspect at the place of a search was unrelated to the suspect's right to privacy[20] and, accordingly, did not meet the threshold for consideration under Article 69(7). However, the Pre-Trial Chamber carefully considered the national procedures preceding the search, noting in particular that "it appears that the order to conduct the search and seizure was given by the competent authority in order to gather evidence for the purpose of lawful criminal proceedings."[21]

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[19] No. 28005/12, 7 July 2015. *See* CEDH, *Brito Ferrinho Bexiga Villa-Nova c. Portugal*, 69436/10, Arrêt du 1décembre 2015, paras. 42-43 ("Les parties conviennent que les données bancaires de la requérante constituent des informations personnelles relevant de sa vie privée, entrant bien dans le champ d'application de l'article 8 de la Convention. Elles s'accordent également à reconnaître qu'il y a eu ingérence dans l'exercice par la requérante de son droit au respect de sa vie privée. La Cour note aussi que les juridictions internes n'ont pas contesté que les informations bancaires étaient couvertes par le secret professionnel étant donné notamment que la requérante avait reçu des versements effectués par des clients sur son compte bancaire personnel (voir ci-dessus paragraphes 9, 10 et 12). La Cour ne voit pas de raison de conclure autrement. Elle rappelle que la notion de 'vie privée' peut inclure les activités professionnelles ou commerciales (*Niemietz c. Allemagne*, 16 décembre 1992, § 29, série A no 251-B). En outre, elle 'accorde un poids singulier au risque d'atteinte au secret professionnel des avocats car il est la base de la relation de confiance entre l'avocat et son client'") (citations omitted).

[20] *Lubanga* Confirmation Decision, para. 72 ("in its judgement on the unlawfulness of the search and seizure, the [REDACTED] Court relied for its finding on a single precedent which, in addition to being more than 20 years old, is based, not on international human rights treaties as claimed by Counsel for the Defence in the above-mentioned appeal, but on a breach of article 33 of the Congolese Criminal Procedure Code which provides that '[TRANSLATION] [H]ouse searches shall be conducted in the presence of the alleged perpetrator of the offence and the person in whose home or residence they are conducted, unless they are not present or refuse to attend.'")

[21] *Id.* para. 76. *See also* Annex D, P. Viebig, Illicitly Obtained Evidence at the International Criminal Court, (The Hague: Asser, 2016), pp. 148-149 ("[e]arly ICC case law also seems to have followed this line. The Trial Chamber, when deciding on an alleged violation of internationally recognized human rights in the context of a house search in *Lubanga*, alluded to the fact that the order to conduct this investigative measure was 'given by the competent authority in order to gather evidence for the purpose of lawful criminal proceedings'. The

The existence of this order under national law, but not the technical violation concerning the presence of the suspect at the place of the search, was considered relevant to evaluating whether the information had been obtained in violation of internationally recognized human rights.[22]

16. National law was also considered relevant, contrary to the Prosecution's assertions, in *Katanga*. The Pre-Trial Chamber ultimately determined that a statement taken from a suspect in the absence of counsel could be admitted as evidence, but only after noting that under Congolese law "the presence of defence counsel at preliminary stages of proceedings is not mandatory, an approach which, to date, has not been found inconsistent with the requirements of a fair trial."[23] In *Delalić et al*., the Trial Chamber reached exactly the opposite conclusion, but only after extensive consideration of the modalities for the giving of such statements under national law.[24] Both of these cases, despite their contradictory conclusions, demonstrate that national law is relevant to assessing the content of the international human rights standards in any particular situation.

17. This Trial Chamber has followed the same approach in its preliminary decision on the Defence motion to declare telephone intercepts inadmissible.[25] The Trial Chamber, far from considering Dutch procedures irrelevant to admissibility, specifically relied on compliance with those measures in rejecting the motion.[26] The Trial Chamber has also taken account of compliance with national law, and expressly cited national law provisions, in admitting statements during these proceedings.[27] The Prosecution has offered no explanation as to why the same approach should not apply here.

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compliance with domestic formalities is thus one consideration in the overall established of a violation under Article 69(7). This approach can be welcomed in light of the comprehensive respect for procedural rights that it reflects.")

22 *Contra* Motion, paras. 4,15.

23 *Katanga and Ngudjolo*, Decision on the confirmation of charges, ICC-01/04-01/07-717, 30 September 2008, para. 97.

24 *Delalić et al*., Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, 2 September 1997, para. 52.

25 *Bemba et al.*, Corrigendum to Motion to Declare Inadmissible Telephone Intercepts of Mr. Mangenda Obtained Pursuant to a Judicial Order Based on Material Misstatements By the Prosecution, ICC-01/05-01/13-1136-Conf-Corr, 13 August 2013.

26 *Bemba et al.,* Decision on Request to declare telephone intercepts inadmissible, ICC-01/05-01/13-1284, 24 September 2015, paras. 25-26 ("[t]he Dutch district court issued several decisions affirming the legality of the authorisation of for telephone interception and the deliverance of the selected taped conversations to this Court…the Dutch district court specifically verified if the compliance with the Request for Assistance was done in conformity with Dutch law").

27 *Bemba et al.,* Decision on Prosecution Rule 68(2) and (3) Requests, ICC-01/05-01/13-1478-Conf, 11 November 2015, para. 72.

18. Indeed, the Prosecution itself has frequently relied on purported compliance with national law to affirm the admissibility of information, or to otherwise defeat claims of inadmissibility.[28] Even in the Motion, the Prosecution is unable to maintain that national law is irrelevant, conceding at one point that "[A]rticle 69(7) may require a determination on national law" while at the same time arguing that this is not automatically (or "*ipso facto*") the case.[29] The statement is correct to the extent that violations of national law do not necessarily constitute a violation of internationally recognized human rights. The only way to properly assess whether that has been the case, however, is to understand the nature of the applicable national legal framework, and the nature of the violation thereof.

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[28] *Bemba et al.*, Prosecution's Fifth Request for the Admission of Evidence from the Bar Table, ICC-01/05-01/13-1498-Conf, 27 November 2015, paras. 3, 14 ("[t]he materials were provided voluntarily, or otherwise lawfully seized from the persons or premises of the Accused pursuant to judicial authorisation and the applicable laws of the national jurisdictions where the seizures took place…[t]he documents…(iii) were lawfully seized from Arido pursuant to the applicable laws of the national jurisdiction where the seizures took place or were otherwise provided by the Accused themselves"); *Bemba et al.*, Prosecution Consolidated Response to the Bemba and Arido Defences' Challenges to Legality of Prosecution Evidence pursuant to Article 69 (ICC-01/05-01-13-1199-Conf and ICC-01/05-01/13-1241-Conf), ICC-01/05-01/13-1359-Conf, 9 October 2015, para. 30 ("[t]here have been no violations of either the Statute or French law in the manner in which Arido's statements were captured. The interviews with Arido were not recorded because French law does not provide for recording of interviews of suspects for offences against the administration of justice, in accordance with article 64(1) of the French Code of Criminal Procedure."); *Bemba et al.*, Public redacted version of "Prosecution's Fourth Request for the Admission of Evidence from the Bar Table", 28 September 2015, ICC-01/05-01/13-1310-Conf, ICC-01/05-01/13-1310-Red, 2 October 2015, paras. 3, 14 ("[t]he materials were provided voluntarily or were otherwise lawfully seized from the persons or premises of the Accused pursuant to judicial authorisation and the applicable laws of the national jurisdictions where the seizures took place…[t]he following factors establish that the probative value of the proposed material outweighs any prejudicial effect:… the materials were lawfully seized from Arido pursuant to the applicable laws of the national jurisdiction where the seizures took place"); *Bemba et al.*, Public redacted version of the "Prosecution's Third Request for the Admission of Evidence from the Bar Table", 21 August 2015, ICC-01/05-01/13-1170-Conf, CC-01/05-01/13-1170-Red, 18 September 2015, paras. 4, 34 ("were otherwise lawfully seized from the person or premises of the Accused pursuant to judicial authorisation and the applicable laws of the national jurisdictions where the seizures took place"); *Bemba et al.*, Prosecution's response to the Kilolo Defence request for evidence to be excluded under article 69(7), ICC-01/05-01/13-1152, 17 August 2015, paras. 8, 9 ("The Single Judge's decision was implemented in accordance with Dutch law. And the Independent Counsel assigned to review the communications for privileged material performed his mandate under the supervision of a Dutch investigating judge and within the premises of Dutch courts"); *Bemba et al.*, Public redacted version of "Prosecution's First Request for the Admission of Evidence from the Bar Table", 16 June 2015, ICC-01/05-01/13-1013-Conf, ICC-01/05-01/13-1013-Red, 23 June 2015, paras. 29, 39, 51 ("[c]umulatively, the following factors readily establish that the probative value of the proposed material outweighs any prejudicial effect:…(ii) the items are reliable, as they were collected in accordance with national legislation and in accordance with the Statute…[a]s is the case with the intercepts, the probative value of the proposed CDRs evidence outweighs any prejudicial effect for the following reasons:…(ii) the items are reliable as they were collected in accordance with national legislation, widely accepted and followed business practices in the relevant industry, and in accordance with the Statute…[a]s in the case of the proposed CDRs, the probative value of the proffered money transfer records outweighs any prejudicial effect for the following reasons:…(ii) the items are reliable, as collected in accordance with national legislation and the Statute").

[29] Motion, para. 13.

19. P-1's report is not being tendered to demonstrate minor or technical violations of Austrian law that would require, *ipso facto*, its exclusion before this Trial Chamber. The report is tendered to show, rather, that the privacy of banking information is treated very seriously under Austrian law. The protection that was violated in the present case "has the rank of constitutional law" in Austria.[30] The judicial authorization required for disclosure of such information may not, as P-1 explains, be granted retroactively nor are there exceptions for emergency situations, lead purposes, or where the inquiry originates from the ICC.[31] The Prosecution, contrary to the assertions in its Motion,[32] requested and obtained huge volumes of financial information without any judicial authorization whatsoever. This conduct: (i) if performed by an Austrian official, would have been a violation of Austrian law; (ii) induced Western Union to violate Austrian law; and (iii) violated Article 99(4) and § 13(1) Austrian Law on Cooperation With the International Criminal Court whose purposes are precisely to ensure that the acts of ICC investigators on Austrian territory comply with Austrian law.

20. The Prosecution mischaracterizes P-1's report as commenting "on the validity of a decision of a national court."[33] P-1 does not even discuss the pre-conditions for issuing a judicial order, let alone comment on the correctness of any of the judicial orders authorizing collection of financial data. This argument has no merit.

21. P-1's report is directly relevant to whether the Prosecution violated internationally recognized human rights – in particular, the right to be free from unlawful interference with privacy. The report is also relevant to the Prosecution's likely fall-back position that the violation was based on a good faith misunderstanding or ignorance by the ICC investigators of national law.[34] As in previous cases, the Trial Chamber should be in a

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[30] Austrian Banking Act (Bankwesengesetz, BWG), Article 38(5): (5) (constitutional law provision) Paras. 1 to 4 may only be amended by the National Council with at least one-half of the representatives present and with a two-thirds majority of the votes cast.
CAR-D23-0006-0001, Expert Report of Prof. Dr. Otto Lagodny, 2 February 2016 ("P-1's Report"), p. 3.
[31] *Id.* pp. 4-8.
[32] Motion, para. 7 ("[t]hose records were collected by the Austrian state through a request for information by the Prosecution.") In fact, a statement by the Prosecution's own investigators dated 3 November 2015 and which has been submitted to the Trial Chamber, confirms that they requested and received most, if not all, of the financial records of sixty-seven individuals *before* the first court order was signed on 8 November 2012. *See* CAR-OTP-0092-0018, Investigation Report Screening of names against Western Union database, 3 November 2015. *See also* CAR-OTP-0092-0834 and CAR-OTP-0092-0867, Anordnung Der Auskunftserteilung, Bankkonten Und Bankgeschäfte, 8 November 2012.
[33] Motion, para. 8.
[34] The Prosecution investigators have asserted that they were told by an Austrian official that "the OTP was allowed to screen Western Union material however once material was required for evidentiary purposes, a court

position to fully assess national law in order to understand the nature of the violation that has taken place; whether it does, in the circumstances, amount to a violation of internationally recognized human rights; and whether, given all the circumstances, the violation is so serious that the admission of the information procured thereby would "be antithetical to and would seriously damage the integrity of the proceedings."

(ii) National Law Is Relevant To Whether The Prosecution Has Violated the Statute

22. National law is also relevant to the other potential prong of exclusion under Article 69(7): whether the Prosecution violated the Statute. Article 99(1) provides that "[r]equests for assistance shall be executed in accordance with the relevant procedure under national law." Article 99(1), by its express terms, does not limit the actors to whom it is applicable. Even assuming, *arguendo*, that it does not apply to Prosecution investigators while on the territory of a State, Article 99(4) narrowly limits the circumstances in which Prosecution investigators may conduct such investigations. In fact, Article 99(4) imposes three conditions on such investigations: (i) it must be "necessary for the successful execution of a request"; (ii) only where it "can be executed without any compulsory measures"; and, in the case of a State which was not the *locus* of the crime, (iii) only after "consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party."

23. Whether "compulsory measures" are required can be assessed only with reference to national law. P-1's report directly addresses this issue, explaining that compulsory measures are indeed required under Austrian law to obtain financial information from Western Union. The Prosecution investigators therefore violated Article 99(4) by engaging in investigations that, under Austrian law, first, and not retroactively, required compulsory measures in the form of a judicial order.

24. P-1's report also explains how Article 99(4) has been implemented within Austrian law. Austria's cooperation legislation requires the ICC to: (i) give "prior notice" to the

order would need to be obtained." *See* CAR-OTP-0092-0018, Investigation Report Screening of names against Western Union database, 3 November 2015, p. 1. P-1's report directly addresses whether such a claim exists under Austrian law, which, in turn, is probative of whether the Prosecution investigators would have been so informed. P-1's report also addresses the procedures under national law for cooperation with the ICC, which is relevant to whether the Prosecution investigators should be permitted to rely on alleged informal consultations with an Austrian prosecutor as the basis for asserting a good faith error or ignorance of Austrian law.

Federal Minister of Foreign Affairs of the "time and purpose of the investigations"; and (ii) affirm that "they do not involve recourse to or the threat of recourse to coercive measures."[35] The mechanism is evidently designed to formalize the *modus operandi* of cooperation to avoid errors or confusion as to permissible conduct. The Prosecution has not yet produced any information suggesting that any such notice or affirmation was given to the appropriate Austrian authorities. Given the evidence that has been heard so far, these requirements under Austrian law will likely be relevant to the Prosecution's eventual argument that any non-compliance by the investigators with Austrian law was the product of a good faith mistake. This argument is not tenable in light of the bright-line procedures in place, whose evident purpose is to protect national sovereignty and avoid negligent violations of Austrian law.

25. P-1's report is, accordingly, directly relevant to whether financial information from Western Union was obtained, pursuant to Article 69(7), in violation of the Statute.

(iii) The Prosecution's Reliance on Article 69(8) and Rule 63(5) Is Misplaced

26. Article 69(8) provides that "[w]hen deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law."

27. Article 69(8) applies only to "evidence collected by a State." The evidence that is the object of P-1's report was obtained by ICC investigators directly on the territory of a State. This reading of Article 69(8) is consistent with this Trial Chamber's own previous ruling in respect of statements taken by "French authorities […] on French territory in compliance with French law."[36] The Prosecution's claim that "[t]he issue here is no different"[37] because the information was subsequently re-acquired is obviously wrong.

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[35] Austrian Law on Cooperation With the International Criminal Court (Bundesgesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof, ZISG), § 13(1); P-1's Report, p. 6 ("§ 13 shows that onsite investigations of the ICC (including the Office of the Prosecutor according to § 1 of the law) require a 'prior notice' given to the Austrian Federal Minister of Foreign Affairs including time and purpose of the investigations and that they do not involve recourse to or the threat of recourse to coercive measures.")

[36] *Bemba et al.*, Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible, ICC-01/05-01/13-1432, 30 October 2015, para. 24. See also Annex E, D. Piragoff and P. Clarke, 'Article 69 Evidence' in O. Triffterer and K. Ambos (eds), Rome Statute of the International Criminal Court: A Commentary, (Beck/Hart, 3rd revised ed., 2016), p. 1749.

[37] Motion, para. 13.

28. Rule 63(5) provides that Chambers "shall not apply national laws governing evidence, other than in accordance with article 21." P-1's report at no time addresses any law governing evidence. He does not address whether information obtained by the Austrian police in the same way as obtained by the ICC investigators would be admissible in an Austrian criminal trial. That issue would, indeed, be irrelevant to the Trial Chamber's assessment of admissibility, which is governed exclusively by Article 69 and other appropriate sources of ICC law.

29. A recent commentary has usefully explained that Article 69(8) does not preclude consideration of national law even within the context of investigations conducted by national authorities:

> In fact, compliance with formal requirements under domestic law will have to be taken into account when determining whether an "internationally recognized human rights" has been violated. This is because formal correctness as such is a procedural guarantee for persons affected by investigative measures. To this extent, Article 69(8) will have to be interpreted narrowly, prohibiting an overall reliance on domestic violations and a comprehensive assessment of national law, but not its consideration altogether.[38]

(iv) The Trial Chamber Has Previously Affirmed the Materiality of Compliance With National Procedures Under Rule 77, and Deferred Determinations on Admissibility to a Later Stage of Proceedings

30. The Trial Chamber has already indirectly addressed the present issue by determining that the Prosecution's purported contacts with national authorities in pursuit of investigations should be comprehensively disclosed to the Defence.[39] If such

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[38] P. Viebig, Illicitly Obtained Evidence at the International Criminal Court, (The Hague: Asser, 2016), p. 148.
[39] *Bemba et al.,* Decision on Mr Kilolo's Defence "Requête aux fins d'accès aux enregistrements soumis par les autorités néerlandaises au Conseil indépendant nommé par décision ICC-01/05-52-Red2" dated 20 February 2014, ICC-01/05-01/13-214, 21 February 2014, p. 5 ("CONSIDERING that the intercepts carried out by the Dutch authorities, on the basis of which Independent Counsel made their selection, pertain to the procedure pending before the Dutch judicial authorities in accordance with their applicable national law, which procedure is still ongoing"); *Bemba et al.,* Decision on Mangenda Defence Request for Cooperation, ICC-01/05-01/13-1148-Conf, 14 August 2015, paras. 8-11 ("[t]he Mangenda Defence intends to use the Requested Material to determine if the audio-recordings resulting from the telephone surveillance of Mr Mangenda – which the Prosecution intends to rely on during trial – were obtained lawfully… [i]t is not necessary for the defence to demonstrate the illegality of the proposed evidence, since this is precisely the reason why the material is sought…[t]he Prosecution's disclosure obligations extend to any material in the possession of the Prosecution which would assist the Mangenda Defence in determining the legality of the audio-recordings"); *Bemba et al.,* Decision on Defence Requests for Prosecution Requests for Assistance, Domestic Records and Audio Recordings of Interviews, ICC-01/05-01/13-1234-Conf, 10 September 2015, paras. 11-13 ("[t]he Defence have alleged that certain searches or intercepts undertaken by national authorities in executing the Requests for Assistance might have breached the principle of proportionality or were initiated upon incorrect or misleading

information is "material" to the Defence pursuant to Rule 77, then the interpretation and use of this material is likewise probative of issue of relevance to the case.

31. The Motion is also incompatible with this Chamber's consistent guidance that admissibility issues are to be addressed at the end of the case and should not curtail the scope of information heard by the Chamber.[40] The issues raised in the Prosecution's Motion can only be comprehensively addressed within the context of all the evidence, which may include the tendering of additional information about Prosecution investigations that continue to be revealed in Prosecution disclosures.

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information, and that some of the evidence collected was edited before disclosure to the Defence. In such instances, it is imperative that the Defence be able to test the reliability of the procedures employed in collecting the evidence against them, and the Requests for Assistance may assist in this process").

[40] *See e.g. Bemba et al.,* Decision on the Mangenda Defence Request for Extension of Time Limit for Disclosure of Potential Expert Report, ICC-01/05-01/13-1555, 20 January 2016, para. 11 ("the Single Judge holds that any argument on the admissibility of evidence is premature"); *Bemba et al.*, Decision on Prosecution Requests for the 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. 9 ("[a]s a general rule, these proceedings will be conducted more efficiently if the Chamber defers its assessment of the admissibility of evidence until deliberating its judgment pursuant to Article 74(2) of the Statute. The Chamber will consider relevance, probative value and potential prejudice of each item of evidence submitted at that time…"); p. 11 (**"DEFERS** any ruling under Article 69(7) of the Statute for the items in the Second Prosecution Request and Mr Arido's statements to the French authorities advanced in the Third Prosecution Request in accordance with paragraph 14 above"); *Bemba et al.*, Decision on 'Prosecution's Fourth Request for the Admission of Evidence from the Bar Table', ICC-01/05-01/13-1480, 12 November 2015, p. 4 ("**DEFERS** any ruling upon the Materials to its Decision under Article 74(2) of the Statute, in accordance with its Decision of 24 September 2015"); *Bemba et al.*, Decision on 'Prosecution's Fifth Request for the Admission of Evidence from the Bar Table', ICC-01/05-01/13-1524, 14 December 2015, para. 12 ("As to the remainder of the arguments raised against the 108 Items, and consistently with its previous rulings, the Chamber defers consideration of them until it assesses the evidence in the trial judgment.")

IV. CONCLUSION

32. P-1's report and anticipated testimony are probative of the nature of the Prosecution investigators' non-compliance with Austrian law, which, in the circumstances, is relevant to the Prosecution investigators' violation of both the Statute and internationally recognized human rights. The Prosecution's attempt to suppress *in limine* information probative of the nature of this non-compliance should be rejected.

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Respectfully submitted this 10 February 2016,

At The Hague, The Netherlands