Cour
Pénale
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International
Criminal
Court

Original: English

No: **ICC-01/05-01/13**
Date: **10 May 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 Redacted Version with Public Annexes A – F

Revised Request to Exclude Evidence Pursuant to Article 69(7)

Source: **Defence for Jean-Jacques Kabongo Mangenda**

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

The Office of the Prosecutor
Ms Fatou Bensouda
Mr James Stewart
Mr Kweku Vanderpuye

Counsel for Jean-Jacques Kabongo Mangenda
Mr Christopher Gosnell
Mr Arthur Vercken

Counsel for Jean-Pierre Bemba Gombo
Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba
Mr Paul Djunga Mudimbi
Mr Steven Powles

Counsel for Fidèle Babala Wandu
Mr Jean-Pierre Kilenda Kakengi Basila
Mr Roland Azama Shalie Rodoma

Counsel for Narcisse Arido
Mr Charles Achaleke Taku
Ms Beth Lyons

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. INTRODUCTION

1. In October and early November 2012, Prosecution investigators obtained from Western Union information about the financial transactions of countless individuals.[1] This information was obtained without any judicial authorisation from any court. The Prosecution could not have been unaware of the legal requirement to have such an authorisation and, indeed, requested it on 2 November 2012. While this request was still pending before the Austrian judicial authorities, the Prosecution nevertheless continued to obtain financial information – including all Western Union financial records of Mr. Mangenda for a period of more than five years.

2. This violated the internationally recognised human right to protection from "unlawful interference" with privacy. Neither in Austria nor in Ireland is it lawful for a financial institution to disclose financial records, including to law enforcement, without judicial authorisation. The disclosure and acquisition of these records, accordingly, constituted an "unlawful interference" with privacy. The fact that the Prosecution subsequently re-obtained the information pursuant to a proper judicial authorisation is irrelevant at best and, at worst, aggravates the violation.

3. The Statute was also violated by these acts. The Prosecution did not follow Austrian law, as required by Article 99(1), and obtained information in Austria that required "compulsory measures" under Austrian law, which is prohibited under Article 99(4). The Prosecution also appears to have violated its promise to Austria that "[REDACTED]."[2]

4. The only appropriate and adequate remedy for these violations is to exclude, pursuant to Article 69(7), both the financial records themselves and the telephonic surveillance authorised and conducted on the basis of those financial records. Admitting information obtained as a direct result of the violation of Mr. Mangenda's internationally recognised rights and the Statute would be antithetical to and would seriously damage the integrity of the proceedings.

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[1] The present submission is a public redacted version of the Mangenda Defence's filing ICC-01/05-01/13-1791-Conf-Corr.
[2] CAR-OTP-0092-0892; CAR-OTP-0092-0890.

II. SEQUENCE OF RELEVANT EVENTS

5. On 28 September 2012, a Prosecution investigator who had been communicating with Mr. Smetana about another case,[3] wrote the following email to him:

> [REDACTED].[4]

The email did not inform Mr. Smetana that these names were related to a different case, and no information has been disclosed by the Prosecution suggesting that Mr. Smetana was otherwise so informed.

6. Six days later, the Prosecution investigator narrowed his request to three names only – [REDACTED].[5] Again, no indication in the email that these names related to a different or new case. On 11 October 2012, Mr. Smetana apparently responded, providing an Excel spreadsheet detailing approximately two hundred financial transactions.[6]

7. On 15 October 2012, the Prosecution sent an email to the Austrian Ministry of Justice as follows:

> [REDACTED].[7]

8. This notification would appear to be in purported compliance with § 13 (1) of the *Austrian Law on Cooperation with the International Criminal Court*, which permits the ICC to collect evidence in Austria provided that "the Federal Ministry of Foreign Affairs is given prior notice thereof and is informed of the time and purpose of the investigations and that they do not involve recourse to or the threat of recourse to coercive measures." This provision reflects Article 99(4) of the ICC Statute, which permits investigations on the territory of a State Party only "following consultations" and only where "necessary for the successful execution of a request which can be executed without any compulsory measures."

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[3] CAR-OTP-0092-0018 (REDACTED).
[4] CAR-D20-0003-0009.
[5] CAR-OTP-0092-0022 (REDACTED).
[6] *Id.* p.-0023 (REDACTED); CAR-OTP-0092-0024 (REDACTED).
[7] CAR-OTP-0092-0892-R01 (REDACTED).

9. On 19 and 20 October 2012, Prosecution Investigator [REDACTED] visited the offices of Western Union in Vienna to "screen" information concerning certain sixty-seven individuals.[8] Over the course of these two days, [REDACTED] and Mr. Smetana were only able to "screen" 32 of these 67 names "due to time constraints". The Prosecution investigators' statement, provided on 3 November 2015, does not indicate whether Excel spreadsheets were obtained from Mr. Smetana during this meeting. The time taken to review this information suggests that it may have been reviewed in detail *in situ*.

10. On 1 November 2012, another email was sent to the Austrian Ministry of Justice advising it of another mission to be undertaken by [REDACTED] to the offices of Western Union in Vienna.[9] This notification advised the Austrian government for the first time that these investigations pertained to the *Bemba* case, rather that Côte d'Ivoire or Libya. The same undertaking was made that "[REDACTED]."

11. On 2 November 2012, the Prosecution sent a "Request for Assistance" to the Austrian Government.[10] This RFA states, without much specificity, that the Prosecution is "[REDACTED]."[11] The RFA implies that the Prosecution, based on its review of information provided by Mr. Smetana during the meetings on 19 and 20 October, has come to a certain conclusion:

> [REDACTED].[12]

Attached to this RFA is the same list of 67 individuals that the Prosecution investigator had already taken with him to Vienna on 19 October 2012.[13]

12. On 4 and 5 November 2012, a second mission to the offices of Western Union was undertaken. During those two dates, the remaining 35 names on the list were

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[8] [REDACTED].
[9] CAR-OTP-0092-0890-R01 (REDACTED).
[10] CAR-OTP-0091-0351 (REDACTED).
[11] *Id*. para.5.
[12] *Id*. para.6.
[13] CAR-OTP-0092-0834, p.-0846; *see also* CAR-OTP-0091-0351, p. 356); *cf*. Investigation Report, pp.2-3.

"check[ed]."[14] The Investigator's Report does not say, as in respect of the previous visit, whether the investigators obtained Excel spreadsheets or any other documents from Mr. Smetana during this visit. However, on 7 November 2012, [REDACTED] emailed Mr. Smetana as follows:

> [REDACTED][15]

Four Excel spreadsheets containing Western Union financial information are attached to this email.[16] The Excel metadata of these documents indicate that they were created by "Herbert Smetana, The Western Union Company" or "[REDACTED], The Western Union Company" between 4 October and 5 November 2012. The implication is that these documents had been obtained during the on-site visits to Western Union.

13. Mr. Smetana responded to [REDACTED]'s email later in the afternoon on 7 November 2012, attaching a spreadsheet of Mr. Mangenda's financial information going back to 2005.[17] This is the second Excel spreadsheet sent by email by Mr. Smetana to the OTP containing comprehensive transaction dates, suggesting that he felt at ease providing all such information despite the absence of any judicial authorisation to do so.

14. The day before this correspondence, Mr. Smetana manifested his awareness that a request for a judicial order was pending. He wrote to [REDACTED] that he had "[REDACTED]."[18] This email implies that the Austrian Prosecutor's office had not previously been aware of an investigation concerning Central African Republic, and that Mr. Smetana was aware that an application for a judicial order was now pending in respect of that investigation.

15. On 8 November 2012, the Austrian Prosecutor sent a request to the *Landesgericht für Strafsachen Wien* seeking an "Order for information regarding bank accounts and bank transactions" in accordance with sections 109 and 116 of the Austrian Code of

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[14] Investigation Report, p.1.
[15] CAR-OTP-0092-0028-R02 (REDACTED).
[16] CAR-OTP-0092-0029; CAR-OTP-0092-0030; CAR-OTP-0092-0031; CAR-OTP-0092-0032.
[17] CAR-OTP-0092-0033 (REDACTED); CAR-OTP-0092-0034.
[18] CAR-OTP-0092-0027-R01 (REDACTED).

Criminal Procedure.[19] The proposed addressee of the order was "Western Union Payment Services."

16. On 9 November 2012, [REDACTED] emailed Mr. Smetana that "[REDACTED]" and asked him to "[REDACTED]."[20] The name given was "[REDACTED]", which did not appear on the list of sixty-seven names for which the Prosecution has sought a judicial order. On 12 November 2012, Mr. Smetana responded to this email, attaching an Excel spreadsheet with comprehensive financial transaction data.[21]

17. On 15 November 2012, the order to "Western Union Payment Services" was issued with the following notation:

> [REDACTED].[22]

The Defence has no disclosure of any translation having been provided, which may explain the allegation that Mr. Arido was [REDACTED].[23]

III. SUBMISSIONS

(i) Applicable Law

18. Article 69(7) provides that:

> evidence obtained by means of a violation of this Statute or internationally recognised human rights shall not be admissible if: […]
> (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

19. The sections below will address in turn: (i) the scope of the right to privacy; (ii) the violation of that right; (iii) the violation of Article 99(1) and 99(4) of the Statute; and (iv) the factors relevant to exclusion under Article 69(7); and (v) the application of these factors in the present circumstances.

[19] CAR-OTP-0092-0834 (original language); CAR-D24-0002-1363 (English translation).
[20] CAR-OTP-0092-0035 (REDACTED).
[21] CAR-OTP-0092-0035 (REDACTED); CAR-OTP-0092-0037.
[22] CAR-OTP-0092-0834, p.-0836 (original language); CAR-D24-0002-1363 (English translation).
[23] CAR-OTP-0092-0834 (original language); CAR-D24-0002-1363 (English translation).

(ii) Financial Information Falls Within the Scope of the Internationally-Recognised Right to Privacy

20. Privacy is an internationally recognised human right.[24] Article 8 of the European Convention on Human Rights, which mirrors Article 17 of the ICCPR, declares that:

> 1. Everyone has the right to respect of his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

21. The European Court of Human Rights has recognised that banking information is protected by the right to privacy:

> il 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). 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.[25]
>
> …
>
> the seizure in the sense of copying of banking data […] amounts to interference for the purposes of Article 8.[26]

22. "Interference" with privacy is permissible "in accordance with the law." The "law" that regulates interference with privacy is the national law of the State concerned.[27] National law is accordingly relevant to determining whether there has been a violation of the internationally-recognised right to privacy.

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[24] *Lubanga*, Decision on the confirmation of charges, ICC-01/04-01/06-803-tEN, 29 January 2007 ("*Lubanga* Confirmation Decision"), para.74.

[25] ECHR, *G.S.B. v. Suisse*, No. 28601/11, 22 December 2015, para.50 (internal citations omitted).

[26] ECHR, *M.N. and Others v. San Marino*, No. 28005/12, 7 July 2015, paras.51-55. *See* ECHR, *Brito Ferrinho Bexiga Villa-Nova v. Portugal*, 69436/10, 1 December 2015.

[27] UN Human Rights Committee, CCPR General Comment No.16 (23rd Session, 8 April 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N.Doc.HRI/GEN/1/Rev.1, para.8 ("relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted.")

(iii) The Prosecution Violated the Right to Privacy of Mr. Mangenda and 67 Others By Obtaining Their Financial Information Without Judicial Authorisation from Any Authority

23. The Prosecution obtained a large volume of financial information without any judicial authorisation. The full scale of this disclosure is unknown, but the documents disclosed by the Prosecution show that it received six full spreadsheets of financial information concerning countless individuals, including Mr. Mangenda, prior to any judicial authorisation.[28] Mr. Mangenda's financial information was disclosed *in toto* no later than 7 November 2012. Some of these disclosure occurred after the Prosecution had made a request for judicial authorisation for disclosure of this very information.

24. There are also reasonable grounds to believe that the Prosecution obtained Excel spreadsheets or extensive financial data in respect of the 64 other individuals on its list. This inference arises from the fact that (i) the Prosecution sent Western Union financial spreadsheets to Mr. Smetana on 6 November, which appear to have been obtained during the site visits;[29] (ii) the Prosecution email on that date reflects that the Prosecution has analysed this data in detail; and (iii) Mr. Smetana's readiness to send Excel spreadsheets by e-mail, from which it may be inferred he was also prepared to provide the same information in person during the on-site visits. In any event, the fact that the Prosecution appears to have spent four full days at the offices of Western Union gathering financial data is suggestive of the extent to which such information was disclosed and reviewed on the sport.

25. The manner in which the Prosecution obtained this information was not "in accordance with the law." Article 38(2)1 of the Austrian *Banking Act* and §116 of the Austrian *Code of Criminal Procedure* require judicial authorisation before – not after – information on bank accounts is disclosed.[30] Retroactive authorisation is not permissible.[31] This is an obligation that applies not only to the holder of the

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[28] CAR-OTP-0092-0024 (REDACTED); CAR-OTP-0092-0029 (REDACTED); CAR-OTP-0092-0030 (REDACTED); CAR-OTP-0092-0031 (REDACTED); CAR-OTP-0092-0032 (REDACTED); CAR-OTP-0092-0034 (REDACTED); CAR-OTP-0092-0037 (REDACTED).

[29] CAR-OTP-0092-0028-R02 (REDACTED); *see also* CAR-OTP-0092-0029; CAR-OTP-0092-0030; CAR-OTP-0092-0031; CAR-OTP-0092-0032 (REDACTED).

[30] CAR-D23-0006-0001 ("Lagodny Report"), p.4.

[31] *Id.* p.5.

information, but also to law enforcement agencies whose duty, after all, is to uphold the law.[32]

26. Mr. Smetana demonstrated his awareness of the need for a judicial order by [REDACTED].[33] In fairness to Mr. Smetana, however, there is no indication as to when the Prosecution investigators informed him that this disclosure concerned a new case. Mr. Rook's email of 28 September gives no indication that the names are unrelated to the case for which he had previously sought disclosure, presumably with a proper judicial authorisation. The Prosecution's notice of an on-site investigation to the Austrian authorities dated 15 October 2012 declares [REDACTED],[34] and the Prosecution has submitted to this Court that its records show that [REDACTED].[35] Yet the Investigation Report states that during this visit he [REDACTED].[36] These contradictory statements raise questions about what Mr. Smetana was told during the first on-site investigation, and the Prosecution should clarify these issues in any response it may file.

27. The Prosecution has advanced several purported justifications for obtaining this information without any judicial authorisation. The first was that [REDACTED][37] Professor Lagodny rejected that this distinction had any relevance under Austrian law,[38] and this proposition was not disputed by the Prosecution. Even assuming that this claim has any validity, the Prosecution knew by no later than 2 November 2012, as reflected in its first RFA, that it needed a court order for the information it was seeking. Nevertheless, Prosecution investigators travelled to Vienna and copied the very information for which there was a pending request for a court order.

28. The Prosecution has also asserted that Austrian law is inapplicable.[39] Yet the Prosecution itself sought the assistance of the Austrian Government for the production

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[32] *Id.* p.8.
[33] ICC-01/05-01/13-T-34-CONF-ENG, 3 November 2015, 30:1-5; 35:7-9; 36:18-23; 37:19-20; 38:3; 47:18-20; 48:6.
[34] CAR-OTP-0092-0892-R01 (REDACTED).
[35] ICC-01/05-01/13-T-33-CONF-ENG, 2 November 2015, 5:23-4.
[36] Investigation Report, p.1.
[37] ICC-01/05-01/13-T-35-CONF-ENG, 4 November 2015, 74:18.
[38] Lagodny Report, pp.7-8.
[39] ICC-01/05-01/13-T-44-CONF-ENG, 11 March 2016, 25-30, 40; CAR-OTP-0093-0217.

of the information "[REDACTED]"[40] The consequent judicial order was addressed to "[REDACTED]"[41] – Mr. Smetana's employer. Furthermore, Mr. Smetana consulted his legal department several times[42] without this ever leading to any suggestion that the material could be disclosed without an Austrian court order. And even in the unlikely event that Irish law governs the custody of the data,[43] it too prohibits disclosure of financial information without a court order.[44] The only authority in a position to issue such an order was an Austrian court.[45]

29. The Prosecution also invokes the fine print on the back of a Western Union transmission form as constituting a purported waiver of any and all rights to privacy over banking information.[46] Even in the unlikely event that such terms of adhesion could ever constitute a waiver of such a fundamental right, the language is too ambiguous to constitute an express waiver. The contract says merely that "Western Union may also give information to third parties, where there is a reasonable need, to help prevent and detect crime, to prosecute offenders, national security or other legal reasons."[47] Nothing in this language implies that the usual modalities and procedures for disclosing information to law enforcement agencies should not apply. The assessment of Professor Lagodny – ambushed without any advance notice – was "that this does not fall under" such an exception.[48]

30. None of the asserted justifications have even colourable validity. The hand-over of information by Western Union to the ICC was not "in accordance with the law" and therefore, violated the right to privacy. Both Mr. Smetana and the Prosecution investigators must have known this. The non-compliance with the legal procedures for obtaining banking information constitutes a violation of the right to privacy.

(iv) The Investigation Violated Articles 99(1) and 99(4) of the Statute

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[40] CAR-OTP-0092-0844.
[41] CAR-OTP-0092-0834.
[42] ICC-01/05-01/13-T-34-CONF-ENG, 3 November 2015, 33:17-20; 34:22-23; 36:4-8.
[43] ICC-01/05-01/13-T-44-CONF-ENG, 11 March 2016, 42:12-14 (REDACTED).
[44] *Walsh v National Irish Bank Limited*, [2007] 5 JIC 0407.
[45] ICC-01/05-01/13-T-44-CONF-ENG, 11 March 2016, 44:18-21.
[46] CAR-OTP-0093-0217, p.-0218.
[47] CAR-OTP-0093-0237, p.-0239, third column.
[48] ICC-01/05-01/13-T-44-CONF-ENG, 11 March 2016, 46:17-19.

31. Article 99(1) of the Rome Statute 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" where "it can be executed without any compulsory measures". Unless the State is the place where the crime occurred, such investigation can be undertaken only "following consultations with the requested State Party."

32. The Prosecution's investigations in Austria did not comply with these requirements. Austrian law requires judicial authorisation prior to disclosure of financial information, which is also a "compulsory measure." Furthermore, the Prosecution promised Austria that "[REDACTED]."[49]

33. The Prosecution may argue that the prohibition of compulsory measures does not apply because, *de facto*, Mr. Smetana voluntarily violated Austrian law. If Article 99(4) were to be so interpreted it would place the ICC in the position of encouraging citizens to violate their national law. Indeed, Mr. Smetana indicated that his normal practice was [REDACTED].[50] Why he deviated in such a remarkable manner from his usual practice in this case is a mystery; in any event, Article 99(4) should not be interpreted in a manner that encourages the Prosecution to request intermediaries to act in an unlawful manner.

34. Austrian law prescribes the application of compulsory measures to obtain the financial information. By failing to comply with this requirement, both Article 99(1) (requiring execution of requests "in accordance with the relevant procedures under national law") and Article 99(4) (limiting investigation on the territory of a State to those that can be executed "without any compulsory measures") were breached.

(v) The Circumstances Require Exclusion Under Article 69(7)

35. Non-compliance with national law does not, *ipso facto*, mean that evidence obtained as a result must be automatically excluded. Article 69(7) provides, instead, that evidence obtained "by means of a violation of this Statute or internationally

[49] CAR-OTP-0092-0080; CAR-OTP-0092-0892.
[50] ICC-01/05-01/13-T-35-CONF-ENG, 4 November 2015, 72:4.

recognised human rights shall not be admissible" only where its admission "would be antithetical to and would seriously damage the integrity of the proceedings."

36. National law is, however, relevant to this analysis because: (i) the Statute itself requires compliance with national law (*e.g.,* Articles 99(1) and 99(4)); and (ii) the content of national law regulates whether the internationally-recognised right to privacy has been limited "in accordance with the law".

37. Article 69(8) does not preclude reference to national law for these purposes, especially in the present case. First, Article 69(8) is expressly limited to "evidence collected by a State." Second, Article 69(8) does not say that "national law is irrelevant" but only that the Court "shall not rule on the application of the State's national law" to its own investigators. Interpreting Article 69(8) as permitting violations of Articles 99(1) and 99(4) with impunity makes no sense. On the contrary, ensuring compliance of ICC investigators with relevant national law and Part IX of the Statute in general is a matter of much greater concern for the integrity of the Rome Statute than it is, for example, of the ICTY Statute.

38. Whether admission of evidence would, in particular circumstances, be "antithetical to and would seriously damage the integrity of the proceedings" has received judicial treatment only once, by the *Lubanga* Pre-Trial Chamber. The ICTY and ICTR have addressed the same general issue on several occasions.[51] These brief discussions, paradoxically, are quantitatively outweighed by academic commentary on the issue.[52]

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[51] *Brdjanin*, Decision on the Defence "Objection to Intercept Evidence", 3 October 2003 ("*Brdjanin* Decision"); *Zejnil Delalic et al.*, Decision On The Tendering Of Prosecution Exhibits 104 – 108, 9 February 1998; *Haraqija & Morina*, Decision on Morina and Haraqija Second Request for a Declaration of Inadmissibility and Exclusion of Evidence, 24 November 2008 ("*Haraqija & Morina* Decision"); *Bagosora et al.*, Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89(C), 14 October 2004, paras.13-21; *Nchamihigo*, Decision on the Prosecutor's Application to Admit into Evidence the Transcripts of the Accused's Interview as a Suspect and the Defence's Request to Hold a Voir Dire Article 17 of the Statute and Rules 42, 43 and 95 of the Rules of Procedure and Evidence, 5 February 2007.

[52] *See e.g.* Viebig, Illicitly Obtained Evidence at the International Criminal Court, (The Hague: Asser, 2016) ("Viebig"); K. Vanderpuye, "The International Criminal Court and Discretionary Evidential Exclusion: Toeing the Mark?", 14 Tul. J. Int'l & Comp. L. 127; A. Alamuddin, "Collection of Evidence", in Khan, Buisman, Gosnell (eds.) *Principles of Evidence in International Criminal Justice* (Oxford: Oxford UP 2010).

39. Article 69(7)(b), as distinct from Article 69(7)(a), provides for exclusion of evidence even in cases where its reliability has not been affected.[53] Whether the integrity of proceedings would be damaged by admission depends on the conception of the core values of the Court embodied by such proceedings. One respected author has adopted the view that the four core values of the Statute are "respect for the sovereignty of States, respect for the rights of the person, the protection of victims and witnesses and the effective punishment of those guilty of grave crimes."[54]

40. This Trial Chamber is urged to adopt the following criteria for assessing whether the admission of evidence obtained in violation of the Statute or internationally-recognised human rights should not be admitted:

- Whether the Prosecution, as opposed to a national actor, committed the violation;[55]
- Whether the Prosecution knew or should have known that the investigative measure violated the Statute or human rights or whether, conversely, the investigation was carried out in a good faith and honest belief that it did not violate the Statute or human rights;[56]
- Whether the information could have been obtained without the violation, in a timely manner; [57]
- Whether the violation was serious, viewed either from the perspective of the violation of the Statute or the human right, or whether, conversely, the violation was minor;[58] and
- Whether the offense is so serious as to outweigh any violations of the Statute and human rights that may have occurred.[59]

[53] D. Piragoff and P. Clarke, "Article 69", in O. Triffterer and K. Ambos (eds.) *Rome Statute of the International Criminal Court: A Commentary* (3rd ed., C. H. Beck, Munich) ("Piragoff & Clarke"), p.1749 (explaining that the word "and" in previous drafts was replaced with the disjunctive word "or" as the provision currently reads.)
[54] *Id*. p.1748.
[55] Viebig, p.182; Alamuddin, pp.301,304.
[56] *Brdjanin* Decision, para.63(1); Viebig, p.186; *Haraqija & Morina* Decision, para.20.
[57] *Brdjanin* Decision, para.63(2)-(5).
[58] *Id.* para.63(7); *Lubanga* Conformation Decision, para.78; Alamuddin, p.302; Viebig, p.170)
[59] *Brdjanin* Decision, para.63(7). The application of this criterion, however, appears to be controversial: Alamuddin, p.304; Viebig, p.166.

41. All of these factors in the present case point to the damage to the integrity of these proceedings by admitting the Western Union records, and the intercepts that were authorised on the basis of these records.

42. First, the Prosecution was directly involved in the violation.

43. Second, the Prosecution must have been aware of the need to obtain judicial authorisation before obtaining financial records in Austria. The sensitivity of banking information is a matter of common knowledge, and certainly must be taken to be within the knowledge of the Prosecution, which has a specialised office devoted to such matters. The collection of such data was all the more egregious after the Prosecution had requested a judicial order for authorisation to collected the very information that it then proceeded to collect without regard to whether an order existed or not. These factors demonstrate that the violation was wilful and knowing.[60]

44. Third, a mechanism was readily available to collect the information lawfully.

45. Fourth, the violation was serious and is not mitigated by subsequently obtaining the necessary judicial authorisation. The 2 November 2012 RFA relies, at paragraphs 5 and 6, *on the very information whose disclosure is sought in the RFA itself*. The 2 November 2012 RFA can be paraphrased as saying: "We have already looked at the information we are asking for, and you can be assured that our suspicions of criminal conduct are well-justified." Such an approach turns the requirement of judicial authorisation into a meaningless pantomime. The admission of evidence obtained in this manner damages the integrity of the proceedings both by not sanctioning a violation of human rights, and not upholding a due respect for the Austrian procedures that are in place precisely in order to safeguard those rights – which includes a prohibition on retro-active authorisation for disclosure of financial information.[61]

46. Fifth, the nature of the offences does not weigh in favour of the admission of the evidence regardless of how it was procured. Indeed, it seems paradoxical that evidence obtained in violation of the Statute and human rights could be relied on in a

[60] [REDACTED].
[61] Lagodny Report, p.5.

case alleging perversion of the course of justice. The gravity of the charges is not so overwhelming as to countervail the damage to the integrity of proceedings that would be occasioned by admitting these materials.

47. The Prosecution investigation violated both human rights and the Statute. The violation was not technical, indirect, unknowing or minor in scale. It was serious, deliberate and arbitrary.[62] Admitting the information obtained would undermine the core values of respect for human rights, respect for sovereignty, and respect of the rule of law:

> The rationale for this paragraph is that it would be antithetical to the purposes and integrity of a Court, which was created to redress serious violations of international humanitarian law, to admit and use evidence that was obtained by means of a violation of its own Statute or internationally recognised human rights. Essentially, the admission and use of such evidence by the Court would damage the purpose and integrity of its own proceedings, which are to uphold the rule of law and human rights in the world (or, in the words of the preamble to the Statute, 'respect for the enforcement of international justice' and 'peace, security and well-being of the world').[63]

48. Admitting as evidence obtained as a result of these violations of both human rights and the Statute would be "antithetical to and would seriously damage the integrity of the proceedings."

(vi) The Intercepted Communications Obtained on the Basis of the Unlawfully Obtained Financial Records Should Also Be Excluded

49. The only concrete information in support of the Prosecution's request for judicial authorisation to listen to all of Mr. Mangenda's telephone conversations was the Western Union payment records.[64] On the basis of those records, the Prosecution asserted that [REDACTED].[65] The Prosecution asserted on this basis that

[62] Germany, *BVerfG, Beschluss des Zweiten Senats vom 12 April 2005 - 2 BvR 1027/02 - Rn. (1-140),* para.135.
[63] Piragoff & Clarke, p.1748.
[64] *Situation in the Central African Republic,* Request for Judicial Order to Obtain Evidence for Investigation under Article 70, ICC-01/05-51-Conf, 19 July 2013, para.21.
[65] *Id*.

[REDACTED].[66] The Prosecution also mentions that [REDACTED].[67] The Single Judge relied on these submissions in [REDACTED].[68]

50. The Prosecution has since acknowledged that its suspicions on the basis of these records were incorrect.[69] Nevertheless, the Prosecution relied on those payment records, including their submission in summarised form to the Pre-Trial Chamber,[70] in order to obtain judicial authorisation for surveillance. No other concrete information was presented or cited.

51. The sole purported basis for the telephonic surveillance of Mr. Mangenda was the unlawfully procured Western Union records. Admitting this evidence would be just as antithetical to, and damage just as much, the integrity of the proceedings as would the admission of the Western Union records themselves.

(vii) Tardy and Incomplete Disclosure by the Prosecution In Respect of its Western Union Investigations and the Lack of Involvement of the Defence Either Directly or By Proxy in the Review of Information for Privilege Are Further Matters Weighing in Favour of a Remedy

52. The Defence learned for the first time that financial records had been sought by, and handed over to, the Prosecution without any judicial authorisation *after* Mr. Smetana had commenced his testimony.[71] To this day, the Defence does not have disclosure of any electronic files or other records that were obtained by the Prosecution during its missions in Vienna on 19-20 October and 4-5 November 2012. Even the two mission notifications to Austria went undisclosed until 23 February 2016, after the Defence had inquired three times as to the existence and disclosure of any such notifications.[72] The Prosecution's failure to disclose these materials without prompting raises an

[66] *Id.*
[67] *Id*. para.16.
[68] *Situation in the Central African Republic,* Decision on the Prosecutor's "Request for judicial order to obtain evidence for investigation under Article 70", ICC-01/05-52-Conf, 29 July 2013, p.7.
[69] 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 [REDACTED].
[70] Annex A to Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70, ICC-01/05-44-AnxA, 3 May 2013.
[71] ICC-01/05-01/13-T-34-CONF-ENG, 3 November 2015, 43:16-17.
[72] Email from Mangenda Defence to Prosecution, "Letter from the Mangenda Defence", 8 January 2016, 5:47; Email from Mangenda Defence to Prosecution, "Mangenda Request for Clarification and Disclosure", 18 January 2016, 11:07; Email from Prosecution to Mangenda Defence, "160121 – PD's Response to the Letter from the Mangenda Defence on 08 January 2016", 21 January 2016, 13:08; Email from Mangenda Defence to Prosecution, "Letter from Mangenda Defence", 19 February 2016, 11:55.

alarming question: what else has not been disclosed that may be relevant to these matters? The Defence was only able to surmise the existence of these documents when it became aware of the provisions of Austrian law; there may be many other undisclosed documents whose existence the Defence was not able to infer.

53. The absence of the usual safeguards for the review and transmission of intercepted communications of those subject to legal privilege are a further cause of concern. Dutch procedure requires an examining magistrate to consult in detail with either the lawyer who is the target of the surveillance or, if the security of the investigation requires that confidentiality be maintained, the head of the local Dutch bar association.[73] This procedure was followed in respect of the seized hard drives and computers, but not in respect of the audio-surveillance.[74] The Independent Counsel did not and could not perform this function, and the Dean of the Hague bar was not afforded the opportunity to consult with the Independent Counsel about how this privilege was to be observed.[75] These deviations from the procedures usually applicable in such situations, even assuming they do not constitute an independent violation of rights, are nevertheless further factors to be considered in assessing how the integrity of proceedings would be affected by the admission of this material, which was procured on the basis of a previous violation of rights.

IV. CONCLUSION AND REMEDY REQUESTED

54. The decision to be issued by this Trial Chamber is of momentous importance. It will be the first time that this Court addresses the consequences of a serious violation of human rights and the Statute. The only remedy for such a violation under the ICC Statute is provided by Article 69(7). The issues are even more momentous given that the violations, in a world where personal information is so easily obtained and transferred without regard to national sovereignty, involves privacy. This Trial Chamber has a rare opportunity to create a benchmark that will guide the conduct of this institution, set an example to other courts around the world, and uphold the core principles of this Court. As has been eloquently stated by one author, no court can

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[73] *Besluit van 10 april 2013, houdende aanpassing van het Besluit bewaren en vernietigen niet-gevoegde stukken met het oog op de vernietiging van geheimhoudersgesprekken*, Art. 4(3).
[74] CAR-D20-0006-1347.
[75] CAR-D20-0006-1316, p.6 (“REDACTED”)

"with any degree of moral authority, demand that law enforcement officers refrain from unacceptable practices while tacitly condoning the same by making official use of the fruits of such practices."[76] The only appropriate remedy is exclusion of the Western Union financial records, and the highly intrusive telephonic surveillance of Mr. Mangenda authorised and conducted on the basis of that information.

Christopher Gosnell
Counsel for Mr. Jean-Jacques Kabongo Mangenda

Respectfully submitted this 10 May 2016,
At The Hague, The Netherlands

[76] Vanderpuye, p.162.