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Date: **29 April 2016**

**TRIAL CHAMBER VII**

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

**Decision on Requests to Exclude Western Union Documents and other Evidence  
Pursuant to Article 69(7)**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

**The Office of the Prosecutor**

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**Counsel for Narcisse Arido**

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**Legal Representatives of Victims**

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**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for Victims**

**The Office of Public Counsel for the Defence**

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**REGISTRY**

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**Registrar**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Others**

**Trial Chamber VII** ('Chamber') of the International Criminal Court, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Articles 67, 69(7), 96(3), 99(1) and 99(4) of the Rome Statute ('Statute'), Rule 63(5) of the Rules of Procedure and Evidence ('Rules') and Regulations 23 *bis*(3) and 24(5) of the Regulations of the Court, issues the following 'Decision on Request to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7)'.

## I. Procedural History

1. On 24 September 2015, the Chamber issued a decision in which it, *inter alia*, recognised several financial records emanating from Western Union ('Western Union Documents') as formally submitted.<sup>1</sup> During the course of the proceedings, further Western Union Documents were recognised as formally submitted.<sup>2</sup>
2. Between 2 November and 4 November 2015, P-267, who acted as the focal point of Western Union for the communication and cooperation with the Office of the Prosecutor ('Prosecution'), provided his testimony.<sup>3</sup>
3. On 11 March 2016, D23-1 provided his testimony.<sup>4</sup> D23-1 was called as an expert by the Mangenda Defence on the issue of the legality and propriety under which the Western Union Documents were obtained.<sup>5</sup>

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<sup>1</sup> Decision on Prosecution Request for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf), ICC-01/05-01/13-1285. In this decision the Chamber explained its approach that it will consider the relevance, probative value and potential prejudice of submitted items in its judgments pursuant to Article 74(2) and will recognise items as 'formally submitted' and discussed within the meaning of Article 74(2) of the Statute, paras 9-17.

<sup>2</sup> Emails from Trial Chamber VII to the parties on 6.11.2015, at 10:54 and 21.03.2016, at 08:59.

<sup>3</sup> Transcripts of hearings on 2, 3 and 4 November 2015, ICC-01/05-01/13-T-33-ENG, ICC-01/05-01/13-T-34-Conf-ENG and ICC-01/05-01/13-T-35-Conf-ENG.

<sup>4</sup> Transcripts of hearings on 11 March 2016, ICC-01/05-01/13-T-44-ENG.

<sup>5</sup> *See*, 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), 10 February 2016, ICC-01/05-01/13-1618, para.19, justifying why the report of D23-1 was being tendered.

4. On 8 April 2016, the defence for Mr Babala ('Babala Defence') filed a request to declare the Western Union Documents inadmissible pursuant to Article 69(7) of the Statute ('Babala Request').<sup>6</sup>
5. On the same day, the defence for Mr Mangenda ('Mangenda Defence') filed an application to exclude the Western Union Documents and telephone calls which were intercepted by the Dutch authorities ('Intercepted Communications') pursuant to Article 69(7) of the Statute ('Mangenda Request').<sup>7</sup>
6. Also on the same day, the defence for Mr Arido ('Arido Defence') filed a motion requesting that the Chamber declare the Western Union Documents, two interviews conducted with Mr Arido in France ('Arido Statements') and private emails of Mr Arido ('Arido Communications') inadmissible pursuant to Article 69(7) of the Statute ('Arido Request').<sup>8</sup>
7. Also on the same day, the defence for Mr Kilolo ('Kilolo Defence') filed a request to exclude the Western Union Documents and Intercepted Communications pursuant to Article 69(7) of the Statute ('Kilolo Request').<sup>9</sup>
8. On 22 April 2016, the Prosecution filed its response, submitting that the motions should be rejected ('Response').<sup>10</sup>
9. On the same day, the Mangenda and Kilolo Defence filed responses, joining the other defence teams' requests ('Mangenda Response' and 'Kilolo Response', respectively).<sup>11</sup>

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<sup>6</sup> Requête de la Défense de M. Fidèle Babala Wandu afin d'obtenir l'inadmissibilité des registres Western Union, ICC-01/05-01/13-1785-Conf.

<sup>7</sup> Request to Exclude Evidence Pursuant to Article 69(7), ICC-01/05-01/13-1791-Conf, with 6 public annexes A to F. A corrected version of the request was filed on 11 April 2016, ICC-01/05-01/13-1791-Conf-Corr.

<sup>8</sup> Narcisse Arido's motion on inadmissibility and exclusion of evidences, ICC-01/05-01/13-1795-Conf.

<sup>9</sup> Motion on behalf of Aime Kilolo Musamba pursuant to Article 69(7) of the Statute to exclude evidence obtained in violation of the Statute and/or internationally recognized human rights, ICC-01/05-01/13-1796-Conf. The Chamber notes that the Kilolo Request is 21 pages long and therefore in violation of Regulation 37(1) of the Regulations of the Court. However, the Chamber considers it appropriate to consider the submissions made in the response in the interest of justice.

<sup>10</sup> Prosecution's Consolidated Response to Defence Motions Seeking Exclusion of Evidence under Article 69(7) of the Rome Statute, ICC-01/05-01/13-1833-Conf, with public Annex A.

10. On 25 April 2016, the Mangenda Defence requested leave to reply to the Response ('Mangenda Reply Request').<sup>12</sup> On 26 April, 2016, the Prosecution provided its response, submitting that the Mangenda Reply Request should be denied.<sup>13</sup>

## II. Submissions

### *Defence teams submissions*

#### *A) Western Union Documents*

11. The Mangenda, Babala, Arido and Kilolo Defence (together, 'Defence') all request that the Western Union Documents be declared inadmissible. The Defence submits that the Western Union Documents were obtained in violation of the applicable national procedures.<sup>14</sup> According to the Defence, the Prosecution contacted Western Union, inspected and received from P-267 copies of financial data regarding the accused and other persons without any prior authorisation or court order from the competent Austrian authorities.<sup>15</sup> Only after having already reviewed some of the data, the Prosecution filed a request for assistance ('RFA') with the Austrian authorities. The Defence submits further that even after having filed the RFA the Prosecution did not wait until the request was decided upon but continued to liaise with Western Union.<sup>16</sup>

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<sup>11</sup> Mangenda Defence Response to ICC-01/05-01/13-1785-Conf, ICC-01/05-01/13-1795-Conf, ICC-01/05-01/13-1796-Conf and ICC-01/05-01/13-1799-Conf, 22 April 2016, ICC-01/05-01/13-1832-Conf. Response on behalf of Mr Kilolo to Article 69(7) Applications submitted by other Defence teams, 22 April 2016, ICC-01/05-01/13-1830-Conf.

<sup>12</sup> Request for Leave to Reply to Prosecution's Consolidated Response to Defence Motions Seeking Exclusion of Evidence under Article 69(7) of the Statute (ICC-01/05-01/13-1833-Conf), ICC-01/05-01/13-1835-Conf.

<sup>13</sup> Prosecution's Response to Mangenda's "Request for Leave to Reply to Prosecution's Consolidated Response to Defence Motions Seeking Exclusion of Evidence under Article 69(7) of the Statute (ICC-01/05-01/13-1833-Conf)", ICC-01/05-01/13-1849-Conf.

<sup>14</sup> Mangenda Request, ICC-01/05-01/13-1791-Conf, para. 2 ; Kilolo Request, ICC-01/05-01/13-1796-Conf, paras 33-37.

<sup>15</sup> Mangenda Request, ICC-01/05-01/13-1791-Conf, paras 5-6 ; Arido Request, ICC-01/05-01/13-1795-Conf, para. 39-41 ; Kilolo Request, ICC-01/05-01/13-1796-Conf, paras 22, 33-34 ; Babala Request, ICC-01/05-01/13-1785-Conf, paras 16-17

<sup>16</sup> Mangenda Request, ICC-01/05-01/13-1791-Conf, paras 11-17.

12. Additionally, it is argued that the court order of the Austrian authorities was based on a misrepresentation of facts, since the order states that Mr Arido is suspected of genocide.<sup>17</sup> This is of further concern – in the opinion of the Kilolo Defence – as the Austrian law on the cooperation with the Court does not provide for judicial assistance for Article 70 offences.<sup>18</sup> Further, the Arido Defence submits that the request for Western Union Documents is overly broad and that the information obtained is unreliable.<sup>19</sup>
13. This, in the view of the Defence, violated the accused’ and other people’s right to privacy<sup>20</sup> as well as Articles 99(1) and (4) of the Statute.<sup>21</sup>
14. The Defence submits that due to the specific circumstances in which the Western Union Documents were collected, their admission into evidence would be antithetical to and would seriously damage the integrity of the proceedings in the sense of Article 69(7)(b) of the Statute.<sup>22</sup> It avers that the Prosecution was directly involved in the unlawful production of the evidence, that the Prosecution was fully aware of the illegality of the procedure, that rights of the accused – and not simply a third party – were violated, that the violation is serious and not mitigated by other circumstances.<sup>23</sup> Additionally, the Defence submits that the tardy disclosure of the Prosecution in respect of the Western Union Documents further mitigates in favour of excluding the documents.<sup>24</sup> The Arido Defence furthermore

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<sup>17</sup> Arido Request, ICC-01/05-01/13-1795-Conf, paras 43-44 ; Kilolo Request, ICC-01/05-01/13-1796-Conf, para. 13.

<sup>18</sup> Kilolo Request, ICC-01/05-01/13-1796-Conf, para. 43.

<sup>19</sup> Arido Request, ICC-01/05-01/13-1795-Conf, paras 45-48.

<sup>20</sup> Mangenda Request, ICC-01/05-01/13-1791-Conf, paras 23-30 ; Arido Request, ICC-01/05-01/13-1795-Conf, para. 49 ; Kilolo Request, ICC-01/05-01/13-1796-Conf, paras 46-47 ; Babala Request, ICC-01/05-01/13-1785-Conf, paras 30-37.

<sup>21</sup> Mangenda Request, ICC-01/05-01/13-1791-Conf, paras 31-34 ; Kilolo Request, ICC-01/05-01/13-1796-Conf, paras 44-45 ; Babala Request, ICC-01/05-01/13-1785-Conf, paras 39-42.

<sup>22</sup> Mangenda Request, ICC-01/05-01/13-1791-Conf, paras 40-41 ; Arido Request, ICC-01/05-01/13-1795-Conf, para. 49 ; Kilolo Request, ICC-01/05-01/13-1796-Conf, para. 54 ; Babala Request, ICC-01/05-01/13-1785-Conf, paras 51-58.

<sup>23</sup> Mangenda Request, ICC-01/05-01/13-1791-Conf, paras 42-46 ; Kilolo Request, ICC-01/05-01/13-1796-Conf, para. 48-52.

<sup>24</sup> Mangenda Request, ICC-01/05-01/13-1791-Conf, para. 52, Kilolo Request, ICC-01/05-01/13-1796-Conf, para. 23 ; Babala Request, ICC-01/05-01/13-1785-Conf, paras 44-47.

submits that the violation casts doubt on the reliability of the evidence.<sup>25</sup> Additionally, the Mangenda Defence submits that the prohibition of ruling on the application of national law is confined to cases where the evidence is collected by the State and not when this is done following a cooperation request by the Court.<sup>26</sup>

*B) Intercepted Communications obtained by the Dutch Authorities*

15. The Mangenda and Kilolo Defence further aver that the manner in which the Western Union Documents were obtained vitiates the Intercepted Communications.<sup>27</sup>

*C) Arido Statements*

16. The Arido Defence submits that the interviews taken by the French police in the follow-up to Mr Arido's arrest in November 2013 violated Mr Arido's right to remain silent and his right to counsel.<sup>28</sup> The Arido Defence argues that Mr Arido lacked proper legal representation during his interview by the French police on 23 November 2013, making it impossible to provide informed consent to be questioned.<sup>29</sup> Further, the Arido Defence submits that the statements were taken in violation of Rule 111 of the Rules.<sup>30</sup> It avers that for these reasons the admission of the Arido Statements would be antithetical to the proceedings and would seriously damage their integrity.<sup>31</sup>

*D) Arido Communications*

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<sup>25</sup> Arido Request, ICC-01/05-01/13-1795-Conf, paras 49.

<sup>26</sup> Mangenda Request, ICC-01/05-01/13-1791-Conf, para. 37.

<sup>27</sup> Mangenda Request, ICC-01/05-01/13-1791-Conf, paras 49-51 ; Kilolo Request, ICC-01/05-01/13-1796-Conf, paras 57-60.

<sup>28</sup> Arido Request, ICC-01/05-01/13-1795-Conf, para. 23.

<sup>29</sup> Arido Request, ICC-01/05-01/13-1795-Conf, paras 15-17.

<sup>30</sup> Arido Request, ICC-01/05-01/13-1795-Conf, paras 18-20.

<sup>31</sup> Arido Request, ICC-01/05-01/13-1795-Conf, paras 21-23.

17. The Arido Defence also submits that private emails of Mr Arido should be declared inadmissible due to a violation to Mr Arido's right to privacy.<sup>32</sup>

*Prosecutions Submissions*

18. The Prosecution submits as a general point that the defence bears the burden when requesting that evidence should be excluded pursuant to Article 69(7) of the Statute. This includes the 'chapeau criteria' of Article 69(7), a violation of the Statute or an internationally recognised human right, as well as the specific criteria of Article 69(7)(a) and (b) of the Statute which lead to the exclusion of evidence.<sup>33</sup>
19. It further argues that Article 69(8) of the Statute and Rules 63(5) of the Rules prohibit the Chamber from determining if a State or its national agencies complied with the national law.<sup>34</sup> Article 69(8) applies, according to the Prosecution, irrespectively of whether the collection of evidence is done in response to a cooperation request by the Court or not.<sup>35</sup>
20. The Prosecution submits that for all four categories of evidence which the Defence requests to exclude (Western Union Documents, Intercepted Communication, Arido Statements and Arido Communications), it is not proven that a violation of the Statute or an internationally recognised human right has occurred or that the criteria of Article 69(7)(a) or (b) of the Statute have been fulfilled.<sup>36</sup>
21. More specifically, the Prosecution submits that the Western Union Documents were provided as a result of official RFAs with the Austrian authorities and do not

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<sup>32</sup> Arido Request, ICC-01/05-01/13-1795-Conf, paras 29-37.

<sup>33</sup> Prosecution Response, ICC-01/05-01/13-1833-Conf, paras 3-6.

<sup>34</sup> Prosecution Response, ICC-01/05-01/13-1833-Conf, paras 7-8.

<sup>35</sup> Prosecution Response, ICC-01/05-01/13-1833-Conf, paras 11-13.

<sup>36</sup> Prosecution Response, ICC-01/05-01/13-1833-Conf, paras 14, 62, 69-74.



result from the prior contacts between the Prosecution and Western Union representatives.<sup>37</sup>

22. It further argues that Austrian law is not the applicable law<sup>38</sup> and that even if this were the case it was not breached due to the consent forms included in the terms and conditions used by Western Union.<sup>39</sup> Moreover, the Prosecution asserts that the RFAs did not contain any factual misrepresentations and that it did not wilfully mislead the Austrian authorities.<sup>40</sup>
23. In respect of the Intercepted Communications, the Prosecution submits that even if, *arguendo*, the Western Union Documents were obtained unlawfully, this does not require the exclusion of the Intercepted Communications.<sup>41</sup> It further avers that the Western Union Documents were not the only concrete information on which the request for the Intercepted Communications was based.<sup>42</sup>
24. With regard to the Arido Statements the Prosecution submits that the relief requested was already subject to a decision by the Chamber and that the Arido Defence did not show that the criteria for reconsideration were met.<sup>43</sup> Further, the Prosecution asserts that even if a violation had occurred, the mistakes were of a technical nature and the circumstances surrounding the statements show that Mr Arido provided them voluntarily in full knowledge of his rights.<sup>44</sup>
25. Concerning the Arido Communications the Prosecution submits that they were lawfully obtained, that their review did not infringe Mr Arido's rights<sup>45</sup> and that

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<sup>37</sup> Prosecution Response, ICC-01/05-01/13-1833-Conf, paras 15-17, 23.

<sup>38</sup> Prosecution Response, ICC-01/05-01/13-1833-Conf, paras 16, 21-22.

<sup>39</sup> Prosecution Response, ICC-01/05-01/13-1833-Conf, paras 16-20.

<sup>40</sup> Prosecution Response, ICC-01/05-01/13-1833-Conf, para. 24 and 70.

<sup>41</sup> Prosecution Response, ICC-01/05-01/13-1833-Conf, para. 27-30.

<sup>42</sup> Prosecution Response, ICC-01/05-01/13-1833-Conf, para. 31.

<sup>43</sup> Prosecution Response, ICC-01/05-01/13-1833-Conf, paras 46-49.

<sup>44</sup> Prosecution Response, ICC-01/05-01/13-1833-Conf, para. 73.

<sup>45</sup> Prosecution Response, ICC-01/05-01/13-1833-Conf, paras 54-61.

their admission would not be antithetical to, or seriously damage, the integrity of the proceedings.<sup>46</sup>

### III. Preliminary Issues

26. As a preliminary matter, the Chamber notes that the Defence filed only confidential versions of the various requests. The Prosecution stated that it will file a public redacted version of its Response as soon as it receives the public redacted versions of the requests. The Chamber hereby instructs the Defence to either request reclassification as 'public' or file a public-redacted version of its respective requests forthwith. The Prosecution is instructed to file a public-redacted version of its Response after having received the public redacted versions of the various requests. In respect of the Mangenda Response, the Chamber finds that there are no reasons for the current classification and instructs the Registry to reclassify it as 'public'.
27. Further, the Chamber notes the Mangenda Reply Request, in which it is submitted that the Prosecution raised certain positions for the first time in the Response.<sup>47</sup> The Chamber finds that none of the arguments raised in the Response are new or could not have been reasonably foreseen by the Defence. The Response does not contain any propositions constituting a change in the Prosecution's argumentation which would in and of itself necessitate a reply. Further, the Mangenda Defence does not propose to provide new facts, but wishes to reply to arguments made by the Prosecution. The Chamber considers that it has all the necessary information to rule on the Defence Requests. Accordingly, the Mangenda Reply Request is rejected.

### IV. Applicable Law

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<sup>46</sup> Prosecution Response, ICC-01/05-01/13-1833-Conf, para. 74.

<sup>47</sup> Mangenda Reply Request, ICC-01/05-01/13-1835-Conf, para.2.

28. The Chamber recalls the approach taken in its previous decisions pursuant to Article 69(7) of the Statute<sup>48</sup> – such applications have been ruled upon during trial as an exception to the general rule that the Chamber ‘defers its assessment of the admissibility of evidence until deliberating its judgment’.<sup>49</sup>
29. In accordance with Article 69(7) of the Statute, the Chamber will first consider whether the evidence was collected in violation of the Court’s statutory scheme or internationally recognised human rights. If such a violation is determined, the Chamber will then consider whether this violation ‘casts substantial doubt on the reliability of the evidence’ or whether the admission of the evidence ‘would be antithetical to and would seriously damage the integrity of the proceedings’. In the present case, the internationally recognised human right at issue is the right to privacy, which may not be interfered with except ‘in accordance with the law’.<sup>50</sup> The ‘in accordance with the law’ standard requires, among other things, that: (i) the measure or measures in question should have some basis in law; (ii) the law in question should be accessible to the person concerned and foreseeable as to its effects; and (iii) as regards foreseeability, the law must set forth with sufficient precision the conditions in which a measure may be applied, to enable the persons concerned – if need be, with appropriate advice – to regulate their conduct.<sup>51</sup>
30. Accordingly, the Chamber will determine for each issue in question first whether the Statute or internationally recognised human right have been violated and

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<sup>48</sup> Corrigendum of public redacted version of Public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests, 12 November 2015, ICC-01/05-01/13-1478-Red-Corr; Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible, 30 October 2015, ICC-01/05-01/13-1432; Decision on Request to declare telephone intercepts inadmissible, 24 September 2015, ICC-01/05-01/13-1284; Decision on Kilolo Defence Motion for Inadmissibility of Material, 16 September 2015, ICC-01/05-01/13-1257.

<sup>49</sup> Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf), 24 September 2015, ICC-01/05-01/13-1285, paras 9, 13.

<sup>50</sup> Art. 8(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Interference with this right is subject to other requirements, such as the interference being ‘necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country’, but there is no argument in the present case that any privacy rights have been violated in these respects.

<sup>51</sup> See European Court of Human Rights (Grand Chamber), *Khoroshenko v. Russia*, 30 June 2015, 41418/04, para. 110 (further citations therein). See also Human Rights Committee, General Comment 16, 28 September 1988, paras 3, 8 and 10; Inter-American Court of Human Rights, *Case of Tristán Donoso v. Panamá*, Judgment, 27 January 2009, paras 55-57.

second whether the criteria of Article 69(7)(a) or (b) of the Statute have been fulfilled.

31. The parties raise several arguments concerning the application of national law and the Chamber's power and limits to decide if evidence was obtained in accordance with national law. The Prosecution argues that the Chamber is 'expressly and categorically prohibited' from considering such arguments.<sup>52</sup>
32. The Chamber is not persuaded that the role of national law in the present inquiry is as categorically clear as the Prosecution suggests. Indeed, Article 69(8) of the Statute 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.' Rule 63(5) of the Rules also provides that '[t]he Chambers shall not apply national laws governing evidence, other than in accordance with Article 21'. In accordance with these provisions, it is clear that the Chamber cannot analyse whether or not the Austrian authorities correctly applied domestic laws as such.
33. However, Article 69(7) of the Statute also requires the Chamber to explore whether a violation of the Statute or internationally recognised human rights occurred. Some specific provisions of the Statute apply directly to national authorities acting on request of the Court – such as Articles 55(2) and 59 of the Statute – making the way in which national procedures were implemented relevant in an Article 69(7) analysis. Further, any interference with the internationally recognised right to privacy must be done 'in accordance with the law', and a Chamber's analysis of this right may also have some element of reviewing national law when national authorities act pursuant to Court cooperation requests. In this way, an Article 69(7) inquiry may engage with a

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<sup>52</sup> Response, ICC-01/05-01/13-1833-Conf, paras 7-13.

discussion of the application of national law,<sup>53</sup> which creates tension with Article 69(8) of the Statute.

34. This tension requires the Chamber to balance its obligations under Article 69(7) and (8) of the Statute. The Chamber will review the application of national law only to the extent necessary to determine whether a violation occurred under Article 69(7) of the Statute. In other words, the Chamber in these situations engages with national law solely to determine if something so manifestly unlawful occurred that it amounts to a violation of the Statute or internationally recognised human rights. If the Chamber cannot conclude that such manifestly unlawful conduct occurred at the national level, the Chamber is not permitted to further examine whether a mere infringement of domestic rules of procedure transpired.
35. In this regard, the Chamber notes that cooperation in Article 70 cases is done in accordance with Article 70(2) of the Statute. This provision specifies that cooperation with the Court in Article 70 investigations 'shall be governed by the domestic laws of the requested State'. The Defence relies on Articles 96(3) and 99 of the Statute for purposes of their requests. Article 99(1) of the Statute likewise provides that '[r]equests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State [...]'.
36. At the outset, the Chamber observes that provisions under Part IX address the relationship between requested States and the Court. Safeguard clauses embedded in the various provisions of Part IX address sovereignty concerns of States and are not generally apt to protect the interests of the individual. Once the State has complied with the Court's cooperation request, even if national laws were not correctly applied, the State is considered to have nevertheless complied with its obligations under Part IX. Thus, in the present instance, while Part IX of the

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<sup>53</sup> See Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803-tEN, paras 62-90 (translation notified 14 May 2007).

Statute generally applies to the proceedings,<sup>54</sup> a failure to comply with national procedures in executing a request under Part IX does not necessarily mean that this Statute has been violated for purposes of Article 69(7) of the Statute.

37. There is also a further consideration which militates against conflating Part IX considerations with those under Article 69(7) of the Statute. If these provisions in Part IX are understood as setting out the requirement that the national law of the requested State be respected in the course of executing a cooperation request, then every potential breach of national procedure – even mere infringements of domestic procedure that do not constitute violations of international human rights law – would qualify as a violation of the Statute for purposes of Article 69(7) of the Statute. Such an interpretation would render Article 69(8) of the Statute essentially superfluous, because the Chamber would be required to rule on the application of every aspect of national law in order to be assured that the Statute was not breached. Such an interpretation is untenable – Article 69(8) of the Statute was designed to make sure that the Court would not interfere with State sovereignty and ‘get involved in intricate inquiries about domestic laws and procedures’.<sup>55</sup>
38. For the same reasons, the Chamber rejects the argument advanced by the Defence that Article 69(8) of the Statute only applies when the evidence is collected by the State and not in cases where this is done upon a request by the Court.
39. An overly broad interpretation of these provisions in Part IX would also call into question why Article 69(7) of the Statute only addresses violations of the ‘Statute’ and ‘internationally recognised human rights’. The most common situation when

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<sup>54</sup> See Rule 167 of the Rules.

<sup>55</sup> Preparatory Committee, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, March-April and August 1996, A/51/22 Supp. 22, pages 60-61; Hans-Jörg Behrens, *The Trial Proceedings*, in Roy Lee (ed.), *The International Criminal Court – The Making of the Rome Statute*, 1999, page 246. The April 1998 Draft Statute also had bracketed language in what became Article 69(8) which would have given Chambers more flexibility in examining national law, but this language was ultimately removed. Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for the International Criminal Court, 14 April 1998, A/CONF.183/2/Add.1, page 110 (‘When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on [, but may have regard to,] the application of the State’s national law’).

the application of national law arises in Article 69(7) challenges is when States Parties act pursuant to cooperation requests falling under Part IX of the Statute. If any kind of domestic procedural violation qualified as an Article 69(7) violation, then the chapeau of the provision would not need to be limited to only violations of the Statute or internationally recognised human rights.

40. In order to preserve the meaning of Article 69(8) of the Statute and to maintain the limits on the kinds of violations specified in Article 69(7) of the Statute, the Chamber determines that infringements of domestic procedure do not *per se* constitute violations of the Statute under Article 69(7), even if such infringements are not in accordance with the laws of the requested State referenced in Part IX of the Statute.<sup>56</sup> This conclusion is necessitated by the principle of treaty interpretation that every provision in the Statute must be interpreted in a manner which gives every provision meaning and independent content. On this understanding, the reference to national law in Article 99(1) of the Statute describes obligations between the Court and its member states – it indicates how States execute requests for cooperation, and do not establish independent rights for the accused. A State’s failure to respect its own national procedures does not automatically result in a ‘violation of this Statute’ for Article 69(7) purposes.

## V. Analysis

41. As outlined above, the Chamber will assess first whether the Statute or an internationally recognised human right has been violated and second determine whether the criteria of Article 69(7)(a) or (b) of the Statute have been fulfilled.

### A) *Western Union Documents*

42. The Chamber considers that the following main facts have been chronologically established in respect of the production of the Western Union Documents: (i) the

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<sup>56</sup> See ICC-01/05-01/13-1432, para. 24 (making reference to Article 99(1) and how the Chamber could not conduct any further review by virtue of Article 69(8)).

Prosecution contacted and met with its focal point from Western Union, P-267, before filing a RFA to Austrian authorities;<sup>57</sup> (ii) P-267 provided information to the Prosecution before a RFA was sent or an order from the Austrian Authorities was received;<sup>58</sup> (iii) after the transmitting the first RFA and before having received a judicial order the Prosecution met a second time with P-267;<sup>59</sup> (iv) P-267 provided further information to the Prosecution in knowledge of the pending first RFA;<sup>60</sup> (v) the Austrian Authorities granted the first RFA;<sup>61</sup> (vi) the Prosecution filed a second and third RFA with the Austrian authorities<sup>62</sup> which were both also granted<sup>63</sup> and (vii) the Western Union Documents were obtained from the Austrian authorities in response to the RFAs.<sup>64</sup>

*i) Violation of this Statute or internationally recognised human rights*

43. The Defence alleges that Articles 99(1) and (4) of the Statute have been breached and that the right to privacy of several accused and other persons<sup>65</sup> has been violated.
44. In respect of the alleged breach of Article 99(1) of the Statute the Chamber recalls its findings made in paragraph 35-40 above.

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<sup>57</sup> The first request for assistance was sent on 2 November 2012, CAR-OTP-0091-0351. The Prosecution initially contacted P-267, its contact person at Western Union, via E-mail on 28 September and 4 October 2012 (CAR-OTP-0092-0021 and CAR-OTP-0092-0022). The Prosecution also met with P-267 on 19 and 20 October 2012 at the offices of Western Union in Vienna (CAR-OTP-0092-0018).

<sup>58</sup> Email of P-267 to the Prosecution on 11 October 2012, CAR-OTP-0092-0022\_R01 at 0023 and CAR-OTP-0092-0024 (containing the data).

<sup>59</sup> Members of the Prosecution met with P-267 at the offices of Western Union in Vienna on 4 and 5 November 2012, CAR-OTP-0092-0018,

<sup>60</sup> CAR-OTP-0092-0033-R02.

<sup>61</sup> Cooperation request from 2 November 2012, CAR-OTP-0009-0892; judicial order (in German) from 15 November 2012, CAR-OTP-0092-0834 (an unofficial, non-binding translation was provided by one of the defence teams, CAR-D24-0002-1363).

<sup>62</sup> The second RFA was sent on 18 October 2013, CAR-OTP-0091-0360 and the third was RFA sent on 10 October 2014, OTP-0091-0371.

<sup>63</sup> The judicial order granting the second RFA was issued on 5 November 2013, CAR-OTP-0074-0829, and the judicial order granting the third RFA was issued on 15 October 2014, CAR-OTP-0085-0845.

<sup>64</sup> See, Prosecution's First Request for the Admission of Evidence from the Bar Table, 16 June 2015, ICC-01/05-01/13-1013-Conf, para. 47 and Fn 128.

<sup>65</sup> See, Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the admission of material from the "bar table", ICC-01/04-01/06-1981 ('Lubanga Article 69(7) Decision'), para.37, holding that Article 69(7) also applies if the right to privacy of a third party is violated.



45. In respect of the alleged violation of Article 99(4) of the Statute the Chamber notes that the evidence in question, the Western Union Documents, were not obtained according to the procedure set out in Article 99(4) of the Statute. Rather they were provided by the Austrian authorities in response to Prosecution's RFAs (see paragraph 42 (vii) above). Accordingly, Article 99(4) of the Statute is not applicable in the present case.
46. The right to privacy is an internationally recognised human right.<sup>66</sup> It includes also financial information such as data kept by banks and, by extension, by financial service companies such as Western Union.<sup>67</sup> Interference with the exercise of this right must be done in accordance with an applicable law. Accordingly, the Chamber has to determine if the provision of the Western Union Documents was executed in accordance with the law.
47. The Chamber is not convinced by the Prosecution's argument that Austrian law does not apply in the current case. The Prosecution cannot, on the one hand, submit that the Western Union Documents were lawfully obtained in execution of an Austrian court order pursuant to RFAs<sup>68</sup> and, on the other hand, argue that the law applied by the Austrian Authorities in the execution of these RFAs does not apply.
48. Article 38(1) of the Austrian Banking Act ('Banking Act', Bankwesengesetz) prohibits *inter alia* credit institutions from divulging secrets which are revealed or made accessible to them exclusively on the basis of business relations with customers. Article 38(2) of the Banking Act contains a series of exceptions as to when the obligation to maintain banking secrecy does not apply.

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<sup>66</sup> Article 8 of the European Convention on Human Rights; Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms; Article 17 International Covenant on Civil and Political Rights; Article 11 of the American Convention on Human Rights; Article 12 of the Universal Declaration of Human Rights, Article 21 of the Arab Charter of Human Rights.

<sup>67</sup> See, European Court of Human Rights, *M.N. and others v. San Marino*, 7 October 2015, para.51-53.

<sup>68</sup> Prosecution Response, ICC-01/05-01/13-1833-Conf, para.15.

49. Pursuant to Article 38(2) No.1 of the Banking Act, such exception exists if there is a court approved order in accordance with Articles 116 and 210(3) of the Austrian Code of Criminal Procedure.
50. It is undisputed that the Prosecution sent three RFAs to the Austrian Authorities. Upon these requests, the Austrian public prosecutor issued in three separate orders which were approved by an Austrian Judge, in accordance with the procedure prescribed in Article 38 (2) No.1 of the Banking Act.
51. As explained above, the Chamber will only assess whether there are grounds which render this authorisation manifestly unlawful so as to void it, and not if the authorisation itself was lawfully provided under Austrian law as such.
52. In respect of the arguments put forward by the Defence that the Austrian authorities were misled by false statements in the RFA, indicated by the fact that Mr Arido (and others) were suspected of genocide ('Völkermord') according to the title of the first order of the Austrian Authorities, the Chamber notes that the Austrian Authorities make specific reference to the first RFA in the justification of the order.<sup>69</sup> The Prosecution explains in the first RFA that the reason for the request for financial data is 'that these money transfers could be linked to the commission of crimes under the jurisdiction of the Court such as offenses against the administration of justice'.<sup>70</sup> Accordingly, the Chamber does not find any indication that the order was based on a misrepresentation of facts or that the Austrian authorities were misled.
53. With regards to the Kilolo Defence's argument that the Austrian cooperation regime does not provide for judicial assistance in respect of Article 70 offences, the Chamber notes Article 44 of the Austrian Law on Cooperation with the Court

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<sup>69</sup> CAR-OTP-0092-0834, at 0835. Further, the fact that Mr Arido's name appears on the order, seems to be due to the fact that he is the first person on the list of people from whom financial data is requested, *see* order at CAR-OTP-0092-0834, CAR-OTP-0092-0836.

<sup>70</sup> CAR-OTP-0092-0351, at 0354, para.5.

specifically provides for such possibility. In respect of the Arido Defence's argument that the request for financial data concerning Mr Arido was overly broad, the Chamber again reiterates that it is barred from assessing the concrete application of national law. This means that the Chamber will not assess if the national authorities should not have granted the RFA due to the alleged overly broad character of the request.

54. Further, the Chamber will assess whether the contacts between the Prosecution and Western Union and the receipt of information prior to the issuance of the first RFA and any order from the Austrian Authorities vitiate the judicially approved orders.
55. The orders were issued in accordance with Article 116 of the Austrian Code of Criminal Procedure. In his report, D23-1 states that such order cannot be applied retroactively<sup>71</sup> and further explains that information only sought for lead purposes cannot circumvent a prior court approved order.<sup>72</sup>
56. However, in an investigation report by the Prosecution on the screening of names against the Western Union database it is stated that a senior public prosecutor of the Austrian Ministry of Justice advised that the Prosecution was allowed to screen material from Western Union unless it was required for evidentiary purposes, in which case a RFA was needed in order to obtain a court order.<sup>73</sup>
57. Further, the Chamber finds that the Prosecution at no point in time tried to conceal the fact that it had prior contacts with Western Union and access to financial information. In an email from 15 October 2012, the Prosecution informed the Austrian Authorities that it was planning to meet with representatives from

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<sup>71</sup> CAR-D23-0006-0001, at 0005.

<sup>72</sup> CAR-D23-0006-0001, at 0007-0008.

<sup>73</sup> CAR-OTP-0092-0018.

Western Union for the first time.<sup>74</sup> Equally, on 1 November 2012, the Prosecution sent a further email announcing that a second meeting had been scheduled.<sup>75</sup>

58. Moreover, in its second RFA to the Austrian authorities of 18 October 2013, the Prosecution explicitly states that '[o]n 19 October 2012, a meeting was facilitated by Mr Herbert Smetana, Director of International Security of Western Union [...] and subsequent screenings of documents allowed to identify a number of transactions and movement of large sums of money...'.<sup>76</sup> It follows that the Austrian public prosecutor was aware of the prior contacts between the Prosecution and Western Union and that the Prosecution had access to financial data beforehand when requesting that the orders be approved by an Austrian judge.
59. The Chamber considers that upon the facts and submissions presented it is not proven that the Prosecution's contacts with Western Union and the reception of financial data prior to the first order of the Austrian Authorities vitiate judicially approved orders and, in consequence, led to a manifest violation of Article 38 of the Austrian Banking Act.
60. Accordingly, the Chamber finds that manner in which the Western Union Documents were provided is not so manifestly unlawful that it fails to be 'in accordance with the law' for purposes of the right to privacy as reviewed under Article 69(7) of the Statute. Any further inquiry would involve applying Austrian law to determine a mere infringement of national procedure, which this Chamber is expressly precluded from doing by the terms of Article 69(8) of the Statute and Rule 63(5) of the Rules. Consequently, the Chamber holds that no violation of an internationally recognised human right has occurred.

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<sup>74</sup> CAR-OTP-0092-0892-R01. The fact that the email did not mention that the meeting was, *inter alia*, concerning investigations into suspected Article 70 offences related to the case *Prosecutor v. Jean-Pierre Bemba Gombo* is of no importance, since it shows that there the Prosecution generally adverted the Austrian authorities to its contacts with Western Union prior to any judicial orders.

<sup>75</sup> CAR-OTP-0092-0890-R01.

<sup>76</sup> CAR-OTP-0091-0360, at CAR-OTP-0091-0362, para.6.

61. However, due to the importance of the issue, the Chamber will also assess whether – in case the alleged violation had occurred – the criteria of Article 69(7)(a) or (b) of the Statute would have been fulfilled.

*ii) the violation casts substantial doubt on the reliability of the evidence, Article 69(7)(a),*

62. The Arido Defence submits that the violation of Mr Arido's right of privacy 'casts substantial doubt on the reliability of the evidence'.<sup>77</sup> The Arido Defence does not provide any further explanation for its assertion and the Chamber fails to see how the content of the material – and ultimately its reliability – is affected by the fact that it was unlawfully produced. If the Western Union Documents would have been obtained without any violation to the right to privacy, the content would have been the same. Accordingly, the Chamber finds that a hypothetical violation of the right to privacy does not cast substantial doubt on the reliability of the evidence.

*iii) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings, Article 69(7)(b)*

63. The Chamber recalls the finding of Trial Chamber I in the *Lubanga Case* that not any violation of an internationally recognised human right would automatically damage the integrity of the proceedings before this Court, since Article 69(7) of the Statute provides for a 'dual test' of first establishing that a violation has occurred and then deciding if this violation leads to the exclusion of the evidence.<sup>78</sup>

64. In assessing if the (hypothetical) violation would lead to the inadmissibility of the evidence, the Chamber will assume that the violation of the right of privacy stems from the prior contacts of the Prosecution with P-267 and the provision of financial data before the approval of the first order by an Austrian judge.

<sup>77</sup> Arido Request, ICC-01/05-01/13-1795-Conf, para.49.

<sup>78</sup> Lubanga Article 69(7) Decision, ICC-01/04-01/06-1981, para.41.

65. The Chamber considers the following factors to be of importance in determining whether the admission had to be excluded pursuant to Article 69(7)(b) of the Statute: the fact that the (hypothetical) violation resulted from actions of the Prosecution itself and not from a third party and the importance of the right to privacy, which both mitigate for an exclusion of the evidence.
66. Further, the Chamber notes that the relevant materials were only disclosed to the Defence during the course of the proceedings and upon order by a Chamber and that the Prosecution informed the Austrian authorities of the prior meetings and included this information also in the second RFA.
67. The Chamber further notes that the general terms and conditions for money transfer services by Western Union contain provisions to which the sender and receiver of the money transfer agree including, among others scenarios, that the information may be provided to third parties where there is a reasonable need to, *inter alia*, 'help, prevent and detect crimes crime [and] prosecute offenders'.<sup>79</sup> The Chamber does not pronounce itself on whether this constitutes a valid written consent to the disclosure of secrets pursuant to Article 38(2) No.5 of the Austrian Banking Act, which is disputed between the parties. However, the terms and conditions show that the users of Western Union had to be aware that the personal information they provided might be communicated within the Western Union group and to third parties for a number of reasons and was not subject to absolute privacy.
68. From the information provided by the Prosecution, it appears that the Austrian authorities themselves gave the impression that a previous screening of financial information was in accordance with the Austrian law.<sup>80</sup> Accordingly, it can be assumed that the Prosecution believed itself to act in accordance with the existing law during the prior contacts. The belated disclosure of the information is not, in

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<sup>79</sup> See e.g., CAR-OTP-0093-0237, at 0239.

<sup>80</sup> CAR-OTP-0092-0834, second paragraph.

and of itself, indicative that the Prosecution acted in bad faith. Lastly, the Chamber notes that the Austrian authorities granted the RFAs in knowledge of the prior contacts of the Prosecution with Western Union and the exchange of information.

69. Considering the above, the Chamber is of the view that the Prosecution did not act with the deliberate intention to circumvent the national law or (hypothetically) violate of the right to privacy. Further, the information that was received through the (hypothetical) violation was later also provided lawfully via cooperation with the Austrian authorities. Accordingly, the Chamber finds that the admission of the Western Union Documents is not antithetical to and would not seriously damage the integrity of the proceedings, despite the belated disclosure of materials relating to this issue.
70. In summary, the Chamber finds that, with regard to the Austrian law, there was no manifestly unlawful conduct and it is not convinced that the Western Union Documents were not obtained 'in accordance with the law'. In consequence, the Chamber further finds that the Western Union Documents were not obtained by means of violation of this Statute or internationally recognised human rights and that even if such violation would be assumed, the criteria of Articles 69(7)(a) and (b) of the Statute are not fulfilled.
71. Accordingly, the Chamber rejects the Defence's requests to exclude the Western Union Documents.

*B) Intercepted Communications obtained by the Dutch Authorities*

72. The Chamber notes that the issue of legality of the Intercepted Communications is also the subject of a separate request by the Defence for Mr Bemba<sup>81</sup> which will be considered in a separate decision by the Chamber. Therefore, the present decision

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<sup>81</sup> Defence Application pursuant to Article 69(7) of the Rome Statute, 12 April 2016, ICC-01/05-01/13-1799-Conf, with confidential Annexes A, B, C, D, F and public Annex E.

considers only the arguments provided by the Kilolo and Mangenda Defence in respect of the illegality of the Western Union Documents.

73. The main argument of the Kilolo and Mangenda Defence is that the Western Union Documents were the basis for obtaining the Intercepted Communications and that the illegality of the Western Union Documents renders the Intercepted Communications consequently also unlawful. Since the Chamber has found that the Western Union Documents were obtained lawfully, it considers this argument to be void.
74. Accordingly, the Chamber rejects the Mangenda and Kilolo Request in respect of its request to declare the Intercepted Communication inadmissible.

*C) Arido Statements*

75. The Chamber notes that the Arido Defence already challenged the admissibility of the Arido Statements<sup>82</sup> and the Chamber rejected the application to declare them inadmissible.<sup>83</sup> The Arido Defence simply ignores this fact in its submissions and fails to address any of the necessary criteria for reconsideration.<sup>84</sup>
76. Further, the Chamber does not find any apparent reasons which demonstrate a ‘clear error of reasoning’ or the necessity to ‘reconsider the prior decision in order to prevent an injustice’. Accordingly, the Chamber rejects the Arido Request in this regard.

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<sup>82</sup> Narcisse Arido’s Response to the Prosecution’s Third Bar Table Motion (ICC-01/05-01/13-1170-Conf), 14 September 2015, ICC-01/05-01/13-1241-Conf, paras 34-56. A public redacted version was filed on 8 October 2015 (notified on 9 October 2015), ICC-01/05-01/13-1241-Red.

<sup>83</sup> Decision on Bemba and Arido Defence eRequestes to Declare Certain Materials Inadmissible, 30 October 2015, ICC-01/05-01/13-1432, paras 22-28.

<sup>84</sup> *See only*, Decision on Defence Request for Reconsideration of or Leave to Appeal ‘Decision on “Defence Request for Disclosure and Judicial Assistance”’, 24 September 2015, ICC-01/05-01/13-1282, para. 8.



*D) Arido Communications*

77. The Chamber notes that the Prosecution requested only one item<sup>85</sup> falling under this category to be formally submitted into evidence according to the procedure set out by the Chamber.<sup>86</sup> After receiving submissions by the parties,<sup>87</sup> the Chamber declared this item inadmissible.<sup>88</sup> As a result, no item falling under this category is formally submitted with the Chamber. Accordingly, the Chamber declares this part of the Arido Request to be moot.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**DISMISSES** the Arido Request in respect of the Arido Communications as moot;

**REJECTS** the Mangenda, Kilolo and Babala Request and the remainder of the Arido Request;

**REJECTS** the Mangenda Reply Request;

**ORDERS** the Defence to either request reclassification as ‘public’ or file a public-redacted version of its respective requests forthwith and the Prosecution to file a public-redacted version of its Response after having received the public-redacted versions of the various requests; and

**ORDERS** the Registry to reclassify the Mangenda Response and Kilolo Response as ‘public’.

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<sup>85</sup> CAR-OTP-0092-05082-R01, email from the Prosecution to the Chamber and the parties on 23 March 2016, at 15:57. *See also*, Arido Request, ICC-01/05-01/13-1795-Conf, para. 24.

<sup>86</sup> *See*, ICC-01/05-01/13-1285, paras 9-17.

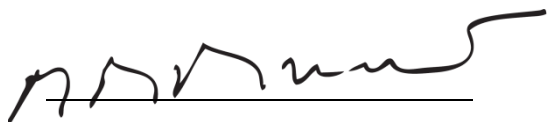
<sup>87</sup> Email by the Arido Defence to the Chamber and the parties on 26 March 2016, at 15:44 and email by the Prosecution to the Chamber and the parties on 29 March 2016, at 15:18.

<sup>88</sup> Email by the Chamber to the parties on 14 April 2016, at 16:31.

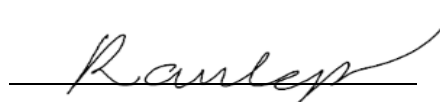
Done in both English and French, the English version being authoritative.



**Judge Bertram Schmitt, Presiding Judge**



**Judge Marc Perrin de Brichambaut**



**Judge Raul C. Pangalangan**

Dated 29 April 2016

At The Hague, The Netherlands