SEPARATE OPINION OF JUDGE GEOFFREY HENDERSON

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I. Violations of internationally recognised human rights in the investigation phase

1. While I agree with the outcome, I respectfully disagree with my colleagues' decision regarding the approach to the admissibility of the Western Union Records, particularly with the application of articles 69 (7) and 69 (8) of the Statute. The main issue of disagreement arises from my colleagues' analysis of whether the records were obtained as a result of a violation of an internationally recognised right *i.e.* the right to privacy under article 69 (7) of the Statute. Also, my colleagues in my view misapplied article 69 (8) of the Statute.

A. The relevant law

2. The exclusionary rule stipulated in article 69 (7) of the Statute requires that evidence obtained by a violation of an internationally recognized human right shall not be admissible if it casts substantial doubt on the reliability of the evidence or is antithetical to and seriously damages the integrity of the proceedings.[1] The rule requires a two-part assessment; the first step entails an inquiry into whether evidence was obtained in breach of a human right.

3. Under international law the right to privacy protects individuals against arbitrary interferences with private life. However, this is not an absolute right and can be interfered with as long as the interference is: (i) in accordance with the law; (ii) necessary in the pursuit of a legitimate aim (such as the prevention of crime); and (iii) proportional to the aim being pursued.[2] It is important to stipulate at the outset that a breach of or compliance with national law does not automatically equate to a breach of or compliance with internationally recognised human rights. To assess whether any such violation has occurred, the conduct needs to be evaluated against the yardstick of international human rights law.

4. I agree with my colleagues' statement that the scope of inquiry into national law, when assessing whether the interference with the individual's right to privacy was made in accordance with the law, is limited by article 69 (8) of the Statute.[3] The provision forbids the Court from ruling on the application of the State's national law when deciding on the admissibility of evidence collected by the State. However, for reasons elaborated below, in

[1] Article 69 (7) (a) and 69 (7) (b) of the Statute.
[2] Information relating to bank accounts is protected by article 8 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, as amended by Protocols No. 11 and No. 14, 213 United Nations Treaty Series 2889 (ECHR). *See* *G.S.B. v. Switzerland*, para. 51.
[3] *Bemba et al.* Appeal Judgment, para. 286 onwards.

my view article 69 (8) of the Statute does not apply to the specific circumstances of the present case.

B. Violations of the right to privacy

1. Violation 1: the Western Union Records were obtained by means of a violation of the right to privacy by the Prosecution

5. It is undisputed that the Prosecution had access to the Western Union Records prior to formally receiving the information from the Austrian authorities. The first request for assistance ("RFA"), sought on 2 November 2012, was approved by an Austrian judge on 15 November 2012.[4]

6. On 14 June 2012, the Prosecution received an anonymous tip alleging a bribery scheme involving defence witnesses in the case against Mr Jean-Pierre Bemba Gombo.[5] On 28 September and 4 October 2012, Prosecution investigators contacted their focal point at Western Union seeking transactional information, which was relayed to the Prosecution (on 11 October 2012) in the form of an excel spreadsheet.[6] The transactions related to three individuals, including Mr Narcisse Arido, dating back to December 2005. Two trips were subsequently organised by the Prosecution to the Western Union offices in Vienna (19-20 October 2012 and 4-5 November 2012) during which more records were screened.[7] On 7 November 2012, the contact at Western Union sent five more excel spreadsheets detailing transactions involving numerous individuals, including one spreadsheet relating only to Mr Jean-Jacques Mangenda Kabongo, again dating back to 2005.[8]

[4] Response, para. 58; Three RFAs in total: First RFA (2 November 2012), CAR-OTP-0091-0351 ("RFA 1"); Second RFA (18 October 2012), CAR-OTP-0091-0371 ("RFA 2"); Third RFA (10 October 2014), CAR-OTP-0091-0360 ("RFA 3").
[5] Response, para. 2.
[6] *See* Response, para. 58. *Note* that these records related to three individuals including Mr Arido and dated back to December 2005: Western Union Transactions, CAR-OTP-0092-0024. This was attached to an email from the Western Union official to an OTP Investigator on 11 October 2012, CAR-OTP-0092-0022-R01, page 0023.
[7] Response, para. 58.
[8] Response, paras 58 and 73; Western Union Transactions, CAR-OTP-0092-0029, CAR-OTP-0092-0030, CAR-OTP-0092-0031, CAR-OTP-0092-0032 and CAR-OTP-0092-0034 (relates only to Mr Mangenda).

i. The Prosecution failed to act in accordance with the law

7. To ascertain whether the Prosecution acted in accordance with the law it needs to be established whether Austrian law allows the Prosecution to access transactional information without a court order approving such access. However, prior to engaging in this analysis, the applicability of article 69 (8) of the Statute needs to be assessed.

8. The focus of article 69 (8) of the Statute is on evidence collected "by a State". Based on the express wording of the provision, and as argued by Mr Mangenda, "the deference to State sovereignty sought to be achieved by Article 69(8) is not applicable when the evidence is obtained directly by the Prosecution".[9] It is important to note that article 21 (3) of the Statute requires the Court to apply and interpret the law in a manner consistent with internationally recognized human rights. Any other interpretation of article 69 (8) of the Statute would exempt the Prosecution from any meaningful oversight on this particular issue.

9. In the present instance the Prosecution initially obtained the information directly via a private contact at the Western Union office; there was no State involvement. It is open to the Court, and in fact the Court is under an obligation, in this instance, to satisfy itself that the Prosecution acted in accordance with international human rights standards in accessing the records. Contrary to the view expressed by my colleagues, this inevitably demands an inquiry into the relevant Austrian law.[10] The question of undue interference with Austria's sovereignty does not arise as it is the Prosecution's conduct that is under scrutiny.

10. The Prosecution makes two main submissions to evidence that its conduct was in compliance with Austrian law. First, heavy reliance is placed on an investigation report detailing a meeting between Prosecution investigators and a Senior Austrian Public Prosecutor on 16 March 2011, during which the latter advised the investigators that "the OTP was allowed to screen Western Union material" without a court order.[11] Second, the Prosecution submits that the Austrian authorities were apprised of the meetings with the

[9] Mr Mangenda's Appeal Brief, para. 49. *Note* Mr Mangenda also argues that article 69 (8) of the Statute does not apply when evidence is collected by the State at the Prosecution's behest, which is incorrect for the reasons stated by the Majority: *Bemba et al.* Appeal Judgment, para. 290.
[10] *Bemba et al.* Appeal Judgment, paras 291-292 and 327.
[11] Investigation Report, CAR-OTP-0092-0018.

Western Union officials for the purpose of "screening" relevant information, and were never reprimanded for their conduct.[12]

11. The investigation report in question (CAR-OTP-0092-0018) has been deemed inadmissible by my colleagues due to lack of compliance with rule 68 (2) (b) or 68 (3) of the Rules — a decision with which I agree.[13] It is to be noted that this document is the only piece of evidence which sheds light on the diligence with which the Prosecution ensured compliance with Austrian law. It is surprising that the Prosecution chose to rely primarily on a meeting conducted in March 2011, over a year before receipt of the anonymous tip, relating to an entirely different investigation. Even if the investigation report is not relied upon, the Prosecution by its own admission (elaborated upon below), understood the applicable Austrian law as allowing only the perusal or "screening" of the information without any copies being taken. The Prosecution's conduct far exceeded this, and consciously so.

12. The Prosecution contends that, prior to submitting a formal RFA, the Austrian authorities were informed of the meetings with the Western Union officials[14] to "screen relevant information" on two occasions.[15] It is important to highlight that failure by the State to raise an issue with the Prosecution's conduct does not absolve the Prosecution of its duty to be diligent in ensuring compliance with the law. Moreover, closer inspections of the notifications reveal that the authorities were never fully apprised of the extent of the Prosecution's contact with Western Union, or of the Prosecution's possession of Western Union Records.

13. The first notification (on 15 October 2012) introduces the sender as the International Cooperation Advisor on the Côte d'Ivoire situation and states "and in *that* capacity, I would like to inform you hereby that *in the context of our investigative activities* a meeting has been scheduled to take place with Western Union representatives on 18-19 October 2012".[16] No mention is made of the situation in the Central African Republic. While this error was rectified in the second notification (on 1 November 2012), both promise that "no documents

[12] First OTP Notification (15 October 2012), CAR-OTP-0092-0892-R01 ("First Notification"); Second OTP Notification (1 November 2012), CAR-OTP-0092-0890-R01 ("Second Notification"); *See also* Response, para. 65.
[13] *Bemba et al.* Appeal Judgment, paras 300-308.
[14] The meetings took place on 19-20 October 2012 and 4-5 November 2012: *see* Response, para. 58.
[15] First Notification, CAR-OTP-0092-0892-R01; Second Notification, CAR-OTP-0092-0890-R01.
[16] First Notification, CAR-OTP-0092-0892-R01 (emphasis added).

or copies thereof will be taken by the OTP representatives" during the meetings.[17] The promise amounts to an express undertaking that the Prosecution will not seek to obtain possession of the Western Union Records. Neither notification, nor the first RFA,[18] makes any mention of the Prosecution's prior contact with Western Union,[19] or of the records already received on 11 October 2012.[20] After an enquiry by the Prosecution, more records were sent, on a larger scale, from Western Union on 7 November 2012.[21] The Prosecution again refrained from mentioning this in its second and third RFA requests.[22]

14. The Prosecution's explanation that copies of the transactions were not specifically requested, and the Western Union contact was simply requested to run "checks" is unconvincing.[23] After receiving a list of transactions as an attachment in response to the initial email to run "checks",[24] the Prosecution was unequivocally seeking the same outcome when more information was sought via email on 7 November 2012, which unsurprisingly eventuated in the same result.[25] The Austrian authorities were never apprised of the entirety of the situation and therefore a failure to take issue or reprimand by the Austrian authorities does not evidence Prosecution's compliance with Austrian law. In any case, an objective assessment of whether the Prosecution was in compliance with Austrian law cannot be determined solely by reliance upon the absence of disapproval by State authorities.

15. Austrian law expressly stipulates exceptions allowing interferences with the right to privacy relating, in particular, to provision of access to financial transactions. Article 38 (2) of the Austrian Banking Act creates exceptions allowing credit institutions like Western Union

[17] First Notification, CAR-OTP-0092-0892-R01, page 0892. Second Notification, CAR-OTP-0092-0890-R01, page 0891.
[18] RFA 1, CAR-OTP-0091-0351.
[19] Email communication from OTP Investigator to Western Union official on 28 September 2012, CAR-OTP-0092-0021-R01 and on 4 October 2012, CAR-OTP-0092-0022-R01.
[20] CAR-OTP-0092-0024.
[21] Email communication from OTP Investigator to Western Union Official on 07 November 2012, CAR-OTP-0092-0033-R02; The email attached the following Western Union Transactions, CAR-OTP-0092-0034, CAR-OTP-0092-0029, CAR-OTP-0092-0030, CAR-OTP-0092-0031, CAR-OTP-0092-0032; *See also* Response, para. 73.
[22] RFA 2, CAR-OTP-0091-0371; RFA 3, CAR-OTP-0091-0360.
[23] Response, para. 73.
[24] Email from OTP (28 September 2012), CAR-OTP-0092-0021-R01 resulting in receipt of the following Western Union Transactions on 11 October 2012, CAR-OTP-0092-0024.
[25] Email from OTP (7 November 2012), CAR-OTP-0092-0033-R02 resulting in receipt of the following Western Union Transactions on 7 November 2012, CAR-OTP-0092-0034, CAR-OTP-0092-0029, CAR-OTP-0092-0030, CAR-OTP-0092-0031, CAR-OTP-0092-0032.

to reveal confidential information.[26] The relevant exception, in article 38 (2) (1) of the Banking Act, specifies that the obligation to maintain banking secrecy does not apply "vis-à-vis public prosecutors and criminal courts in connection with criminal court proceedings *on the basis of a court approval* (Article 116 Criminal Procedure Code)".[27] While such orders were eventually rendered by an Austrian court — the first authorisation given on 15 November 2012[28] — the Prosecution had already sought and received the relevant information prior to this date, amounting to a violation of the right to privacy. The Prosecution failed to even utilise the applicable law at first instance, let alone act in accordance with it.

16. It is also important to consider potentially unforeseen and undesirable consequences that may result from my colleagues' approach to article 69 (8) of the Statute. In the present case, the Court was able to rely upon Austria to conduct the relevant checks and balances (*i.e.* to make sure that RFAs are authorised in compliance with international human rights law). In fact, this is precisely what transpired, as explained in the following section. However, who is supposed to make sure that human rights standards are upheld in situations where the Prosecution operates independently or national authorities are either unavailable or cannot be relied upon to genuinely safeguard the relevant human rights? If my colleagues' hands-off approach were followed, there would effectively be no meaningful judicial oversight over how the Prosecution collects evidence in such situations. This goes against the fundamental ethos of the Court, which is built upon ensuring that internationally recognised human rights are respected at all times. The Court cannot simply turn a blind eye and hide behind a formalistic interpretation of article 69 (8) of the Statute.

17. Additionally, if the Prosecution is operating in an environment where local authorities are not involved or cannot reasonably be expected to provide genuine judicial oversight, it is incumbent upon the Prosecution to come before the Pre-Trial Chamber to seek authorisation for all investigatory acts that may infringe upon internationally recognised human rights. There is a clear legal basis for the suggested approach: article 54 (1) (c) of the Statute requires the Prosecution to at all times "[f]ully respect the rights of persons arising under the Statute",

[26] First Western Union Decision, para. 49.
[27] Austrian Banking Act (emphasis added).
[28] Authorisation of the first RFA by the Austrian court, CAR-OTP-0092-0834 (in German); *See* unofficial, non-binding translation provided by the Defence, CAR-D24-0002-1363.

which includes the internationally recognised human rights of all individuals who may be affected by the Prosecution's investigations; and article 57 (3) (a) of the Statute provides that the Pre-Trial Chamber may "issue such orders […] as may be required for the purposes of an investigation", thereby constituting an appropriate forum to consider such requests.

ii. The Prosecution's conduct amounted to a disproportionate interference with the right to privacy

18. International human rights standards require that any interference with the right to privacy be proportionate to the legitimate investigative needs at issue. I agree with my colleagues' statement of the law on this issue when it said that it considers the "requirement of proportionality to be an integral part of the condition that any interference with the right to privacy not be 'arbitrary' within the meaning of article 17 of the International Covenant on Civil and Political Rights".[29]

19. It is incumbent upon the Prosecution to conduct a proportionality analysis to ensure compliance with human rights law. At the very least the Prosecution should be able to provide evidence that it undertook such a proportionality assessment. It is insufficient and unacceptable to allege that information dating back to 2005 was never specifically sought,[30] and therefore the Western Union Records obtained did not amount to a disproportionate interference with the right to privacy. Indeed, had there been proper oversight, it is unlikely that records dating back so far in time would have been released.

20. It is acknowledged that in the first email sent by the Prosecution investigator to the Western Union contact on 28 September 2012, the investigator sought information pertaining to individuals "involved in suspect transactions […] over the past 12 months".[31] However, the records received dated back to 2005,[32] well before the arrest warrant for Mr Jean-Pierre Bemba Gombo was issued in the Main Case.[33] There is no evidence to suggest that the Prosecution voiced concern over the receipt of information dating back to 2005, or tried to restrict the flow of information received in the future to a more proportionate timeframe. In

[29] *Bemba et al.* Appeal Judgment, para. 331.
[30] This can be implied from the Response, para. 73.
[31] Email from OTP (28 September 2012), CAR-OTP-0092-0021-R01 and follow up email on 4 October 2012, CAR-OTP-0092-0022-R01; *See also* Response, para. 58.
[32] CAR-OTP-0092-0022-R01.
[33] The arrest warrant was issued on 23 May 2008.

another email sent by the Prosecution, on 7 November 2012, requesting information on Mr Mangenda's transactions, no timeframe was stipulated.[34] The records that were transferred to the Prosecution as a result contained information pertaining to numerous individuals (in the form of five excel spreadsheets), including Mr Mangenda, and again, dating back to 2005.[35]

21. This unfortunate course of events continued when the Prosecution formally submitted its first RFA on 2 November 2012.[36] Unlike the second and third RFA the Prosecution did not restrict its request to Western Union transactions pertaining to a proportionate timeframe;[37] to the contrary the first RFA makes no reference at all to a relevant timeframe. The Western Union Records received in execution of the Prosecution's first RFA includes entries from June 2005.[38] My colleagues accept that

> [w]hile the transmission of information on financial transactions conducted after the commencement of the Main Case appears justified […] it is more difficult for the Appeals Chamber to discern the reasons why the Prosecutor received, from the Western Union and through the Austrian authorities, information concerning money transfers conducted before the issuance of the warrant of arrest against Mr Bemba in the Main Case.[39]

However, I disagree with my colleagues' final conclusion on this issue. High privacy expectations are attached to financial transactions despite the actual information not being of a particularly intimate or sensitive nature.[40]

22. It would appear that the Prosecution made no effort to frame its request, to Western Union or the Austrian authorities, in a manner consistent with the confines of the investigation. The moment the Prosecution realised that it had obtained private and protected information, which held no relation to the offenses being investigated, it should have taken all necessary measures to ensure that the information was not further disseminated, both within its office and, especially, beyond. This was wrong. The Office of the Prosecutor should at all

[34] Email from OTP (7 November 2012), CAR-OTP-0092-0033-R02.
[35] CAR-OTP-0092-0034, CAR-OTP-0092-0029, CAR-OTP-0092-0030, CAR-OTP-0092-0031, CAR-OTP-0092-0032.
[36] RFA 1, CAR-OTP-0091-0351.
[37] RFA 2, CAR-OTP-0091-0371, para. 9 (1 February 20013 to 31 October 2013); RFA 3, CAR-OTP-0091-0360, para. 13 (1-23 November 2013).
[38] Western Union Transactions (received from the Austrian government), CAR-OTP-0070-0004, CAR-OTP-0070-0005, CAR-OTP-0070-0006, CAR-OTP-0070-0007, CAR-OTP-0073-0273, CAR-OTP-0073-0274, CAR-OTP-0073-0275.
[39] *Bemba et al.* Appeal Judgment, para. 337.
[40] *Bemba et al.* Appeal Judgment, para. 338.

times comply with the highest standards of legality and professionalism. Therefore, the Prosecution's conduct in obtaining and subsequent receipt of Western Union Records dating back to 2005 amounts to a disproportionate interference with the right to privacy.

2. Violation 2: the Western Union Records were obtained as a result of a violation of the right to privacy by Austria

i. The initial authorisations granting the RFAs were not in accordance with Austrian law

23. On 22 April and 24 May 2016, the Higher Regional Court of Vienna (*Oberlandesgericht Wien*) repealed two of the three previous authorisations, granted by the lower courts, allowing execution of the Prosecution's RFA.[41] I agree with my colleagues that while the Court is not bound by these decisions the Trial Chamber is free to take into account *as facts* decisions of national courts.[42] When assessing the applicability of article 69 (8) of the Statute, the Trial Chamber correctly stated that "[t]he fact that the Chamber is barred from analysing whether national law has been correctly applied does not mean that it is precluded from taking into consideration decisions of national jurisdictions which determine whether national law has been respected".[43] This proposition put forth by the Trial Chamber is one with which I entirely agree. Far from constituting an undue interference into Austria's sovereignty, by taking these rulings into account the Court is showing due respect for decisions made by a domestic judicial body.

24. My colleagues place undue weight on the fact that Austrian authorities did not bring the two decisions to the Court's attention under articles 93 (3) or 97 of the Statute.[44] In my view, neither article is applicable to the present situation as they refer to impediments preventing execution of an RFA.[45] The articles were not meant to cover situations such as the present where all RFAs had already been executed by the time the first decision by the Higher

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[41] First Austrian Appellate Court Decision (22 April 2016), CAR-D23-0011-0006 ("First Austrian Decision"); Second Austrian Appellate Court Decision (24 May 2016), CAR-D23-0011-0016 ("Second Austrian Decision"). The two rulings were also registered in their original form (in German): CAR-D24-0005-0001; CAR-D24-0005-0013. The French translations were registered as: CAR-D24-0005-0045, CAR-D24-0005-0033.
[42] *Bemba et al.* Appeal Judgment, para 342.
[43] Second Western Union Decision, para. 27.
[44] *Bemba et al.* Appeal Judgment, paras 343-344.
[45] Article 93 (3) of the Statute states "[w]here execution of a particular measure […] is prohibited"; Article 97 of the Statute states "[w]here a State Party receives a request […] in relation to which it identifies problems which may impede or prevent the execution of the request".

Regional Court was issued.[46] My colleagues' interpretation unreasonably expects State authorities to report all successful challenges to authorised and executed RFAs *ex post facto*. It cannot be the case that a Trial Chamber is expected to ignore a successful challenge made in a national court vindicating the rights of the accused, unless the requested State brings the national court's decision to the attention of the Trial Chamber.

25. The Higher Regional Court stipulated that the interferences with the right to privacy were not in accordance with Austrian law as the Prosecution had failed to provide "sufficient suspicion". This was held to be the case despite the Austrian court being conscious of the fact that the Prosecution learned of the money transfers during the proceedings against Mr Jean-Pierre Bemba Gombo and that a meeting had been conducted with a Western Union contact to examine documents, which eventually revealed numerous relevant transactions.[47] The information provided was still held to be "inadequate to warrant the necessity of the measure".[48]

26. In this particular instance, the two appellate rulings by the Higher Regional Court can be treated as determinative facts for the purpose of establishing that, by authorising execution of the Prosecution's requests based on inadequate information, Austrian authorities acted in violation of their own laws. The Trial Chamber was therefore correct to conclude that "the internationally recognised right to privacy [had] been violated".[49]

ii. Providing access to records dating back to 2005 amounted to a disproportionate interference with the right to privacy

27. I am in agreement with my colleagues that the "requirement of proportionality is of relevance in the present case because of the applicable standard under international law […] regardless of whether it is contemplated by the domestic law of the State concerned, or has been already considered by domestic courts".[50]

[46] Austrian authorities sent information in execution of all three RFAs by 6 February 2015: *Bemba et al.* Appeal Judgment, para. 232. The first Austrian appellate court decision was issued on 22 April 2016.
[47] First Austrian Decision, CAR-D23-0011-0006, pages 0013-0014.
[48] Second Austrian Decision, CAR-D23-0011-0016, page 0025.
[49] Second Western Union Decision, para. 28.
[50] *Bemba et al.* Appeal Judgment, para. 332.

28. The conduct under investigation related to money transfers conducted "in the course of ongoing proceedings against Mr Jean-Pierre Bemba Gombo".[51] However, the trial did not start until November 2010. Arguably transactions following Mr Bemba's arrest in May 2008 might have been relevant to the investigation. My colleagues' reliance on the fact that the information pertaining to transactions between 2005 and 2008 was only introduced into evidence as it was itemised in the same document containing relevant money transfers at later dates is misplaced.[52] Also, it is irrelevant that neither the Prosecution nor the Trial Chamber relied on these transactions.[53] The fact remains that provision of Western Union Records, dating back to 2005, by the Austrian authorities constitutes a disproportionate interference with the right to privacy.

29. As highlighted above, the breach was exacerbated by the Prosecution failing to take appropriate measures in relation to the transactions between 2005 and 2008. The Prosecution could have avoided further dissemination of the information and, after informing the Austrian authorities, deleted the information from their records. Instead the Prosecution failed to even acknowledge a disproportionate interference with the right to privacy.

C. Article 69 (7) (b) of the Statute assessment

30. The second limb of the article 69 (7) of the Statute test requires establishing either that "the violation casts substantial doubt on the reliability of the evidence"[54] or that admission of the Western Union Records would be "antithetical to and would seriously damage the integrity of the proceedings".[55] The reliability of the evidence is not an issue as there is no reason to believe that the violation renders the Western Union Records unreliable.

31. The Trial Chamber in its Second Western Union Decision briefly discussed the relevant considerations to take into account when evaluating the impact of the violation on the integrity of the proceedings.[56] Taking into account the application of identical language at the ICTY,[57] the Trial Chamber stipulated that the nature of the violation and the fault, or lack

[51] RFA 1, CAR-OTP-0091-0351 at 0354.
[52] *Bemba et al.* Appeal Judgment, para. 338.
[53] *Bemba et al.* Appeal Judgment, para. 338.
[54] Article 69 (7) (a) of the Statute.
[55] Article 69 (7) (b) of the Statute.
[56] Second Western Union Decision, para. 33.
[57] *See* rule 95 of the ICTY Rules of Procedure and Evidence.

thereof, of the Prosecution are relevant considerations.[58] Barring any detailed analysis of the requirements under article 69 (7) (b) of the Statute, it is worthwhile to consider how the Trial Chamber in *Prosecutor v. Thomas Lubanga Dyilo* (referred to in the Second Western Union Decision)[59] dealt with the issue.[60] In my view, the framework laid down by the *Lubanga* Trial Chamber to assist with conducting this analysis is apposite.

32. In *Lubanga,* the Trial Chamber acknowledged that article 69 (7) of the Statute "represents a clear exception to the general approach" in relation to admissibility of evidence (the general approach entailing an assessment of relevance, probative value and any prejudicial effect caused by the evidence).[61] Keeping in mind the *lex specialis* nature of article 69 (7) of the Statute *vis-à-vis* the general admissibility considerations, if established that evidence has been obtained in violation of an internationally recognized human right, "the probative value of the evidence in question cannot inform its decision on admissibility".[62] Furthermore, considering the wording of article 69 (7) of the Statute even a non-serious violation may lead to evidence being deemed inadmissible, provided that the second limb of the test, article 69 (7) (a) or (b) of the Statute, is satisfied. As stated in *Lubanga,*"[i]t is only in the second limb of the test that a requirement of a degree of seriousness is introduced […] unconnected to the seriousness of the violation".[63]

33. Nevertheless, the gravity of the violation is a consideration that the Court may take into account when assessing the seriousness of the damage to the integrity of the proceedings.[64] It is at the Court's discretion to determine what other factors might form part of the factual matrix when undertaking this assessment. The Trial Chamber in *Lubanga* suggests that the purpose of the exclusionary rule is, *inter alia*, to discipline or deter unlawful conduct by the Prosecution. Therefore, an assessment of the Prosecution's control over the evidence gathering process or the power to prevent the improper conduct is particularly relevant.[65]

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[58] Second Western Union Decision, para. 33.
[59] Second Western Union Decision, para. 33.
[60] Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the admission of material from the 'bar table'", 24 June 2009, ICC-01/04-01/06-1981, ("*Lubanga* Bar Table Decision").
[61] *Lubanga* Bar Table Decision, para. 34.
[62] *Lubanga* Bar Table Decision, para. 43.
[63] *Lubanga* Bar Table Decision, para. 35.
[64] *Lubanga* Bar Table Decision, para. 47.
[65] *Lubanga* Bar Table Decision, para. 46.

34. To summarise, relevant factors for the Court to take into account might include: (i) the gravity of the violation; (ii) whether the Prosecution was in control of the process or had the power to prevent the conduct in question; (iii) whether the rights violated related to someone else other than the appellants;[66] and (iv) the level of care that was displayed to minimise the risk of any violations occurring and measures taken once the violation has occurred to reduce the impact thereof.

35. Violation 1: the Prosecution showed a careless disregard for Austrian law by obtaining access to the Western Union Records prior to the first RFA being authorised. Taking into account the importance of respecting the right to privacy, it nonetheless cannot be stated that the Prosecution acted with the intention to circumvent national procedures. The Prosecution, in complete control of the process, should have shown greater diligence in ascertaining the correct state of Austrian law for the purposes of obtaining the records. Similarly, the flow of disproportionate information received from the Western Union contact, on two different occasions, could and should have been curbed. The fact that the appellants' right to privacy was violated, in addition to that of other persons, is also relevant. The Prosecution's reliance on the absence of a reprimand by the Austrian authorities is not convincing, given that incomplete information was relayed to these authorities to begin with. These are all relevant factors for the Trial Chamber to consider, in exercise of its discretion, when deciding whether a breach was such as to amount to the evidence being excluded under article 69 (7) (b) of the Statute.

36. Having considered these factors however, I am in agreement with the Trial Chamber that "the infringements to the right of privacy [were] not so severe as to taint the fairness of the proceedings".[67] The Trial Chamber did not err when it exercised its discretion not to exclude the Western Union Records under article 69 (7) (b) of the Statute. The impropriety in this case arises from carelessness on the part of the Prosecution in failing to follow the accepted national procedures and engage in a proportionality analysis. While a higher level of professionalism and diligence (in conducting its investigations) is expected from the Prosecution, the mistakes that were made in this case do not rise to the level that it can be said

[66] *Lubanga* Bar Table Decision, para 47. *See also* Second Western Union Decision, para. 33.
[67] Second Western Union Decision, para. 39.

that it would be antithetical to or seriously damaging to the integrity of the proceedings if the Western Union Records were not excluded because of them.

37. Violation 2: while the Austrian court erroneously authorised the RFAs at first instance and subsequently provided the Prosecution with a disproportionate amount of information, the admission of evidence received as a result of this violation does not cause serious damage to the integrity of the proceedings. The Higher Regional Court of Vienna acknowledged that, under normal circumstances, domestic procedure allows the Prosecution to rectify its RFA by providing more information. Unfortunately, by the time the first Austrian appellate court decision was rendered, the proceedings against the appellants were nearing the end (in April 2016). Provision of additional information by the Prosecution, if the Prosecution was provided with the opportunity to do so, may well have materialised in the same result *i.e.* authorisation of the RFAs. Under these circumstances, it cannot be said that the violation was so egregious that only exclusion of the documents could have prevented the integrity of the proceedings from being seriously damaged.

II. The Trial Chamber's approach to admissibility of evidence

38. My colleagues have endorsed the Trial Chamber's approach to the submission and admission of evidence. Mr Babala, Mr Bemba and Mr Arido complain that this procedural approach to evidence that does not require the Trial Chamber to give individual rulings on the relevance and/or admissibility of individual items of evidence, is erroneous as a matter of law and has resulted in their suffering prejudice. I agree with them. I do not agree with my colleagues that the approach followed by the Trial Chamber is a fair reflection of the compromise at Rome which created a hybrid system.[68] On the contrary, in my respectful view, the approach approved by my colleagues has effectively undermined the compromise reached by the States Parties between the Common Law and the Romano-Germanic legal traditions.[69]

[68] *Bemba et al.* Appeal Judgment, para. 590.
[69] Although it is clear from the Statute and the Rules of Procedure and Evidence, as well as the relevant *travaux préparatoires*, that States Parties wished to find a middle ground between different national procedural systems, it is far less clear from the sources what the precise contours of this compromise were or, indeed, whether there was a clear common understanding of how the system was to operate in practice. *See* D. Piragoff and P. Clarke, "Evidence" in O. Triffterer and K. Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck *et al.*, 3nd ed., 2016), p. 1322 explaining that: "As with all of

39. The compromise in Rome authorised Trial Chambers to assess the admissibility of all evidence but did not include formal exclusionary rules, such as the hearsay rule or the bad character rule. Instead, the Statute contains a more generic admissibility test that gives Trial Chambers considerable flexibility in evaluating the appropriateness of admitting evidence into the case record. The drafters in Rome also made sure that Trial Chambers could issue admissibility rulings on their own motion without the need for objections raised by the parties.[70] The Statute's admissibility regime is thus considerably less formal than what exists in most Common Law jurisdictions and offers more flexibility and discretion to the judges. However, and this is crucial, otherwise the compromise would not work, it does not dispense with the need to consider the question of admissibility of evidence altogether.

40. It is, in my view, important to respect the delicate balance that was reached in Rome. Unfortunately, although my colleagues acknowledge the ideal of the hybrid system, it has effectively endorsed the Romano-Germanic system's approach to the submission of evidence without, however, adopting the necessary safeguards that exist in this system. In my respectful view, this is based on a misunderstanding of the purpose behind screening submitted evidence before admitting it in the context of adversarial proceedings.

41. First, my colleagues repeat the worn argument that Common Law systems approach evidence "atomistically", whereas Romano-Germanic systems adopt a "holistic" approach. With the greatest of respect for my colleagues and the scholars upon whose views they seem to rely, this is a caricature which fundamentally misrepresents how the Common Law inspired adversarial system works in reality. Indeed, the fact that Common Law judges consider the authenticity, probative value and potential prejudice of each item of evidence individually

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article 69, para. 4 is an amalgam of both common law and civil law concepts and does not strictly follow the procedures of either. While the article adopts presumptively the civil law procedure of general admissibility and free evaluation of evidence, some common law concepts are incorporated, which results in a hybrid system. The basic principle in both common law and civil law systems is 'that the relevant evidence which has probative value is admissible if such evidence is not affected by an exclusionary virus [footnote omitted]. Article 69(4) permits the Court 'to rule on the relevance or admissibility of any evidence' before considering the question of weight". *See also* A. Orie, "Accusatorial v. Inquisitorial Approach in International Criminal Proceedings prior to the Establishment of the ICC and in the Proceedings before the ICC" in A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court*, Vol. II (Oxford University Press, 2002), p. 1485 considering article 69(7) as a middle ground: "As we pointed out, the Rules of Evidence function in a very specific procedural context. Although common-law features may still dominate this context, the civil-law influence cannot be disregarded".

[70] Article 64 (9) (a) of the Statute.

does not mean that they consider these factors in isolation. Moreover, once the evidence is admitted, its evidentiary weight is assessed ever so "holistically" as in any other legal system.

42. Second, contrary to what my colleagues in both the Trial Chamber and the Appeals Chamber seem to believe, the purpose of ruling on admissibility in Common Law inspired adversarial systems is not limited to shielding juries from potentially unreliable evidence. On the contrary, making admissibility rulings serves two important functions: firstly, to provide notice to the parties as to the purpose for which the evidence has been entered into the case record; *i.e.* what the tendering party aims to prove by it (possibly in conjunction with other evidence) and, second, to ensure that the Chamber receives all necessary information to make a fully informed evaluation of the exhibit's evidentiary weight.

43. This last point brings me to another misconception concerning the role of admissibility rulings. They are not meant to be preliminary rulings on what an exhibit may or may not prove. Rather, they are designed to differentiate exhibits that have the *potential* to prove something that is relevant to the case from those that do not. There is no point in cluttering the case record with exhibits whose relevance to the charges cannot be demonstrated or that are of such doubtful probative value that no sensible Trial Chamber could reasonably base any findings upon them.

44. In party-driven trials, particularly trials of great complexity or size, it is essential that judges prevent trial proceedings from being inundated by large amounts of irrelevant, unauthentic, non-probative (*e.g.* anonymous hearsay) or otherwise prejudicial evidence. That is what the general admissibility rule contained in article 69 (4) of the Statute is designed for. It is not a formal exclusionary rule, which is based on protecting values that have nothing to do with the inherent quality of the evidence. Instead, it is the practical reflection of a basic principle of procedural fairness as well as a procedural tool to manage and streamline the presentation and evaluation of evidence.

45. It may well be that there is no need for such a filter in trials that are conducted on the basis of a central dossier and where the presentation of evidence is driven by the presiding judge. However, it is important to bear in mind that this particular trial was conducted along adversarial lines. Each side conducted their own investigations, there was a formal process for

disclosure[71] and evidence was presented in a partisan manner.[72] The adversarial trial model, especially in criminal cases, may create an imbalance between the parties. If left unchecked by the Trial Chamber, such imbalances may result in unfairness. It is one of the central tasks of judges in adversarial trials to ensure that parties approach the presentation of their respective cases with appropriate rigour, *e.g.* by not inundating the case record with vast amounts of evidence of questionable relevance, authenticity or probative value. This necessarily requires the Chamber to intervene at the time of submission. This is because in an adversarial model the introduction of an item of evidence creates a professional responsibility on the part of the opposing party to challenge it. If it fails to do so, the Trial Chamber would be entitled to infer from this that the opposing party accepts the proposition for which the evidence is submitted.

46. In my respectful view, it is a profound misconception to suggest that it is not possible to make fully informed admissibility rulings before all the evidence is in. To suggest this amounts to saying that thousands of judges on Common Law benches throughout the world have for centuries been making ill-informed decisions. Such a suggestion is plainly wrong. Indeed, as any experienced Common Law judge knows, decisions on relevance, probative value and prejudice are made on the strength of the parties' submissions. If the tendering party is of the view that the Chamber must assess these factors in light of other evidence that is still to be submitted, they have the responsibility to point this out to the Chamber who may then admit such evidence *de bene esse*. The Chamber will normally accept such submissions on a good faith and prima facie basis.

47. Perhaps my colleagues' misapprehension of what happens in adversarial trials can be explained by a difference in conception of what it means for a party to submit evidence. From reading the Majority decision, one gets the sense that they view the act of submitting evidence as merely adding information to a collective pool and that it is the judges' responsibility to make sense of it. While I fully agree that judges are not bound by the purpose for which parties submit evidence, this does not mean that their intention is entirely irrelevant. On the contrary, if there is to be any order and focus in the presentation and discussion of evidence, it

[71] Trial Chamber VII, *Prosecutor v. Bemba et al.*, "Decision on modalities of disclosure", 22 May 2015, ICC-01/05-01/13-959, with one public annex.
[72] Trial Chamber VII, *Prosecutor v. Bemba et al.*, "Directions on the conduct of the proceedings", 2 September 2015, ICC-01/05-01/13-1209.

is essential that parties and judges alike know at all times what is being discussed and for what purpose. After this discussion, parties must be able to depend on the Chamber only relying on the evidence for the purpose that was actually discussed. If the Chamber realises at a later stage that the evidence may in fact be relevant in relation to a different point, it is open to the Chamber to raise the issue with the parties, and if necessary, invite them to make the necessary further submissions. My colleagues seem to accept this principle but fail to explain how this would work in practice if the Trial Chamber only "considers" relevance and admissibility for the first time during final deliberations.[73]

48. My colleagues state that in order for a Chamber to be able to rely on evidence, it need not be formally admitted, as long as it has not been ruled inadmissible. My colleagues further say that the duty contained in rule 64 (2) of the Rules to give reasons for "any rulings on evidentiary matters" only applies when the Trial Chamber actually rules on admissibility.[74] With respect, this is difficult to follow as it is unclear what the difference is between an item of evidence being "not inadmissible" and it being "admissible". The only manner to make sense of this is to assume that the former presupposes the absence of a negative decision, whereas the latter requires a positive decision. If this is what my colleagues have in mind, they must equally think that there is a presumption of admissibility. Unfortunately, no legal basis for this presumption is offered, nor is any reasonable justification given.

49. Yet, adopting a presumption of admissibility is a far-reaching step. It means that a Trial Chamber must only give reasons for excluding evidence from the case record and that there is no need to justify its inclusion. It also means that the tendering party is relieved from having to show that the evidence it wants to submit is relevant and probative. Instead, if the opposing party wishes to obtain a ruling from the Trial Chamber on whether or not the evidence can be relied upon and for what purpose, it has to demonstrate that the evidence lacks relevance or probative value. This is an impermissible burden placed in particular on an accused where the Prosecution is the calling party presenting its evidence.

50. Moreover, under my colleagues' approach, there would be two classes of evidence in the case record: (a) evidence that has been explicitly ruled admissible (after a challenge by the opposing party) and (b) evidence that is merely "recognised as submitted". However, as far as

[73] *Bemba et al.* Appeal Judgment, para. 623.
[74] *Bemba et al.* Appeal Judgment, para. 596.

I understand my colleagues, there would be no material difference between the two. My colleagues argue that admissibility rulings made during trial do not reduce the need for parties to make submissions on the standard admissibility criteria at the end of the trial, because the Trial Chamber may ultimately still disregard evidence that it previously admitted.[75] This is a profound mistake. Once a Trial Chamber has ruled an item of evidence admissible it is no longer at liberty to simply ignore the evidence in the article 74 judgment, especially when it contains information that is arguably at odds with the Court's findings. The Trial Chamber's approach, which is endorsed by my colleagues, essentially consists in leaving the parties entirely in the dark until the end of the trial and then to withhold any explanation as to why certain exhibits are relied upon and others not mentioned.

51. My colleagues justify their stance by pointing to examples of national systems (after first saying that "little assistance, if any, may be derived from the practices of national, international or internationalised criminal jurisdictions"),[76] that are alleged to operate with a similar system as the one adopted here. To the best of my knowledge none of the systems mentioned by the Prosecutor to which my colleagues refer (*i.e.* France, Germany, Belgium, Portugal and Finland), conduct criminal investigations and trials in the same adversarial manner as we do here at the Court. Nor does the Court have the safeguard of an independent nonpartisan investigating judicial officer and a central dossier. The analogy in my respectful view is fundamentally flawed. More importantly, as a matter of law I reject the premise that the Court is authorised to adopt a particular procedural model simply on the basis that a random selection of national jurisdictions from one particular legal tradition operates in a similar manner. There is simply no legal basis for such an approach, either in the sources of law (article 21 of the Statute) or in the relevant principles of treaty interpretation.

52. My colleagues also rely heavily on the views of "commentaries". However, on closer scrutiny, it transpires that all the references are to one author, who was a member of one of the delegations at the Rome Conference. While this type of publication may sometimes be helpful to understand the concerns of at least some States during the negotiations and are of persuasive value, they have no independent authority. In any event, the main point I take away from Mr Piragoff's publications is that the drafters genuinely tried to find common

[75] *Bemba et al.* Appeal Judgment, para. 609.
[76] *Bemba et al.* Appeal Judgment, para. 574.

ground between the common law and the Romano-Germanic approach to evidence. In my respectful view, the effect of my colleagues' decision has been to undermine that compromise.

53. Finally, I wish to express my unease with the approach taken by my colleagues based on the provisions of the Statute and the Rules of Procedure and Evidence. In particular, I reject my colleagues' emphasis on the use of the verb "may" in article 69 (4) of the Statute – as opposed to the use of the verb "shall" in article 69 (7) of the Statute and similar provisions. This difference simply means that in case of the latter, the Trial Chamber has no choice but to exclude the evidence, whereas article 69 (4) of the Statute is drafted in a manner that is designed to give Trial Chambers a large measure of discretion in terms of whether or not to admit particular items of evidence, *even if* there may be concerns relating to relevance or probative value. For example, when a party submits an item of hearsay evidence, this will often raise questions concerning the probative value of the information. If article 69 (4) of the Statute were a compulsory exclusionary rule, Trial Chambers would be required to always exclude such evidence. However, article 69 (4) of the Statute was designed precisely to avoid such inflexibility and to give Trial Chambers a large measure of discretion in this regard. This is confirmed by rule 63 (2) of the Rules, which states that Chambers "have the authority, *in accordance with the discretion described in article 64, paragraph 9*, to assess freely all evidence submitted *in order to determine its relevance or admissibility in accordance with article 69*".

54. In other words, the distinction between articles 69 (4) and 69 (7) of the Statute is not that in the case of the former the Chamber may *rule* on admissibility and that in the case of the latter the Chamber must *rule* on admissibility. Rather, the difference is that in the case of the former the Chamber may *exclude* the evidence if there are concerns, whereas in the case of the latter the Chamber must *exclude* the evidence if the conditions are met.

55. I note, on this point, that my colleagues have explained the Appeals Chamber's judgment in *Bemba* OA5 OA6.[77] They do so by making a distinction between "considering" the criteria of article 69 (4) of the Statute and "ruling" on them. With the greatest respect, the issue that arose for the Appeals Chamber in that case was the decision of the Trial Chamber to

[77] *Bemba et al.* Appeal Judgment, para. 594.

allow all of the evidence to be submitted and its failure to issue any admissibility rulings. The effect of my colleagues' decision is that it permits opaque decision making where the parties and participants may only have the satisfaction of knowing that their objections where considered but may never know what impact they had on the Chamber's reasoning, if any.

Judge Geoffrey Henderson

Dated 8th day of March 2018
At The Hague, The Netherlands