International Criminal Court
Trial Chamber VII - Courtroom 1
Situation: 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 - ICC-01/05-01/13
Presiding Judge Bertram Schmitt, Judge Marc Perrin de Brichambaut and Judge Raul Pangalangan
Trial Hearing
Monday, 2 November 2015
(The hearing starts in open session at 9.33 a.m.)
THE COURT USHER: All rise.
The International Criminal Court is now in session.
PRESIDING JUDGE SCHMITT: Good morning, everybody.
Could the court officer please call the case.
THE COURT OFFICER: Thank you, Mr President.
The situation in the Central African Republic in the case of The Prosecutor versus Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, case reference ICC-01/05-01/13.
We are in open session.
PRESIDING JUDGE SCHMITT: Then I ask for the appearances of the parties.
Please, Mr Vanderpuye.
MR VANDERPUYE: Good morning, Mr President, your Honours. Good morning everyone. Today the Prosecution is represented by Olivia Struyven sitting to my right, behind her is Sylvie Vidinha and to her left Sylvie Wakchom. I'm

Kweku Vanderpuye.

PRESIDING JUDGE SCHMITT: Thank you very much.

For the Defence please.

MR GOSNELL: Good morning, Mr President, your Honours. The appearances for Mr Mangenda are the same as on Friday. Thank you.

MR POWLES: Good morning, Mr President, your Honours. This morning Mr Kilolo is represented by myself and Ms Lueka Groga.

MR TAKU: May it please your Honours, I appear for Mr Arido. With me Mr Kiel Walker and Mr Tharcisse Gatarama.

MR KILENDA: (Interpretation) Good morning, Mr President. Good morning, your Honours. I do have the pleasure to introduce to you this morning Coralie Kripfel who is our case manager. And the rest of our team, that is Maître Azama and myself are present.

MS TAYLOR: Good morning, Mr President, your Honours. The Defence for Mr Bemba is represented by myself and Ms Yuqing Liu. Thank you.

PRESIDING JUDGE SCHMITT: You can remain standing because I've been informed that you want to address the Chamber.

MS TAYLOR: Thank you very much, Mr President. I feel that since my colleague Mr Larochelle isn't here, I have to take up the mantle of having a Monday-disclosure rant. So here we go.

After the commencement of the trial, 5 October, the Defence received one of these famous requests for assistance, in particular one concerning Austria. And it's CAR-OTP-0091-0351. And at page 0354, paragraph 6, we were informed for the first time that on 19 October 2012, a meeting was facilitated by Mr Herbert Smetana, director of international security of Western Union.

There was a subsequent screening of documents that has identified a number of transaction and movements of large sums of money in connection with a number of individuals which appear to be of relevance to the ongoing investigation.

Now, this is the first time that we're apprised of this meeting, which predates any request for assistance. The fact that it was facilitated by the witness who is appearing today is clearly relevant to our preparation of the cross-examination of this witness.

The Defence have a right to adequate time and facilities. We have a right to receive information which could be relevant to our cross-examination in advance of that cross-examination so we can prepare our cross-examination, so we can obtain instructions, so we can have an holistic strategy concerning what this Bench has recognized is relevant to the Defence, and that is the legality of the collection of information in this case.

Now, if we don't have any information about this, if we're finding this out after the commencement of the trial, we can't do that. It's not enough for the Prosecution to repeatedly say that we can put questions to the witness. If we do that, we only find out information during the cross-examination itself, which means we can't prepare. Our right to time and facilities to prepare has not been fulfilled.

This information is either Rule 76 if it emanates from the witness or it concerns the witness, or at the very least it's material to the preparation of the Defence. But when we asked the Prosecution for any notes or records, we were informed that it's an internal work product, we were informed only that they screened 30 names. We don't know which names. We don't know when it happened, why it happened, who initiated it. That's all the information we have. And this is not adequate. It does not fulfil our right to prepare for this witness.

So we respectfully request the Chamber to order the Prosecution to disclose information which we should have already. We shouldn't have to ask for it. This falls within their proprio motu disclosure obligations.

So we shouldn't have to be bothering you on Monday mornings with this, and we apologise for that, your Honour, but we are in the situation and we do need a remedy. Thank you.

PRESIDING JUDGE SCHMITT: Thank you very much. Of course, it's not a very fortunate beginning of the week, but it's not -- nobody's -- it's not your fault at least.

Mr Vanderpuye, do you want to comment on this request?

MR VANDERPUYE: Mr President, I think we've gone around and around on this question of what is internal work product, what is disclosable under 77 or 76, and so on and so forth, for quite some time in this case.

And I think there is a fundamental misunderstanding as to what constitutes internal work product, what is properly disclosable under 77, what is the nature or the burden the Defence has to demonstrate information, and what is the -- to demonstrate the right to certain information and what is the Prosecution's obligation with respect to its affirmative disclosure, to affirmative disclosure.

The document that my colleague is talking about is referenced in an RFA, which was disclosed pursuant to the order of the Chamber, pursuant to the Chamber's direction to disclose such material.

I would point out that this Chamber's decision is in diametric opposition to the Pre-Trial Chamber's ruling with respect to the disclosure of RFAs as concerns the purported legality of the -- of material that is acquired by a State. In this case, and I believe I pointed the Chamber a couple of times now to I think it's Article 69(8), which deals expressly with that -- with that issue; what is the relevance, probative value and what is the Court's position with regard to the assessment of the legality of information or evidence that is gathered by a State.

And I think Article 69(8) is quite clear on that.

Our disclosure obligations have been interpreted in the context of that Article of the Statute, which we don't think is something that can be obviated by a decision of the Chamber, or by the Chamber in general, nor has the Chamber expressly directed the -- directed the Prosecution to disregard that Article in terms of its disclosure obligations in this case.

The material that she's talking about, that is my colleague, is what is contained in an internal memorandum that was prepared by an investigator in this case with respect to the screening of certain information.

That information concerns records that were -- records that are maintained by Western Union. And the note itself indicates only that a screening took place, which is what we provided to the Defence. That's what it says. That is the tangible item to which the Defence can, if at all, make a claim for disclosure.

We consider that the material is internal. It is contained in an internal document. It references investigative activity, an investigative practice and it is not otherwise disclosable.

And to the extent that it is disclosable, the salient information provided -- has been provided to the Defence; namely, that a screening took place. I believe it's on 19 October, I'm forgetting the year, I think it was 2012, concerning -- concerning a number of names as relates to this case.

I should also point out that the note itself relates to investigative activities concerning another case which has obviously no relevance to this one.

So our position is that the Defence has the information that is contained in that particular instrument, that is referenced in the RFA, and that there is nothing else that the Defence is entitled to, either as a matter of disclosure under Rule 77, or as a matter of disclosure under Rule 76, or as a matter of courtesy in this case because that information -- the information, as contained in the Western Union records, they have the Western Union records. They have the names that were run in the Western Union records as concern -- as is contained in an annex that is referenced in the material at issue in any event, some 68 or 67 names.

So we're quite -- we're quite convinced that the Defence has everything that they're entitled to have in respect of testing the legality, if it's an issue even in this case, of the acquisition of the Western Union material. And in any event, they have the person here who is responsible for having processed that information and complied with the authorities in Austria with respect to the disposition of that material.

So I hope I've made that clear to the Chamber. And I'm happy to answer any other questions the Chamber, Mr President, you may have.

PRESIDING JUDGE SCHMITT: Any further comments by the Defence teams?

MR GOSNELL: Yes, Mr President. Just briefly. First of all, I appreciate those submissions and thank my colleague for having made them and also for the responses that were given to us over the weekend in response to our queries.

We've been told now that there is just an internal memorandum that contains no disclosable information, just one line or one piece of information. And there is no dispute or suggestion that's not correct.

But the existence of such a document suggests that there are also handwritten notes or typewritten notes prepared by an investigator when they actually met with the witness.

And under 76(1), if something comes out of the mouth of the witness and is recorded by a Prosecution investigator, it is our position, without reference to Rule 77 or any other extrapolation or substantive review, if it comes from that witness that's disclosable under 76(1).

And one of the difficulties with 76(1) is the Prosecution may in good faith may be interpreting the provision in a certain way. There is no disclosure based on that interpretation and then we don't know about the material. We're not even able to bring it to your Honours' attention. And now we do have one rare occasion where we see that we don't know if these notes exist, but it would seem to suggest that the notes do exist.

So leaving aside the issue of the typewritten document which may at the top say "Internal Memorandum," there is also the question of what notes were taken by the investigator and do those notes contain even in part, not necessarily in the entirety, even in part propositions from the witness who is about to come and appear before you and who we're expected to cross-examine.

PRESIDING JUDGE SCHMITT: Mrs Taylor?

MS TAYLOR: Thank you, Mr President. Just to follow up on the issue raised by my colleague, I refer your Honours to the judgment in the Banda Jerbo case of 17 February 2012, and that's number 295, which says Rule 76 applies irrespective of the form.

If the Prosecution meets with a witness or an external entity, that's not an internal meeting. They can't evade their disclosure obligations by putting "Internal Memo" at the top if they're collecting information from external entities which concerns an ongoing case.

The RFA, which is dated after the October meeting, also says that the meeting was facilitated by Mr Smetana. Now, I highly doubt that the Prosecution just turned up to Western Union and knocked on the door. There must have been prior correspondence and communications with Mr Smetana which we have not received. Given this predates any request for assistance, predates any judicial decision, this is clearly relevant to legality. And it's not enough for the Prosecution to simply disagree with the Bench and say they don't believe that that's disclosable. There's a decision which says it is and that's a decision which now applies in this case given that the Prosecution did not seek leave to appeal it. Thank you, Mr President.

PRESIDING JUDGE SCHMITT: Mr Vanderpuye -- yeah (Microphone not activated). First Mr Kilenda, then the Presiding Judge and then again Mr Vanderpuye.

MR KILENDA: (Interpretation) I thank you, Mr President. I'll try and be very brief. I would like to second what my two learned colleagues have just said, Counsel Melinda and Counsel Gosnell, by adding just that this is not a hide and seek game. We all have clients that we're defending. And they're running great risks in this case. And it is imperative that everything that has been done to lay charges at their door be addressed by the Defence. And I do not see how any plausible -- for any plausible reasons that there would be for the Prosecution to hide anything from us. Thank you.

PRESIDING JUDGE SCHMITT: Before Mr Vanderpuye has the floor, you can perhaps clarify if during this meeting with the witness there have been taken notes like Mr Gosnell indicated that, or assumes, or presumes.

MR VANDERPUYE: Thank you, Mr President. I spoke to the investigator yesterday evening or afternoon trying to garner information in respect of Ms Taylor's request.

The investigator informed me that the only document that was prepared in relation to that meeting was an end-of-mission report. That is the internal document at issue.

That end-of-mission report he provided to me. I reviewed the end-of-mission report and the end-of-mission report contains exactly the information that we conveyed to the Defence; namely, a single sentence, maybe a sentence and a half that indicates that a screening of those documents took place on the day and the time. It does not indicate the names that were screened. That's essentially all there is with respect to that internal memorandum.

If you'd like me to address the rest of it I can do, but that's the only document that was prepared by the investigator given the information that he gave me.

Now, with respect to my colleagues' assertion that all correspondence relating to the acquisition of material by a State as concerns evidence to be used in a trial is disclosable pursuant to Rule 76, I think that that is a complete misstatement of the law. It doesn't correspond with any jurisprudence in this institution, nor does it correspond with the Rules or the Statute.

Clearly, just because correspondences had between the Prosecution and an entity that ultimately provides information to the Prosecution does not necessarily mean that it goes to a material issue concerning the legality of the acquisition of the evidence subsequently.

Therefore, it does not, A, fall under Rule 77 -- under Rule 77 per se, nor does it fall under Rule 76, which the Chamber has specifically, and I think properly, defined in terms of the objectives of an investigation or the objectives of a case or a statement made toward those ends.

So I don't think that my colleagues' assertions with regards to the disclosable -- disclosability, if you will, of that material obtains in this particular case under either Rule 76, Rule 77, or Article 67. I don't think there is anything to that.

With respect to Mr Gosnell's claims concerning the nature of the material, I don't

disagree with him at all, and I think I informed him this morning quite clearly that the assessments that we make in terms of whether materials can be disclosed or should be disclosed that is contained within internal work product is based on the content of the material, not the form in which it was recorded.
So if in an internal document an investigator or Prosecution -- a member of the Prosecution writes down that the witness said X in relation to an investigation or in relation to the case, we consider that to be a statement within Rule 76 as we pointed out on a previous occasion where that information was contained in a contacts log. And I think Mr Gosnell, it was, maybe among others, made the assertion that that was a Rule 76 statement and I said unequivocally he is correct. And in that particular circumstance it was an oversight because it was contained in that document, it wasn't processed as it should have been, but I recognized clearly that that's a Rule 76 issue. We're talking about something completely different here. And I'm representing to the Court that the information that's contained in that internal memorandum, that end-of-mission report is not a statement; it is simply what I said it is, which is the one sentence that says that a screening was conducted. It doesn't contain any statement of the witness. It doesn't contain any representation or characterisation of what the witness did or said, and therefore does not fall under the disclosure obligations under 77 or 76 or any other provision of the Statute or Rules. Thank you, Mr President.
PRESIDING JUDGE SCHMITT: So we have to delib --
MS TAYLOR: Sorry.
PRESIDING JUDGE SCHMITT: Mrs Taylor.
MS TAYLOR: Just very quickly, Mr President. The Prosecution has now confirmed, it seems, that the correspondence exists and my comments on Rule 76 were concerning notes, not concerning the correspondence. But a correspondence is not

internal work product. If it concerns this witness, it is relevant to our preparation of the cross-examination of the witness. And the Prosecution has failed to refer to any reason not to disclose it to us. Thank you, Mr President.

PRESIDING JUDGE SCHMITT: I have another question - please, Mr Gosnell - another question to Mr Vanderpuye. Is it correct that there exists a correspondence that has not been disclosed to the Defence, correspondence before this meeting of the investigator or the Prosecution with the witness?

MR VANDERPUYE: To be honest, I'm not sure if there is a documented correspondence or whether the correspondence occurred by telephone. I can check that out and I can report back to the Chamber to see whether that is the case. But I would assert that the mere fact that there is correspondence or there might be correspondence is not -- does not necessarily constitute Rule 77 material because that correspondence is not prima facie material to the preparation of the Defence. Obviously there is correspondence because we have the records, right? We couldn't provide the Defence with records from Western Union had we not had contact with Western Union. So the question is whether or not that particular contact is material to the preparation of the Defence. And I haven't heard or seen a prima facie basis to make that claim as yet, but I can find out whether or not there was correspondence which preceded the 12 October -- 19 October 2012 meeting and I'll come back to you as soon as I can.

PRESIDING JUDGE SCHMITT: Irrespective of the deliberation that we will have, the Judges, I personally see, if there was such correspondence, see no reason why it should not be disclosed to the Defence. But we will see.

MR VANDERPUYE: Thank you, Mr President.

PRESIDING JUDGE SCHMITT: Mr Gosnell.

MR GOSNELL: Just very, very briefly. I'm very reassured to have heard my friend's propositions about the scope of Rule 76(1), but one area where there can be confusion in practice is if an investigator believes that if they produce an end-of-mission or summary report, that that's all they have to give to the Prosecutor and that that's all that needs to be disclosed. It may not be the case. If the handwritten notes go beyond, assuming they exist, if it goes beyond what's put in the end-of-mission report, that really ought to be disclosed to us. That falls squarely within the bullet -- the bull's eye of Rule 76(1).

PRESIDING JUDGE SCHMITT: Now we have heard enough I think. We retire for deliberation. And I think perhaps half an hour, I would say, so you have time for a coffee.

THE COURT USHER: All rise.

(Recess taken at 9.55 a.m.)

(Upon resuming in open session at 10.31 a.m.)

THE COURT USHER: All rise.

PRESIDING JUDGE SCHMITT: The Chamber issues the following ruling:

The Prosecution is to inquire if there has been prior correspondence with the witness on this matter.

Further, it is directed to provide this prior correspondence, if any, and the end-of-mission report in question to the Chamber by 1 o'clock.

The Chamber will then assess if the material contains disclosable information.

As regards the contact logs for this witness, the Chamber considers that, in view of the date of disclosure of certain information and the extended discussions between the parties regarding the Prosecution's contacts with this witness, the Defence has a legitimate interest to obtain this information.

Accordingly, the Prosecution is ordered to disclose the contact log for P-267 to the Defence forthwith.

This concludes the ruling.

We will do the following: We will have -- now, of course, we will not have a break at 11 o'clock, it would be too early, but we will continue until 11.30, and then we will have a break that would be the coffee break for the Chamber, to put it this way, and from 12 until 1 o'clock, and then we continue at 2.30.

We will now start with the examination of the witness. We have of course in mind what we have been talking about and we have also, of course, in mind that the Defence has to perhaps, if there is any information that has to be disclosed, we have in mind that they have to have time to prepare, so I can say we would not start with the cross-examination today. I can assure you of that.

So the witness could then be brought in.

(The witness enters the courtroom)

PRESIDING JUDGE SCHMITT: Good morning, Mr Smetana.

WITNESS: CAR-OTP-P-0267

THE WITNESS: Good morning.

PRESIDING JUDGE SCHMITT: You are going to testify before the International Criminal Court. That is perfectly clear for you I understand. On behalf of the Chamber, I would like to welcome you to the courtroom.

The Chamber has been established to try the case of the Prosecutor against Mr Jean-Pierre Bemba Gombo and others. You are called to testify to assist us in our search for the truth.

You will be asked questions by the lawyers in the courtroom and perhaps also by the Judges. In this connection, I would like to guide you: Please listen carefully to those questions. If you do not understand a question, feel free to ask for the question to be repeated or rephrased.

I trust that you have understood that, Mr Smetana.

THE WITNESS: Yes, sir.

PRESIDING JUDGE SCHMITT: Mr Smetana, there should be a card in front of you, or now the courtroom officer has this card for you, with a solemn undertaking.

Could you please read out this card.

THE WITNESS: I solemnly declare that I will speak the truth, the whole truth and nothing but the truth.

PRESIDING JUDGE SCHMITT: Thank you. Mr Smetana, you are now under oath.

As you have just promised, you have to speak the truth. And I inform you that it is an offence within the jurisdiction of this Court to give false testimony. I also trust that you understand this.

THE WITNESS: I have understood.

PRESIDING JUDGE SCHMITT: Before we start with your testimony, I have to address some practical matters you should have in mind when giving your testimony.

As you are well aware, everything we say here in the courtroom is written down and interpreted into English and French. It is therefore important to speak clearly and to speak at a moderate or rather slow pace. Everybody in the courtroom has from time to time difficulties with that, and I can imagine that this is for a witness who is for the first time in a courtroom also a problem, but please, if you can, have it in mind.

Speak also into the microphone and only start speaking when the person asking you the question has finished because to allow for the interpretation everyone has to wait for a few seconds before starting to speak.

If you have any questions yourself, you can indicate that by raising your hand. We will then give you the opportunity to speak.
I think we can now start the testimony of the witness.
Prosecution, you have the floor.
MS STRUYVEN: Thank you, Mr President.
QUESTIONED BY MS STRUYVEN:
Q. Mr Smetana, as you know, my name is Olivia Struyven and I will ask you some questions today on behalf of the Prosecution.
Now, the first question, could you state for the record your full name?
A. My name is Herbert Smetana.
Q. When and where were you born?
A. 28 January 1964, in Wiener Neustadt, Austria.
Q. Where do you currently reside?
A. Currently I'm residing in lower Austria. It's a village next to Wiener Neustadt, it's called Katzelsdorf, Kapellauweg dreßig.
Q. It doesn't have to be so specific. But in Austria, we'll take it.
What is your current occupation?
A. I'm currently director of global investigations and security. I'm based in Vienna and I'm working for Western Union Payment Services Ireland Limited.
Q. Just so that you know, if you see me look at the screen I'm just waiting for the French transcript to follow, so it's not --
A. No problem.
Q. Now, when did you join Western Union?
A. I joined Western Union in September 2002. We had -- there we had still our mother company, which was called First Data. And Western Union was under the

umbrella of First Data Corporation.

Q. And what was your position when you joined Western Union in September 2002?

A. I was a manager of corporate security.

Q. And what were your responsibilities as the manager of corporate security?

A. Our responsibilities are investigating both internal/external fraud or criminal activities targeted at or exploiting our Western Union money transfer system.

Q. And did you subsequently take up other positions at Western Union?

A. Well, within the security, we did also executive facilitation, how we call it, like protection of events and due diligence work as well.

Q. Now, what is your current position at Western Union?

A. My current position is director of global investigations, which is pretty much the same that we did before, but we just changed the title.

Q. Can you very briefly describe to the Chamber what your activities -- what kind of activities you conduct in that function?

A. Pretty much the same as I said before, but we also do law enforcement outreach sessions. We support law enforcement in several countries to help their ongoing investigations in connection with Western Union money transfer systems, and we investigating internal and external fraud.

Q. We're going to come back to the part of your cooperation with law enforcement agencies, but before I get there, could you -- or, I'm going to ask you a few questions about how money is transferred using Western Union. And my first question is going to be: In how many locations can Western Union money transfers be effectuated?

A. Western Union has a network, a combined network of approximately 500,000, we call them, agent locations. Those locations are owned and operated mainly by independent contractors or partners. So we don't own most of these locations. Those are independent partners using our software to transfer the money.

Q. And can you explain how the Western Union transfer system works from the moment someone wants to send money to the moment someone can receive money?

A. Yes. Basically in the -- in the past we have improved our systems, but at this time where we are talking about those transactions in question, we had mainly a consumer-to-consumer transaction. That means the sender, if somebody wants to send money, the sender goes into a computer-equipped Western Union money transfer location and then he provides the details of this money transfer to the operator there.

For example, I would like to send €100 to Den Haag from Austria. I would go into this location, talk to the operator, show an ID, tell the amount, how much I would like to send, and then I have to also -- need to know the country where the money has to be sent, the name of the receiver. And once the operator typed this into the system, the transfer will go through our servers in the United States on the east coast. There it runs through several interdiction lists. And when it's gone through, the receiver on the other hand, in the other country walks into the Western Union computer-equipped location and provides ID card, the name of the sender, the country of the sender and the Money Transfer Control Number transfer control number.

This Money Transfer Control Number is unique to each transaction and will be automatically generated by the system. So each transfer has a 10-digit Money Transfer Control Number.

And this actually goes in minutes. So when the sender is sending the money, it goes straight through the US, through the tandem service, and then straight -- is possible, is available there and the receiver can pick it up straight away in the other country. It works like when you -- when you send money to one country, it's important to know that the money can be picked up at any Western Union location in this country except the United States, where we have -- where we have to tell which state in the United States. But basically all the other countries, you can pick it up everywhere within minutes.

Q. Now, just one clarification. So when the person who wants to send the money, did I understand you correctly that the person who wants to send the money has to already identify the person who is going to pick -- the name of the person who is going to pick it up; is that --

A. Exactly, that's right.

Q. Now, for the service to work, does the person who wants to send the money, does that person have to pay a fee?

A. Yes, it's a certain amount. And it's -- in every country it's a different amount, a different percentage for that fee.

Q. And where is the fee deducted from?

A. The fee is deducted either from the money the sender is laying on the table there and -- or, it will be deducted -- we actually have this to send money form which is to -- filled out, and therefore the sender writes the amount he wants to send but separately he has to pay the fee then.

Q. So for example, if I want to send $2,000, I can either choose the fee to be deducted from the $2,000 or I can choose to in addition pay a small fee in addition to the 2,000?

A. That's correct. And then if you deduct it, of course, it would be less money sent. If I say I would like to send exactly €200, then I would have to pay the fee in addition, otherwise I can say, okay, I have €200, and deduct my fee and then it's probably 180.

Q. Now, about the moment of the payment. So if I understood you correctly, when the person wants to send the money, goes into the agency, the agent records certain information. Does that agent also record the date and the time the money is handed over?

A. Yes. Actually, you have to fill out the to send money form. And on this to send money form you have your name, the sender tells the address, where he's living, provides the ID card, and he has to state the name of the receiver and the country, the receiving country. So this will be captured. And the time as well, of course. As soon as he types it in, as soon as the operator types it in, it will be recorded in Eastern Standard Time. And that's the point that's very important because Eastern Standard Time is pretty much the same like New York time, it's on the eastern coast and we record this only in Eastern Standard Time because our servers are there.

Q. So very concretely, when I make a payment at 11 in the morning in Holland, the record will reflect the corresponding time in New York?

A. Exactly, yes. So you would have to convert the time.

Q. And what about the time that the money is being received?

A. This is exactly the same. So once the receiver picks it up and it's getting paid out, the operator types in the time.

Q. Now, so all this information is entered in some sort of a database. What about the amount of money. In which currency is the amount of money captured?

A. The amount is captured in US dollars with every transaction but, in addition, if somebody wants to send euros, it would -- it would be on an additional line where it

says the amount in euros converted at the -- to -- from US dollars or into US dollars at the same time. So this will be freshened up every -- three times a day to have the correct currency of the day.
Q. So the amount is immediately converted into US dollars and the currency rate that is applied is the latest updated currency rate?
A. That's correct, yes.
Q. Now, about that database. So you explained that the two agents, the sending agent and the receiving agent, enter this information in a database. How long is the data captured in that database?
A. The amount is captured at least five years. We can see sometimes up to six, seven, but that's the minimum of capture time.
Q. Now, returning back to your function and your job, do you or your division have access to that database?
A. That's correct. We have a special tool which is called the money transfer gateway, investigative gateway. This database will be updated every 48 hours. And all worldwide transaction will be pooled and delivered to the other database. This database is made too easily show law enforcement the time everything and then the transaction details because on our other systems you wouldn't understand, it would be just letters and stuff and numbers. It's not easy to identify. And so we, Western Union has made a special database to easy export this in an XLS file.
Q. Now, indeed coming back to this part of your job, can you explain to the Chamber how it works? How does it have -- so when you get a request from a law enforcement agency, what happens?
A. Yes. Basically we try to get the main information like names, date of birth, ID card numbers, whatever is available. And then on this system we can do a couple of

different searches. So I can, for example, search just the name. It's always better to have a date of birth because some people might have the same name. When we run this transaction, then let's say the name brought up 50 transactions. We also double-check then with the ID card when we found the right ID number. We can also drill down the ID number, which provides us sometimes more transactions because the name variations could be different. So could be first name last name, last name first name, but when we drill down the ID we can see how many different name variations this person might have used.

Q. Then what happens once you've conducted that search, how do you proceed?

A. Yes. When I've conducted this search and -- and I compared it with all -- for example, I can also drill down telephone numbers, and when I get all the complete data of the person under investigation, we actually file this in this XLS. We can export it, we file it, and then we are waiting for the official papers from law enforcement to be able to hand it over.

Q. And then once you have the official papers in order to be able to hand the information over, in what format or how do you provide it to the law enforcement agencies?

A. In Austria for example, we provide it with a disc. We played it over to a compact disc.

Q. And do you alter the information in any way, or do you take out certain informations?

A. We -- it could be when we run different, like I said, when we drill down IDs and different names, the only thing we alter, what we take out, is double transactions. That happens when the name is written different than when another person made a transfer and this name popped up under a different variation, name variation. Then it can happen that we have the same transaction twice.

But we can usually see it on the Money Transfer Control Number, that means if I have two same Money Transfer Control Numbers, two same amounts, same dates and seconds, then we know it's a double and then we take that out. All the other data will stay the same of course.

Q. And so you said you hand over the information to the law enforcement agencies on a CD. In what format is the information kept on the CD? Is it also Excel or is it a different format?

A. It's always Excel or Excel SX, so it's maybe an XLS file.

Q. Now I'm going to ask you a few questions about the present case in which you are testifying. Was Western Union requested to provide information about money transfers in this case?

A. Yes. I have received from the Austrian prosecutor an order to release this data. And if necessary, I even have it with me in my -- in my bag, so ...

Q. So I take it that you got a request via the Austrian authorities?

A. Exactly.

Q. And to whom did you provide the information once you've complied with the request?

A. Actually, directly to the address in the -- for the Austrian court, it's in the Landesgerichtsstraße, if you need that too.

Q. No, that -- that will be fine. But I do want to show you, and I have a binder or a small binder for you, I do want to show you 11 Excel sheets that you will be able to find under tabs 2 to 12. And I'll read out the ERN numbers for the record. What you will see in the binders are screenshots of the actual Excel sheets.

For the record, it concerns the following documents: It's 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; CAR-OTP-0074-0854; CAR-OTP-0074-0855; CAR-OTP-0074-0856; and the last one, CAR-OTP-0085-0856.
Mr Smetana, I don't know if you had a chance to just glance through those documents, but do you recognize those documents, tab 2 to 11?
A. Yes, I remember these numbers that you were saying.
Q. And can you explain to the Chamber what the documents are that you see in front of you?
A. Those documents are actually are records of our payments from certain persons.
Q. And do you know who compiled these Excel sheets?
A. I did. I did compile this sheet.
Q. And is the information that is contained in the records consistent with the type of information Western Union normally provides to law enforcement agencies?
A. That's correct.
MS STRUYVEN: Your Honours, with your authorisation, my plan is to ask him to go through one of them. I'm not -- I don't have an intention -- because they're all similar, so I would suggest we just go through one of them.
Q. So Mr Smetana, what I will ask is the court officer to show one of them on your computer screen, because it contains a lot of columns, and it is CAR-OTP-0070-0007, and I would like you more specifically to go to tab 34, which is entitled Nginamau.
Mr Smetana, normally you will see in a -- you will see shortly the information on your computer screen and I would like you just to take the rows 2 and 3 of that Excel sheet and to explain to the Chamber the different columns.
A. The meanings, yes.

Q. Yes, exactly. I don't know if we can --
A. Can --
Q. -- have the headers?
A. Can we go up to the header?
Q. Yeah, exactly.
A. Yeah.
Q. If we can have the headers on the -- yes.
So if you can just explain the columns and what the information contains.
A. Hang on. Yes. The first column, A, is the sending amount in US dollars.
Second column is the Money Transfer Control Number unique to each transaction.
So every transaction has a different number. And it's a 10-digit so we can easily identify that's -- this number is from us.
The third one is easy, it's the sender's name.
The column D is our sending agent. This is a code where we can identify in our systems which agent and the location and the address and everything. I lost -- okay, now it's back.
The next one is the sender's phone number. Here we'll have to say this is provided by the sender to the operator. So we cannot be sure if it's -- always if it's a correct phone number.
Column F is the send date.
And the send -- G, the send time. Here we have to be careful also on the writing of the date and time, Europe or US style. But this one is usually the US style where we captured this.
F, send date.
G, send time, and this is Eastern Standard Time, which is basically the same as

New York time.

So each transaction we have to convert then to the country's time.

In certain cases -- column H, in certain cases, Western Union requires a second ID type that would be here. In some countries we don't need it.

The column I is the sender's date of birth.

The column J is the type of the ID shown; for example, A is passport, B is driving licence. We have at list with all these different ID types.

K is the first ID number shown by the sender or receiver. In this case it's the sending ID number, that means the ID of the sender.

On L we have the SLD location, which means where the ID has been issued.

Column M and N belongs sometimes together because we have also an option in more than 26 countries that you can make payments through Western Union.com website, which means if such a payment has been made you would see the credit card number because you can use these credit cards to send online money transfer to other people in those countries.

And then we would also have the SIP number from where this money has been sent, from example, the home computer of somebody, he gets into Western Union website and types in a transaction. We also capture the IP address from -- from those online transactions. But if you see nothing there, then it was consumer-to-consumer transaction.

Then on O we have the sender's address, which is also provided by the sender and must not necessarily be the correct one. It's just what the operator types in when the sender or receiver types -- writes his address.

Then on P you have the send city.

Q, the send state if available.

And on R, the sender's ZIP code.
And on S, sending country.
And then you have T is the sending currency. So in this case it was that the currency paid at the sent location would be US dollars.
And sent amount local. Here for example it would be the right amount if I would send it in euro.
Send net ID on V is more a Western Union internal, it's not necessary to explain this.
In some occasions, on W, sent occupation, people are able to -- to write down what their job is.
Affinity pay ID is also Western Union internal.
Q. Just before you go to the next column, if you cannot read out the name of the next column.
A. Okay. So, yeah, the next one, all what starts on this sheet with P is from the payee's side, means receiving side. So you have the payee name.
Then at column Zulu you have the pay agent where we also can figure out easily the address where it has been paid out. It's just a code for this agent.
And of course on AA you have the payee's or receiver's phone number as long as he indicates it at the point of sale.
On AB it's again pay date.
AC, pay time in Eastern Standard Time again.
AD is pay ID number 2, of course if there is a second ID required.
Then you have the payee's date of birth, that means the receiver's date of birth.
Again, the payee's ID type.
Then you have the pay ID number
And where the ID has been issued is the pay ID location.

Here again you have the payee's address provided by the receiver.
Payee's city, it's where it's paid out.
Then you have the payee's state.
The ZIP code.
The two-letter payee country.
The AN is not applicable. It's internal.
Then also if the receiver wants to state his occupation he has the possibility for this field.
Then again the pay amount in US dollars is receiver's amount in US dollars.
Then you have the pay currency, that means in which currency it has been paid out, like euro or other currencies.
And then pay amount local means the translation of the US dollars in, for example, euro thousand 365.
Company code is Western Union.
Then you have again ID number.
And then the sending agent name, so the names from our contractors.
We also have in addition the sending agent's address.
In the back here, where the -- the city where the agent resides is the send agent city.
And again the send agent country code.
Pay agent name.
Pay agent address. As I explained, everything is like on the send side.
Pay agent city, of course.
Yeah, that's pretty much it. It has pretty much all the details we need to identify where the money has been sent, or where it has been paid out, including the address of the agents.

Q. Thank you for that. And just to be 100 per cent clear, the information then that is in there then is related to the sender is the information that the sender is providing and the information that is in there related to the receiver is again information that it is -- that the receiver is providing?

A. That's correct, except ID card number, which usually the operator types in from the ID card.

Q. Now, I asked you to look at 11 Excel sheets. Is the information contained in the other 10 Excel sheets similar to the information that we just went through?

A. Yes. We use pretty much all the time the same templates. We can of course take out some -- some internal stuff, but at this time the mitigate programme had -- had these -- these columns like this. There are some probably too much of it, which is Western Union internal, but it captures all the relevant data fields for law enforcement, so ...

Q. Now, there is a few small things in the Excel sheets that I would like to discuss with you and the first one relates to spelling. And I would like you to look at tab 3 of the binder in front of you. And for the electronic version it would be CAR-OTP-0070-0005, and for the electronic version it is tab 4 called Joachim Kokate. And in the hard copy binders it's tab 3.
Now, do you have tab 3 in front of you?

A. Yes.

Q. And I would just like to ask you to look at the rows 29, 32 and 34 of column C.

A. Yes.

Q. And so what I can see here is that you have the name, Joachim Kokate, but it is spelt differently in the different rows.

A. Exactly. You want to know the reason --

Q. Yes.

A. -- why -- why we have put it with this name as well under this sheet? Because, first of all, when you go under sender's phone, you can see that it's the same phone number provided as with the other name; as with Joachim with C is the same phone number I can see then with Joaquim.

And you can probably also see, when I'm right here, it's the same sender's date of birth. So they must have written this first name in a different spelling.

But we can clearly identify that this is the same person because there is also the same ID number on the side, on K, on column K. We have the same phone number, same date of birth and same ID which fully connects those persons together. So that must be the same person.

I'm just checking if the address is also the same. Yeah, 17 Avenue. So it's pretty much -- all the details -- all the other details are the same that links and makes the suspicion that this is of course the same person.

Q. And that was going to be my next question, how -- when you conduct your searches on the database, how do you conduct your searches in order for these results to come up?

A. Yes, I think I shortly mentioned it before. You can start, for example, with the name and date of birth. Once I have the right person with the right date of birth, I drill down any ID card number, which is possibly in our system. So I get all the transactions under this specific ID card number. And when they use the same, sometimes you have then more transactions because the name and spelling is different. But it's the same ID. And we do the same -- we can do the same with telephone numbers, we can do a real lot in drill downs to make sure that this is connected to the same persons.

Q. Now, in respect of a second clarification that I would like in respect of the Excel sheets, if I can ask you to go to tab 5 in your binder, and that would be the fourth page of tab 5. Electronically it would be CAR-OTP-0070-0007, and it's -- within that Excel sheet it's the electronic tab 32 called Musamba.

And for the Judges and the witness it is tab 5, the fourth page. And so this is the transaction sheet of Aimé Musamba Kilolo. And if I look at row 62.

A. The one in yellow?

Q. Yes. It's tab 32 called A Musamba. I think electronically the tab may be at the end of the row. I can ask the question also without the electronic version, but what you will see here is there is an amount of -- I'll try to describe it as objectively as I can. There is an amount of 312.70 US dollars being sent from Aimé Kilolo, what you can see in column 6 -- C to Joachim Kokate which you can see in column Y. But then if you look at the column AP, you see that 312.71 US dollars being collected.

So the received amount is slightly higher than the sent amount. And so my question was going to be in which circumstances does that happen?

A. Yes. Yes, at the -- there might be a slight change from currency exchange rates which -- for example, we update these currency exchange rates three times a day. So there might -- I think that would be the reason why -- why we have this slight difference.

And it's also -- let me see. It's -- oh, sorry, it's paid out in euro. That means they have -- they did a currency exchange into euro at that point because you can send it via US dollars but then they have put the rates from euro. And this is why there is a different amount there because this was sent amount in local currency, so this -- the person has picked it up in euro. And that's the -- the exchange from the -- from the 312, so ...

PRESIDING JUDGE SCHMITT: Mrs Struyven, I think we will have this short break until 12 o'clock and then we continue.

THE COURT USHER: All rise.

(Recess taken at 11.31 a.m.)

(Upon resuming in open session at 12.03 p.m.)

THE COURT USHER: All rise.

PRESIDING JUDGE SCHMITT: We continue with the examination of the Prosecution. You have the floor.

MS STRUYVEN: Thank you, Mr President. We only have a few questions left.

Q. So, Mr Witness, there is a third instance that I would like to clarify. If I can ask you to go to tab 3, and that is for the hard copies, it's tab 3, again, the fourth page. And for the electronic version, that would be CAR-OTP-0070-0005. And for the electronic version, it would be tab 4 Kokate. Now, for the hard copy, as I said it's the fourth page at tab 3, it's highlighted in yellow, it's row 92 that I'm interested in. Here I see a transaction of 549.93 US dollars from, as indicated in column C, Kokate. And the money is being sent, if I go to column Y, it's being sent to Arido Narcise, Narcisse being spelled with one S. And this is a transaction that occurs on 25 July 2012.

Now, when I do the search under the tab of Arido Narcisse, I can't find the same transaction. So I find the transaction from Kokate to Arido, but I don't find the transaction from Arido to Kokate.

Can you explain to us in which instances that can occur?

A. This basically occurs when we do a name check; for example, Joachim Kokate -- or for Narcisse Arido, for example, and I -- I cannot find the same name, like, because maybe there is an S missing, then we search for other related names in this case and then we found actually the transaction which leads back to this Narcisse Arido, because the system usually when I look for a name it must be spelt correctly.

So in this case it could happen that I found this transaction under a transaction from somebody else and as a receiver it's just with one -- one S. So this can occur if -- if we run different searches on the names.

So from one name to the other it can be written correctly, but when I -- when I go directly to Narcisse Arido, it wouldn't pop up if I would put two Ss in. So it occurs that I run transaction from another name in connection to this person and then I can see that this Narcisse is written with only one S. And when I check either IDs or whatever, and then we can -- we can be assured that this is the same person then.

It's a bit difficult with the drill down because when you check this name it must not necessarily pop up under the correct name. It comes sometimes that I check the other name in connection to this person who has transferred something to this person and then I can see it's only written with one S. But usually we verify with ID or with date of birth and other accompaniments so we can -- we can connect this person to this transaction related to this case.

Q. Thank you for that clarification. I only have a few final questions for you.

Having had a chance to look at the materials that I've read out, all the ERN numbers that I've read out, do you have any reasons to believe the information contained in the Western Union records would be inaccurate?

A. No. There is no inaccurate information on all of this, everything is captured.

There could be of course inaccurate information when it comes that the sender or receiver gives wrong details to the operator.

So for example, when somebody walks in and says okay, my address is this address and then it's not the right one, then we cannot do something against it because this information is provided by the sender or by the receiver. Certain information of course is entered by the -- by our operators from ID card numbers, or et cetera, this should be the correct number.

But mainly rely on the information the receiver is giving us, like telephone numbers or other details.

Q. Second question: The information that Western Union provided to the Office of The Prosecutor, was it altered in any way?

A. Not in any way. As I said before, we just come up when we do these drill downs and double-checks that there might be one transaction twice. But from the Money Transfer Control Number when we -- when we check this, then it must be the same Money Transfer Control Numbers we can take out one. You have the same time, same date, same amount, same receiver and the same Money Transfer Control Number. So we take this out because we are sure that this is just doubled from previous investigations on running different systems.

Q. And then one last question which is similar: Was the information in any way manipulated before it was provided to the Office of The Prosecutor?

A. Not at all. So ...

MS STRUYVEN: Then I have no further questions.

PRESIDING JUDGE SCHMITT: If we had known that, perhaps we could have made it before the break.

We have of course this pending issue until 1 o'clock. I would think that a break until 2.30 would be excessive, so I suggest that we have a break until 2 o'clock. And I would like to inquire with the Registry if we, in case we continue with the examination by the Defence, had the possibility to have two hours in the afternoon?

Thumbs up means that it would be possible, so we will come back after a relatively long break now and meet again at 2 o'clock and I hope this issue is solved then.

THE COURT USHER: All rise.

MR POWLES: Mr President. Mr President.

PRESIDING JUDGE SCHMITT: No, it's -- we are too quick.

MR POWLES: No, it was just a small point.

PRESIDING JUDGE SCHMITT: Yeah.

MR POWLES: The witness referred to an order from the Austrian prosecutor that he had in his bag, and I just one wonder whether that could be provided to the Defence seeing as it was offered by the witness.

PRESIDING JUDGE SCHMITT: I don't see a problem with that to be honest. So you suggested it, and I sensed that you thought a while about it, that you have it in your bag, and I don't see any problem in that. So if you can align with each other and (Overlapping speakers).

MR POWLES: Thank you very much, Mr President.

THE WITNESS: Okay. I can --

MR POWLES: Thank you.

PRESIDING JUDGE SCHMITT: (Microphone not activated)

THE COURT USHER: All rise.

(Recess taken at 12.12 p.m.)

(Upon resuming in open session at 2.01 p.m.)

THE COURT USHER: All rise.

PRESIDING JUDGE SCHMITT: We have the following short ruling:
Earlier today the Chamber ordered the Prosecution to inquire whether there was any prior correspondence with Witness 267 regarding the Prosecution submission in

October 2012, and if so, to provide this prior correspondence and the Prosecution's end-of-mission report to the Chamber. The Prosecution was further requested to disclose to the Defence its contact logs with Witness 267.

The Prosecution has duly provided that end-of-mission report to the Chamber and also informed the Chamber that there exists no further documentation in respect of the mission in question.

Having reviewed the end-of-mission report, the Chamber is satisfied that the Prosecution has disclosed all relevant information contained therein to the Defence.

In light of this information and in light of the earlier disclosure to the Defence, of the Prosecution's contact logs with the witness, the Chamber would like to inquire into how much preparation time, if any, the Defence will require for its cross-examination.

This concludes the ruling.

And as I have said at the end of the ruling, I would like to inquire with the Defence teams how much time they envisage for the examination of this witness, and if they will be considering the information we have now given in the ruling, prepared to continue with the examination this afternoon?

MR POWLES: Mr President, your Honours, on behalf of Mr Kilolo, we anticipate that we'll be approximately 45 minutes, maybe a little bit longer, but I'd say approximately 45 minutes. There is material that I can deal with and make some progress with. Obviously we would have preferred to have slightly more time, but I can try. And I think I'll be receiving information as I'm on my feet to put to the witness, but we can certainly make a start today. And we'll be about 45 minutes. And if anything arises from the more recent information that we've received, then we can deal with it at a later date.

PRESIDING JUDGE SCHMITT: Mr Gosnell.

MR GOSNELL: Thank you, Mr President. Our cross-examination, I do not imagine, would exceed the length that has been suggested for the Kilolo cross-examination. I would not -- I would request not to be required to start today. We have just received some documents that are only in German and therefore -- I don't speak German, but even if I did speak German, I wouldn't be able to use them in court, and I would like to use the documents I have chronologically, and one of the earliest documents is in German, so I would request not to be required to start until tomorrow.

PRESIDING JUDGE SCHMITT: I think I have an idea what document you are talking about.

MR POWLES: I mean, I should have said it -- should add, on behalf of Mr Kilolo, it would certainly be preferable to start tomorrow and I suspect we'll be more efficient and I'll be able to get through my cross-examination more expeditiously if we had more time to prepare it now rather than being a bit more muddled and cross-referring to lots of different documents.

PRESIDING JUDGE SCHMITT: Mr Kilenda.

MR KILENDA: (Interpretation) Thank you very much indeed, Mr President. For the time being, the Babala Defence has no questions.

However, we should like to begin tomorrow because we want to make sure that we can check some of the documents that have been communicated to us because it would seem, sir, that our respective clients allow me, therefore, for once, to speak on behalf of all the accused persons here, would be involved in the case of the cooperation between the Office of The Prosecution and the countries from which the witnesses hale, as people haven't committed war crimes. And I would like to be able to look into that, sir. But for the time being, let me confirm that my team will have no questions to ask today.

PRESIDING JUDGE SCHMITT: Mr Taku.

MR TAKU: May it please, your Honours. We had in mind initially to cross-examine this witness for about 15 to 20 minutes, if not less, but we just received these documents and it would be prudent for us to look at these documents with our client to receive further instructions.

PRESIDING JUDGE SCHMITT: And finally, Mrs Taylor, of course.

MS TAYLOR: Thank you, Mr President. We simply reiterate the concerns expressed by my colleagues, particularly concerning our lack of proficiency in German. Thank you.

(Trial Chamber confers)

PRESIDING JUDGE SCHMITT: Yeah, I have in mind that after Mrs Taylor raised their objection this morning, I said that we will be mindful of the problem and especially will be mindful of requests for more preparation time of the Defence, mindful meaning that you remember it when the issue comes up.

And because of that, although it's not very satisfactory at the moment after a break to resume to say to resume tomorrow morning, but I agree with the Defence teams that there is not a completely new situation, but that they have their time, not only because they have these new documents, but we also have -- they have there -- they want to have a consistent examination and that means that they want to have everything on the table and put it together.

Because of that, although as I said not completely satisfactory, we resume tomorrow at 9.30.

I assume that we could, and I have the information that P-214 would be ready tomorrow too, perhaps in the afternoon then, or ...

MR VANDERPUYE: Thank you, Mr President. Yes, my understanding is that

P-214 will be ready to go tomorrow. The witness arrived I think yesterday, and is undergoing the familiarisation today. So all things being equal, he should be available tomorrow, whether it's in the morning or the afternoon.

PRESIDING JUDGE SCHMITT: Then tentatively, I would say, be prepared for the afternoon. In the morning we will have definitely the examination by the Defence of the current witness, and then we see how far we come and we will continue in the afternoon at the earliest.

MR VANDERPUYE: We'll be ready to go, Mr President.

PRESIDING JUDGE SCHMITT: This concludes today's hearing. We resume tomorrow morning at 9.30.

THE COURT USHER: All rise.

(The hearing ends in open session at 2.08 p.m.)