

1 International Criminal Court  
2 Trial Chamber VII - Courtroom 1  
3 Situation: Central African Republic  
4 In the case of The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba,  
5 Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido  
6 ICC-01/05-01/13  
7 Presiding Judge Bertram Schmitt, Judge Marc Perrin de Brichambaut and  
8 Judge Raul Pangalangan  
9 Trial Hearing  
10 Friday, 11 March 2016  
11 (The hearing starts in open session at 9.40 a.m.)  
12 THE COURT USHER: All rise. The International Criminal Court is now in session.  
13 PRESIDING JUDGE SCHMITT: Good morning, everyone.  
14 I see that the video link is established.  
15 THE COURT OFFICER: Good morning, Mr President, indeed.  
16 PRESIDING JUDGE SCHMITT: Could the court officer please call the case.  
17 THE COURT OFFICER: Good morning. Yes, Mr President.  
18 Situation in the Central African Republic in the case of The Prosecutor versus Jean-Pierre  
19 Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala  
20 Wandu and Narcisse Arido, in the case reference ICC-01/05-01/13.  
21 And for the record, we are in open session.  
22 PRESIDING JUDGE SCHMITT: Thank you very much. Appearances, please.  
23 MR VANDERPUYE: Good morning, Mr President, your Honours. Good morning,  
24 everyone.  
25 Today the Prosecution is represented by Olivia Struyven, seated to my right; Karen

1 Heath, seated behind her; Sylvie Vidinha, seated to my left; and I'm Kweku Vanderpuye.

2 Good morning again.

3 PRESIDING JUDGE SCHMITT: Thank you very much.

4 For the Defence, please?

5 MR DJUNGA: Thank you, your Honours. Good morning. Mr Kilolo has been  
6 exempted from attendance today, and he is represented by his usual team.

7 MS LYONS: Thank you. Good morning, your Honours. The Arido team is  
8 represented by Chief Taku to my left; myself, associate counsel, Beth Lyons; Mr Arido,  
9 our client is here; and our two case managers, Mr Kiel Walker, and Mr Tibor Bajnovic.  
10 Thank you.

11 PRESIDING JUDGE SCHMITT: Thank you very much.

12 Mr Kilenda.

13 MR KILENDA: Good morning, your Honours. Mr Babala is assisted by two case  
14 managers, Coralie Klipfel and Adriana-Maria Manolescu, and the usual co-counsels, as  
15 well as Mr Bokolombe.

16 PRESIDING JUDGE SCHMITT: Mr Gosnell?

17 MR GOSNELL: Good morning, Mr President.

18 Christopher Gosnell representing Mr Mangenda to my left assisted by Ms Nikki Sethi  
19 and Miss Rita Yip. Thank you, your Honours.

20 PRESIDING JUDGE SCHMITT: Thank you.

21 And Mrs Taylor, finally.

22 MS TAYLOR: Good morning, Mr President, your Honours. Melinda Taylor on behalf  
23 of Mr Jean-Pierre Bemba. And I'm assisted today by Ms Natacha Lebaindre and  
24 Ms Ines Pierre de la Brière. Thank you.

25 PRESIDING JUDGE SCHMITT: Thank you very much. Before we start --

1 (Microphone not activated)

2 THE INTERPRETER: Microphone, please.

3 PRESIDING JUDGE SCHMITT: Excuse me. I have to start again. Before we start  
4 with the testimony of the expert, the Chamber notes that the Arido Defence has made a  
5 request to delay Mr Arido's testimony until after the Easter recess. We would like for  
6 the Arido Defence to put their reasons for this request on to the record, we have, of  
7 course, taken note of them, and then seek any views from the other parties. So please,  
8 you have the floor, Mr Taku or whomever.

9 MR TAKU: Good morning, your Honours. I thank you once more for this  
10 opportunity to address the Court.  
11 Your Honours, as you've noted, yesterday we sent this request to your Honours and  
12 asked your Honours to further reconsider our request for the following reasons: We  
13 got some disclosures, your Honours, from the Prosecutor a few days ago, about  
14 the -- communicating some information to us. We would like to analyze that  
15 information. We're currently in court and possibly with some very important aspects  
16 relating directly to Mr Arido and also some information relating to that investigation  
17 that we'd like to investigate further, to the extent possible. To the extent possible, I  
18 would like to emphasize, and to be advised to be -- an opportunity to advise Mr Arido  
19 properly about his rights as an accused in this case before he takes the stand.  
20 Also, your Honours, although your Honours have clearly defined the period of time in  
21 which this trial will be conducted, your Honours have clearly stated that your Honours  
22 will not re-litigate the issue in the Bemba trial, we agree entirely with the wisdom of the  
23 Court in so doing, but we're also very interested, your Honours, to look at -- to have an  
24 opportunity to reach the judgment of Mr Bemba that will come out, and not necessarily  
25 for the content of the judgments, but on certain issues relating to particular witnesses

1 that came forth to testify against Mr Arido. We want to see whether that Trial Chamber  
2 will decide some issues, some of the issues related to this particular witness, is there  
3 evidence in that regard. We'll surely -- looking at that judgment will help Mr Arido to  
4 make a determination whether to take the stand or not. He was given an opportunity  
5 to take the stand, though we are still evaluating the evidence as it is adduced.

6 And also, your Honour, finally, your Honours, we do not want to split the evidence of  
7 Mr Arido, that he takes the stand, testifies, then the recess comes and thereafter part of  
8 the trial continues. We want him to take the stand and we'll finish with evidence.

9 Given all this time, your Honours, would help us to determine the issues that Mr Arido  
10 will testify about.

11 My intention is to make Mr Arido testify for him to respond already to the charges.

12 We now understand that we don't want to expand the case. Mr Arido has consistently  
13 said that he doesn't want the case to be expanded. We want to limit ourselves to the  
14 charges against Mr Arido and other consequential issues that arose as a result of the  
15 investigation, so giving us more time to have all this information available to us to  
16 analyse and advise Mr Arido would be in the interest of justice.

17 I'm sorry, your Honours, sorry, your Honours. The Arido Defence, your Honours, we  
18 believe that we've applied to drop witnesses, and we've made that decision advisedly  
19 with the -- of course Mr Arido instructed us to do that in this pending application, but if  
20 Arido's -- the extension is granted, the extension would not go beyond the limits to  
21 which -- of the time that your Honours had previously allocated for the Arido Defence.

22 Thank you very much, your Honours.

23 PRESIDING JUDGE SCHMITT: Thank you, Mr Taku.

24 Any comments first perhaps by the other Defence teams? I think that will not be the  
25 case then. Comments by the Prosecution?

1 MR VANDERPUYE: Thank you, Mr President. We are not amenable to an

2 adjournment of the case for the purposes as spelled out by my colleague, Mr Taku, or

3 Chief Taku.

4 First of all, I don't know specifically what disclosure he's referring to when he says he

5 needs to analyze this information in order to discuss it with his client. It's not particular

6 as to what it is and why it requires that amount of time in order to do so.

7 The second issue relates to the investigation of that information, and so the issue is the

8 same. What is the nature of the information? What are the investigative steps that

9 need to be taken as a result of it? What investigative steps have been taken in

10 anticipation of that information and so on?

11 In relation to -- in relation to his assertion that he needs this time to advise his client of

12 his rights should he testify, I have to admit that I'm a little bit surprised to hear that.

13 Mr Arido has been on this trial since -- if I'm not mistaken, we've been on trial since 29

14 September of 2015. Pre-trial proceedings before this Chamber and other constitutions,

15 at least trial Chamber VII began -- I think the Chamber was constituted on 30 January or

16 so of 2015.

17 Chief Taku came into the case a little bit later, I would estimate about March or so,

18 maybe April of 2015. So it seems to me that up until now, he would have had a

19 sufficient amount of time to discuss with his client the prospect of testifying in this case.

20 And the case for the record was confirmed, I think, on the 14th or so of November of

21 2014. So trial was inevitable, so to speak, at the time that Chief Taku took over

22 leadership of the Arido Defence.

23 With respect to an opportunity to review or to receive the judgment in the Bemba case, I

24 can't see what relevance that has to this Chamber in particular. The matters that are

25 before that Chamber, Trial Chamber III, are distinct and different from the matters

1 before this Chamber.

2 The result of that case has no impact whatsoever on the evidence or the trial before this  
3 Chamber. And I think this Chamber made that abundantly clear at the opening of this  
4 case. And that's the reason why the issues in the main case are not being litigated here,  
5 because it involves a completely separate charge, completely separate facts, and it will  
6 entail obviously a completely separate determination of the evidence relevant to the  
7 charges in this case.

8 I think Chief Taku talked about issues relating to a particular witness or particular  
9 witnesses in that case. And for the same reasons, that has absolutely nothing to do with  
10 the determination here. Whether those witnesses are credited or discredited in the  
11 main case is a separate determination by a separate Chamber based on separate evidence  
12 in separate circumstances, so it really has no relevance whatsoever to Mr Arido's  
13 testimony.

14 He indicated also that one of the reasons that he wanted to delay the testimony of  
15 Mr Arido was so that he could avoid splitting Mr Arido's testimony. I don't foresee  
16 that there are that many witnesses left before the break, and I can't see any reason why  
17 Mr Arido can't be one of the witnesses that are called well in advance of the break. So I  
18 don't see that that is even a legitimate reason to put on his -- to adjourn his evidence.

19 The fifth reason I think he gave was in respect of dropping witnesses that because  
20 they've dropped witnesses they won't exceed the time that's already allocated to the  
21 Chamber. This isn't a trial against one accused. This is a trial against five accused.

22 And I've heard, and I'm sure the Chamber has heard on repeated occasions the need to  
23 conduct these proceedings expeditiously, which is what we did when we put on the  
24 Prosecution case, which is what the Chamber I think repeatedly communicated to the  
25 Defence in this case. And to the extent that there is the opportunity to conclude these

1 proceedings expeditiously, we should take advantage of it, and it would be of no  
2 detriment whatsoever to the Arido Defence for Mr Arido to testify or not testify as his  
3 counsel advised him and as they see fit. And it is absolutely -- there's no reason on that  
4 basis to adjourn the proceedings. We're ready to go when he's ready to go,  
5 Mr President.

6 PRESIDING JUDGE SCHMITT: Thank you very much. Mr Kilenda.

7 MR KILENDA: (Interpretation) Thank you, your Honour, for allowing me to address  
8 the Court. Mr Babala's Defence team is entirely opposed to the Prosecution position. I  
9 would like to remind the Court and the Prosecution, I believe he is rather -- his memory  
10 is quite short these days -- the arrest warrant that was taken in extenso and the  
11 application in which he requested arrest of our respective clients, that arrest warrant set  
12 out that the evidence was impressive and abundant; yet, as early as the initial  
13 appearance, the Prosecution said they were trial ready, they could go to trial quickly.  
14 And I believe if you read the transcripts of the hearings before the Pre-Trial Chamber,  
15 the Prosecution were the first to ask for various delays for disclosure even though they  
16 said that their evidence was abundant and impressive. So I believe that the application  
17 from Mr Arido's team is not exaggerated. And since criminal justice can take time, I  
18 think that -- well, we do wish to move quickly, but at time we need to take times.  
19 The grounds for the application are quite plausible, valid, and I don't think that we need  
20 to engage in express trained sort of criminal justice right now. I believe that we -- that a  
21 delay is necessary so that the Court can ultimately make a final proper decision.

22 MR POWLES: Thank you very much, Mr President. I'll try and be very brief. We  
23 had not intended to take the floor in relation to this particular issue, but I think it's right  
24 that we do respond to an issue that was raised by Mr Vanderpuye on behalf of the Office  
25 of the Prosecutor and that is on behalf of our client. We don't object or oppose the

1 application that's been made on behalf of Mr Arido to postpone the commencement of  
2 his evidence. I think it's right that we should make the Court aware of that. It's right, I  
3 think, that Mr Arido will be one of if not the first accused to give evidence in his Defence  
4 at this institution. It would -- we would certainly appreciate the difficulties that that  
5 could create for Mr Arido were his evidence to be interrupted by not only the Easter  
6 break, which is a number of days, but also not an insignificant event, which is the  
7 judgment in the Bemba main case. And if that were to occur during the duration of  
8 Mr Arido's evidence, we certainly can appreciate the difficulties that that could give rise  
9 to on behalf of his team.

10 PRESIDING JUDGE SCHMITT: Thank you very much. Mr Gosnell is rising. You  
11 have the floor.

12 MR GOSNELL: For the record, we also do not oppose the request, Mr President. I  
13 thought that should just be clear for the record.

14 PRESIDING JUDGE SCHMITT: I think I can -- normally you should not do that, but I  
15 nearly could speak for you, Mrs Taylor. You're also not opposing, I assume.

16 MS TAYLOR: The Defence for Mr Bemba takes no position. Thank you, Mr President.

17 PRESIDING JUDGE SCHMITT: Then, Mr Taku, please be short because I think we  
18 have heard enough on the topic.

19 MR TAKU: Yes, your Honours. Some of the comments made by the Prosecutor are  
20 unprecedented. They are a clear intention to violate the rights of Mr Arido.

21 Mr Arido is an accused who may rightly take the stand in his own defence, but his right  
22 as an accused in this Court cannot be circumvented by the mere fact that he intends to  
23 testify.

24 For the Prosecutor to make comments that he should testify immediately and how long  
25 he could testify, how long this hearing could take, I think it's for the Court to decide

1 when -- how long the Court wants the particular witness to testify. It's not for the  
2 Prosecutor to suggest. He can make determinations about how his evidence will be  
3 presented in the Arido Defence.

4 More important, your Honours, it is unprecedented, and I say it's unprecedented from  
5 my own experienced point of view that in a case like this where the accused, an accused  
6 person has lists of witnesses on his witness list and suddenly the Prosecutor is making a  
7 determination to treat all of them as suspects and is conducting ongoing investigations,  
8 he seeks the cooperation of the Republic of Central Africa, of the government of Central  
9 Africa, and did not disclose the instruments of the -- the assistance that is sought to us  
10 until we've made the application to the Court, who the Court may have evaluated it and  
11 there are several issues, your Honour, Mr Arido has to consider that were discussed in  
12 this case that lead to his movement from Cameroon to France and the individuals  
13 involved. That cooperation and the number of people the Prosecutor saw in South  
14 Africa is directly connected to the issues involved in the security of Mr Arido and his  
15 family and then the ongoing investigation within his family at the moment in Cameroon  
16 to which we're drawing the attention of the Cameroonian police to the ongoing  
17 harassment of Mr Arido's wife and children in Cameroon as well.

18 So we need time, your Honours, for Mr Arido, first, for his own -- for -- in order for him  
19 to even calm down about the anxiety he's having about his family about the ongoing  
20 investigation but to know precisely, to investigate the documents that were sent to us  
21 from South Africa and some of the authorities that were talked and to know exactly  
22 what is going on. I think Mr Arido deserves the right to know.

23 Secondly, your Honours, Mr Arido deserves a right to analyse the evidence adduced by  
24 co-accused in this case, some of which we think has clarified many of the issues that  
25 were of interest to us. And at the end of the day, your Honours, when we have all this

1 information and all the decisions and the pending applications that Mr Arido filed, when  
2 we have all these, your Honours, we will be in the position to make a determination.

3 But before then, your Honours, I think Mr Arido is not the first to have asked or  
4 requested for a delay in the commencement. It's not an adjournment. The Prosecutor  
5 wrongly says an adjournment. It's a delay in the commencement date.

6 In that case, we merely said in our position that your Honours will take into  
7 consideration the points we have raised in making the scheduling order. We are not  
8 imposing anything, but we believe that it would be reasonable in these instances, your  
9 Honours, to give Mr Arido this opportunity to make an informed decision and to  
10 highlight the issues that are left for him to address through his testimony.

11 We oppose the Prosecutor's statement made by the Prosecutors.

12 I hesitate, your Honour, I still very much very much to say that these statements, when  
13 read along with the ongoing actions in the field that the Prosecutor had unleashed  
14 against the witness, Mr Arido, and the testimony of Mr Arido, we merely lack the  
15 resources and the means to go to the field right now. We can't divide our time in the  
16 courtroom and be in the field. So we need very, very later time, your Honours.

17 We will promise that shortly after the recess, after the holidays, we will be thrift, we will  
18 be -- we'll make -- we'll streamline our evidence and we'll make sure that we do not  
19 cause any further delays. Thank you, your Honours, for your kind attention.

20 PRESIDING JUDGE SCHMITT: No further submissions in that respect. I think we  
21 have heard enough.

22 MR VANDERPUYE: Fair enough, Mr President. Can we go into private session for a  
23 moment, please.

24 PRESIDING JUDGE SCHMITT: I don't see the reason.

25 THE INTERPRETER: Microphone.

1 MR VANDERPUYE: Chief Taku has raised certain issues with respect to the  
2 investigation of his client or investigation of people close to his client, which I don't think  
3 should have been addressed in public session if it's a security issue specifically for his  
4 client. I'm happy to address those issues, though, in open session.

5 PRESIDING JUDGE SCHMITT: I think there will be no need because, as I said, we  
6 have heard enough. We have now discussed a certain issue, a certain request by the  
7 Arido Defence, and it's about this request that we will give a ruling on short notice.

8 And if anything else should be addressed to the Court, this is another matter and that  
9 can be brought up if the Prosecution thinks there is something to request it or submit it  
10 or the Arido Defence. But, first of all, the Chamber would like to decide on the request  
11 of Mr Arido and on the issue which we have discussed in the past 30 minutes.

12 MR VANDERPUYE: I agree, Mr President. My concern is that Chief Taku has  
13 basically accused the Office of the Prosecutor of misconduct in a public session, knowing  
14 fully well what the Office of the Prosecutor is doing and that it is entirely appropriate  
15 and legal. I think it's appropriate for us to address that, to set the record straight in this  
16 case and not allow this sort of inappropriate reckless comments to be made on the public  
17 record concerning the actions of the Prosecutor left unaddressed. I don't think that's  
18 appropriate at all.

19 PRESIDING JUDGE SCHMITT: Mr Vanderpuye, so what you have done now is in  
20 open session to lay out your position, that's perfectly okay, and we move on with -- we  
21 will have a short deliberation. We will move on with the subject matter what we have  
22 discussed. And if you want to discuss later on after the witness testimony, if you still  
23 want to discuss this matter, then we can bring it up again.

24 MR VANDERPUYE: Thank you very much, Mr President.

25 (Trial Chamber confers)

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1 PRESIDING JUDGE SCHMITT: So the Chamber gives the following ruling: The  
2 Chamber notes the arguments of the parties on the Arido Defence request to postpone  
3 Mr Arido's testimony until after the Easter recess, namely the week of 4 April 2016.  
4 The Chamber has set a deadline to 8 April 2016 for any applications relating to adding or  
5 subtracting items of evidence from the record. Given the time needed to resolve any  
6 such applications and the fact that Mr Arido is expected to be the last witness called by  
7 any Defence team, having Mr Arido's testimony commence on 4 April does not affect the  
8 fair and expeditious conduct of the proceedings. The Chamber sees no issue with  
9 accommodating the Arido Defence under these circumstances. The request is therefore  
10 granted, and this concludes the ruling.

11 And I remind everybody that, of course, by this ruling, the deadline of 8 April 2016 is not  
12 affected and even Chief Taku I think has said that in his first submission. So we can  
13 now go on to and continue with the testimony of witness D23-1, Professor Lagodny.  
14 And Professor Lagodny can be brought into the video link location.

15 THE COURT OFFICER: (Via video link) Thank you, Mr President.

16 PRESIDING JUDGE SCHMITT: I think the picture has to be adjusted a little bit so that  
17 we can see Professor Lagodny. Now we see him perfectly.

18 WITNESS: CAR-D23-P-0001

19 THE WITNESS: Hello.

20 PRESIDING JUDGE SCHMITT: Professor Lagodny, good morning.

21 THE WITNESS: Good morning, Mr President.

22 PRESIDING JUDGE SCHMITT: You have been called to testify before the International  
23 Criminal Court. On behalf of the Chamber, I would like to welcome you in the  
24 courtroom.

25 THE WITNESS: Thank you.

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

4 Professor Lagodny, there is a card in front of you, I hope so at least, with the solemn  
5 undertaking to tell the truth. Could you please read it out loud?

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

8 PRESIDING JUDGE SCHMITT: Thank you, Professor Lagodny. Now a few practical  
9 matters you should please bear in mind when giving your testimony. As you know,  
10 everything we say here in the courtroom is written down and interpreted into English  
11 and French. It is, therefore, important to speak clearly and to speak at a moderate or  
12 rather slow pace. We want to make sure that your words are understood by the  
13 interpreters.

14 THE WITNESS: Yes.

15 PRESIDING JUDGE SCHMITT: Please speak into the microphone and only start  
16 speaking when the person asking you the question has finished. To allow for the  
17 interpretation, everyone has to wait a few seconds before starting to speak. So I  
18 recommend that when the lawyer has asked his or her question, please count to three  
19 before giving your answer.

20 THE WITNESS: Okay.

21 PRESIDING JUDGE SCHMITT: If you have any questions yourself, raise your hand so  
22 we know that you wish to say something. We will then give you the opportunity to  
23 speak. I trust you have understood this, Professor Lagodny?

24 THE WITNESS: Yes, I have understood this.

25 PRESIDING JUDGE SCHMITT: Thank you very much. Then we will start your

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1 testimony, and I give the Mangenda Defence the floor, I assume, Mr Gosnell.

2 MR GOSNELL: Mr President, with your leave, I'd like to stand, unlike previous  
3 questioning by -- in cases of video link, if that's -- if that's --

4 PRESIDING JUDGE SCHMITT: I'm not inclined to oppose that, Mr Gosnell.

5 MR GOSNELL: Thank you. Thank you, Mr President.

6 QUESTIONED BY MR GOSNELL:

7 Q. Good morning, Professor Lagodny. It's a great pleasure to see you here today.

8 A. Good morning, Mr Gosnell. Thank you, you and the Court, for enabling this  
9 video conference.

10 Q. Could we start please with tab 21, which is CAR-23-0008-0004.

11 THE COURT OFFICER: (Via video link) The document is presented to the witness.

12 THE WITNESS: Yes.

13 MR GOSNELL:

14 Q. Am I right, Professor, that this is your -- a summary of your curriculum vitae?

15 A. Yes, it is.

16 Q. And is it right that you are at present and have since 1999 been a professor at the  
17 University of Salzburg in Austria?

18 A. Yes. Yes, it is.

19 Q. And there you hold the chair for the Austrian and foreign criminal law and  
20 criminal procedure and comparative law?

21 A. Yes, it is true.

22 Q. And do you have any special expertise in the area of mutual legal assistance?

23 A. In spite of telling you a lot of things, I just want to show the Court this book which  
24 I've written together with Wolfgang Schomburg, who was then a judge at the ICTY and  
25 ICTR. I worked on this book together with him since nearly 30 years now.

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1 Q. So I take it that means you do have expertise in the area of mutual legal assistance?

2 A. Yes, sir, I think so.

3 Q. Leaving aside modesty, would you say that you're one of the leading experts in  
4 mutual legal assistance in relation to Austria?

5 A. Well, in the German speaking room, I'm surely someone who is -- who is  
6 well-known. It is always difficult to praise yourself in such a manner. It's not my way  
7 to do things.

8 Q. And in your experience is banking and the financial sector more generally an area  
9 of activity in which mutual legal assistance is often requested?

10 A. Of course. It plays an outstanding role in the whole area. You know, the  
11 banking secrecy nature is something which is -- coming from Germany, as I did 16 years  
12 ago, it was really a miracle for me to see the whole fortress of the banking secrecy nature.

13 Q. All right. And do the principles of mutual legal assistance, let's just start there,  
14 that apply generally, do they apply also in respect of requests in relation to the financial  
15 industry?

16 A. In general, yes; but in the European level, they are more or less reduced. But  
17 looking at -- at the legal situation in Austria, it is hard to get through for Prosecutors or  
18 whatever.

19 Q. All right. Could we please have tab 22 on the Defence list, which is  
20 CAR-D23-0006-0001.

21 THE COURT OFFICER: (Via video link) The document is being shown to the witness.

22 THE WITNESS: Okay.

23 MR GOSNELL:

24 Q. Professor, do you recognize this document?

25 A. Yes, of course. It's the paper I have written, and I have scanned and emailed it

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1 from -- from Freiburg.

2 Q. And if we could please turn to page 8 of this document. Is that your signature  
3 there at the end?

4 A. Yes. I have here the original. This is my signature.

5 Q. And does this report fully and correctly reflect your answers to the questions that  
6 you set out at the beginning of the report?

7 A. Yes, of course.

8 Q. Do you have any objection to this report being submitted as evidence before this  
9 Court?

10 A. No objection.

11 MR GOSNELL: Mr President, at this stage, in compliance with the Trial Chamber's  
12 previous order, I would tender this document now. I'm not sure whether you would  
13 wish to admit it now or whether we do that by some separate procedure.

14 PRESIDING JUDGE SCHMITT: I think you can tender it and we -- for the record, it  
15 would be good what we can do that the Chamber makes a ruling on that.

16 MR GOSNELL: Thank you, Mr President. So for the record, this is tendered pursuant  
17 to Rule 68(3) of the Rules.

18 PRESIDING JUDGE SCHMITT: Then we make this short ruling. The Chamber allows  
19 the introduction of the report of Professor Lagodny according to Rule 68(3) of the Rules.  
20 Please continue.

21 MR GOSNELL: Thank you very much, Mr President. I'd now like to call tab 23 of the  
22 Defence bundle, which is CAR-D23-0007-0001.

23 THE WITNESS: It's working.

24 THE COURT OFFICER: (Via video link) Yes, but we don't hear.

25 Mr Gosnell, could you please repeat the number? We had -- the video link had stopped

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1 for some seconds.

2 MR GOSNELL: Sure. It's Mangenda Defence tab 23, and that's number

3 CAR-D23-0007-0001.

4 THE COURT OFFICER: (Via video link) The document is presented to the witness.

5 THE WITNESS: Okay.

6 MR GOSNELL:

7 Q. Professor, do you remember having received this letter from me?

8 A. Yes, of course.

9 Q. Now, I'd just like to direct your attention to the second last paragraph which says,  
10 "Your answers in respect of these" -- I should say that this document should not be  
11 broadcast.

12 PRESIDING JUDGE SCHMITT: Then we try to do that technically.

13 MR GOSNELL: I thank the Registrar for that.

14 Q. The penultimate paragraph reads, "Your answers in respect of these two questions  
15 should be confined to Austrian or applicable EU law, including to any the extent that  
16 Austrian laws implements or applies norms derived from international sources.  
17 However, the report should not address or discuss international criminal law as such. I  
18 have previously sent you the public version of the transcript of the testimony of  
19 Mr Herbert Smetana as background material to which you may, of course, refer as you  
20 consider necessary or illustrative. Nevertheless, it is believed that it would be most  
21 appropriate for you to focus on the legal questions as posed above, rather than  
22 attempting to apply your legal opinion to the details of the present case.  
23 Now, can I just first ask did you, in fact, in your report abide by that very last sentence?  
24 In other words, simply to set out the law and not to try and apply the law to the facts of  
25 this case?

1 A. Of course. Did I -- I -- when I have looked in the protocol which you have sent me,  
2 I quickly stopped because I think -- I thought that this does not interest me. I was really  
3 focusing on the legal questions and -- because otherwise, it would not have made any  
4 sense for me.

5 Q. And just for clarity of the record, by "protocol," you're referring to some kind of a  
6 transcript of testimony; is that right?

7 A. It's the transcript which you have sent me by mail. I don't know whether the  
8 word "protocol" is correct. The transcript which you have sent me, which was  
9 mentioned right before.

10 Q. And in the end you didn't refer to that protocol?

11 A. No, not at all.

12 Q. And in the end you didn't rely on that protocol for your report?

13 A. No. It made played no role for me.

14 MR GOSNELL: Thank you, Professor.

15 Mr President, those are my questions at this time.

16 PRESIDING JUDGE SCHMITT: Any other Defence teams at the moment? Then I  
17 would give the Prosecution the floor. Mrs Struyven.

18 MS STRUYVEN: Thank you, Mr President. If you don't mind, I'm just going to sit  
19 down.

20 PRESIDING JUDGE SCHMITT: Yes. It's your own choice if you want to sit or to  
21 stand up. Perhaps I would have to think about it if anybody would walk around, but if  
22 you want to remain seated, it's okay.

23 MS STRUYVEN: Thank you, Mr President.

24 EXAMINED BY MS STRUYVEN:

25 Q. Again, good morning, Mr Lagodny, as we met briefly this morning through the

1 video link.

2 My name is Olivia Struyven, and I'm going to ask you a few questions on behalf of the  
3 Office of the Prosecutor. Now, on the first page we briefly addressed this as now, but  
4 on the first page of your report you sent out the instructions provided to you by Defense  
5 of Mr Mangenda, correct?

6 A. Instructions, you mean the questions?

7 Q. Exactly.

8 A. The questions which I have copied -- paste and copy -- copy and paste into that  
9 document.

10 Q. And so you were asked to provide a report on whether it is lawful under Austrian  
11 law for bank or financial institutions to share information with third parties without  
12 judicial authorization, correct?

13 A. Yep. Yep.

14 Q. And you explained to us last week, and I think also just now, that you didn't look  
15 at any documents related to this particular case in preparation of your report?

16 A. No, I didn't.

17 Q. And you did not request any materials from the Austrian Prosecutor's Office?

18 A. No, I didn't.

19 Q. And you also didn't consult anyone from the Austrian Prosecution Office?

20 A. No, I didn't.

21 Q. And you didn't request any materials from Western Union, correct?

22 A. No, nothing at all.

23 Q. Nor did you consult with anyone from Western Union?

24 A. Nope.

25 Q. Just to be clear, other than the materials listed in your report, you did not receive

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1 any additional materials from the Defence in order -- factual documents, I mean, in order  
2 to establish your report?

3 A. No.

4 Q. Okay. So your report actually doesn't discuss the factual situation in this case, in  
5 the case that we're currently dealing with?

6 A. To be honest, I don't know nothing of the facts, anything of the facts.

7 Q. Okay. I have a few more questions about that.

8 In your report, you refer to Western Union. Now, which company within the Western  
9 Union corporate group do you refer to?

10 A. To answer this question, I would have had to go into the facts, and I didn't, so I  
11 can't answer your question.

12 Q. Now, did the Defence tell you which Western Union company in this particular  
13 case collected the information that was shared?

14 A. No. I don't know.

15 Q. And did the Defence tell you which Western Union company processed the  
16 information in this particular case?

17 A. No. All I know about the case is from the minutes or the protocol which was  
18 mentioned by Mr Gosnell before, that's all; the public minutes, you know? You know  
19 what I mean.

20 Q. The testimony of the witness?

21 A. Yeah.

22 Q. But you explained to us that you didn't take that testimony into account to address  
23 your legal assessment of the law?

24 A. Yes, I did so. It was -- I think it was for me simply impossible to address the facts,  
25 so I asked myself, well, why -- to simply refer to the questions, to the leading questions.

1 So and it is -- it was better for me. As I don't know anything about the case, it is better  
2 for me to be able to deal with the legal questions without any, how can I say, bias.

3 Q. Okay.

4 A. I don't know anything. I don't know anything about -- about this fact, so that's all.

5 Q. So you basically didn't apply the facts in this particular case to the law, to the legal  
6 analysis?

7 A. No, not at all.

8 Q. Okay. Now, coming back to my original question, when you did refer to Western  
9 Union, who or what do you refer to then in your --

10 A. What?

11 Q. When you did refer to Western Union in your report, what entity did you refer to?  
12 Did you refer to any particular entity, or what did you mean?

13 A. Listen, the question is for bank or other financial institution brackets such as  
14 Western Union -- and this is the question I'm dealing with. I don't -- I did not think  
15 about which part of Western Union or which kind of -- which kind of special bank or  
16 financial institution. And for me it was clear that this question addresses the bank  
17 secrecy. So the question presupposes that the bank secrecy is applicable. This is not  
18 my task to discuss this question.

19 Q. So your report doesn't assess whether, in this particular case, bank secrecy applies?

20 A. I don't know how often I have to repeat this. No.

21 Q. Sorry. I still am going to ask you a few questions about that. Did the Defence  
22 tell you whether the collection or the processing of the information that was shared in  
23 this case occurred in Austria or outside of Austria?

24 A. I don't know -- I don't remember whether Mr Gosnell told me this, but I  
25 understood the question like if it had occurred in Austria. Of course, otherwise it

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1 doesn't make sense for me.

2 Q. So you started on the premise that the collection of the data that was shared was  
3 actually --

4 A. I can't -- I cannot answer this question because I simply did not think about these  
5 factual questions.

6 Q. Okay. I'll --

7 A. Thank you very much.

8 Q. I will still need to ask you a few questions about this. Did the Defence explain to  
9 you which type of transactions --

10 A. No.

11 Q. -- or whether these types of transactions occurred in Austria or outside of Austria?

12 A. No.

13 THE INTERPRETER: Your Honour, could we possibly leave a 5-second pause between  
14 interventions; otherwise, it's very difficult for the interpreters. Thank you.

15 PRESIDING JUDGE SCHMITT: It's clear we can leave this 5-second rule or we can  
16 apply the 5-second rule; but nevertheless, the no or yes is clearly understandable, I  
17 would say.

18 Ms Struyven, I think the witness expert has made his point clear and has answered very  
19 clearly and, yeah, I think you could move on to whatever other point you have.

20 MS STRUYVEN:

21 Q. Just one last question on these issues. Just so that we're absolutely 100 per cent  
22 clear, your expert report does not take into account because you don't know if Austrian  
23 law applies to Western Union and the transactions that occurred in this case?

24 A. Yes, yes, yes.

25 Q. Okay. Now I want to show you a few documents. I first want to ask you, are

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1 you familiar with the payment services that Western Union offers to consumers?

2 A. No.

3 Q. Okay. I'll show you a document, and I'll explain it to you in very simple terms.

4 Western Union offers services whereby an individual goes to a Western Union agent  
5 anywhere in the world, let's say in Cameroon, goes to an agent, makes a payment there,  
6 pays a fee, the agent puts that into the computer and someone, let's say in Holland, goes  
7 also to a Western Union agent and collects the money. So that is your classical way that  
8 Western Union will offer payment services.

9 Now, have you ever seen -- in order for that transaction to happen, the consumers need  
10 to fill out a form; that is to say, the person receiving the money needs to fill out a form,  
11 and the person sending the money needs to fill out a form. And those forms contain  
12 terms and conditions, legal terms and conditions. So I would like you to go and show  
13 you these legal terms and conditions. And for that, I would like you to go to tab 3 of  
14 the Prosecution's binder.

15 THE COURT OFFICER: The document is being shown to the witness.

16 MR GOSNELL: Mr President.

17 PRESIDING JUDGE SCHMITT: Mr Gosnell.

18 MR GOSNELL: Objection on relevance. I have no -- I do not -- I would like to know  
19 on what basis the Swedish terms and conditions may be relevant.

20 THE WITNESS: I have an objection.

21 PRESIDING JUDGE SCHMITT: No, no, no, no, no, no. Mr Lagodny, this is not -- this  
22 is --

23 THE WITNESS: Okay.

24 PRESIDING JUDGE SCHMITT: -- a golden rule in a courtroom that not to speak two  
25 people or three or more are speaking at the same time, and one objection after the other

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1 is another golden rule in the courtroom.

2 THE WITNESS: Okay.

3 PRESIDING JUDGE SCHMITT: Mr Gosnell has objected to that and I, of course, do not  
4 know if it is the Swedish -- the Swedish regulations; but if it is, Ms Struyven should  
5 establish why this should be of relevance first, and then we can ask the witness a  
6 question.

7 MS STRUYVEN: Yes. There's a few things, your Honours. First of all, these are the  
8 terms and conditions that individuals that make payments to Western Union sign, and  
9 it's the terms and conditions that they agreed. Now, it's these type of payments,  
10 whether they're from Sweden or from Netherlands or from Belgium or Cameroon or any  
11 other African country, these are the terms and conditions that the individuals in this  
12 particular case, that were our case, had to sign before they made the transfer. Now,  
13 these terms and conditions include very specific provisions on the disclosure of the data  
14 that was collected in the framework of these payments, and it is that data, that  
15 information that was shared by Western Union to the Office of the Prosecutor.  
16 Now, in this report, Mr Lagodny makes a very specific exception to the application of  
17 Austrian law, if Austrian law applies, because we're not even certain that Austrian law  
18 applies. But if Austrian law would apply, his report includes an exception to the  
19 application of the Austrian law, which is based on the consent of the person making the  
20 payment. So that is why we believe these terms and conditions in which such consent  
21 is given are very relevant to explore the application of Austrian law.

22 PRESIDING JUDGE SCHMITT: This, of course, concerns immediately the -- or directly  
23 the testimony of the expert, so please put your question to the --

24 MS STRUYVEN: Thank you. I will need to show him a few documents, but I'll try to  
25 do this as efficiently as possible.

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1 Q. Now, if I can ask you, Mr Lagodny, if I can ask you to go to tab 3 of your binder.  
2 And for the record, this is CAR-OTP-0093-0237. So this is a sample that a person who  
3 would want to make a payment in Sweden would need to sign before being in a position  
4 to send the money.

5 A. I have --

6 PRESIDING JUDGE SCHMITT: Please, the witness raises his hand. And since we  
7 have said that this is an indication that he wants to speak to the Court,  
8 Mr Lagodny -- Professor Lagodny, what do you want to tell us?

9 THE WITNESS: I simply want to ask the Prosecution which -- to which page you refer  
10 by saying I have mentioned it in my expertise, this exception.

11 PRESIDING JUDGE SCHMITT: Now, Professor Lagodny, first comes the question by  
12 the -- by Mrs Struyven, and then you can -- and I think she will elaborate on that. So if  
13 she doesn't clarify it, we can clarify it because you have made this sort of objection  
14 beforehand. But first the question, please.

15 MS STRUYVEN:

16 Q. I will come to that, but I first am going to start with a starting point, so to speak.  
17 If you look at this form -- so this form needs to be signed by someone who wants to  
18 make a payment, a payment in person, as it is called. And if you look at the bottom of  
19 the page under Consumer's -- "Customer's Signature," it says, "By signing this form, I  
20 confirm that the information I have provided is correct and that I have read and accepted  
21 the terms and conditions of service over leave and the loyalty programme terms, if  
22 applicable." And on the left-hand side it says, "Important Notice. The terms and  
23 conditions on which the service is provided are set out on the reverse of this form. You  
24 are advised to read these terms and conditions, especially those restricting liability and  
25 data protection before signing this form." Can you see that?

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1 A. Yep.

2 Q. And if I can ask you now to turn to the third page of this document, and it is at  
3 CAR-OTP-0093-0239, in the title it says "Sweden terms and condition applicable to  
4 Western Union money transfer service." And right under that it says, "The service is  
5 afforded by Western Union Payment Service Ireland, Limited, through a network of  
6 authorized agents in European economic area." The abbreviation is WUPSIL. A  
7 subsidiary of Western Union company is an Irish company with registered offices  
8 somewhere in Dublin. The same company is regulated by the Central Bank of Ireland  
9 and is registered as a payment institution in the Central Bank's registered payment of  
10 services firms under a specific number. Can you see that?

11 A. Yes.

12 Q. And if you then look at the third column, the third paragraph, it says, "Your  
13 personal information is processed under applicable law and controlled by Western  
14 Union --"

15 A. Stop. Stop.

16 Q. "-- Payment Service Ireland, Limited."

17 A. Where?

18 Q. It's the first sentence --

19 A. Ah, yes. Okay.

20 Q. Now, and then it goes -- if I go down two paragraphs, it says, "We may provide the  
21 information we hold to parties located outside of the European economic area, including  
22 the US. For the purposes set out in this statement, the categories of data transferred are  
23 personally identifiable information, contact details and information related to the money  
24 transferred, transaction history, and any other information supplied by you."

25 And if I go to the last sentence of that paragraph, it says "Western Union may also give

1 information to third parties where there is a reasonable need to help prevent and detect  
2 crime, to prosecute offenders, national security, or other legal reasons."

3 And lastly, it says that "The information we hold may be accessed by Western Union and  
4 our affiliates, including but not limited," and then it lists several sub companies or  
5 companies within the Western Union group.

6 Now I'm going to show you -- so this is -- this is the type of information I would like you  
7 to have a look at.

8 I have several forms in this binder, but I'm not going to show them all to you. I don't  
9 think it's necessary. I just want to quickly look at the next tab, tab 4, and it's the same  
10 form for then -- for the receiver of the money, and it contains exactly the same terms and  
11 conditions.

12 MR KILENDA: Mr President.

13 PRESIDING JUDGE SCHMITT: Mr Gosnell?

14 MR KILENDA: Mr President, I think it would be fair to the witness to now put a  
15 question based on the first excerpt rather than piling up the excerpts. I think it would  
16 simply be in the interest of clarity --

17 PRESIDING JUDGE SCHMITT: No. I think -- yeah. I think this -- we can -- I think  
18 this is a little bit premature, Mr Gosnell. Ms Struyven should explore the next one  
19 because we are now speaking for the receiver, if I understand it, but then please put your  
20 question. And also bear in mind what Professor Lagodny has said. Put to him what  
21 you are referring to in his report. Thank you.

22 MS STRUYVEN:

23 Q. Mr Lagodny, the first one -- the reason why I want to show you two types of forms  
24 is because the first one that we saw, the Swedish one, is one that is used in the European  
25 economic area.

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1 The second one I want to show you is one used generally in African countries, and that  
2 is one that is in French, but I'm not going to go into the details of that one because it has  
3 the same details as the Swedish one. It is at tab 6. You can see in French it says  
4 (Interpretation) to send money. (Speaks English) And at tab 7 it says --

5 A. I understand French.

6 Q. Okay.

7 PRESIDING JUDGE SCHMITT: But Professor Lagodny, not everybody in the  
8 courtroom so --

9 THE WITNESS: Okay. Okay.

10 PRESIDING JUDGE SCHMITT: -- with your permission --

11 THE WITNESS: Okay.

12 PRESIDING JUDGE SCHMITT: -- allow the interpreters to continue with their  
13 interpretation. Thank you very much.

14 THE WITNESS: I already know what she will ask.

15 MS STRUYVEN:

16 Q. That's good. That's good. But I'm going to, just for the record, because I'm  
17 rushing now and I forgot to mention the ERN numbers, so for the record, the  
18 African -- the form -- I'm saying "African." I mean, Africa is not just one country, of  
19 course, but I mean the African -- the form typically used in Africa to send money at tab 6  
20 is CAR-OTP-0093-0253. And the form typically used in African countries to receive  
21 money is the form at tab 7, which is CAR-OTP-0093-0250.

22 Now, if I ask you to go to tab 6, the form to send money, at the bottom of the page you  
23 see (Interpretation) client signature -- customer signature.

24 (Speaks English) and above that it says, "Certain terms and conditions regarding the  
25 money transfer service you have selected are set forth on the back of this form. By

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1 signing this form, you are agreeing to those terms and conditions." Can you see that?

2 A. No. It's in French, but I've got it. I've understood.

3 Q. Now, the terms and conditions of those forms used in African countries are at the  
4 third page of these forms, but we have an English translation of a very similar form at  
5 tab 5. And for the record, that would be CAR-OTP-0093-0246. So again, that's tab 5.

6 PRESIDING JUDGE SCHMITT: At some point, I'm inclined to pick up the objection of  
7 Mr Gosnell. I expected sort of that at some point in time out of your preparation would  
8 result in a question to the witness, so please move on, but then ask him specifically what  
9 you want to ask him.

10 THE INTERPRETER: Your Honour, if anything could be done about the background  
11 noise while the Prosecution or yourself are speaking, that would be greatly appreciated  
12 for the French interpreters. Thank you.

13 MS STRUYVEN:

14 Q. Okay. So then if I look at these terms and conditions which we find at tab 5 -- as I  
15 said, these are the standard conditions that apply to payments made or received in  
16 African countries, and if I ask you to look at the fourth page, at CAR-OTP-0093-0249, the  
17 last paragraph it says, "The Western Union Money Transfer Service is provided by  
18 Western Union Financial Services, Inc., an American company, for money transfers from  
19 the United States, Canada and Mexico and for commercial services transactions; and  
20 Western Union International Limited, an Irish company, for all other transactions to a  
21 network of authorized agents and representatives."

22 If I ask you to turn to page 3 of this document, that's CAR-OTP-0093-0 --

23 PRESIDING JUDGE SCHMITT: Please, Mrs Struyven, a question, please ask him a  
24 question. I was really indulgent with that.

25 MS STRUYVEN: Okay.

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1 PRESIDING JUDGE SCHMITT: And you can ask a question now, and if you want to  
2 pick up this again and another question arises out of that, you can do it like that. But  
3 the introduction of this question does now last for nearly ten minutes. So please now  
4 put a question to the witness.

5 MS STRUYVEN:

6 Q. Okay. So having read at least briefly those terms and conditions that individuals  
7 need to sign and agree to in order to make a payment in Europe or in Africa, isn't it clear  
8 to you or is it clear from those terms that the services, first of all, are offered by an Irish  
9 company? Would you agree to that?

10 A. I'm still waiting for your question and referring to my expertise. I anticipate your  
11 questions and your arguments, but I want to see it, what do you refer to in my  
12 document?

13 Q. Well, I would like to first ask you a few questions about the company who's  
14 offering the service, the type of financial services that we -- that are relevant in this  
15 particular case, and then I will ask you a question about the exception that you put in  
16 your report about Article 38.

17 A. Madam --

18 Q. But so the first question is, if from these documents is it clear that it's the Irish  
19 company who's actually offering the payment services?

20 A. Madam, I don't want to answer these details of the facts. You've bothered me  
21 with questions dealing with -- that I have not been in the facts, and now you are asking  
22 me about facts of this case. Please, what do you refer to in my -- in my report?

23 Q. Okay.

24 PRESIDING JUDGE SCHMITT: Professor Lagodny, on the other hand you are, of  
25 course, not to judge the questions of any of the participants here. So just answer the

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1 questions, say like you have done before, if it is correct, I cannot answer it. But it's not,  
2 as I said, as a witness or an expert, it's not up to you to tell one of the examiners here in  
3 the courtroom how to examine.

4 Mr Gosnell.

5 THE WITNESS: It's not my --

6 PRESIDING JUDGE SCHMITT: Mr Gosnell is now speaking.

7 MR GOSNELL: Mr President, perhaps I should have leapt to my feet more quickly  
8 immediately after the last question was asked, but I do object. This question falls  
9 outside of the scope of the report, that particular question, and I would object on that  
10 basis.

11 PRESIDING JUDGE SCHMITT: So this was also what the expert expressed in his  
12 answer.

13 And, Mrs Struyven, perhaps the difficulty is we have taken notice of what you referred  
14 to. And also the witness expert has taken notice of it. Why not go directly to his  
15 report and ask him related to his report, and I could assume that it has something to do  
16 with what you wanted to put to him, ask him a question related to his report, and this  
17 would expedite the proceedings, I would say. We have taken notice. You don't have  
18 to repeat what you have said here and referred to in the binder. You don't have to  
19 repeat this via questions to the expert, to put it this way.

20 MS STRUYVEN: And that's not a problem, your Honour. The difficulty I had is that  
21 from the documents and from the terms and conditions that apply to these particular  
22 type of payments, the in-person payments, it seems then they're organised by an Irish  
23 company, the data is collected by an Irish company, the data is processed by an Irish  
24 company, et cetera, et cetera.

25 PRESIDING JUDGE SCHMITT: Yes.

1 MS STRUYVEN: So for me it was first even a question was does Austria law at all  
2 applies.

3 PRESIDING JUDGE SCHMITT: And why do you ask me that?

4 MS STRUYVEN: No, no, no. But what I mean is, and that's why I didn't want to go  
5 into the exception of the Austrian law, because I first wanted to question whether  
6 Austrian law applies. But I will go straight into the exception to the Austrian --

7 PRESIDING JUDGE SCHMITT: So I think we really could shorten this procedure if  
8 you ask this specifically to the witness, because we have him here as the expert for  
9 Austrian law. Perhaps I could give you also an answer, but I'm not in the position to do  
10 that.

11 MS STRUYVEN:

12 Q. Okay. I will go back to your report. So in your report, and I will turn, so this is  
13 CAR-OTP-0006-0001. At the third page of your report, which is at 0003, you say, so you  
14 list the application of Article 38, and then you go to paragraph 2 of that law and you  
15 say -- which says, "The obligation to maintain bank secrecy does not apply," and you list  
16 the first subparagraph, and then you say "Numbers 2 and 9 are not relevant. See text."  
17 Now, we had a look at the text, which is available at 0018 of your report, that's annex B.  
18 And Article 38, second paragraph, sub (5) says, "The obligation to maintain banking  
19 secrecy does not apply if the consumer grants his or her express written consent to the  
20 disclosure of the secrets."

21 So the first question was why did you from the start in your report indicate that that  
22 does not apply?

23 A. Because I had no information about these documents which you have shown to me,  
24 and I'm to some extent, I'm not competent now to answer this question on an ad hoc  
25 basis. If I had this information, I would have been able to consult, for example, two

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1 questions are relevant, what does written consent mean? Has it to be given with regard  
2 to a running procedure or does it suffice that like you have shown to ask that this  
3 consent is in a -- how do you call it? In such terms of condition -- how is it called in  
4 the -- in the documents which you have shown me? The terms and conditions.  
5 I really, I really doubt whether -- although I have not consulted any book on this special  
6 question, which would have been easily been done before if you had the question before.  
7 But I will answer your question on the basis what my estimation of the legal situation is  
8 like.

9 This express written consent to me seems -- it seems not possible that this written  
10 consent can be in such form. I really doubt. With regard to all the -- to all the let me  
11 say firewalls of the bank secrecy, if this -- if your argumentation would be  
12 in -- confirmed to this paragraph 5, I think every bank would have the free door to  
13 circumvent the bank secrecy. But to be honest, I cannot -- I cannot answer your  
14 question properly because I have nothing to consult. It's just a guess of what is the legal  
15 situation. It would be very, very unfair for me from my side to say this is the law. I  
16 have not consulted any textbook, any decisions.

17 Q. Okay. I would like to show you a letter that we actually -- because we did consult  
18 the legal counsel of Western Union on this issue to get his guidance as to --

19 PRESIDING JUDGE SCHMITT: Mr Gosnell.

20 MR GOSNELL: Mr President, I strenuously object to the use of this document. And I  
21 can do this in public session, but probably the witness should not be privy to this  
22 objection.

23 PRESIDING JUDGE SCHMITT: Then we can perhaps turn out sound for the witness  
24 for a moment.

25 THE COURT OFFICER: Mr President, I've been informed that the microphone is off at

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1 the other end, and nevertheless we are in open session.

2 THE COURT OFFICER: (Via video link) No.

3 PRESIDING JUDGE SCHMITT: Mr Gosnell.

4 MR GOSNELL: Thank you, Mr President.

5 THE COURT OFFICER: (Via video link) Stop, stop, stop. I'm sorry, Mr President.

6 We can still hear you.

7 PRESIDING JUDGE SCHMITT: Then we give it another try, please.

8 THE COURT OFFICER: Mr President, I can now confirm that the microphone has been

9 cut at the other end and this time they cannot hear us.

10 PRESIDING JUDGE SCHMITT: Mr Gosnell.

11 MR GOSNELL: Thank you, Mr President. Mr President, this is -- and I have no

12 objection to your Honours looking at this letter at the moment. But this is a letter which

13 I'll summarise as being a letter from an associate general counsel of Western Union.

14 The date of this letter is 1 March 2016, so about 10 days ago. This document actually

15 has not yet been formally disclosed to us. We received a courtesy disclosure yesterday.

16 So the Prosecution has sat on this document which they say they received on 2 March for

17 8 days.

18 Let's put this document into some context factual and in terms of disclosure to

19 understand why I'm objecting to the use of this document with this witness. Your

20 Honours will remember that back in September and October 2012, the Prosecution

21 reached out to a company that I'll generically describe as Western Union. They

22 conducted two visits to their office on Schuberting in Vienna, Austria. The OTP gave

23 formal notice to the Austrian government of those visits. The OTP then made a request

24 for assistance to Austria, a formal request a few days later.

25 On 8 November 2012, the Austrian Prosecutor signed an application to a judge seeking

1 disclosure for financial records, inter alia, under Section 116 of the Austrian Code of  
2 Criminal Procedure.

3 On 15 November 2012, that application was granted by an Austrian judge under that  
4 provision. And your Honours will recall that there were periodic contacts throughout  
5 that period between the Office of the Prosecutor and various officials of Western Union  
6 and Austria.

7 Never in any of these contacts, at least of which we have disclosure, has there ever been  
8 an indication that anything other than Austria law applied to the disclosure and custody  
9 of these documents, which as far as I know and as far as all the evidence indicated  
10 were located and accessed in Vienna, Austria. Mr Smetana clearly thought so because  
11 he testified that that was the case.

12 And I don't know where the author of this letter was in 2012, but Mr Smetana said that  
13 he consulted the legal department at Western Union, so apparently they didn't raise that  
14 issue at the time. And moreover, the Austrian order was specifically directed to the  
15 subsidiary described as WUPSIL, the company that's based in Ireland. Nevertheless,  
16 that company was the object of the Austrian order.

17 So that's the factual situation that we have, which, by the way, is also confirmed by  
18 another document that was just disclosed by the Prosecution yesterday from the  
19 Minister of Justice of Austria, indicating that Article 38 of the Banking Act does apply to  
20 this company and to this disclosure.

21 And finally, your Honours, in terms of just laying the factual background, there's  
22 Prosecution filing 1605 dated the 8th of February when the Prosecution challenged the  
23 relevance of Professor Lagodny's report.

24 Did they raise the issue of the inapplicability of Austrian law at that time? No, they  
25 didn't.

1 Now, let's put this disclosure in its proper context in terms of timing. Your Honours  
2 will recall that prior to Mr Smetana's testimony, we had no disclosure about the  
3 exchange of emails, which is so important for discussing the propriety of the  
4 investigations. That was clearly disclosable under Article -- under Rule 76(1) and Rule  
5 77; and yet, it wasn't disclosed. The Trial Chamber ordered repeatedly disclosure of  
6 documents relevant to the propriety of investigations by the Prosecutor in various  
7 countries. And notwithstanding all of those orders, the Defence only received the two  
8 notices, formal notices, by the Office of the Prosecutor to Austria on 23 February 2016,  
9 just over two and a half weeks ago, and long after we had, of course, been obliged to  
10 finalise our evidence and the submission of the report of Professor Lagodny, and  
11 certainly long after, many months after Mr Smetana had come and gone and many  
12 months after the Prosecution had the benefit of submitting that memorandum that you  
13 may recall from two investigators of the Office of the Prosecutor.  
14 Defence had no disclosure of these notices, which would have been useful for comparing  
15 dates and methodology that were applied during the investigation.  
16 So now that's the context in which this document, dated 1 March from a general counsel  
17 of Western Union, who obviously has a particular interest in this matter, is disclosed,  
18 yesterday afternoon at around 3 o'clock. No opportunity to put it to the witness. The  
19 Prosecution could have put this to the witness when it conducted its interview several  
20 days ago because they had possession of the document. That wasn't done.  
21 Now, the Prosecution might say, well, we don't have any disclosure obligation in respect  
22 of this document. Well, that's not true, your Honours, because your Honours never  
23 gave any dispensation from the normal application of Rule 77, notwithstanding the  
24 normal notice requirements for listing documents for cross-examination. Your Honour  
25 has never said, oh, and by the way, this allows the Prosecution to withhold disclosure of

1 a very salient document for 10 days before it's put on a list of documents.

2 And the second is an argument that we can anticipate from the Prosecution which could  
3 be valid under certain circumstances is that, yes, there's a forensic purpose of taking a  
4 witness by surprise with a particular document. For fact witnesses --

5 PRESIDING JUDGE SCHMITT: I think you have -- you have made your point  
6 and -- yeah.

7 MR GOSNELL: Well, can I just get to the remedy, Mr President?

8 PRESIDING JUDGE SCHMITT: Of course. Thank you.

9 MR GOSNELL: No objection to the Prosecution putting whatever propositions it wants;  
10 if they're relevant to the witness's expertise, he can give an answer. But what I do object  
11 to is putting this document, with an appearance of credibility. The witness hasn't had  
12 any opportunity to look into this in advance, he clearly is concerned about that, and this  
13 is really an unfair tactical advantage being sought by the Prosecution based on late  
14 disclosure amongst a pattern of late disclosure. So the remedy is modest. It's only  
15 requesting that this document shouldn't be used with the witness.

16 PRESIDING JUDGE SCHMITT: I guess the Prosecution wants to answer to that.

17 MS STRUYVEN: Yes.

18 PRESIDING JUDGE SCHMITT: Ms Struyven.

19 MS STRUYVEN: I'll try to be brief though.

20 The information that's contained in this letter is actually just summarizing the  
21 information that is contained on the forms of Western Union, which are publicly  
22 available, the to-send-money forms, the to-receive-money forms in every which one  
23 country one looks at are publicly available. So this information is really not new.  
24 Now, I think this information gives some sort of a legal analysis of the situation of those  
25 particular transactions. We have in front of us a legal expert. I think it is only fair if he

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1 can have a proper look at the one. It's two pages long. I think he can -- it would be  
2 fair to him, actually, to have him read the document of two pages, and then basically just  
3 provide his opinion as to whether this is correct or not.

4 PRESIDING JUDGE SCHMITT: There is some --

5 MS STRUYVEN: He could possibly do this over the break, maybe, if he wants to have  
6 the time to properly look.

7 PRESIDING JUDGE SCHMITT: There is some merit in what Mr Gosnell said and also  
8 what Ms Struyven said, so a remedy would be the following: We are now shortly after  
9 11 o'clock. We will have a break. We will give the expert, during the break, the  
10 opportunity to read this document and then you put out of this document your  
11 propositions and the witness can say -- and it would be absolutely fair to the witness if  
12 he's then probably says, oh, it's -- if it is his opinion, he cannot say us on the short notice  
13 something about it or he cannot answer to the proposition, then it's absolutely okay  
14 because really it's -- otherwise, it's sort of an assault on the witness.

15 So Mr Gosnell is correct.

16 To put it now to him and in this immediate situation would not be fair. We will have a  
17 look if -- I think we make 30 minutes of a break -- if it is two pages long, and we will see  
18 afterwards if the witness is in the position to meaningfully answer to it. So this is the  
19 remedy. We have to tell it, of course, to the witness, that is clear; and therefore, we  
20 need sound.

21 THE COURT OFFICER: We are back, Mr President.

22 PRESIDING JUDGE SCHMITT: Professor Lagodny, I want to shortly inform you what  
23 the result of this discussion was. It was about if it is proper to show you immediately a  
24 document two pages long and ask you questions, and we have decided that this is not  
25 fair to you as an expert.

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1 We will give you the opportunity. We will have a 30-minutes break. We'll give you  
2 the opportunity to read it. And if you can, from your point of view as an expert,  
3 meaningfully answer to it -- meaningfully answer to it, it's okay; and if not, you tell us.

4 THE WITNESS: I reject that at the moment -- I reject this at the moment. I will not do  
5 this point.

6 PRESIDING JUDGE SCHMITT: This is relatively unusual, to put it this way. Why  
7 not -- why not give it a try in 30 minutes, it's two pages long, and you can read it. And  
8 as I said, it's absolutely okay with your role if you say afterwards you are not in the  
9 position to answer to that, though. This is absolutely -- I don't see any unfairness to  
10 you as an expert, and you have -- before you have also expressed very clearly what you  
11 think about certain questions and you can do that, if you want, afterwards. Is that  
12 okay?

13 THE WITNESS: Mr President, I think I have misunderstood you, and I have to  
14 apologize for that.

15 PRESIDING JUDGE SCHMITT: Okay.

16 THE WITNESS: Of course will I read these two pages and then give my commentary to  
17 that.

18 PRESIDING JUDGE SCHMITT: Thank you very much. So then we have the break,  
19 and we will have -- we have -- now we would have only 25 minutes, but I think we have  
20 said 30 minutes for 5 past the half, 35 past 11. And please now show without any  
21 further delays this document to the witness expert.

22 THE COURT OFFICER: (Via video link) If I may have the number of the document,  
23 please, Felipe.

24 THE COURT USHER: All rise.

25 (Recess taken at 11.05 a.m.)

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1 (Upon resuming in open session at 11.39 a.m.)

2 THE COURT USHER: All rise.

3 PRESIDING JUDGE SCHMITT: The first question would be to Mrs Struyven, can you  
4 give us an estimate how long your examination will last?

5 MS STRUYVEN: Your Honour, I think not more than 5 minutes.

6 PRESIDING JUDGE SCHMITT: Professor Lagodny, you have heard that not longer  
7 than estimate 5 minutes. So this is, of course, not a promise, but it's an estimate, not  
8 more.

9 Have you had an opportunity to read these two pages?

10 THE WITNESS: (Via video link) Yes, yes, I did.

11 PRESIDING JUDGE SCHMITT: Okay. Then I would give Mrs Struyven the floor, if  
12 you want to put out of this document a proposition and question the witness.

13 MS STRUYVEN: Thank you, Mr President.

14 PRESIDING JUDGE SCHMITT: Perhaps for the benefit of the Chamber it should be  
15 also said where we are, where we stand.

16 MS STRUYVEN: Yes. No problem.

17 Q. So, Mr Lagodny, in the letter I refer to, so it's tab 2 of the binder,

18 CAR-OTP-0093-0217, and I mean the letter explains it at more length, but in the fourth  
19 paragraph, the last sentence, continuing on the second page, you have been able to see  
20 that the counsel of Western Union confirms that Austrian law does not apply to  
21 payments or financial transactions organised by the Irish company as we have seen in  
22 the European forms and in the African forms, correct? Did you see that?

23 A. I have read that, yes.

24 Q. And if you then look at the second page, so I'm at CAR-OTP-0093-0218, and I look  
25 at the very last paragraph, it says that in any event, users validly, so the users that make,

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1 that do these in person payments in Europe or in Africa, that they validly waive the  
2 application of data protection laws, right?

3 A. I have read this paragraph.

4 Q. Now, and that would then in any event constitute an exception to Article 38 of the  
5 Austrian banking laws if, and that's a big if, if Austrian law would apply, correct?

6 MR GOSNELL: Objection.

7 PRESIDING JUDGE SCHMITT: Mr Gosnell.

8 THE WITNESS: It's my turn?

9 PRESIDING JUDGE SCHMITT: Please wait on Mr Gosnell's objection and then we  
10 decide on that or perhaps we have a remedy for it and then you can answer or not.

11 MR GOSNELL: I just object to the form of the question, Mr President, because it's  
12 assuming something to be true and then asking for a conclusion based on that  
13 assumption, but without stating that it's just an assumption. So I think it should be  
14 clear for the witness, especially given the source of the document, that it's an assumption,  
15 it's a proposition, and then what is the consequence of that, assuming that proposition is  
16 correct. I just want the record to be as clear as possible.

17 PRESIDING JUDGE SCHMITT: Could you undertake to rephrase that question a little  
18 bit, Mrs Struyven?

19 MS STRUYVEN: I will try.

20 Q. So having read the forms, because you actually also had a look at the forms, and  
21 having read the letter, even if Austrian banking laws would apply, under Article 38,  
22 there is an exception in relation to the consent, and the consent that is signed by the  
23 users of Western Union, that consent would validly exclude the application of Austrian  
24 laws, correct?

25 A. Ms Struyven, let me first stress that it is a nice letter, but to answer your question

1 would exceed my expertise. Why? The banking, the Austrian Banking Act is  
2 administrative law, and what we're talking about here is the territorial reach of  
3 administrative law. And this is not my specialty, not at all.

4 However, a second point is it is nice that Mr Fischer writes such a letter, but for me, I  
5 don't know what to do with such a letter. It is a private opinion on a subject that at my  
6 first appreciation seems to be very, very difficult. And of course, this is a statement of  
7 someone who is biased, simply biased.

8 I would not be able to answer your questions directly, nor if I had time to prepare for  
9 this, because I'm not a specialist for administrative, international administrative law and,  
10 third, this letter is a pure private opinion of whatever.

11 Even though Mr Fischer is the associate general counsel of Western Union, if I would call  
12 the associate general counsel of whatever, it is a private, private opinion. And I admire  
13 that Mr Fischer is able to give his expertise on these questions without any reference to  
14 any law. So I'm -- first, my expertise is exceeded; second, I'm very surprised by the  
15 courage of Mr Fischer.

16 PRESIDING JUDGE SCHMITT: I think this was an answer, Mrs Struyven.

17 MS STRUYVEN:

18 Q. Yes, Mr Fischer, but you did in your report --

19 A. I'm not Mr Fischer.

20 PRESIDING JUDGE SCHMITT: Of course, only for the record we are talking with  
21 Professor Lagodny.

22 MS STRUYVEN: Yes, of course.

23 Q. Excuse me. But in your report, you didn't include an exception to the application  
24 of Austrian banking law, although in the body of your report you said that consent, I  
25 will --

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1 PRESIDING JUDGE SCHMITT: What are you referring to, please?

2 MS STRUYVEN: So I'm referring to the expert report of Mr Lagodny, and again I'll  
3 refer to in the third page of the report, for the record it's CAR-D23-0006-0001. It's tab 1  
4 of your binders. And I am at page 3 of the report, which is at 0003. There it's clear you  
5 say that numbers 2 to numbers 9 are not relevant, whereas, in fact, if you look at the text  
6 of Article 38, number 5, which is in between number 2 and 9 actually says that, I'll read  
7 this out loud again, that one of the exceptions to the obligation to maintain bank secrecy  
8 so it does not apply the obligation to maintain bank secrecy if the customer grants his  
9 express written consent, correct?

10 A. Yes. Ms Struyven, we are coming back to what you have asked me two hours ago.  
11 And now I'm really getting -- okay, I've learned from the President that it's not my job to  
12 judge on this.

13 But I've told you before, in the beginning you told me that or you asked me whether I  
14 have looked into the file and about the details, and I said I have not gone into the details.  
15 I don't know nothing about the facts. And now you are asking me about details which I  
16 have not known when I have written this report, and your argument simply is unfair.  
17 To say why didn't you -- why didn't you answer a question which has not been asked to  
18 you? This would be the unfairness.

19 PRESIDING JUDGE SCHMITT: Mrs Struyven, I think we have an answer here, and it  
20 indeed has been addressed by you before the break too.

21 MS STRUYVEN: I have no further questions.

22 Thank you, Mr Lagodny.

23 PRESIDING JUDGE SCHMITT: Are there any further questions by the Defence teams?

24 Mr Gosnell.

25 MR GOSNELL: Just a very few, Mr President.

1 QUESTIONED BY MR GOSNELL:

2 Q. Professor, it's Christopher Gosnell again. Could I ask you please to turn to  
3 document tab 22, which is your report, annex B, page 3, and for the record --

4 A. It's Article 116.

5 Q. That's correct, Professor. We're talking about Article 116 of the Austrian Code of  
6 Criminal Procedure. Can I just ask a very general question, and that is, is it true that  
7 the Austrian Code Of Criminal Procedure applies on the entire territory of Austria?

8 A. Of course, of course.

9 Q. That includes Vienna?

10 A. I think so. It's the only capital of Austria.

11 Q. And those words at the beginning of Section 116(1), "information on bank accounts  
12 and bank operations," do I understand correctly, given the general principle about the  
13 application of the Austrian Criminal Procedure Code, that this refers to bank accounts or  
14 appears to refer to bank accounts and bank operations on the territory of Austria or in  
15 the territory of Austria?

16 A. Of course, without being an expert to international administrative law, it seems  
17 very clear for me that the territorial applicability is out of question.

18 Q. And as a matter of general principles in respect of mutual legal assistance, it would  
19 of course be ridiculous, would it not, to speak of a Dutch or a Swedish or an Irish court  
20 issuing enforceable orders on the territory of Austria, correct?

21 A. Yes, I think that would be very correct as a general rule.

22 Q. Thank you. Now could I ask you to turn back please to annex A of your report.  
23 And I would like your linguistic assistance please, Professor. So I'll ask you to please  
24 look at the German version --

25 A. Yes.

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1 Q. -- of Article 38(5), 38(1)(5), and can I just first of all, before I ask you any questions,  
2 could I just ask you please to give us in English your translation of that particular  
3 provision, Article 38(1)(5), if you can, please?

4 A. Article, Article 38(2), number 5, correct?

5 Q. Yes. I apologise. You're right, it's Article 38(2)(5).

6 A. If -- I would, I would translate it as follows. If the client has consented to the  
7 revelation -- no -- making, making of (indiscernible) to show -- this is difficult to do  
8 translation --

9 PRESIDING JUDGE SCHMITT: Professor Lagodny, why not go to your translation that  
10 you have in, I think it's annex B, annex B --

11 THE WITNESS: Thank you.

12 PRESIDING JUDGE SCHMITT: -- because there you speak of disclosure.

13 THE WITNESS: Thank you very much. Thank you very much. "Grants to the  
14 disclosure of secrets," yes. Thank you, Mr President.

15 "The disclosure of" -- yes, what is the question?

16 MR GOSNELL:

17 Q. Let me put it a different way. And the President has very helpfully suggested a  
18 way forward. Can I just ask is the English translation correct when you look at that; is  
19 that right?

20 A. Yes, yes. In my -- as far as my grammatical understanding is concerned, this  
21 disclosure of secrets somehow has to be after -- on a special, on a special occasion, not in  
22 general.

23 But, you know, the word "disclosure of secrets" from my understanding means there has  
24 to be a specific procedure which has already been going on. So returning to the  
25 question of Ms Struyven, this consent given very, very much in advance in my

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1 grammatical understanding is not covered by Section 5. But this is my ad hoc  
2 appreciation.

3 Q. Fully understood. Thank you, Professor.

4 May we turn now please to Prosecution tab 3. For the record, that's  
5 CAR-OTP-0093-0237. And we can go direct, go direct please to page 3.

6 THE COURT OFFICER: (Via video link) The document is presented to the witness.

7 MR GOSNELL:

8 Q. Now, Professor, I would like to go back to the passage that was presented to you  
9 by my learned colleague from the Prosecution. And it's probably in about 7 or 8 point  
10 font, but I can read it. And what it says is, "We made add to information you provide  
11 with information from other businesses or individuals including information to validate  
12 the accuracy of your information provided by you. Western Union may also give  
13 information to third parties where there is a reasonable need to help prevent and detect  
14 crime, to prosecute offenders, national security or other legal reasons."

15 Would you agree with me that at least here there is no specification of the precise  
16 circumstances in which disclosure is being authorised, correct?

17 A. When thinking about what I've said before on the quality and the time of the  
18 disclosure, I would, without being an expert for that, without being consulted any legal  
19 books, any, any court decisions, I would think that this does not fall under Section 5.  
20 But as I said beforehand, I'm not an expert on that, because I'm not prepared for that.

21 Q. Fully understood. And let's now leave this document entirely and let's even leave  
22 entirely the Banking Act and let me just ask you a very general question based upon  
23 your knowledge of Austrian law. Do you have any awareness or knowledge of  
24 circumstances where boilerplate language included in a contract does not operate to  
25 modify generally applicable law? In other words, where courts say, well, here is

1 something in 8-point font attached to a contract, but nevertheless it does not vary the  
2 obligations of the parties under generally applicable law.

3 A. As far as I have understood, the general approach in Austrian law, it is out of any  
4 question that a private, a private agreement concerns public law. But the approach of  
5 Ms Struyven was very correct, it would of course be an open door for private  
6 agreements to be made. But I don't think -- I don't -- it does not match with the, with  
7 the whole theory of public law as far as I've understood it. But to be honest, I'm not  
8 here for administrative law.

9 PRESIDING JUDGE SCHMITT: Mr Gosnell, it is indeed a very difficult question to the  
10 witness, the expert, because it is so general, yes? You know, when you ask such a  
11 general question on legal matters, there might be somewhere an exception or something  
12 else. So it's really hard for the witness to answer this one.

13 MR GOSNELL: You're right, Mr President. And thank you for that guidance. And  
14 I'm done with my questions.

15 Professor, thank you very much for your forbearance.

16 PRESIDING JUDGE SCHMITT: Thank you very much, Mr Gosnell.

17 And of course, thank you very much to Professor Lagodny. This concludes your  
18 testimony. We are happy that you were able to answer our questions and for your time  
19 today. And have a safe trip home. Thank you very much.

20 THE WITNESS: (Via video link) Thank you.

21 (The witness is excused)

22 PRESIDING JUDGE SCHMITT: This concludes also the hearing for today. I think  
23 nobody in the courtroom would contradict me if I would say that this was an interesting  
24 hearing today. We will resume on Tuesday at 9.30 with the witness of expert of  
25 Mr Babala.

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- 1 THE COURT USHER: All rise.
- 2 (The hearing ends in open session at 12 p.m.)