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TRIAL CHAMBER VII

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

THE PROSECUTOR

***v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO MUSAMBA, JEAN-JACQUES
MANGENDA KABONGO, FIDÈLE BABALA WANDU AND NARCISSE ARIDO***

Public with Confidential Annexes A, B and C

**Corrigendum to Defence Response to “Narcisse Arido’s Request for an Effective
Remedy in Light of Two Austrian Decisions” (ICC-01/05-01/13-1928-Conf)**

Source: Counsel for Jean-Pierre Bemba Gombo

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

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1. Introduction

1. The Defence for Mr. Jean-Pierre Bemba hereby files its response to ‘Narcisse Arido’s Request for an Effective Remedy in Light of Two Austrian Decisions’ (the Request).¹
2. The Defence concurs that firstly, the elements for introducing these decisions into evidence after the close of evidence are met, and secondly, that there is a right to an effective remedy, which encompasses the specific remedies requested by the Defence for Mr. Arido.
3. The Defence further underscores that the Request strikes at the heart of the legal responsibilities of the International Criminal Court as an organisation, which is duty-bound to respect domestic Court orders directed to it.

2. Submissions

2.1 It is in the interests of justice to allow the Defence to rely on Court orders, which were received after the close of evidence

4. The conditions for the introduction and reliance on the Austrian Court decisions are amply met in this case.
5. As a preliminary point, the Defence for Mr. Arido is relying on these Court decisions for the limited purpose of challenging the legality of Prosecution evidence. The Trial Chamber has already acknowledged that a more flexible approach applies as concerns the introduction of information pertaining to the legality of evidence, as compared to evidence which concerns issues arising directly from the charges.²

¹ ICC-01/05-01/13-1928-Conf

² ICC-01/05-01/13-1753, para. 12.

6. In any case, Trial Chamber I, II, and III have confirmed that the Chamber has a discretion to admit evidence after the close of evidence,³

(i) where the evidence in question is fresh or when the party requesting fresh hearings was unable, despite the use of reasonable diligence, to identify and produce the evidence beforehand, (ii) where the conditions for admissibility of evidence are satisfied and (iii) where the potential contribution of the evidence to the determination of the truth is sufficiently significant to justify fresh hearings, with the possible implications for the fairness of the trial or the integrity of the proceeding.

7. The case law of both the ICC and *ad hoc* Tribunals have further recognised that it may be appropriate to allow the Defence to introduce exculpatory evidence, which was obtained after the close of evidence, where the reasons for the delay are related to disclosure violations by the Prosecution.⁴

8. Throughout the pre-trial stage, the Defence repeatedly requested the Prosecution to disclose information concerning the legality of the collection of evidence in Austria. The Defence also consistently maintained its position that this information was relevant to the admissibility of the Western Union records,⁵ and that the Defence could not mount a proper challenge under Article 69(7) in its absence.⁶

9. Whereas the Single Judge of the Pre-Trial Chamber declined to order disclosure, in a series of decisions dating from 14 August 2015,⁷ the Trial Chamber clarified that information concerning the legality of the collection of evidence fell within the Prosecution's Rule 77 disclosure obligations.

³ ICC-01/04-01/07-3279-tENG, para. 14. See also ICC-01/05-01/08-3029, para. 29; ICC-01/04-01/06-2727, para. 28.

⁴ ICC-01/05-01/08-3154-Red; Prosecutor v. Oric, Decision on Urgent Defence motion Regarding Prosecutorial Non-Compliance with Rule 68, 27 October 2005; Prosecutor v. Delic, Trial Chamber, Decision on urgent Defence Motion Concerning Rule 68 Compliance by the Prosecution, 28 March 2008, para.23; Prosecutor v. Delic, Trial Chamber, Decision on Defence Motion to Recall Witnesses, 4 April 2008, p. 4; Prosecutor v. Ndindiliyimana et al, Decision on Defence motions Alleging Violation of the Prosecutor's Disclosure obligations Pursuant to Rule 68, 22 September 2008

⁵ ICC-01/05-01/13-1074-Conf, para. 87, paras. 91-101.

⁶ ICC-01/05-01/13-1245-Red, paras. 6-8

⁷ ICC-01/05-01/13-1148-Conf, para. 10.

10. Nonetheless, notwithstanding this clear direction, the Defence did not receive the Requests for Assistance directed to Austria until after the start of trial on 5 October 2015, which was 25 days after the Trial Chamber had expressly ordered their disclosure.⁸
11. Similarly, although the Trial Chamber had clarified in July 2015 that Rule 77 encompassed all materials concerning the legality of collection of evidence, the Prosecution failed to disclose key correspondence and emails with P-267 until the middle of P-267's testimony in November 2015.
12. It must be noted on this point that the Prosecution initially denied that such correspondence existed;⁹ the Defence were only able to controvert this false assertion through its cross-examination of P-267.
13. Similarly, although the Prosecution disclosed one Austrian Court decision which was issued in 2013, the Defence only obtained the earlier decisions because during cross-examination, P-267 referred to their existence, and was able to produce them (albeit in German).¹⁰
14. With fourteen days of receiving the decisions, the Defence teams filed a complaint in accordance with Austrian law. Given the circumstances, it is evident that the Defence acted in a particularly diligent and expeditious manner, and could not have seized the Austrian Court in a timelier manner, due to the delays in receiving crucial documents.
15. Whereas the investigation, pre-trial and prosecution stage of this case lasted for three years, there was an extremely truncated Defence stage (approximately five months between the end of the Prosecution case, until the close of evidence). The standard delays in obtaining information from State authorities thus had a disproportionately prejudicial impact on the Defence.

⁸ ICC-01/05-01/13-1234-Conf.

⁹ ICC-01/05-01/13-T33, p4 –p. 11, line 20; p. 35, lines 1-12.

¹⁰ ICC-01/05-01/13-T33, p. 34.

16. Although the Court issued one of the decisions at the end of April 2016, as explained by the Defence for Mr. Arido, the Defence did not receive information concerning the actual content of the decisions until recently.
17. The Defence also acted in a diligent manner in order to expedite the transmission of the decision. In particular, the Defence first made repeated inquiries with the Counsel Support Section as to the possible destination and delivery of the decision.¹¹
18. When it became apparent that the letter addressed to Counsel at the ICC had somehow become lost, the Defence then took the extraordinary step of instructing an Austrian lawyer in order to obtain direct access.¹²
19. The Defence, at all times, acted with the requisite standard of diligence for the admission of “fresh evidence”.¹³
20. The documents themselves are self-evidently authentic, reliable, and probative to the issue of the legality of the collection of the Western Union records.
21. Apart from the fact that the Prosecution was the initial cause of delays, the Prosecution would also not be prejudiced through the admission of these decisions at this stage of the proceedings.
22. The matters raised before the Austrian Courts were referred to by the Defence in multiple filings; the Prosecution has had notice of these matters.
23. It is now not necessary for the Trial Chamber to rule on the application of Austrian law,¹⁴ or determine whether there is a manifest violation, which warrants a

¹¹ Annex A.

¹² CAR-D24-0005-0027.

¹³ Prosecutor v. Delalic et al, Appeal Judgment, 20 February 2001, para. 283; Prosecutor v. Gotovina et al, Trial Chamber “Decision on Prosecution’s Motion to Reopen Its Case”, 21 April 2010, para. 10; Prosecutor v. Prlic et al, Trial Chamber “Decision on Prlic’s Motion to Reopen Its Case”, 3 July 2009, p. 5; Prosecutor v. Popovic et al, Trial Chamber “Decision on Motion to Reopen the Prosecution Case”, 9 May 2008, para. 24; Prosecutor v. Mrksic et al, Trial Chamber “Decision on Motion to Reopen Prosecution Case”, 23 February 2007, para. 4; Prosecutor v. Hadzihasanovic and Kubura, Trial Chamber “Decision on the Prosecution’s Application to Reopen Its Case”, 1 June 2005, para 35;

¹⁴ ICC-01/05-01/13-1854, para. 32.

consideration of domestic law.¹⁵ The Court in Vienna has done that, and ruled that there transmission of the records to the ICC Prosecution was completely unlawful.¹⁶

24. It would therefore be in the interests of justice to have an authoritative declaration from an Austrian Court as concerns the law which applied to the transmission of the Western Union records, and the procedure and evidential standards which should have applied.

2.1.1 The Defence has a right to an effective remedy, which includes the restitution of the records, and their exclusion as evidence in this case

25. There are three independent bases for either returning the records to Austria, or excluding them from evidence in this case:

- *Firstly*, the ICC is obliged to respect national laws and orders, and must therefore comply with the Austrian Court's ruling that the transmission of the records to the ICC was illegal and has now been invalidated;
- *Secondly*, as a result of the Austrian Court's ruling that privileges and immunities continue to apply to the Western Union records, the records should either be destroyed or returned to the Defence, or Mrs. Bemba; and
- *Thirdly*, the Austrian Court's ruling that the reasonable suspicion standard had not been met, constitutes a new facts, which warrants reconsideration of the Trial Chamber's ruling on their exclusion under Article 69(7) of the Statute.

26. As concerns the first basis, in its decision of 29 April 2016, the Trial Chamber ruled that violations of the State cooperation provisions of the Statute were not relevant to requests to exclude evidence under Article 69(7) of the Statute.¹⁷

27. The Trial Chamber did not, however, address the separate issue as to whether the ICC – as an organisation which is required to act in a manner which is consistent

¹⁵ ICC-01/05-01/13-1854, para. 34.

¹⁶ Annex C (English translations).

¹⁷ ICC-01/05-01/13-1854, paras. 37-38.

with national law – can retain evidence, in violation of a domestic Court order. This question does not just relate to specific provisions of the Statute, it relates to the overarching responsibility of all entities of the ICC to act in a lawful manner.

28. This issue is of fundamental importance to the Request, and is predicated on the difference between interpreting or applying national law, and complying with domestic judicial orders. This distinction is of the utmost importance in circumstances in which the ICC Prosecution did not obtain an ICC judicial order or request for cooperation, but relied on Austria's own legal process in order to ground the legality of its collection of evidence.¹⁸

29. Unlike the *ad hoc* Tribunals, the ICC Statute and Rules give the ICC no hierarchical superiority *vis-à-vis* domestic Courts.¹⁹ The relationship is instead governed by the terms of the Statute, and any agreements entered into by the ICC and the State in question.

30. In terms of the Statute, the Prosecutor has no right to conduct investigations on the territory of a State, but must either seek the authorisation of the State in question, or rely on national authorities to conduct investigative acts on its behalf, in accordance with the provisions of national law.

31. The Prosecutor has itself, cited this scheme in order to justify the application of specific national law requirements to suspect interviews in this case,²⁰ notwithstanding the fact that they eroded the minimum guarantees afforded to the defendants under the Rome Statute. It would be unfair to allow the Prosecution to rely on national law to the detriment of the Defence, whilst simultaneously preventing the Defence from relying on national law to enforce fundamental rights.

32. In terms of additional legal instruments, although the ICC is imbued with certain privileges and immunities, this grant of function immunity is subject to the proviso

¹⁸ ICC-01/05-01/13-1833-Conf, para. 15.

¹⁹ ICC-01/11-01/11-563, para. 25; See also ICC-01/11-01/11-480, para. 16.

²⁰ ICC-01/05-01/13-1359-Conf, para.3, 30, 31; ICC-01/05-01/13-1359-Conf, para.34 ; ICC-01/05-01/13-1170-Conf, paras.26 and 27.

that the Court, and its officials must act in a manner which is consistent with national law.

33. Article 24 of the Agreement on Privileges and Immunities (APIC), which was entered into by the ICC and Austria,²¹ specifies that,

1. The Court shall cooperate at all times with the appropriate authorities of States Parties to facilitate the enforcement of their laws and to prevent the occurrence of any abuse in connection with the privileges, immunities and facilities referred to in the present Agreement.

2. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying privileges and immunities under the present Agreement to respect the laws and regulations of the State Party in whose territory they may be on the business of the Court or through whose territory they may pass on such business. They also have a duty not to interfere in the internal affairs of that State.

34. APIC thus exempts the ICC from the jurisdiction of national courts, but not national laws or decisions promulgated by national courts.²²

35. Throughout the course of this case, the Pre-Trial Chamber and the Trial Chamber have operated on the assumption that materials requiring a domestic court order could only be transmitted to the ICC after domestic judicial authorisation had been obtained.²³

²¹ The Agreement was adopted by the ICC Assembly of State Parties, and Austria ratified it on 17 December 2003.

²² “Under international law, immunities are only granted from local jurisdiction and not from local laws.” P. Mochochoko, *ibid.*, p. 661.

²³ “Like the Chamber, the Prosecution is obliged to respect these authorities’ compliance with national laws and procedures concerning the transmission of the seized materials, however inconvenient the result”; ICC-01/05-01/13-234-Red, para. 23; ICC-01/05-01/13-255, pages 4, 6 and 7; ICC-01/05-01/13-1284, paras 25 and 26.

36. The Appeals Chamber has further found that it is the responsibility of State parties to resolve conflicts between their obligations under the Statute or cooperation agreements, and their obligations under international human rights law.²⁴
37. There are also important policy considerations for adhering to the ICC's agreement in APIC to respect Austrian law: as emphasised by the Appeals Chamber, violating agreements with States would "seriously damage the Court's ability to enter into future cooperation agreements with States, which would undermine the Court's ability to obtain needed testimony and evidence and render it more difficult to establish the truth in the cases before it."²⁵
38. The decisions of the Austrian Court were also issued subsequent to complaints filed by the defendants in this case; the specific finding that the initial orders for transmission to the ICC are now invalidated constitute an essential element in the defendant's right to an effective remedy.
39. The right to an effective remedy is a peremptory norm of international law.²⁶ Even if the remedy arises independently of the ICC Statute, due to the requirement that the Statute must be interpreted and applied in a manner which is consistent with the internationally recognised human right to an effective remedy (as *per* Article 21(3)) the Trial Chamber can not act in a manner which would frustrate this right.
40. This is consonant with the findings of the Appeals Chamber and Trial Chamber II.²⁷ The Appeals Chamber has also cited with approval legal precedent which exhorts the duty to provide a remedy for violations of international and national law committed in the the course of investigating and prosecuting an accused:²⁸

²⁴ ICC-01/04-02/12-158, para. 29.

²⁵ ICC-01/04-02/12-158, para. 26.

²⁶ In the matter of El Sayed, 'Order Assigning the Matter to the Pre-Trial Judge', CH/PRES/2010/01, paras. 26, 35; See also ICC-01/04-02/12-158, para. 24; ICC-01/04-01/07-3003-tENG, para. 69.

²⁷ ICC-01/04-02/12-158, para. 24.

²⁸ ICC-01/04-01/06-772, para. 29, citing *Bennett v. Horseferry Road Magistrates' Court*, House of Lords, 24 June 1993, [1993] 3 All ER (All England Law Reports), page 138, at page 155.

To quote from the judgment of Lord Bridge in *Bennett v. Horseferry Road Magistrates' Court* (supra), "[w]hen it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court takes cognisance of that circumstance.

41. In terms of violations concerning the collection of evidence, the Appeals Chamber further endorsed the findings of the ECHR in the case of *Teixeira de Castro v. Portugal*, and the conclusion that "Improper conduct by the investigating authorities and the use of evidence resulting therefrom "in the impugned criminal proceedings meant that, right from the outset, the applicant was definitively deprived of a fair trial".²⁹
42. In discussing the specific application of the abuse of process doctrine to the situation of Mr. Lubanga, the Chamber further confirmed that whether the Statute provides that processes must be implemented in accordance with national law, the ICC must assess whether national law is followed.³⁰

The enforcement of a warrant of arrest is designed to ensure, as article 59 (2) of the Statute specifically directs, that there is identity between the person against whom the warrant is directed and the arrested person, secondly, that the process followed is the one envisaged by national law, and thirdly that the person's rights have been respected. The Court does not sit in the process, as the Prosecutor rightly observes, on judgment as a court of appeal on the identificatory decision of the Congolese judicial authority. Its task is to see that the process envisaged by Congolese law was duly followed and that the rights of the arrestee were properly respected. Article 99 (1) of the Statute lays down that the enforcement of the warrant must follow the process laid down by the law of the requested state. In this case, the Pre-Trial Chamber determined that the process followed accorded with Congolese law.

²⁹ ICC-01/04-01/06-772, para. 38, Judgment, 9 June 1998, Application no. 44/1997/828/1034, para. 39.

³⁰ ICC-01/04-01/06-772, para. 41.

43. The Appeals Chamber thus acknowledged that the ICC could and should verify whether the processes envisaged by domestic law for the execution of ICC orders were followed.
44. P-267 released the records for use as evidence on the understanding that their transmission had been approved by an Austrian Court.³¹ In turn, the Austrian Magistrate transmitted these records to the ICC as part of the execution of the initial approval by the Austrian Court.³²
45. This condition is no longer fulfilled; the sole basis for the Prosecution's reliance on them as evidence has now been revoked.
46. Since the Prosecution itself claimed that the excel sheets provided by Mr. Smetana were only provided for 'lead' purposes,³³ Article 54(3)(e) is applicable. This precludes their use as evidence, as the ICC Appeals Chamber has affirmed that the ICC does not possess the right to unilaterally waive Article 54(3)(e).³⁴
47. Apart from the fact that the Trial Chamber should, as a matter of legal principle, respect the rulings of the Austrian Court, the motivation for these rulings constitute grounds to destroy the records, and exclude them from evidence.
48. In particular, the Austrian Court found that the transmission of the Western Union records to the ICC Prosecution was invalid because:
- a. The transmission violated privileges and immunities; and
 - b. The standard of a 'reasonable suspicion' has not been met.
49. The first element constitutes a violation of Article 48(4) of the Statute, and the second, a violation of the right to privacy.

³¹ ICC-01/05-01/13-T-33-ENG, p. 22, lines 19-20; CC-01/05-01/13-T-34-CONF-ENG, pp. 5-6 ; ICC-01/05-01/13-1833-Conf, para. 15.

³² See CAR-OTP-0082-1952 at 1953; See also CAR-OTP-0087-0010, CAR-OTP-0087-0008, CAR-OTP-0087-0006. See also ICC-01/05-01/13-1854, para. 56.

³³ ICC-01/05-01/13-1833-Conf, para. 15.

³⁴ ICC-01/04-01/06-1486, para. 3.

50. Breaches of privileges and immunities do not constitute technical infringements: they go to the heart of the ability of the Defence to perform its work.³⁵ They ensure the ability of the Defence to perform its functions in an independent manner, which is also consistent with Defence confidentiality, as set out in Article 67(1)(b) and (g) and Rule 73(1).

51. The only entity which has the authority to lift Defence privileges and immunities is the Presidency; this was a deliberate choice designed to preserve the independence of Counsel.³⁶

52. The protection of privileges and immunities extends to documents and records concerning Defence activities and Defence witnesses; “[i]nviolability of papers and documents is an important part of these protections.”³⁷ The inviolability of Defence information aims to ensure the protection of Defence witnesses and investigations from arbitrary interference from national authorities.³⁸ Eroding this principle will erode the confidence of potential witnesses and sources that their cooperation with the Defence will remain strictly confidential, and expose actual witnesses and sources to risk.

53. In addition to the violation of Defence rights and privileges, the provision of the names of protected Defence witness to national authorities violated protective orders, and witness immunities. The very nature of the Prosecution’s request identified them as persons who had links to the Defence. This flew in the face of the express recognition by the State parties that such information should not be provided to national authorities, absent a waiver of the witness’s immunity by the Presidency or a variation of the protective order by an impartial Chamber.³⁹

³⁵ *Prosecutor v. Gotovina et al.*, Decision on Gotovina Defence Appeal Against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, (Gotovina Immunities Decision) 14 February 2011, para. 31.

³⁶ “In order to preserve the independence of counsel and enhance the confidence of clients in them, it was decided to give the authority to the Presidency and not the judges before whom counsel will normally appear.” P. Mochochoko, *Fordham International Law Journal* [Vol. 25:638], p. 656.

³⁷ P. Mochochoko *ibid.*, p. 656.

³⁸ Gotovina Immunities Decision, para. 31 and fn. 88.

³⁹ “The major concern with this formulation was that given the nature of the crimes for which witnesses will be required to testify, revealing their identity would put them in a dangerous situation where they could be attacked and killed to prevent them from giving testimony. In the course of the discussions, the article was amended to provide that the names of experts, witnesses, and victims could only be disclosed after the Court

54. As recognised by the Austrian Court, at the time that the documents were transmitted, the Presidency had not lifted any privileges and immunities, which attached to the records.

55. In the absence of such a waiver, the Prosecution had no right to arrogate to itself the right to assess, on a completely *ex parte* basis, whether activities fall within the proper remit of the Defence or their witnesses and whether privileges and immunities should attach vis-à-vis States. The Prosecution cannot play the roles of investigator, prosecutor and judge on such matters. The Court would be unable to function in the environment that it does unless the power to confirm the scope of immunities and to lift them is vested in an impartial entity. To put it this way, if the Trial Chamber or ICC were to ratify the right of any entity, other than the entity designated by the Statute or APIC, to determine the proper scope and content of immunities, then it would open a Pandora's Box to States doing exactly the same in other cases, which would vitiate the very purpose of the Court's immunities.⁴⁰ International law also recognises that privileges and immunities cannot be waived unilaterally, even if a party's concerns are substantiated.⁴¹

56. The Prosecution failed to request any such waiver during the course of its investigations and was thus aware that Defence immunities applied in full force. It is an abuse of power for the Prosecution to explicitly request States to undertake investigative steps, which contravene their own legal obligations. This is particularly the case where those legal obligations aim to protect fundamental rights of the Defence. In such circumstances, it does not matter that the immunities *could* have been waived, what matters is that they were not waived at the time the investigative actions occurred. It is an abuse of process for the executive to take shortcuts to further its own objectives at the expense of respect for the law.⁴²

had considered and decided on such disclosure.⁴³ This was however not found to be adequate protection and it was agreed to limit the disclosure to officials of the Court": P. Mochochoko, *ibid.*, p. 662.

⁴⁰ See *Case concerning United States diplomatic and consular staff in Tehran*, Judgment, 24 May 1980, ICJ Reports 3, paras. 83-85.

⁴¹ *Case concerning United States diplomatic and consular staff in Tehran*, Judgment, 24 May 1980, ICJ Reports 3, paras. 83-85.

⁴² *R v. Horseferry Road Magistrates' Court, Ex parte Bennett*, [1994] 1 A.C. 42. Lord Lane CJ, citing *Reg. v. Hartley* [1978] 2 N.Z.L.R. 199, 216-217.

57. As will be developed below, at the time that the records were transmitted, the Prosecution had no legitimate, and independent basis to claim that the transmission of moneys between all sixty-seven persons over the time period in question, fell outside the scope of Defence functions.

58. Apart from the issue of ICC/APIIC immunities, the transmission of the records also violated the diplomatic immunity of Madame Caroline Bemba, who is a member of the National Assembly of the DRC.⁴³ Madame Bemba was therefore at all times covered by diplomatic immunity of a “third State”.⁴⁴

59. Article 98(1) of the Statute prohibits the Court from proceeding with a request for assistance if it would require the requested State to act inconsistently with its obligations under international law with respect to the diplomatic immunity of a person of a third State. Article 98(1) therefore acts as an absolute bar (“may not proceed”) to the Court’s reliance on inviolable information concerning Mrs. Bemba, in the absence of a waiver of her immunities.

60. This prohibition is further reflected in the Austrian Law on Cooperation with the International Criminal Court,⁴⁵ which specifies that there is an obligation to either consult with the ICC, or reject a request for assistance if its execution would “violate the State immunity or diplomatic immunity of a person or property of a third State”.⁴⁶

61. There is, however, no evidence that either the ICC or Austria requested the Democratic Republic of Congo to lift her immunities. Article 27 of the Statute, which refers to the ability of the ICC to exercise criminal jurisdiction over an individual notwithstanding immunities, is also not applicable to requests for production or documents or evidence.

⁴³ The Defence has attached a copy of Madame Bemba’s diplomatic passport; Annex A.

⁴⁴ The meaning of “third state” in article 98(1) should, according to the literature, be interpreted as meaning “state other than the requested state” since it would otherwise give rise to consequences that were not intended by the drafters: see Claus Kreß and Kimberly Prost, in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court*, 1513-1516, (Second Edition, München/Oxford/Baden-Baden: C.H. Beck/Hart/Nomos, 2008 p. 1606; W. Schabas, *Commentary on the Rome Statute*, (Oxford: OUP, 2010), p. 1039.

⁴⁵ Federal Law no. 135, Published on 13 August 2002, No. GP XXI RV 1168 AB 1214 P. 110 BR 6696 AB 6739 S 690

⁴⁶ Article 9(3).

62. Apart from the fact that reliance on the records would violate Articles 48 and 98 of the Statute, it would damage the integrity of the Court to sanction the use of evidence obtained in violation of privileges and immunities.

63. For this reason, the practice of the ICC, *ad hoc* Tribunals, the International Court of Justice, and the United Nations has been to demand that the originals of documents, which were obtained by national authorities in violation of privileges and immunities, should be returned to their rightful owner, and copies should be destroyed.⁴⁷

64. This remedy applies even if the Prosecution or national authorities wish to use the documents as evidence in criminal proceedings;⁴⁸ to hold otherwise, would constitute a continuing violation and defeat the very purpose of the privileges and immunities.

65. The Austrian Court further recognised that:

- a. Austrian law concerning bank secrecy applied to the transmission of the records;
- b. In order to transmit the records, there needed to be evidence of a reasonable suspicion that the person was engaged in certain prohibited acts;
- c. This requirement need to be fulfilled as a condition precedent; “Banking secrecy must not be broken merely for establishing suspicion”;
- d. there were significant concerns regarding whether the threshold of a reasonable suspicion had been fulfilled; and
- e. exceptional grounds existed to reconsider, and annul the initial decisions.⁴⁹

66. Since the ICC cannot act as a “Court of Appeal” as concerns the correct interpretation of Austrian law, the Trial Chamber cannot look behind the validity of these legal findings.

⁴⁷ Gotovina Immunities Decision; ICC-01/11-01/11-291; *Case concerning United States diplomatic and consular staff in Tehran* Judgment 24 May 1980, ICJ Reports 3, 34-35, para. 69 <http://www.icj-cij.org/docket/files/64/6291.pdf> Provisional Measures, 22 April 2015, *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, para. 27.

⁴⁸ *Case concerning United States diplomatic and consular staff in Tehran* Judgment 24 May 1980, ICJ Reports 3, 34-35, para. 77. See also para. 79. *Gotovina Immunities Decision*, paras. 38-45, 67. (it is notable that in this case, the suggestion to search for documents had initially emanated from ICTY Prosecution. The Appeal Chamber’s decision that the documents should be restored to the Defence therefore affirms that privileges and immunities applied to both Croatia, and in a derivative capacity, the ICTY Prosecution).

⁴⁹ Annex C.

67. The validity of the Court's finding concerning the absence of an evidential foundation for granting the request is, moreover, reinforced by the Prosecutor's submissions before the ICC. In particular, it is apparent from the Prosecutor's submissions to the Trial Chamber that it only attempted to ascertain whether there was any linkage between these payments and Defence activity after it obtained the records.⁵⁰

68. The dearth of concrete evidence in the Prosecution's possession at this juncture is underscored by a finding of the Single Judge, eight months after the first requests for assistance to States were issued, that:

The very premise of the Prosecutor's Request - i.e., the fact that the Prosecutor needed the assistance of the Chamber in accessing information - shows that the [OTP], whilst working on an investigative scenario, has not yet come to a determination as to whether there are reasonable grounds to believe that an offence within the context of article 70 has indeed been committed...⁵¹

69. The Prosecution thus requested States, which are parties to the Statute and APIC, to intrude into areas protected by Defence immunities, on the basis of a fishing expedition.

70. The findings of the Austrian Court constitute new facts, which vitiate the Trial Chamber's previous ruling on the applicability of Article 69(7). The Trial Chamber had determined that Austrian law applied, and that the illegal transmission of the records could violate the internationally recognised right to privacy.⁵² The Trial Chamber nonetheless ruled that the Defence had failed to establish any facts which would vitiate the legality of the Austrian Court orders.⁵³ This finding has been rendered otiose by the Austrian Court's own ruling that these orders are now vitiated.

⁵⁰ ICC-01/05-01/08-2548-Red4, para. 4.

⁵¹ ICC-01/05-50, para. 9.

⁵² ICC-01/05-01/13-1854, paras. 46 and 47.

⁵³ ICC-01/05-01/13-1854, para. 59.

This constitutes clear grounds for reconsideration in accordance with the jurisprudence of this Court.⁵⁴

71. The Trial Chamber did not previously rule on the issue as to whether the scale of the violations would trigger exclusion. The facts are, however, patently distinguishable from previous ICC case law declining to do so. In particular, in contrast to previous decisions:

- a. The rights of the Defendants, rather than third parties, were directly implicated;
- b. The ICC Prosecutor was directly engaged in the process, and responsible for the omissions (failing to substantiate the request, failing to request a waiver of immunities), which gave rise to the violations of the Defendants' rights;
- c. The judicial orders were vitiated by multiple, substantial violations of fundamental Defence rights and privileges and immunities, rather than just technical infringements; and
- d. The records contained information, which the Trial Chamber had previously declined to allow the Prosecution to elicit from the witnesses in questions.⁵⁵

72. In terms of the latter aspect, the integrity of the proceedings is clearly violated in circumstances in which the Prosecution abuses its investigative powers in order to bypass the Chamber's authority to control the confidentiality of information.

73. Finally, the Defence endorses the submissions of the Defence for Mr. Arido that the Austrian Court orders have implications as concerns the admissibility of any derivative materials (such as the intercepts and detention unit records). At the very least, they impact on the weight which must be given to them.⁵⁶

⁵⁴ ICC-01/05-01/13-1896, para. 8.

⁵⁵ ICC-01/05-01/08-T-244-ENG, pp. 58-60.

⁵⁶ ICC-01/05-01/13-1799-Conf, paras. 99 and 101.

3. Relief Sought

74. For the reasons set out above, the Defence for Mr. Jean-Pierre Bemba respectfully requests the Trial Chamber to grant the Request.



Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba

Dated this 29th day of June 2016

The Hague, The Netherlands