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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

Defence Request for Leave to Appeal the 'Decision on Request in Response of Two
Austrian Decisions'

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 Gombo respectfully seeks leave to appeal the ‘Decision on Request in Response of Two Austrian Decisions’ (the Decision),¹ in relation to the following issues:
 - i. The Trial Chamber’s omission to consider whether there was an alternative basis to exclude the documents under the Statute (i.e other than *via* Article 69(7)), or otherwise provide an effective remedy (*The First Issue*); and
 - ii. Whether the Trial Chamber omitted to give sufficient weight to allegations of improper conduct on the part of the Prosecution (including the Prosecution’s unlawful reliance on information transmitted directly from Mr. Smetana, the ambiguous formulation of the Requests for Assistance (RFAs), and the Prosecution’s failure to request and disclose timeously the ‘Repealed Austrian Rulings’, RFAs, and related correspondence with Mr. Smetana) (*the Second Issue*).

Submissions

The First Issue

2. The Defence for Mr. Arido requested the Trial Chamber to order the destruction or return of the documents to Austria.² The Defence for Mr. Bemba further argued since the existence of a valid Austrian Court order had been a condition precedent as concerns the transmission of the records to the

¹ ICC-01/05-01/13-1948.

² ICC-01/05-01/13-1928-Conf-Cor, para. 4.

ICC, the repeal of these orders vitiated the right of the ICC to retain and rely on them.³

3. These issues were not, however, addressed by the Trial Chamber.
4. This omission impacts on both the outcome of the decision itself, and the outcome of the trial.
5. In terms of the first aspect, as argued by the respective Defence teams, both the ICC Statute and the Agreement on Privileges and Immunities between the ICC and Austria stipulate that the Prosecution must conduct its investigations in a manner which is consistent with the domestic law of Austria.
6. Although Article 54 and Part 9 allow the Prosecution to request Austria to provide cooperation, such cooperation must be implemented in a manner which is consistent with domestic law.
7. Both Western Union, and Austrian authorities agreed to transmit the requested Western Union records to the ICC for use as evidence in the proceedings, they did so on the basis of the understanding that there was a valid judicial order, which mandated the transmission of these records to the ICC. The repeal of these orders therefore revoked the basis for their consent.
8. The framework of mutual legal assistance set out in Part 9 and Article 93 in particular makes very clear that firstly, the ICC cannot request States to violate national law,⁴ secondly, that if compliance with certain domestic legal procedures is a condition precedent to the execution of cooperation requests,

³ ICC-01/05-01/13-1941-Corr, paras. 48-73.

⁴ See for example, Article 93(1) (chapeau element), and Article 93(1)(f) "Any other type of assistance which is not prohibited by the law of the requested State".

the ICC must respect such conditions,⁵ and thirdly, the fact that the ICC has physical possession of information provided by a State does not entitle the ICC to use such information in a manner which is contrary to the conditions imposed by the State.⁶

9. These principles are particularly salient in cases where protection of personal data is at issue, such as the case at hand. This is evidenced in mutual legal assistance frameworks such as the European Convention for Mutual Legal Assistance in Criminal Matters. The principle of mutual consent between States, from which mutual legal assistance generally derives and under which it operates, is facilitated through the requirement that transmission of information containing personal data is to be subjected to specific and explicit conditions imposed by the requested State.⁷ Such conditions must be respected by the requesting State, and if they are not, consent to the assistance can be revoked and the transmitted information has to be reinstated to the requested State.⁸

10. Finally, the Austrian Rulings make very clear that that it is their understanding that the appropriate course of action would be for the Austrian Prosecution to resubmit the request to transmit the information to the ICC, and that upon submission of such a request, the Court would also consider further issues, such as the applicability of privileges and immunities of the Defence. The Defence notes in this regard that since the Austrian Court declined to rule on the separate question as to whether an Austrian Court had the power to waive privileges and immunities (in the absence of a

⁵ As underscored by Article 93(5).

⁶ See for example, Article 93(8) and (10(b)(ii).

⁷ Article 6, 95/46/EC – The Data Protection Directive (http://ec.europa.eu/justice/policies/privacy/docs/95-46-ce/dir1995-46_part1_en.pdf), ‘Personal data must be (...) (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes’.

⁸ Advocate General Bot’s Opinion, *Case C-362/14, Maximillian Schrems v Data Protection Commissioner* (<http://curia.europa.eu/juris/document/document.jsf?docid=168421&doclang=EN>), para. 141.

waiver from the ICC Presidency), the privileges and immunities of the Defence (and Ms. Bemba) as concerns the records remain intact. Indeed, the Court's ruling that the reasonable suspicion element had not been fulfilled only serves to underscore the absence of a basis for assuming that the information within the records did not fall with the protected functions of Defence/Diplomatic activity. The basis for immediate restitution (as elaborated by the Defence for Mr. Bemba) continues to apply.⁹

11. By declining to rule that the ICC Prosecution is obliged to request the Austrian Prosecutor to follow the process set out by the Austrian Court, the Trial Chamber has effectively, nullified the legal effect of this ruling, and denied the Defence the right to seek an effective remedy as concerns its right to assert privileges and immunities before the Austrian Court.

12. It follows from the above that if the Trial Chamber had considered and adopted the arguments of the Defence, this would have had the necessary consequence that the Chamber would have been precluded from relying on the Western Union records in any final judgment. Given the important role that the records have played in the Prosecution case, this outcome would have impacted on the outcome of the trial itself.

13. Immediate intervention from the Appeals Chamber is therefore required to ensure that the outcome of this trial is not tainted by the alleged error.

Second issue

14. Although the Trial Chamber found that the right to privacy had been violated, the Chamber rejected Defence arguments that the admission of

⁹ ICC-01/05-01/13-1941-Cor, para. 50-64.

evidence would be antithetical to and would seriously damage the integrity of the proceedings.

15. In reaching this conclusion, the Chamber found that the “the Prosecution did not act with intention to circumvent national procedures”, and “undertook the necessary steps to legally obtain the material”.¹⁰ The Trial Chamber further noted that it was the ‘Repealed Austrian Rulings’ which “prevented the Prosecution from potentially providing further information to the Austrian authorities”.¹¹

16. It is respectfully submitted that these conclusions fail to give adequate weight to improper conduct on the part of the Prosecutor. Had the Chamber done so, it would have concluded otherwise.

17. Notwithstanding earlier obfuscations on this point, it is now not disputed that the Prosecution requested Western Union to transmit confidential data directly to the Prosecution before any Court order had been issued. This was intentional, wrongful conduct on the part of the Prosecution.

18. The Austrian Court’s decision to repeal its earlier orders is predicated on this wrongful conduct. Namely, the Court found that the threshold for ‘reasonable suspicion’ had not been fulfilled because the evidential relevance of the records had been established through information, which the Prosecution was not entitled to have.¹²

19. Similarly, the Court found that the request had failed to specify the crimes with sufficient precision. This ambiguity stems from the language employed

¹⁰ Para. 39.

¹¹ Para. 37.

¹² “Banking secrecy must not be broken merely for establishing suspicion”, ICC-01/05-01/13-1941-Conf-AnxC, p. 11.

by the ICC Prosecution in its requests for assistance, which intentionally created the impression that the requests were linked to serious crimes, and the charged events in ICC-01/05-01/08.¹³

20. The Prosecution even maintained this ambiguity during the proceedings in this case, arguing that the information had been requested as part of its investigations in the Main Case.¹⁴

21. Although the Trial Chamber found in its decision of 29 April 2016 that it did not consider that the Austrian authorities had been misled by the wording of the RFAs,¹⁵ it is clear from the Repealed Rulings that the ambiguity in wording was problematic.¹⁶ Article 96(2) of the Statute also imposes the obligation on the requesting party (in this case, the Prosecution) to ensure that its request for assistance is sufficiently clear, detailed, and substantiated.

22. The fact that the initial orders were based on flawed information and reasoning was therefore squarely attributable to the intention conduct of the ICC Prosecution.

23. Similarly, in finding that the “Repealed Austrian Rulings also prevented the Prosecution from potentially providing further information to the Austrian

¹³ See CAR-OTP-0091-0351 (referring to the decision of the Prosecution to enter into an investigation into Article 5 crimes in the CAR situation) and CAR-OTP-0091-0353 and 0354, which set out specific incidents and dates concerning the substantive charges against Mr. Bemba, and the repeated reference to ‘crimes under the jurisdiction of the Court’, which is defined in article 5 as genocide, war crimes and crimes against humanity.

¹⁴ “MS STRUYVEN: Maybe just very shortly to correct. These documents date 24 November 2012, and at the time the investigation was taking place in the main case, meaning in relation to the Bemba case in which war crimes and crimes against humanity were alleged. So that is why these documents refer to these crimes, just simply because at that time there was no separate Article 70 case.” ICC-01/05-01/13-T-34-CONF-ENG ICC-01/05-01/13-T-34-CONF-ENG pp. 66 lines 24-25, p. 67 lines 103.

¹⁵ ICC-01/05-01/13-1854

¹⁶ ICC-01/05-01/13-1941-Conf-AnxC, p. 12.

authorities”,¹⁷ the Trial Chamber omits to note or consider why the flawed findings were not litigated at an earlier juncture.

24. Concretely, notwithstanding the Prosecutor’s duty to search for and collect all relevant information that might be relevant, the Prosecution did not request the Austrian authorities to transmit these rulings to it. The Prosecution also resisted multiple requests from the Defence for access to the RFAs concerning the collection of the Western Union records.¹⁸ As a result of the conduct of the Prosecution, the Defence was not in a position to file a complaint before Austrian Court until after the testimony of Mr. Smetana.

25. Had the Prosecution acted in a manner which was consistent with its obligations under Article 54(1)(a), and Rule 77, these issues could have been litigated and addressed at the pre-confirmation phase. It was thus not the Repealed Rulings which prevented the Prosecution from providing further information, but the Prosecution’s own failure to respect the rights of the Defence under the Statute. It would be antithetical to the integrity of the proceedings to allow the Prosecution to benefit from its own investigative and disclosure failings.

26. As was the case with First Issue, the Defence respectfully submits that had the Trial Chamber given due weight to these allegations of improper conduct on the Prosecution, it would have determined that the criteria for exclusion were met. This in turn, would have impacted on the outcome of the trial. Immediate appellate intervention is required for the same reason as for the First Issue.

¹⁷ Para. 37.

¹⁸ See ICC-01/05-01/13-1941-Corr, paras. 8-14.

Relief sought

27. For the reasons set out above, the Defence for Mr. Bemba respectfully requests the Honourable Trial Chamber to grant the Defence leave to appeal the 'Decision on Request in Response of Two Austrian Decisions' in relation to the two issues set out above.



Melinda Taylor
Counsel for Mr. Jean-Pierre Bemba

Dated this 20th day of July 2016

At The Hague, The Netherlands