

**Cour
Pénale
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**International
Criminal
Court**

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No.: ICC-01/05-01/13

Date: 15 July 2016

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, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO***

Public Redacted Document

**Public redacted version of "Prosecution's Response to 'Corrigendum to Narcisse Arido's Request for an Effective Remedy in Light of Two Austrian Decisions'",
27 June 2016, ICC-01/05-01/13-1939-Conf**

Source: The Office of the Prosecutor

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

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I. Introduction

1. The Arido Defence's Request for an Effective Remedy in Light of Two Austrian Decisions ("Motion")¹ should be rejected. The Motion advances no cognisable basis for the relief requested, and fails on the facts and the law. Trial Chamber VII ("Chamber") should dismiss the Motion.

II. Confidentiality

2. This filing is classified as "*Confidential*" as it responds to a filing of the same designation. A "*Public redacted*" version will be filed.

III. Submissions

A. The Prosecution defers to the Chamber's discretion regarding the requested variation of time limits

3. Insofar as Arido seeks that the Chamber vary the applicable time limits concerning the Motion, the Prosecution defers to the Chamber's discretion, which is expressly delimited by regulation 35(2) of the Regulations of the Court. That said, the Motion and the attendant circumstances of the case make clear that, well before resting its case on 21 April 2016,² the Arido Defence was fully aware of the pendency of proceedings before the Vienna Appeals Court resulting in the two Austrian Decisions³ now at issue. Given that knowledge, Arido rested his case without any reference to the pendency of the Austrian appeals proceedings or otherwise subject

¹ ICC-01/05-01/13-1928-Conf-Corr. For the same reasons as those expressed below, the relief requested by Babala (ICC-01/05-01/13-1929-Conf) and Kilolo (ICC-01/05-01/13-1938-Conf) and any other Accused which may join the Motion should also be rejected. To the extent that any of the Accused in responding to the Motion either raises arguments not addressed in the Motion or requests relief on a different basis, the Prosecution reserves the right to request leave to reply or to file a response as is appropriate.

² ICC-01/05-01/13-1825.

³ See CAR-D24-0005-0001, rendered on 22 April 2016, CAR-D24-0005-0013, rendered on 24 May 2016 respectively

to their outcome,⁴ and further failed to timely raise the issue on the Chamber's closure of the evidence in the case on 29 April 2016.⁵

B. Judicial notice of the Austrian Decisions is inappropriate

4. Arido's request for judicial notice of the Austrian Decisions is ill-founded and unnecessary. *First*, as concerns the relief requested and, *inter alia*, the exclusion of evidence under article 69(7) of the Rome Statute ("Statute"), the Austrian Decisions are not evidential in the sense that they are not probative of a contested issue in the context of the Chamber's article 74 determinations;⁶ *second*, to the extent that the Chamber may consider the Austrian Decisions in respect of the Motion itself, judicial notice is not required; and *third*, even if the Austrian Decisions can be considered evidentiary in respect of the trial, the Motion fundamentally misunderstands the notion of judicial notice, in conflating matters which may be readily *provable* and those for which a Chamber may legally dispense with any proof – *i.e.*, facts of common knowledge.⁷ Decisions of domestic courts fall within the category of readily provable *evidence* outside the Court's jurisdiction, not *facts* within it — for which such proof need not be adduced.

C. There are no legal grounds for the destruction or repatriation of the Western Union records

5. Arido's request for the destruction or repatriation of the Western Union records at issue is without any legal foundation in the statutory framework. Nor does the Motion otherwise provide any authority for the requested relief. Accepting the Austrian Decisions on their face, the relief sought further depends on their

⁴ ICC-01/05-01/13-1825, paras. 1-3.

⁵ ICC-01/05-01/13-1859.

⁶ See *e.g.* ICC-01/05-01/13-1753, para. 12 (holding that the proffered evidence of D20-0002 "cannot be considered as admissible 'evidence', but could be considered as supporting material in an Article 69(7) motion."). The Chamber has already and correctly found that any purported violation of the right to privacy does not affect the reliability of the records obtained. See ICC-01/05-01/13-1854, para. 62 ("Western Union Exclusion Decision").

⁷ See article 69(6) of the Rome Statute.

retroactive application to material which the Chamber found was acquired in compliance with the Statute and in accordance with the Austrian legal framework,⁸ and which the Chamber properly recognised as “formally submitted” on the appropriate tender by the Prosecution⁹ — all well before the Austrian Decisions were ever rendered.

6. That the Austrian Decisions (apparently obtained by default)¹⁰ identify procedural errors on the part of the Public Prosecutor and Austrian court in acting on the Prosecution’s requests for assistance (“RFAs”), does not render the acquisition and transmission of the Western Union records (albeit, ostensibly in error) a legal nullity under the Statute. At the time the Western Union records were acquired and transmitted, this was sanctioned by Austrian authorities, who thereby lawfully discharged their obligations both under the Statute and pursuant to their national legal framework—even if their actions were later deemed erroneous by a domestic appeals court.¹¹

7. Further, to the extent that the Austrian Decisions themselves do not require any domestic authority involved in the acquisition and transmission of the Western Union records, or otherwise request the Court to expunge, return, or destroy any such material, they undermine any legal basis for Arido’s request.

D. The Motion fails to meet the legal requirements for reconsideration

8. Arido’s request for reconsideration fails on the facts and the law. Although the Chamber did not have the Austrian Decisions at its disposal when rendering the Western Union Exclusion Decision, this alone does not satisfy the legal threshold for reconsideration. To the contrary, the Motion fails to demonstrate that the

⁸ See ICC-01/05-01/13-1854, paras. 50, 54, 59, 70.

⁹ ICC-01/05-01/13-1285.

¹⁰ See CAR-D24-0005-0001, at 0004 (“*Damit war – im Zweifel (die Staatsanwaltschaft Wien auesserte sich zur Beschwerde ebensowenig wie die Oberstaatsanwaltschaft Wien (vgl AS 5 in ON) – von der Rechtzeitigkeit der Beschwerde auszugehen.*”); CAR-D24-0005-0013, at 0016.

¹¹ See e.g. ICC-01/05-01/13-1854, para. 36 (internal citations omitted).

unavailability of the Austrian Decisions to the Chamber resulted in an injustice or a manifestly unsound consequence¹² — and, in fact, it has not. Arido's conclusory assertion that "the existence of the Austrian Decisions makes the Decision on the Exclusion of Evidence unsound"¹³ is neither reasoned nor substantiated. The Austrian Decisions do not have, and could not have, any impact on the Western Union Exclusion Decision for several reasons.

9. *First*, the Austrian Decisions ostensibly concern whether the conduct of the Austrian authorities complied with national law, which the Statute and Rules of Procedure and Evidence preclude the Chamber from determining.¹⁴ Thus, in the Western Union Exclusion Decision, the Chamber specifically and correctly determined, "it is clear that the Chamber cannot analyse whether or not the Austrian authorities correctly applied domestic laws as such."¹⁵ In this regard, consideration of the Austrian Decisions would have made no difference as to the outcome of Defence's exclusion applications.

10. *Second*, the Motion fails to demonstrate that the Austrian Decisions could, or would, have altered the Chamber's determination that the Prosecution or Austrian authorities did not "manifestly violate" Austrian law,¹⁶ *i.e.* that actions did not constitute a flagrant disregard of the applicable national laws put in place to protect privacy rights.

11. As the Chamber found and correctly concluded, "infringements of domestic procedure do not *per se* constitute violations of the Statute under Article 69(7), even if such infringements are not in accordance with the laws of the requested State".¹⁷ It

¹² ICC-01/04-02/06-519, para. 12; *see particularly*, ICC-01/04-01/06-2705, para. 18.

¹³ ICC-01/05-01/13-1928-Conf-Corr, para. 26.

¹⁴ *See* article 69(8) of the Rome Statute; rule 63(5) of the Rules of Procedure and Evidence.

¹⁵ ICC-01/05-01/13-1854, para. 32.

¹⁶ ICC-01/05-01/13-1854, paras. 59, 60, 70.

¹⁷ ICC-01/05-01/13-1854, para. 40.

determined that, in balancing its obligations under articles 69(7) and (8), it was constrained to:

“review the application of national law only to the extent necessary to determine whether a violation occurred under Article 69(7) of the Statute. In other words [...] solely to determine if something *so manifestly unlawful occurred* that it amounts to a violation of the Statute or internationally recognised human rights.”¹⁸

Thus, the Chamber concluded “that [the] manner in which the Western Union Documents were provided is not so manifestly unlawful that it fails to be ‘in accordance with the law’ for purposes of the right to privacy”.¹⁹

12. The Austrian Decisions neither alter this analysis, nor show that the conduct of the Prosecution or the domestic authorities was “manifestly unlawful.” To the contrary, the Austrian Decisions show that the relevant domestic legal procedures were followed – even if a purported technical error was made. As those decisions and the Western Union Exclusion Decision show,²⁰ the Prosecution consistently operated within the Austrian legal framework securing privacy rights. The Prosecution consulted Austrian Public Prosecutor [REDACTED]. It submitted an RFA which was accepted and processed by the Austrian prosecutors and approved by the Austrian courts. And it was through that process that these records were transmitted to the Prosecution. In short, all of the applicable domestic legal procedures were observed.

13. The Austrian lower court’s errors identified in the Austrian Decisions in no way demonstrate conduct in collecting the relevant records which the Austrian Public Prosecutor, regional court Judge, or indeed, the Prosecution could reasonably have

¹⁸ ICC-01/05-01/13-1854, para. 34 (emphasis added).

¹⁹ ICC-01/05-01/13-1854, para. 60.

²⁰ See generally CAR-D24-0005-0001; CAR-D24-0005-0013; ICC-01/05-01/13-1854, paras. 55-60.

considered to be flagrantly not “‘in accordance with the law’ for purposes of the right to privacy.”²¹ Rather than demonstrating manifest unlawfulness, the Austrian Prosecutor and regional court’s review, approval and execution of the Prosecution’s RFAs on multiple occasions²² show that the Austrian legal framework regarding the protection of the right to privacy was respected. The Austrian Decisions reflect nothing more than a technical error of the lower court, and not a manifest circumvention of the appropriate domestic procedural safeguards of the right to privacy. Notably, the Austrian Decisions do not require the return or destruction of the Western Union records obtained pursuant to the Prosecution’s RFAs.

14. *Third*, the Motion does not establish how the technical error attendant to the Austrian regional court proceedings establish a violation of the right to privacy so serious and intrusive as to warrant the exclusion of evidence before this Court. For instance, the Chamber, *inter alia*, never concluded that a violation of the Austrian Banking Act necessarily comprises “manifest unlawfulness” for the purposes of the right to privacy in the context of an article 69(7) analysis. The Austrian Decisions would have had no effect on the Chamber’s analysis or the arguments previously advanced by the Prosecution.²³ Rather, the Chamber categorically found that the Statute does not allow it to assess whether the prior authorisations of an Austrian Judge for the acquisition and transmittal of the Western Union records pursuant to the Prosecution’s RFAs — as was indisputably done here — were “[themselves] lawfully provided under Austrian law as such.”²⁴ Consideration of the Austrian Decisions does not affect that legal analysis and therefore, the conclusion.

15. Given the Chamber’s assessment that the right to privacy may not be interfered with except in accordance with the law, the Western Union Exclusion Decision holds that consideration of domestic law in such context is limited to

²¹ ICC-01/05-01/13-1854, para. 60.

²² See e.g. CAR-OTP-0092-0834; CAR-OTP-0092-0836.

²³ See ICC-01/05-01/13-1833-Conf, paras. 16, 21-22. See also ICC-01/05-01/13-1854, para. 67.

²⁴ See ICC-01/05-01/13-1854, paras. 50, 51.

determining whether the correct procedural safeguards were applied — rather than the correctness of their application. Insofar as the Austrian Decisions speak only to the latter issue, their review is irrelevant to the Chamber's determination under article 69(7), and thus defeats Arido's request for reconsideration.

IV. Relief Requested

16. For the foregoing reasons, the Motion should be dismissed in all respects.



Fatou Bensouda, Prosecutor

Dated this 15th Day of July 2016
At The Hague, The Netherlands