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**International
Criminal
Court**

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Date: **14 July 2016**

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul C. 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

Decision on Request in Response to Two Austrian Decisions

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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Trial Chamber VII ('Chamber') of the International Criminal Court ('Court' or 'ICC'), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Articles 64, 67(1) and 69 of the Rome Statute ('Statute') and Regulation 35 of the Regulations of the Court ('Regulations'), issues the following 'Decision on Request in Response to Two Austrian Decisions'.

I. Procedural History

1. On 9 March 2016, the Presiding Judge of the Chamber set a deadline of 8 April 2016 ('8 April Deadline') for all evidentiary submissions, including requests to recognise material as formally submitted.¹
2. On 29 April 2016, the Chamber issued a decision rejecting, inter alia, requests to declare financial records emanating from Western Union ('Western Union Documents') inadmissible ('Western Union Decision').²
3. On the same day, the Presiding Judge declared the presentation of evidence to be closed.³
4. On 20 April and 24 May 2016, the *Oberlandesgericht Wien* (Higher Regional Court of Vienna) rendered two rulings, repealing two lower-court rulings ('Repealed Austrian Rulings') and denying authorisation of two judicial orders submitted by the Austrian public prosecutor's office concerning the collection of the Western Union Documents ('Austrian Rulings').⁴

¹ Hearing of 9 March 2016, ICC-01/05-01/13-T-42-Red2, p.54, line 18 to p.43, line 12.

² Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7), ICC-01/05-01/13-1854.

³ Decision Closing the Submission of Evidence and Further Directions, ICC-01/05-01/13-1859.

⁴ CAR-D24-0005-0013 (first *Oberlandesgericht* decision), CAR-D24-0005-0045 (official French translation of CAR-D24-0005-0013). CAR-D24-0005-0013 (second *Oberlandesgericht* decision), CAR-D24-0005-0034 (official French translation of CAR-D24-0005-0013).

5. On 9 June 2016, the defence for Mr Arido ('Arido Defence') filed a motion in reaction to the Austrian Rulings containing several requests ('Request').⁵
6. On 10 and 24 June 2016, the defence for Mr Babala and Mr Kilolo filed their responses, joining the Request.⁶
7. On 27 June 2016, the Office of the Prosecutor ('Prosecution') filed its response, submitting that the Request should be rejected ('Prosecution Response').⁷
8. On the same day, the defence for Mr Mangenda and Mr Bemba ('Mangenda Defence' and 'Bemba Defence, respectively) filed their responses, joining the Request ('Mangenda Response'⁸ and 'Bemba Response',⁹ respectively).

II. Submissions

9. The Arido Defence requests in particular that the Chamber (i) take judicial notice of the Austrian Rulings and 'the violations contained therein' and consider these violations in the assessment of the Western Union Documents and 'any evidence obtained through them';¹⁰ (ii) order the destruction or transfer back to the Austrian authorities of all material obtained on the basis of the Repealed Austrian Rulings;¹¹ (iii) re-consider the Western Union Decision and grant the

⁵ Narcisse Arido's Request for an Effective Remedy in Light of Two Austrian Decisions, a corrected version was filed on 13 April 2016, ICC-01/05-01/13-1928-Conf-Corr.

⁶ Adjonction de la Défense de M. Fidèle Babala Wandu à « *Narcisse Arido's Request for an Effective Remedy in Light of Two Austrian Decisions* » (ICC-01/05-01/13-1928-Conf), ICC-01/05-01/13-1929-Conf; Adjonction de la défense de monsieur Aimé Kilolo Musamba à « *Narcisse Arido's Request for an Effective Remedy in Light of Two Austrian Decisions* » (ICC-01/05-01/13-1928-Conf), ICC-01/05-01/13-1938-Conf.

⁷ Prosecution's Response to "Corrigendum to Narcisse Arido's Request for an Effective Remedy in Light of Two Austrian Decisions", (ICC-01/05-01/13-1928-Conf-Corr), ICC-01/05-01/13-1939-Conf.

⁸ Response to Arido Request for an Effective Remedy in Light of Two Austrian Decisions (ICC-01/05-01/13-1928-Conf) ICC-01/05-01/13-1940-Conf.

⁹ Defence Response to "Narcisse Arido's Request for an Effective Remedy in Light of Two Austrian Decisions" (ICC-01/05-01/13-1928-Conf), ICC-01/05-01/13-1941 with three confidential annexes A to C. A corrigendum was filed on 29 April 2016, ICC-01/05-01/13-1941-Corr.

¹⁰ Request, ICC-01/05-01/13-1928-Conf-Corr, paras 4 a. and 28 a..

¹¹ Request, ICC-01/05-01/13-1928-Conf-Corr, paras 4 b. and 28 b..

initial relief requested¹² and (iv) admit the Austrian Rulings into evidence pursuant to Article 69(4) of the Statute.¹³

10. In respect of the timing of the Request, the Arido and Bemba Defence submit that the defence received the first of the Austrian Rulings only on 27 May 2016, due to a problem with the postal delivery and acted diligently in trying to obtain it.¹⁴ As to the second the Austrian Ruling, the Arido Defence submits that it was issued on 24 May 2016 and only received by the defence on 6 June 2016, after the closing submissions.¹⁵ Accordingly, the Arido Defence argues that the conditions of Regulation 35(2) of the Regulations are fulfilled¹⁶ and the Bemba Defence submits that it would be in the interests of justice to allow the defence to rely on the Austrian Rulings.¹⁷
11. In respect of the application to take judicial notice of the Austrian Rulings, the Arido Defence submits that they are official court documents, bear inherent signs of authenticity and are material to the case.¹⁸
12. With regard to the request that all material obtained on the basis of the Austrian Rulings be destroyed or transferred to the Austrian authorities, the Arido Defence argues that the Austrians Rulings clarify that the material should 'have never been transmitted to the Prosecution'.¹⁹ Accordingly, in the view of the Arido Defence, the use of these documents goes against the consent of the State of Austria.²⁰ The Mangenda Defence argues that this should also include the

¹² Request, ICC-01/05-01/13-1928-Conf-Corr, paras 4 c. and 28 c..

¹³ Request, ICC-01/05-01/13-1928-Conf-Corr, paras 4 d. and 28 d..

¹⁴ Request, ICC-01/05-01/13-1928-Conf-Corr, paras 7-8; Bemba Response, ICC-01/05-01/13-1941-Corr, paras 16-19.

¹⁵ Request, ICC-01/05-01/13-1928-Conf-Corr, para. 9.

¹⁶ Request, ICC-01/05-01/13-1928-Conf-Corr, para. 6.

¹⁷ Bemba Response, ICC-01/05-01/13-1941-Corr, para. 4.

¹⁸ Request, ICC-01/05-01/13-1928-Conf-Corr, paras 11-15. *See also*, Bemba Response, ICC-01/05-01/13-1941-Corr, para. 20.

¹⁹ Request, ICC-01/05-01/13-1928-Conf-Corr, para. 18.

²⁰ Request, ICC-01/05-01/13-1928-Conf-Corr, para. 19.

intercepted communications, as the Western Union Documents were the basis for the authorisation to intercept the telephone communication.²¹

13. The Bemba Defence submits that the Court is obliged to respect national laws and orders which, in the present case and according to the Bemba Defence, necessitate compliance with the Austrian Rulings and lead to the exclusion of the evidence and destruction of the material obtained. It further argues that this is part of the right to an effective remedy.²²
14. Further, the Bemba Defence argues that the Austrian Rulings have found that the transmission violated privileges and immunities which constitute a violation of Article 48(4) of the Statute as well as Ms Caroline Bemba's diplomatic immunity.²³
15. Concerning the request for reconsideration, the Bemba Defence submits that the findings in the Austrian Rulings contain new facts and warrant reconsideration of the Western Union Decision.²⁴ Equally, the Arido Defence submits that the Austrian Rulings constitute a new fact that leaves the Western Union Decision manifestly unsound²⁵ and the Mangenda Defence submits that they show that the manner in which the Western Union Documents were provided was manifestly unlawful.²⁶
16. The Mangenda Defence additionally submits that the Austrian Rulings also clarify that Article 99(4) of the Statute was violated.²⁷
17. The Prosecution submits that, with regard to the request to take judicial notice of the Austrian Rulings, the requested relief is unnecessary since the material in

²¹ Mangenda Response, ICC-01/05-01/13-1940-Conf, paras 5-6.

²² Bemba Response, ICC-01/05-01/13-1941-Corr, paras 25-47.

²³ Bemba Response, ICC-01/05-01/13-1941-Corr, paras 48-64.

²⁴ Bemba Response, ICC-01/05-01/13-1941-Corr, paras 48, 65-73

²⁵ Request, ICC-01/05-01/13-1928-Conf-Corr, para. 18.

²⁶ Mangenda Response, ICC-01/05-01/13-1940-Conf, para. 3.

²⁷ Mangenda Response, ICC-01/05-01/13-1940-Conf, para. 4.

question is not probative of a contested issue in the decision under Article 74 of the Statute and, for the purposes of the Request itself, judicial notice is not required.²⁸ Lastly, it submits that the Austrian Rulings do not fall into the category of material of which judicial notice can be taken of.²⁹

18. In respect of the relief that the material obtained on the basis of the Repealed Austrian Rulings be destroyed, the Prosecution avers that it lacks any legal basis,³⁰ that – at the moment of the acquisition – the Western Union Documents were lawfully obtained³¹ and that the Austrian Rulings do not require a restitution or destruction of them.³²
19. In respect of the request to reconsider the Western Union Decision, the Prosecution submits that the legal requirements are not met. It argues that the fact that the Chamber did not possess the Austrian Rulings at the time of the issuance of the Western Union Decision does not make it unsound since these rulings could not have impacted it.³³ In support of this, the Prosecution submits that, firstly, the Chamber is precluded from determining if the national law has been respected. Since the Austrian Rulings concern precisely this point, the Chamber is prohibited from taking them into consideration.³⁴ It further submits that the Austrian Rulings do not prove that Austrian law was ‘manifestly violated’.³⁵ Lastly, the Prosecution argues that the Austrian Rulings do not establish a violation of the right to privacy that is so serious and intrusive that it warrants the exclusion of evidence before this Court. It submits that in determining if the Western Union Documents have been acquired ‘in accordance

²⁸ Prosecution Response, ICC-01/05-01/13-1939-Conf, para. 4.

²⁹ Prosecution Response, ICC-01/05-01/13-1939-Conf, para. 4.

³⁰ Prosecution Response, ICC-01/05-01/13-1939-Conf, para. 6.

³¹ Prosecution Response, ICC-01/05-01/13-1939-Conf, para. 6.

³² Prosecution Response, ICC-01/05-01/13-1939-Conf, para. 7.

³³ Prosecution Response, ICC-01/05-01/13-1939-Conf, para. 8.

³⁴ Prosecution Response, ICC-01/05-01/13-1939-Conf, para. 9.

³⁵ Prosecution Response, ICC-01/05-01/13-1939-Conf, paras 10-13.

with the law' the determining factor is whether the procedural safeguards have been applied, not if they have been applied correctly.³⁶

III. Analysis

20. The Chamber will first address the relief to reconsider the Western Union Decision and then address the remainder of the relief sought.

1. *Reconsideration of the Western Union Decision*

21. As a preliminary matter, the Chamber notes that it has previously stated that, in order to be considered as supporting material in a challenge of the legality of evidence, the material in question does not necessarily have to be admitted into evidence (or recognised as 'formally submitted' in the system established by the Chamber).³⁷ Accordingly, the Chamber takes into account the Austrian Rulings when deciding whether the Western Union Decision should be reconsidered.

22. In respect of the timing of the Request, the Chamber notes the submissions by the Arido and Bemba Defence, and finds that it is in the interest of justice to consider the Request, despite the fact that it was filed after the closing arguments of the parties.

23. The Chamber recalls its prior jurisprudence as well as decisions of other chambers regarding reconsideration.³⁸ Accordingly, reconsideration is

³⁶ Prosecution Response, ICC-01/05-01/13-1939-Conf, paras 14-15.

³⁷ Decision on Bemba Defence Application for Admission of D20-2's Prior Recorded Testimony Pursuant to Rule 68(2)(b) of the Rules, 29 March 2016, ICC-01/015-01/1753, para. 12.

³⁸ Decision on Kilolo Defence Request for Reconsideration, 15 June 2015, ICC-01/05-01/13-1085-Conf, para.4; Decision on Defence Request for Reconsideration of or Leave to Appeal 'Decision on "Defence Request for Disclosure and Judicial Assistance"', 24 September 2015, ICC-01/05-01/13-1282, para. 8; Decision on Kilolo Defence Request for Reconsideration, 15 July 2015, ICC-01/05-01/13-1085-Conf, para. 4; Decision on Prosecution's Motion for Reconsideration of the Closing Submissions Directions, 15 January 2016, ICC-01/05-01/13-1552, para.6; Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705; Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the request to present views and concerns of victims on their legal representation at the trial phase, 14 December 2012, ICC-01/09-01/11-511, para. 6; Trial Chamber V(B), *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial,

exceptional and should only be done if a clear error of reasoning is demonstrated or if it necessary to prevent an injustice. New facts and arguments arising since the decision was rendered may be relevant to this assessment.

24. Firstly, it needs to be determined if the Austrian Rulings can be considered as 'new facts'. The Chamber will then assess whether, upon these new facts, the reconsideration of the Western Union Decision is necessary to prevent an injustice.³⁹
25. The first of the rulings has been issued prior to the decision.⁴⁰ However, since none of the parties knew of the existence of the ruling and this was not due to any lack of diligence, the Chamber is of the view that, for the purposes of the Request, it is to be considered as a 'new fact'. The second of the Austrian Rulings was rendered after the Western Union Decision and is therefore also a 'new fact'.
26. In the Western Union Decision, the Chamber stated that, for the purposes of Article 69(7) of the Statute, it will 'first consider whether the evidence was collected in violation of the Court's statutory scheme or internationally recognised human rights' and then assess if such a violation fulfilled the criteria of Article 69(7)(b). In the Western Union Decision, the Chamber held that the alleged violation in question could not fulfil the criteria of Article 69(7)(a) of the Statute⁴¹ and finds that the same holds true for the current circumstances.
27. The Chamber does not follow the Prosecution's argumentation that the Austrian Rulings could not have affected the decision of the Chamber since they concern the legality of conduct of national authorities which the Chamber is barred from determining. The fact that the Chamber is barred from analysing whether

26 November 2013, ICC-01/09-02/11-863; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-611, 27 May 2015, para. 12.

³⁹ The Chamber does not consider it necessary to assess whether a 'clear error of reasoning' exists, since this is not alleged by any of the parties.

⁴⁰ The first Austrian Ruling was issued on 20 April 2016, the Western Union Decision was rendered on 29 April.

⁴¹ Western Union Decision, ICC-01/05-01-13-1854, para. 62 in which the Chamber stated that the alleged violation in question could not fulfil the criteria of Article 69(7)(a) of the Statute.

national law has been correctly applied⁴² does not mean that it is precluded from taking into consideration decisions of national jurisdictions which determine whether national law has been respected. The Austrian Rulings repealed the initial rulings due to a lack of basic reasoning and denied the request for authorisation of the underlying two judicial orders concerning the collection of the Western Union Documents.

28. In view of the Austrian Rulings, the Chamber considers that any further assessment whether there was manifestly unlawful conduct⁴³ is not necessary⁴⁴ and concludes that the internationally recognised right to privacy has been violated. The Chamber is not persuaded by the Prosecution's interpretation that the 'in accordance with the law' requirement when assessing privacy infringements⁴⁵ means only that the correct procedural safeguards were applied, irrespective of the correctness of their application.⁴⁶ Following this view would lead to a merely formalistic interpretation of this safeguard to interfere with a person's right to privacy, and which does not provide an effective protection of this right.
29. The Chamber will now proceed to determine if this violation means that the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings, pursuant to Article 69(7)(b).
30. The Chamber does not follow the arguments by the Bemba Defence that the Austrian Rulings found that the transmission of the material violated privileges and immunities. In respect of the first Austrian Ruling the mentioning of potential additional obstacles to grant the initial orders due to immunities is a

⁴² See, Western Union Decision, ICC-01/05-01/13-1854, para. 32.

⁴³ See *submission on that matter*, Prosecution Response, ICC-01/05-01/13-1939-Conf, para. 10; Mangenda Response, ICC-01/05-01/13-1940-Conf, para. 3.

⁴⁴ See, Western Union Decision, ICC-01/05-01/13-1854, para. 34.

⁴⁵ See, Western Union Decision, ICC-01/05-01/13-1854, para. 29.

⁴⁶ Prosecution Response, ICC-01/05-01/13-1939-Conf, para. 15.

mere recapitulation of the assertions by the defence.⁴⁷ The first Austrian Ruling states unequivocally that, in view of the finding that the initial request did not provide sufficiently concrete suspicion for the alleged crimes, it will not rule on any other arguments brought forward in the appellants.⁴⁸ The second Austrian Ruling is silent altogether in regard to this issue.

31. Further, the arguments raised by the Bemba Defence do not constitute new facts which can be taken into account for the purposes of reconsideration. The facts underlying the allegation that a violation of privileges and immunities occurred were known at the time of the request leading up to the Western Union Decision and are independent of the Austrian Rulings. Accordingly, the Chamber will not take this issue into consideration.
32. As stated in the Western Union Decision and by other chambers of this Court⁴⁹ not every violation of an internationally recognised human right leads automatically to the exclusion of the evidence under Article 69(7)(b) of the Statute.
33. The Chamber will therefore assess whether the violation of the right to privacy – which stems in this case from the fact that the rulings by national courts authorising the order to communicate the Western Union Documents were ruled unlawful and overturned by two higher court rulings – renders an admission of the Western Union Documents antithetical to and seriously damaging the integrity of the proceedings. The Chamber cannot consider the Austrian national laws governing evidence for this purpose;⁵⁰ as put by Pre-Trial Chamber I in the

⁴⁷ CAR-D24-0005-0001, at 0011 and the official French translation CAR-D24-0005-0045 at 0054. The ruling ‘Article 18 of the Statute’ but the Chamber assumes that the arguments of the appellants were geared towards Article 48 of the Statute.

⁴⁸ CAR-D24-0005-0001, at 0011 ‘*Aufgrund der schon aus den angeführten Gründen erfolgten Aufhebung des angefochtenen Beschlusses erübrigt sich ein Eingehen auf das weitere Beschwerdevorbringen.*’ and the official translation CAR-D24-0005-0045 at 0055.

⁴⁹ Western Union Decision, ICC-01/05-01/13-1854, para. 63; Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the admission of material from the "bar table", 24 June 2009, ICC-01/04-01/06-1981, para. 41.

⁵⁰ See Rule 63(5) of the Rules.

Lubanga case it is rather the role of the Chamber ‘to seek an appropriate balance between the Statute’s fundamental values in each concrete case.’⁵¹ Noting the application of identical language to Article 69(7)(b) at the ICTY,⁵² relevant factors to consider when evaluating the impact of a violation on the integrity of the proceedings include the nature of the violation in question and the fault, or lack thereof, of the Prosecution.⁵³ The Chamber also remains mindful of the general guidance of the European Court of Human Rights that the proceedings as a whole, including the way in which the evidence was obtained, must remain fair.⁵⁴

34. For this purpose, the Chamber takes the importance of the right to privacy into consideration. Further, it notes that the reasons to quash the Repealed Austrian Rulings were a lack of substantiation of the initial requests. However, as explained above, this is the only reason for which the initial rulings were repealed. The Chamber also notes that the Austrian Rulings do hint at the possibility that further substantiating information may have been available at the time.⁵⁵

35. The Chamber does not agree with the Bemba Defence, that the fact that Trial Chamber III in the case of *Prosecutor v. Jean-Pierre Bemba Gombo* (‘Main Case’) had

⁵¹ Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of the Charges, 29 January 2007, ICC-01/04-01/06-803-tEN, para. 84. See also, Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the admission of material from the "bar table", 24 June 2009, ICC-01/04-01/06-1981, para. 42, speaking equally of a balancing exercise.

⁵² Rule 95 of the ICTY Rules provides: ‘No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings’. Rule 95 of the ICTR Rules is identical.

⁵³ See generally ICTY, Trial Chamber, *Prosecutor v. Radoslav Brdjanin*, Decision on the Defence ‘Objection to Intercept’, 3 October 2003, IT-99-36-T, para. 63(1)-(2), (4); ICTY, Trial Chamber, *The Prosecutor v. Dario Kordic and Mario Cerkez*, Oral Decision, 2 February 2000, IT-95-14/2-T, page 13694; ICTY, Trial Chamber, *Prosecutor v. Zejnir Delalic et. al.*, Decision on the Tendering of Prosecution Exhibits 104 -108, 9 February 1998, IT-96-21-T, paras 19-20; ICTY, Trial Chamber, *Prosecutor v. Zejnir Delalic et. al.*, Decision on Zdravko Music's Motion for the Exclusion of Evidence, 2 September 1997, IT-96-21-T, paras 54-55, 57-70.

⁵⁴ ECtHR, Grand Chamber, *Gafgen v. Germany*, 1 June 2010, 22978/05, para. 163; ECtHR, *Khan v. The United Kingdom*, Judgment, 12 May 2000, 35394/97, § 34. See also Article 21(3) of the Statute.

⁵⁵ CAR-D24-0005-0001, at 0010 and the official translation in CAR-D24-0005-0045 at 0053 (mentioning the contents of an email from the Court’s Prosecution with additional information not included in the request for assistance, the request from the Austrian Prosecutor or the judicial granting order).

declined to allow questions on a certain subject⁵⁶ speaks in favour of excluding the evidence. In the specific case, Trial Chamber III declined a question by the Prosecution to an expert witness of the defence regarding compensation for his work on the grounds of relevance 'in relation to the case'.⁵⁷ First, the expert witness in question was not one of the persons for whom financial documents were requested from Western Union. Second, the rejection on grounds of relevance in the Main Case does not mean that the Prosecution is barred from trying to elicit this sort of information in a different context where it might be relevant, such as Article 70 investigations. Accordingly, the Chamber does not find that the Prosecution, by requesting the financial data from Western Union, tried to 'bypass' a decision from Trial Chamber III, as suggested by the Bemba Defence.⁵⁸

36. The Chamber agrees that the Prosecution was involved in the process that led to the illegally obtained material, inasmuch as it triggered, via requests for assistance to the Austrian authorities, the process of requesting the judicial orders. However, even though the *Oberlandesgericht* deemed that the information provided by the Prosecution was insufficient, the Prosecution was in no position to know this. In fact, the Prosecution had complied with all the formal requirements by engaging with the national authorities in order to legally obtain the requested material. As previously stated,⁵⁹ the Prosecution tried at all times to apprise the Austrian authorities of its actions in respect of obtaining the Western Union Documents. The Prosecution had also reason to believe that it had complied with all the substantive requirements, since the Austrian public prosecutor's office did not request further information and proceeded to request

⁵⁶ Bemba Response, ICC-01/05-01/13-1941, para. 71-72.

⁵⁷ Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-T-224-Eng, p.59, l.5 to p.60, l.8.

⁵⁸ Bemba Response, ICC-01/05-01/13-1941, para. 72.

⁵⁹ Western Union Decision, ICC-01/05-01/13-1854, paras 66-69.

authorisation of the collection of the Western Union Documents via judicial order.

37. Further, and most importantly, the first-instance Austrian court provided the judicial orders as requested, so that the Prosecution had to assume that it had fulfilled all necessary requirements to legally obtain the material. It is clear that the transmission of the Western Union Documents was not per se forbidden and that the Austrian law provides for a procedure to legally obtain them. The Repealed Austrian Rulings also prevented the Prosecution from potentially providing further information to the Austrian authorities that would have more substantiated the requests in order to meet the requirements of the Austrian law.
38. The Chamber also emphasises that the Defence has had a full opportunity during trial to challenge the authenticity and use of these financial records. The way in which these records were obtained did not affect the Defence's ability to challenge them in any meaningful way. The Chamber considers that the fairness of the trial has been guaranteed in relation to these records, despite the manner in which they were obtained.
39. Accordingly, it is clear to the Chamber that the Prosecution did not act with the intention to circumvent national procedures, undertook the necessary steps to legally obtain the material and had to – especially because Austrian courts repeatedly issued respective orders – assume that it had obtained the Western Union Documents lawfully. Taken into account the violation – caused by an error of legal reasoning by a national court –, the conduct of the Prosecution and the specificities of the case as expounded above, the infringements to the right of privacy are not so severe as to taint the fairness of the proceedings.
40. In consequence, the Chamber finds that, while there has been a violation of the right to privacy, the admission of the Western Union Documents would not be antithetical to and would seriously damage the integrity of the proceedings.

41. In view of the above, the Chamber rejects the request for reconsideration.

2. Request for judicial notice and admission into evidence

42. Since the Austrian Rulings are only relevant in respect of the decision on the exclusion of the Western Union Documents for the evidence and have been taken into consideration with regard to this issue, the Chamber rejects the request to take judicial notice of the Austrian Rulings as well as the request to admit them into evidence.

3. Request for destruction or transfer back to the Austrian authorities of all material obtained on the basis of the Repealed Austrian Rulings

43. In light of the above and in view that the Western Union Documents are not excluded from the evidence, the Chamber rejects this part of the Request.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Raul C. Pangalangan

Dated 14 July 2016

At The Hague, The Netherlands