Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/05-01/08**
Date: **24 June 2010**

TRIAL CHAMBER III

Before: **Judge Adrian Fulford, Presiding Judge**
Judge Elizabeth Odio Benito
Judge Joyce Aluoch

SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR
v. JEAN-PIERRE BEMBA GOMBO

Public - URGENT

Decision on the Admissibility and Abuse of Process Challenges

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

The Office of the Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Ms Petra Kneuer, Senior Trial Lawyer

Counsel for the Defence
Mr Nkwebe Liriss
Mr Aimé Kilolo-Musamba

Legal Representatives of the Victims
Ms Marie-Edith Douzima-Lawson

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives
Central African Republic:
Mr Laurent Ngon Baba, Minister of Justice
Mr Emile Bizon, Advocate at the Central African Bar
Mr Modeste Martineau Bria, Public Prosecutor of the Bangui Court of Appeal

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber III ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court" or "ICC"), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, ("*Bemba* case") issues the following Decision on the Admissibility and Abuse of Process Challenges:

I. BACKGROUND AND SUBMISSIONS

1. Although some of the documents referred to in this Decision are not part of the public record of the case, the Chamber is satisfied that the Decision can be issued publicly as the content of the relevant material was referred to publicly, either in the written or in the oral submissions of the parties, participants and representatives of the Central African Republic ("CAR"). In any event, there is no relevant information that requires protection.

A. Procedural summary in the CAR

2. In June 2003, the *Procureur de la République de Bangui* ("Public Prosecutor of the *Tribunal de Grande Instance*" or "Public Prosecutor") commenced investigations into incidents in the CAR that occurred between October 2002 and 15 March 2003.[1]

3. On 5 September 2003, the *Doyen des Juges d'Instruction près le Tribunal de Grande Instance de Bangui* ("Senior Investigating Judge") brought legal proceedings against the accused, charging him with using troops to undermine the security of the CAR and with aiding and abetting murder, rape and pillage. These were joined with proceedings already initiated against Mr Patassé and others.[2]

[1] Prosecution's Response to Motion Challenging the Admissibility of the Case by the Defence for Jean-Pierre Bemba Gombo pursuant to Articles 17 and 19(2)(a) of the Rome Statute, 29 March 2010, ICC-01/05-01/08-739 with 4 public annexes, paragraph 13.
[2] Requête en vue de contester la recevabilité de l'Affaire conformément aux articles 17 et 19 (2) (a) du Statut de Rome, 25 February 2010, ICC-01/05-01/08-704-Red3-tENG, paragraph 26. This document was originally filed as 'confidential, *ex parte* Prosecution and Defence'. It was reclassified as 'confidential' following the

4. The Public Prosecutor of the *Tribunal de Grande Instance* ceased his investigations in May 2004.[3]

5. In the *"Réquisitoire de non lieu partiel"* of 28 August 2004, [4] the Public Prosecutor of the *Tribunal de Grande Instance* applied to the Senior Investigating Judge to terminate the criminal proceedings against Mr Bemba for the 2002-2003 events in the CAR. The application was put by the Public Prosecutor on the basis that although the evidence established that Mr Bemba had made his troops available to Mr Patassé, it was unproven that Mr Bemba was aware, in advance, of their (intended) eventual use or that he directly participated in the commission of the crimes perpetrated by his troops.[5]

6. On 16 September 2004, the Senior Investigating Judge issued an *"Ordonnance de non lieu partiel et de renvoi devant la Cour Criminelle"* ("Order of 16 September 2004" or *"Ordonnance de non lieu"*).[6] In summary, the judge decided that the

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Chamber's decision of 23 April 2010; ICC-01/05-01/08-704-Conf-tENG. On 25 February 2010, the defence filed a public redacted version of the Challenge to admissibility, ICC-01/05-01/08-704-Red. On 26 February 2010, the Chamber provisionally ordered the Registry to reclassify this public redacted version as a confidential document *ex parte* because of some security concerns with regard to prosecution witnesses whose identities were not properly redacted; consequently the Chamber has instructed that the document is to remain confidential, however it is no longer *ex parte*. On 2 March 2010, the defence filed a new public redacted version of the Challenge to admissibility, ICC-01/05-01/08-704-Red2. This version was also subsequently reclassified as confidential on 9 March 2010 pursuant to the Chamber's instruction as a preventive measure. On 9 April 2010, the defence, in consultation with VWU, submitted a third public redacted version of the Challenge to admissibility, ICC-01/05-01/08-704-Red3. An English translation of the third public redacted version was issued as ICC-01/05-01/08-704-Red3-tENG. All subsequent references will be to this document.

[3] ICC-01/05-01/08-739, paragraph 13.

[4] Communication par la Défense des copies de documents référenciés dans les notes de bas de pages de sa requête en contestation de la recevabilité, 16 March 2010, ICC-01/05-01/08-721 with 26 public annexes and 3 confidential *ex parte* defence and prosecution only annexes; ICC-01/05-01/08-721-Anx26 (CAR-OTP-0004-0065 to 0112). Originally this document was filed with 23 public annexes and 6 confidential *ex parte* defence and prosecution only annexes, however 3 of these annexes (17, 19 and 26) were reclassified as public pursuant to the Trial Chamber's instruction on 15 June 2010; CAR-OTP-0019-0087 to 0134; English translation CAR-OTP-0061-0094 to 0130.

[5] ICC-01/05-01/08-721-Anx26 (CAR-OTP-0004-0065 to 0112), pages 21 and 22; CAR-OTP-0004-0065 to 0112 at 0084 and 0085; CAR-OTP-0019-0087 to 0134 at 0106 and 0107; English translation CAR-OTP-0061-0094 to 0130 at 0109.

[6] ICC-01/05-01/08-721-Conf-Exp-Anx16; CAR-OTP-0019-0137 to 0164; This document is available publicly, see Annex 2C to the Registrar's transmission of the responses to the summary of the "Requête en vue de contester la recevabilité de l'Affaire conformément aux articles 17 et 19 (2) (a) du Statut de Rome" from the Central African Republic and the Democratic Republic of Congo, 19 April 2010, ICC-01/05-01/05-758-Conf with 2 confidential annexes and 5 public annexes. Originally all of the annexes were confidential, however 5 of these annexes (2A, 2B, 2C, 2D and 2E) were reclassified as public pursuant to the Trial Chamber's instruction

accused enjoyed diplomatic immunity as Vice-President of the Democratic Republic of Congo ("DRC"), and was protected from prosecution for complicity in the crimes of premeditated murder, rape, theft *et al*, committed by his fighters in the CAR.[7] He determined in addition that "it is apparent from the preliminary investigation that there is insufficient incriminating evidence against Jean-Pierre Bemba, [...], to show" he committed the specified crimes, and therefore he concluded that the accused (and five others) should be dismissed from the proceedings.[8] However, the judge also referred the case against Mr Patassé and others to the *Cour Criminelle* of the CAR for trial.[9]

7. On behalf of the *"Ministère Public"*, the *"Premier Substitut du Procureur de la République"* ("Deputy Prosecutor") before the *Tribunal de Grande Instance* lodged, on 17 September 2004, an apparently valid appeal against the judge's Order of 16 September 2004.[10]

8. On 23 November 2004, the *"1er Avocat Général"* ("First Advocate-General") before the *Cour d'Appel de Bangui* ("Bangui Court of Appeal") seized the *"Chambre d'Accusation"* ("Indictment Chamber") in Bangui of a *"Réquisitoire Supplétif Aux Fins de Saisine de la Chambre d'Accusation"*, in which it requested the Court partially to reverse the Order of 16 September 2004 and to commit Mr Bemba together with Mr Patassé and others to trial before the [national]

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on 15 June 2010; ICC-01/05-01/05-758-Anx2C. The Chamber was provided with a draft English translation of this filing.

[7] CAR-OTP-0019-0137 to 0164 at 0147, ICC-01/05-01/08-758-Anx2C. A draft translation of this document was provided to the Chamber, which is quoted.

[8] CAR-OTP-0019-0137 to 0164 at 0161, 0162 and 0164, ICC-01/05-01/08-758-Anx2C.

[9] CAR-OTP-0019-0137 to 0164 at 0164, ICC-01/05-01/08-758-Anx2C.

[10] Translation by the Registrar of Submissions made by the Authorities of the Central African Republic pursuant to the Oral Order of the Hearing held on the 27 April 2010 with confidential annexes 1, 2 and 3, 10 May 2010, ICC-01/05-01/08-770. The three annexes were reclassified as public pursuant to the Trial Chamber's instruction on 15 June 2010; ICC-01/05-01/08-770-Anx2, page 3, "Acte d'Appel"; See also reference to this appeal in the Appeals Judgment of 17 December 2004, CAR-OTP-0019-0171 at 0172. There is an English translation of Annex 1: ICC-01/05-01/08-770-Anx1-tENG. The Chamber was provided with draft English translations of annexes 2 and 3.

Criminal Court.[11] The First Advocate-General specifically referred to the accused, and submitted that it has been established that he was complicit in crimes committed by his troops (the "Banyamulengués").[12]

9. On the following day, on 24 November 2004, the *Procureur Général* ("Public Prosecutor of the Bangui Court of Appeal") filed a "*Réquisitoire*" before the Indictment Chamber of the Bangui Court of Appeal, requesting an order transferring the trial of the crimes affecting persons, referred to as "*crimes de sang*" ("blood crimes"), brought against Mr Patassé and others to the ICC. [13]

10. On 6 December 2004, the "*2ème Avocat Général*" ("2nd Advocate-General") made an oral application before the Indictment Chamber of the Bangui Court of Appeal.[14] The Chamber notes that, although the defence relies on this document in its further submissions,[15] a page of the document, disclosed by the Office of the Prosecutor ("prosecution") to the defence on 18 December 2009, is missing. To date, the Chamber has not been provided with the full version of the document[16] and accordingly it has not been able to take it into account.

11. Thereafter, on 11 December 2004, Mr Nganatouwa Goungaye Wanfiyo, counsel acting on behalf of President Bozizé, sent a letter to the Bangui Court of Appeal in the "*Etat Centrafricain / Patassé et Autres*" case, submitting, on behalf of the CAR, a request to refer war crimes committed on CAR territory

[11] ICC-01/05-01/08-770-Anx2, page 10. This réquisitoire was referred to as a 'Réquisitoire Supplétif' as a previous réquisitoire was filed on 22 October 2004 against a different accused (CAR-OTP-0019-0165). The « Réquisitoire Supplétif » concerning Mr Bemba states in French: « Qu'on ne saurait lui accorder le bénéfice du non-lieu ».
[12] ICC-01/05-01/08-770-Anx2, page 9.
[13] ICC-01/05-01/08-721-Anx17; CAR-OTP-0019-0167.
[14] CAR-OTP-0019-0189.
[15] Réponse de la Défense aux observations de la République Centrafricaine du 17 mai 2010 ainsi que celle des autres parties, 14 May 2010, ICC-01/05-01/08-776-Conf. See also ICC-01/05-01/08-776-Red reclassified confidential upon instruction from the Chamber on 18 May 2010, and public redacted version filed on 18 May 2010, ICC-01/05-01/08-776-Red2, paragraph 48..
[16] The Chamber requested the prosecution, the initial recipient of the document, to provide a full version: email communication from the Legal Advisor to the Trial Division to the prosecution on 27 May 2010.

in 2002 to the ICC, under Article 14 of the Rome Statute ("Statute"). The letter proposed severing the proceedings, referring the crimes of rape, murder, destruction of movable and immovable property and pillaging during the events of 2002 to the ICC. It was suggested that if the ICC Prosecutor initiated an investigation, it would be conducted using means not available to the CAR.[17]

12. On 16 December 2004, the Indictment Chamber of the Bangui Court of Appeal issued a judgment ("Appeals Judgment of 16 December 2004"), which partially upheld the appeal of the Public Prosecutor of the Bangui Court of Appeal.[18] The Bangui Court of Appeal determined that the "blood crimes" committed in connection with the events in 2002 constitute war crimes pursuant to Article 8 of the Statute and fall under the jurisdiction of the ICC. It ordered the severance of the case against Mr Patassé, Mr Bemba and others for these crimes and directed the prosecution to submit the matter to the competent authority for referral to the ICC.[19]

13. The 2nd Advocate-General before the Bangui Court of Appeal lodged a *"pourvoi en cassation"* (appeal on points of law) on 20 December 2004, against the Appeals Judgment of 16 December 2004.[20]

14. On 7 January 2005, the ICC Prosecutor received a letter dated 18 December 2004, sent on behalf of the Government of the CAR. In the letter, the situation, involving crimes against humanity and war crimes falling within the

[17] CAR-OTP-0019-0169 to 0170. This document was disclosed on 13 April 2010 (Prosecution's Communication of Pre-Inspection Report for Material Provided to the Defence under Rule 77 on 13 April 2010, 14 April 2010, ICC-01/05-01/08-753).
[18] ICC-01/05-01/08-721-Conf-Exp-Anx18 (CAR-OTP-0004-0148 to 0166); CAR-OTP-0019-0171 to 0188; English translation CAR-OTP-0061-0030 to 0043; ICC-01/05-01/08-758-Anx2D.
[19] ICC-01/05-01/08-721-Conf-Exp-Anx18 (CAR-OTP-0004-0148 to 0166), pages 9 – 12 and 18 – 19; CAR-OTP-0019-0171 to 0188, at 0178 – 0180 and 0186 – 0187; English translation CAR-OTP-0061-0030 to 0043 at 0036, 0037 and 0042.
[20] CAR-OTP-0019-0199. This was disclosed on 18 December 2009 following the Prosecution's Communication of documents disclosed to the Defence on 18 December 2009 pursuant to the "Second decision on disclosure relating to an admissibility challenge" dated 14 December 2009, 18 December 2009, ICC-01/05-01/08-659.

jurisdiction of the ICC and committed throughout the territory of the CAR since 1 July 2002, was referred to this Court.[21] The letter specifically requested the Prosecutor to open an investigation into this situation with a view to determining whether Mr Patassé, Mr Bemba, Mr Koumtamadji alias Miskine or others, should be charged with these crimes.[22]

15. The *Cour de Cassation* issued its judgment on 11 April 2006 ("*Cour de Cassation* Judgment of 11 April 2006"), confirming the Appeals Judgment of 16 December 2004, to the extent that it varied the Senior Investigating Judge's decision and directed the national prosecution to seize the ICC of the proceedings against Mr Patassé, Mr Bemba and others. The *Cour de Cassation* indicated, *inter alia*, that recourse to international justice was the only means of preventing impunity for crimes allegedly committed in the CAR since 1 July 2002 by Mr Patassé, Mr Jean Pierre Bemba and his troops, and others.[23] The Court indicated that the CAR judicial services are clearly unable to investigate or prosecute the alleged perpetrators and observed that the ICC is the forum to try perpetrators of the most serious crimes in the event that States are genuinely unable to try them.[24]

16. On 6 and 8 April 2010, Me Gbobouko, Mr Bemba's lawyer in Bangui, filed several motions against the CAR judicial decisions, arguing that the latter had never been served on him. Counsel, first, contested the Appeals Judgment of 16 December 2004[25] ("*Opposition*") and, second, submitted a "*recours en rétractation*" (appeal) against the *Cour de Cassation* Judgment of 11 April 2006

[21] Annex 1A to "Prosecutor's Submission on Further Information and Materials", 27 May 2008, ICC-01/05-01/08-29-Conf-Anx1A (reclassified on 1 December 2008 pursuant to the Chamber's "Decision on Re-classification and Unsealing of Certain Documents", 1 December 2008, ICC-01/05-01/08-301) and ICC-01/05-01/08-721-Anx19; CAR-OTP-0001-0135 to 0137.
[22] ICC-01/05-01/08-29-Conf-Anx1A and ICC-01/05-01/08-721-Anx19; CAR-OTP-0001-0135 to 0137 at 0136.
[23] ICC-01/05-01/08-721-Conf-Exp-Anx20; CAR-OTP-0019-0258 to 0261; English translation CAR-OTP-0061-0022 to 0027; ICC-01/05-01/08-758-Anx2E.
[24] CAR-OTP-0019-0258 at 0260; English translation CAR-OTP-0061-0022 at 0025.
[25] Requête de la Défense aux fins d'informer la Chambre de Première Instance III de nouveaux développements de procédure judiciaire intervenus en République Centrafricaine, 13 April 2010, ICC-01/05-01/08-751 with 4 public annexes ; ICC-01/05-01/08-751-AnxA. The Chamber was provided with a draft English translation of this filing.

in order to have the decision annulled.[26] Third, on 16 April 2010, Mr Bemba's counsel in Bangui filed a *"pourvoi en cassation"* before the *Cour de Cassation* against the Appeals Judgment of 16 December 2004 (*"Pourvoi* against the Appeals Judgment of 16 December 2004").[27]

17. Mr Bemba's counsel in Bangui, on 19 April 2010, submitted a letter to the *Cour de Cassation* of Bangui seeking to withdraw the *"recours en rétractation"* filed on 8 April 2010 against the *Cour de Cassation* Judgment of 11 April 2006.[28]

18. On 15 May 2010, counsel for Mr Bemba filed a brief in support of the *Pourvoi* of 16 April 2010 to the *Cour de Cassation*, seeking to set aside and annul the Appeals Judgment of 16 December 2004.[29] There are five grounds supporting the motion: (1) certain national procedural requirements and the rights of the accused were violated, because the defence was not heard by the investigating judge, and the accused was not summoned to appear before the first instance court or the Indictment Chamber; (2) the appeal by the Public Prosecutor's Office leading to the reversal of the Order of Dismissal was never notified to the accused, thereby preventing him from exercising his rights and vitiating all the subsequent procedural acts, including the impugned decision; (3) the absence of notification of the appeal prevented the applicant from filing a written brief, causing a serious violation of the rights of the defence, rendering the entire proceedings a nullity; (4) the Indictment Chamber violated legal provisions relating to immunity by issuing the impugned

[26] ICC-01/05-01/08-751-AnxC.
[27] Deuxième Requête de la Défense aux fins d'informer la Chambre de Première Instance III d'un nouveau développement de procédure judiciaire intervenu en République Centrafricaine en date du 16 Avril 2010, 19 April 2010, ICC-01/05-01/08-757 with 3 public annexes; ICC-01/05-01/08-757-AnxA. The Chamber was provided with a draft English translation of this filing.
[28] Registrar's transmission of documents transmitted by the Central African Republic, 26 April 2010, ICC-01/05-01/08-765-Conf with 2 public annexes. Originally the annexes were classified as 'confidential', however they were reclassified as public pursuant to the Trial Chamber's instruction on 15 June 2010; ICC-01/05-01/08-765-Anx2.
[29] Requête de la Défense en vue d'informer la Chambre de Première Instance III de l'Etat de la procédure en République Centrafricaine, 11 June 2010, ICC-01/05-01/08-795 with confidential Annex A : ICC-01/05-01/08-795-Conf-AnxA. English translation: 'Defence Submission to Inform Trial Chamber III of the Status of the Proceedings in the Central African Republic', 17 June 2010, ICC-01/05-01/08-795-tENG and ICC-01/05-01/08-795-Conf-AnxA-tENG.

decision at a time when the applicant enjoyed protection from criminal jurisdiction in his capacity as Vice-President of the DRC; and (5) the Indictment Chamber did not adequately investigate whether the criteria under Article 17(3) of the Statute had been met when ordering severance of the proceedings.[30]

19. On 21 May 2010, the Indictment Chamber of the Bangui Court of Appeal held the *Opposition* that was filed by the defence on 6 April 2010 to be inadmissible.[31] It noted that the applicant failed to file a written brief in support of his recourse contesting the Appeals Judgment of 16 December 2004 and the Indictment Chamber is, therefore, unaware of the arguments on which the applicant bases the application.[32] Moreover, the Indictment Chamber indicated that, pursuant to national law, the remedy chosen by the accused in the form of an application to set aside (*Opposition*) is not available against the Appeals Judgment of 16 December 2004.[33] Lastly, the Indictment Chamber determined that it does not have jurisdiction to deal with an *Opposition* contesting a judgment of the Bangui Court of Appeal.[34] In a letter dated 11 June 2010, the CAR transmitted the decision of 21 May 2010 to the Registry of the ICC, for notification to Mr Bemba.[35]

[30] ICC-01/05-01/08-795-Conf-AnxA-tENG, pages 7 - 12.
[31] The Registrar's transmission of the minutes of the hearing held by the "Chambre d'Accusation de la Cour d'Appel de Bangui" in the case of "Jean Pierre BEMBA-GOMBO contre Ministère Public et Etat Centrafricain" submitted by the authorities of the Central African Republic, ICC-01/05-01/08-790 with annexes; Annex 1: ICC-01/05-01/08-790-Anx1. This annex was reclassified as public pursuant to the Trial Chamber's instruction on 15 June 2010. There is an English translation available: ICC-01/05-01/08-790-Anx1-tENG.
[32] ICC-01/05-01/08-790-Anx1-tENG, page 7.
[33] ICC-01/05-01/08-790-Anx1-tENG, pages 7 – 8.
[34] ICC-01/05-01/08-790-Anx1-tENG, page 8.
[35] Annex to Addendum to "The Registrar's transmission of the minutes of the hearing held by the "Chambre d'Accusation de la Cour d'Appel de Bangui" in the case of "Jean Pierre BEMBA-GOMBO contre Ministère Public et Etat Centrafricain" submitted by the authorities of the Central African Republic", 15 June 2010, ICC-01/05-01/08-797-Conf-Anx.

B. Procedural history before the ICC

20. As set out above, on 18 December 2004, by a letter sent to the ICC Prosecutor[36] (received on 7 January 2005[37]), the Government of the CAR referred the situation of crimes against humanity and war crimes allegedly committed on the territory of the CAR since 1 July 2002 to the ICC.

21. Pre-Trial Chamber III ("Pre-Trial Chamber"), on 10 June 2008, issued a warrant of arrest against Jean-Pierre Bemba Gombo ("Mr Bemba").[38] As to admissibility, the Pre-Trial Chamber indicated as follows:

> 21. The Chamber considers that the circumstances in the instant case justify it in ruling on the admissibility of the case, and finds that there is no reason to conclude that Mr Jean-Pierre Bemba's case is not admissible, particularly since there is nothing to indicate that he is already being prosecuted at national level for the crimes referred to in the Prosecutor's Application. On the contrary, it would appear that the CAR judicial authorities abandoned any attempt to prosecute Mr Jean-Pierre Bemba for the crimes referred to in the Prosecutor's Application, on the ground that he enjoyed immunity by virtue of his status as Vice-President of the DRC.
>
> 22. Accordingly, on the basis of the evidence and information provided by the Prosecutor, the Chamber finds the case concerning Mr Jean-Pierre Bemba admissible. This decision does not in any way prejudge any decision on the admissibility of the case which might subsequently be rendered under article 19 of the Statute.[39]

22. On 15 June 2009, Pre-Trial Chamber II (now seized of the case and also referred to as the "Pre-Trial Chamber")[40] confirmed the charges against the

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[36] Prosecutor's Submission on Further Information and Materials, 27 May 2008, ICC-01/05-01/08-29-US-Exp with annexes; ICC-01/05-01/08-29-Conf-Anx1A, available to the Defence on 3 December 2008 following the reclassification decision of Pre-Trial Chamber III (ICC-01/05-01/08-301) and Communication par la Défense des copies de documents référenciés [sic] dans les notes de bas de pages de sa requête en contestation de la recevabilité, 16 March 2010, ICC-01/05-01/08-721-Anx19. This was reclassified as public pursuant to the Trial Chamber's instruction on 15 June 2010.
[37] ICC-01/05-01/08-704-Red3-tENG, paragraph 40.
[38] WARRANT OF ARREST FOR JEAN-PIERRE BEMBA GOMBO REPLACING THE WARRANT OF ARREST ISSUED ON 23 MAY 2008, 10 June 2008, ICC-01/05-01/08-14-tENG.
[39] ICC-01/05-01/08-14-tENG, paragraphs 21 and 22.
[40] Following a change of composition of Pre-Trial Chamber III on 19 March 2009, this Chamber was dissolved and the situation in Central African Republic was assigned to Pre-Trial Chamber II, see 'Decision on the constitution of Pre-Trial Chambers and on the assignment of the Central African Republic situation', 19 March 2009, ICC-01/05-01/08-390.

accused[41] and Mr Bemba was committed to trial before the Trial Chamber, which was constituted on 18 September 2009.[42] Addressing admissibility, the Pre-Trial Chamber indicated:

> 25 [...] the Chamber recalls the Decision of 10 June 2008 in which it determined that, on the basis of the evidence and information submitted by the Prosecutor, the Case falls within the jurisdiction of the Court and is admissible.
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> 26. Since the issuance of the 10 June 2008 Decision there has not been any change in the circumstances that negates its earlier findings on either jurisdiction or admissibility of the Case. Thus, the Chamber determines that the Case continues to fall within the jurisdiction of the Court and is admissible.[43]

23. Counsel for Mr Bemba ("defence") filed an application challenging the admissibility of the case ("Challenge to admissibility") pursuant to Articles 17 and 19(2) of the Statute on 25 February 2010,[44] filing a corrigendum on 1 March 2010.[45]

24. On 8 March 2010, the Chamber held a status conference to establish the procedure to be followed on the Challenge to admissibility pursuant to Rule 58(2) of the Rules of Procedure and Evidence ("Rules"). The Chamber instructed the parties and participants, including the authorities in the CAR and in the DRC, to file their observations on the defence application; it convened a hearing for oral submissions on the application for 27 April 2010; and it postponed the start of the trial to 5 July 2010.[46]

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[41] Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424.
[42] Decision constituting Trial Chamber III and referring to it the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, 18 September 2009, ICC-01/05-01/08-534.
[43] ICC-01/05-01/08-424, paragraphs 25 and 26.
[44] ICC-01/05-01/08-704-Red3-tENG.
[45] Corrigendum Requête en vue de contester la recevabilité de l'Affaire conformément aux articles 17 et 19 (2) (a) du Statut de Rome, 1 March 2010, ICC-01/05-01/08-704-Conf-Corr.
[46] Transcript of hearing on 8 March 2010, ICC-01/05-01/08-T-20-CONF-ENG CT2.

25. The defence filed the documents referred to in the footnotes to its Challenge to admissibility on 15 March 2010.[47] No application was made for the Chamber to hear witnesses or to receive evidence from the bar table, pursuant to Article 69(2) of the Statute and Regulation 54(g) of the Regulations of the Court.

26. On 19 March 2010, the Registrar filed a summary of the Challenge to admissibility,[48] as ordered by the Chamber during the hearing on 8 March 2010.[49] A corrigendum and the public redacted version were respectively filed on 3 and 12 May 2010.[50]

27. The Registrar filed a report on 26 March 2010, informing the Chamber that on 19 March 2010 the Registrar had provided the summary to the authorities in the CAR and the DRC, and to those legal representatives of victims who had communicated with the Court, pursuant to Rule 59(2) of the Rules and in accordance with the Chamber's order.[51]

28. On 29 March 2010, the prosecution [52] and Ms Douzima, one of the legal representatives of victims, [53] filed their responses to the Challenge to admissibility.

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[47] ICC-01/05-01/08-721.
[48] Registrar's submission of an amended summary of the "Requête en vue de contester la recevabilité de l'Affaire conformément aux articles 17 et 19 (2) (a) du Statut de Rome" pursuant to rule 59 (2) of the Rules of Procedure and Evidence, 19 March 2010, ICC-01/05-01/08-727-Conf-Anx-Exp and ICC-01/05-01/08-727-Conf-Exp-Anx.
[49] ICC-01/05-01/08-T-20-CONF-ENG CT2, page 1, line 20 to page 2, line 11.
[50] Corrigendum to the Annex, 3 May 2010, ICC-01/05-01/08-727-Conf-Anx-Exp-Corr; Public Redacted Version of the Corrigendum to the Annex, 12 May 2010, ICC-01/05-01/08-727-Anx-Corr-Red.
[51] Registrar's report on the notification of the summary of the "Requête en vue de contester la recevabilité de l'Affaire conformément aux articles 17 et 19 (2) (a) du Statut de Rome" to the Central African Republic, the Democratic Republic of Congo and the Legal representatives of victims, 26 March 2010, ICC-01/05-01/08-737-Conf with 2 confidential annexes.
[52] ICC-01/05-01/08-739.
[53] Observations de la Représentante légale des victimes à la requête de la Défense en vue de contester la recevabilité de l'affaire conformément aux: articles 17 et 19(2) (a) du Statut de Rome, 30 March 2010, ICC-01/05-01/08-740; and ICC-01/05-01/08-740-tENG.

29. The Office of Public Counsel for Victims ("OPCV") filed its observations on the Challenge to admissibility on 1 April 2010.[54]

30. On 13 April 2010 the defence filed an application informing the Trial Chamber of developments in the legal proceedings in the CAR, and particularly that Me Gbobouko, Mr Bemba's counsel in Bangui, had filed several motions against CAR judicial decisions that had allegedly never been served on him.[55] The defence requested that this application form part of its Challenge to admissibility.

31. The defence filed its response on 14 April 2010 to the prosecution and the legal representatives' observations on the Challenge to admissibility.[56]

32. On 19 April 2010, the defence filed a second application informing the Trial Chamber of further developments in the legal proceedings in the CAR,[57] which the defence also asked to be considered as part of its Challenge to admissibility.

33. Also on 19 April 2010, the Registrar filed the observations of the CAR[58] and the DRC[59] to the summary of the Challenge to admissibility. The CAR authorities provided the Chamber with three relevant CAR judicial decisions concerning the national proceedings against Mr Bemba.[60]

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[54] Response by the Legal Representative of Victims to the Defence's Challenge on Admissibility of the Case pursuant to articles 17 et 19 (2) (a) of the Rome Statute with 102 Annexes Confidential ex parte OPCV only and same Annexes Public Redacted, 1 April 2010, ICC-01/05-01/08-742. A corrigendum was filed on 16 April 2010; ICC-01/05-01/08-742-Corr.
[55] Requête de la Défense aux fins d'informer la Chambre de Première Instance III de nouveaux développements de procédure judiciaire intervenus en République Centrafricaine, 13 April 2010, ICC-01/05-01/08-751.
[56] Réplique de la Défense aux observations du Procureur et de Représentants légaux des victimes sur la requête en contestation de la recevabilité de l'Affaire, 14 April 2010, ICC-01/05-01/08-752 and Corrigendum, ICC-01/05-01/08-752-Corr with 3 public annexes ; and ICC-01/05-01/08-752-Corr-tENG.
[57] ICC-01/05-01/08-757.
[58] ICC-01/05-01/05-758-Anx2A, ICC-01/05-01/05-758-Anx2B and ICC-01/05-01/05-758-Conf-Anx3.
[59] ICC-01/05-01/05-758-Conf-Anx1.
[60] ICC-01/05-01/05-758-Anx2C, ICC-01/05-01/05-758-Anx2D and ICC-01/05-01/05-758-Anx2E.

34. On 23 April 2010, the prosecution[61] and the OPCV[62] respectively filed their responses to the defence first and second applications of 13 and 19 April 2010 on developments in the judicial proceedings in the CAR.

35. The defence, also on 23 April 2010, requested leave to file a report from an expert on criminal procedure in the CAR, who could give evidence on 27 April 2010.[63]

36. The prosecution[64] and the OPCV[65] respectively filed their opposition to the defence Request to rely on expert evidence on 26 April 2010.

37. On 27 April 2010, the Chamber held a status conference during which the CAR authorities, the parties and the legal representatives of participating victims submitted their oral observations on the Challenge to admissibility and related issues. The defence Request for an expert witness was dismissed on the basis that the interpretation of the law of criminal procedure in the CAR did not necessitate calling an expert witness, and could be addressed satisfactorily in counsel's submissions. [66] At the hearing, the Chamber identified two matters to be addressed by the CAR authorities by way of written submissions, to be filed by 7 May 2010: (1) whether proceedings are nullified under CAR national law if an accused is not informed that an investigative judge has dismissed the charges, and (2) whether, during appellate proceedings in a criminal case (*Pourvoi*), there is an automatic stay

[61] Prosecution's Consolidated Response to the Defence Applications of 13 and 19 April 2010 Informing the Chamber of New Procedural Developments in the Central African Republic, 23 April 2010, ICC-01/08-01/05-761.
[62] Response by the Legal Representative to the Defence's First and Second Requests in order to inform the Chamber of new developments in the judicial proceedings in the Central African Republic, 23 April 2010, ICC-01/05-01/08-759.
[63] Requête de la Défense aux fins de faire intervenir un témoin-Expert en Droit de Procédure Pénale de la République Centrafricaine, 23 April 2010, ICC-01/08-01/05-760. The Chamber was provided with a draft English translation of this filing.
[64] Prosecution's Response to the "Requête de la Défense aux fins de faire intervenir un témoin-expert en Droit de Procédure Pénale de la République Centrafricaine", 26 April 2010, ICC-01/08-01/05-763.
[65] Response by the Legal Representative to the "Requête de la Défense aux fins de faire intervenir un témoin-expert en Droit de Procédure Pénale de la République Centrafricaine", 26 April 2010, ICC-01/08-01/05-762.
[66] Transcript of hearing on 27 April 2010, ICC-01/05-01/08-T-22-ENG CT WT, page 2, lines 7-15.

of proceedings.[67] It instructed the legal representatives of victims and the prosecution to file their respective responses by 11 May 2010, and the defence by 14 May 2010.[68]

38. The information requested from the CAR, as set out above, was filed on 7 May 2010, and was notified to the Chamber on 10 May 2010.[69] This included the national prosecution appeal of November 2004[70] and provisions of the CAR Code of Criminal Procedure.[71]

39. The prosecution[72] and the OPCV[73] filed their respective responses to the CAR final submissions regarding the national points of law on 11 May 2010.

40. On 14 May 2010, the defence responded to the final submissions by the CAR and the observations of the prosecution and other participants.[74]

41. On 9 June 2010, the Registry transmitted to the Chamber an extract of the Registry of the Bangui Court of Appeal, containing the decision of the Indictment Chamber in the case *"Jean Pierre BEMBA-GOMBO C. Ministère Public et Etat Centrafricain"* dated 21 May 2010, rejecting the *Opposition* filed by counsel for the accused on 6 April 2010 as inadmissible.[75] The Chamber was informed of the notification of this decision to Mr Bemba on 15 June 2010.[76]

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[67] ICC-01/05-01/08-T-22-ENG CT WT page 66, line 5 to page 67, line 16.
[68] ICC-01/05-01/08-T-22-ENG CT WT, page 6, lines 16 – 19.
[69] Transmission by the Registrar of Submissions made by the Authorities of the Central African Republic pursuant to the Oral Order of the Hearing held on the 27 April 2010, 10 May 2010, ICC-01/05-01/08-770 and ICC-01/05-01/08-770-Anx1-tENG.
[70] ICC-01/05-01/08-770-Anx2.
[71] ,ICC-01/05-01/08-770-Anx3.
[72] Prosecution's Response to Submissions filed by the Authorities of the Central African Republic pursuant to the Order of the Chamber at the Hearing held on the 27 April 2010, 11 May 2010, ICC-01/05-01/08-774.
[73] Submissions by the Legal Representative on the supplementary information provided by the Central African Republic on national law, 11 May 2010, ICC-01/05-01/08-773.
[74] ICC-01/05-01/08-776-Red2. The Chamber was provided with a draft English translation of this filing.
[75] ICC-01/05-01/08-790-Conf.
[76] Addendum to "The Registrar's transmission of the minutes of the hearing held by the "Chambre d'Accusation de la Cour d'Appel de Bangui" in the case of "Jean Pierre BEMBA-GOMBO contre Ministére Public et Etat Centrafricain" submitted by the authorities of the Central African Republic", 15 June 2010, ICC-01/05-01/08-797-Conf.

42. On 11 June 2010, the defence responded to the Registry's transmission by submitting the brief it had filed in support of the *Pourvoi* against the Appeals Judgment of 16 December 2004.[77] It submits that the arguments contained in the Challenge to admissibility and subsequent submissions, in particular concerning the suspensive effect, remain valid despite the inadmissibility of the *Opposition*.[78]

43. On 17 June 2010, the defence filed its "Deuxième requête de la Défense en vue d'informer la Chambre de Première Instance III sur l'état de la Procédure en République Centrafricane".[79] No relevant relief is sought, and it is unnecessary for the Chamber to consider this filing further.

C. Disclosure of documents relevant to the admissibility challenge

44. The Pre-Trial Chamber issued its "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties" on 31 July 2008.[80]

45. Pursuant to that Decision, on 1 October 2008 the prosecution disclosed the greater part of its evidence to the defence, including information relevant to the admissibility of the case.[81]

46. On 3 October 2008,[82] the prosecution disclosed evidence under Rule 77 of the Rules to the defence, including the Order of 16 September 2004;[83] a record of

[77] ICC-01/05-01/08-795-tENG and ICC-01/05-08-795-Conf-AnxA-tENG.
[78] ICC-01/05-01/08-795-tENG, paragraph 4.
[79] Deuxième requête de la Défense en vue d'informer la Chambre de Première Instance III sur l'état de la Procédure en République Centrafricaine, 17 June 2010, ICC-01/05-01/08-799 with 2 annexes. The Chamber was provided with a draft translation of this document.
[80] Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, 31 July 2008, ICC-01/05-01/08-55.
[81] Prosecution's Communication of Potentially Exonerating Evidence Disclosed to the Defence on 1 October 2008, 1 October 2008, ICC-01/08-01/08-133 with confidential annex A.

the Appeals Judgment of 16 December 2004;[84] and a record of the *Cour de Cassation* Judgment of 11 April 2006.[85]

47. Following the reclassification by the Pre-Trial Chamber of several filings in the record of the case,[86] on 1 December 2008 additional documents provided by the CAR Government, which are relevant to the admissibility of the case, were made available to the defence, including the referral letter of 18 December 2004 and the supporting report of 21 June 2005.[87]

48. On 22 July 2009, the defence filed a first request for disclosure of documents relevant to the admissibility of the case.[88] On 18 September 2009, the Pre-Trial Chamber refused the request on the basis that the defence no longer had *locus standi* to challenge admissibility as part of the pre-trial stage.[89]

49. On 22 September 2009, the defence, by letter to the prosecution, reiterated its request for disclosure of documents relevant to the admissibility of the case that had not previously been disclosed, particularly correspondence, along with material concerning contacts and meetings between the prosecution and the CAR or the DRC authorities.[90]

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[82] Prosecution's Communication of Materials Provided to the Defence under Rule 77 on 3 October 2008, 3 October 2008, ICC-01/05-01/08-138 with confidential annex A
[83] CAR-OTP-0019-0137 to 0164. See ICC-01/05-01/08-138-Conf-AnxA, page 113, entry 1242.
[84] CAR-OTP-0019-0171 to 0188. See ICC-01/05-01/08-138-Conf-AnxA, page 113, entry 1244.
[85] CAR-OTP-0019-0258 to 0261. See ICC-01/05-01/08-138-Conf-AnxA, pages 113 – 114, entry 1250.
[86] ICC-01/05-01/08-301.
[87] CAR-OTP-0001-0139 to 0157, this document is a "mémoire" by the CAR authorities on 21 June 2005, supporting the referral of the CAR situation to the ICC. It was disclosed to the defence following the reclassification of ICC-01/05-01/08-29-Conf-Anx1B as confidential by the Chamber on 1 December 2008. It can also be found as document CAR-OTP-0001-0139 to 0157.
[88] REQUETE AUX FINS DE DIVULGATION DES ELEMENTS PERTINENTS RELATIFS A L'ADMISSIBILITE, 22 July 2009, ICC-01/05-01/08-458.
[89] Decision on the « REQUETE AUX FINS DE DIVULGATION DES ELEMENTS PERTINENTS RELATIFS A L'ADMISSIBILITE», 18 September 2009, ICC-01/08-01/05-529.
[90] Letter from Mr Kilolo to the prosecution entitled "Demande de divulgation des éléments du dossier répressif", 22 September 2009, ICC-01/05-01/08-739-AnxC.

50. The prosecution responded to the defence on 29 September 2009, indicating that it had disclosed all the relevant documents and requesting greater specificity as to the material sought by the defence.[91]

51. On 5 October 2009, the defence filed the second "Requête Aux Fins De Divulgation" raising additional disclosure issues before the Trial Chamber.[92] In particular, the defence requested the complete "dossier" of the proceedings before the CAR national criminal courts, the Prosecutor's notification of the commencement of an investigation in the CAR and the DRC (pursuant to Article 18 of the Statute), any response to the notification, and the minutes of the meetings held concerning admissibility between the prosecution and the authorities in the CAR and the DRC.[93]

52. The prosecution disclosed certain additional materials to the defence on 12 October 2009 under Rule 77 of the Rules, which included documents in the CAR criminal proceedings dossier. The Prosecutor also disclosed the letter he had sent to the DRC authorities and other States Parties, informing them of his decision to commence an investigation into the situation in the CAR, and the absence of any DRC response.[94]

53. On 8 December 2009, the prosecution provided the Chamber with further documents from the CAR "dossier" not considered relevant to the admissibility challenge.[95] The Chamber, on 14 December 2010, ordered their disclosure, along with certain other decisions from the CAR national judicial authorities which had not previously been disclosed.[96] On 18 December 2009,

[91] Letter from the prosecution to Mr Kilolo, 29 September 2009, ICC-01/05-01/08-739-AnxD.
[92] Requête aux fins de Divulgation, 5 October 2009, ICC-01/08-01/05-542.
[93] ICC-01/08-01/05-542, paragraph 7.
[94] Prosecution's Communication of documents disclosed to the Defence on 9 October 2009 pursuant to Paragraph 12 (c) of the Defence "Requête aux fins de Divulgation" dated 5 October 2009 and request for non-disclosure order, 12 October 2009, ICC-01/08-01/05-554 with confidential annex A.
[95] ICC-01/05-01/08-T-19-CONF-EXP-ENG ET, page 2, lines 9 to 18.
[96] Second decision on disclosure relating to an admissibility challenge, 14 December 2009, ICC-01/05-01/08-655, paragraphs 13 – 20.

the prosecution effected disclosure of these items and other documentation from the CAR national authorities.[97]

54. The defence filed observations in response to this disclosure on 22 December 2009,[98] asserting that the prosecution had deliberately disclosed more material than was required by the Chamber, including additional incriminatory material. The defence requested the Chamber not to take into consideration the additional incriminatory material and to order that the prosecution is not entitled to rely on it.[99] The Chamber, at a status conference on 29 March 2010, addressed this application, indicating it was unnecessary for the Chamber to review the individual documents or, indeed, to make any order since the material was provided to the defence solely to assist in the preparation of its admissibility challenge.[100]

55. On 14 April 2010, the Chamber received the "Prosecution's Communication of Pre-Inspection Report for Material provided to the Defence under Rule 77 on 13 April 2010", which concerned a recently disclosed document relating to the CAR judicial national proceedings.[101]

56. Following this disclosure, the defence, on 19 April 2010, filed a second application informing the Trial Chamber of new developments in legal proceedings taking place in the CAR (referred to above).[102]

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[97] Prosecution's Communication of documents disclosed to the Defence on 18 December 2009 pursuant to the "Second decision on disclosure relating to an admissibility challenge" dated 14 December 2009, 18 December 2009, ICC-01/05-01/08-659.
[98] Observations de la Défense sur la Divulgation du Procureur du 18 Décembre 2009 conformément à la seconde décision de la Chambre de Première Instance III du 14 Décembre 2009 référencée ICC-01/05-01/08-655, 22 December 2009, ICC-01/08-01/05-663. The Chamber was provided with a draft English translation of this filing.
[99] ICC-01/08-01/05-663, paragraph 11.
[100] Transcript of 29 March 2010, ICC-01/05-01/08-T-21-ENG ET WT, page 27, line 19 to page 28, line 3.
[101] Prosecution's Communication of Pre-Inspection Report for Material provided to the Defence under Rule 77 on 13 April 2010, 15 April 2010, ICC-01/05-01/08-753.
[102] Deuxième Requête de la Défense aux fins d'informer la Chambre de Première Instance III d'un nouveau développement de procédure judiciaire intervenu en République Centrafricaine en date du 16 Avril 2010, 19 April 2010, ICC-01/05-01/08-757.

D. Submissions of the parties and participants

1. Competence of the Trial Chamber and the timing of the application

a. Defence submissions

57. The defence addressed the timing of its application in the substantive admissibility challenge of 25 February 2010. It submits that the timeframes established by Trial Chamber II in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ("*Katanga* case") are not, in fairness, applicable in the present case.[103] It observes that although Trial Chamber II determined that Mr Katanga's application was filed at an inappropriate time, the Chamber nonetheless considered the matter substantively, because (1) counsel for Mr Katanga was unaware that the motion was filed out of time and (2) they may have been led to believe that a challenge based on the grounds in Article 17(1) of the Statute was appropriate, because of indications from the Pre-Trial Chamber during an *ex parte* hearing.[104] It submits that even if the present application was filed at an incorrect stage, it is fair to adopt the same approach as in the *Katanga* case.[105] The relevant Decision in the *Katanga* case was issued on 16 June 2009, the day after the confirmation Decision in the *Bemba* case (15 June 2009), and therefore counsel for Mr Bemba was unaware of the approach then adopted, namely that admissibility challenges should be made before the Decision on the confirmation of charges.[106]

58. It is highlighted that the prosecution, on 22 July 2009, resisted the first defence request for an order from the Pre-Trial Chamber for disclosure of evidence relating to admissibility, on the grounds that it had fully discharged its

[103] ICC-01/05-01/08-704-Red3-tENG, paragraphs 5 and 6.
[104] ICC-01/05-01/08-704-Red3-tENG, paragraph 14, referring to "Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire (article 19 du Statut)", 16 June 2009, ICC-01/04-01/07-1213, paragraphs 56 and 58.
[105] ICC-01/05-01/08-704-Red3-tENG, paragraph 15.
[106] ICC-01/05-01/08-704-Red3-tENG, paragraph 16.

disclosure obligations between November 2008 and December 2008.[107] On 18 September 2009, the Pre-Trial Chamber decided that the defence no longer had *locus standi* to challenge the admissibility of the case at the Pre-Trial stage, and that it should raise the issue with the Presidency or before the Trial Chamber.[108]

59. The defence submitted a fresh application for disclosure before the Trial Chamber on 5 October 2009, which was considered during the status conference on 7 October 2009.[109] The defence indicated its intention to challenge the admissibility of the case, and the prosecution accepted that the defence is entitled to raise the issue at this stage.[110] The defence submits that the prosecution's previous indication that it had discharged its disclosure obligations was incorrect, and given the Trial Chamber had ordered the prosecution to disclose additional information relating to admissibility by 18 December 2009, it was unable to complete its work on the application before the Christmas and New Year judicial recess.[111] The defence suggests that for these reasons it should not be barred from making the application at this stage.[112]

60. The defence notes that the prosecution did not object to the timing of the challenge. In relation to the OPCV's submission regarding the jurisprudence of Trial Chamber II,[113] the defence notes it was not endorsed by the Appeals Chamber[114] and it is submitted, therefore, that it is not binding.[115]

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[107] ICC-01/05-01/08-704-Red3-tENG, paragraphs 7 and 8.
[108] ICC-01/05-01/08-704-Red3-tENG, paragraph 9, referring to ICC-01/05-01/08-529, paragraph 14.
[109] ICC-01/05-01/08-704-Red3-tENG, paragraph 10, referring to ICC-01/05-01/08-542.
[110] ICC-01/05-01/08-704-Red3-tENG, paragraph 11, referring to Transcript of hearing on 7 October 2009, ICC-01/05-01/08-T-14-ENG ET WT, pages 33, lines 3 – 11.
[111] ICC-01/05-01/08-704-Red3-tENG, paragraph 12, referring to ICC-01/05-01/08-655.
[112] ICC-01/05-01/08-704-Red3-tENG, paragraph 13.
[113] ICC-01/05-01/08-742-Corr, paragraphs 33 – 34 and footnote 37.
[114] Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, ICC-01/04-01/07-1497.
[115] ICC-01/05-01/08-752-Corr-tENG, paragraph 3.

b. Prosecution submissions

61. As just set out above, the prosecution does not oppose the defence application on the basis that it has been filed out of time.[116]

62. The prosecution submits that the Appeals Chamber Decision of 25 September 2009 in the *Katanga* case, to the extent that it addresses Trial Chamber II's construction of Article 19(4) of the Statute, is *obiter dicta* and therefore it is not binding on Trial Chamber III.[117] Trial Chamber II concluded, for the purposes of Article 19(4) of the Statute, that the trial commences when the case is transferred from the Pre-Trial Chamber to the Trial Chamber.[118] The prosecution urges the adoption of a single definition of the phrase "commencement of the trial", to eliminate confusion as to when the trial commences,[119] given that Trial Chamber I in the case of *The Prosecutor v. Thomas Lubanga Dyilo* ("*Lubanga* case") decided that "[...] the true opening of the trial [is] when opening statements, if any, are made prior to the calling of witnesses."[120]

c. OPCV submissions

63. Principal counsel of the OPCV reminded the Chamber that during the hearing of 7 October 2009, the Chamber indicated that it needed to determine the question "as to which Chamber, pre-trial or trial, should deal with the substantive" defence admissibility challenge.[121] She suggests that on the basis of Articles 19(6) and 64(4) of the Statute, and Rule 60 of the Rules, when read

[116] ICC-01/05-01/08-739, paragraph 38.
[117] ICC-01/05-01/08-739, paragraph 36.
[118] ICC-01/05-01/08-739, paragraph 34, referring to "Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case" (Article 19 of the Statute), 16 June 2009, ICC-01/04-01/07-1213-tENG, paragraph 49.
[119] ICC-01/05-01/08-739, paragraph 37.
[120] ICC-01/05-01/08-739, paragraph 37, referring to "Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted", 13 December 2007, ICC-01/04-01/06-1084, paragraph 39.
[121] ICC-01/05-01/08-742-Corr, paragraph 24.

in conjunction with the relevant legislative history, the Trial Chamber is the appropriate Chamber to rule on the issue at this stage of the proceedings.[122]

64. However, principal counsel develops her submission against the background of Article 19(4) of the Statute and the Decision of Trial Chamber II in the *Katanga* case of 16 June 2009, by arguing that the admissibility application, filed out of time, should be rejected *in limine litis*.[123] She submits that the defence, as a first step, should have sought leave to challenge the admissibility of the case at the trial stage of the case, on the basis of "exceptional circumstances", and that in any event, the application should be limited to matters arising under Article 17(1)(c) of the Statute.[124]

65. Principal counsel suggests that the exceptional circumstances test is not met because the relevant documents were available to defence counsel at an earlier stage in the case, thereby enabling the accused to make this application in a timely manner.[125]

66. It is argued that although the Decision of Trial Chamber II on the timing of a challenge to admissibility was not available until after the confirmation Decision, the defence should have focused on Article 19(4) of the Statute, and in any event ignorance of the law is not a sustainable argument.[126] It is underlined that defence counsel delayed a further eight months following Trial Chamber II's Decision in the *Katanga* case on this issue, thereby enhancing the requirement for leave prior to bringing this admissibility challenge.[127]

[122] ICC-01/05-01/08-742-Corr, paragraphs 25 – 29.
[123] ICC-01/05-01/08-742-Corr, paragraphs 30 – 34.
[124] ICC-01/05-01/08-742-Corr, paragraph 34.
[125] ICC-01/05-01/08-742-Corr, paragraph 36.
[126] ICC-01/05-01/08-742-Corr, paragraph 37.
[127] ICC-01/05-01/08-742-Corr, paragraph 37.

2. *Burden and Standard of Proof*

a. Defence submissions

67. The defence indicates that it acknowledges that it bears the burden of proof under the maxim *onus probandi actori incumbit* principle, and it refers to case law from the International Criminal Tribunal for Rwanda ("ICTR") to the effect that the burden of demonstrating that proceedings are an abuse of the process rests with the defence.[128]

68. It submits that the appropriate standard is the balance of probabilities,[129] as defined by Lord Nicholls of Birkenhead in the House of Lords in the United Kingdom as follows:

> The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. [130]

69. The defence submitted that the prosecution's suggested higher burden of proof in these circumstances: the "clear and convincing evidence" standard (see below), is not supported by the Court's jurisprudence and it would operate against the spirit of Article 67(1)(i) of the Statute (which prevents a reversal of the burden of proof).[131]

70. The defence furthermore submits that there is nothing to support a suggestion that the same standard of proof should be applied to the admissibility

[128] ICC-01/05-01/08-704-Red3-tENG, paragraphs 201 and 202.
[129] ICC-01/05-01/08-704-Red3-tENG, paragraph 203.
[130] *Re H (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563 at page 586.
[131] ICC-01/05-01/08-752-Corr-tENG, paragraphs 8 – 10 and referring to "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006", 14 December 2006, ICC-01/04-01/06-772 and ICC-01/04-01/07-1497, paragraph 111.

challenge as to the abuse of process application,[132] not least because the burden of proof rests with the prosecution during a criminal trial.[133]

b. Prosecution submissions

71. The prosecution submits that the defence bears the burden of proof when it seeks to demonstrate that the case is inadmissible and an abuse of the process.[134]

72. The Statute does not stipulate the standard or the burden of proof for the purposes of Article 19 of the Statute, and the prosecution argues that when a challenge is made to the Court's jurisdiction, whether under Article 19 of the Statute as a challenge to admissibility or on the basis of abuse of process, the appropriate standard of proof is that of "clear and convincing evidence."[135]

c. OPCV submissions

73. Principal counsel for the OPCV submits that the defence bears the burden of proof on an admissibility challenge[136] and for an abuse of process application, and that the minimum evidentiary threshold is proof by way of *prima facie* evidence.[137]

3. *Admissibility*

a. Defence submissions

74. Addressing Article 17(1)(b) of the Statute, the defence submits that the case is inadmissible because there has been an effective national investigation, followed by domestic proceedings, on the same allegations that are currently before the ICC. It is argued the CAR authorities showed willingness, and they

[132] ICC-01/05-01/08-752-Corr, paragraphs 11 – 15.
[133] ICC-01/05-01/08-752-Corr, paragraphs 16 – 23.
[134] ICC-01/05-01/08-739, paragraph 39.
[135] ICC-01/05-01/08-739, paragraphs 43 – 45.
[136] ICC-01/05-01/08-742-Corr, paragraph 36.
[137] ICC-01/05-01/08-742-Corr, paragraph 73.

have the ability, to prosecute the accused.[138] Moreover, the defence argues the case lacks sufficient gravity to justify the involvement of the ICC (Article 17(1)(c) of the Statute).[139]

75. As to complementarity, the defence emphasizes that referrals by a State Party should be without influence from the prosecution, and if the ICC Prosecutor invokes the jurisdiction of the Court, he should do so under Article 15(1) of the Statute.[140] It suggests that "self-referral", as occurred in this instance, is not supported by the text of the drafting history of the Statute,[141] and that by inviting a State to utilise Article 14(1) of the Statute, the prosecution avoids the kind of judicial scrutiny that is available under Article 15 of the Statute.[142] It is argued that by encouraging State "self-referrals", the prosecution is at risk of manipulation by transient governments which, having seized power in a *coup d'état*, may attempt to exploit the Court in order to eliminate their enemies.[143] Therefore, if the Prosecutor chooses to activate the jurisdiction of the Court, it is argued this should be under Article 15(1) of the Statute.[144]

76. The defence submits that the first criterion of Article 17(1)(b) of the Statute has been met since the case has been the subject of (effective and genuine) investigation in the CAR.[145] The defence refers to Pre-Trial Chamber III's Decision of 10 June 2008, that the proceedings currently before the ICC concern the same crimes that were the subject of national proceedings in the CAR.[146]

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[138] ICC-01/05-01/08-704-Red3-tENG, paragraph 1.
[139] ICC-01/05-01/08-704-Red3-tENG, paragraph 1.
[140] ICC-01/05-01/08-704-Red3-tENG, paragraphs 60 and 61.
[141] ICC-01/05-01/08-704-Red3-tENG, paragraphs 62 – 67.
[142] ICC-01/05-01/08-704-Red3-tENG, paragraphs 67 – 68.
[143] ICC-01/05-01/08-704-Red3-tENG, paragraph 68.
[144] ICC-01/05-01/08-704-Red3-tENG, paragraphs 60 and 61.
[145] ICC-01/05-01/08-704-Red3-tENG, paragraphs 69 – 74.
[146] ICC-01/05-01/08-704-Red3-tENG, paragraph 72, referring to « Décision relative à la Requête du Procureur aux fins de délivrance d'un mandat d'arrêt à l'encontre de Jean-Pierre Bemba Gombo » , 10 June 2008, ICC-01/05-01/08-14; Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 17 July 2008, ICC-01/05-01/08-14-tENG.

77. The defence submits that there is no "inability to prosecute" in the sense of Article 17 of the Statute, because the domestic judicial system has not collapsed, and the CAR is wholly capable of gathering evidence and concluding the criminal proceedings which were commenced there prior to the referral to the Court.[147] It submits that the Statute did not envisage that diplomatic immunity or an accused residing outside the territorial jurisdiction of the CAR were factors that could be taken into account when assessing the "inability to prosecute" criterion.[148]

78. The defence observes that when the Court issued the arrest warrant against the accused, and when the prosecution announced the initiation of an investigation into the CAR situation, the reasons previously given by the judicial authorities in the CAR as to their "inability" to prosecute the accused did not apply, since from April 2007 he was no longer Vice-President of the DRC and at that time he was living in exile in Portugal.[149] The defence observes that although the prosecution of Mr Bemba was discontinued in the CAR, on 16 September 2004, his co-accused, Mr Patassé, was committed for trial before the Bangui courts on the same charges, notwithstanding the fact that he also was living outside the CAR.[150] The defence submits that the accused's diplomatic immunity constituted no more than a temporary procedural obstacle.[151]

79. The defence suggests the dismissal of the case in the CAR was for political reasons, as opposed to any inability on the part of the authorities or the judicial system, and it quotes a member of the CAR judiciary, who commented that the national proceedings were dropped to avoid difficulty

[147] ICC-01/05-01/08-704-Red3-tENG, paragraphs 75 and 76.
[148] ICC-01/05-01/08-704-Red3-tENG, paragraphs 77 and 78.
[149] ICC-01/05-01/08-704-Red3-tENG, paragraphs 79 and 80.
[150] ICC-01/05-01/08-704-Red3-tENG, paragraph 94.
[151] ICC-01/05-01/08-704-Red3-tENG, paragraph 95.

with the DRC.[152] The defence submits that the 203 statements taken from victims by the CAR authorities demonstrate that significant investigative steps had been taken in furtherance of the Bangui case and that the CAR judicial system was functioning effectively and efficiently.[153] It suggests that the statistics of the Bangui Court of Appeal show that the CAR judiciary functions properly and can conduct criminal proceedings.[154] It notes that the infrastructure is in place to conduct the proceedings in Bangui, as demonstrated by the prosecution when it requested *in situ* hearings in Bangui.[155]

80. The defence further submits that Pre-Trial Chamber III erred in inferring "unwillingness" on the part of the CAR authorities to prosecute the accused when they "abandoned any attempt" to proceed with the case, given – it is suggested – that the CAR authorities only referred to their "inability" to prosecute him.[156] The defence submits that up until the dismissal of the case for insufficient evidence, the CAR judicial authorities had conducted proceedings in a regular fashion, and that the hiatus in the criminal proceedings against the accused was for diplomatic reasons, since he was a serving Vice-President of the DRC.[157]

81. The defence objects to what it calls the "re-characterisation" of the circumstances by the prosecution – describing them as a situation of inactivity – which would render the case admissible in accordance with the Appeals Chamber's Decision of 25 September 2009 in the *Katanga* case.[158] The defence notes that in this Decision the Appeals Chamber found that the Court has the discretion to refuse a State referral and it requests the Chamber to exercise

[152] ICC-01/05-01/08-704-Red3-tENG, paragraphs 81 – 90.
[153] ICC-01/05-01/08-704-Red3-tENG, paragraph 91 and footnote 64.
[154] ICC-01/05-01/08-752-Corr-tENG, paragraph 38.
[155] ICC-01/05-01/08-752-Corr-tENG, paragraph 39.
[156] ICC-01/05-01/08-704-Red3-tENG, paragraphs 97 and 98.
[157] ICC-01/05-01/08-704-Red3-tENG, paragraph 99.
[158] ICC-01/05-01/08-752-Corr-tENG, paragraph 27, referring to ICC-01/04-01/07-1497.

that discretion in the present case, submitting that the circumstances of the *Bemba* case are not comparable to those of the *Katanga* case.[159]

82. The defence maintains that the criteria of "inability" and "unwillingness" under Article 17 of the Statute have not been met, and that in any event the circumstances have now fundamentally changed,[160] and in this regard the defence quotes from a letter of 1 August 2008 from President Bozizé to the Secretary-General of the United Nations.[161] The defence submits that this letter was an attempt to prevent an investigation by the Court into matters for which the President was a potential suspect; it is suggested that the letter highlights the "dubious nature" of the assertion that the accused could not be prosecuted; and it demonstrates that there had not been a "total or substantial collapse or unavailability" of the national CAR judicial system.[162]

83. Therefore, the defence submits that the case is inadmissible under Article 17(1)(b) of the Statute because the CAR judicial authorities initiated valid investigations against the accused for the crimes currently before the ICC, which the CAR thereafter discontinued for reasons other than its genuine unwillingness or inability to prosecute. The defence relies on the Order of 16 September 2004, as regards the criteria of Article 17(1)(b) of the Statute.[163] The order was rendered following an application from the Public Prosecutor of the *Tribunal de Grande Instance*, and it dealt with the merits of the case by effectively stopping the proceedings.[164] It is suggested the case against the accused was impermissibly taken up again by the national authorities, in violation of the procedure prescribed by the Code of Criminal Procedure for the CAR.[165]

[159] ICC-01/05-01/08-752-Corr-tENG, paragraphs 28 – 34.
[160] ICC-01/05-01/08-704-Red3-tENG, paragraphs 109 – 113.
[161] ICC-01/05-01/08-704-Red3-tENG, paragraph 113; CAR-OTP-0057-0060 to 0062.
[162] ICC-01/05-01/08-704-Red3-tENG, paragraphs 113 and 114.
[163] ICC-01/05-01/08-752-Corr-tENG, paragraph 24(1) and footnote 19.
[164] ICC-01/05-01/08-752-Corr-tENG, paragraph 24(2).
[165] ICC-01/05-01/08-752-Corr-tENG, paragraph 25.

84. The defence submits that the CAR never renounced its jurisdiction over the case in favour of the Court.[166] It argues that the judicial authorities who rendered the decision not to prosecute, artificially revived the case on instruction of the executive of the CAR by way of the Bangui Court of Appeal, which, in its judgment of 16 December 2004, addressed a decision that had not been submitted for its review.[167]

85. The defence suggests that it is for the Court to determine inability in the sense of Article 17(3) of the Statute, a finding that should only be made in exceptional circumstances.[168]

86. The defence application is based on Article 17(1)(b) and (c) of the Statute, and the accused is not seeking trial in the CAR.[169] It suggested that the CAR was willing to proceed with the case and that it is irrelevant whether it lacks the ability to so.[170] The defence submits that investigations had taken place in the CAR, resulting in a ruling not to proceed that fell within the scope of Article 17 of the Statute.[171] The defence argues that the dismissal order was a decision on its merits, which was not appealed by the prosecution.[172]

87. Addressing Articles 17(1)(c) and 20 of the Statute, the defence submits that the case is inadmissible on the basis of the principle of *ne bis in idem*.[173] It is argued that an examination of the documents relating to the criminal proceedings against the accused in the CAR show that the investigations of the national authorities were into allegations that are identical to the present charges.[174] It

[166] ICC-01/05-01/08-752-Corr-tENG, paragraph 26.
[167] ICC-01/05-01/08-752-Corr-tENG, paragraph 26.
[168] ICC-01/05-01/08-752-Corr-tENG, paragraphs 40 – 45.
[169] ICC-01/05-01/08-T-22-ENG CT WT, page 50, lines 18 – 23.
[170] ICC-01/05-01/08-T-22-ENG CT WT, page 51, lines 3 – 19.
[171] ICC-01/05-01/08-T-22-ENG CT WT, page 60, lines 20 – 24.
[172] ICC-01/05-01/08-T-22-ENG CT WT, page 60, line 4 to page 61, line 2.
[173] ICC-01/05-01/08-704-Red3-tENG, paragraphs 115 – 131.
[174] ICC-01/05-01/08-704-Red3-tENG, paragraphs 117 – 124.

is said they resulted in the application for an Order for Partial Termination of Proceedings by the Office of the Public Prosecutor in Bangui due to a lack of evidence.[175]

88. The defence submits that the Senior Investigating Judge's Order of 16 September 2004 terminated finally the criminal proceedings against the accused in relation to the acts for which he is currently being prosecuted at the Court, and the latter in consequence offends the *res judicata* principle.[176] In support of this argument, it is submitted that the ICC Prosecutor did not disclose the notice of appeal against the Order of 16 September 2004; that the appeal lodged by the Deputy Prosecutor is without effect as it did not relate to the accused; and that in the circumstances the Bangui Court of Appeal never had jurisdiction over the accused.[177]

89. Therefore, the defence argues that the Order of 16 September 2004 means that the current proceedings violate the principle of *res judicata* and that the principle of *ne bis in idem* does not require an acquittal or a conviction.[178]

90. The defence submits that the principle of *ne bis in idem* is equally applicable whether the national proceedings are based on "ordinary" crimes or international crimes, and that the definitions of the Statute in this regard are not decisive.[179] It is argued that there is no obligation under the Statute for States to incorporate the substantive criminal law of the Statute into their national laws in order to conclude that an individual has been prosecuted.[180]

[175] ICC-01/05-01/08-704-Red3-tENG, paragraphs 122 – 124.
[176] ICC-01/05-01/08-704-Red3-tENG, paragraph 126.
[177] ICC-01/05-01/08-704-Red3-tENG, paragraph 127.
[178] ICC-01/05-01/08-752-Corr-tENG, paragraph 24(3) and 24(4).
[179] ICC-01/05-01/08-752-Corr-tENG, paragraphs 51 and 52.
[180] ICC-01/05-01/08-752-Corr-tENG, paragraph 51.

91. On the proper interpretation of Article 20 of the Statute, the defence suggests that it is necessary to take national laws into account.[181] It sets out the application of the principle of *ne bis in idem* to orders for dismissal of charges in the French and the broadly similar CAR systems, and on this basis it suggests that the principle applies to final and definitive orders for dismissal of charges.[182] The defence draws attention to Article 114 of the national Code of Criminal Procedure applicable in the CAR at the time (now Article 143), which stipulates that an order for dismissal of charges ends criminal proceedings that can only be reactivated under strict conditions.[183]

92. The defence submits that precedents from the International Criminal Tribunal for the former Yugoslavia and ICTR are not of assistance because the *ad hoc* tribunals do not have provisions on admissibility that are comparable to Article 17 of the Statute and the wording of the tribunals' *ne bis in idem* provisions differ from Article 20(3) of the Statute.[184]

93. The defence refers to a decision of the European Court of Justice of 11 February 2003 in which it is said an agreement between the accused and the prosecution was found to constitute a final decision and accordingly the principle of *ne bis in idem* was applicable.[185]

94. The defence submits that in contrast to Articles 20(1) and Article 20(2) of the Statute, Article 20(3) makes no reference to a conviction or acquittal, and it suggests this was deliberate in order to include other examples of

[181] ICC-01/05-01/08-752-Corr-tENG, paragraphs 53 and 54.
[182] ICC-01/05-01/08-752-Corr-tENG, paragraphs 55 – 69.
[183] ICC-01/05-01/08-752-Corr-tENG, paragraph 83.
[184] ICC-01/05-01/08-752-Corr-tENG, paragraphs 70 and 71.
[185] ICC-01/05-01/08-752-Corr-tENG, paragraph 79 and footnote 52, referring to ECJ, *Judgment of the Court in joined cases C-187/01 (Gözütok) and C-385/01 (Brügge)*, 11 February 2003

"terminating" proceedings.[186] It submits that the case has been decided on the merits.[187]

95. In the alternative, it is argued that neither the Bangui Court of Appeal nor the *Cour de Cassation* have questioned the competence or jurisdiction of the CAR's judiciary; no court order has removed jurisdiction for these matters from the CAR's courts; and the latter, in the circumstances, remain seized of the case.[188] The defence submits that the decision of the CAR government to refer the case to the ICC violated the principle of the separation of executive and judicial powers, and that the Court is not lawfully seized following a political decision which violated this fundamental principle of rule of law.[189]

96. The defence submits that certain elements of the Document containing the Charges are incomplete, in that they indicate an incalculable number of crimes were perpetrated, in addition to those specifically charged involving identifiable victims, and that (1) this artificially increases the gravity of the prosecution's arguments and (2) the accused is unable to defend himself against such imprecise accusations.[190]

97. The defence submits that the case does not meet the level of gravity required under Article 17(1)(d) of the Statute, against the standard of gravity set by the prosecution in relation to Iraq and the factors which determine whether a case meets the required threshold of gravity as described in the prosecution's "Policy Paper on the Interests of Justice", dated September 2007.[191]

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[186] ICC-01/05-01/08-752-Corr-tENG, paragraph 81.
[187] ICC-01/05-01/08-752-Corr-tENG, paragraph 82.
[188] ICC-01/05-01/08-704-Red3-tENG, paragraph 128.
[189] ICC-01/05-01/08-704-Red3-tENG, paragraph 129.
[190] ICC-01/05-01/08-704-Red3-tENG, paragraphs 135 and 136. The Chamber notes that the defence has filed a request concerning the Second Document Containing the Charges: "Requête aux fins d'obtenir une Décision ordonnant la correction et le dépôt du Second Document Amendé Contenant les Charges", 12 February 2010, ICC-01/05-01/08-694. This will be dealt with in a separate decision.
[191] ICC-01/05-01/08-704-Red3-tENG, paragraphs 137 and 138.

98. The defence suggests the Court's jurisprudence has failed to establish criteria in order to assess gravity in this context.[192]

99. The defence maintains that the level of alleged responsibility, that of a military commander, does not, in the present circumstances, meet the requisite level of gravity to justify prosecution by the Court, noting that the accused was originally charged with "co-perpetration" pursuant to Article 25 of the Statute and that failing to take sufficient steps to prevent others from committing offences is less serious than ordering or committing criminal acts.[193] The defence refers to the conclusion of the Pre-Trial Chamber that it is not necessary to establish a direct causal link and that it suffices to prove that "the commander's omission increased the risk of the commission of the crimes charged [...]".[194] The defence maintains this further lessens the objective gravity of the case,[195] as does the fact that the military campaign under examination was conducted over a very short period of only five months.[196]

100. The defence emphasizes that whilst the concept of command responsibility is crucial when it can be demonstrated that a commander had, or should have had, knowledge of established and objectively verifiable crimes, in the present case this cannot be proven.[197]

b. Prosecution submissions

101. The prosecution submits that the case is admissible due to the inactivity of the national authorities since the investigations initiated in the CAR were not terminated on the basis of an evaluation of the merits of the case.[198]

[192] ICC-01/05-01/08-704-Red3-tENG, paragraph 139.
[193] ICC-01/05-01/08-704-Red3-tENG, paragraphs 142 – 144.
[194] ICC-01/05-01/08-704-Red3-tENG, paragraph 145, referring to ICC-01/05-01/08-424, paragraph 425.
[195] ICC-01/05-01/08-704-Red3-tENG, paragraphs 145 and 146.
[196] ICC-01/05-01/08-704-Red3-tENG, paragraphs 147.
[197] ICC-01/05-01/08-704-Red3-tENG, paragraphs 148 and 149.
[198] ICC-01/05-01/08-739, paragraph 3.

102. In response to the defence submissions on "self-referrals", the prosecution observes that the Appeals Chamber in its Decision of 25 September 2009 in the *Katanga* case held that while the preamble to the Statute rehearses the duty of States to exercise their criminal jurisdiction over international crimes, the Statute does not prevent a State from relinquishing its jurisdiction in favour of the Court.[199] The prosecution relies on an observation by the Appeals Chamber that a general prohibition against "self-referrals" is not a suitable tool for fostering compliance by States with the duty to exercise criminal jurisdiction, and that the Court retains the discretion to decline the exercise of jurisdiction on the basis of a State referral.[200] The prosecution takes issue with the suggestion that it influenced the CAR authorities in their decision to refer the situation; it summarises its own investigative activities; and it refutes the suggestion that it sought to avoid judicial review by the Pre-Trial Chamber.[201]

103. On the basis of the Appeals Chamber Decision of 25 September 2009, the prosecution submits that this case is admissible on the basis of inactivity, as (1) the accused was not tried and (2) the CAR proceedings were not terminated on the ground that prosecution was unwarranted.[202] The prosecution further argues that if inactivity is relied on, it is irrelevant that the domestic authorities are willing and able to investigate and prosecute other cases, and that a Decision by this Court on admissibility does not constitute a judgment on the national justice system as a whole.[203]

104. The prosecution submits that abandonment by the CAR authorities of the proceedings against the accused did not constitute a decision not to prosecute based on the merits of the case, within the meaning of Article 17(1)(b) of the

[199] ICC-01/05-01/08-739, paragraph 47 referring to ICC-01/04-01/07-1497, paragraph 85.
[200] ICC-01/05-01/08-739, paragraph 47 referring to ICC-01/04-01/07-1497, paragraphs 85 – 86.
[201] ICC-01/05-01/08-739, paragraphs 48 – 50.
[202] ICC-01/05-01/08-739, paragraphs 51 – 55, referring to ICC-01/04-01/07-1497, paragraphs 1, 2 and 78.
[203] ICC-01/05-01/08-739, paragraph 56.

Statute, because the investigations were discontinued before they were completed.[204] Therefore, the prosecution maintains that Article 17(1)(b) of the Statute envisages the completion of the relevant investigations, a requirement that has not been fulfilled.[205]

105. It submits that even if the Chamber considers the decision taken by the CAR authorities falls within the meaning of Article 17(1) (b) of the Statute, the CAR authorities are genuinely unable to prosecute the case.[206] The prosecution notes that Article 17(3) of the Statute enjoins the Court to consider whether the national judicial system has totally or substantially collapsed, or is unavailable, and it submits that in this case problems that have included the accused's personal immunity, security concerns and the difficulty in collecting the necessary evidence, resulted in the overall "unavailability" of the CAR national judicial system.[207] With regard to the definition of "inability" under Article 17(3) of the Statute, the prosecution argues that the criteria for inability are alternative rather than cumulative. It submitted that the Statute requires either "a total or substantial collapse" or the "unavailability of the national judicial system", the latter being applicable in the present case.[208]

106. The prosecution notes that the Chamber is not bound by the characterisation or description of the situation by the national authorities in its assessment of admissibility, and it does not accept the defence interpretation of the Pre-Trial Chamber's Decision of 10 June 2008:[209] it is suggested the Pre-Trial Chamber merely observed that the domestic proceedings had been abandoned without specifying whether this arose from unwillingness or inability.[210] It submits

[204] ICC-01/05-01/08-739, paragraphs 57 – 60.
[205] ICC-01/05-01/08-T-22-ENG CT WT, page 27, lines 3 – 27.
[206] ICC-01/05-01/08-739, paragraph 61.
[207] ICC-01/05-01/08-739, paragraphs 61 – 64.
[208] ICC-01/05-01/08-T-22-ENG CT WT, page 33, line 20 to page 34, line 12.
[209] ICC-01/05-01/08-14-tENG, paragraphs 21 – 22.
[210] ICC-01/05-01/08-739, paragraphs 65 and 66.

that the letter from President Bozizé to the United Nations does not substantiate a suggested ability or willingness on the part of the CAR authorities to prosecute the accused in national proceedings.[211]

107. The prosecution relies on the defence contention that the CAR judiciary was rendered "ineffective, unaccountable, corrupt, and dependent on the executive" following General Bozizé's ascension, thereby substantiating the argument that the judiciary was genuinely unable to proceed against the accused.[212]

108. The prosecution contends that the case is not inadmissible pursuant to Article 17(1)(c) of the Statute, as this would require a prior conviction or acquittal, and it is argued that the accused was never tried before the CAR authorities.[213] The prosecution suggests the defence is inconsistent in its arguments, as it has, on the one hand, asserted that CAR authorities should have recommenced proceedings against the accused once he lost vice-presidential immunity, and, on the other hand, relied on the principle of *res judicata,* suggesting that the order of the investigating judge dismissing the charges finally concluded the case against the accused.[214]

109. The prosecution underlines that although the Statute does not define the term "gravity" for the purposes of admissibility, the Appeals Chamber has resisted an overly restrictive interpretation of the concept of gravity such as would hamper the preventative or deterrent role of the Court.[215]

[211] ICC-01/05-01/08-739, paragraphs 65 and 66.
[212] ICC-01/05-01/08-739, paragraph 67 referring to ICC-01/05-01/08-704-Red3-tENG, paragraph 181 and footnote 113.
[213] ICC-01/05-01/08-739, paragraph 68.
[214] ICC-01/05-01/08-739, paragraphs 69 - 72
[215] ICC-01/05-01/08-739, paragraph 73.

110. It submits the pending charges meet the gravity test;[216] it argues they have sufficient specificity, given that the sheer scale of the alleged crimes limit a high degree of specificity;[217] and it contends this issue should be separated from the admissibility challenge.[218]

111. It is said that the Pre-Trial Chamber rejected the argument that the mode of liability relied on by the prosecution means the case is insufficiently grave, indicating these arguments are more appropriate on sentence.[219] At the status conference on 8 March 2010, the prosecution argued that, in any event, a commander may receive an aggravated sentence, given his role.[220]

112. Similarly, the prosecution submits that arguments centred on an alleged insufficiency of evidence should not be confused with the issue of the gravity of the charges.[221]

113. As to the facts that are determinative of an admissibility challenge, the prosecution relies on the Appeals Chamber Decision in the *Katanga* case[222] to submit that the admissibility of a case is to be determined on the basis of the facts that exist when the challenge is lodged, up until the time when the decision is issued.[223]

c. Submissions from the legal representative of victims

114. On the basis of the *Cour de Cassation* Judgment of 11 April 2006, the legal representative of victims submits that the case is admissible based on the inability of the CAR genuinely to investigate or prosecute.[224]

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[216] ICC-01/05-01/08-739, paragraphs 75, 78 and 79.
[217] ICC-01/05-01/08-739, paragraphs 76 and 77.
[218] ICC-01/05-01/08-739, paragraph 76.
[219] ICC-01/05-01/08-739, paragraph 80 referring to ICC-01/05-01/08-475, paragraph 48.
[220] ICC-01/05-01/08-T-22-ENG CT WT, page 35, lines 10 – 20.
[221] ICC-01/05-01/08-739, paragraph 81.
[222] ICC-01/04-01/07-1497, paragraph 56.
[223] ICC-01/05-01/08-T-22-ENG CT WT, page 31, line 14 to page 33, line 4.
[224] ICC-01/05-01/08-740-tENG, paragraphs 18,19 and 21.

115. The legal representative submits that "inability" under Article 17(3) of the Statute is not restricted to situations where all or a substantial part of the judiciary has collapsed, but that "inability may also be demonstrated by the State's unwillingness to arrest the accused, to gather the necessary evidence and testimony or otherwise genuinely to conduct proceedings".[225] In counsel's submission, the reasons underlying the initial inability still persist – including the lack of appropriate infrastructure[226] – and the legal representative submits that the CAR cannot reopen the proceedings against the accused, "still less so with judicial cooperation from the Kingdom of Belgium or the Portuguese Republic, with which it has no judicial agreements".[227]

116. The legal representative submits that the order of the investigating judge was not a decision on the merits of the case,[228] and that it was issued pursuant to the law of 1962, under which the investigating judge was solely charged with providing information and is unable to determine the case.[229] Following a request from the Chamber to provide the relevant references to the CAR law,[230] she drew the Chamber's attention to Article 27(a) and subsequent articles of the 15 January 1962 law (number 61/265) relating to the creation of a code on criminal procedure and Title III, Chapter I, section I of the same code that deals with the powers of the *juge d'instruction*.[231]

117. It is submitted that the decision issued by the Indictment Chamber of the Bangui Court of Appeal, which was appealed by the public prosecution

[225] ICC-01/05-01/08-740-tENG, paragraph 20.
[226] ICC-01/05-01/08-740-tENG, paragraph 22.
[227] ICC-01/05-01/08-740-tENG, paragraph 23.
[228] ICC-01/05-01/08-T-22-ENG CT WT, page 37, line 25 to page 38, line 12.
[229] ICC-01/05-01/08-T-22-ENG CT WT, page 37, line 25 to page 38, line 12.
[230] ICC-01/05-01/08-T-22-ENG CT WT, page 42, line 11 to page 43, line 4.
[231] Email communication from the Legal representative of the victims to the Legal Advisor to the Trial Division, 28 April 2010.

service before the *Cour de Cassation,* led to a final decision, namely that the CAR courts are unable to try Mr Bemba.[232]

118. The *Cour de Cassation* determined that the CAR is unable to conduct the relevant investigations and subsequent prosecution, and in consequence it is suggested that international cooperation is necessary to combat impunity.[233] Counsel argued that the CAR lacks the necessary infrastructure in terms of detention facilities, and it is suggested that a national judicial decision is not necessary for the CAR authorities to seize the ICC.[234]

119. The legal representative of victims submits that the decision dismissing the case does not engage the *res judicata* principle since the Order of 16 September 2004 of the Senior Investigating Judge of the Bangui *Tribunal de Grande Instance* was appealed and partially reversed by the Bangui Court of Appeal to the extent that it orders severance.[235] The legal representative submits that the *Cour de Cassation* Judgment of 11 April 2006 confirming the severance of the case against the accused is the relevant final decision.[236] It removed the case from the jurisdiction of the national courts and referred it to the ICC.[237]

120. The legal representative submits that five of the eight charges brought against the accused are amongst the most serious crimes within the Court's jurisdiction and it observes that the defence chose not appeal the Decision on the confirmation of the charges.[238]

[232] ICC-01/05-01/08-T-22-ENG CT WT, page 39, line 20 to page 40, line 3.
[233] ICC-01/05-01/08-T-22-ENG CT WT, page 40, lines 9 – 14.
[234] ICC-01/05-01/08-T-22-ENG ET WT, page 40, lines 20 – 24 and page 41, lines 9 – 14.
[235] ICC-01/05-01/08-740-tENG, paragraphs 24 and 25.
[236] ICC-01/05-01/08-740-tENG, paragraph 26.
[237] ICC-01/05-01/08-740-tENG, paragraph 27.
[238] ICC-01/05-01/08-740-tENG, paragraphs 30 – 32.

d. OPCV submissions

121. Principal counsel for the OPCV submits that even if the Chamber is not inclined to dismiss the entirety of the defence admissibility motion on the basis that it is out of time, it should nonetheless only consider the merits of the defence arguments on the issue of *ne bis in idem* because challenges at the trial stage are limited to this issue.[239]

122. On the basis of the Decision of the Appeals Chamber of 25 September 2009 in the *Katanga* case, it is argued that the case is not inadmissible under Article 17(1)(b) of the Statute because the CAR authorities did not decide not to prosecute.[240] Counsel submits that the Bangui Court of Appeal and the *Cour de Cassation* ordered severance of the national proceedings so that the accused, along with others, could be referred to the Court for prosecution.[241]

123. Principal counsel suggests that the defence arguments concerning the ability and willingness of the CAR authorities to investigate and prosecute the accused are irrelevant, since under Article 17(1)(b) they need only be examined if there has been a decision not to prosecute, which does not apply in the present case.[242]

124. It is contended that the victims of atrocities committed in the CAR have an interest in the truth and a right to justice, which are to be differentiated from their right to reparations.[243]

125. Counsel submitted a summary of the views and concerns of 200 victims (either already participating, or actual or future applicants), of which 117

[239] ICC-01/05-01/08-742-Corr, paragraph 39, footnote 35 and paragraphs 60 and 67.
[240] ICC-01/05-01/08-742-Corr, paragraphs 60 – 66.
[241] ICC-01/05-01/08-742-Corr, paragraphs 65 and 66.
[242] ICC-01/05-01/08-742-Corr, paragraph 66.
[243] ICC-01/05-01/08-742-Corr, paragraph 81.

were collected in written form.[244] In relation to national proceedings in the CAR, victims have emphasized that the domestic judiciary does not have the financial and legal resources to conduct a trial against the accused for the crimes of which he is charged before the Court.[245] One victim, whose observations are attached as annex 102, provides information about the budget allocated for judicial matters;[246] he observes that the Statute was not incorporated into national law until January 2010; and that at present only one magistrate has received formal training on the legal texts of the Court.[247]

126. The victims support a trial before the ICC, maintaining it is the only way for the world to understand what occurred and to ensure the impartiality of the proceedings.[248] They apprehend that they would be unable effectively to participate in national proceedings, since domestic legislation does not provide sufficient guarantees for their participation or for reparations, and the national authorities cannot supply adequate security for participating victims.[249] It is said that some victims unsuccessfully attempted to commence criminal proceedings for the events that occurred in the CAR between October 2002 and March 2003.[250]

127. The submission is advanced that the facts argued by the defence do not support a dismissal of the case based on the principle of *ne bis in idem* pursuant to Article 17(1)(c) of the Statute.[251] By reference to Articles 19(1)(c) and 20(3) of the Statute, counsel submits that in the present case the *chapeau* of Article 20(3) of the Statute is not fulfilled as the accused has not been tried by another court for the same conduct and that subsections (a) and (b) are

[244] ICC-01/05-01/08-742-Corr, paragraphs 83 – 90. The written observations were attached as annexes to the filing.
[245] ICC-01/05-01/08-742-Corr, paragraphs 86 and 89.
[246] ICC-01/05-01/08-742-Corr, paragraph 87.
[247] ICC-01/05-01/08-742-Corr, paragraph 87.
[248] ICC-01/05-01/08-742-Corr, paragraph 88.
[249] ICC-01/05-01/08-742-Corr, paragraph 89.
[250] ICC-01/05-01/08-742-Corr, paragraph 90.
[251] ICC-01/05-01/08-742-Corr, paragraph 59.

therefore not relevant.[252] Further inquiry into the national proceedings need not be conducted to determine that the principle of *ne bis in idem* does not apply.[253]

128. Principal counsel submits that the principle of *ne bis in idem* only applies in cases where final judgments on the merits of the case have been rendered at trial, such as definitive acquittals or convictions, and it does not apply to interlocutory decisions or prosecutions discontinued due to lack of evidence, or other premature terminations of criminal proceedings that do not have *res judicata* effect.[254] To support this argument, she sets out references and case law relating to the principle of *ne bis in idem* in international humanitarian law, human rights law, and international criminal law.[255] Counsel also discusses the legislative history of the Statute and specifically refers to comments made during the debates excluding the application of the principle of *ne bis in idem, inter alia,* when proceedings are discontinued for technical reasons.[256]

129. It is noted that, in contradiction to the interpretation of the facts by the defence, the Pre-Trial Chamber found that the *Ordonnance de non lieu* issued by the Senior Investigating Judge of Bangui constituted abandonment of the proceedings by the national authorities rather than completion of the proceedings based on their merits.[257]

130. Counsel submits that charges meet the gravity threshold,[258] on the basis of the scope, scale and nature of the crimes allegedly committed by the troops controlled by the accused.[259]

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[252] ICC-01/05-01/08-742-Corr, paragraphs 40 and 41.
[253] ICC-01/05-01/08-742-Corr, paragraph 41.
[254] ICC-01/05-01/08-742-Corr, paragraphs 42 and 56.
[255] ICC-01/05-01/08-742-Corr, paragraphs 43 – 51 and 55.
[256] ICC-01/05-01/08-742-Corr, paragraphs 52 – 54.
[257] ICC-01/05-01/08-742-Corr, paragraphs 57 – 59.
[258] ICC-01/05-01/08-742-Corr, paragraphs 67 – 71.

131. Finally, it is argued that the gravity of the charges should not be confused with the mode of liability under Article 28(a) of the Statute.[260]

e. Submissions from the CAR

132. Counsel for the CAR observes that the CAR ratified the Statute in October 2001 and that the conditions for the exercise of jurisdiction of the Court pursuant to Articles 5, 12, 13 and 14 of the Statute are all fulfilled.[261]

133. The CAR's submissions as to "willingness" were not entirely consistent. At one stage it was submitted that the case is admissible before the Court, not because the CAR is unwilling, but on account of its inability to pursue proper proceedings against the accused.[262] However, during oral submissions before the Chamber, the CAR relied on unwillingness and inability as regards the national judicial proceedings (this is addressed hereafter, as part of the Chamber's analysis). Counsel submits that even if the CAR had the resources to prosecute the accused – which it does not – it could not have done so on the basis of the crimes listed in Article 5 of the Statute.[263] At the time the CAR authorities first instituted proceedings against the accused the national penal code did not include comparable crimes.[264] As of 6 January 2010, the new penal code includes these crimes, but due to the principle of non-retroactivity they cannot be applied to the events for which the accused is being prosecuted before the ICC.[265] It is suggested that because the CAR has withdrawn from handling the case, it is barred from resuming the prosecution in accordance with the principle of withdrawal.[266]

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[259] ICC-01/05-01/08-742-Corr, paragraphs 68 and 69.
[260] ICC-01/05-01/08-742-Corr, paragraphs 68 and 69.
[261] ICC-01/05-01/08-758-Anx2B, pages 6 and 7.
[262] ICC-01/05-01/08-758-Anx2B, pages 9 – 12.
[263] ICC-01/05-01/08-758-Anx2B, page 9.
[264] ICC-01/05-01/08-758-Anx2B, page 9.
[265] ICC-01/05-01/08-758-Anx2B, page 9.
[266] ICC-01/05-01/08-T-22-ENG CT WT, page 10, line 24 to page 11, line 5.

134. As to inability, it is submitted that the Bangui Court of Appeal and the *Cour de Cassation* have issued decisions clearly describing the courts' inability to undertake these proceedings,[267] and it is stressed that Mr Patassé and Mr Bemba did not live in the CAR, and the CAR judiciary did not have the power to oblige Togo and the DRC, respectively, to extradite them.[268] Attention is focussed on the shortage of judges and relevant human resources, and the lack of financial and other means.[269] Furthermore, the CAR representative stressed that the position of the victims, and the presence of MLC militia on the territory of the CAR, as well as the areas of conflict, make it impossible, given the security considerations, to organise and hold a trial against Mr Bemba on the territory of the CAR.[270]

135. A "*Fédération Internationale des Droits de l'Homme*" ("FIDH") report of February 2004 is cited, which sets out the country's lack of means; the risk of interference with the independence and impartiality of the judiciary; the conditions of insecurity; and the absence of operative war crimes legislation, all of which, it is submitted, lead to the conclusion that the CAR judiciary is unable to conduct investigations and prosecutions against those suspected of having committed war crimes.[271]

136. The CAR submits that to date, it lacks the practical and financial means to complete satisfactorily the investigations and prosecutions that it commenced against the accused, along with others. With reference to a further FIDH report of July 2008, the CAR representative lists some of the practical impediments for the domestic authorities, such as the absence of the accused from the CAR territory; the limited investigation into the crimes committed in Bangui and its vicinity; the lack of forensic tools; and virtual absence of

[267] ICC-01/05-01/08-758-Conf-Anx2B, pages 10 – 12; ICC-01/05-01/08-T-22-ENG ET WT, page 8, lines 10 – 21.
[268] ICC-01/05-01/08-758-Conf-Anx2B, page 11..
[269] ICC-01/05-01/08-T-22-ENG ET WT, page 8, line 22 to page 9, line 5.
[270] ICC-01/05-01/08-T-22-ENG ET WT, page 9, lines 6 – 23.
[271] ICC-01/05-01/08-758-Anx2B, page 11.

(proper) evidence collection.[272] He submits that the monies allocated to the Minister of Justice in the national budget of 2010 demonstrates that the CAR is not in a position to cover the costs connected with a trial against the accused.[273]

137. On the question of the CAR's willingness to prosecute Mr Bemba, it was argued that this applied in 2003, when the Public Prosecutor of the *Tribunal de Grande Instance* in Bangui instituted proceedings and seized the investigating judge of a request relating to the accused.[274] However, Mr Bemba was out of the territory – he had been appointed Vice-President of the DRC, thereby benefiting from presidential immunity – and the judge could not proceed.[275]

138. Counsel referred to the subsequent proceedings before the Bangui Court of Appeal and the *Cour de Cassation,*[276] and observed that when the government of the CAR decided to refer the case to the ICC, it relinquished the prosecution for the crimes currently under examination.[277]

139. It is submitted that the CAR is neither able nor willing to prosecute Mr Bemba.[278]

140. The CAR representative submits that the principle of *ne bis in idem* only applies in the event of a conviction or an acquittal, when the avenues of appeal are no longer extant.[279]

141. The CAR representative suggests Mr Bemba has not been tried and there has been no (final) court judgment.[280]

[272] ICC-01/05-01/08-758-Anx2B, page 11.
[273] ICC-01/05-01/08-758-Anx2B, page 11.
[274] ICC-01/05-01/08-T-22-ENG ET WT, page 6, lines 1 – 8.
[275] ICC-01/05-01/08-T-22-ENG ET WT, page 6, lines 8 – 20.
[276] ICC-01/05-01/08-T-22-ENG ET WT, page 6, line 21 to page 7, line 25.
[277] ICC-01/05-01/08-T-22-ENG ET WT, page 7, line 25 to page 8, line 9.
[278] ICC-01/05-01/08-T-22-ENG CT WT, page 8, lines 4 – 9 and page 10, line 24 to page 11, line 5.
[279] ICC-01/05-01/08-758-Anx2B, pages 13 and 14.

142. The CAR representative submits that there is a contradiction between the defence submission that there has been a final national decision on proceedings against the accused and the appellate proceedings recently launched in the CAR.[281]

143. The CAR addressed particular issues concerning the appeal by the Public Prosecutor before the *Tribunal de Grande Instance* against the Order of 16 September 2004 issued by the Senior Investigating Judge in Bangui. It indicated that pursuant to Article 99(a) of the CAR Code of Criminal Procedure, the Public Prosecutor may lodge an appeal ***in any case***, including against an order by the investigating judge granting or refusing a request to proceed with a case (*réquisitoire*).[282] A copy of the appeal document[283] has been provided to the Chamber, and the CAR representative suggests that the Deputy Prosecutor lodged the appeal against the Order of 16 September 2004 in its entirety, including the dismissal of the charges against the accused.[284]

144. It is submitted that, pursuant to Article 103 of the CAR Code of Criminal Procedure, the Public Prosecutor of the Bangui Court of Appeal correctly filed submissions in support of the appeal in three consecutive applications, on 22 October 2004, 23 and 24 November 2004 (two "*réquisitoires*" and one "*Réquisitoire Supplétif*"), which have been submitted to the Chamber.[285] On this basis, it is argued that the Indictment Chamber of the Bangui Court of Appeal was seized of an appeal concerning the accused, and accordingly it had jurisdiction.[286]

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[280] ICC-01/05-01/08-T-22-ENG CT WT, page 11, line 10 to page 12, line 24.
[281] ICC-01/05-01/08-758-Anx2B, pages 12 and 13.
[282] ICC-01/05-01/08-770-Anx1-tENG, paragraphs 10 – 13.
[283] ICC-01/05-01/08-770-Anx2, page 3.
[284] ICC-01/05-01/08-770-Anx1-tENG, paragraphs 16, 17 and 22.
[285] The réquisitoire of 22 October 2004 was filed against a different accused (CAR-OTP-0019-0165).
[286] ICC-01/05-01/08-770-Anx1-tENG, paragraphs 19 – 23.

4. Abuse of process

a. Defence submissions

145. The defence sets out that the abuse of process and admissibility challenges are independent of each other, but were brought simultaneously for reasons of practicality.[287]

146. The defence submits that the proceedings are vitiated to such an extent that a fair trial is no longer possible.[288] Relying on the concept of 'abuse of process',[289] the defence suggests that the guilt or innocence of the accused is irrelevant for these purposes, since this is a protection designed to uphold the integrity of the judicial process.[290]

147. The defence argues that abuse of process may arise when (1) it is impossible to guarantee a fair trial or (2) there has been a violation to the Court's sense of justice or the ethics of the Court such as to undermine the integrity of judicial proceedings.[291] The defence submits that the prejudice to the accused means it has sufficiently satisfied this test.[292]

148. The defence relies on three grounds to stay the present proceedings: (1) the prosecution's failure to disclose evidence relating to its contact with members of the CAR government and the judiciary, as regards the issue of complementarity;[293] (2) the misuse of the judicial process for political purposes;[294] and (3) the unlawful means by which the accused was brought to the Court.[295]

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[287] ICC-01/05-01/08-752-Corr-tENG, paragraph 87.
[288] ICC-01/05-01/08-704-Red3-tENG, paragraphs 150 – 200.
[289] ICC-01/05-01/08-704-Red3-tENG, paragraphs 150 and 151.
[290] ICC-01/05-01/08-704-Red3-tENG, paragraph 152.
[291] ICC-01/05-01/08-752-Corr-tENG, paragraphs 88 – 90.
[292] ICC-01/05-01/08-752-Corr-tENG, paragraphs 91 – 111.
[293] ICC-01/05-01/08-704-Red3-tENG, paragraphs 153 and 154 – 170.
[294] ICC-01/05-01/08-704-Red3-tENG, paragraphs 153 and 171 – 186.
[295] ICC-01/05-01/08-704-Red3-tENG, paragraphs 153 and 187 – 196.

149. As to disclosure, the defence identified documents relating to discussions between the prosecution and the CAR authorities on the issue of complementarity, and it sets out the history of its requests for information and the prosecution response, the latter to the effect that it had fulfilled its disclosure obligations and that it was not in possession of undisclosed material in this category.[296] The defence maintains that the prosecution does not dispute that material in this category is disclosable.[297] On the basis of what are submitted to be the differences between the prosecution's report to the Pre-Trial Chamber of 15 December 2006 detailing its activities in the CAR relating to complementarity and its submission of 12 October 2009, setting out that it was not in possession of any notes of meetings relevant for the issue of admissibility, the defence suggests that the prosecution held a series of meetings without taking any notes.[298] It notes that the prosecution was under a duty to keep an accurate, contemporaneous report of the mission to Bangui, and that the absence of a report prevents the defence from assessing the veracity of the conclusions drawn by the prosecution in relation to the CAR government's unwillingness or inability to prosecute.[299] The defence suggests that the prosecution's contacts, on an *ex parte* basis, with the CAR judiciary without maintaining a contemporaneous report, at a time when an appeal on the issue of referral was pending before the *Cour de Cassation*, was highly inappropriate.[300] The defence expresses concerns that the prosecution took advantage of its meetings with the judicial organs to advise them on a successful referral.[301] It further refers to case law on the failure to disclose evidence and abuse of process, including from the *Lubanga* case, and notes

[296] ICC-01/05-01/08-704-Red3-tENG, paragraphs 154 – 158.
[297] ICC-01/05-01/08-704-Red3-tENG, paragraph 159.
[298] ICC-01/05-01/08-704-Red3-tENG, paragraph 160.
[299] ICC-01/05-01/08-704-Red3-tENG, paragraphs 161 and 162.
[300] ICC-01/05-01/08-704-Red3-tENG, paragraphs 163 – 167.
[301] ICC-01/05-01/08-704-Red3-tENG, paragraph 167.

that in the present case there is no way of knowing whether information that should have been disclosed is essential to the defence.[302]

150. The defence submits that the lack of disclosure by the prosecution and its failure to maintain proper records are not open to remedy, and that a fair trial is no longer possible.[303]

151. The defence further suggests the proceedings are abusive because the decision to initiate judicial proceedings against Mr Patassé (former President of the CAR) and the accused was politically motivated, and that the proceedings were designed to ensure that President Bozizé was free of challenge.[304] The defence submits that the President of the DRC, Joseph Kabila, and the DRC authorities had a political interest in the accused's transfer to the Court.[305] The defence notes that the Prosecutor met President Kabila on 2 April 2006, and it is suggested that the issue of complementarity in the CAR was discussed with the DRC authorities.[306] The defence seeks information on whether discussions of this kind may have been unrecorded.[307] The defence suggests that President Bozizé's counsel, Mr Goungaye Wanfiyo, was in direct personal contact with members of President Kabila's government on 21 July 2006, "less than a week and a half" after the judgment of the *Cour de Cassation* of the CAR, and that this contact was part of an ongoing plan to encourage victims to file complaints against the accused and the MLC troops.[308] The defence submits that the prosecution withheld material relating to meetings with the CAR authorities and this alone establishes an appearance of bias on the part of the prosecution.[309] It suggests that the Court should resist this abuse of national and international criminal proceedings by the CAR authorities (*viz.* by

[302] ICC-01/05-01/08-704-Red3-tENG, paragraphs 168 – 170.
[303] ICC-01/05-01/08-704-Red3-tENG, paragraphs 197 – 200.
[304] ICC-01/05-01/08-704-Red3-tENG, paragraphs 171 – 173.
[305] ICC-01/05-01/08-704-Red3-tENG, paragraphs 174 – 179.
[306] ICC-01/05-01/08-704-Red3-tENG, paragraph 177.
[307] ICC-01/05-01/08-704-Red3-tENG, paragraph 177.
[308] ICC-01/05-01/08-704-Red3-tENG, paragraphs 178 and 179.
[309] ICC-01/05-01/08-704-Red3-tENG, paragraphs 180 – 186.

removing political opponents from the scene).[310] On the basis, *inter alia*, of national case law, the defence requests a stay of proceedings.[311]

152. It is suggested that the apparent political interference in the case gives rise to an objectively founded fear that prosecution witnesses were pressurised into giving evidence.[312]

153. The defence complains that counsel to President Bozizé who was also the lawyer acting for most of the victims (and who, it is submitted, should not have been involved in judicial matters), wrote to the President of the Court to request Mr Bemba's further involvement in the proceedings, by way of transfer to the ICC.[313]

154. It is argued that CAR national law envisages that a case is only reopened on the basis of new charges.[314] The defence submitted that the national proceedings against the accused were *ultra vires*.[315]

155. The defence suggests that apparent irregularities surrounding the surrender of the accused to the Court should be taken into account as part of the abuse application.[316] On 21 May 2008, Pre-Trial Chamber III dismissed the prosecution's first application to issue a warrant of arrest for the accused due to insufficient information, yet two days later, on 23 May 2008, a provisional arrest warrant was obtained that was enforced the following day by the Kingdom of Belgium.[317] The defence maintains that the arrest warrant was based on information that the accused was preparing to flee, although this information has never been disclosed despite repeated requests from the

[310] ICC-01/05-01/08-704-Red3-tENG, paragraphs 180 – 186.
[311] ICC-01/05-01/08-704-Red3-tENG, paragraph 186.
[312] ICC-01/05-01/08-704-Red3-tENG, paragraphs 197 – 200.
[313] ICC-01/05-01/08-T-22-ENG CT WT, page 58, lines 17 – 24.
[314] ICC-01/05-01/08-T-22-ENG CT WT, page 59, lines 4 – 20.
[315] ICC-01/05-01/08-T-22-ENG CT WT, page 60, lines 6 – 19.
[316] ICC-01/05-01/08-704-Red3-tENG, paragraphs 187 – 196.
[317] ICC-01/05-01/08-704-Red3-tENG, paragraphs 187 – 196.

defence.[318] It is suggested that the prosecution is withholding this material because it cannot guarantee its accuracy or authenticity, and it is submitted the circumstances raise the suspicion that the justice system is being exploited for political ends.[319]

b. Prosecution submissions

156. The prosecution submits that none of the matters raised reveal that the rights of the accused have been infringed or that a fair trial is no longer possible.[320] It relies on the Appeals Chamber observation in its Decision of 25 September in the *Katanga* case that:

> [...] a challenge to admissibility under article 19(2)(a) of the Statute is not the mechanism under which to raise alleged violations of the rights of the accused in the course of the prosecutorial process. [...] [U]nless alleged prejudices and violations are relevant to the criteria of article 17 of the Statute, they cannot render a case inadmissible.[321]

157. The prosecution submits that the alleged lack of disclosure is an issue that must be – and has been – litigated separately.[322] On the argument that the prosecution should have produced and disclosed contemporaneous reports of its meetings with the CAR authorities that took place in November 2005 in the context of the preliminary examination of the situation,[323] it maintains that whilst it is required to disclose information that would be material to the preparation of the defence, this does not include internal documents ("work products"), such as the notes and the report prepared in relation to the November 2005 mission.[324] The prosecution maintains that, apart from notes and memoranda that are in any event not disclosable, all relevant factual information stemming from the meetings touching on admissibility has been

[318] ICC-01/05-01/08-704-Red3-tENG, paragraphs 189 and 190.
[319] ICC-01/05-01/08-704-Red3-tENG, paragraphs 191 – 196.
[320] ICC-01/05-01/08-739, paragraphs 82, 84 and 85.
[321] ICC-01/05-01/08-739, paragraphs 82 and 83, referring to ICC-01/04-01/07-1497, paragraph 113.
[322] ICC-01/05-01/08-739, paragraph 84.
[323] ICC-01/05-01/08-739, paragraphs 86 and 87.
[324] ICC-01/05-01/08-739, paragraph 88.

disclosed to the defence, including (1) the *dossier* on the proceedings initiated before the Bangui criminal courts and (2) the prosecution's report pursuant to Pre-Trial Chamber III's Decision requesting information on the status of the preliminary examination of the CAR situation.[325] In relation to the "pre-investigative mission" of November 2005, the prosecution suggests that it has not conceded that any material then recorded forms part of the investigation; it indicates that it does not have minutes or correspondence relevant to the issue of admissibility; and it sets out that it informed the Pre-Trial Chamber that the mission was conducted "for the purposes of further developing preliminary analysis, focusing in particular on collecting additional information on the conduct of the national proceedings prior to the referral."[326] It submits that the meetings with the relevant judicial authorities were not only appropriate, but they formed part of the prosecution's duty properly to investigate the admissibility of the case.[327] The prosecution submits that the domestic case-law referred to by the defence is not relevant to the instant case, and that the relevant Decision in the *Lubanga* case does not materially assist because it addressed non-disclosure of potentially exculpatory materials covered by agreements entered into pursuant to Article 54(3)(e) of the Statute.[328]

158. As to the suggested exercise of political influence on the proceedings by the prosecution, other impermissible conduct and an appearance of bias, it is submitted that the complaints lack any substantive foundation and the matters raised are irrelevant to the proceedings before the Court.[329] It argued that the defence case on abuse of process contradicts its substantive

[325] ICC-01/05-01/08-739, paragraph 89.
[326] ICC-01/05-01/08-739, paragraph 90.
[327] ICC-01/05-01/08-739, paragraph 91.
[328] ICC-01/05-01/08-739, paragraph 92, referring to the "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 13 June 2008, ICC-01/04-01/06-1401.
[329] ICC-01/05-01/08-739, paragraphs 93, 94 and 96.

admissibility arguments.[330] The prosecution suggests that even if the CAR authorities inappropriately conceded jurisdiction in favour of the Court, this is irrelevant because the Court should not investigate the underlying motive for a referral, or attempt to force a State to investigate or prosecute.[331] The prosecution adds that the Appeals Chamber suggested in its Decision of 14 December 2006 that the jurisdiction of the Court is not engaged every time domestic jurisdiction is relinquished and the Statute contains strict requirements and controls to ensure the proper exercise of the Court's jurisdiction.[332]

159. Addressing the circumstances of the surrender of the accused to the Court, the prosecution submits that the defence has misrepresented the position.[333] The prosecution relies on the Chamber's Decision, made in the context of arguments on the accused's detention, that a suggested ill-founded request for provisional arrest was irrelevant, and it submits that the present complaint also lacks relevance to the challenge to admissibility.[334] Moreover, the prosecution submits that the defence has failed to demonstrate any irregularity in the provisional arrest of the accused and his subsequent transfer from Belgium, and accordingly it is argued that the threshold for disclosure has not been met as regards disclosure of the sources for the information that underpinned the application for the provisional arrest warrant.[335] Additionally, it is submitted that prosecution sources are usually covered by Rule 81(2) of the Rules, as their disclosure would affect the prosecution's further or ongoing investigations.[336]

[330] ICC-01/05-01/08-739, paragraph 95.
[331] ICC-01/05-01/08-739, paragraph 97.
[332] ICC-01/05-01/08-739, paragraph 98, referring to ICC-01/04-01/06-772, paragraph 42.
[333] ICC-01/05-01/08-739, paragraphs 99 and 100.
[334] ICC-01/05-01/08-739, paragraphs 101 and 102.
[335] ICC-01/05-01/08-739, paragraph 102.
[336] ICC-01/05-01/08-739, paragraph 102.

c. OPCV submissions

160. Principal counsel of the OPCV submits that the defence abuse of process application should be summarily dismissed, as wanting any factual or legal basis.[337]

161. By reference to international criminal case law, including the Appeals Chamber Decision in the *Lubanga* case of 14 December 2006,[338] principal counsel submits that not every human rights violation engages the abuse of process doctrine, and that a certain minimum threshold needs to be met.[339]

162. Principal counsel submits that the defence submissions on abuse are unsupported by evidence, and instead constitute general accusations and speculation.[340] It is argued that even if evidence has been presented to support the defence allegations, they are not of a gravity to constitute an abuse of the process and they do not rebut the presumption accorded to the prosecution that it has properly discharged its functions under the Statute.[341]

163. In response to the later defence submissions, principal counsel of the OPCV submits that the defence has failed to provide any evidence that the judiciary of the CAR was unduly influenced by the letter sent by Mr Goungaye Wanfiyo.[342] She maintains that the CAR authorities have the right to refer situations to the Court pursuant to Article 14 of the Statute; she suggests there was nothing irregular in the referral; and she submits that political innuendos do not have a bearing on the legal criteria that must be applied by the Court in order to decide on the admissibility of a case.[343]

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[337] ICC-01/05-01/08-742-Corr, paragraphs 72 – 80.
[338] ICC-01/04-01/06-772, paragraph 34.
[339] ICC-01/05-01/08-742-Corr, paragraphs 74 – 78.
[340] ICC-01/05-01/08-742-Corr, paragraph 79.
[341] ICC-01/05-01/08-742-Corr, paragraphs 77 and 80.
[342] ICC-01/05-01/08-759, paragraphs 16 – 19.
[343] ICC-01/05-01/08-759, paragraphs 17 – 19.

d. Submissions from the CAR

164. As to the alleged abuse of process, the representative of the CAR submits that the application is without foundation and it is a delaying tactic of the defence.[344]

165. The CAR submits that the notes made in relation to meetings between the prosecution and the CAR authorities fall within the scope of Rule 81(1) of the Rules and are not subject to disclosure.[345] It was submitted that the CAR authorities did not communicate with the ICC Prosecutor about the issue of admissibility.[346]

166. In relation to the defence allegation that the proceedings before the Court were initiated for political reasons, the CAR suggests the accused currently plays no political role in the DRC.[347] Counsel submits that the CAR authorities and the Court have no political interest in the accused.[348]

167. In summary, it is argued the accused was surrendered to the Court legitimately by the Belgian authorities.[349]

5. Recent developments in the CAR

a. Defence submissions

168. In its filing of 13 April 2010, the defence asked the Chamber to take into account new procedural developments in the CAR as part of its challenge to admissibility.[350]

[344] ICC-01/05-01/08-T-22-ENG CT WT, page 14, lines 6 – 11.
[345] ICC-01/05-01/08-758-Anx2B, page 15.
[346] ICC-01/05-01/08-T-22-ENG CT WT, page 21, lines 6 – 13.
[347] ICC-01/05-01/08-758-Anx2B, page 15.
[348] ICC-01/05-01/08-758-Anx2B, page 15.
[349] ICC-01/05-01/08-758-Anx2B, page 15.
[350] ICC-01/05-01/08-751.

169. The defence apparently contacted a law firm in the CAR to establish the status of certain domestic legal proceedings.[351] It is suggested that all the decisions of the Appeals Chamber and the *Cour de Cassation* were taken "by default" against Mr Bemba and they were never served on him, thus preventing him from exercising any remedies available to him under the Code of Criminal Procedure in the CAR.[352]

170. The defence attaches documents relevant to proceedings now instituted by the accused before the national Appeals Court (the Bangui Court of Appeal) and the *Cour de Cassation,* requesting the *Cour de Cassation* to revoke its decision and for the CAR courts to retain jurisdiction over the case currently before the Chamber.[353] The documents simply indicate that applications have been made that are relevant to the Appeals Judgment of 16 December 2004 and the *Cour de Cassation* Judgment of 11 April 2006.[354]

171. The defence submits that the effect of the recent applications is that the case file is currently being examined by the Office of the General Prosecutor of the Bangui Court of Appeal, who was asked to submit his decision on further proceedings in the near future.[355]

172. It is suggested by the defence that decisions that are allegedly pending from the Bangui Court of Appeal and the *Cour de Cassation* are likely to have a significant impact on the question of *ne bis in idem,* and on relevant complementarity issues, enhancing the merits of the accused's challenge to the admissibility of the case.[356] The defence indicates that the only decision

[351] ICC-01/05-01/08-751, paragraph 6.
[352] ICC-01/05-01/08-751, paragraph 7.
[353] ICC-01/05-01/08-751, paragraphs 8 – 10.
[354] ICC-01/05-01/08-751-AnxA, ICC-01/05-01/08-751-AnxB, ICC-01/05-01/08-751-AnxC and ICC-01/05-01/08-751-AnxD.
[355] ICC-01/05-01/08-751, paragraphs 9 and 11.
[356] ICC-01/05-01/08-751, paragraphs 13 and 14.

that has not been appealed is the dismissal decision of the Senior Investigating Judge of Bangui.[357]

173. On 19 April 2010, the defence filed a second request for leave to inform Trial Chamber III of further judicial proceedings in CAR.[358] On 13 April 2010, the defence sent a letter to the prosecution requesting disclosure of evidence relevant to admissibility, which the prosecution referred to in its filing of 29 March 2010.[359]

174. Also on 19 April 2010, the prosecution disclosed a letter from Mr Goungaye (President Bozizé's counsel) addressed to the President of the Criminal Court of Bangui (which is within the Bangui Court of Appeal) dated 11 December 2004.[360] The defence complains about late disclosure of this letter.[361] However, the prosecution referred to the letter in paragraph 18 of its public response of 29 March 2010, citing it in part.[362]

175. The defence submits that President Bozizé's has provided a power of attorney, signed in his capacity as the Head of State of the CAR, which requests an order severing the 'blood crimes' faced by the accused, and their referral to the ICC.[363] It is highlighted that this letter was sent even though the Bangui Court of Appeal was in the process of ruling on the prosecution's appeal on the same facts. The Bangui Court of Appeal agreed with these recommendations.[364] The defence suggests that the letter explains why the national Chamber's ruling (delivered 5 days following receipt of the letter)

[357] ICC-01/05-01/08-751, paragraph 12.
[358] ICC-01/05-01/08-757.
[359] ICC-01/05-01/08-757, paragraphs 5 and 6.
[360] ICC-01/05-01/08-757, paragraph 7.
[361] ICC-01/05-01/08-757, paragraphs 9 and 10.
[362] ICC-01/05-01/08-757, paragraph 8.
[363] ICC-01/05-01/08-757, paragraph 12.
[364] ICC-01/05-01/08-757, paragraphs 12 and 13.

included the position of the accused, even though the appeal submitted by the prosecution did not raise his position.[365]

176. Following this disclosure, the defence filed a motion against the decision of the Bangui Court of Appeal on 16 April 2010.[366] It emphasizes what it submits is the importance of the proceedings before the *Cour de Cassation* for the admissibility challenge and attaches an extract from the register of the Bangui Court of Appeal as well as an extract of the "*Loi organique No 95.0011 portant organisation et fonctionnement de la Cour de Cassation*" of 23 December 2005 on the organization and functioning of the CAR *Cour de Cassation* ("*loi organique*"), of which Articles 20, 21 and 23 are said to be of importance.[367]

177. The defence argued that the decision of the judge of the Indictment Chamber was a nullity once it was not notified within 48 hours.[368]

178. Additionally, the defence submits that when challenges are filed with the *Cour de Cassation* in criminal matters, the original decision is suspended until the appeal is decided.[369]

179. The defence indicates that it recently challenged the national decisions in order to establish that they were rendered *ultra vires*, and not to challenge the Court's proceedings based on Article 17 of the Statute or to reopen the proceedings in the CAR.[370]

180. The defence in its final submissions acknowledges that a decision of "*renvoi*", transferring a case to trial, and an "*ordonnance de non lieu*", in which charges are not deemed to be sufficiently supported, are not treated in the same way,

[365] ICC-01/05-01/08-757, paragraph 14.
[366] ICC-01/05-01/08-757, paragraph 15.
[367] ICC-01/05-01/08-757, paragraphs 16 – 18.
[368] ICC-01/05-01/08-T-22-ENG CT WT, page 46, line 25 to page 47, line 18.
[369] ICC-01/05-01/08-T-22-ENG CT WT, page 47, line 19 to page 48, line 8.
[370] ICC-01/05-01/08-T-22-ENG CT WT, page 60, lines 6 – 19; page 62, lines 2 – 4.

and that the latter does not require notification.[371] It is suggested that the application filed in the national courts automatically suspended the decision of the Bangui Court of Appeal in which the case was transferred to the ICC.[372]

181. The defence submits that every judicial decision that operates to the disadvantage of the accused must be notified to allow him to exercise his rights of challenge.[373] Based *inter alia* on Articles 111(e), 113(b), 194, 193, 95, 109 of the CAR Code of Criminal Procedure,[374] the defence suggests that there does not need to be an express nullity provision: it is sufficient that a lack of notification deprives the accused of his right to a remedy, as with the *Cour de Cassation* Judgment of 11 April 2006.[375] In the alternative, with reference to Articles 219 and 276 of the former and current CAR Codes of Criminal Procedure, it is suggested that the decision should not be executed.[376] In either event, the defence submits that the Order of 16 September 2004 remains in effect.[377]

182. Citing Articles 21, 61 and 64 of the *loi organique*,[378] the defence submits that the Appeals Judgment of 16 December 2004 is null and void; it should not be executed; and it is at the very least suspended by the defence *pourvoi* filed in the CAR on 16 April 2010.[379]

183. As set out above, the defence now accepts there was no need to notify the *Ordonnance de non lieu*, but it submits that the decision of the Indictment Chamber should have been notified, as well as the appeal by the national

[371] ICC-01/05-01/08-776-Red2, paragraphs 6 – 11.
[372] ICC-01/05-01/08-776-Red2, paragraphs 12 – 15.
[373] ICC-01/05-01/08-776-Red2, paragraph 17.
[374] ICC-01/05-01/08-776-Red2, paragraphs 18 – 28.
[375] ICC-01/05-01/08-776-Red2, paragraphs 29 and 30.
[376] ICC-01/05-01/08-776-Red2, paragraphs 31 – 36.
[377] ICC-01/05-01/08-776-Red2, paragraph 37.
[378] ICC-01/05-01/08-776-Red2, paragraphs 38 and 39.
[379] ICC-01/05-01/08-776-Red2, paragraph 40.

prosecution.[380] The defence argues it is not for the Chamber to determine the validity or admissibility of the national appeal filed by the accused.[381] Moreover, it suggests that the Appeals Judgment of 16 December 2004, which partially overturned the *Ordonnance de non lieu*, did not indicate that the latter was a mere administrative decision for which there is no recourse.[382]

b. Prosecution submissions

184. In response to the two defence applications containing further information on recent developments as regards proceedings in the CAR, the prosecution requests the Chamber (1) to dismiss the applications, as they have no bearing on the present admissibility challenge before the Court and (2) to refuse the defence request to join both applications to its admissibility challenge.[383]

185. It submits that the defence attempts to challenge the judgments of the CAR national courts do not reopen the national investigation or the prosecution, and accordingly they do not affect the present admissibility challenge.[384]

186. The prosecution notes that the defence has failed properly to demonstrate the accused's entitlement to challenge the decision that he was not to be investigated or prosecuted in the CAR.[385]

187. The prosecution highlights that the accused filed his three challenges to the CAR domestic decisions more than three years after they were issued, and more than six weeks after he filed his motion challenging the admissibility of the case, and it submits that he must have been aware of the domestic

[380] ICC-01/05-01/08-776-Red2, paragraphs 65 – 68.
[381] ICC-01/05-01/08-776-Red2, paragraphs 69 – 72.
[382] ICC-01/05-01/08-776-Red2, paragraphs 73 and 74.
[383] ICC-01/05-01/08-761, paragraph 13.
[384] ICC-01/05-01/08-761, paragraphs 2, 3, 5 and 12.
[385] ICC-01/05-01/08-761, paragraphs 4, 6 and 7.

decisions considerably earlier.[386] It questions the accused's motives in raising these issues at this late stage.[387]

c. Submissions from the legal representative of victims

188. Counsel addressed the defence appeal, submitted on 16 April 2010 before the CAR *Cour de Cassation* against the Appeals Judgment of 16 December 2004, and focussed, first, on the defence failure to file a brief in support (notwithstanding the time limits) and, second, on its request to the *Cour de Cassation* to postpone the scheduled hearing.[388] It is argued the appeal is a tactic to delay the proceedings.[389]

189. Counsel submitted that in the CAR a court decision in these circumstances is not suspended when an appeal is lodged.[390] At the request of the Chamber, the provisions of the *loi organique* were made available.[391] It is contended that it is not open to a party to appeal against procedural decisions of the Indictment Chamber, and that Article 60, at line 3, states that a party failing to appear in a criminal matter cannot appeal to the Court of Appeal. In all the circumstances, it is suggested that the appeal lodged by the defence has not had suspensive effect.

d. OPCV submissions

190. As regards defence applications containing further information on recent developments as regards proceedings in the CAR, principal counsel for the OPVC submits that the defence has not provided any legal basis for the contention that the recent filings before the CAR courts are admissible or will

[386] ICC-01/05-01/08-761, paragraphs 8 and 9.
[387] ICC-01/05-01/08-761, paragraph 10.
[388] ICC-01/05-01/08-T-22-ENG CT WT, page 38, line 13 to page 39, line 8
[389] ICC-01/05-01/08-T-22-ENG CT WT, page 39, lines 9 – 13.
[390] ICC-01/05-01/08-T-22-ENG CT WT, page 39, lines 14 – 19.
[391] Email communication from the Legal representative of the victims to the Legal Advisor to the Trial Division, 28 April 2010.

lead to new proceedings.[392] She suggests that the applications filed by the defence in the CAR are inadmissible pursuant to national law and she observes that the defence has failed to submit its grounds.[393] Counsel submits that the defence contradicts itself in arguing, on the one hand, that there has been a final decision terminating the national proceedings against the accused, thereby constituting *ne bis in idem*, and, on the other, that proceedings are ongoing.[394] She suggests that the recent filings by the defence before the CAR courts are a delaying tactic, which is viewed by the victims as a further impediment to their legitimate right to establish the truth, and to access justice.[395]

191. Principal counsel of the OPCV submits that the *"Recours en Retraction"* and *"Recours en opposition"* before the CAR courts do not change the legal or factual circumstances rendering the case admissible before the Court.[396] The judgment of the *Cour de Cassation* was not based on the merits of the criminal allegations, but is of a procedural nature without *res judicata* effect.[397] Principal counsel submits that the Chamber should not, at this stage, engage in any substantive analysis of the documents purportedly filed in Bangui by the defence without further action taken by the CAR judiciary.[398]

192. On the issue of notification, principal counsel relies on the wording of Article 95(b) of the CAR Code of Criminal Procedure which reads: "Notification of this committal for trial will be given as soon as possible on penalty of nullity to the accused and his or her counsel as well as the right to appeal the order within 48 hours of the notification. A copy of the order will be issued to the accused." It is submitted that Articles 95(a) and (b), read together, address

[392] ICC-01/05-01/08-759, paragraphs 6 – 12.
[393] ICC-01/05-01/08-759, paragraphs 7 – 10.
[394] ICC-01/05-01/08-759, paragraph 11.
[395] ICC-01/05-01/08-759, paragraph 12.
[396] ICC-01/05-01/08-759, paragraphs 13 – 15.
[397] ICC-01/05-01/08-759, paragraph 13.
[398] ICC-01/05-01/08-759, paragraph 15.

situations in which the investigative judge commits an individual for trial – this is the only situation when the individual concerned must be notified on pain of nullification.[399]

e. Submissions from the CAR

193. It is suggested that no notification was sent to Mr Bemba because at the time he was Vice President of the DRC, and no relevant legal agreement between the DRC and CAR existed; accordingly, there was no procedure for informing Mr Bemba. It was submitted that whilst there is a legal obligation to notify decisions to the parties, there are no sanctions or specific consequences if this does not happen, save possibly to extend deadlines for an appeal.[400]

194. It is suggested that whilst the Trial Chamber should not seek to review the merits of proceedings before the CAR courts, it should nonetheless act on the dilatory and abusive character of the recently launched appellate proceedings.[401]

195. Several provisions of the CAR Code of Criminal Procedure that deal with notification obligations were identified, and it is submitted that the CAR judicial authorities were not under an obligation to notify the Order of 16 September 2004 or the Appeals Judgment of 16 December 2004 to the accused.[402]

196. It is suggested that Articles 95(a) and (b) and 99 (as opposed to Article 85) of the CAR Code of Criminal Procedure apply in these circumstances, which establish the obligation to notify the accused of an order by an investigating judge to commit him for trial, which did not occur in this case. It is observed

[399] ICC-01/05-01/08-773, paragraph 6.
[400] ICC-01/05-01/08-T-22-ENG CT WT, page 18, line 12 to page 20, line 3.
[401] ICC-01/05-01/08-758-Anx2B, page 14.
[402] ICC-01/05-01/08-770-Anx1-tENG, paragraphs 24 – 41.

that on appeal, the blood crimes were severed from the economic crimes (the CAR judicial authorities were unable to prosecute and try the former).[403]

197. It is submitted that by Article 99, appealable orders are to be notified to the accused within 48 hours, but that this provision covers the three limited situations (pursuant to Articles 83(a), 84 and 85) in which an accused is permitted to lodge an appeal against an order by the investigating judge. It is suggested the obligation to notify the accused of an order by an investigating judge operates only if there is an order appealable by the accused. It is suggested that this obligation did not exist in relation to the Order of 16 September 2004 and issues such as his possible pre-trial detention and bail were not engaged.[404]

198. It is argued the defence relied inappropriately on Article 193(f) of the former CAR Code of Criminal Procedure since this provision concerns the notification procedure for a summons to appear when someone is living abroad. Given the circumstances of the case, this provision does not apply;[405] it is argued no national legal text requires the notification of a decision of severance.

199. It is submitted on behalf of the CAR that pursuant to Article 21 of the *loi organique*, a *pourvoi* concerning penal proceedings has suspensive effect, which applies to that lodged by Mr Bemba. It is said the issue in the present case is whether the accused was entitled to lodge a *pourvoi* against the Appeals Judgment of 16 December 2004, and the decision on severance was a measure relating solely to judicial administration, which the accused cannot appeal.[406]

[403] ICC-01/05-01/08-770-Anx1-tENG, paragraphs 24 – 27.
[404] ICC-01/05-01/08-770-Anx1-tENG, paragraph 32.
[405] ICC-01/05-01/08-770-Anx1-tENG, paragraphs 37 – 40.
[406] ICC-01/05-01/08-770-Anx1-tENG, paragraphs 42 – 47.

II. APPLICABLE LAW

200. In accordance with Article 21(1) of the Statute, the Chamber has considered the following provisions:

> **Preamble**
> **The States Parties to this Statute,**
>
> [. . .]
> **Emphasizing** that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,
> [. . .]
>
> **Article 5 of the Statute**
> **Crimes within the jurisdiction of the Court**
>
> 1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
> (a) The crime of genocide;
> (b) Crimes against humanity;
> (c) War crimes;
> (d) The crime of aggression.
> 2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.
>
> **Article 13 of the Statute**
> **Exercise of jurisdiction**
>
> The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:
> (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
> (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
> (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.
>
> **Article 14 of the Statute**
> **Referral of a situation by a State Party**
>
> 1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Article 17 of the Statute
Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
(d) The case is not of sufficient gravity to justify further action by the Court.
2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 19 of the Statute
Challenges to the jurisdiction of the Court or the admissibility of a case

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.
2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:
(a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
(c) A State from which acceptance of jurisdiction is required under article 12.
3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.
4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place

prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).
5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.
6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.
7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.
8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:
(a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;
(b) To take a Statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and
(c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.
9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.
10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.
11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

Article 20 of the Statute
Ne bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a

manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Article 21 of the Statute
Applicable law

1. The Court shall apply:
(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Article 61 of the Statute
Confirmation of the charges before trial

[. . .]
7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:
(a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;
(b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;
(c) Adjourn the hearing and request the Prosecutor to consider:
(i) Providing further evidence or conducting further investigation with respect to a particular charge; or
(ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.
[. . .]
9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.
[. . .]
11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to

article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

Article 64 of the Statute
Functions and powers of the Trial Chamber

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.
[. . .]
6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:
[. . .]
(f) Rule on any other relevant matters.
[. . .]
9. The Trial Chamber shall have, *inter alia*, the power on application of a party or on its own motion to:
(a) Rule on the admissibility or relevance of evidence; and
[. . .]

Article 67 of the Statute
Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
[. . .]
(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.
2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Article 69 of the Statute
Evidence

[. . .]
2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.
[. . .]

Rule 58 of the Rules of Procedure and Evidence
Proceedings under article 19

1. A request or application made under article 19 shall be in writing and contain the basis for it.
2. When a Chamber receives a request or application raising a challenge or question concerning its jurisdiction or the admissibility of a case in accordance with article 19, paragraph 2 or 3, or is acting on its own motion as provided for in article 19, paragraph 1, it shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. It may hold a hearing. It may join the challenge or question to a confirmation or a trial proceeding as long as this does not cause undue delay, and in this circumstance shall hear and decide on the challenge or question first.
3. The Court shall transmit a request or application received under sub-rule 2 to the Prosecutor and to the person referred to in article 19, paragraph 2, who has been surrendered to the Court or who has appeared voluntarily or pursuant to a summons, and shall allow them to submit written observations to the request or application within a period of time determined by the Chamber.
4. The Court shall rule on any challenge or question of jurisdiction first and then on any challenge or question of admissibility.

Rule 59 of the Rules of Procedure and Evidence
Participation in proceedings under article 19, paragraph 3

1. For the purpose of article 19, paragraph 3, the Registrar shall inform the following of any question or challenge of jurisdiction or admissibility which has arisen pursuant to article 19, paragraphs 1, 2 and 3:
(a) Those who have referred a situation pursuant to article 13;
(b) The victims who have already communicated with the Court in relation to that case or their legal representatives.
2. The Registrar shall provide those referred to in sub-rule 1, in a manner consistent with the duty of the Court regarding the confidentiality of information, the protection of any person and the preservation of evidence, with a summary of the grounds on which the jurisdiction of the Court or the admissibility of the case has been challenged.
3. Those receiving the information, as provided for in sub-rule 1, may make representation in writing to the competent Chamber within such time limit as it considers appropriate.

Rule 60 of the Rules of Procedure and Evidence
Competent organ to receive challenges

If a challenge to the jurisdiction of the Court or to the admissibility of a case is made after a confirmation of the charges but before the constitution or designation of the Trial Chamber, it shall be addressed to the Presidency, which shall refer it to the Trial Chamber as soon as the latter is constituted or designated in accordance with rule 130.

Rule 77 of the Rules of Procedure and Evidence
Inspection of material in possession or control of the Prosecutor

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents,

photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

Rule 78 of the Rules of Procedure and Evidence
Inspection of material in possession or control of the defence

The defence shall permit the Prosecutor to inspect any books, documents, photographs and other tangible objects in the possession or control of the defence, which are intended for use by the defence as evidence for the purposes of the confirmation hearing or at trial.

Rule 134 of the Rules of Procedure and Evidence
Motions relating to the trial proceedings

1. Prior to the commencement of the trial, the Trial Chamber on its own motion, or at the request of the Prosecutor or the defence, may rule on any issue concerning the conduct of the proceedings. Any request from the Prosecutor or the defence shall be in writing and, unless the request is for an *ex parte* procedure, served on the other party. For all requests other than those submitted for an *ex parte* procedure, the other party shall have the opportunity to file a response.
2. At the commencement of the trial, the Trial Chamber shall ask the Prosecutor and the defence whether they have any objections or observations concerning the conduct of the proceedings which have arisen since the confirmation hearings. Such objections or observations may not be raised or made again on a subsequent occasion in the trial proceedings, without leave of the Trial Chamber in this proceeding.
3. After the commencement of the trial, the Trial Chamber, on its own motion, or at the request of the Prosecutor or the defence, may rule on issues that arise during the course of the trial.

Regulation 54 of the Regulations of the Court
Status conferences before the Trial Chamber

At a status conference, the Trial Chamber may, in accordance with the Statute and the Rules, issue any order in the interests of justice for the purposes of the proceedings on, *inter alia*, the following issues:
[. . .]
(g) The number of documents as referred to in article 69, paragraph 2, or exhibits to be introduced together with their length and size;
[. . .]

Regulation 52 of the Regulations of the Registry
Presentation of Evidence during a hearing

1. During a hearing, evidence shall be presented in electronic format.
2. For the purpose of the presentation, participants shall provide to the court officer, in electronic version whenever possible, the evidence they intend to use at the hearing at least three full working days before the scheduled hearing.

Code of Professional Conduct for counsel

Article 24
Duties towards the Court
1. Counsel shall take all necessary steps to ensure that his or her actions or those of counsel's assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute.
2. Counsel is personally responsible for the conduct and presentation of the client's case and shall exercise personal judgement on the substance and purpose of statements made and questions asked.
3. Counsel shall not deceive or knowingly mislead the Court. He or she shall take all steps necessary to correct an erroneous statement made by him or her or by assistants or staff as soon as possible after becoming aware that the statement was erroneous.
4. Counsel shall not submit any request or document with the sole aim of harming one or more of the participants in the proceedings.
5. Counsel shall represent the client expeditiously with the purpose of avoiding unnecessary expense or delay in the conduct of the proceedings.

III. ANALYSIS AND CONCLUSIONS

A. Preliminary Issues

1) Burden and Standard of Proof

201. The Rome Statute framework does not expressly provide where the burden of proof lies on an admissibility or abuse of process application, or to which standard. However, the compelling logic of the situation is that should an accused challenge the admissibility of the case under Article 19(2)(a) of the Statute or argue that its continuation amounts to an abuse of the process of the Court, it falls to him to establish the facts and other relevant matters that are said to support the argument. In both situations, the accused is arguing that the proposed trial before the ICC should not occur and the suggested terminal result is, therefore, the same. There is no logical or legal basis for suggesting that the burden of establishing the relevant facts rests with the accused for one argument (*e.g.* abuse – as suggested by the defence) but with the prosecution for the other. In each instance the Court is seized of an application to halt the proceedings before the Chamber considering the

matter, with, potentially, identical consequences for the accused, the witnesses and victims. Although the wider ramifications – such as a possible trial of the accused before national courts – may not be identical as between concluding the process is abusive and upholding an admissibility challenge, as regards these proceedings before the ICC the distinction suggested by the defence is without substantive foundation, and it could lead to absurd results, such as the Court applying different burdens and standards of proof to concurrent and broadly similar arguments that have a common or overlapping factual foundation.

202. It is of note that although this issue was not directly addressed, the Appeals Chamber on the Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case,[407] approached the appeal throughout on the basis of whether the accused had "persuaded" the Chamber by his arguments.[408] There was no suggestion raised in counsel's arguments or in the judgment that the prosecution bore the burden of proving that the proceedings were admissible.

203. As to the standard of proof in these circumstances, although the Rome Statute framework again does not provide guidance, the overwhelming preponderance of national and international legal systems apply what is frequently called the "civil standard" of proof (a balance of probabilities) when the burden lies upon the defence in criminal proceedings. There is no reason to depart from that approach in these circumstances, and the prosecution's suggested threshold of "clear and convincing evidence" is not to be found within the Rome Statute framework, but instead it is based on certain academic commentary. Most particularly, the references by the prosecution to other courts and tribunals imposing a higher standard of

[407] ICC-01/04-01/07-1497.
[408] See, for example ICC-01/04-01/07-1497, paragraphs 85 and 111.

proof, depending on the seriousness and the likely consequences of the decision, are to an important extent taken out of their true context. The group of cases relied on by the prosecution essentially relates to the burden of proof in civil or regulatory cases, and it is critical to bear in mind that these are criminal proceedings, and it would be unjust to impose a variable standard of proof on the accused, depending on the seriousness of the application that he is making. His ability to defend himself should not be made more difficult simply because he is challenging the prosecution's right to continue with the prosecution at this Court.

204. As to the Court's overarching approach, although the defence must establish, to the civil standard, the relevant facts and other necessary matters that underpin the application, in other respects it is not of assistance to describe this exercise as depending on the defence satisfying the burden of proof on the accused's argument. Instead, the result of these applications is simply dependent on a judicial assessment by the Court as to whether the case is admissible or whether the continued trial is not abusive. Therefore, although the defence bears an evidential burden, the Court will otherwise simply weigh the merits of the competing submissions in arriving at its judgment, and that latter task is not dependent on, or improved by, imposing a burden on the accused to "prove" the argument.

2) Timing of the Application

205. Article 19(4) of the Statute provides that, save exceptionally, an admissibility challenge is to be made prior to, or at, the commencement of the trial. There is conflicting jurisprudence between Trial Chambers I and II as to when a trial commences. Trial Chamber II has concluded in its Reasons of 16 June 2009[409] that the commencement of the trial is when the Trial Chamber is constituted,

[409] ICC-01/04-01/07-1213.

whereas Trial Chamber I determined that the trial begins for the purposes of Article 61(9) – the true opening of the trial occurs – when the opening statements are made prior to calling the witnesses.[410]

206. The Appeals Chamber considered, but did not determine this issue in its "Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case" because the appellant had not suffered any prejudice as a result of Trial Chamber II's interpretation of Article 19(4) of the Statute.[411]

207. Although the prosecution does not suggest that the application has been filed out of time or that for other reasons it should be summarily dismissed without consideration of the merits, Principal Counsel for the OPCV argues that the admissibility challenge was filed out of time, and that it should be dismissed *in limine*; additionally, it is argued that the exceptional circumstances test in Article 19(4) of the Statute is not met.

208. Trial Chamber II, in certain *obiter dicta* observations, indicated that the Statute provides little direct or indirect assistance on this issue, given that both interpretations find support in various parts of the Rome Statute framework;[412] moreover, the inquisitorial and common law systems, of which this Court is in a sense a hybrid, each favour a different result.[413] The central reason why Trial Chamber II preferred the moment when the bench is constituted, was the possibility that otherwise undue delay may be caused to the proceedings – it was suggested that the drafters wanted challenges of this nature submitted at the earliest opportunity.[414]

[410] ICC-01/04-01/06-1084, paragraph 39.
[411] ICC-01/04-01/07-1497, paragraph 38.
[412] ICC-01/04-01/07-1213, paragraphs 33 – 37 and paragraph 42.
[413] ICC-01/04-01/07-1213, paragraph 41.
[414] ICC-01/04-01/07-1213, paragraph 44.

209. However, this analysis led Trial Chamber II to the conclusion that there is a three stage process: the first, prior to the confirmation Decision, when all forms of challenge to admissibility are possible; the second, "which is fairly short" between the filing of the confirmation Decision and the constitution of the Trial Chamber, when challenges may be based on *ne bis in idem*; and the third which mirrors the second, save that the challenge can only be made in exceptional circumstances, and with leave.

210. The Chamber is persuaded by the Decision of Trial Chamber I on this issue, namely that the commencement of the trial occurs when the opening statements are made, immediately before the beginning of the evidence. The gap between the constitution of the Trial Chamber and the opening speeches can be six months or longer, during which time a considerable amount of preparatory, pre-trial work is likely to be undertaken. The matters that fall for consideration at that stage are diverse, and may include the composition and funding of the defence team; participation by victims; the evidence to be relied on, and including the instruction of joint expert witnesses and the use of documentary material; the venue for the trial (*in situ* or in The Hague); along with a myriad of other substantive matters. It is difficult, in the judgment of this Chamber, to describe the stage of the proceedings during which factors of this kind are considered as following – as coming after – the commencement of the trial: they are all preparatory, pre-trial matters that need to be resolved prior to its commencement, when the merits of the case are considered. Therefore, with respect, this Chamber considers the interpretation favoured by Trial Chamber II unnecessarily strains the language of Article 19(4) of the Statute. Instead, notwithstanding the importance of expeditiousness, giving the words of the Article their natural and normal meaning, in this Chamber's view the trial of the accused, and an evaluation of the merits of the case against him, starts ("commences") when

the evidence in the case is called and counsel – by speeches, submissions, statements and questioning – address the merits of the respective cases.

211. It follows that the admissibility challenge does not fall to be dismissed without consideration of its merits, and the exceptional circumstances provision of Article 19(4) of the Statute does not apply to these circumstances (limiting the challenge to *ne bis in idem* issues, pursuant to Articles 17(1)(c) and 20 of the Statute).

212. It is necessary to remark that these submissions, in any event, did not concern the abuse of process application.

B. Admissibility

1) Disclosure

213. The issue under this heading is whether the prosecution has provided the defence with the disclosable documents (i.e. those relevant to this application). By way of summary, the defence complains that the prosecution has not served the correspondence relating to, and the notes of, meetings between the authorities in the CAR, the DRC and the OTP. The defence also suggests that it has received insufficient details of the court proceedings in the CAR, as revealed, for instance, by the Chamber's order for additional disclosure on 14 December 2009.

214. The prosecution does not accept that it has failed to provide the notes of any meetings with government or national judicial authorities on the subject of complementarity and admissibility, or any relevant CAR national judicial decisions. It denies that it advised the CAR, and including the judicial organs, on a referral to this Court. Therefore, the prosecution argues that it has

disclosed all of the Article 67(2) and Rule 77 information (exculpatory and preparatory material), and that it is not obliged to disclose internal documents under Rule 81(1) of the Rules. However, it avers that within the Rule 81(1) material, it is not in possession of any minutes or correspondence with the CAR that are relevant to admissibility. It has set out unequivocally that any meetings with the State authorities were held to enable the Chamber to develop a "preliminary analysis".

215. Disclosure responsibilities rest with the prosecution under Article 67(2) of the Statute and Rule 77 of the Rules, and the Chamber's role is limited to resolving disclosure disputes when there are sustainable grounds for suggesting that the Prosecutor has failed to discharge his duties. Notwithstanding the complaints by the defence, there is no evidence the prosecution is in breach of its responsibilities and the Chamber has no reason to doubt the undertaking by lead counsel that she has complied with her obligations. The main national judicial decisions relevant to this matter were all disclosed on 3 October 2008: as set out above, in the Prosecution's Communication of Materials provided to the Defence under Rule 77[415] the prosecution disclosed documents that included the Order of 16 September 2004; a record of the Appeals Judgment of 16 December 2004; and a record of the *Cour de Cassation* Judgment of 11 April 2006.

216. Accordingly, the defence has at all material times been aware of the relevant judicial proceedings. Otherwise, the defence complaints about material non-disclosure as regards the admissibility challenge are essentially speculative, and in the event the accused has failed to provide any evidence or other material to support the argument that the prosecution has breached its disclosure obligations. The defence has failed to establish this element of the abuse of process challenge on a balance of probabilities.

[415] ICC-01/05-01/08-138 with confidential Annex A.

2) The Proceedings in the CAR

Two preliminary issues

217. It is important to have two critical points clearly in mind when considering the proceedings in the CAR. First, the relevant moment for the purposes of an admissibility challenge. The Appeals Chamber in the *Katanga* case has resolved any doubt as to this issue:

> 56. [...] Generally speaking, the admissibility of a case must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge. This is because the admissibility of a case under article 17 (1) (a), (b) and (c) of the Statute depends primarily on the investigative and prosecutorial activities of States having jurisdiction. These activities may change over time. Thus, a case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned States and vice versa. [...][416]

218. Second, for the purposes of Article 17 of the Statute, the case that was brought against the accused in the CAR was broadly the same as the prosecution has now brought before Trial Chamber III, save that the charges are inevitably different (given the particular crimes within the ICC's jurisdiction: Article 5 of the Statute) and the evidence has developed and changed as a result of the investigation by the OTP. The conduct and underlying offences (murder, rape, pillage *etc*) are the same, as are many of the central events that are relied on.

History

219. Although a considerable number of submissions have been advanced on the issue of the national proceedings, the essential elements are clear, and given the criticisms that have been advanced as regards the judicial proceedings in the CAR, it is helpful to set out here the relevant sequence of events.

[416] ICC-01/04-01/07-1497, paragraph 56.

220. On 28 August 2004, the Public Prosecutor of the *Tribunal de Grande Instance* applied to the investigating judge for the accused to be exonerated of the offences which, in June 2003, he had started investigating, concerning incidents in the CAR between October 2002 and 15 March 2003.[417]

221. In due course, on 16 September 2004 the Senior Investigating Judge of the *Tribunal de Grande Instance* of Bangui determined that the accused could not be prosecuted for the charges of premeditated murder, rape, theft and others committed by his fighters in the CAR because he was the Vice-President of the DRC, and accordingly enjoyed diplomatic immunity.[418] The Senior Investigating Judge simultaneously purported to dismiss the charges against the accused and five others on charges connected with unlawful use of troops, premeditated murder, fatal wounding, rape, arbitrary arrest and false imprisonment, pillaging, concealment, destruction of property and theft on the basis of insufficient incriminating evidence. To the extent that it is said the investigating judge may have been unduly influenced by Mr Bemba's position in the Government of the DRC (see the interview between a member of the CAR judiciary and the prosecution),[419] the Chamber remarks that his decision was wholly in favour of the accused.

222. The dismissal of the charges by the Senior Investigating Judge was not a final decision on the merits of the case because on the following day, 17 September 2004, the Deputy Prosecutor of the *Tribunal de Grande Instance*, on behalf of the *Ministère Public*, entered a *prima facie* valid appeal as regards all accused ("*PATASSÉ Ange-Felix et autres*") against the Senior Investigating Judge's decision and including the Order of 16 September 2004 (it was filed within the

[417] ICC-01/05-01/08-721-Anx26 (CAR-OTP-0004-0065 to 0112); CAR-OTP-0019-0087 to 0134; English translation CAR-OTP-0061-0094 to 0130.
[418] ICC-01/05-01/08-721-Conf-Exp-Anx16; CAR-OTP-0019-0137 to 0164; ICC-01/05-01/08-758-Anx2C.
[419] ICC-01/05-01/08-704-Conf-tENG, paragraph 83; CAR-OTP-0055-0483 to 0514.

48 hour timeframe stipulated by Article 90 of the CAR Code of Criminal Procedure).[420]

223. Thereafter, on 23 November 2004 the First Advocate-General of the Bangui Court of Appeal filed additional submissions in the Bangui Court of Appeal requesting a partial amendment to the Order of 16 September 2004, namely to commit all the accused for trial.[421]

224. On the following day, 24 November 2004, the Public Prosecutor of the Bangui Court of Appeal filed an application before the Bangui Court of Appeal requesting the trial of the offences known as "blood crimes" at the International Criminal Court and the trial of the financial crimes involving misappropriation of public funds in the national courts.[422]

225. On 11 December 2004 counsel acting for the President of the CAR wrote to the Bangui Court of Appeal informing it that he had been authorised to submit a request for referral to the ICC, including the case of Mr Patassé and others, requesting that the "blood crimes" (such as murder) should be severed from the economic crimes, and that only the latter group should be tried before the national courts.[423]

226. On 16 December 2004, the Indictment Chamber of the Bangui Court of Appeal in the Appeals Judgment of 16 December 2004, indicated that the ICC's jurisdiction over war crimes cover the *crimes de sang* of murder (wilful killing), destruction and appropriation of property, rape, pillage and all other forms of serious injury to individuals and property. It ordered severance of war crimes (allegedly) committed in connection with the events in 2002 which the

[420] ICC-01/05-01/08-770-Anx2, page 3, "Acte d'Appel".
[421] ICC-01/05-01/08-770-Anx2, pages 8 – 10.
[422] ICC-01/05-01/08-721-Anx17; CAR-OTP-0019-0167.
[423] CAR-OTP-0019-0169 to 0170.

accused and others face, and, given they fall within the jurisdiction of the ICC, the prosecution was ordered to refer the case or the alleged offences to the competent authorities.[424]

227. On 20 December 2004 the 2nd Advocate-General at the Bangui Court of Appeal filed a *prima facie* valid notice of appeal against the Appeals Judgment of 16 December 2004.[425]

228. The *Cour de Cassation* on 11 April 2006 confirmed the decision of the Bangui Court of Appeal. Critically, the Court observed that there was no doubt that the CAR judicial services are unable genuinely to investigate and prosecute the offences severed by the Court below. Furthermore, it was expressly held that by reversing the lower court's decision and instructing the prosecution to pursue the proper international avenue, the Indictment Chamber of the Bangui Court of Appeal had applied the law "in due fashion".[426] This is the final appellate court in the CAR for these purposes.

229. As set out in the summary of the relevant history at the beginning of this Decision, the defence four years later, in April 2010, filed a variety of motions against the principal CAR judicial decisions,[427] arguing that the latter had never been served on the accused; these included the 16 December 2004 and 11 April 2006 appellate decisions, although the challenge to the latter decision was later withdrawn. In the result, the defence maintained the accused's challenges to the Appeals Judgment of 16 December 2004 (the "*opposition*" and the "*pourvoi en cassation*"). Given the potential relevance of these recent filings to this Decision, the Chamber is of the view that it is in the interests of justice to consider them, notwithstanding their late submission.

[424] ICC-01/05-01/08-721-Conf-Exp-Anx18 (CAR-OTP-0004-0148 to 0166); CAR-OTP-0019-0171 to 0188; English translation CAR-OTP-0061-0030 to 0043.
[425] CAR-OTP-0019-0199.
[426] ICC-01/05-01/08-721-Conf-Exp-Anx20; CAR-OTP-0019-0258 to 0261; English translation CAR-OTP-0061-0022 to 0027.
[427] See ICC-01/05-01/08-751-AnxA, ICC-01/05-01/08-751-AnxC and ICC-01/05-01/08-757-AnxA.

230. On 21 May 2010 the Indictment Chamber ruled on the recent application to set aside the Appeals Judgment of 16 December 2004 (*Opposition*). Given the accused failed to tender any written brief in support of his application and bearing in mind that proceedings before the Indictment Chamber are essentially considered on the basis of written materials, the application was set aside. However, addressing the substance of the challenge, the Chamber observed that applications of this kind are not provided for in the CAR Code of Criminal Procedure, and therefore the instant motion was impermissible.[428]

Suspensive effect

231. As to the suggested suspensive effect of the appeals filed in April 2010 (*viz.* four years after the decision), no sufficient explanation has been provided for these extremely late filings. The defence has been aware of all the relevant national judicial decisions since, at the latest, the prosecution's disclosure of 3 October 2008, and it is abusive of the accused to delay filing a challenge of this kind until a stage so late in the process that it is likely that the *Cour de Cassation* will not have determined the "*pourvoi en cassation*" prior to the filing of this Chamber's present Decision on admissibility. Absent an acceptable explanation – and none has been forthcoming – the Chamber determines that this step constitutes an abuse of this court's process. In the circumstances the Chamber declines to take into consideration the suggested suspensive effect of the recent motions.

Impropriety or irregularity, including notification

232. On analysis, there is no basis for this Chamber to conclude that there has been any material impropriety or irregularity in the proceedings before the national courts, which on the entirety of the evidence before this bench were conducted appropriately and in conformity with the procedural codes of that

[428] ICC-01/05-01/08-790-Anx1-tENG.

country. This includes the suggestion originally advanced by the defence that the Order of 16 September 2004 of the Senior Investigating Judge of the *Tribunal de Grande Instance* of Bangui is a nullity because it was not notified to the accused within 48 hours. The defence now accepts that there was no requirement to notify this *Ordonnance de non lieu*. The only possible relevant procedural irregularity, given it was accepted at one stage by counsel for the CAR (although the concession was later withdrawn), is that the two appellate decisions should have been communicated to the accused;[429] however, Mr Bemba was Vice-President of the DRC at the time, and it is said by the CAR that no mechanisms existed for transmitting the decisions to him in those circumstances.

233. More fundamentally, as submitted by the representative of the CAR, under the national Code of Criminal Procedure failure to notify the relevant appellate decisions to the accused – if the obligation existed – does not invalidate the relevant decision or the proceedings. The defence relied on Article 95(a) and (b) of the CAR Code of Criminal Procedure,[430] but those provisions relate to the committal of an accused for trial by the investigating judge, and they are not relevant to decisions of the higher courts when acting in an appellate capacity. It is critical in this regard to stress that in ordering severance of the proceedings, the Indictment Chamber was not acting under Article 109 of the CAR Code of Criminal Procedure – the provision that enables it to designate one of its number to act as an investigating (*i.e.* first instance) judge, who may then be bound, at least impliedly, by Article 95(b) of the CAR Code of Criminal Procedure should he commit an accused for trial. Instead, the Indictment Chamber, composed of three judges, acted in its appellate capacity, and no provision similar to Article 95(b) has been cited that indicates that appellate proceedings are nullified if the accused is not

[429] ICC-01/05-01/08-T-22-ENG CT WT, page 19, line 7 to page 20, line 3. This concession was later revoked, see ICC-01/05-01/08-770-Anx1-tENG, paragraph 36 *et seq.*
[430] ICC-01/05-01/08-T-22-ENG CT WT, page 47, lines 5 – 11.

notified of a relevant decision. The defence also cited Article 111(e) which relates to committal decisions to the *Cour Criminelle*.[431] However, this provision is not of assistance in these circumstances, given the Indictment Chamber did not commit the accused to the *Cour Criminelle* for trial, and moreover, unlike Article 95(a), it is not accompanied by a provision indicating that the proceedings will be nullified if the accused is not notified. Similarly, Article 193(f), also relied by the defence – which relates to notification of summonses to those living abroad – is irrelevant. The Chamber stresses that these conclusions are based on the submissions relied on and developed during the course of this application. The Chamber has not attempted, nor should it attempt, to provide a definitive interpretation of the criminal law of the CAR.

234. The Order of 16 September 2004 was overturned on appeal and there is no evidential basis (again, as opposed to speculation) for the suggestion that the appellate judges of the Indictment Chamber of the Bangui Court of Appeal or the *Cour de Cassation* were motivated by political rather than judicial considerations: there is simply no evidential foundation to the suggestion that the appellate judges were influenced by improper factors, and including any letters sent by, and representations made on behalf of, the government. The Indictment Chamber was informed that a reference was to be made to the ICC and thereafter it severed the case. It is not a sustainable argument that the letter of 11 December 2004 from counsel acting for the President of the CAR, providing information to the Court on the intended reference to the ICC, undermines the validity of the judicial decisions made thereafter; to the contrary, the letter provided the Court with relevant information for the purposes of the accompanying submission requesting severance. Furthermore, there is no basis for the contention that the prosecution artificially revived the case on instruction from the government or that the

[431] ICC-01/05-01/08-776-Red2, paragraphs 27 – 29.

Order of 16 September 2004 was never appealed. Appellate proceedings were lodged in conformity with the rules, and the suggested political interference which has been extensively referred to, is not made out on the basis of any evidence.

Judgment of the *Cour de Cassation*

235. However, wholly independently of the Chamber's determination of the issues set out in the preceding two paragraphs, the *Cour de Cassation* Judgment of 11 April 2006 is determinative of the national judicial proceedings, and only in exceptional circumstances should this Chamber seek to go behind a national judicial decision, particularly when the matter has been litigated before the final court of appeal. Given the lack of any evidence of material impropriety or irregularity in those proceedings (as opposed to speculation and quotations from reports that have not been introduced properly into evidence – see the development of this point below), it is unnecessary for this Chamber to attempt to define the ambit of those exceptional circumstances.

3) Article 17 of the Statute

236. Article 17 of the Statute defines the grounds on which challenges can be made to Court on the basis of lack of jurisdiction or inadmissibility, pursuant to Article 19(2) of the Statute. Within Article 17 of the Statute, four separate grounds are set out, which are considered hereafter. It is important to stress that in this case the defence has founded its arguments on Article 17(1)(b), (c) and (d) of the Statue, but for completeness the Chamber has briefly addressed the outstanding provision, Article 17(1)(a).

Article 17(1)(a)

237. Under this provision, the case is inadmissible if the case is being investigated or prosecuted by the relevant State, unless the latter is unwilling or genuinely

unable to proceed. The defence has not contended that the case is still being investigated or prosecuted – indeed, one of its central arguments is that the Order of 16 September 2004 was a final decision on its merits, which was not the subject of a (valid) appeal. However, the accused has sought to reopen or resurrect aspects of the proceedings in the CAR in the various motions he filed in April 2010, and therefore the Chamber briefly addresses this provision.

238. Put broadly, the courts of the CAR and the State authorities have indicated unequivocally that these proceedings in that country were concluded or discontinued when the case was referred to the ICC. Accordingly, although motions were filed in April 2010, which have been considered in more detail elsewhere in this Decision, there is no extant investigation or prosecution in the CAR, and the first requirement of Article 17(1)(a) does not apply.

Article 17(1)(b)

239. Under this provision, the case is inadmissible if the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute, unless the latter is unwilling or genuinely unable to do so.

240. As the Appeals Chamber has observed, this provision contains two cumulative elements: the case must have been investigated and the relevant State must have made a decision not to prosecute.[432] Given the relatively extensive evidence apparently before the Senior Investigating Judge, it appears that this case was investigated in the CAR. However, once his dismissal decision had been set aside, decisions were taken by the appellate courts (set out extensively above) which brought the national proceedings to a halt. In this context, it is necessary to bear in mind the Decision of the Appeals

[432] ICC-01/04-01/07-1497, paragraph 82.

Chamber on the effect of conclusions of this kind by national judicial authorities:

> 83. However, the provision (Article 17(1)(b)) must also be applied and interpreted in light of the Statute's overall purpose, as reflected in the fifth paragraph of the Preamble, namely "to put an end to impunity". If the decision of a State to close an investigation because of the suspect's surrender to the Court were considered to be a "decision not to prosecute", the peculiar, if not absurd, result would be that because of the surrender of a suspect to the Court, the case would become inadmissible. In such scenario, neither the State nor the ICC would exercise jurisdiction over the alleged crimes, defeating the purpose of the Rome Statute. Thus, a "decision not to prosecute" in terms of article 17 (1) (b) of the Statute does not cover decisions of a State to close judicial proceedings against a suspect because of his or her surrender to the ICC.[433]

241. The decision by the national appellate courts that the case should be referred to the ICC was matched by the State's request to the ICC to open an investigation into the crimes allegedly committed by Mr Bemba and others in light of the gravity of the alleged acts and the supporting evidence relating to war crimes and crimes against humanity within the ICC's jurisdiction (see the "*Mémoire*" dated 21 June 2005, signed on behalf of the CAR government by Mr Nganatouwa Goungaye Wanfiyo, following his initial referral letter of 18 December 2004 asking the ICC to open an investigation). In the earlier letter dated 11 December 2004 to the President of the Criminal Court of Bangui (see above), the same author set out that if the ICC's Prosecutor initiated an investigation, it could be conducted using means not available to the CAR. It is to be interpolated that the referral to the ICC was effected by the letter of 18 December 2004, with further supporting information provided on 21 June 2005, rather than the decisions of the appellate courts.

242. Neither of these decisions by the national courts and the State (*viz.* to refer the case to the ICC) were decisions "not to prosecute". They were, instead, decisions closing the proceedings in the CAR – there was an order for severance that approximately coincided with the referral to the ICC (they

[433] ICC-01/04-01/07-1497, paragraph 83.

were two days apart). It follows that the first element of Article 17(1)(b) is not met: in the sense described by the Appeals Chamber, there has not been a decision not to prosecute the accused. To the contrary, the CAR seeks his prosecution at this Court.

243. Given the conclusions above, strictly, the Trial Chamber is not required to examine unwillingness and inability. [434] However, for the sake of completeness, as regards the second element of Article 17(1)(b) although for the purposes of this provision the State is "willing" because it positively seeks the accused's trial at the ICC, it is no longer prepared to prosecute the accused in the national courts. In his oral submissions on 27 April 2010, [435] the representative of the CAR indicated that although his country originally intended to prosecute the accused (in 2003), the proceedings before the investigative judge were discontinued. Thereafter, during the course of the appellate proceedings, and before the *Cour de Cassation* Judgment of 11 April 2006, the Government referred the case to the ICC. By this referral, the CAR indicated its "unwillingness" to prosecute the accused domestically – indeed, in oral submissions the representative made it clear that once it seized the ICC with the case, it relinquished any willingness to prosecute the accused on the territory of the CAR. [436] This "unwillingness", as described during submissions, is not unwillingness for the purposes of Article 17(1)(b).

244. Article 17(2) of the Statute sets out certain criteria that the Court shall take into consideration when making a determination on unwillingness in a particular case. In essence, they are designed to ensure that the Court will focus on whether i) the relevant individual is being shielded from prosecution, ii) there has been unjustified delay that is inconsistent with an intention to bring the accused to justice and iii) the proceedings lack

[434] See ICC-01/04-01/07-1497, paragraph 78.
[435] ICC-01/05-01/08-T-22-ENG CT WT, page 4 *et seq.*
[436] ICC-01/05-01/08-T-22-ENG CT WT, page 7, line 16 to page 8, line 9.

independence and impartiality. None of these considerations apply in the instant case.

245. As to inability, the representative indicated that the Government was influenced by the national courts' stated inability to pursue the proceedings successfully. It was submitted that the CAR does not have the capacity to conduct a trial of this kind, given the human resources required, the number of cases pending before the national courts and the shortage of judges. The budget of the Ministry of Justice is described as "ridiculously insignificant", and insufficient for a case of this kind. Various practical problems were relied on, and including the suggested continued operations of the MLC and the consequent instability of the region. In this regard, see also the letter of 11 December 2004, setting out that if the ICC's Prosecutor initiated an investigation, it could be conducted using means not available to the CAR.

246. Those submissions are, in the judgment of the Chamber, determinative of this issue. As set out above, the relevant unwillingness or inability is that of the State (as opposed to the judges of the national courts, although the latter's views can be a material consideration), and the Court accepts counsel's clear oral submission on behalf of the Government that the CAR is unable to conduct a trial before the national courts. The cumulative effect of the submissions, reinforced by the observations of the *Cour de Cassation*, is that the CAR has neither the investigative resources to handle these offences adequately (notwithstanding the various witness statements taken by the investigating judge) nor the judicial capacity to try them. As the judges of the *Cour de Cassation* observed, "[...] there can be no doubt that the CAR judicial services are unable genuinely to investigate or prosecute [the charges]". It is self-evident that trials of this kind, if handled in a way that does justice to the parties, involve lengthy live testimony and substantial presentation and consideration of documentary evidence, lasting inevitably many months, and

the necessary protective measures for witnesses may prove extremely difficult or impossible to implement by the national authorities in the CAR in these particular circumstances (given the accused's alleged history and affiliations). The prosecution referred to material indicating that the alleged power of the accused has been seen by the authorities of the CAR as a major obstacle to his appearance before its courts.[437] The failed attempt in 2003 to deal with the case and the letter dated 1 August 2008 from President Bozizé to the Secretary General of the United Nations do not undermine the underlying force of those submissions. The letter only establishes that the national authorities have not yet made a determination as to their ability to deal with the crimes allegedly committed in 2005. Given the relative complexity and extent of the prosecution case against the accused for crimes alleged committed in 2002-2003, the Chamber accepts that the prosecuting authorities and the national courts in the CAR would be unable to handle the case against this accused nationally. Indeed, as the *Cour de Cassation* observed, the lack of any meaningful progress in the case since the Senior Investigating Judge charged the accused, demonstrates the inability on the part of the CAR to establish "genuine proceedings", a conclusion that is seemingly reinforced by the quotations from the statement of the Senior Investigating Judge taken by the prosecution and relied on in this context by the defence. This determination that the CAR national judicial system is unable to investigate effectively or try the accused leads inevitably to the conclusion that for the purposes of Article 17(3) of the Statute, the national judicial system of the CAR is "unavailable", because it does not have the capacity to handle these proceedings.

247. Given the comments of the *Cour de Cassation* as to the capacity of the judicial services in the CAR, it is to be observed that under Article 17(1)(a) and (b) of the Statute, as regards unwillingness or inability, it is not the national courts' determination as to whether or not they are unwilling or unable genuinely to

[437] ICC-01/05-01/08-739, paragraph 62.

carry out the investigation or prosecution, but the State's unwillingness or inability, that is relevant. Whilst the State can no doubt take into consideration relevant observations made by the judiciary, it is not bound by them; it follows that even if the motion "*pourvoi en cassation*" before the *Cour de Cassation* has suspensive effect (see the analysis above), that result is wholly irrelevant to this Chamber's Decision under Article 17(1) of the Statute. It needs to be emphasized, however, that under Article 17(1)(a) and (b) of the Statute, the ultimate determination on these matters is made by the ICC.

Article 17(1)(c)

248. As set out above, the accused has not already been tried for the conduct which is the subject of the present complaints (see Article 20(3)). The decision at first instance in the CAR was not in any sense a decision on the merits of the case – instead it involved, *inter alia*, a consideration of the sufficiency of the evidence before the investigating judge who was not empowered to try the case – and it did not result in a final decision or acquittal of the accused, given the successful appellate proceedings. This conclusion addresses the defence submissions that, save exceptionally, orders of this kind are final, because the appellate proceedings set aside the investigating judge's order. In any event, a "trial" for the purposes of Article 17(1)(c) of the Statute could only have occurred before the *Cour Criminelle* and not before the Senior Investigating Judge. For these reasons, along with those set out extensively above, this provision therefore does not apply.

Article 17(1)(d)

249. Under this provision, the Chamber is obliged to consider whether the case is of sufficient gravity to justify further action by the Court. The Pre-Trial Chamber by Article 61(7) of the Statute is obliged to determine whether there is sufficient evidence to establish substantial grounds to believe the accused committed each of the crimes charged. Inherent, therefore, in the Pre-Trial

Chamber's Decision is the conclusion that, for the confirmed charges, each of the relevant elements were made out on the basis of substantial grounds. The Pre-Trial Chamber in its Decision of 15 June 2009 determined that, on the basis of the evidence and information submitted by the Prosecutor, the case comes within the jurisdiction of the Court and is admissible.[438] It follows that the Pre-Trial Chamber concluded that the charges met the gravity threshold necessary for confirmation, and on that basis they merited trial by this Chamber. It is of note that the Confirmation Decision of 15 June 2009 was not appealed by the accused.

C. Abuse of Process

1) Disclosure

250. The defence suggests there has been incomplete disclosure regarding the provisional arrest warrant, the accused's arrest in Belgium and his subsequent transfer to the Court. This allegation is considered in greater detail hereafter, but as regards evidence, none has been provided to the Chamber to substantiate these allegations, and leading counsel for the prosecution has stated unequivocally that the Prosecutor has discharged his obligations concerning the circumstances of the accused's arrest and transfer. There is no basis, on the evidence, for doubting that undertaking.

251. The sole instance of material non-disclosure relates to the letter of 11 December 2004 which was only disclosed to the defence on 13 April 2010. This letter should have been revealed at an earlier stage, but in the event this omission has not caused any material prejudice. Full submissions have been advanced on its contents, and accordingly this markedly late disclosure does not render these proceedings an abuse of the process.

[438] ICC-01/05-01/08-424, paragraphs 25 and 26.

2) Jurisdiction

252. As the Appeals Chamber has observed, the Statute does not provide for a stay of proceedings based on an abuse of the Court's process,[439] but applying the requirement of Article 21(3) of the Statute that the framework of the Rome Statute is to be interpreted and applied in accordance with internationally recognized human rights, the Appeals Chamber decided that :

> 37. [w]here a fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.[440]

253. On the basis of the rights of the accused enshrined in the Statute, and applying the provisions of Articles 21(3) and 64(6)(f) of the Statute, the Chamber should stay the proceedings if a violation of the accused's rights render a fair trial impossible.

3) Evidence

254. For the abuse of process challenge, no application was made to the Chamber to call witnesses or to admit documentary evidence, and including reports by NGOs and interviews with politicians. It is to be stressed that although written reports and similar materials may, in the right circumstances, be relevant to, and probative of, the issues that a Chamber has to consider, it is critical that applications are made to the Court if a party or a participant seeks to rely on evidence of this kind. Article 69(2) of the Statute indicates that (witness) testimony shall be given in person, although a Chamber may, *inter alia*, permit the introduction of documentary material. Documents, most particularly if they are unsupported by any evidence from the witness box,

[439] ICC-01/04-01/06-772, paragraph 35.
[440] ICC-01/04-01/06-772, paragraph 37.

require the leave of the Court before they can be relied on; this is to ensure that they will be probative of the issues under examination and that they are, at least on a *prima facie* basis, sufficiently reliable. Moreover, the Rome Statute framework has established a scheme that is to be followed for the production of written materials in advance that a party or participant seeks to rely on. Rule 78 of the Rules is relevant to this application, which provides that the defence shall permit the prosecution to inspect any documents which are intended for use by the accused as evidence, and by Regulation 52(2) of the Regulations of the Registry, the participants shall provide to the Court Officer the evidence they intend to use at the hearing at least three working days before the scheduled hearing. The defence failed to comply with any of these provisions in this case.

255. Instead, counsel simply quoted, for instance, from written reports and interviews with politicians in the written submissions, without applying to the Chamber for leave to rely on them as documentary evidence. Examples of this approach by the defence include "well-informed observers": Peace and Security in Africa;[441] extracts from FIDH reports;[442] extracts from a report by Human Rights Watch; [443] and a "Weblog", allegedly quoting President Kagame of Rwanda.[444] In the circumstances, given that their provenance and reliability is entirely univestigated and untested, these materials carry little, if any, evidential weight.

4) Merits

256. The merits of this application have largely been dealt with in the conclusions set out above, some of which have been addressed in the part of this Decision

[441] ICC-01/05-01-08-704-Conf-tENG, paragraph 82.
[442] ICC-01/05-01-08-704-Conf-tENG, paragraphs 171 and 172.
[443] ICC-01/05-01-08-704-Conf-tENG, paragraph 175.
[444] ICC-01/05-01/08-704-Conf-tENG, paragraph 176.

relating to the admissibility challenge. In essence, the defence complains of material non-disclosure; alleged misuse of the judicial process for political purposes; the suggested unlawful means by which the accused was brought to the ICC; and the route by which this case came before the ICC (*viz.* the Article 14 point). The complaints as to non-disclosure have been addressed separately above (save for material relating to the arrest warrant), and the Chamber has determined earlier in this Decision that the assertion that the judicial process was used for political purposes (against the accused's interests) entirely lacks a credible or sufficient evidential foundation.

The accused's arrest and transfer

257. Addressing the process by which the accused was detained in the Kingdom of Belgium and particularly the complaint by the defence of material non-disclosure of the source of the information that the accused was preparing to flee, the defence set out certain speculative assertions as to the date and the accuracy of the information, along with factors that it is alleged demonstrate the accused was not planning to leave the country, all of which have been considered by the prosecution. The latter has determined that notwithstanding those matters it is not in possession of any information that falls, in consequence, to be disclosed under Article 67(2) of the Statute or Rule 77 of the Rules. As explained earlier, disclosure is primarily the responsibility of the prosecution, and the Chamber's role is limited to adjudicating in cases of doubt, and given the prosecution's clear statement that it is not in possession of information that comes within either of the provisions set out above, there is no *prima facie* evidence of material non-disclosure in this regard. The Chamber is therefore unpersuaded that any material irregularity attaches to the circumstances in which the accused was brought to the ICC, and including in the application process for the provisional arrest warrant.

258. The following conclusions of the Single Judge of Pre-Trial Chamber III are relevant to these conclusions:[445]

> 47. As regards the warrant of arrest of 10 June 2008, it needs to be noted that it replaced in its entirety the warrant of 23 May 2008, adding two charges to those already existing, but making no change in respect of the principal facts and the necessity of the arrest. The warrant of 10 June 2008 was declared enforceable in the Kingdom of Belgium on 13 June 2008 by a decision of the Chambre du Conseil du Tribunal de Première Instance de Bruxelles, in respect of which Mr Jean-Pierre Bemba had the benefit of legal remedies at the national level.
>
> 48. The Single Judge further observes that, following his arrest on 24 May 2008, Mr Jean-Pierre Bemba was promptly brought before a judge on 25 May 2008 and informed of his rights [...]. In the examination of his requests for release, hearings were scheduled for 4 and 24 June 2008 [...]. The Chamber was involved in the procedure leading to those hearings by way of making recommendations under article 59(5) of the Statute [...]. The information submitted shows that Mr Jean-Pierre Bemba had effective legal representation and that he was afforded adequate procedural protection with ample opportunities to raise any objections that he had at the national level at the appropriate time.
>
> 49. To the extent that this part of the Application for interim release has been substantiated, the Single Judge has found no indication of any irregularity or arbitrariness in the procedure followed by the competent Belgian authorities that would constitute a material breach of article 59(2) of the Statute affecting the proceedings before the Court or render the detention of Mr Jean-Pierre Bemba on the authority of the Court otherwise unacceptable.

Article 14 of the Statute

259. As to the defence complaint that the Prosecutor inappropriately instigated the CAR to request an investigation by the prosecution under Article 14 of the Statute. This allegation similarly depends entirely on speculation by the defence, composed largely of quotations from NGO reports and from politicians, along with assertions as to the motives of various key players, but no credible evidence has been produced to support these allegations. The alleged collusion between the prosecution and the CAR authorities is, on the material before the Chamber on this application, simply unfounded.

[445] Decision on application for interim release" ICC-01/05-01/08-73 22-09-2009 17/21 EO PT
Pursuant to Decision ICC-01/05-01/08-528, dated 18-09-2009 , this document was reclassified as public.

260. There is, therefore, no evidential foundation for the suggestion that the Prosecutor, improperly or otherwise, influenced the CAR's "self-referral" under Article 14 of the Statute. In any event, the Appeals Chamber, in the context of describing the balance between the complementarity principle and the goal of ending impunity, has cautioned against inappropriately deterring States from relinquishing jurisdiction in favour of the Court. It has indicated that a general prohibition would not foster compliance by States:

> 85. The Appeals Chamber is not persuaded by the argument of the Appellant that it would be to negate the obligation of States to prosecute crimes if they were allowed to relinquish domestic jurisdiction in favour of the International Criminal Court. [...][446]

IV. FINAL CONCLUSIONS

261. In the overall result, the following conclusions are to be drawn. The criminal proceedings in the CAR have exhausted each of the available appellate stages (save only that as far as the *Cour de Cassation* is concerned, a recently filed motion on a point of law is still outstanding, the "*pourvoi*"). The final result of those national proceedings, when coupled with the CAR's reference of the case to the ICC, is that this is **not**: i)"a case (that) is being investigated or prosecuted by (the) State with jurisdiction over it" (Article 17(1)(a)) – there is no current investigation or prosecution in the CAR; ii) a case where the State "decided not to prosecute the person concerned" (Article 17(1)(b) of the Statute) because the State decided the accused should be prosecuted by the International Criminal Court; or iii) a case where the person concerned "has already been tried for conduct which is the subject of the complaint" (Article 17(1)(c) of the Statute) – there has been no decision on the merits by a competent court. Finally, the case satisfies the gravity test (Article 17(1)(d) of the Statute). The State decided to prosecute Mr Bemba; the Senior Investigating Judge's dismissal was overturned on appeal and there was a

[446] ICC-01/04-01/07-1497, paragraphs 85 and 86.

near-simultaneous referral of the case to the relevant authorities at the ICC under Article 14 of the Statute; no trial of the conduct has taken place, and instead the entire criminal proceedings against the accused are being prosecuted before this Court, because of the State's domestic inability to conduct this trial. It follows the case is admissible.

262. There has been no material irregularity or impropriety in the proceedings, and the abuse of process challenge is without foundation.

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

Judge Adrian Fulford

Judge Elizabeth Odio Benito

Judge Joyce Aluoch

Dated this 24 June 2010

At The Hague, The Netherlands